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California Supreme Court Survey - A Review of Decisions: May 1995-August 1996

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California Supreme Court Survey

May 1995 - August 1996

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

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

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

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I. APPELLATE REVIEW

A statute making a petition for extraordinary writ the exclusive mode of appellate review for claims brought under the California Public Records Act does not violate the appellate jurisdiction provision of the California Constitution: Powers v. City of Richmond.

I. INTRODUCTION

In *Powers v. City of Richmond*,¹ the California Supreme Court considered whether California Government Code section 6259(c), providing that petitions for extraordinary writ are the exclusive means of review for superior court actions seeking disclosure of documents under the Public Records Act (PRA), violates article VI, section 11 of the California Constitution which states that, with the exception of death penalty cases, a court of appeal has "appellate jurisdiction" over all superior court actions within its original jurisdiction.² The trial court entered judgment for the City of Richmond (Richmond), denying Powers' request to compel Richmond to prepare and release a computer generated report con-

1. 10 Cal. 4th 85, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995). Justice Kennard delivered the majority opinion in which Justices Baxter and Werdegar concurred. *Id.* at 89-115, 893 P.2d at 1161-78, 40 Cal. Rptr. 2d at 840-57. Chief Justice George wrote a concurring opinion, joined by Retired Associate Justice Arabian. *Id.* at 115-24, 893 P.2d at 1178-84, 40 Cal. Rptr. 2d at 857-63 (George, C.J., concurring). Justice Lucas wrote a dissenting opinion, joined by Justice Mosk. *Id.* at 124-83, 893 P.2d at 1184-1224, 40 Cal. Rptr. 2d at 863-903 (Lucas, J., dissenting).

2. *Id.* at 89-90, 893 P.2d at 1161, 40 Cal. Rptr. 2d at 840. Powers, a candidate for city council, requested the City of Richmond to disclose the expenditures of the mayor, city council, and city manager for the second half of fiscal year 1990-91. *Id.* at 90, 893 P.2d at 1161, 40 Cal. Rptr. 2d at 840. Upon receipt of the specific information in a computer generated report, Powers requested the same information for the first half of fiscal year 1990-91. *Id.* Instead of providing Powers with the specific information, the City of Richmond gave Powers access to a check register which contained intermingled information with other departments and agencies. *Id.*; see CAL. GOV'T CODE § 6259(c) (West 1995) (describing the mode of appellate review for PRA actions); CAL. CONST. art VI, § 11 (discussing the application of appellate jurisdiction). See generally 76 C.J.S. *Records* § 122 (1994 & Supp. 1996) (explaining that an action may be brought in violation of a state statute for disclosure of records); Edward M. Schaffer et al., *A Look at the California Records Act and its Exemptions*, 4 GOLDEN GATE U. L. REV. 203 (1973) (surveying the California Public Records Act as a response to the Federal Freedom of Information Act of 1967).

taining specific expenditure information for the beginning of fiscal year 1990-91.³

The court of appeal denied Powers' petition for a writ of mandate without a hearing or issuance of a written opinion.⁴ Further, the court of appeal granted Richmond's motion to dismiss Powers' direct appeal as barred under section 6259(c), reasoning that the appellate jurisdiction provision of the California Constitution does not deprive the legislature from specifying alternative forms of appellate review in PRA cases, specifically petitions for extraordinary writ in lieu of direct appeals.⁵

The California Supreme Court affirmed the court of appeal's dismissal, holding that the legislature's requirement for a petition for extraordinary writ as the exclusive mode of appellate review in PRA cases is constitutional.⁶ The court found that neither the language of article VI of the California Constitution nor extrinsic evidence confer a right of direct appeal on a litigant when a superior court is exercising original jurisdiction.⁷ The court stated that the legislature is afforded considerable discretion in devising appellate procedures so long as the constitutional right of appeal is not substantially impaired.⁸

II. TREATMENT

A. *Majority Opinion*

The court began its analysis by considering the legislative intent behind the appellate jurisdiction language of the California Constitution.⁹ Giving the words their ordinary meaning,¹⁰ the court stated that appellate jurisdiction refers to the exercise of a reviewing court's power to review errors in trial court proceedings.¹¹ The court found no intention

3. *Powers*, 10 Cal. 4th at 90, 893 P.2d at 1161, 40 Cal. Rptr. 2d at 840.

4. *Id.*

5. *Id.* at 90-91, 893 P.2d at 1161-62, 40 Cal. Rptr. 2d at 840-41.

6. *Id.* at 115, 893 P.2d at 1178, 40 Cal. Rptr. 2d at 857.

7. *Id.* at 95, 893 P.2d at 1164, 40 Cal. Rptr. 2d at 843.

8. *Id.* at 110, 893 P.2d at 1174, 40 Cal. Rptr. 2d at 853. *See generally* 52 AM. JUR. 2D *Mandamus* § 316 (1970 & Supp. 1993) (explaining the availability of extraordinary writs if expressly provided by statute); J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 439-40 (1994) (discussing the inclusion of extraordinary writs as a method of appellate jurisdiction).

9. *Powers*, 10 Cal. 4th at 91, 893 P.2d at 1162, 40 Cal. Rptr. 2d at 841.

10. *Id.*

11. *Id.* at 93, 893 P.2d at 1163, 40 Cal. Rptr. 2d at 842. *See generally* 4 CAL. JUR. 3D *Appellate Review* § 63 (1973) (discussing the modes of appellate review); 2 B.E. WITKIN, CALIFORNIA PROCEDURE 3D, *Courts* § 254 (1985 & Supp. 1996) (summarizing reviewing courts and appellate proceedings); Roy A. Gustafson, *Some Observations About California Courts of Appeal*, 19 UCLA L. REV. 167, 167-83 (1971) (tracing the devel-

to confer on litigants an implied right of direct appeal in all cases within the original jurisdiction of the superior courts.¹²

Although the court found no ambiguity in the text of the constitution, the court proceeded to examine extrinsic evidence to interpret article VI, section 11.¹³ Specifically, the court reviewed the 1966 Constitutional Revision to section 11 which deleted redundant, obsolete or unnecessary provisions for matters capable of being prescribed by statute.¹⁴ The court reasoned that the broad scope of legislative control over judicial procedures, the lack of reference to any right of appeal, and the lack of case law expressly limiting appellate jurisdiction to a right of direct appeal is evidence that the judicial construction of the revision did not intend to invoke a right to direct appeal.¹⁵ The court further reviewed the entire evolution of article VI, section 11 as well as various court decisions construing the evolving provisions¹⁶ and found the right of appeal discussions inclusive of all forms of appellate review, including review by petition of extraordinary writ.¹⁷ The court concluded that the legislature may regulate the mode of appellate review so long as one's constitutional right of appeal is not substantially impaired by such regulation.¹⁸ Thus, the court's analysis of section 11's development supported its determination that the appellate jurisdiction provision conferred no right to direct appeal onto litigants.¹⁹

Finally, the court considered whether the legislature's application of extraordinary writ review in PRA cases impaired judicial power.²⁰ The

opment and binding effect of California courts of appeal).

12. *Powers*, 10 Cal. 4th at 93, 893 P.2d at 1163, 40 Cal. Rptr. 2d at 842.

13. *Id.*

14. *Id.* at 93-94, 893 P.2d at 1163-64, 40 Cal. Rptr. 2d at 842-43. *See generally* 2 B.E. WITKIN, CALIFORNIA PROCEDURE 3D, *Courts* § 258 (1985 & Supp. 1996) (explaining the Constitutional Revision of 1966); 8 B.E. WITKIN, CALIFORNIA PROCEDURE 3D, *Extraordinary Writs* § 5 (1985) (describing the 1966 revision's broadening effect on the constitutional language to include extraordinary writs).

15. *Powers*, 10 Cal. 4th at 95, 108-09, 893 P.2d at 1164, 1173-74, 40 Cal. Rptr. 2d at 843, 852-53.

16. *Id.* at 95-108, 893 P.2d at 1165-74, 40 Cal. Rptr. 2d at 844-53.

17. *Id.* at 97, 100, 893 P.2d at 1166, 1168, 40 Cal. Rptr. 2d at 845, 847. *See generally* 2 B.E. WITKIN, CALIFORNIA PROCEDURE 3D, *Courts* § 265 (1985 & Supp. 1996) (discussing the permissibility of appellate review by extraordinary writ).

18. *Powers*, 10 Cal. 4th at 98-99, 103, 110, 893 P.2d at 1166-67, 1169-70, 1174, 40 Cal. Rptr. 2d at 845-46, 848-49, 853.

19. *Id.* at 105-06, 893 P.2d at 1171-72, 40 Cal. Rptr. 2d at 850-51.

20. *Id.* at 110, 893 P.2d at 1175, 40 Cal. Rptr. 2d at 854.

court concluded that the purpose of the legislature's substitution of writ review was to speed appellate review, thereby allowing courts to quickly rule on substantive issues which are of public importance and demand prompt resolution.²¹ The court reasoned that this purpose preserved the intent of the PRA, prohibiting agencies to cause excessive delays in the disclosure of public information.²² Because the court found that the appellate jurisdiction provision of the California Constitution does not confer a right of direct appeal in all original jurisdiction superior court cases, the court held that any legislative action to restrict the mode of appellate review is constitutional so long as the constitutional powers of the court are not impaired.²³

B. Chief Justice George's Concurring Opinion

Chief Justice George concurred with the majority but took issue with the court's broad holding.²⁴ Chief Justice George argued that under the doctrine of judicial restraint, a constitutional holding should never be broader than necessary to decide the precise facts at issue.²⁵ Expressing a concern that broad legislative authority to substitute extraordinary writ review for direct appeal could transform the appellate process,²⁶ Chief Justice George concluded that the constitutional permissibility of the substitution of review by extraordinary writ in place of direct appeal should be specific to the PRA.²⁷

21. *Id.* at 111-13, 893 P.2d at 1175-76, 40 Cal. Rptr. 2d at 854-55. For a discussion of the issuance of extraordinary writs in the absence of another adequate, speedy remedy by appeal, see 43 CAL. JUR. 3D *Mandamus and Prohibitum* §§ 1, 7 (1978 & Supp. 1996). See Kelso, *supra* note 8 (describing the goals of the appellate system, including the reduction of unnecessary delay in trial and appellate courts).

22. *Powers*, 10 Cal. 4th at 111, 893 P.2d at 1175, 40 Cal. Rptr. 2d at 854. For a discussion of the delay in California courts as evidenced by a 263% increase in state court appeal decisions, see Karl Manheim, *The Business of the California Supreme Court: A Comparative Study*, 26 LOY. L.A. L. REV. 1085 (1993). See generally Robert S. Thompson, *Restructuring of Judicial Pyramid: Expanding the Jurisdiction of the California Court of Appeal*, 28 SANTA CLARA L. REV. 293, 303-11 (1988) (proposing a restructuring of appellate jurisdiction to decrease case overload).

23. *Powers*, 10 Cal. 4th at 115, 893 P.2d at 1178, 40 Cal. Rptr. 2d at 857.

24. *Id.* at 116, 893 P.2d at 1178, 40 Cal. Rptr. 2d at 857 (George, C.J., concurring).

25. *Id.* (George, C.J., concurring).

26. *Id.* at 116-17, 893 P.2d at 1178-79, 40 Cal. Rptr. 2d at 857-58 (George, C.J., concurring).

27. *Id.* at 123-24, 893 P.2d at 1183-84, 40 Cal. Rptr. 2d at 862-63 (George, C.J., concurring).

C. Justice Lucas' Dissenting Opinion

In a separate opinion, Justice Lucas disagreed with the majority's holding that the legislature may limit appellate review to petitions for extraordinary writ.²⁸ Justice Lucas argued that the California Constitution guarantees litigants a right of appeal, review on the merits, and a written opinion explaining the reasoning of the court.²⁹ Justice Lucas stated that the legislature cannot eliminate just any constitutionally granted right.³⁰ Justice Lucas further argued that absent rulings on preliminary issues unrelated to the underlying cause of action, PRA cases have consistently afforded litigants a right of appeal.³¹ Since Justice Lucas believed that the legislative purpose of section 6259(c) did not preclude a direct appeal in cases where a party's extraordinary writ is summarily denied, he concluded that the statute should not bar an appeal in the instant case.³²

III. IMPACT

The holding in *Powers* will further the policy of expediting the disposition of cases in California courts.³³ There are several policy reasons, however, that support the use of written opinions.³⁴ First, written opinions become settled law, usable as precedent for subsequent decisions.³⁵ In addition, many believe the written requirement ensures a careful examination by the courts.³⁶ Furthermore, written opinions inform the general public, guiding them towards earlier resolution of potential disputes.³⁷ Another concern, as expressed by both the concurring and dissenting justices, is the ability of the legislature to allow courts of appeal to become solely writ courts.³⁸ However, the assurance of a speedy and

28. *Id.* at 125-26, 893 P.2d at 1184-85, 40 Cal. Rptr. 2d at 863-64 (Lucas, J., dissenting).

29. *Id.* at 126-27, 173, 893 P.2d at 1185-86, 1217, 40 Cal. Rptr. 2d at 864-65, 896 (Lucas, J., dissenting).

30. *Id.* at 151, 893 P.2d at 1202, 40 Cal. Rptr. 2d at 881 (Lucas, J., dissenting).

31. *Id.* at 176-77, 893 P.2d at 1220, 40 Cal. Rptr. 2d at 899 (Lucas, J., dissenting).

32. *Id.* at 128, 893 P.2d at 1186, 40 Cal. Rptr. 2d at 865 (Lucas, J., dissenting).

33. See generally Manheim and Thompson, *supra* note 22.

34. *Powers*, 10 Cal. 4th at 141, 893 P.2d at 1195, 40 Cal. Rptr. 2d at 874 (Lucas, J., dissenting).

35. *Id.* (Lucas, J., dissenting).

36. *Id.* (Lucas, J., dissenting).

37. *Id.* (Lucas, J., dissenting). See Kelso, *supra* note 8 (discussing the advantages of published written opinions).

38. *Powers*, 10 Cal. 4th at 173-74, 893 P.2d at 1217-18, 40 Cal. Rptr. 2d at 896-97

efficient resolution to cases, especially in light of the overflow existent in California courts, suggests that extraordinary writs are an acceptable method of review upon legislative determination.³⁹

IV. CONCLUSION

The California Supreme Court, through its holding, confirmed that a litigant's right of appeal does not automatically confer a right to direct appeal.⁴⁰ Instead, the court found that in cases lacking an adequate appeal remedy, or mandating public necessity for prompt issue resolution, the legislature may permit extraordinary writs to serve as the exclusive method of appeal.⁴¹ The court's holding extended beyond the scope of the PRA, finding such legislative actions a valid exercise of appellate jurisdiction.⁴²

MONICA M. RANDAZZO

(Lucas, J., dissenting).

39. See *Kelso*, *supra* note 8 (discussing the use of extraordinary writs to reduce unnecessary delay in appellate courts); *Thompson*, *supra* note 22 (defining the case overload problem).

40. *Powers*, 10 Cal. 4th at 112-14, 893 P.2d at 1176-77, 40 Cal. Rptr. 2d at 855-56.

41. *Id.* at 113, 893 P.2d at 1176, 40 Cal. Rptr. 2d at 855.

42. *Id.* at 115, 893 P.2d at 1178, 40 Cal. Rptr. 2d at 857.

II. CRIMINAL LAW

- A. *A jury's deadlock on a greater offense of gross vehicular manslaughter followed by a conviction on the lesser included offense of vehicular manslaughter bars subsequent prosecution of the greater offense pursuant to the double jeopardy statute, Penal Code section 1023: People v. Fields.*

I. INTRODUCTION

In *People v. Fields*,¹ the California Supreme Court addressed whether constitutional or statutory provisions against double jeopardy barred the retrial of the defendant on the greater offense (gross vehicular manslaughter while intoxicated) on which the jury failed to reach an agreement when, in the same proceeding, the jury returned a guilty verdict on a separately charged lesser included offense (vehicular manslaughter while intoxicated).² The supreme court affirmed the court of appeal's³ reversal of the defendant's conviction on the greater offense and reinstated the original sentence, holding that pursuant to Penal Code section 1023,⁴ the defendant's conviction of the lesser included offense barred a

1. 13 Cal. 4th 289, 914 P.2d 832, 52 Cal. Rptr. 2d 282 (1996). In this decision, retired Chief Justice Lucas, assigned by the Acting Chairperson of the Judicial Council, delivered the majority opinion, in which Chief Justice George and Justices Arabian, Baxter, Kennard, and Werdegar concurred. *Id.* at 295-312, 914 P.2d at 834-45, 52 Cal. Rptr. 2d at 284-95. Justice Mosk wrote a separate concurring opinion. *Id.* at 312, 914 P.2d at 845, 52 Cal. Rptr. 2d at 295 (Mosk, J., concurring).

2. *Id.* at 295-312, 914 P.2d at 834-45, 52 Cal. Rptr. 2d at 284-95.

3. *People v. Fields*, 30 Cal. App. 4th 1731, 36 Cal. Rptr. 2d 777 (1994). The court of appeal's basis for reversing the defendant's conviction was that a retrial on the greater offense (gross vehicular manslaughter while intoxicated) was barred by double jeopardy. *Fields*, 13 Cal. 4th at 297, 914 P.2d at 835, 52 Cal. Rptr. 2d at 285. After dismissing the greater offense, the court of appeal affirmed the trial court's convictions and findings on the lesser included offense and reinstated the original sentence. *Id.*

4. CAL. PENAL CODE § 1023 (West 1985 & Supp. 1996). Section 1023 provides, in relevant part:

When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading.

subsequent retrial on the greater offense, notwithstanding the first jury's deadlock on the greater offense.⁵

II. TREATMENT

A. Majority Opinion

As a basis for its analysis, the majority resolved the apparent tension between two distinct double jeopardy principles: (1) the "implied acquittal" doctrine, which states that a conviction of a lesser included offense constitutes an implicit acquittal on the greater offense, thereby barring its retrial,⁶ and (2) the doctrines of "manifest necessity" and "legal necessity," federal and state exceptions to double jeopardy prohibitions, which justify retrial of an offense following the discharge of a deadlocked jury.⁷

Id.; see also *Fields*, 13 Cal. 4th at 305, 914 P.2d at 841, 52 Cal. Rptr. 2d at 291 (quoting CAL. PENAL CODE § 1023).

5. *Fields*, 13 Cal. 4th at 295-312, 914 P.2d at 834-45, 52 Cal. Rptr. 2d at 284-95. In *Fields*, the defendant, later determined to have had a blood-alcohol content of .16%, drove through a red light and collided with a third party's vehicle, killing the third party as a result. *Id.* at 296, 914 P.2d at 834, 52 Cal. Rptr. 2d at 284. The defendant was charged with six offenses: Count I—gross vehicular manslaughter while intoxicated (CAL. PENAL CODE § 191.5(a)); Count II—vehicular manslaughter while intoxicated (CAL. PENAL CODE § 192(c)(3)); Count III—gross vehicular manslaughter (CAL. PENAL CODE § 192(c)(1)); Count IV—driving under the influence and causing bodily injury (CAL. VEH. CODE § 23153(a)); Count V—driving with a blood-alcohol level of .08% or more and causing bodily injury (CAL. VEH. CODE § 23153(b)); and Count VI—driving with a suspended license (CAL. VEH. CODE § 14601(a)). *Id.*

Subsequently, although the jury returned verdicts of guilty on Counts II, IV, V, and VI, the trial court declared a mistrial and set a date for retrial on Counts I and III because the jury was deadlocked on those counts. *Id.* at 296-97, 914 P.2d at 834-35, 52 Cal. Rptr. 2d at 284-85. Four months later, the defendant was rearraigned and charged with Counts I and III, and the case was transferred to a different judge following jury selection. *Id.* at 297, 914 P.2d at 835, 52 Cal. Rptr. 2d at 285. After the trial court dismissed Count III, the second jury returned a verdict of guilty on Count I (gross vehicular manslaughter while intoxicated). *Id.*

6. *Fields*, 13 Cal. 4th at 299, 914 P.2d at 836, 52 Cal. Rptr. 2d at 286. The implied acquittal doctrine has been recognized by both the United States Supreme Court and California courts. *Id.*; see also *Stone v. Superior Court*, 31 Cal. 3d 503, 511, 646 P.2d 809, 815, 183 Cal. Rptr. 647, 653 (1982) (stating that "a verdict of guilty on a lesser included offense constitutes an implied acquittal of the greater offense of which the jury could have convicted the defendant"); *Green v. United States*, 355 U.S. 184 (1957) (stating that an acquittal barring subsequent prosecution may be either express or implied by conviction on a lesser included offense, provided the jury had the opportunity to decide on the greater offense). See generally 1 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* §§ 325-326 (2d ed. 1988 & Supp. 1996) (stating that a conviction on a lesser included offense bars further prosecution of the greater offense and setting forth the elements required of a lesser included offense).

