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California Supreme Court Survey - A Review of Decisions: June 1985–August 1985

Timothy C. Williams

California Supreme Court Survey
June 1985 - August 1985

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

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I. ANTITRUST

Efforts by private individuals to influence government action, even though unethical and illegal, are not within the scope of either the Sherman Act or the Cartwright Act, regardless of an anti-competitive purpose or effect: **Blank v. Kirwan.**

In *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 216 Cal. Rptr. 718 (1985), the court upheld defendants' demurrers because plaintiff's complaint failed to state a cause of action under the California restraint of trade statutory scheme known as the Cartwright Act. *See* CAL. BUS. & PROF. CODE §§ 16700-26 (West 1976 & Supp. 1985).

In 1978, the City of Bell (hereinafter the City) enacted an ordinance legalizing private poker clubs and a zoning ordinance approving a twenty acre parcel of land as the only location in the City in which poker clubs could operate. Trammell Crow Company owned the twenty-acre tract and leased it to private individuals who had applied for and received poker licenses. Plaintiff had also applied for a poker license but was refused because he had not obtained property within the specially zoned tract.

Plaintiff brought a cause of action against City officials and two

private individuals who had obtained licenses. He asserted that they had conspired to use inside information to monopolize the operation of poker clubs in the City. Defendants demurred to plaintiff's first amended complaint, admitting that they had influenced the government to get the ordinances passed. The trial court sustained the demurrers without leave to amend, and plaintiff appealed to the supreme court.

The Cartwright Act is California's statutory scheme for restraint of trade and provides in part that "every trust is unlawful, against public policy and void." CAL. BUS. & PROF. CODE § 16726 (West 1976). The Act defines a trust as any "combination of capital, skill or acts by two or more persons . . . [t]o create or carry out restrictions in trade or commerce." *Id.* § 16720. Plaintiff asserted that defendants violated the Cartwright Act when they conspired to monopolize the poker club licensing in the City of Bell.

Since the Cartwright Act is modeled after the federal Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982), California courts look to the Sherman Act and cases construing it to interpret the Cartwright Act. *See Marin County Board of Realtors, Inc. v. Palsson,* 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976). Regarding government influence and its relation to the Sherman Act, the principal law is commonly known as the *Noerr-Pennington* doctrine. The law states that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136 (1961). Thus, according to the *Noerr-Pennington* doctrine attempts by individuals to influence government do not even fall within the scope of either the Sherman Act or the Cartwright Act. The only exception to the *Noerr-Pennington* doctrine is when attempts to influence government are shams; in those situations the Sherman and Cartwright Acts are controlling.

Plaintiff's complaint contended that the private party defendants had influenced the local government to obtain a monopoly in the poker club business. This is exactly the kind of conduct that the *Noerr-Pennington* doctrine protects. As the supreme court pointed out, nothing precluded the plaintiff from procuring land and petitioning the City Council to rezone it to allow the operation of a poker club. The court therefore concluded that plaintiff's allegations did not constitute a cause of action since the defendants' conduct was not within the scope of either the Sherman or Cartwright Acts.

Plaintiff contended that the case fell within the "sham" exception. However, the court refused to conclude that the defendants' actions

constituted a sham. It was clear that they had made efforts to influence the actions of the local government. Though the defendants' actions may have been illegal or unethical, they still did not violate the Cartwright Act. *See Bustop Shelters v. Convenience & Safety Corp.*, 521 F. Supp. 989, 995 (S.D.N.Y. 1981). The court noted that defendants' could be prosecuted under other criminal statutes.

The court's holding in *Blank* reiterates the well settled doctrine that efforts to influence government do not fall within the scope of the Cartwright Act, even though the influence upon government officials may have been unethical and illegal. Thus, the demurrer to plaintiff's amended complaint, which asserted a violation of the Cartwright Act, was properly sustained without leave to amend because it did not constitute a cause of action under the Cartwright Act.

MISSY KELLY BANKHEAD

II. BANKING AND FINANCIAL INSTITUTIONS

Federal regulations notwithstanding, a bank overdraft charge of six dollars may be unconscionable: **Perdue v. Crocker National Bank.**

I. INTRODUCTION

In *Perdue v. Crocker National Bank*,[1] on a motion for demurrer, the plaintiff was awarded the opportunity to prove his contention that the defendant's overdraft fee is prohibited by state law. The suit was filed as a class action.[2]

The plaintiff, a bank depositor, sought injunctive and compensatory relief against Crocker National Bank (hereinafter the Bank) for its practice of charging customers six dollars for processing checks drawn on accounts without sufficient funds (hereinafter NSF).[3] It was alleged that this charge was set unilaterally by the Bank and increased without justification, even though the actual cost of process-

1. 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985). The majority opinion was written by Justice Broussard, with Chief Justice Bird, Justices Mosk, Reynoso, White, Breiner, and Savitt concurring. Justices White, Breiner, and Savitt were assigned by the Chairperson of the Judicial Counsel.