7. *Fields*, 13 Cal. 4th at 299-300, 914 P.2d at 836-37, 52 Cal. Rptr. 2d at 286-87. For

Drawing a distinction between a deadlocked jury and a silent jury, the majority concluded that the doctrine of implied acquittal was inapplicable to situations where the jury expressed its inability to reach an agreement on the greater offense, but applied to instances where the jury was merely silent on that offense.⁸ In support of its conclusion, the majority cited *Green v. United States* for the proposition that "jeopardy is not regarded as having come to an end . . . in those cases where unforeseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict."⁹ In light

purposes of the federal doctrine of manifest necessity, the defendant is considered to be in jeopardy once the jurors have been impaneled and sworn. *Id.* at 299, 914 P.2d at 836, 52 Cal. Rptr. 2d at 286 (citing *Crist v. Bretz*, 437 U.S. 28, 38 (1978)). According to this rule, once the defendant has been placed in jeopardy and the jury is subsequently discharged, a retrial is not permissible unless the defendant consents to the retrial or manifest necessity required such a discharge. *Id.* (citing *Green*, 355 U.S. at 188). The United States Supreme Court has adhered to the general principle, first articulated in *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824); that a jury's discharge resulting from its failure to agree constitutes manifest necessity and permits retrial of the defendant. *Fields*, 13 Cal. 4th at 299-300, 914 P.2d at 836-37, 52 Cal. Rptr. 2d at 286-87.

California's version of this doctrine, the doctrine of legal necessity, permits retrial when there is a legal necessity for the jury's discharge. *Id.* Like its federal counterpart, the California rule provides that a discharge caused by the jury's inability to reach an agreement is such a legal necessity. *Id.*; see also CAL. PENAL CODE §§ 1140-1141 (permitting retrial following the discharge of a jury if the court determines that "there is no reasonable probability that the jury can agree"); *id.* § 1160 (implementing the legal necessity doctrine in a multiple count situation). See generally 22 C.J.S. *Criminal Law* § 231 (1989) (classifying the discharge of a jury due to manifest necessity as an exception to double jeopardy prohibitions).

8. *Fields*, 13 Cal. 4th at 301, 914 P.2d at 837-38, 52 Cal. Rptr. 2d at 287-88 (citing *Selvester v. United States*, 170 U.S. 262, 263 (1898)). According to the Court in *Selvester*, if the jury is silent on certain offenses and is subsequently discharged, the jury's silence constitutes an acquittal barring retrial as to those offenses for which the jury fails to return a verdict because "the record affords no adequate legal cause for the discharge of the jury." *Id.* (quoting *Selvester*, 170 U.S. at 269). However, if the jury is discharged following an expressed jury deadlock, "[t]he effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offense as to which the jury has disagreed and on account of which it has been regularly discharged would not constitute second jeopardy." *Id.* (quoting *Selvester*, 170 U.S. at 269). See generally William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411 (1993) (discussing the applicability of the implied acquittal doctrine to cases in which the jury has returned a verdict on a lesser included offense, but was silent on the greater offense).

9. *Fields*, 13 Cal. 4th at 301-02, 914 P.2d at 838, 52 Cal. Rptr. 2d at 288 (quoting *Green*, 355 U.S. at 188) (alteration in original) (internal quotations omitted). In *Green*, a

of *Green's* conclusion and the Fifth Amendment, the majority held that in situations where the jury was expressly deadlocked on the greater offense, but returned a verdict of guilty on the lesser included offense, the conviction on the lesser included offense did not bar a retrial on the greater offense.¹⁰

Following its determination that the implied acquittal doctrine was inapplicable to the instant case under both federal and state law, the majority turned its attention to whether the defendant was properly retried on the greater offense.¹¹ The majority reasoned that when the jury returned a verdict of guilty on the lesser included offense, the defendant stood convicted of that offense within the meaning of Penal Code section 1023.¹² Pursuant to that section, the majority concluded that the conviction on the lesser included offense barred a subsequent prosecution

jury's silence on the greater offense did not constitute manifest necessity to discharge the jury; therefore, retrial of the defendant on the greater offense was barred. *Id.* See generally 1 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* §§ 290, 292 (2d ed. 1988 & Supp. 1996) (classifying a jury's inability to agree as an instance where the ensuing discharge of the jury would be the result of legal necessity, thereby precluding a defendant from asserting a defense based on double jeopardy principles); 20 CAL. JUR. 3D *Criminal Law* § 2330 (1985 & Supp. 1996) (summarizing the effect of jury discharge as a result of the jury's inability to agree); 21 AM. JUR. 2D *Criminal Law* § 303 (1981) (discussing the ramifications of a jury discharge based on the jury's failure to agree).

10. *Fields*, 13 Cal. 4th at 301, 914 P.2d at 838, 52 Cal. Rptr. 2d at 288. The majority held that both federal and state double jeopardy principles supported the conclusion that a jury deadlock on the greater offense did not constitute an implied acquittal of the lesser included offense. *Id.*; see also U.S. CONST. amend. V (guaranteeing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"); CAL. CONST. art. I, § 15 (stating that "[p]ersons may not twice be put in jeopardy for the same offense"); *Mauk v. State*, 605 A.2d 157, 171 (Md. Ct. Spec. App. 1992) (holding that a retrial on the greater offense, following the declaration of a mistrial due to a hung jury, was not barred by federal double jeopardy prohibitions even though the jury had returned a guilty verdict on the lesser included offense). *But cf.* *People v. Fisher*, 632 N.E.2d 689, 692-95 (Ill. App. Ct. 1994) (stating that there is no analytical distinction between jury deadlock and jury silence for double jeopardy purposes). See generally 22 C.J.S. *Criminal Law* § 233 (1989) (stating that "[t]he discharge of the jury by the court without verdict, where there is no reasonable expectation that they will be able to agree, does not bar another trial").

11. *Fields*, 13 Cal. 4th at 305-07, 914 P.2d at 840-42, 52 Cal. Rptr. 2d at 290-92.

12. *Id.* at 305, 914 P.2d at 840, 52 Cal. Rptr. 2d at 290. See also *supra* note 4 (setting forth the language of Penal Code § 1023). See generally Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191 (1984) (explaining the justifications for and the application of the lesser included offense doctrine); Colonel James A. Young III, *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159 (1996) (setting forth the role of the lesser included offense doctrine in criminal prosecutions for multiple offenses).

on the greater offense, notwithstanding the first jury's deadlock on the greater offense.¹³

According to the majority's interpretation of the acquittal-first rule established in *People v. Kurtzman*, the jury may deliberate on the greater and lesser included offenses in any order, but must acquit the defendant of the greater offense before returning a verdict on the lesser offense.¹⁴ Contrary to *Kurtzman*, when the jury in the instant case rendered a verdict of guilty only on the lesser included offense without a corresponding acquittal on the greater offense, its verdict of conviction was

13. *Fields*, 13 Cal. 4th at 305, 914 P.2d at 840-41, 52 Cal. Rptr. 2d at 290-91. According to the majority, underlying the principle that a conviction on the lesser included offense was a bar to retrial of the greater offense was the notion that, once a conviction on the lesser included offense has been obtained, a conviction on the greater offense would have the effect of being a double conviction on the lesser offense. *Id.* at 306, 914 P.2d at 841, 52 Cal. Rptr. 2d at 291; see also *People v. Greer*, 30 Cal. 2d 589, 596-97, 184 P.2d 512, 516-17 (1947) (interpreting § 1023 to bar a subsequent retrial of the greater offense once a defendant has been convicted of a lesser included offense). *But cf.* *People v. Pearson*, 42 Cal. 3d 351, 355, 721 P.2d 595, 596, 228 Cal. Rptr. 509, 511 (1986) (recognizing a rule prohibiting convictions of both the greater offense and lesser included offenses). See generally 20 CAL. JUR. 3D *Criminal Law* § 2322 (1985) (setting forth the doctrine of implied acquittal as it pertains to double jeopardy principles); 17 CAL. JUR. 3D *Criminal Law* §§ 78-79 (1984) (defining "lesser included offense" and discussing the consequences of convicting a defendant of both a lesser included offense and the greater offense in the same proceeding).

14. *Fields*, 13 Cal. 4th at 308-09, 914 P.2d at 843, 52 Cal. Rptr. 2d at 293 (citing *People v. Kurtzman*, 46 Cal. 3d 322, 758 P.2d 572, 250 Cal. Rptr. 244 (1988)).

incomplete.¹⁵ The majority stated the consequence of such jury action as follows:

[O]nce the jury is discharged after rendering a verdict of guilty on the lesser included offense, without a corresponding verdict of acquittal on the greater offense, the defendant stands convicted of the lesser included offense, and retrial on the greater offense is barred notwithstanding the jury's deadlock on that charge.¹⁶

Therefore, although the jury's conviction of the defendant on the lesser included offense did not constitute an implied acquittal of the greater offense, retrial on the greater offense was barred by section 1023, notwithstanding the jury's deadlock on the greater offense.¹⁷

B. Justice Mosk's Concurring Opinion

In a separate concurring opinion, Justice Mosk concurred with the judgment and holding of the majority, but observed that the lesser included offense and the greater offense in the instant case constituted the "same offense" within the meaning of the Fifth Amendment.¹⁸ Therefore,

15. *Id.* at 309, 914 P.2d at 843, 52 Cal. Rptr. 2d at 293. According to the majority, "[u]nder these circumstances, the trial court is permitted, pursuant to section 1161, to direct the jury to reconsider its verdict of conviction in light of the acquittal-first rule." *Id.* at 310, 914 P.2d at 844, 52 Cal. Rptr. 2d at 294. Section 1161 provides in pertinent part:

When there is a verdict of conviction, in which it appears to the [c]ourt that the jury have mistaken the law, the [c]ourt may explain the reason for that opinion and direct the jury to reconsider their verdict, and if after the reconsideration, they return the same verdict, it must be entered. . . .

CAL. PENAL CODE § 1161 (West 1985 & Supp. 1996). In such instances of mistake of law, the incomplete conviction on the lesser included offense "does not implicate a defendant's double jeopardy interest in avoiding retrial on the greater offense." *Fields*, 13 Cal. 4th at 310-11, 914 P.2d at 844, 52 Cal. Rptr. 2d at 294. By contrast, if rather than committing a mistake of law the jury renders an incomplete verdict of conviction on the lesser included offense followed by the jury's discharge, "the trial court no longer has jurisdiction to direct jurors to reconsider their irregular verdict." *Id.* at 311, 914 P.2d at 844, 52 Cal. Rptr. 2d at 294.

16. *Fields*, 13 Cal. 4th at 311, 914 P.2d at 844-45, 52 Cal. Rptr. 2d at 294-95.

17. *Id.* at 312, 914 P.2d at 845, 52 Cal. Rptr. 2d at 295.

18. *Id.* (Mosk, J., concurring). See generally James A. Bell, IV & Todd Richman, *Twenty-Fifth Annual Review of Criminal Procedure*, 84 GEO. L.J. 1076 (1996) (specifying the types of prosecutorial proceedings that are barred by the Double Jeopardy Clause of the Fifth Amendment); 1 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 271 (2d ed. 1989) (outlining the guarantees contained in the Federal Constitution, California Constitution, and California statutes against placing a defendant twice in jeopardy); 20 CAL. JUR. 3D *Criminal Law* § 2314 (1985) (stating that conviction, acquittal, or jeopardy is a bar to further prosecution for the same offense, for an attempt of the same offense, or for an offense necessarily included therein).

concluded Justice Mosk, the double jeopardy clause barred retrial of the greater offense after the defendant was convicted of the lesser included offense.¹⁹

III. IMPACT AND CONCLUSION

Prior to *Fields*, the supreme court had not reconciled the doctrine of implied acquittal and the doctrine of manifest or legal necessity as they have pertained to instances where the jury had convicted a defendant of a lesser included offense, but was deadlocked on the greater offense. Although the majority affirmed the continued validity of both doctrines, the court found the implied acquittal doctrine inapplicable to situations where the jury is expressly deadlocked, rather than silent, on the greater offense.²⁰

The discharge of the jury following a deadlock, pursuant to the doctrine of manifest or legal necessity, normally would have permitted retrial of the defendant on the greater offense.²¹ Notwithstanding the jury's deadlock and the effect of the doctrine of manifest or legal necessity thereon, the court concluded that, pursuant to Penal Code section 1023, the defendant's conviction of the lesser included offense barred a subsequent retrial on the greater offense.²²

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19. *Fields*, 13 Cal. 4th at 312, 914 P.2d at 845, 52 Cal. Rptr. 2d at 295 (Mosk, J., concurring). See generally 20 CAL. JUR. 3D *Criminal Law* §§ 2313-2343 (1985) (discussing the scope and effect of double jeopardy principles in terms of both the Fifth Amendment and the California Constitution and their impact on criminal proceedings); 21 AM. JUR. 2D *Criminal Law* §§ 243-320 (1981) (summarizing the federal prohibitions against placing a defendant twice in jeopardy during criminal proceedings).

20. *Fields*, 13 Cal. 4th at 301, 914 P.2d at 837, 52 Cal. Rptr. 2d at 287.

21. *Id.* at 300, 914 P.2d at 837, 52 Cal. Rptr. 2d at 287.

22. *Id.* at 312, 914 P.2d at 845, 52 Cal. Rptr. 2d at 295.

- B. *A murder victim's statements to her daughter that she was going to another city with the defendant and that daughter should call her aunt if victim did not return were admissible into evidence as an exception to the hearsay rule. Also, there may be a special circumstance to impose the death penalty where the murder victim was not an eyewitness to the defendant's prior crime: People v. Jones.*

I. INTRODUCTION

In *People v. Jones*,¹ the court considered two issues. First, the court addressed whether a murder victim's statements to her daughter that she was leaving with the defendant and that the daughter should call her aunt in the event that the victim did not return were admissible at trial as an exception to the hearsay rule.² Second, the court determined whether a special circumstance exists to impose the death penalty when the murder victim, who could have testified against the defendant regarding another crime, was not an eyewitness to the prior crime.³ The trial court admitted the evidence, convicted the defendant of first-degree murder, and under special circumstances, sentenced him to death.⁴ The

1. 13 Cal. 4th 535, 917 P.2d 1165, 54 Cal. Rptr. 2d 42 (1996). Chief Justice George wrote for the majority. *Id.* at 537, 917 P.2d 1166, 54 Cal. Rptr. 2d at 44. Justices Mosk, Kennard, Werdegar, Chin, Lillie, and Lucas concurred. *Id.* at 551, 917 P.2d at 1175, 54 Cal. Rptr. 2d at 52.

2. *Id.* at 547, 917 P.2d at 1173, 54 Cal. Rptr. 2d at 50. The defendant was convicted of fatally shooting Carolyn Grayson. *Id.* at 537, 917 P.2d at 1166-67, 54 Cal. Rptr. 2d at 43-44. Prior to Grayson's death, Grayson and the defendant lived together and had "maintained a stormy romantic relationship." *Id.* at 537, 917 P.2d at 1167, 54 Cal. Rptr. 2d at 44. Evidence introduced at trial showed that the defendant killed Grayson in order to prevent her from testifying that he was responsible for the murder of a neighbor, Janet Brenner. *Id.* at 537-38, 917 P.2d at 1169, 54 Cal. Rptr. 2d at 44. The supreme court discussed several facts not at issue in this case, such as the death of Janet Brenner, Grayson's statements to others, the plot to kill Grayson, as well as the defendant's statements. *Id.* at 538-40, 917 P.2d at 1167-69, 54 Cal. Rptr. 2d at 44-46. At issue in this case was the admissibility of statements by Grayson to her daughter prior to her death. *Id.* at 548, 917 P.2d at 1173, 54 Cal. Rptr. 2d at 50. At trial, Grayson's daughter testified that her mother had stated that she was leaving that night with the defendant and that if she did not return, the daughter was to call her aunt. *Id.* at 541, 917 P.2d at 1169, 54 Cal. Rptr. 2d at 46. The trial court admitted the statement over defense hearsay and leading question objections. *Id.*

3. *Id.* at 549, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51. The defendant contended that the trial court erred when it failed to instruct the jury that for a special circumstance, the victim must have been an eyewitness to the prior crime. *Id.* at 550, 917 P.2d at 1175, 54 Cal. Rptr. 2d at 52. The supreme court disagreed. *Id.*

4. *Id.* at 537, 917 P.2d at 1166, 54 Cal. Rptr. 2d at 43.

court vacated the conviction on separate grounds⁵ and held that the statement of the murder victim to her daughter instructing her to call her aunt in the event she did not return was properly admitted as a statement of the declarant's state of mind.⁶ Further, the court held that the killing of any witness to a prior crime who might testify in a future criminal proceeding constitutes a special circumstance to impose the death penalty.⁷

II. TREATMENT

A. *The Murder Victim's Statement*

Chief Justice George, writing for a unanimous court, rejected three arguments offered by the defendant.⁸ First, he concluded that the daughter's statement was not inadmissible hearsay.⁹ The Chief Justice rejected the defendant's contention that *People v. Alcalde*¹⁰ should be overruled based on the legislature's enactment of Evidence Code Sec-

5. *Id.* In a separate habeas corpus proceeding, the court vacated the conviction based on deficient performance by the defendant's counsel. *Id.* For a discussion of the companion case, see *In re Jones*, 13 Cal. 4th 552, 917 P.2d 1175, 54 Cal. Rptr. 52 (1996); see also 6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Extraordinary Writs* § 3350 (2d ed. 1989) (stating that ineffective counsel is one of those rights "regarded as so fundamental that [its] denial or substantial impairment constitutes a violation of due process . . ."). Because the conviction was vacated, the court in this case stated that it was providing guidance for issues that would likely arise in the new trial. *People v. Jones*, 13 Cal. 4th at 537, 917 P.2d at 1167, 54 Cal. Rptr. 2d at 44.

6. *Id.* at 549, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

7. *Id.* at 550, 917 P.2d at 1175, 54 Cal. Rptr. 2d at 51.

8. *Id.* at 547-49, 917 P.2d at 1173-74, 54 Cal. Rptr. 2d at 50-51.

9. *Id.* at 547-48, 917 P.2d at 1173-74, 54 Cal. Rptr. 2d at 50-51. Hearsay evidence is commonly defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* § 574 (3d ed. 1986). See generally Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 567 (1992) (discussing the justifications and criticisms of the hearsay doctrine); Diana L. Nelson, *State v. Walker: The North Carolina Supreme Court's State of Mind Concerning the Admissibility of Evidence Under the Rule 803(3) Hearsay Exception in Criminal Cases*, 71 N.C. L. REV. 2038 (1993) (stating that liberalization of the hearsay exception has led to "significant sentiment in favor of Rules reform" throughout the nation).

10. 24 Cal. 2d 177, 148 P.2d 627 (1944). For a discussion of *Alcalde*, see 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* § 755 (3d ed. 1986).

tion 1250,¹¹ which codified the court's ruling in *Alcalde*.¹² In *Alcalde*, the court held that "declarations of present intent are admissible to prove a future act."¹³ Because the *Alcalde* ruling had been codified and the statement in the instant case was offered to prove conduct of the declarant in conformity with that state of mind, the court refused to review the holding.¹⁴

Second, the court addressed the statement's trustworthiness.¹⁵ The defendant contended that under Evidence Code Section 1252,¹⁶ the statement was untrustworthy because Grayson was a prostitute and had never informed her daughter where she was going or why she was leaving.¹⁷ However, there was no evidence that Grayson ever lied to her daughter.¹⁸ Furthermore, the court determined that because Grayson usually did not disclose her destinations to her daughter, it was inferable that on this occasion she wanted her daughter to know her plans.¹⁹ Thus, the court determined that the statement carried a higher probability of trustworthiness.²⁰

Lastly, the court rejected the defendant's argument that Grayson's instructions to her daughter to call her aunt in the event she did not return implied that Grayson believed she would never return.²¹ Moreover, the defendant contended that the statement further implied that

11. CAL. EVID. CODE § 1250 (Deering 1986 & Supp. 1995) (stating that "evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when . . . [t]he evidence is offered to prove the declarant's state of mind . . . or explain acts or conduct of the declarant"). For further discussion regarding state of mind and intent as evidence of future act, see 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* § 752 (3d ed. 1986). See also 31 CAL. JUR. 3D *Evidence* §§ 270 & 273 (1976 & Supp. 1996) (stating that state of mind may be used "to prove or explain acts or conduct of the declarant" as well as "to prove that he did those acts").

12. *Jones*, 13 Cal. 4th at 548, 917 P.2d at 1173-74, 54 Cal. Rptr. 2d at 50-51.

13. *Alcalde*, 24 Cal. 2d at 186, 148 P.2d at 631; see Amanda Bartlett Meak, Note, *The Death of Res Gestae and Other Developments in Missouri Hearsay Law*, 60 MO. L. REV. 991 (1995) (stating that for purposes of the hearsay exception, courts should distinguish between direct assertions of declarant's state of mind and declarant's statements used to show then-existing state of mind).

14. *Jones*, 13 Cal. 4th at 548, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

15. *Id.* at 548-49, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

16. CAL. EVID. CODE § 1252 (Deering 1986 & Supp. 1995) ("Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."); see also 31 CAL. JUR. 3D *Evidence* § 269 (1976) (restating the general rule under Evidence Code Section 1252).

17. *Jones*, 13 Cal. 4th at 548, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

18. *Id.* at 548-49, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

19. *Id.* at 549, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

20. *Id.*

21. *Id.*

Grayson feared him and that she anticipated that he might kill her.²² In contrast, the court held that Grayson's statement could just as easily been interpreted as implying that Grayson believed she may not return that night.²³ Additionally, the court noted that the defendant failed to object on these grounds at trial.²⁴ Thus, the court concluded that the trial court properly admitted the statement.²⁵

B. *The Special Circumstance Issue*

In the second part of the opinion, the court held that the killing of any witness to a prior crime supports a special circumstance for imposing the death penalty.²⁶ The court rejected the defendant's contention that the witness must be an eyewitness.²⁷ To support its conclusion, the court cited *People v. Allen*,²⁸ which found a special circumstance where the victim was not an eyewitness, "but had received information implicating the defendant in [the] crime"²⁹ The court then stated the general rule that "[i]f an accused believes himself to be exposed to criminal prosecution and intentionally kills *another* to prevent that person from testifying in an anticipated or pending criminal proceeding, the special circumstance may be found true"³⁰ Because the court

22. *Id.*

23. *Id.* For a discussion of federal courts' inconsistent interpretation of the state of mind exception, see Diane Kiesel, Comment, *One Person's Thoughts, Another Person's Acts: How the Federal Circuit Courts Interpret the Hillmon Doctrine*, 33 CATH. U. L. REV. 699 (1984); see also David E. Seidelson, Symposium, *The Federal Rules of Evidence: A Few Surprises*, 12 HOFSTRA L. REV. 453 (1984) (discussing federal circuit courts' differing interpretations of the state of mind exception).

24. *Jones*, 13 Cal. 4th at 549, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

25. *Id.* For a comprehensive discussion of "declarant state of mind" rules, see 29 AM. JUR. 2D *Evidence* § 667 (1994 & Supp. 1996).

26. *Jones*, 13 Cal. 4th at 550, 917 P.2d at 1175, 54 Cal. Rptr. 2d at 52.

27. *Id.* See generally 22 CAL. JUR. 3D *Criminal Law* § 3341 (1985 & Supp. 1996) (discussing the substantive requirements for special circumstances including the requirements for imposition of the death penalty, and the killing of a witness to a prior crime); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1576 (2d ed. 1989 & Supp. 1996) (outlining the three elements required for a showing of special circumstances).

28. 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986).

29. *Jones*, 13 Cal. 4th at 550, 917 P.2d at 1175, 54 Cal. Rptr. 2d at 52 (citing *Allen*, 42 Cal. 3d at 1222, 729 P.2d 115, 232 Cal. Rptr. 849).

30. *Id.* (quoting *People v. Weidert*, 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985)).

found nothing indicating an "eyewitness requirement," the court rejected the defendant's argument.³¹

III. IMPACT AND CONCLUSION

Prior to the court's opinion in *Jones*, the rule was well established in California for more than fifty years that state of mind evidence is admissible to show the declarant's present intent to perform a future act.³² The rule was codified in 1965,³³ and the decision in *Jones* leaves the rule unchanged.³⁴ In addition, the rule that the murder of any witness to a prior crime is sufficient for a special circumstance has been established for over ten years.³⁵ Because the court has left these well-established rules undisturbed, it is doubtful that this case will have a great impact on the law of evidence.

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31. *Id.*; see 22 CAL. JUR. 3D *Criminal Law* § 3343 (1985 & Supp. 1996) (discussing the strict requirements for a finding of special circumstances by the trier of fact); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1588 & 1589 (2d ed. 1989 & Supp. 1996) (stating the general and special findings required for a showing of special circumstances).

32. *People v. Alcalde*, 24 Cal. 2d 177, 148 P.2d 627 (1944).

33. *Jones*, 13 Cal. 4th at 548, 917 P.2d at 1174, 54 Cal. Rptr. 2d at 51.

34. CAL. EVID. CODE § 1250 (Deering 1986 & Supp. 1995).

35. *People v. Allen*, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986); *People v. Weidert*, 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985).

C. *Judges have the power to strike prior felony convictions in furtherance of justice in three strike cases: People v. Romero.*

I. INTRODUCTION

In *People v. Romero*,¹ the California Supreme Court examined whether a court may, on its own motion, strike prior felony convictions in cases arising under California Penal Code sections 667(b)-(i) and 1170.12, commonly referred to as the "three strikes" provisions.² In *Romero*, the trial

1. 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996). Justice Werdegar delivered the majority opinion and Chief Justice George, Justice Mosk, Justice Kennard, Justice Baxter, and Justice Lucas concurred. *Id.* at 504-33, 917 P.2d at 629-49, 53 Cal. Rptr. 2d at 790-810. Justice Chin wrote a separate concurring opinion. *Id.* at 533-34, 917 P.2d at 649-51, 53 Cal. Rptr. 2d at 810-11 (Chin, J., concurring). The Honorable Malcolm M. Lucas retired in May 1996, prior to this decision. See Bob Egelko, *Chief Justice Lucas Announces Retirement*, L.A. DAILY NEWS, Oct. 1, 1995 (briefly discussing the retirement of Justice Lucas and some of his notable rulings). Justice Lucas was able to participate in the decision of this case pursuant to a provision in the California Constitution which provides that a "retired judge who consents may be assigned to any court" by the Chief Justice. CAL. CONST. art. VI, § 6.

2. *Romero*, 13 Cal. 4th at 504, 917 P.2d at 630, 53 Cal. Rptr. 2d at 791. California Penal Code §§ 667(b)-(i) and 1170.12 are two nearly identical statutes. *Id.* Section 667 is a provision drafted by the legislature while § 1170.12 is a voter initiative. *Id.* Both provisions provide, in relevant part, that if a defendant has been convicted of two or more "violent" or "serious" felonies, the imposed sentence is "an indeterminate term of life imprisonment." CAL. PENAL CODE §§ 667(e)(2)(A) & 1170.12(c)(2)(A) (West 1988 & Supp. 1997). There are further provisions which detail the possibility of parole after a "minimum term." CAL. PENAL CODE §§ 667(e)(2)(A)(i)-(iii) & 1170.12 (c)(2)(A)(iii) (West 1985 & Supp. 1997). "The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation." CAL. PENAL CODE §§ 667(f)(2) and 1170.12(d)(2) (West 1985 & Supp. 1997). See Christine Markel, Comment, *A Swing and A Miss: California's Three Strikes Law*, 17 WHITTIER L. REV. 651 (1996) (outlining a thorough history of the three strikes law including relevant cases that contributed to public opinion); David C. Owen, Comment, *Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California's "Three Strikes" Legislation*, 29 U.C. DAVIS L. REV. 437 (1996) (discussing the effect of three strikes laws on juveniles); Keith C. Owens, Comment, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to its Knees*, 25 SW. U. L. REV. 129 (1995) (discussing the problems California will face if judges are unable to use discretion in the sentencing process).

court judge, without a motion from the prosecution, struck the defendant's prior felony convictions.³ The district attorney petitioned for writ of mandamus to vacate the judge's order arguing that under the express language of Penal Code section 667(b)-(i),⁴ the judge did not have the power to dismiss prior felony allegations except upon request by the prosecution.⁵ The court of appeal issued the district attorney's writ finding that the trial court could not dismiss prior felony convictions on its own motion.⁶ Reversing in part, the California Supreme Court held that trial courts could, on their own motion, strike prior felony allegations.⁷

3. *Romero*, 13 Cal. 4th at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793. In *Romero*, the district attorney filed an information charging Jesus Romero with possession of a controlled substance. *Id.* at 506, 917 P.2d at 631, 53 Cal. Rptr. 2d at 792. Included in the indictment were the defendant's prior convictions which consisted of second degree burglary, attempted burglary of an inhabited dwelling, first degree burglary of an inhabited dwelling, and possession of a controlled substance. *Id.* The burglary and attempted burglary charges would count as "strikes," making the defendant eligible for a life sentence. *Id.* The defendant originally plead not guilty, however, the judge made a deal with him to change his plea in exchange for striking the defendant's prior convictions for three strike purposes. *Id.* at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793. The defendant was sentenced to six years, three years for the possession charge and three consecutive one-year enhancements for the prior felony convictions. *Id.*

For a discussion on how a state has the authority to punish offenders with prior convictions more severely than first time offenders, see 24 C.J.S. *Criminal Law* § 1598 (1989 & Supp. 1996). For discussions on what constitutes a prior conviction, see R. Daniel O'Conner, Note, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three-Strikes and You're Out" Scheme*, 36 B.C. L. REV. 847 (1995) and 39 AM. JUR. 2D *Habitual Criminals* § 8 (1968 & Supp. 1995).

4. Penal Code § 667 became effective on March 7, 1994 while § 1170.12 did not take effect until November 9, 1994. *Romero*, 13 Cal. 4th at 505, 917 P.2d at 630-31, 53 Cal. Rptr. 2d at 791-92. While the defendant was charged with a crime committed on May 9, 1994, and therefore, only § 1170.12 applied, the court nonetheless discussed both sections. *Id.* at 505, 917 P.2d at 631, 53 Cal. Rptr. 2d at 792.

5. *Id.* at 506, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793. For a general discussion on the powers and conduct of a judge, see 21 CAL. JUR. 3D *Criminal Law* §§ 2935-2943 (1995 & Supp. 1996). For a general discussion on the acceptable conduct of the prosecutor, see 21 CAL. JUR. 3D *Criminal Law* §§ 2949-2971 (1995 & Supp. 1996).

6. *Romero*, 13 Cal. 4th at 506, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793.

7. *Id.* at 532, 917 P.2d at 649, 53 Cal. Rptr. 2d at 810.

II. TREATMENT

A. *Majority Opinion*

1. The Doctrine of Separation of Powers was not violated.

The supreme court first considered the defendant's contention that if the statute was interpreted to allow only the prosecution to make a motion to strike the priors, separation of powers would be violated.⁸ The court discussed its decision in *People v. Tenorio*⁹ where a similar statute¹⁰ was held to violate the doctrine of separation of powers.¹¹ The court in *Tenorio* discussed the concept that the judge works in a judicial capacity while the prosecutor is a member of the executive branch.¹² In *Romero*, the California Supreme Court summarized the *Tenorio* decision as stating that once the prosecutor decides to indict, the process becomes judicial, and that a law requiring the prosecutor to consent to the

8. *Id.* at 508, 917 P.2d at 633, 53 Cal. Rptr. 2d at 794. The California Constitution states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." CAL. CONST. art. III, § 3. For a historical discussion on the doctrine of separation of powers that focuses on Madison and the Federalist Papers, see Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996). For a modern discussion of separation of powers emphasizing recent justices who have impacted the current interpretation of the doctrine, including Justice Scalia and Justice White, see Matthew J. Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961 (1995). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 107 (9th ed. 1988 & Supp. 1996) (discussing the nature of the separation of powers doctrine).

9. 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970). This case overruled the California Supreme Court's decision rendered only eight years prior in *People v. Sidener*, 58 Cal. 2d 645, 375 P.2d 641, 25 Cal. Rptr. 697 (1962) (holding that the ability to allow only the prosecutor to dismiss a case is valid based on the common-law power of *nolle prosequi*).

10. California Health & Safety Code § 11718 states:

No allegation of fact which, if admitted or found to be true, would change the penalty for the offense charged from what the penalty would be if such fact were not alleged and admitted or proved to be true may not be dismissed by the court or stricken from the accusatory pleading except upon motion of the district attorney.

CAL. HEALTH & SAFETY CODE § 11718 (repealed 1972).

11. *Tenorio*, 3 Cal. 3d at 95, 473 P.2d at 997, 89 Cal. Rptr. at 253.

12. *Id.* at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252.

dismissal of the prior felony allegations at that point would “unacceptably compromise[] judicial independence.”¹³

The supreme court then stated that the separation of powers doctrine was not offended in this case.¹⁴ The court explained that separation of powers would only be offended if the law was construed to remove a judge’s discretion in dismissing prior convictions in furtherance of justice.¹⁵

2. The court interpreted Penal Code sections 667 and 1170.12 as giving judges discretion to strike prior convictions.

The California Supreme Court next noted that if it can interpret California Penal Code sections 667(b)-(i) and 1170.12 in a way that makes them constitutional, it must do so.¹⁶ The court focused on Penal Code section 1385, which gives the court the general power to strike priors in furtherance of justice.¹⁷ The supreme court stated that unless there was

13. *Romero*, 13 Cal. 4th at 512, 917 P.2d at 635, 53 Cal. Rptr. 2d at 796. *Tenorio* has been subsequently used by the California Supreme Court to find other statutes unconstitutional. See *People v. Navarro*, 7 Cal. 3d 248, 497 P.2d 481, 102 Cal. Rptr. 137 (1972) (holding unconstitutional a statute that required the prosecutor to consent before a judge could order a defendant into a treatment facility for drug addicts); *Esteybar v. Municipal Court*, 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971) (unanimously finding a statute unconstitutional that required prosecutorial approval for a judge to treat a wobbler as a misdemeanor); *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974) (finding unconstitutional a statute that allowed a prosecutor to veto the judge’s decision to divert a defendant charged with a narcotics offense into a pretrial treatment program).

14. *Romero*, 13 Cal. 4th at 513, 917 P.2d at 635, 53 Cal. Rptr. 2d at 797.

15. *Id.*

16. *Id.* at 509, 917 P.2d at 632, 53 Cal. Rptr. 2d at 794.

If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.

Id. at 509, 917 P.2d at 633, 53 Cal. Rptr. 2d at 794 (quoting *Miller v. Municipal Court*, 22 Cal. 2d 818, 828, 142 P.2d 297, 303 (1943) (discussing proper court jurisdiction for cases brought under the Emergency Price Control Act of 1942)); see also 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 96 (9th ed. 1988 & Supp. 1996) (discussing construction in favor of the constitutionality of a statute).

17. California Penal Code § 1385 provides that:

clear legislative intent eliminating the power the courts are given under Penal Code section 1385(a), California Penal Code sections 667(b)-(i) and 1170.12 should not be read as abolishing that power in three strike situations.¹⁸ Canvassing the tumultuous history of Penal Code section 1385,¹⁹ the court reasoned that the legislature would not have included a provision in California Penal Code sections 667(f)(2) and 1170.12 that allows the prosecuting attorney to strike a prior felony conviction "pursuant to 1385" unless they also intended the court to retain its power under section 1385.²⁰

The court next addressed the district attorney's argument that the language of Penal Code section 1385(b) eliminates a court's power to strike prior felony convictions in three strike cases.²¹ Penal Code section 1385(b) states, "[t]his section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."²² The court noted defendant's three arguments: (1) Penal Code section 1385(b) was added to the Penal Code in 1986, and at that time, Penal Code section 667 did not contain the "three strikes" provision,²³ (2) only Penal Code section 1170.12 is valid because

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

CAL. PENAL CODE § 1385 (West 1996).

18. *Romero*, 13 Cal. 4th at 518, 917 P.2d at 640, 53 Cal. Rptr. 2d at 801.

19. *Id.* at 509-14, 917 P.2d at 633-36, 53 Cal. Rptr. 2d at 794-97.

20. *Id.* at 521-22, 917 P.2d at 642, 53 Cal. Rptr. 2d at 803; *see also* *People v. Burke*, 47 Cal. 2d 45, 301 P.2d 241 (1956) (unanimously holding that § 1385 gave trial courts the power to strike sentencing allegations in furtherance of justice), *overruled by* *People v. Sidener*, 58 Cal. 2d 645, 375 P.2d 641, 25 Cal. Rptr. 697 (1962) (holding trial courts could not strike prior convictions except on motion of prosecutor), *overruled by* *People v. Tenorio*, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970); *People v. Tanner*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979) (holding that judges could not discuss criminal firearm charges using § 1385).

21. *Romero*, 13 Cal. 4th at 522, 917 P.2d at 642, 53 Cal. Rptr. 2d at 803.

22. CAL. PENAL CODE § 1385 (West 1996).

23. *Romero*, 13 Cal. 4th at 525-26, 917 P.2d at 645, 53 Cal. Rptr. 2d at 806. In 1986, § 667 contained what is now § 667(a), which includes the provision mandating five-year enhancements for prior serious felonies. CAL. PENAL CODE § 667(a) (West 1996).

section 1170.12 was enacted later than section 667, thus 1170.12, which is not mentioned in section 1385, is not affected by the section 1385 language;²⁴ and (3) the term enhancement does not apply to three strikes situations.²⁵ While the court did not fully address these issues, it did find that the defendant's arguments created enough doubt to show that there was not "clear legislative intent" to eliminate the courts discretion under section 1385.²⁶

B. Justice Chin's Concurring Opinion

In a brief concurring opinion, Justice Chin agreed that the clear legislative intent necessary to eliminate the court's power to strike prior felony convictions was absent.²⁷ The majority's treatment of the separation of powers issue precipitates Justice Chin's separate concurring opinion.²⁸ Justice Chin asserted that even if the statute were interpreted as eliminating the court's power to strike prior felony convictions, such an interpretation would not violate the doctrine of separation of powers.²⁹

III. IMPACT

Romero allows judges to use discretion to strike prior felony convictions.³⁰ Presumably, *Romero* will reduce the number of defendants that receive life sentences under the three strikes provision, although the extent of such a decrease is impossible to determine.³¹ Other issues are also presented by this decision. For example, the court stated that *Romero* will be fully retroactive.³² This will undoubtedly create a back-

24. *Romero*, 13 Cal. 4th at 526, 917 P.2d at 645, 53 Cal. Rptr. 2d at 806; see also *Petaluma v. Pacific Tel. & Tel. Co.*, 44 Cal. 2d 284, 282 P.2d 43 (1955) (holding when two statutes deal with the same subject, the more recent prevails).

25. *Romero*, 13 Cal. 4th at 526-27, 917 P.2d at 645-46, 53 Cal. Rptr. 2d at 806-07. The attorney general agreed with the defendant on this point, writing in his brief, "[w]e have previously made plain our belief that the three strikes statute is not an 'enhancement.'" *Id.* at 527, 917 P.2d at 646, 53 Cal. Rptr. 2d at 807.

26. *Id.* at 525, 917 P.2d at 645, 53 Cal. Rptr. 2d at 806.

27. *Id.* at 533, 917 P.2d at 649-50, 53 Cal. Rptr. 2d at 810-11 (Chin, J., concurring).

28. *Id.* at 533, 917 P.2d at 650, 53 Cal. Rptr. 2d at 811 (Chin, J., concurring).

29. *Id.* at 533-534, P.2d at 649-650, 53 Cal. Rptr. 2d at 810-11 (Chin, J., concurring).

30. *Id.* at 529-30, 917 P.2d at 647, 53 Cal. Rptr. 2d at 808.

31. Currently, there are an estimated 16,000 people who have been sentenced under the three strikes law. Henry J. Reske, *Three Strikes, You Might Be Out*, 82 A.B.A. J., Sept. 1996, at 26. All of these cases will be reviewed to see if the court understood that it had the discretion to strike prior felony allegations. *Id.* The current interpretation will also apply to all new cases coming up through the court system. *Id.*

32. *Romero*, 13 Cal. 4th at 530 n.13, 917 P.2d at 648 n.13, 53 Cal. Rptr. 2d at 809 n.13.

log in the criminal courts.³³ Also, county public defenders offices, who do not generally deal with appeals issues, are overseeing the review of these cases due to the phrasing of footnote thirteen.³⁴ This is also contributing to a backlog of cases at the offices of local public defenders.³⁵

IV. CONCLUSION

The California Supreme Court did not find that California Penal Code sections 667(f)(2) and 1170.12 violated the doctrine of separation of pow-

Our holding, which relates only to sentencing, is fully retroactive. A defendant serving a sentence under the Three Strikes law imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice pursuant to 1385(a), may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for habeas corpus to secure reconsideration of the sentence. Such a petition should be filed in the sentencing court. . . .

Id. (citations omitted); see also Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996) (discussing retroactive lawmaking generally); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 495, 496 (9th ed. 1988) (discussing whether statutes and initiatives should be constructed retroactively).

33. See generally Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What are Constitutional Conditions and What can be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489 (1991) (discussing the problems caused by the nation's prisons which are on average operating at over 120% of capacity); Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313 (1983) (discussing the effects of overcrowding on inmates).

34. The role of the county public defender is to see cases through trial court sentencing. See CAL. GOV'T CODE § 27706 (West 1988 & Supp. 1997) (discussing the duties of public defenders). The role of the state public defender is to represent defendants on appeal, petition for hearing, or petition for rehearing in an appellate court. See CAL. GOV'T. CODE § 15421 (West 1992) (discussing the duties and powers of the state public defender); *Erwin v. Appellate Dep't of the Superior Court of Ventura County*, 146 Cal. App. 3d 715, 194 Cal. Rptr. 328 (1983) (finding that providing representation for indigent criminal appellants is the duty of the state public defender). In *Romero*, however, the supreme court states that the petition for writ of habeas corpus should be filed with the sentencing court; thus, the county public defender's office is still obligated to represent the defendants. *Romero*, 13 Cal. 4th at 530 n.13, 917 P.2d at 648 n.13, 53 Cal. Rptr. 2d at 809 n.13. See generally 39 AM. JUR. 2D *Habeas Corpus* §§ 1-177 (1968) (thoroughly discussing the writ of habeas corpus).

35. Telephone interview with Jean Farley, Assistant Deputy Public Defender, Ventura County (Nov. 17, 1996). The County of Ventura has had to develop a new section within the defender's office and hire new staff to deal with the influx of cases. *Id.*

ers. Instead, they interpreted the statutes to mean that both the judge and the prosecuting attorney can strike prior felony convictions in furtherance of justice in three strike cases.³⁶

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36. *Romero*, 13 Cal. 4th at 529-31, 917 P.2d at 647, 53 Cal. Rptr. 2d at 808-09.

III. DEEDS

A deed to a railroad company that purported to convey a "right of way" actually conveyed a fee interest and not an easement; this determination was fact-specific, and the court examined extrinsic evidence to illuminate the parties' intent: City of Manhattan Beach v. Superior Court.