2. The suit was filed in 1978 on behalf of all persons with checking accounts at defendant Bank. A subclass was specified as all persons who have paid overdraft charges to the Bank. *Id.* at 920, 702 P.2d at 508, 216 Cal. Rptr. at 350.

3. The six dollar fee for a draft without sufficient funds is referred to as the NSF charge.

ing an NSF check is approximately thirty cents.[4] Based upon these allegations, the plaintiff asserted five causes of action. The Bank demurred to each cause of action. The demurrers were sustained by the superior court without leave to amend, after it had taken notice of the fact that the plaintiff had previously filed three similar complaints in another action. The court of appeal affirmed the holding.

II. SUPREME COURT'S TREATMENT OF THE ALLEGATIONS

A. Contractual Rights to Impose the NSF Fee

In the first cause of action, the plaintiff contended that the signature card did not authorize NSF fees. This contention was based on the rule that when one party has total control over the prices or performances to be rendered, the contract formed is illusory and unenforceable.[5] Recognizing that this rule of law applies only if the total discretion granted to one party has the effect of relieving that party of any real contractual duty,[6] the court noticed that the Bank and depositors had reciprocal promises. Therefore, as a matter of law, the Bank was found to have a contractual right to charge depositors the NSF fee.

However, the Bank's discretionary power to charge fees carried a concommitant duty of exercising that power in accordance with good faith and fair dealing.[7] The plaintiff therefore was granted leave to amend to seek a determination of whether the Bank exercised good faith in setting its fees.[8]

B. Unconscionability of NSF Fees

In order to prove that the Bank's NSF charges were unconscionable, plaintiff alleged that the Bank, being in a superior bargaining position, forced depositors to pay a service charge that is much greater than the actual cost to the Bank. Furthermore, the signature card imposed no obligation on the Bank, but gave it the power of termination at will.

California Civil Code section 1670.5 specifies that a court may re-

4. Plaintiff mentioned in his petition for hearing that a high reasonable estimate for the NSF fee would be about one dollar. Thus, the Bank allegedly made between 600 and 2,000 percent in profit on the NSF charge. *Id.* at 928, 702 P.2d at 513, 216 Cal. Rptr. at 355.

5. Automatic Vending Co. v. Wisdom, 182 Cal. App. 2d 354, 357, 6 Cal. Rptr. 31, 33 (1960).

6. When a promisor has no duty because of his broad discretionary power the promise is illusory and lacking in consideration. *Id.*

7. *Id.* at 358, 6 Cal. Rptr. at 33. *See* Annot., 49 A.L.R.2D 508 (1956). *See also* Annot., 91 A.L.R.3D 1237 (1979) (application of U.C.C. § 2-305, CAL. COMM. CODE § 2305 (West 1964), to open price terms in a contract).

8. Lazar v. Hertz Corp., 143 Cal. App. 3d 128, 141, 191 Cal. Rptr. 849, 857 (1983).

fuse to enforce an unconscionable contract or an unconscionable clause within the contract.[9] A contract of adhesion will not be enforced if it contains a provision that does not fall into the reasonable expectations of the weaker party, or is unduly oppressive when considered in its context. However, the allegations in this case, which characterized the Bank's agreement with the plaintiff as an adhesion contract, did not automatically make it unconscionable.[10] Furthermore, plaintiff's conclusory allegation that the price was unconscionable was not sufficient to warrant an evidentiary hearing under section 1670.5(b). Nonetheless, an inquiry into the contract's purpose, setting, and effect would be necessary,[11] and, since plaintiff's case would turn upon further allegations and proof as to the circumstances of the transaction, dismissal on demurrer was inappropriate.[12]

The court rejected the Bank's contention that the NSF fee could not be unconscionable since it was set at an amount equal to the market price. Naturally, it is unlikely that a court would find a price set in a freely competitive market to be unconscionable, but the price charged by an oligopoly[13] is not free from scrutiny. Moreover, other considerations are also relevant to the analysis. Included among them are the cost of the goods or service to the seller, the inconveniences imposed on the seller, and the true value of the item.[14]

The court ultimately held that plaintiff's allegations, though not sufficient to prove unconscionability, did adequately state a cause of action for unconscionability.[15] The alleged 2,000 percent profit the Bank earned from the NSF fee and the nature of the signature card[16]

9. CAL. CIV. CODE § 1670.5(a) (West 1985). This section of the code is very similar to the Uniform Commercial Code section 2-302. California had deleted this provision of the U.C.C. until enacting section 1670.5 in 1979.