I. INTRODUCTION

In *City of Manhattan Beach v. Superior Court*,¹ the California Supreme Court considered whether a deed that purported to convey a "right of way" to a railroad company conveyed a fee simple interest or merely an easement.² The trial court concluded that the grant only con-

1. 13 Cal. 4th 232, 914 P.2d 160, 52 Cal. Rptr. 2d 82 (1996). Justice Arabian, retired Associate Justice of the California Supreme Court, assigned by the Chairperson of the Judicial Council, wrote the majority opinion, in which Chief Justice Lucas and Justices Baxter and George joined. *Id.* at 235-50, 914 P.2d at 162-72, 52 Cal. Rptr. 2d at 84-94. Justice Mosk wrote a separate opinion concurring and dissenting. *Id.* at 250-67, 914 P.2d at 172-83, 52 Cal. Rptr. 2d at 94-105. (Mosk, J., concurring and dissenting). Justice Kennard wrote a dissenting opinion in which Justice Werdegar joined. *Id.* at 267-68, 914 P.2d at 183-84, 52 Cal. Rptr. 2d at 105-06 (Kennard, J., dissenting).

2. *Id.* at 235-50, 914 P.2d at 162-72, 52 Cal. Rptr. 2d at 84-94. In *City of Manhattan Beach*, the Redondo Land Company [hereinafter RLC] acquired 4500 acres in Manhattan Beach from an 1887 deed. *Id.* at 235, 914 P.2d at 162, 52 Cal. Rptr. 2d at 84. In 1888, the RLC, predecessor in interest to all but two real parties in interest [hereinafter the heirs], conveyed a strip of property to the Redondo Beach Railway Company, predecessor in interest to the Atchison, Topeka and Santa Fe Railway Company [hereinafter Santa Fe]. *Id.* at 235-36, 914 P.2d at 162-63, 52 Cal. Rptr. 2d at 84-85. At issue in the dispute is the nature of the interest that was conveyed by the RLC-to-Railway deed. *Id.* at 236, 914 P.2d at 163, 52 Cal. Rptr. 2d at 85. The deed provided, in pertinent part, that the RLC, "for and in consideration of the sum of one dollar 'remise[d], release[d] and quit-claim[ed]' to the railway 'the right of way for the construction, maintenance and operation of a Steam Railroad, upon[,] over and along" the subject property. *Id.* The RLC also reserved a portion of the property from the grant for the maintenance of a warehouse. *Id.* In addition the grant contained three conditions requiring the grantee to: (1) maintain a side track to provide a freight station; (2) provide a minimum number of railroad crossings to allow full use and enjoyment of the remaining land; and (3) provide culverts and drainage to prevent flooding of the remaining land. *Id.* The grant provided for a reversion to the grantors and their successors in interest if the grantee failed to satisfy the conditions. *Id.* The habendum clause of the deed provided: "To have and to hold all and singular the rights aforesaid unto [the railway] and its assigns and successors forever, subject however to and upon the terms and

veyed an easement, which terminated when Santa Fe Railway Company discontinued railway activities.³ After the court of appeal denied review, the supreme court issued an alternative writ and transferred the case to the court of appeal.⁴ The court of appeal held that the deed itself conveyed only an easement and that extrinsic evidence supported that conclusion.⁵ Reversing the court of appeal, the supreme court held that the deed conveyed a fee interest, but based its conclusion on extrinsic evidence necessary to interpret the deed.⁶

II. TREATMENT

A. *Majority Opinion*

Justice Arabian, writing for the majority, began his analysis by addressing the principles of law governing the interpretation of deeds and the propriety of an appellate court's review of a lower court's interpretation of a deed.⁷ The court stated that the primary objective of interpreting a deed is to fulfill the intent of the parties and that a court should only

conditions aforesaid." *Id.* at 236-37, 914 P.2d at 163, 52 Cal. Rptr. 2d at 85. In 1897, the RLC, the railway, and one Parvin Wright, who held an option on 463 acres of the RLC's land, signed an indenture that abrogated the reversionary conditions of the original deed as long as a certain station was maintained. *Id.* at 237, 914 P.2d at 163, 52 Cal. Rptr. 2d at 85. There was no reverter provision in the new condition. *Id.*

During the following fifteen years, the RLC disposed of all remaining land, culminating in corporate dissolution proceedings which concluded that "all of the property of said corporation has been disposed of." *Id.* Railway activity continued until 1982, when all rail activity ended. *Id.* Steven R. Wild, *A History of Railroad Abandonments*, 23 *TRANSP. L.J.* 1 (1995) (discussing termination of a railroad's use of an easement). In 1982, Santa Fe leased the property to the City of Manhattan Beach [hereinafter the City], then sold it to the City in 1986. *City of Manhattan Beach*, 13 Cal. 4th at 237, 914 P.2d at 163, 52 Cal. Rptr. 2d at 85.

In 1987, the heirs filed suit against the City and Santa Fe, alleging that the abandonment of railway activities entitled the heirs to exercise their powers of termination. *Id.* The heirs also sought to quiet title and recover damages for inverse condemnation. *Id.*

3. *City of Manhattan Beach*, 13 Cal. 4th at 237, 914 P.2d at 164, 52 Cal. Rptr. 2d at 86. The trial court also found Santa Fe and the City liable for inverse condemnation. *Id.* For a discussion of alternative uses of discontinued railroad rights of way, see generally Thomas A. Duda, Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?*, 33 *ST. LOUIS U. L.J.* 205 (1988).

4. *City of Manhattan Beach*, 13 Cal. 4th at 238, 914 P.2d at 164, 52 Cal. Rptr. 2d at 86.

5. *Id.*

6. *Id.* at 235, 914 P.2d at 162, 52 Cal. Rptr. 2d at 84.

7. *Id.* at 238, 914 P.2d at 164, 52 Cal. Rptr. 2d at 86.

examine extrinsic evidence to give meaning to the instrument.⁸ The court further stated that interpretation is a judicial function and an appellate court is not bound by a lower court's findings unless the lower court's interpretation relied on the credibility of the extrinsic evidence.⁹ Because the lower court's conclusion in *City of Manhattan Beach* was not based on the credibility of the extrinsic evidence, the supreme court concluded that it was not bound by the lower court's interpretation.¹⁰

The court began its interpretation by examining the terms of the deed.¹¹ The court discussed several general and statutory rules of construction in favor of concluding that the deed conveyed a fee interest.¹² First, the words "remise, release and quitclaim" as used in the deed are commonly used in a quitclaim deed; quitclaim deeds are deeds that transfer whatever interest the grantor may have in the property.¹³ Second, the law presumes a grant of fee simple unless the grant shows the intent to convey a lesser estate.¹⁴ Third, when two parts of a deed conflict, the former prevails.¹⁵ Fourth, the term "right of way" is less definite than the term "quitclaim," and doubtful clauses are construed against the grantor.¹⁶ Fifth, the use of a legal description and a reservation of a por-

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* See generally 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 235 (9th ed. 1987 & Supp. 1996) (discussing the applicability of contract law to deed interpretation); Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH. L. REV. 1 (1993) (discussing general rules of deed interpretation).

12. *City of Manhattan Beach*, 13 Cal. 4th at 238-45, 914 P.2d at 164-69, 52 Cal. Rptr. 2d at 86-91.

13. *Id.* at 239, 914 P.2d at 164-65, 52 Cal. Rptr. 2d at 86-87. Because the RLC owned the property in fee simple, the quitclaim deed would convey a fee simple. *Id.* See generally 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 135 (9th ed. 1987 & Supp. 1996) (discussing conveyances by quitclaim deeds).

14. *City of Manhattan Beach*, 13 Cal. 4th at 242, 914 P.2d at 167, 52 Cal. Rptr. 2d at 89; see also CAL. CIV. CODE § 1105 (West 1996). See generally 53 CAL. JUR. 3D *Railroads* §§ 59, 61 (1979 & Supp. 1996) (discussing property rights and distinguishing a fee interest from an easement).

15. *City of Manhattan Beach*, 13 Cal. 4th at 242, 914 P.2d at 167, 52 Cal. Rptr. 2d at 89; see also CAL. CIV. CODE § 1070 (West 1996). Because the quitclaim preceded the right of way terminology, this would favor the conveyance of a fee interest. *City of Manhattan Beach*, 13 Cal. 4th at 242-43, 914 P.2d at 167, 52 Cal. Rptr. 2d at 89.

16. *City of Manhattan Beach*, 13 Cal. 4th at 242-43, 914 P.2d at 167, 52 Cal. Rptr. 2d at 89.

tion of the property indicate the intent to convey a fee.¹⁷ Sixth, conditions in the deed whose violation would result in reversion to the grantors indicated the grantor intended to convey a fee, because an easement does not revert, but rather terminates upon violation of the deed's conditions.¹⁸ Finally, because the mortgagee and two officers of the RLC signed the deed, it is likely the grantors intended to convey a fee interest.¹⁹

The court discussed several factors that would militate a finding that the deed intended to convey an easement.²⁰ First, the deed made multiple references to a "right of way," and contained a general presumption that a right of way granted to a railroad only conveys an easement.²¹ Second, contrary to the statutory presumption of a fee, the use of right of way indicates the intent to convey a lesser interest.²² Third, the deed's description of the right of way as "upon[,] over and along" the property of the grantor is akin to an easement appurtenant.²³ Fourth, the nominal consideration received by the RLC indicated an easement.²⁴

The court also examined the purpose and habendum clauses of the deed and concluded that neither was dispositive in illustrating the parties' intent.²⁵ After examining the four corners of the deed, the court held that the deed appeared to convey a fee simple and an easement simultaneously, and that an examination of extrinsic evidence was necessary to illuminate the parties' intent.²⁶

17. *Id.* at 244, 914 P.2d at 168, 52 Cal. Rptr. 2d at 90.

18. *Id.* at 244, 914 P.2d at 168-69, 52 Cal. Rptr. 2d at 90-91. *See generally* Frona Powell, *Defeasible Fees and the Nature of Real Property*, 40 U. KAN. L. REV. 411 (1992) (discussing interests in land).

19. *City of Manhattan Beach*, 13 Cal. 4th at 245, 914 P.2d at 169, 52 Cal. Rptr. 2d at 91.

20. *Id.* at 238-46, 914 P.2d at 164-69, 52 Cal. Rptr. 2d at 86-91.

21. *Id.* at 240-41, 914 P.2d at 165-66, 52 Cal. Rptr. 2d at 87-88. *See generally* 53 CAL. JUR. 3D *Railroads* § 69 (1979) (discussing the presumption of an easement in conveyances to railroads).

22. *City of Manhattan Beach*, 13 Cal. 4th at 243, 914 P.2d at 167, 52 Cal. Rptr. 2d at 89; *see also* CAL. CIV. CODE § 801.7 (West 1982 & Supp. 1997).

23. *City of Manhattan Beach*, 13 Cal. 4th at 244, 914 P.2d at 168, 52 Cal. Rptr. 2d at 90 (alteration in original).

24. *Id.* at 245, 914 P.2d at 169, 52 Cal. Rptr. 2d at 91. The court did recognize, however, that the RLC could have anticipated a benefit from the railway's presence, thus minimizing the importance of actual consideration. *Id.*

25. *Id.* at 243-45, 914 P.2d at 167-69, 52 Cal. Rptr. 2d at 89-91.

26. *Id.* at 245-46, 914 P.2d at 169, 52 Cal. Rptr. 2d at 91. *See generally* Kristi Robbins Rezabek, Comment, *Property Law—Buhl v. US Sprint Communications Co.: Ascertain the Rights of Fee Owners on Whose Land a Railroad Easement Exists*, 22 MEMPHIS ST. U. L. REV. 843 (1992) (discussing a Tennessee court's analysis of a scenario similar to *City of Manhattan Beach*).

The court discussed several subsequent actions by the RLC that indicated that the deed conveyed a fee.²⁷ First, the 1888 conveyance to Parvin Wright modifying the reversionary conditions stated that the earlier "deed shall remain a *grant* as therein expressed."²⁸ Second, when contemplating disposal of its remaining property by partition, the RLC excluded the railway property, indicating that the RLC already considered it disposed.²⁹ Third, in a quiet title action resulting from the partition, the RLC, in court documents, specifically excepted the railway property from the proceedings, referring to it as "being the lands conveyed [to the railway] by the [1888 deed]."³⁰ Fourth, the RLC's decree of dissolution stated that all property had been distributed to its shareholders except the railway property, indicating that the RLC already considered it disposed.³¹ Finally, Manhattan Beach was only accessible by train, therefore, it was in the RLC's interest, as a land developer, to improve access to the land it speculatively purchased, a purpose best served by granting an absolute interest to the railway.³² Additionally, the heirs argued that Santa Fe was bound by representations made during tax assessment litigation and Interstate Commerce Commission hearings, but the court concluded that a legal conclusion made decades later is not compelling evidence of the parties' intent.³³ Using extrinsic evidence, the court held that the RLC believed it had already conveyed a fee.³⁴

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk concurred with the majority's conclusion that the deed indicated a conveyance of an easement, but dissented on the conclusion that the deed also conveyed a fee interest.³⁵ Justice Mosk argued that the intent of the parties could be discerned from examining the deed exclusively and warned that a liberal policy of utilizing extrinsic evidence

27. *City of Manhattan Beach*, 13 Cal. 4th at 246-49, 914 P.2d at 169-72, 52 Cal. Rptr. 2d at 91-94.

28. *Id.* at 246, 914 P.2d at 170, 52 Cal. Rptr. 2d at 92 (emphasis in original).

29. *Id.*

30. *Id.* at 247, 914 P.2d at 170, 52 Cal. Rptr. 2d at 92 (alteration in original).

31. *Id.*

32. *Id.* at 248, 914 P.2d at 171, 52 Cal. Rptr. 2d at 93.

33. *Id.* at 249, 914 P.2d at 171-72, 52 Cal. Rptr. 2d at 93-94.

34. *Id.* at 249-50, 914 P.2d at 172, 52 Cal. Rptr. 2d at 94.

35. *Id.* at 250, 914 P.2d at 172, 52 Cal. Rptr. 2d at 94 (Mosk, J., concurring and dissenting).

would undermine reliance on recorded documents.³⁶ Justice Mosk criticized the majority for “plac[ing] undue emphasis on certain other language in the deed.”³⁷ First, Justice Mosk stated that a quitclaim deed can be used to convey an easement as well as a fee.³⁸ Second, the use of a legal description in the deed is appropriate with an easement because it must be fixed to the land.³⁹ Third, the majority emphasized that reverter clauses are only used when conveying fee interests, however, Justice Mosk stated that “reverter” was commonly misused when drafting a railroad right of way.⁴⁰ Justice Mosk argued that the trial court’s examination of extrinsic evidence, which supported a finding of an easement, should not be disturbed.⁴¹ Justice Mosk also disagreed with holding Santa Fe liable, along with the City, for inverse condemnation, arguing that Santa Fe was not an active joint participant in the taking.⁴²

C. Justice Kennard’s Dissenting Opinion

Justice Kennard agreed with Justice Mosk’s conclusion that the deed conveyed only an easement, but argued that Santa Fe should be held liable for inverse condemnation because Santa Fe was a joint participant in the taking.⁴³

III. IMPACT AND CONCLUSION

The impact of *City of Manhattan Beach* will be decidedly minimal. The majority even stated, “In reaching our conclusion, we emphasize that the peculiar facts of this case dictate the narrow, perhaps unique, basis of our holding.”⁴⁴ Therefore, it seems that the greatest impact is the court’s willingness to introduce extrinsic evidence to illuminate the

36. *Id.* at 253, 914 P.2d at 174, 52 Cal. Rptr. 2d at 96 (Mosk, J., concurring and dissenting).

37. *Id.* at 256, 914 P.2d at 176, 52 Cal. Rptr. 2d at 98 (Mosk, J., concurring and dissenting).

38. *Id.* at 256-57, 914 P.2d at 176, 52 Cal. Rptr. 2d at 98 (Mosk, J., concurring and dissenting).

39. *Id.* at 258, 914 P.2d at 177, 52 Cal. Rptr. 2d at 99 (Mosk, J., concurring and dissenting).

40. *Id.* at 260, 914 P.2d at 178-79, 52 Cal. Rptr. 2d at 100-01 (Mosk, J., concurring and dissenting).

41. *Id.* at 262-63, 914 P.2d at 180, 52 Cal. Rptr. 2d at 102 (Mosk, J., concurring and dissenting).

42. *Id.* at 265-67, 914 P.2d at 182-83, 52 Cal. Rptr. 2d at 104-05 (Mosk, J., concurring and dissenting).

43. *Id.* at 267-68, 914 P.2d at 183-84, 52 Cal. Rptr. 2d at 105-06 (Kennard, J., dissenting).

44. *Id.* at 249-50, 914 P.2d at 172, 52 Cal. Rptr. 2d at 94.

parties' intent to a deed and the potential for this extrinsic evidence to undermine the effectiveness of recorded instruments.⁴⁵

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45. *Id.* at 253, 914 P.2d at 174, 52 Cal. Rptr. 2d at 96 (Mosk, J., concurring and dissenting).

IV. DELINQUENT, DEPENDENT AND NEGLECTED CHILDREN

A juvenile court, when terminating its dependency jurisdiction, may issue an order conditioning visitation on a parent's participation in counseling to minimize potential dangers of the same risk of physical abuse or emotional harm that previously led to the dependency adjudication. In doing so, the juvenile court is not bound by the requirements of Family Code section 3190:

In re Chantal S.

I. INTRODUCTION

In *In re Chantal S.*,¹ the California Supreme Court considered whether a juvenile court could issue an order conditioning visitation on a parent's participation in counseling when terminating its dependency jurisdiction.² Affirming the decision of the court of appeal, the supreme court held that the juvenile court retained jurisdiction to place conditions upon a parent's visitation rights based upon policy considerations that the

1. 13 Cal. 4th 196, 913 P.2d 1075, 51 Cal. Rptr. 2d 866 (1996). In this decision, Chief Justice Lucas delivered the majority opinion, in which Justices Kennard, Baxter, George, Werdegar, and Chin concurred. *Id.* at 200-15, 913 P.2d at 1078-87, 51 Cal. Rptr. 2d at 868-78. Justice Mosk wrote a concurring and dissenting opinion. *Id.* at 215-16, 913 P.2d at 1087-88, 51 Cal. Rptr. 2d at 878-79 (Mosk, J., concurring and dissenting).

2. *Id.* at 200-15, 913 P.2d at 1078-87, 51 Cal. Rptr. 2d at 868-78. Chantal was adjudged a dependent child of the juvenile court based on findings that her father acted violently towards her. *Id.* at 201, 913 P.2d at 1078, 51 Cal. Rptr. 2d at 869. The juvenile court ordered counseling for Chantal. *Id.* Shortly after the dependency order, Chantal's father was sentenced to three years in prison for unrelated charges. *Id.* While the father was still in prison, the social worker assigned to the case recommended that dependency be terminated and Chantal's mother be awarded sole custody because Chantal was no longer in need of the court's protection and her mother complied with the "service plan" devised for her by the Department of Social Services. *Id.* at 201-02, 913 P.2d at 1078, 51 Cal. Rptr. 2d at 869. Chantal's father objected to terminating the juvenile court's jurisdiction, but the court nonetheless granted custody of Chantal to her mother and announced that the court would terminate dependency after an order was prepared containing specific conditions for visitation rights. *Id.* at 202, 913 P.2d at 1078-79, 51 Cal. Rptr. 2d at 869. Such an order was prepared, specifying that Chantal's father must regularly attend psychotherapy and sign a release of information to Chantal's therapist regarding his progress before he could visit his daughter. *Id.* at 202, 913 P.2d at 1079, 51 Cal. Rptr. 2d at 869-70. Once satisfactory progress had been made, he would be permitted to visit Chantal in her therapist's office. *Id.* at 202, 913 P.2d at 1079, 51 Cal. Rptr. 2d at 870. Chantal's father appealed from the custody order, claiming that the juvenile court could not require him to submit to counseling as a condition of visitation and that the order unlawfully delegated judicial authority to therapists. *Id.* The court of appeal rejected these assertions, and affirmed the order. *Id.*

juvenile court retains a duty to consider the best interests of a child and to protect that child from the abuse or neglect which previously led to the dependency adjudication.³

II. TREATMENT

A. Majority Opinion

1. A juvenile court has the authority to require counseling as a condition of visitation.

Chief Justice Lucas, writing for the majority, addressed whether California Welfare & Institutions Code sections 362.4⁴ and 362(c)⁵ apply to juvenile courts following termination of dependency jurisdiction.⁶ The court began its analysis by overruling the holding in *Katherine M.*⁷ and then stated that section 362.4 expressly authorizes the court to make custody and visitation orders, and therefore, implicitly authorizes the

3. *Id.* at 202-15, 913 P.2d at 1079-87, 51 Cal. Rptr. 2d at 870-78. See 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 104 (9th ed. 1987 & Supp. 1996) (discussing relevant factors the court must consider in determining the best interests of the child); V. Pualani Enos, Recent Development: *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996) (discussing family violence and public policy concerns regarding abused women and children). "We, as a society, can justify removing children from their abusive parent when the dangers that parent poses outweigh the benefits the children receive by remaining with the natural parent." *Id.* at 231.

4. Section 362.4 states: "When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court . . . the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child." CAL. WELF. & INST. CODE § 362.4 (West Supp. 1997).

5. Section 362(c) states, in pertinent part:

The juvenile court may direct any and all reasonable orders to the parents . . . of the minor who is the subject of any proceedings under this chapter. . . . Such an order may include a direction to participate in a counseling . . . program The program in which a parent . . . is required to participate shall be designed to eliminate those conditions that led to the court's finding that the minor is a person described by Section 300.

CAL. WELF. & INST. CODE § 362(c) (West Supp. 1997).

6. *Chantal*, 13 Cal. 4th at 202-04, 913 P.2d at 1079-80, 51 Cal. Rptr. 2d at 870-71.

7. *In re Katherine M.*, 27 Cal. App. 4th 91, 33 Cal. Rptr. 2d 298 (1994) (holding a juvenile court may not require a parent to submit to counseling as a condition of custody once the court terminates its dependency jurisdiction), *overruled by In re Chantal S.*, 13 Cal. 4th 196, 913 P.2d 1075, 51 Cal. Rptr. 2d 876 (1996).

court to make collateral orders, such as counseling orders, that are reasonably related to the custody and visitation orders.⁸ The court further held that section 362(c) remains applicable when a juvenile court terminates dependency jurisdiction.⁹ Moreover, the court reasoned that the termination of dependency jurisdiction does not necessarily indicate that the conditions which led to the dependency order have disappeared.¹⁰ The juvenile court may therefore decide that continued supervision of the minor as a dependent child is not necessary for the child's protection, yet order conditions on visitation to minimize or eliminate any possible danger to the minor.¹¹

2. Family Code section 3190 does not apply to juvenile court orders.

Next, the court concluded that Family Code section 3190¹² does not apply to dependency proceedings in the juvenile court.¹³ The court reasoned that the application of a family law presumption that joint custody is in the best interest of the child is inconsistent with the purpose of juvenile court law.¹⁴ In juvenile dependency proceedings, the child is involved in the court proceedings because he or she has been abused or neglected.¹⁵ Therefore, the parents' ability to protect and care for the child is the central issue, and the juvenile court is best situated to make custody determinations based on the best interests of the child without any presumptions that joint custody is in the child's best interest.¹⁶

8. *Chantal*, 13 Cal. 4th at 203-04, 913 P.2d at 1079-80, 51 Cal. Rptr. 2d at 870.

9. *Id.* at 204, 913 P.2d at 1080, 51 Cal. Rptr. 2d at 871.

10. *Id.*

11. *Id.* See generally 33 CAL. JUR. 3D *Family Law* § 945 (1994 & Supp. 1996) (discussing permissible restrictions a court may place on a parent's visitation rights); Joel E. Smith, Annotation, *Right to Require Psychiatric or Mental Examination for Party Seeking to Obtain or Retain Custody of Child*, 99 A.L.R. 3D 268 (1995 & Supp. 1996) (discussing psychiatric or mental examinations as conditions for a parent seeking custody of his or her child).

12. Family Code section 3190 states in pertinent part that the family court may: require parents involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional . . . for not more than one year . . . if the court finds both of the following: (1) The dispute between the parents or between a parent and child poses a substantial danger to the best interest of the child. (2) The counseling is in the best interest of the child.

CAL. FAM. CODE § 3190 (West Supp. 1997).

13. *Chantal*, 13 Cal. 4th at 205-08, 913 P.2d at 1081-83, 51 Cal. Rptr. 2d at 871-74.

14. *Id.* at 206, 913 P.2d at 1082, 51 Cal. Rptr. 2d at 872; see also 33 CAL. JUR. 3D *Family Law* § 900 (discussing the public policies in custody disputes).

15. *Chantal*, 13 Cal. 4th at 207-08, 913 P.2d at 1082, 51 Cal. Rptr. 2d at 873.

16. *Id.* at 206, 913 P.2d at 1082, 51 Cal. Rptr. 2d at 872.

Further, the court asserted that the legislature has expressly provided that specific parts of the Family Code apply to orders issued by the juvenile court.¹⁷ Therefore, the court held that the legislature's failure to expressly apply Family Code section 3190 to the juvenile court reveals a lack of legislative intent to apply that section to juvenile court proceedings.¹⁸

3. The court order did not constitute an improper delegation of judicial authority.

The final issues addressed by the court were whether the order improperly delegated authority to the two therapists by specifying that visitation be "facilitated" by Chantal's therapist, and whether the determination of "satisfactory progress" must be made by the father's therapist before visitation may occur.¹⁹ The court began by stating that an order may not delegate to therapists absolute discretion to determine whether visitation should occur.²⁰ The court reasoned that the order in the instant case did not vest therapists with absolute discretion.²¹ Rather, the order vested the therapists with some discretion to determine when satisfactory progress has been made and the ordered visitation may begin.²² Furthermore, the court stated that the juvenile court rejected the course of denying visitation altogether and instead opted for the restrictive order, which in essence amounted to a windfall gain for the father, and thus was not a violation of his rights.²³

17. *Id.*

18. *Id.* at 206-07, 913 P.2d at 1082, 51 Cal. Rptr. 2d at 872-73. The court further rejected the father's claim that Family Code section 3190 should apply on due process grounds. *Id.* at 211-13, 913 P.2d at 1085-86, 51 Cal. Rptr. 2d at 875-77. The court stated that the juvenile court affords procedural protections which will continue to apply once the case is transferred to family court. *Id.*

19. *Id.* at 213-14, 913 P.2d at 1086-87, 51 Cal. Rptr. 2d at 877-78.

20. *Id.* at 213, 913 P.2d at 1086, 51 Cal. Rptr. 2d at 877. See 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 92 (9th ed. 1995) (discussing involuntary psychiatric therapy for an indefinite period of time); see also *In re Marriage of Matthews*, 101 Cal. App. 3d 811, 161 Cal. Rptr. 879 (1980) (holding that a court is not empowered to order a parent to undergo involuntary psychiatric therapy for an indefinite period of time).

21. *Chantal*, 13 Cal. 4th at 213, 913 P.2d at 1086, 51 Cal. Rptr. 2d at 877.

22. *Id.*

23. *Id.* at 213-14, 913 P.2d at 1087, 51 Cal. Rptr. 2d at 877-78. For a general discussion on the creation and termination of the parent-child relationship, see 59 AM. JUR. 2D *Parent and Child* § 7 (2d ed. 1995) (discussing the legal parameters of the parent-

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk's separate opinion concurred with the majority's judgment, but disagreed with the majority's holding regarding the delegation of authority to therapists.²⁴ Justice Mosk argued that the visitation order unlawfully delegated judicial authority to individuals outside the government by granting substantially unfettered discretion to private psychotherapists.²⁵ Based on this rationale, Justice Mosk argued that the court of appeal committed reversible error in affirming the juvenile court's visitation order.²⁶

III. IMPACT

Prior to *Chantal*, the California Supreme Court held that a juvenile court could not require a parent to submit to counseling as a condition of custody once the court terminated its dependency jurisdiction.²⁷ The holding in *Chantal*, however, reflects recent trends in California law concerning the best interests of an abused or neglected child²⁸ and stands for the proposition that the judicial system must carefully consider the best interests of a child, while recognizing the child's need for a relationship with his or her biological parents.²⁹ While the trend is to put more weight on the best interests of children, the holding in *Chantal* balances these two considerations by imposing conditions upon an abusive parent that reasonably relate to visitation and the protection of the abused

child relationship).

24. *Chantal*, 13 Cal. 4th at 215-16, 913 P.2d at 1087-88, 51 Cal. Rptr. 2d at 878-79 (Mosk, J., concurring and dissenting).

25. *Id.* at 215, 913 P.2d at 1087-88, 51 Cal. Rptr. 2d at 878 (Mosk, J., concurring and dissenting).

26. *Id.* at 215, 913 P.2d at 1087, 51 Cal. Rptr. 2d at 878 (Mosk, J., concurring and dissenting).

27. *In re Katherine M.*, 27 Cal. App. 4th 91, 33 Cal. Rptr. 2d 298 (1994), *overruled by In re Chantal S.*, 13 Cal. 4th 196, 913 P.2d 1075, 51 Cal. Rptr. 2d 866 (1996).

28. See Darlene Selby, Comment, *Recent Trends in California Law Concerning the Best Interests of the Child*, 1 PEPP. L. REV. 89 (1973) (discussing California legal trends concerning the best interests of an abused or neglected child).

29. See generally Michael P. Roche, Article, *Childhood and its Environment: The Implications for Children's Rights*, 34 LOY. L. REV. 5 (1988). Roche specifically suggests that "both utility and justice can be better served by the adoption of a more flexible approach to allocating rights to children." *Id.* at 33; see also Andre P. Derdeyn et al., *Alternatives to Absolute Termination of Parental Rights after Long-Term Foster Care*, 31 VAND. L. REV. 1165 (1978) (discussing the need for flexible child placement alternatives without costing the child exposure to his or her biological family). "While such parental 'interest' should be accorded less importance than the child's need for adequate parenting, the adult's assertion of rights in these types of cases is not, by definition, inimical to the child's welfare." *Id.* at 1190.

child.³⁰ As a result, *Chantal* will likely provide more rights to children in the courtroom while encouraging alternatives to absolute termination of parental rights.

IV. CONCLUSION

The California Supreme Court's ruling in *Chantal* gives the juvenile court system the opportunity to protect children, even beyond the termination of their dependency jurisdiction. By allowing the court to place conditions on abusive parents before visitation may occur, the court will be able to protect a child's best interests while maintaining the parent-child relationship.

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30. For a discussion of the child's best interests, see Christian Reichel Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417 (1991) (discussing the progress and development of children's rights). "It took decades before the judicial system took cognizance of the fact that a child was entitled to have his or her best interests protected by a court of law." *Id.* at 419.

V. EQUAL PROTECTION

A cause of action exists under former § 1513(d) of the Airport and Airway Improvement Act of 1982 when unequal treatment under California's facially impartial tax laws is alleged: American Airlines, Inc. v. San Mateo County.

I. INTRODUCTION

In *American Airlines, Inc. v. San Mateo County*,¹ the California Supreme Court determined whether § 1513(d) of the former 49 United States Code Appendix of the Airport and Airway Improvement Act of 1982² grants a private cause of action and under what circumstances a plaintiff can use that section as a basis for a claim.³ Reversing the appellate court's decision, the California Supreme Court held that § 1513(d) permits a private right of action and further found that the plaintiff's claim in the instant case was sufficiently based on allegations of unequal treatment under California tax laws.⁴ Lastly, the court rejected the applicability of § 1513(d) on the alternative basis that the assessment ratio

1. 12 Cal. 4th 1110, 912 P.2d 1198, 51 Cal. Rptr. 2d 251 (1996). Justice Arabian wrote the majority opinion in which Chief Justice Lucas, Justices Baxter, George, Mosk, and Werdegar concurred. *Id.* at 1116-40, 912 P.2d at 1202-18, 51 Cal. Rptr. 2d at 255-71. Justice Kennard authored a separate concurring opinion. *Id.* at 1140-42, 912 P.2d at 1218-20, 51 Cal. Rptr. 2d at 271-72 (Kennard, J., concurring).

2. The statute is currently embodied in 49 U.S.C. § 40116(d). *Id.* at 1116 n.1, 912 P.2d at 1202 n.1, 51 Cal. Rptr. 2d at 255 n.1. Former § 1513(d) was in effect during the contested tax years of 1985-1989. *Id.*

3. *Id.* at 1116, 912 P.2d at 1202, 51 Cal. Rptr. 2d at 255. American Airlines and nine other airlines [hereinafter "airlines"] joined against 18 California counties seeking a declaratory judgment and partial return of funds collected as ad valorem personal property taxes. *Id.* at 1117, 912 P.2d at 1203, 51 Cal. Rptr. 2d at 256. The airlines alleged that their commercial property was taxed at levels equal to or higher than the true market value of the property, unlike commercial property in other industries which was taxed at levels below its true market value. *Id.* at 1118-19, 912 P.2d at 1204, 51 Cal. Rptr. 2d at 257. The trial court granted the counties' motion for summary judgment, concluding that the method by which airline property was taxed precluded the airlines from showing a prima facie case of discrimination under former 49 U.S.C. § 1513(d) and that the statute disallowed private causes of action. *Id.* at 1120, 912 P.2d at 1205, 51 Cal. Rptr. 2d at 258. The court of appeal affirmed the trial court's decision. *Id.*

4. *Id.* at 1116, 912 P.2d at 1202, 51 Cal. Rptr. 2d at 255.

for airline personal property⁵ is higher than the ratio for railroad personal property.⁶

II. TREATMENT

A. Majority Opinion

1. Background

The court began by analyzing statutes which prohibit discrimination against interstate carriers on the basis of taxation.⁷ Noting the similar language and intertwining legislative histories of these statutes, the court stated that the similarities allowed cross-application of cases so that a case explaining one statute could be used to explain another statute, with one noteworthy exception.⁸ In contrast to the other statutes, the court stated that former § 1513(d) did not except itself out of the general rule that state tax collections cannot be stopped by federal court action.⁹

Continuing its preliminary investigation, the court defined the key tax terms and practices in California.¹⁰ The court found that aircraft property having no primary location is taxed via a formula which approximates the time such property spends in the state.¹¹

5. See 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§ 131-132 (9th ed. 1989 & Supp. 1996) (stating the general rule that "all forms of tangible personal property are taxable" but noting that aircraft, depending on whether it is commercial or private, is taxed under separate statutes).

6. *American Airlines*, 12 Cal. 4th at 1116-20, 912 P.2d at 1205, 51 Cal. Rptr. 2d at 255.

7. *Id.* at 1120-22, 912 P.2d at 1205-06, 51 Cal. Rptr. 2d at 258-59. The three statutes included the Airport and Airway Improvement Act of 1982, the Railroad Revitalization and Regulatory Reform Act of 1976 (formerly 49 U.S.C. § 11503), and the Motor Carrier Act of 1980 (formerly 49 U.S.C. § 11503(a)). *Id.* For the history, scope, and determination of discrimination under the statutes, see Scott M. Schoenwald, Note, *Discriminatory Demands and Divided Decisions: State and Local Taxation of Rail, Motor, and Air Carrier Property*, 39 VAND. L. REV. 1107, 1122-35 (1986).

8. *American Airlines*, 12 Cal. 4th at 1122-23, 912 P.2d at 1206-07, 51 Cal. Rptr. 2d at 259-60.

9. *Id.* at 1124, 912 P.2d at 1207, 51 Cal. Rptr. 2d at 260.

10. *Id.* at 1124, 912 P.2d at 1207-08, 51 Cal. Rptr. 2d at 260-61; see Bonnie H. Keen, *Tax Assessment of Contaminated Property: Tax Breaks for Polluters?*, 19 B.C. ENVTL. AFF. L. REV. 885, 889-92 (1992) (delineating basic property tax assessment principles).

11. *American Airlines*, 12 Cal. 4th at 1124-25, 912 P.2d at 1208, 51 Cal. Rptr. 2d at 261; see Marissa R. Arrache, Comment, *Factor Representation in the Apportionment of Income From Intangibles*, 36 SANTA CLARA L. REV. 485, 485-92 (1996) (tracking different

Further judicial inquiry revealed that, unlike airline property, railroad property is taxed on a unitary standard whereby an entire enterprise is valued as one unit and not as the sum of its assets.¹² To determine railroad property values, an "income" or "capitalized earnings" approach is used so that the fair market value of the property is measured by how much "an investor would be willing to pay for the right to receive the future income the property is projected to produce."¹³

2. Airlines' Claims

a. Former § 1513(d) grants a private right of action.

In deciding whether a federal statute grants a private cause of action, the court focused on whether Congress meant to create such a cause of action.¹⁴ Examining the language of former § 1513(d) in light of whether the statute was enacted for a special group, whether Congress wanted to grant or deny a remedy, whether a private cause of action would further the statute's underlying policy, and whether the creation of the federal cause of action would be consistent with other laws,¹⁵ the court concluded that the statute created a private right of action.¹⁶

First, the court stated that § 1513(d) was intended to benefit a particularized group, namely taxpayers who own airline property, because the statute protected them from discriminatory taxation.¹⁷ Second, the court found that § 1513(d) indicated legislative intent to create a private cause of action because its relevant language reiterated the language of the Motor Carrier Acts and the Railroad Revitalization and Regulatory Reform Act, both of which granted a private remedy.¹⁸ Third, the court

taxing techniques used as businesses grow beyond state borders).

12. *American Airlines*, 12 Cal. 4th at 1124-25, 912 P.2d at 1208, 51 Cal. Rptr. 2d at 261.

13. *Id.* at 1126, 912 P.2d at 1209, 51 Cal. Rptr. 2d at 261-62.

14. *Id.* at 1128, 912 P.2d at 1210, 51 Cal. Rptr. 2d at 263; see Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 863 (1996) (advocating a retreat from exclusive reliance on congressional intent in determining whether a private cause of action exists).

15. *American Airlines*, 12 Cal. 4th at 1128, 912 P.2d at 1210, 51 Cal. Rptr. 2d at 263 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)); see Nancy Eisenhauer, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1185-93 (1992) (discussing the Supreme Court's transition from *Cort's* four-prong test to a two-prong test focusing only on whether the statute creates a federal right for a specific group of citizens and on the legislative intent behind the statute).

16. *American Airlines*, 12 Cal. 4th at 1131, 912 P.2d at 1212, 51 Cal. Rptr. 2d at 265.

17. *Id.* at 1129, 912 P.2d at 1211, 51 Cal. Rptr. 2d at 263-64.

18. *Id.* at 1129-30, 912 P.2d at 1211, 51 Cal. Rptr. 2d at 264. The court stated that

held a private right to bring suit was a proper implementation of § 1513(d) policy.¹⁹ Fourth, the court acknowledged state dominance over tax laws, but judged the potential burdens on interstate commerce to warrant federal intervention regarding airline property taxation.²⁰ Based on these factors, the court held that a private cause of action exists.²¹

b. Airlines have a claim for relief under former § 1513(d).

The airlines argued that they were the victims of de facto discrimination caused by the nonassessment or underassessment of other commercial and industrial property, in contrast to the full assessment of airline property to its fair market value.²² The court agreed that the airlines had stated a proper claim under former § 1513(d) because the airlines were allegedly being taxed by a higher assessment ratio than other commercial property in relation to true market values.²³ In addition, the court provided guidance to the airlines about how to prove discrimination.²⁴

The court explained that the mere showing that property inadvertently escaped assessment was insufficient to prove discrimination between properties.²⁵ To the contrary, the court insisted that the airlines bear the burden of proving that action or inaction on behalf of the tax assessor²⁶ either disadvantageously targets or disparately affects the Airlines because it produces "significant amounts of unassessed or underas-

"while Congress did not include an express exemption to the Tax Injunction Act in former section 1513(d) . . . the fact that the rest of the relevant statutory language is virtually identical to the Motor Carrier and 4-R Acts indicates that Congress did intend that judicial redress be available." *Id.* at 1129-30, 912 P.2d at 1211, 51 Cal. Rptr. 2d at 263-64.

19. *Id.* at 1130, 912 P.2d at 1211-12, 51 Cal. Rptr. 2d at 264.

20. *Id.* at 1130, 912 P.2d at 1212, 51 Cal. Rptr. 2d at 264.

21. *Id.* at 1131, 912 P.2d at 1212, 51 Cal. Rptr. 2d at 265.

22. *Id.* at 1131-32, 912 P.2d at 1212-13, 51 Cal. Rptr. 2d at 265.

23. *Id.* at 1136, 912 P.2d at 1215, 51 Cal. Rptr. 2d at 268; see 51 CAL. JUR. 3D *Property Taxes* § 51 (1979 & Supp. 1996) (confirming that "all property subject to general property taxation [be taxed] at 100 percent of its full value").

24. *American Airlines*, 12 Cal. 4th at 1132-36, 912 P.2d at 1213-16, 51 Cal. Rptr. 2d at 265-68.

25. *Id.* at 1133-34, 912 P.2d at 1214, 51 Cal. Rptr. 2d at 266-67.

26. See 51 CAL. JUR. 3D *Property Taxes* § 49 (1979 & Supp. 1996) (stating that assessors are not normally liable for simple errors or misjudgments and that only gross negligence or corruption would give rise to personal liability for damages).

essed . . . commercial and industrial personal property.²⁷ The level of disparity the airlines would have to prove, however, was left uncertain because former § 1513(d) set no minimum amount.²⁸ Other statutes had required at least a 5% disparity.²⁹ Because the airlines asserted a 15% disparity, the court did not have to resolve whether former § 1513(d) required proof of only a de minimus disparity or a disparity of at least 5%.³⁰

As its second basis of relief, the airlines contended that airline property is comparable to railroad property. The airlines argued that because railroad property is taxed at only 70% of its fair market value, while airline property is taxed at 100% of its fair market value, discrimination exists under former § 1513(d).³¹ The court rejected this assertion, finding railroad property to be transportation property which the statute excluded from the definition of comparable commercial and industrial property.³²

B. Justice Kennard's Concurring Opinion

Justice Kennard wrote separately to express concern with the airlines' requested remedy of a refund.³³ Because underassessed property is required to be retroactively assessed and because federal laws do not require that refunds be made, Justice Kennard concluded that the proper discrimination remedy would be to first let the government reclaim the amounts it would have received under a proper assessment before any refund claims are allowed.³⁴

27. *American Airlines*, 12 Cal. 4th at 1135, 912 P.2d at 1215, 51 Cal. Rptr. 2d at 267.

28. *Id.* at 1135, 912 P.2d at 1215, 51 Cal. Rptr. 2d at 268.

29. *Id.*

30. *Id.* at 1136, 912 P.2d at 1215, 51 Cal. Rptr. 2d at 268.

31. *Id.* at 1136, 912 P.2d at 1216, 51 Cal. Rptr. 2d at 268.

32. *Id.* at 1139, 912 P.2d at 1218, 51 Cal. Rptr. 2d at 270. Former § 1513(d)(2)(D) defined commercial and industrial property as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." *Id.* at 1137, 912 P.2d at 1216, 51 Cal. Rptr. 2d at 269.

33. *Id.* at 1141-41, 912 P.2d at 1219, 51 Cal. Rptr. 2d at 271 (Kennard, J., concurring).