10. *Perdue*, 38 Cal. 3d at 925, 702 P.2d at 511, 216 Cal. Rptr. at 353. *See also* Graham v. Scissor-tail, 28 Cal. 3d 807, 820, 623 P.2d 165, 172-73, 171 Cal. Rptr. 604, 612 (1981).

11. CAL. CIV. CODE § 1670.5(b) (West 1985).

12. *Perdue*, 38 Cal. 3d at 926, 702 P.2d at 512, 216 Cal. Rptr. at 354.

13. An oligopoly is defined as, "a market situation in which each of a few producers affects but does not control the market." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 793 (1971).

The court did not discuss the market status of Crocker National Bank in this context. Since a business that is part of an oligopoly will be held to a different legal standard in price-setting, it is presumed that the lower court will have to address this issue should Crocker contest the implication on remand.

14. *Perdue*, 38 Cal. 3d at 927, 702 P.2d at 512, 216 Cal. Rptr. at 354.

15. *Id.* at 928, 702 P.2d at 514, 216 Cal. Rptr. at 355-56.

16. In fact, the contractual language appears in print so small on the card that

made it look as though the Bank had structured a one-sided transaction in which the Bank had all the rights and the depositor had all the duties.

C. *Bank's Acts of Unfair Competition*

Plaintiff alleged that the Bank had committed two acts of unfair competition. First, the Bank used the signature card in a deceptive and misleading manner in that it failed to disclose the legal authority the card gave it to impose NSF charges. Second, NSF fees have been arbitrarily and unfairly waived for certain customers. The California Business and Professional Code defines unfair competition as a business practice that is unlawful, unfair or fraudulent.[17]

In dealing with plaintiff's allegations the court found the first one ambiguous. It was uncertain if the allegation was that the Bank represented the signature card to customers in a deceptive manner, or if the card itself was deceptive. However, under either interpretation the court stated the plaintiff had sufficiently alleged that the Bank engaged in unfair competition by stating that it deceived or misled its customers.[18]

The court found a substantive defect in the second allegation. The required showings under the rules of the Unfair Practices Act[19] were not stated in any of the plaintiff's allegations. It was only stated that arbitrary waiver of the NSF fee for certain customers shifts the true cost of processing NSF checks to other customers. Even if this were proven to be true, such would not suffice to show unfair competition.[20]

D. *NSF Charge as an Unlawful Penalty*

To adequately plead the fifth cause of action, the plaintiff averred that depositors impliedly promised to refrain from writing NSF checks. Writing such a check, the plaintiff contended, was a breach

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many people would not be able to see it. *Id.* at 928, 702 P.2d at 513, 216 Cal. Rptr. at 355.

17. CAL. BUS. & PROF. CODE § 17200 (West Supp. 1985).

18. *Perdue,* 38 Cal. 3d at 929, 702 P.2d at 514, 216 Cal. Rptr. at 356. *See* CAL. BUS. & PROF. CODE § 17200 (West Supp. 1985). Because the plaintiff is seeking only injunctive relief in this cause of action, he need not show that he was himself injured. He need only prove that members of the public are likely to be deceived. *Id.* § 17500. *See also* Chern v. Bank of America, 15 Cal. 3d 866, 876, 544 P.2d 1310, 1316, 127 Cal. Rptr. 110, 116 (1976).

The court in the principal case seemed to actually be describing the elements of the prohibited conduct in section 17500 of the Business and Professions Code, rather than section 17200.

19. CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1964).

20. *Id.* § 17071. *See also* Hladek v. City of Merced, 69 Cal. App. 3d 585, 138 Cal. Rptr. 194 (1977); Dooley's Hardware Mart v. Food Giant Markets, Inc., 21 Cal. App. 3d 513, 98 Cal. Rptr. 543 (1971).

of his contract with the Bank. Thus, the Bank's NSF charge, being far in excess of the actual damages of thirty cents, was a collection of liquidated damages in violation of Civil Code sections 1670 and 1671.[21]

A damage clause that seeks to collect an amount disproportionate to actual losses is invalid since a wronged party may collect only the amount of the actual damages.[22] Notwithstanding the invalidity of such damage penalties, the court held that depositors made no promise to refrain from writing NSF checks.[23] Therefore, the NSF charge could not be construed as an agreement for liquidated damages, and the court affirmed dismissal of the fifth cause of action without leave to amend.[24]