34. *Id.* (Kennard, J., concurring); see 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 238 (9th ed. 1989 & Supp. 1996) (listing the grounds upon which a taxpayer can file a claim for a tax refund after it has been paid).

III. IMPACT

An important consequence of the court's decision is that former § 1513(d) allows taxpayers to avail themselves of an opportunity to sue when the rate of ad valorem property taxes on air transportation property is higher than the tax rate applied to other commercial and industrial property.³⁵ In light of Justice Kennard's concurring opinion questioning the right to a refund, the remedy ultimately afforded may not be the taxpayer's most desired remedy.

After stating that a private cause of action exists, the scope of the decision appears limited by both the statute's demise and the range of taxpayers who may utilize the court's holding because owners of commercial aircraft property are affected. In addition, those who can properly bring suit may choose to do so only with caution, considering the court's warnings that the taxpayer bears the burden of proving a practice or policy that either disadvantageously targets or disparately affects the taxpayer because it produces a substantial amount of untaxed commercial and industrial property.³⁶

IV. CONCLUSION

In *American Airlines, Inc. v. San Mateo County*, the California Supreme Court declared former § 1513(d) of the Airport and Airway Improvement Act of 1982 to grant a private cause of action.³⁷ The court permitted a suit by aircraft owners alleging discrimination by the higher rate of assessment for aircraft versus other commercial property when the suit is not premised on a comparison with railroad property.³⁸

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35. *American Airlines*, 12 Cal. 4th at 1131, 912 P.2d at 1212, 51 Cal. Rptr. 2d at 265.

36. *Id.* at 1135, 912 P.2d at 1215, 51 Cal. Rptr. 2d at 267.

37. *Id.* at 1116, 912 P.2d at 1202, 51 Cal. Rptr. 2d at 255.

38. *Id.*

VI. JUVENILE COURT LAW

Anders v. California, which requires compliance with certain procedures before a court will permit appointed counsel to withdraw from a case, is not applicable to an indigent parent's appeal from judgment affecting the custody of a child or terminating parental rights:

In re Sade C.

I. INTRODUCTION

In *In re Sade C.*,¹ the California Supreme Court addressed whether *Anders v. California*² extends to "an indigent parent's appeal from a judgment or order . . . adversely affecting his custody of a child or his status as the child's parent."³ The court of appeal decided that *Anders*

1. 13 Cal. 4th 952, 920 P.2d 716, 55 Cal. Rptr. 2d 771 (1996). Justice Mosk wrote the majority opinion, in which Chief Justice George, and Justices Baxter, Werdegarr, Chin, and Brown concurred. *Id.* at 959-96, 920 P.2d at 718-42, 55 Cal. Rptr. 2d at 773-97. Justice Kennard filed her own dissenting opinion. *Id.* at 995-1000, 920 P.2d at 742-45, 55 Cal. Rptr. 2d at 797-800 (Kennard, J., dissenting).

2. 386 U.S. 738 (1967). *Anders* has been the subject of several law review articles. See, e.g., Henry Gabriel & Kimber L. Tuttle, *Duties of the Court Appointed Attorney*, 27 TEX. TECH L. REV. 429, 442-48 (1996) (discussing the requirements of the *Anders* brief); Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal than Others*, 23 FLA. ST. U. L. REV. 625 (1996) (discussing *Anders* as it relates to indigent defendants); Eduardo I. Sanchez, Note, *The Right to Counsel and Frivolous Appeals: Assistance to the Court or Advocacy for the Indigent Client—Which is the Real McCoy?*, 43 U. MIAMI L. REV. 921 (1989) (discussing *Anders* requirements in relation to frivolous lawsuits by indigents); Jack M. Bains, Comment, *Termination of the Attorney-Client Relationship: How Far Must Anders Compliance Go? A Survey of Decisions*, 16 J. LEGAL PROF. 229 (1991) (discussing *Anders* application to indigent defendants).

3. *Sade C.*, 13 Cal. 4th at 959, 920 P.2d at 718, 55 Cal. Rptr. 2d at 773. In *Sade C.*, the court consolidated two juvenile cases for appeal. *Id.* In the first case, the Department of Children's Services (DCS) sought to remove Sade C. from the custody of her parents, Lakeisha C. and Gregory C. *Id.* at 960, 920 P.2d at 718-19, 55 Cal. Rptr. 2d at 773-74. DCS alleged that "Sade had suffered, or faced a substantial risk that she would suffer, serious physical harm or illness as a result of her parent's failure or inability to furnish adequate supervision or protection, or their inability to provide regular care, because of substance abuse." *Id.* at 960, 920 P.2d at 718, 55 Cal. Rptr. 2d at 773. Both of Sade's parents had a history of substance abuse and criminal activity. *Id.* at 960, 920 P.2d at 719, 55 Cal. Rptr. 2d at 774. At the first appearance, the juvenile court declared the child a dependant and placed Sade in the custody of Bernice White, Lakeisha's aunt. *Id.* Sade's parents ignored family reunification services which were offered by the court. *Id.* at 961, 920 P.2d at 719, 55 Cal. Rptr. 2d at 774. See generally 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 176 (1987 & Supp. 1996) (discussing family reunification services). Subsequently, White sought to adopt Sade and

did not extend to juvenile proceedings.⁴ On rehearing, the court of appeal affirmed this decision, deciding that it was not required to undertake an independent review⁵ of the lower court record for appealable issues.⁶ The California Supreme Court affirmed the decision of the court of appeal, holding that *Anders* "prophylactic" procedures for situations when appointed appellate counsel seeks to withdraw from a case do not extend to indigent parents' appeals from judgments obtained by the state, when such judgments adversely affect their custody of a child or status as a child's parent.⁷

terminate all parental rights of Lakeisha and Gregory. *Sade C.*, 13 Cal. 4th at 961, 920 P.2d at 719, 55 Cal. Rptr. 2d at 774. Gregory appeared to challenge the order of termination, and the court appointed counsel. *Id.* Counsel sought to withdraw, filed a brief, and requested independent review of the record by the court. *Id.* at 961-62, 920 P.2d at 719-20, 55 Cal. Rptr. 2d at 774-75.

In the second case, the petition filed by DCS alleged that one Vanessa R. had been physically and emotionally harmed by her parents inability to adequately supervise and protect her. *Id.* at 962, 920 P.2d at 720, 55 Cal. Rptr. 2d at 775. Vanessa was removed from her parents, Kris M. and Edward R., after an emergency room physician reported potential child abuse. *Id.* at 963, 920 P.2d at 720, 55 Cal. Rptr. 2d at 775. The parties agreed to place the child with Kris' mother and stepfather and to participate in family reunification services. *Id.* at 963, 920 P.2d at 720-21, 55 Cal. Rptr. 2d at 75-76. The juvenile court found in favor of the DCS allegations of child abuse and cruelty and removed the child for placement by DCS. *Id.* All other terms of the agreement were followed. *Id.* Both Kris and Edward appealed the decision of the juvenile court, and separate counsel was provided. *Id.* at 964, 920 P.2d at 721, 55 Cal. Rptr. 2d at 776. Both counsel filed briefs requesting withdrawal from the case and independent review by the appellate court for potential grounds for appeal. *Id.* at 964-65, 920 P.2d at 721-22, 55 Cal. Rptr. 2d at 776-77.

4. *Id.* at 965, 920 P.2d at 722, 55 Cal. Rptr. 2d at 777.

5. For a discussion on independent review in California, see J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 468-71 (1994).

6. *Sade C.*, 13 Cal. 4th at 964-65, 920 P.2d at 721-22, 55 Cal. Rptr. 2d at 776-77.

7. *Id.* at 984, 920 P.2d at 734, 55 Cal. Rptr. 2d at 789.

II. TREATMENT

A. Majority Opinion

1. Historical Background

Justice Mosk, writing for the court in *Sade C.*, began the majority opinion with an in-depth review of the law surrounding the *Anders* decision⁸ and then made three conclusions based on this analysis.⁹

First, the court set forth the procedural requirements of *Anders*.¹⁰ Second, the court stated that the *Anders* decision is limited to an indigent criminal defendant's first appeal as of right.¹¹ The majority referred to *Pennsylvania v. Finley*¹² and *Austin v. United States*¹³ which established that *Anders* does not apply to collateral appeals or discretionary review of a defendant's case.¹⁴ Third, the court stated that an indigent criminal defendant has an actual right to effective representation by

8. *Id.* at 965-77, 920 P.2d at 722-30, 55 Cal. Rptr. 2d at 777-85.

9. *Id.* at 977-79, 920 P.2d at 730-31, 55 Cal. Rptr. 2d at 785-86.

10. *Id.* at 977-78, 920 P.2d at 730, 55 Cal. Rptr. 2d at 785. In order for appointed counsel to withdraw, counsel must first submit an *Anders* brief to the appellate court. *Id.* at 977, 920 P.2d at 730, 55 Cal. Rptr. 2d at 785. Second, the defendant must be provided with a copy of the brief in order to raise additional arguments. *Id.* Third, the appellate court must conduct a review of the record to determine whether the case has merit. *Id.* Finally, the court must decide whether to grant the motion for withdrawal or decide the case on the merits. *Id.* If the court decides the case on the merits, the defendant is entitled to representation of counsel. *Id.* The court must either deny the withdrawal request or grant the request and provide for a replacement. *Id.* at 977-78, 920 P.2d at 730, 55 Cal. Rptr. 2d at 785.

11. *Id.* at 978, 920 P.2d at 730, 55 Cal. Rptr. 2d at 785.

12. 481 U.S. 551 (1987). In *Finley*, the United States Supreme Court limited the application of *Anders* to "an indigent criminal defendant in his first appeal as of right." *Sade C.*, 13 Cal. 4th at 972, 920 P.2d at 726, 55 Cal. Rptr. 2d at 781 (citing *Finley*, 481 U.S. at 555). The right to counsel, established by previous cases, does not extend beyond the defendant's first appeal, and thus *Anders* does not extend to collateral appeals. *Id.* at 972-73, 920 P.2d at 727, 55 Cal. Rptr. 2d at 782 (citing *Finley*, 481 U.S. at 555).

13. 115 S. Ct. 380, 381 (1994) (declining to extend *Anders* to situations in which an appeal is merely discretionary).

14. *Sade C.*, 13 Cal. 4th at 978, 920 P.2d at 730, 55 Cal. Rptr. 2d at 785.

counsel,¹⁵ citing *Finley*,¹⁶ *Evitts v. Lucey*,¹⁷ *McCoy v. Court of Appeals of Wisconsin*,¹⁸ and *Penson v. Ohio*¹⁹ to support its conclusion.

The court summarized by stating that *Anders* was formulated to "protect an indigent criminal defendant's right . . . to the assistance of appellate counsel appointed by the state in his first appeal as of right,"²⁰ as established in *Finley*, *Jones v. Barnes*,²¹ *Evitts*, *McCoy*, and *Penson*.²² Therefore, a court should only permit counsel to withdraw in the event that the "appeal lacks any basis in law or fact."²³

The California Supreme Court then discussed two additional California cases decided after *Anders*.²⁴ First, *People v. Feggans*²⁵ furthered the

15. *Id.* at 978, 920 P.2d at 730-31, 55 Cal. Rptr. 2d at 785-86.

16. See *supra* note 12 and accompanying text.

17. 469 U.S. 387 (1985). In *Evitts*, the United States Supreme Court, basing its decision on the Due Process Clause of the Fourteenth Amendment, held that "a criminal defendant . . . has a right to the effective assistance of counsel in his first appeal as of right." *Sade C.*, 13 Cal. 4th at 970-71, 920 P.2d at 725-26, 55 Cal. Rptr. 2d at 780-81 (quoting *Evitts*, 469 U.S. at 404).

18. 486 U.S. 429 (1988). In *McCoy*, the United States Supreme Court addressed whether a state could require the inclusion of a no-merit statement in an *Anders* brief. *Sade C.*, 13 Cal. 4th at 974, 920 P.2d at 727-28, 55 Cal. Rptr. 2d at 782-83 (citing *McCoy*, 486 U.S. at 430). The Court upheld this type of state requirement on the premise that the statement only furthers the purpose of *Anders*, to determine whether or not the appeal is frivolous. *Id.* at 974, 920 P.2d at 728, 55 Cal. Rptr. 2d at 783 (citing *McCoy*, 486 U.S. at 439).

19. 488 U.S. 75 (1988). In *Penson*, the United States Supreme Court found that the lower court erred when it allowed counsel to withdraw prior to completing an independent review of the record. *Sade C.*, 13 Cal. 4th at 976, 920 P.2d at 729, 55 Cal. Rptr. 2d at 784 (citing *Penson*, 488 U.S. at 82). Furthermore, by not filing an *Anders* brief, counsel failed to point out areas which could be the possible basis of appeal. *Id.* Mary R. True, Note, *The Constitutional Basis of the Indigent Appellant's Right to Appointed Counsel: Penson v. Ohio*, 58 U. CIN. L. REV. 1137 (1990) (discussing requirements of an *Anders* brief).

20. *Sade C.*, 13 Cal. 4th at 978, 920 P.2d at 730, 55 Cal. Rptr. 2d at 786.

21. 463 U.S. 745 (1983). In *Jones*, the United States Supreme Court concluded that there is no duty under the Constitution for appointed counsel to "raise every nonfrivolous issue requested by the defendant." *Sade C.*, 13 Cal. 4th at 970, 920 P.2d at 725, 55 Cal. Rptr. 2d at 780 (quoting *Jones*, 463 U.S. at 746). In addition, counsel retains the ability to make "reasonable professional judgments" by choosing not to pursue a nonfrivolous issue on appeal. *Id.* (citing *Jones*, 463 U.S. at 754).

22. See *supra* notes 12, 17-19 (discussing *Finley*, *Evitts*, *McCoy* and *Penson*).

23. *Sade C.*, 13 Cal. 4th at 979, 920 P.2d at 731, 55 Cal. Rptr. 2d at 786 (citing *McCoy*, 486 U.S. at 438-39 n.10).

24. *Id.* at 979-81, 920 P.2d at 731-33, 55 Cal. Rptr. 2d at 786-88.

25. 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967).

Anders decision by holding that “[c]ounsel must prepare a brief to assist the court. . . . Counsel is not allowed to withdraw from the case until the court is satisfied that he has discharged his duty to the court and his client to set forth adequately the facts and issues involved.”²⁶ *Feggans* also requires an appellate court to provide the appellant with new counsel if any meritorious contention remains.²⁷

Second, the court discussed *People v. Wende*.²⁸ In *Wende*, the California Supreme Court decided whether the court of appeal must independently review the entire record prior to finding that an appeal lacked merit.²⁹ The *Wende* court found that upon submission of an *Anders* brief, an appellate court must conduct this review.³⁰ Furthermore, the *Wende* court held that counsel is under no obligation to withdraw “if he believes the appeal to lack any basis in law or fact” because counsel’s involvement will benefit both the court and the defendant.³¹

2. Discussion

The majority of the court in *Sade C.* next turned to its primary discussion: whether it should extend *Anders* to “an indigent parent’s appeal from a judgment or order . . . adversely affecting his custody of a child or his status as the child’s parent.”³² The court advanced three reasons why *Anders* should not be extended to juvenile court proceedings. First, the court stated that *Anders* applied only in a criminal context.³³ By contrast, juvenile court proceedings are civil in nature and therefore “far

26. *Sade C.*, 13 Cal. 4th at 979, 920 P.2d at 731, 55 Cal. Rptr. 2d at 786 (quoting *Feggans*, 67 Cal. 2d at 447-48, 432 P.2d at 23, 62 Cal. Rptr. at 421).

27. *Id.* at 980, 920 P.2d at 731, 55 Cal. Rptr. 2d at 786 (citing *Feggans*, 67 Cal. 2d at 447-48, 432 P.2d at 23, 62 Cal. Rptr. at 421).

28. 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979).

29. *Sade C.*, 13 Cal. 4th at 980, 920 P.2d at 732, 55 Cal. Rptr. 2d at 787 (citing *Wende*, 25 Cal. 3d at 440, 600 P.2d at 1074, 158 Cal. Rptr. 2d at 842).

30. *Id.* (citing *Wende*, 25 Cal. 3d at 441-42, 600 P.2d at 1074-75, 158 Cal. Rptr. 2d at 842-43).

31. *Id.* at 980-81, 920 P.2d at 732-33, 55 Cal. Rptr. 2d at 787-88 (citing *Wende*, 25 Cal. 3d at 442, 600 P.2d at 1071, 158 Cal. Rptr. 2d at 839). This holding is distinct from that of previous cases: the *Person* Court stated that counsel *may* seek to withdraw, the *Anders* Court contended that counsel *should* seek to withdraw, and the *McCoy* Court found that counsel had a *duty* to withdraw. *See id.* at 981 n.9, 920 P.2d at 732 n.9, 55 Cal. Rptr. 2d at 787 n.9; *see* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* § 77 (1985) (discussing ethical considerations regarding withdrawal by an attorney); Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621 (1996) (discussing the ethical dilemmas facing attorneys who wish to withdraw from representation of parents in child abuse cases).

32. *Sade C.*, 13 Cal. 4th at 981-82, 920 P.2d at 733, 55 Cal. Rptr. 2d at 788.

33. *Id.* at 982, 920 P.2d at 733, 55 Cal. Rptr. 2d at 788.

removed from the object of the *Anders* court's concern.³⁴ Second, the court stated that *Anders* is dependent upon the right to counsel at an appellate proceeding.³⁵ Indigent parents at juvenile proceedings, however, do not possess this right.³⁶ Finally, the court summarized by stating that the right to counsel at a first appeal "does not exist for the indigent parent adversely affected by a state-obtained decision on child custody or parental status."³⁷

The court next addressed three arguments in favor of extension of *Anders* to the case at bar.³⁸

a. Fourteenth Amendment Due Process Clause

First, the appellants contended that the Fourteenth Amendment Due Process Clause compelled extension of *Anders* to an indigent parent's appeal.³⁹ In deciding this issue, the court based its analysis on the United States Supreme Court decision in *Lassiter v. Department of Social Services*.⁴⁰ In *Lassiter*, the United States Supreme Court developed a balancing test to evaluate a Fourteenth Amendment claim.⁴¹ The factors involved included: (1) the private liberty interests of the parties; (2) the government interest at stake; and (3) the "risk that the procedures used will lead to erroneous decisions."⁴²

Applying the first of these three factors to the case at bar, the court found that the "private interests at stake are those of the indigent parent and his child."⁴³ The court reasoned that indigent parents have two primary interests.⁴⁴ First, they have an interest "in the care, custody, and management of [their] child[ren]."⁴⁵ Second, they have an interest in "the 'accuracy and justice' of the resolution of [their] appeal."⁴⁶ Children

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 983, 920 P.2d at 734, 55 Cal. Rptr. 2d at 789.

38. *Id.* at 984-93, 920 P.2d at 734-41, 55 Cal. Rptr. 2d at 789-96.

39. *Id.* at 985, 920 P.2d at 735, 55 Cal. Rptr. 2d at 790.

40. 452 U.S. 18 (1981) (holding that the appointment of counsel is not constitutionally required in every proceeding on parental status).

41. *Sade C.*, 13 Cal. 4th at 987, 920 P.2d at 736, 55 Cal. Rptr. 2d at 791 (citing *Lassiter*, 452 U.S. at 27).

42. *Id.* (citing *Lassiter*, 452 U.S. at 27).

43. *Id.* at 987, 920 P.2d at 737, 55 Cal. Rptr. 2d at 792.

44. *Id.* at 987-88, 920 P.2d at 737, 55 Cal. Rptr. 2d at 792.

45. *Id.* at 987, 920 P.2d at 737, 55 Cal. Rptr. 2d at 792.

46. *Id.* at 987-88, 920 P.2d at 737, 55 Cal. Rptr. 2d at 792 (internal citations omitted)

also have two recognized liberty interests.⁴⁷ First, children have an interest “in a ‘normal family home’ with parents if possible[,] or at least in a home that is ‘stable.’”⁴⁸ Second, children have an interest “in an accurate and just resolution of [their] parents’ appeal.”⁴⁹ In reconciling these interests, the court recognized that protecting the interest of the parent may harm that of the child because “[w]hat the parent wants or needs is not necessarily what the child wants or needs.”⁵⁰ Therefore, it determined that the decision made by the lower court was accurate and just.⁵¹

Turning to the second balancing test factor, the California Supreme Court stated that the “*parens patriae*” interest in protecting the welfare of the child fulfilled the government’s interest factor as required by *Lassiter*.⁵² In addition, the state has an administrative interest in reducing the amount of time it takes to resolve an appeal, because “a ‘period of time’ that ‘may not seem . . . long . . . to an adult . . . can be a lifetime to a young child.’”⁵³

Finally, the court found that the third factor of the balancing test, the risk of erroneous resolution of the appeal, was only “negligible” in the instant case.⁵⁴ The court noted that the appointed counsel acts as a faithful advocate on behalf of the defendant to ensure compliance with procedural protections throughout the process.⁵⁵

Therefore, the majority of the court found that the Fourteenth Amendment Due Process Clause did not prohibit court exclusion of the *Anders* procedures from an indigent parent’s appeal.⁵⁶

b. *Fourteenth Amendment Equal Protection Clause*

The appellants’ second argument was that the Equal Protection Clause of the Fourteenth Amendment mandates similar treatment to all indigent

(quoting *Lassiter*, 452 U.S. at 27).

47. *Id.* at 988-89, 920 P.2d at 737-38, 55 Cal. Rptr. 2d at 792-93.

48. *Id.* at 988, 920 P.2d at 737, 55 Cal. Rptr. 2d at 792 (internal citations omitted) (quoting *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) and *In re Marilyn H.*, 5 Cal. 4th 295, 306, 851 P.2d 826, 833, 19 Cal. Rptr. 2d 544, 551 (1993)).

49. *Id.* at 988, 920 P.2d at 738, 55 Cal. Rptr. 2d at 793 (citing *Santosky*, 455 U.S. at 754 n.7).

50. *Id.* at 989, 920 P.2d at 738, 55 Cal. Rptr. 2d at 793.

51. *Id.*

52. *Id.* (citing *Santosky*, 455 U.S. at 766 (1982)).

53. *Id.* at 990, 920 P.2d at 738-39, 55 Cal. Rptr. 2d at 793-94 (quoting *Marilyn H.*, 5 Cal. 4th at 310, 851 P.2d at 835, 19 Cal. Rptr. 2d at 553 (omissions in original)).

54. *Id.* at 990, 920 P.2d at 739, 55 Cal. Rptr. 2d at 794.

55. *Id.*

56. *Id.*

litigants, thus requiring that parents receive the protection granted to criminal defendants under *Anders*.⁵⁷ The California Supreme Court rejected this argument on the basis that “[c]riminal defendants and parents are *not* similarly situated.”⁵⁸ Criminal defendants are given certain protections under the Constitution that parents are not, including the right to counsel,⁵⁹ the right to confront their accusers, an increased burden of proof, and the right to appellate counsel at the first appeal.⁶⁰ In addition, criminals face punishment, whereas parents in juvenile court proceedings do not.⁶¹

c. State Policy

The court moved on to address the third and final argument advanced on behalf of the parents.⁶² The appellants contended that the court should extend *Anders* “as a matter of policy in the exercise of [the] inherent power to declare rules of California appellate procedure.”⁶³ The majority conducted a cost-benefit analysis and found that the costs of adopting such a rule outweighed its benefits.⁶⁴ The costs included time, money, and the undermining of the finality of lower court judgments.⁶⁵ On the other hand, the only benefit was ensuring adequate representation, which the court described as “relatively small.”⁶⁶

Therefore, the California Supreme Court declined to extend *Anders* to an indigent parent’s appeal challenging a lower court’s judgment as to

57. *Id.* at 991-92, 920 P.2d at 740, 55 Cal. Rptr. 2d at 795.

58. *Id.* at 991, 920 P.2d at 740, 55 Cal. Rptr. 2d at 795.

59. Although the U.S. Constitution guarantees only criminal defendants the right to counsel, California provides this right in juvenile proceedings to both indigent juveniles and parents. 27 CAL. JUR. 3D *Delinquent and Dependent Children* §§ 62-67 (1987 & Supp. 1996).

60. *Sade C.*, 13 Cal. 4th at 991-92, 920 P.2d at 740, 55 Cal. Rptr. 2d at 795 (citing U.S. CONST. amends. V, VI, VIII, & XIV, § 1). Although not required to do so under the U.S. Constitution, California provides the indigent parent with a right to representation on appeal. 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 222 (1987 & Supp. 1996) (stating that indigent parent is entitled to representation on appeal); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 640 (1989) (stating that there is a right to counsel on appeal for both indigent child and parent).

61. *Sade C.*, 13 Cal. 4th at 991, 920 P.2d at 740, 55 Cal. Rptr. 2d at 795.

62. *Id.* at 992, 920 P.2d at 740, 55 Cal. Rptr. 2d at 795.

63. *Id.*

64. *Id.* at 992-93, 920 P.2d at 740-41, 55 Cal. Rptr. 2d at 795-96.

65. *Id.*

66. *Id.*

child custody or termination of parental rights⁶⁷ and affirmed the decision of the lower court.⁶⁸

B. Justice Kennard's Dissenting Opinion

Justice Kennard dissented from the majority of the court in *Sade C.* for two primary reasons.⁶⁹ First, she asserted that California statutory law implicitly grants an indigent parent the right to counsel on appeal in a juvenile court proceeding.⁷⁰ Furthermore, California Welfare and Institutions Code section 317.5 requires appointed counsel to be competent.⁷¹ Justice Kennard contended that the court of appeal must follow the procedures outlined in *Anders* in order to ensure the competence of counsel because "the affirmance of a juvenile court's judgment erroneously depriving a parent of the custody of the child . . . results in a loss to both the parent and the child that can never be undone."⁷²

Second, Justice Kennard dissented from the majority because every state which has decided the applicability of *Anders* to juvenile court proceedings has held that *Anders* has "equal force to cases involving indigent parents appealing a juvenile court's decision."⁷³

Therefore, Justice Kennard would have reversed the judgment of the lower court and mandated compliance with *Anders*.⁷⁴

III. IMPACT

The primary impact of the decision in *Sade C.* is the court's express limitation of the applicability of *Anders*.⁷⁵ Despite the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and rights under California law,⁷⁶ the court narrowly construed the *Anders* decision, thereby limiting protection to criminal defendants.⁷⁷ In this respect, the court followed the trend set by the United States Supreme Court in

67. *Id.* at 993, 920 P.2d at 741, 55 Cal. Rptr. 2d at 796.

68. *Id.* at 994-95, 920 P.2d at 741-42, 55 Cal. Rptr. 2d at 796-97.

69. *Id.* at 995-1000, 920 P.2d at 742-45, 55 Cal. Rptr. 2d at 797-800 (Kennard, J., dissenting).

70. *Id.* at 998, 920 P.2d at 744, 55 Cal. Rptr. 2d at 799 (Kennard, J., dissenting).

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

72. *Id.* at 998, 920 P.2d at 745, 55 Cal. Rptr. 2d at 800 (Kennard, J., dissenting).

73. *Id.* at 999, 920 P.2d at 745, 55 Cal. Rptr. 2d at 800 (Kennard, J., dissenting).

74. *Id.* at 999-1000, 920 P.2d at 745, 55 Cal. Rptr. 2d at 800 (Kennard, J., dissenting).

75. *See id.* at 982, 920 P.2d at 733, 55 Cal. Rptr. 2d at 788.

76. *See supra* notes 39-66 and accompanying text.

77. *Sade C.*, 13 Cal. 4th at 982, 920 P.2d at 733, 55 Cal. Rptr. 2d at 788.

*Finley*⁷⁸ and *Austin*,⁷⁹ and declined to extend *Anders* to collateral appeals and cases of discretionary review.

IV. CONCLUSION

Counsel seeking to withdraw from cases involving an appeal from a judgment concerning child custody or the termination of parental rights are no longer required to file an *Anders* brief.⁸⁰ This leaves the indigent parent with the responsibility of challenging the decision of the lower court.⁸¹ In order to do so, the appellant must "raise claims of reversible error or other defect . . . and 'present argument and authority on each point made.'"⁸² If the parent raises no valid contentions, the appellate court may order dismissal of the appeal.⁸³ Hence, the courts of appeal did not err in the two cases involved in *Sade C.* by dismissing the claims because both defendants failed to raise meritorious challenges to the judgment rendered by the lower court.⁸⁴

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78. *See supra* note 12.

79. *See supra* note 13.

80. *Id.* at 982, 920 P.2d at 733, 55 Cal. Rptr. 2d at 788.

81. *Id.* at 994, 920 P.2d at 742, 55 Cal. Rptr. 2d at 797.

82. *Id.* (quoting *County of Sacramento v. Lackner*, 97 Cal. App. 3d 576, 591, 159 Cal. Rptr. 1, 9 (Ct. App. 1979)).

83. *Id.*

84. *Id.*

VII. PUBLIC WELFARE AND UTILITIES

Causes of action for personal injury, trespass, nuisance, inverse condemnation, negligence and violation of due process rights in connection with alleged injuries caused by electric and magnetic field (EMF) emissions fail when they interfere with the regulatory commission's policy on EMF emissions and public health and safety:
San Diego Gas & Electric Co. v. Superior Court.

I. INTRODUCTION

In *San Diego Gas & Electric Co. v. Superior Court*,¹ the California Supreme Court considered whether homeowners had a right to sue for injuries sustained as a result of electric and magnetic field (EMF) emissions from power lines above their property when a previously decided case held that the regulatory commission, rather than the courts, has exclusive jurisdiction over such matters.² The trial court overruled the defendant's demurrer which asserted that because the utility regulatory commission had exclusive jurisdiction, the trial court lacked jurisdiction over the complaint.³ Addressing the merits of the plaintiffs' complaint,⁴

1. 13 Cal. 4th 893, 920 P.2d 669, 55 Cal. Rptr. 2d 724 (1996). Justice Mosk wrote the majority opinion in which Chief Justice George and Justices Kennard, Baxter, Werdegar, Chin, and Brown concurred. *Id.* at 893-951, 920 P.2d at 669-705, 55 Cal. Rptr. 2d at 724-60.

2. *Id.* at 902-03, 920 P.2d at 673, 55 Cal. Rptr. 2d at 728. The plaintiffs, Martin and Joyce Covalt, owned a home and property in San Clemente, California. *Id.* at 910, 920 P.2d at 678, 55 Cal. Rptr. 2d at 733. San Diego Gas & Electric Company (Electric Company) owns an easement next to the plaintiffs' property, through which the company runs electricity via power lines. *Id.* at 910-11, 920 P.2d at 678, 55 Cal. Rptr. 2d at 733. The plaintiffs claimed that the power lines "emitted unreasonably dangerous levels of electromagnetic radiation" onto their property, and further, that the Electric Company increased the number of power lines in 1990, resulting in higher levels of radiation. *Id.* at 911, 920 P.2d at 678-79, 55 Cal. Rptr. 2d at 733-34. In 1993, the plaintiffs filed suit against the Electric Company for personal injuries and property damage, demanding relief in the form of money damages and an injunction prohibiting the Electric Company from continuing to run electricity through the subject power lines. *Id.* at 912, 920 P.2d at 679, 55 Cal. Rptr. 2d at 734.

3. *Id.* at 912, 920 P.2d at 679-80, 55 Cal. Rptr. 2d at 734-35. The defendant relied on Public Utilities Code section 1759, which provides that "no court except [the] Supreme Court has jurisdiction to review any order or decision of the Public Utilities Commission . . . or to interfere with the commission in performance of its duties." *Id.* at 902, 920 P.2d at 673, 55 Cal. Rptr. 2d at 728 (citing CAL. PUB. UTIL. CODE § 1759 (West 1994)). Public Utilities Code section 2016, which "authorizes an action in superior court for damages caused by an unlawful act of a public utility," is in apparent conflict with section 1759. *Id.* (citing CAL. PUB. UTIL. CODE § 2016 (West 1994)). Fortu-

the court of appeal held that the homeowners failed to show that they suffered any physical personal injuries from the EMF emissions; thus, their personal injury causes of action were meritless.⁵ Turning to the allegations of property damage, the appellate court concluded that a ruling for the plaintiffs on any of the property damage causes of action would violate the rule set forth in *Waters*.⁶ Consequently, the court of appeal overturned the trial court's decision.⁷ The California Supreme Court affirmed the court of appeal and held that the plaintiffs' complaint conflicted with the Public Utility Commission's policy on EMF emissions and public health and safety.⁸

II. TREATMENT

The supreme court began its opinion with a lengthy discussion of the scientific principles behind electric and magnetic fields.⁹ After a recitation of the facts and procedural history of the case at bar,¹⁰ the supreme

nately, the supreme court previously decided the conflict at issue in *Waters v. Pacific Tel. Co.*, holding that section 2016 applies only to cases where the damages remedy would not "hinder or frustrate the commission's declared supervisory and regulatory policies." *Id.* at 902-03, 920 P.2d at 673, 55 Cal. Rptr. 2d at 728 (quoting *Waters v. Pacific Tel. Co.*, 12 Cal. 3d 1, 4, 523 P.2d 1161, 1162, 114 Cal. Rptr. 753, 754 (1974)).

4. *Id.* at 913-14, 920 P.2d at 680, 55 Cal. Rptr. 2d at 735. Although in general the appellate court may not review the trial court's decision on a demurrer until the case has been tried on the merits, there is an exception to the rule. *Id.* at 912-13, 920 P.2d at 680, 55 Cal. Rptr. 2d at 735. Pursuant to this exception, which allows appellate court review "when the demurrer raises an important question of subject-matter jurisdiction," the appellate court granted the Electric Company's writ. *Id.* at 913, 920 P.2d at 680, 55 Cal. Rptr. 2d at 735.

5. *Id.* at 913-14, 920 P.2d at 680, 55 Cal. Rptr. 2d at 735. The court noted that in order to recover for the fear of cancer caused by the emissions, the plaintiffs must prove, among other things, that a preponderance of the scientific and medical evidence supports their fear. *Id.*

6. *Id.* at 914, 920 P.2d at 681, 55 Cal. Rptr. 2d at 736. See *supra* note 3, for an explanation of the *Waters* rule.

7. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 914, 920 P.2d at 681, 55 Cal. Rptr. 2d at 736.

8. *Id.* at 903, 920 P.2d at 673, 55 Cal. Rptr. 2d at 728.

9. *Id.* at 903-10, 920 P.2d at 673-78, 55 Cal. Rptr. 2d at 728-33. Within this background discussion, the court emphasized two points. First, the way that electric power grids work, and second, that EMFs are not just a product of power lines, but materialize from wired buildings, ground currents and household appliances. *Id.* at 908-10, 920 P.2d at 677-78, 55 Cal. Rptr. 2d at 732-33.

10. *Id.* at 910-14, 920 P.2d at 678-81, 55 Cal. Rptr. 2d at 733-36.

court explained that both the state constitution and the legislature have conferred broad powers and authority to the Utility Regulatory Commission.¹¹ The court stated that the California Legislature, via the Public Utilities Act (PUA), established the procedure for judicial review of a commission decision.¹² Because section 1759 of the PUA, which provides that any judicial review of commission decisions is to be exclusively decided by the supreme court (bypassing the appellate court), conflicts with section 2016, which provides a private cause of action for money damages, the supreme court was compelled to decide whether the instant action could stand under existing case law.¹³ The supreme court reiterated that *Waters* resolved this conflict by holding that section 2016 allowed an action for damages only if it “would not hinder or frustrate the commission’s declared supervisory and regulatory policies.”¹⁴

The court pronounced that the commission has the authority to determine public health and safety risks, as well as prescribe a remedial policy for those risks.¹⁵ In addition, the court declared that the commission has the power to decide where overhead electric lines, poles, and wires sit.¹⁶ With the authority issue settled, the court turned to whether the commission had adopted and implemented a policy on EMF emissions and public welfare.¹⁷

The court explained that in 1988 the commission along with the Department of Health Services prepared a study to research whether the risk of cancer from EMF emissions was unreasonable, and if so, what re-

11. *Id.* at 914-15, 920 P.2d at 681, 55 Cal. Rptr. 2d at 736. The court noted that article XII, sections 1-6 of the California Constitution lists the regulatory commission’s powers, while the Public Utilities Act contains the legislature’s declaration of commission authority. *Id.*

12. *Id.* at 915, 920 P.2d at 681-82, 55 Cal. Rptr. 2d at 736-37.

13. *Id.* at 916-17, 920 P.2d at 682, 55 Cal. Rptr. 2d at 737; *see also supra* note 3.

14. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 917-18, 920 P.2d at 683, 55 Cal. Rptr. 2d at 738 (quoting *Waters v. Pacific Tel. Co.*, 12 Cal. 3d 1, 4, 523 P.2d 1161, 1162, 114 Cal. Rptr. 753, 754 (1974)). The court expressly noted that if there was no current commission policy, then there would be no bar to an action for damages. *Id.* at 918, 920 P.2d at 683, 55 Cal. Rptr. 2d at 739. The court proceeded to list various case examples where there was either no active commission policy, or the cause of action did not conflict with an operative policy. *Id.* at 919-23, 920 P.2d at 684-87, 55 Cal. Rptr. 2d at 739-42.

15. *Id.* at 923-24, 920 P.2d at 687, 55 Cal. Rptr. 2d at 742.

16. *Id.* at 924-25, 920 P.2d at 687-88, 55 Cal. Rptr. 2d at 742-43. The court provided a brief history regarding the development of this power. *Id.* Additionally, the court noted that each utility “must obtain a certificate of public convenience and necessity from the commission before” constructing or upgrading any power line. *Id.* at 925, 920 P.2d at 688, 55 Cal. Rptr. 2d at 743. Thus, the utilities are coordinated through a central power source, the commission.

17. *Id.* at 926, 920 P.2d at 688, 55 Cal. Rptr. 2d at 743.

medial measures they should take.¹⁸ Unfortunately, the study was inconclusive, finding that although the health risk from EMF emissions was troublesome, it was not yet substantial.¹⁹ Thus, the commission decided to take no further action regarding the cancer risk until there were more concrete findings.²⁰

Next, the court set forth the preliminary policy that the commission developed to address the public fear of the unknown risks of EMF related cancer.²¹ The court listed the proposed terms of a regulatory policy as follows: (1) avoid erecting new power lines; (2) if new lines are necessary, put new commission restrictions on implementation of the lines; (3) hold hearings on health and safety policies in connection with EMF emissions; (4) take affirmative steps to reduce existing fields, be aware of the potential problems when new lines are put up, and measure existing fields at homes and offices; and (5) research and educate the public as to the EMF emission related cancer issue.²² The court then summarized an official "Interim Policy" adopted by the commission to resolve the relevant issues.²³ The policy terms included: (1) a decrease in emissions for "new and upgraded facilities"; (2) acceptance of comments on ways to treat existing facilities; (3) mitigation of the emissions by design modifications; (4) uniform utility policies and measurement plans (to educate the public); (5) creation of an advisory committee to implement a policy on education and research, funded by the utilities; (6) creation of coordinated, centralized education on EMF emissions funded by the utilities; and (7) creation of coordinated, centralized research on EMF emissions funded by the utilities.²⁴

Keeping this interim policy in mind, the court next examined whether the plaintiffs' prayers for relief conflicted with the commission's implemented policy on EMF emissions.²⁵ With respect to the plaintiffs' claims

18. *Id.* at 926, 920 P.2d at 688-89, 55 Cal. Rptr. 2d at 743-44.

19. *Id.* at 926, 920 P.2d at 689, 55 Cal. Rptr. 2d at 744.

20. *Id.* at 927, 920 P.2d at 689, 55 Cal. Rptr. 2d at 744; *see also* James H. Stilwell, *Walking the High Wire: Practical Possibilities for Regulatory Responses to the Electromagnetic Field Quandary*, 15 REV. LITIG. 141 (1996) (discussing the Catch-22 faced by regulatory commissions as well as possible solutions to the EMF dilemma).

21. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 928, 920 P.2d at 690, 55 Cal. Rptr. 2d at 745.

22. *Id.* at 928-30, 920 P.2d at 690-92, 55 Cal. Rptr. 2d at 745-47.

23. *Id.* at 930-33, 920 P.2d at 691-93, 55 Cal. Rptr. 2d at 747.

24. *Id.* at 931-34, 920 P.2d at 692-94, 55 Cal. Rptr. 2d at 747-49.

25. *Id.* at 935, 920 P.2d at 694, 55 Cal. Rptr. 2d at 749.

of personal injury, the court rejected their cause of action because they did not prove (as no one could) that EMF emissions cause cancer.²⁶ To the plaintiffs' allegations of trespass, specifically the assertion that the Electric Company's emissions entered the plaintiffs' property without their consent, the court replied that because emissions are intangible, the proper cause of action is for nuisance, not trespass.²⁷ Because the plaintiffs also alleged nuisance, the court declared that the plaintiffs must prove that "interference with [their] . . . use and enjoyment of [the] property" caused substantial actual damage and was unreasonable.²⁸ The court then held that the plaintiffs failed to show that their fear of cancer had caused interference with their use and enjoyment of the property because recovery for fear of cancer would conflict with the commission's extensive study and policy finding that there was no reasonable harm connected with EMF emissions.²⁹

The court also found the plaintiffs' inverse condemnation allegation meritless because they failed to prove the government took, damaged, or invaded the property, "result[ing] in a burden on the property that [was] direct, substantial, and peculiar to the property itself."³⁰ Finally, the court rejected the plaintiffs' other sundry complaints by noting that: (1) the legislature declared the commission's jurisdictional authority;³¹ (2)

26. *Id.*; see Nicholas Shannin, *Converging Theories: An Analysis of the Future of Medical Monitoring as a Remedy for the Victims of Powerline Radiation Torts*, 7 U. FLA. J.L. & PUB. POL'Y 127 (1995) (discussing the possibility of awarding medical monitoring costs as damages to EMF plaintiffs).

27. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 935-36, 920 P.2d at 695, 55 Cal. Rptr. 2d at 750. The court analogized the instant case to *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280 (1982), which involved another intangible—noise.

28. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 937-38, 920 P.2d at 696-97, 55 Cal. Rptr. 2d at 751-52. The court defined the test for "unreasonableness" as whether the harm to the plaintiff outweighed the social benefit of the defendant's conduct. *Id.* at 938, 920 P.2d at 697, 55 Cal. Rptr. 2d at 752. For a general discussion of the remedies available for a nuisance cause of action, see 47 CAL. JUR. 3D *Nuisances* §§ 57-59 (1994) (discussing injunctions, costs, and damages).

29. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 939, 920 P.2d at 697, 55 Cal. Rptr. 2d at 752. *But see* 47 CAL. JUR. 3D *Nuisances* § 18 (1994) (stating "[t]he frightening effect . . . and . . . mental distress caused to the plaintiff, may also be taken into consideration"); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1472 (9th ed. 1988) (noting the plaintiff may recover future damages).

30. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 939-43, 920 P.2d at 697-700, 55 Cal. Rptr. 2d at 752-55; see also 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 1058 (9th ed. 1988) (distinguishing inverse condemnation from a simple tort cause of action). For a general discussion of inverse condemnation, see Michael Rikon, *Inverse Condemnation*, 67 N.Y. ST. B.J., Dec. 1995, at 28.

31. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 944, 920 P.2d at 700, 55 Cal. Rptr. 2d at 755.

the *Waters* rule is not to be read narrowly;³² (3) the scientific and medical community has not reached any consistent conclusions as to the relationship between EMF emissions and cancer;³³ (4) the EMF policy is as uniform as it can be;³⁴ (5) the plaintiffs' power lines, as upgraded in 1990, were "existing" when the interim policy was rendered in 1993;³⁵ (6) there is no negligence cause of action because it would be unfair to hold the utility liable for not doing what the policy did not require it to do;³⁶ (7) the plaintiffs do not have a constitutional right to compensation because they failed to prove a "taking";³⁷ (8) the plaintiffs did not prove a due process violation as the policy was quasi-legislative, rather than quasi-judicial,³⁸ and (9) the plaintiffs did not have a right to a jury trial because in inverse condemnation cases that right is limited to the damages issue, of which there was none.³⁹

III. IMPACT

By emphasizing the Public Utility Commission's broad constitutional and legislative powers, the supreme court reinforced a standard of "deference to the regulatory commission."⁴⁰ Accordingly, *San Diego Gas & Electric Co.* compels lower courts faced with similar regulatory commission issues to take a "hands off" approach.⁴¹ This conclusion is further supported by the court's reaffirmation of the twenty-two year old *Waters* holding, which also determined that the commission's policy controls.⁴²

Additionally, the California Supreme Court foreclosed any possibility of monetary recovery by the plaintiffs for personal injury or property damage caused by EMF emissions.⁴³ In so doing, the court essentially took the position that there is no conclusive evidence supporting the notion that EMF emissions cause cancer.⁴⁴ Unfortunately, until the public per-

32. *Id.* at 944, 920 P.2d at 701, 55 Cal. Rptr. 2d at 756.

33. *Id.* at 946, 920 P.2d at 702, 55 Cal. Rptr. 2d at 757.

34. *Id.* at 949, 920 P.2d at 704, 55 Cal. Rptr. 2d at 759.

35. *Id.* at 950, 920 P.2d at 704, 55 Cal. Rptr. 2d at 759.

36. *Id.*

37. *Id.* at 950, 920 P.2d at 705, 55 Cal. Rptr. 2d at 760.

38. *Id.* at 951, 920 P.2d at 705, 55 Cal. Rptr. 2d at 760.

39. *Id.*

40. *Id.* at 914-15, 920 P.2d at 681-82, 55 Cal. Rptr. 2d at 736.

41. *See id.*

42. *Id.* at 916-23, 920 P.2d at 682-87, 55 Cal. Rptr. 2d at 737-42.

43. *See supra* notes 25-39 and accompanying text.

44. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 935, 920 P.2d at 694, 55 Cal. Rptr. 2d

ception catches up to the court's view, property values of land in close proximity to power lines will likely continue to fall, and the owners will have no judicial recourse.⁴⁵

IV. CONCLUSION

In *San Diego Gas & Electric Co.*, the court examined the Public Utility Commission's policy on EMF emissions and decided to defer to that policy.⁴⁶ Consequently, plaintiffs are barred from bringing causes of action for personal injury, trespass, nuisance, inverse condemnation, negligence, and violation of Constitutional Due Process based upon the effects of EMF emissions on personal property.⁴⁷

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at 749.

45. See Andrew James Schutt, Comment, *The Power Line Dilemma: Compensation for Diminished Property Value Caused by Fear of Electromagnetic Fields*, 24 FLA. ST. U. L. REV. 125 (1996) (discussing fear as a factor in computing damages to property value); James R. Arnold, *The Value of Contaminated Property in The Impact of Environmental Law on Real Estate and Other Commercial Transactions*, 643, 646 (A.L.I.-A.B.A. Course of Study, Oct. 12, 1995), available in WESTLAW, CA47 A.L.I.-A.B.A. 643 ("science and law struggle to meet the demands of business and the public for certainty and specific dollar value for contamination's effects in the arena of public opinion"); *supra* notes 28-29 and accompanying text.

46. *San Diego Gas & Elec. Co.*, 13 Cal. 4th at 903, 920 P.2d at 673, 55 Cal. Rptr. 2d at 728.

47. See *supra* notes 25-39 and accompanying text.

SUMMARIES

I. Criminal Law

- A. A criminal defendant may not challenge a prior conviction on the ground of ineffective assistance of counsel in the course of a current prosecution for a noncapital offense.**

Garcia v. Superior Court, Supreme Court of California, Decided January 9, 1997, 14 Cal. 4th 953, 928 P.2d 572, 59 Cal. Rptr. 2d 858.

Facts. After being charged with possession of heroin, the defendant filed a motion to strike one of two prior serious convictions, arguing that the conviction was constitutionally invalid because he had received ineffective assistance of counsel. The trial court determined that the defendant was not entitled to raise a federal constitutional claim by way of a motion to strike, and further ruled that no state constitutional bases for his claim existed. The court of appeal reversed, holding that the defendant was entitled to challenge a prior conviction regarding the effectiveness of counsel.

Holding. Reversing the court of appeal, the supreme court held that under the Federal Constitution, a defendant is entitled to a hearing on the effectiveness of counsel for prior convictions in a "capital" case. The same protection is not afforded, however, in "noncapital" cases except where the right to representation of counsel has been denied. The court cited *Custis v. United States*, 511 U.S. 485 (1994), which held that under federal sentencing statutes, criminal defendants may only challenge the validity of prior convictions for violations of the right to representation by counsel. Furthermore, the court reasoned that trial court efficiency would be compromised by requiring evidentiary hearings for every claim of ineffective counsel from prior convictions. Lastly, the court held that nothing in the state constitution requires a trial court to provide an evidentiary hearing in these cases.

- B. California Welfare and Institutions Code section 702 requires that in a juvenile adjudication, where the defendant has committed a crime which would be punishable in an adult proceeding as either a misdemeanor or a felony, the trial court must expressly state in the record that the violation is a misdemeanor or felony.**

In re Manzy, Supreme Court of California, Decided February 20, 1997, 14 Cal. 4th 1199, 930 P.2d 1255, 60 Cal. Rptr. 2d 889.

Facts. The juvenile defendant was charged with and admitted guilt to "joyriding" and possession of methamphetamine, a controlled substance. The maximum penalties for joyriding and possession of a controlled substance were one month and three years of jail time, respectively. The possession of a controlled substance charge, however, was a "wobbler" offense which gave the trial court the discretion to treat the crime as a felony or misdemeanor. Although the probation department recommended that a sentence of sixty to seventy-five days be instituted, the juvenile court ordered the defendant to serve the maximum sentence, three years and one month in jail. The minor defendant appealed, alleging that the trial court failed to adhere to California Welfare and Institutions Code section 702, because the court failed to expressly state whether possession of the controlled substance was a felony or misdemeanor.

Holding. Affirming the decision of the court of appeal, the supreme court held that the trial court's failure to expressly state in the record whether the drug possession offense was a felony or misdemeanor required that the case be remanded for a formal declaration, even though the sentence indicated that the court decided it was a felony. Because of the prejudicial effect of a felony conviction due to Proposition 8, which states that any prior felony conviction can be used for impeachment purposes in a criminal case, and the "three strikes law" which allows sentence enhancement when the defendant has committed certain prior felonies, it was important for the court to definitively express whether the offense at issue was a felony or misdemeanor.

- C. **Where a trial court has made a fact-specific inquiry in its discretionary decision pursuant to California Penal Code section 17(b) to reduce a wobbler offense initially filed under the three strikes law from a felony to a misdemeanor, such exercise of authority is not an abuse of discretion.**

People v. Alvarez, Supreme Court of California, Decided January 16, 1997, 14 Cal. 4th 968, 928 P.2d 1171, 60 Cal. Rptr. 2d 93.

Facts. Upon discovery of drug paraphernalia, including a "baggie" containing 0.41 grams of powdered methamphetamine, during a consensual search, the defendant was charged with a felony violation of Health and Safety Code section 11377, subdivision (a). The People further alleged four prior serious felony convictions within the meaning of California Penal Code sections 667 and 1170.12 (the "three strikes law"). During the jury trial, the trial court took under submission the defendant's motion to have the felony charge declared a misdemeanor under California Penal Code section 17(b). After the jury returned a guilty verdict, the trial court exercised its discretion at the sentencing hearing and reduced the defendant's felony charge to a misdemeanor.

The People filed a petition for a writ of mandate to vacate the trial court's reduction of the felony charge and its refusal to punish the defendant as a recidivist under the three strikes law. The court of appeal granted the petition and vacated the defendant's sentence, concluding that the trial court abused its discretion by failing to sufficiently consider the defendant's criminal history and by substituting its views of proper sentencing for those set forth by the legislature under the three strikes law.

Holding. Reversing the decision of the court of appeal, the supreme court held that the trial court retains its broad authority under California Penal Code section 17(b) to reduce "wobbler offenses," crimes that may be sentenced alternately as felonies or misdemeanors, at the trial court's discretion; under the three strikes law. The court stated that the legislature did not enact the three strikes law with an intent to supersede a trial court's discretionary authority under section 17(b). The court further

reasoned that before the three strikes law is triggered, the defendant must be convicted of a felony in the current proceeding. Once a trial court determines that the nature of a defendant's current conviction is a misdemeanor at a sentencing hearing, the offense becomes a misdemeanor for all purposes and the three strikes law does not apply.

The court further held that the trial court's discretionary decision-making under section 17(b) to reduce wobbler offenses initially filed under the three strikes law is reviewable. The court found that "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary." The trial court is otherwise presumed to have sustained legitimate sentencing objectives, and the sentence will be upheld on review. The court noted that relevant factors which the trial court should consider include the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, his traits of character as evidenced by his behavior and demeanor at trial, and, when appropriate, general sentencing objectives such as those set forth in California Rules of Court, rule 410. The court also acknowledged the importance of public safety as a factor and noted that the defendant's criminal history should be considered. The court resolved, however, that public safety considerations do not create a presumption against reducing wobbler offenses in three strikes cases. Finally, the court noted that an intense factual inquiry is essential to the trial court's exercise of authority pursuant to section 17(b), and such inquiry must be reflected on the record.

The supreme court concluded that the trial court did not abuse its discretion under section 17(b) by balancing the nature of the offense, the defendant's criminal history, and the fact that the offense was charged under the three strikes law, in its decision to reduce the defendant's felony charge. Therefore, the court held that the reduction of the recidivist defendant's felony drug possession conviction to a misdemeanor was warranted.

- D. Transferred intent can be used to satisfy the intent element for more than one crime, thus, allowing the defendant to be found guilty of murder of the unintended victim and attempted murder of the intended victim.**

People v. Scott, Supreme Court of California, Decided December 19, 1996, 14 Cal. 4th 544, 927 P.2d 288, 59 Cal. Rptr. 2d 178.

Facts. In May 1991, the defendant and an accomplice drove to a park and opened gunfire upon Calvin Hughes (Hughes). Hughes escaped without harm, but Gary Tripp (Tripp) was shot in the leg and buttocks, and Jack Gibson (Gibson) was killed when a bullet struck him in the head. The defendant was charged with the murder of Gibson, the attempted murders of Hughes and Tripp, and assault with a firearm on Hughes, Tripp, and two others. Further, as to each count, a firearm enhancement was alleged. The first trial resulted in a deadlocked jury. In the second trial, the jury instruction on transferred intent provided that the defendant's intent to kill Hughes could be transferred to Gibson. The defendant was convicted of second degree murder, two counts of attempted murder, and two counts of assault with a firearm. The court of appeal modified and affirmed the conviction, rejecting the defendant's argument that the transferred intent instruction should not have been given since the defendant was charged with first degree murder of the unintended victim and attempted murder of the intended victim. The California Supreme Court affirmed the lower court's decision.

Holding. The supreme court held that the trial court did not err by giving a transferred intent jury instruction. In affirming the decision of the court of appeal, the court noted that intent is not "used up" once it satisfies an element of one charge. The court further rejected the defendant's contention that the trial court erred in instructing the jury on transferred intent for use of a firearm because the issue was not timely on appeal.

II. Fraud and Deceit

When a person writes a letter of recommendation, that person owes a duty of due care to third persons to not misrepresent facts regarding an individual's qualifications or character if such misrepresentations could reasonably and foreseeably cause physical injury to a third person.

Randi W. v. Muroc Joint Unified School District, Supreme Court of California, Decided January 27, 1997, 14 Cal. 4th 1066, 929 P.2d 582, 60 Cal. Rptr. 2d 263.

Facts. The defendants were school district officers who wrote letters of recommendation to a college placement service, recommending Robert Gadams (Gadams), a former administrative employee, for a teaching position in another school district. According to the plaintiff's allegations, the defendants had knowledge of prior complaints of sexual misconduct against Gadams, but recommended him "unreservedly," failing to disclose any such impropriety. As a result of the letters of recommendation, another school district hired Gadams as a teacher. The plaintiff, a student in the hiring school district, stated that she had been sexually assaulted by Gadams. The plaintiff charged the defendants with general negligence, negligent hiring, fraud, negligent misrepresentation, negligence per se, and a Title IX sexual harassment violation. The defendants demurred as a matter of law, arguing that in each cause of action, the plaintiff failed to establish the element of a duty of due care owed to third parties. The trial court dismissed the plaintiff's complaint on all grounds. The court of appeal reversed the trial court's judgment on three counts: negligent misrepresentation, fraud, and negligence per se. The court of appeal based its reversal of the negligent misrepresentation and fraud counts, referring to the Restatement Second of Torts, §§ 310-311, which impose "liability on one who intentionally or negligently gives false information to another person that results in physical injury to the recipient or a third person." The court of appeal also reversed the trial court on the negligence per se count, stating that the district owed a duty to the plaintiff to report charges of sexual misconduct to the authorities under the Child Abuse and Neglect Reporting Act. The California Supreme Court reviewed the decision, a case of first impression before the court.

Holding. The court began by stating a general rule of law: "all persons have a duty to use ordinary care to prevent others from being injured as

the result of their conduct." The court next determined that the plaintiff's injuries were reasonably foreseeable to the defendants, who could have taken alternative courses of conduct to evade such harm. Considering these factors, and a strong public policy in safeguarding minors from sexual and physical abuse, the court held that when a person writes a letter of recommendation, that writer owes a duty of due care to third persons to not misrepresent facts regarding a person's qualifications or character if such a misrepresentation could reasonably and foreseeably cause a physical injury to the third person.

Applying the new law to the facts, the court determined that the trial court improperly sustained the defendant's demurrers regarding the allegations of negligent misrepresentation and fraud. The court reasoned that the defendants owed a duty to the plaintiff, and their undeserved recommendation of him was deceptively false and misleading if the defendants had knowledge of Gadams' repeated sexual assaults. Further, the court explained that the plaintiff was not required to have relied personally on the letters of recommendation. Rather, the plaintiff was merely required to allege that a physical injury resulted from the school district's reliance on the misrepresentation.

However, the supreme court reversed the court of appeal's decision regarding the negligence per se allegation, finding that the defendants did not owe a duty to the plaintiff to report any incidents of child abuse because the plaintiff was not a member of the intended class to be protected by the Child Abuse and Neglect Reporting Act.

III. Insurance

California Public Utilities Code section 24361, the provision of California's version of the Uniform Aircraft Financial Responsibility Act (CUAFRA) that prohibits the cancellation of any aircraft liability insurance policy meeting the requirements of CUAFRA unless thirty days prior notice is given to the Department of Transportation, applies only to policies that have been filed with the Department of Transportation after an accident in satisfaction of CUAFRA's financial responsibility requirements.

Escobedo v. Estate of Snider, Supreme Court of California, Decided February 20, 1997, 14 Cal. 4th 1214, 930 P.2d 979, 60 Cal. Rptr. 2d 722.

Facts. On October 30, 1992, Danny Snider (Snider) and Jennie Escobedo (Escobedo) were killed in the crash of a Piper aircraft. Snider was the owner and operator of the aircraft and Escobedo was his non-paying passenger. The plaintiff, Escobedo's mother, filed a wrongful death action against Snider's estate, but pursuant to the Probate Code, was limited in recovery to the amount of insurance coverage, if any. On September 12, 1992, Snider's insurer informed Snider that his liability policy would be canceled if an additional payment was not received by October 12, 1992. On October 12, the insurer informed Snider that his policy would be canceled for nonpayment of the premium, but that the policy could be reinstated with no lapse in coverage if payment was received by October 27, 1992. Snider never paid the premium.

The trial court entered judgment in favor of the plaintiff upon its finding that there was no coverage at the time of the accident due to the expiration of the policy on October 12. The court of appeal reversed on the grounds that CUAFRA required the insurer to send a cancellation notice to the Department of Aeronautics before effecting cancellation. Absent such notification, the court of appeal held that the policy could not have expired on October 12. The supreme court granted review to decide whether section 24361 of the California Public Utilities Code governs cancellation of all aircraft liability policies meeting certain coverage minima, or only those policies filed with the department after an accident to satisfy the financial responsibility requirement.

Holding. Reversing the court of appeal, the supreme court held that section 24361 applies only to cancellation of insurance policies that have, before cancellation, been proffered to the department to show financial responsibility after an accident.

In the instant case, the court concluded that the plaintiff failed to prove that the policy at issue fell within the class of policies subject to section 24361. After determining that the language of section 24361 and its purpose within CUAFRA were ambiguous, the court stated that it chose an interpretation that will result in extending fewer policies' coverage beyond the time of their facial cancellation, and avoiding the imposition of a clerical burden of dubious value under CUAFRA on aviators, insurers, and the department.

IV. Torts

To the extent that it protects tobacco companies from direct liability for harm caused by smoking, California Civil Code section 1714.45 also precludes the allocation of proportionate fault to absent tobacco companies in order to reduce non-economic damages payable under Proposition 51.

Richards v. Owens-Illinois, Inc., Supreme Court of California, Decided January 23, 1997, 14 Cal. 4th 985, 928 P.2d 1181, 60 Cal. Rptr. 2d 103.

Facts. The plaintiff, a shipyard worker for forty-four years who was exposed to uncontained insulation, filed suit against the defendant, an asbestos manufacturer, alleging negligence, strict liability for a defective product, and negligent and intentional infliction of emotional distress arising from his asbestos exposure. At trial, the defendant introduced evidence that the plaintiff had smoked one to two packs of cigarettes per day over the course of forty-three years, resulting in his affliction with obstructive airway disease, a condition likely to exacerbate asbestosis. Pursuant to Solano County Superior Court procedures for asbestos litigation, the trial was tried in two parts. First, the jury was to determine whether the plaintiff's exposure to asbestos was a proximate cause of his injury, and determine the total amount of his damages. Second, the judge issued a burden-shifting instruction to the jury instructing that the plaintiff had met his burden and should prevail unless the defendant could adduce proof that its product was not a legal cause of the plaintiff's injury. Following the first phase, the jury found in favor of the plaintiff, awarding \$5000 for economic damages and \$275,000 for non-economic damages. Prior to the second phase, the defendant sought permission to establish that, in addition to the plaintiff's own fault for smoking and the fault of the defendant and other asbestos manufacturers, cigarette manufacturers were at fault for supplying the harmful tobacco. If allowed, pursuant to Proposition 51, the defendant could have reduced its amount of liability for non-economic damages by the amount attributable to the tobacco companies. The trial court ruled in favor of the plaintiff's objection on the grounds that California law does not consider tobacco companies to be at fault for smoking-related illness. Therefore, tobacco com-

panies are not within the “universe of tortfeasors” among which liability can be apportioned. The court instructed the jury to only apportion fault between the plaintiff, the defendant, and other asbestos manufacturers and employers. The jury apportioned 2.5 percent fault to the plaintiff, 1 percent to the defendant, and 96.5 percent to other entities.

The defendant appealed, citing as error the denial of the tobacco company defense and the burden-shifting instruction. The court of appeal reversed, relying on *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 828 P.2d 140, 7 Cal. Rptr. 2d 238 (1992). The court interpreted *DaFonte* as holding that apportionment of non-economic damages under Proposition 51 must include the “universe of tortfeasors,” even those who are immune from suit. The court also ruled that if a retrial occurred, the burden-shifting instruction should not be given.

Holding. Reversing the court of appeal, the supreme court reconciled *DaFonte*, Proposition 51, and California Civil Code section 1714.45. Proposition 51 eliminated joint and several liability in certain cases, and limited a defendant’s liability for non-economic damages to the amount directly proportionate to his percentage of fault. The *DaFonte* court held that a party may be at fault for purposes of apportionment but immune for purposes of liability. This court noted, however, that section 1714.45, a near verbatim codification of comment i of section 402A of the Restatement (Second) of Torts, provides that a manufacturer shall not be liable for injury or death caused by a product which is “inherently unsafe” and is known to be so by the ordinary consumer, and is a common consumer product intended for personal consumption, such as tobacco. The court concluded that because tobacco suppliers are immune from direct liability because they are simply not at fault, there is no fault to be apportioned to them indirectly under Proposition 51.

The court remanded on the issue of the burden-shifting instruction to determine if it alone warranted a new trial. The court cautioned that it was also considering the instruction in a pending appeal of a companion judgment, and nothing in the instant case should preclude the court of appeal from applying a subsequent ruling.

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