III. THE COURT'S TREATMENT OF PREEMPTION

The Bank argued that federal law preempted any attempt by the State of California to regulate banking service charges. It specifically set forth three arguments. First, banks are empowered to accept deposits and to exercise all incidental powers necessary to carrying on the business of banking.[25] Also, bank directors are required to refrain from any practices that are unsafe or unsound.[26] An NSF

21. CAL. CIV. CODE § 1671(d) (West 1985). Generally, a contractual provision authorizing liquidated damages is valid only if it represents what the parties reasonably anticipated as a fair average for compensation in the event of a breach. *Perdue*, 38 Cal. 3d at 930-31, 702 P.2d at 515, 216 Cal. Rptr. at 357 (citing Garrett v. Coast & Southern Fed. Savings & Loan Ass'n, 9 Cal. 3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973); Better Food Markets v. American Dist. Teleg. Co., 40 Cal. 2d 179, 253 P.2d 10 (1953)). *See also* Annot., 63 A.L.R.3D 50 (1975); Annot., 42 A.L.R.2D 591 (1955).

22. Shapiro v. United California Bank, 133 Cal. App. 3d 256, 184 Cal. Rptr. 34 (1982); Hoffman v. Security Pacific Nat'l Bank, 121 Cal. App. 3d 964, 176 Cal. Rptr. 14 (1981). *See also* Jacobs v. Citibank, N.A., 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984).

23. *Perdue*, 38 Cal. 3d at 932, 702 P.2d at 516, 216 Cal. Rptr. at 358. In *Shapiro*, the court held that an express agreement to pay NSF charges does not constitute an implied promise to not write overdrafts. One way in which implied promises are found is when it appears from the contractual language that the promise was so clearly within the contemplation of the parties that they deemed it unnecessary to express it. *Shapiro*, 133 Cal. App. 3d at 262, 184 Cal. Rptr. at 38.

The supreme court in the principal case noted that the Bank offers a service in which overdrafts are covered automatically by the customer's credit card account. *Perdue*, 38 Cal. 3d at 924, 702 P.2d at 510, 216 Cal. Rptr. at 352. The existence of this service supports the refusal to find an implied contract on this issue, and is consistent with the standard expressed by the *Shapiro* court.

24. *Perdue*, 38 Cal. 3d at 932, 702 P.2d at 516, 216 Cal. Rptr. at 358. The court also modified *Shapiro* and *Hoffman*, in dicta, by expressing disagreement with the fiction that an overdraft check is an application for an extension of credit. *Id.*

25. 12 U.S.C.A. § 24 (West 1945 & Supp. 1985).

26. *Id.* §§ 1818(b), (e). "The phrase 'unsafe and unsound banking practice' is

charge low enough to avoid an attack of unconscionability might also be inadequate to discourage the writing of such checks. Thus, not only are banks empowered to set NSF fees without being inhibited by state law, an adequate and substantial fee is mandated. Second, when Congress deregulated interest rates,[27] it contemplated that banks would charge higher service rates to depositors. Charges for services that were previously subsidized by below market interest rates on deposit accounts would now have to be raised. Further, as suggested by an agency regulation, Congress intended that such charges would be set in a market that is free of state regulation.[28] Third, the Code of Federal Regulations expressly preempts state laws in the area of service charges set by national banks.[29] After estab-

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widely used . . . and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies." Groos Nat'l Bank v. Comptroller of Currency, 573 F.2d 889, 897 (5th Cir. 1978).

27. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982).

28. 12 C.F.R. § 7.8000(a) (1985).

29. *Id.* § 7.8000. The entire section is read as follows:

> Charges by national banks
>
> (a) All charges to customers should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding or discussion with other banks or their officers.
>
> (b) Establishment of deposit account service charges, and the amounts thereof, is a business decision to be made by each bank according to sound banking judgment and federal standards of safety and soundness. In establishing deposit account service charges, the bank may consider, but is not limited to considering:
>
> (1) Costs incurred by the bank, plus a profit margin, in providing the service;
>
> (2) The deterrence of misuse by customers of banking services;
>
> (3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;
>
> (4) Maintenance of the safety and soundness of the institution.
>
> (c) A national bank may establish any deposit account service charge pursuant to paragraphs (a) and (b) of this section notwithstanding any state laws which prohibit the charge assessed or limit or restrict the amount of that charge. Such state laws are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks.

Id.

Sections (b) and (c) were added by the Comptroller of Currency on March 10, 1984. Section (a) was amended on December 2, 1983. Even though it appeared that the Comptroller was promulgating the regulations to influence the resolution of the principal case, the court found no impropriety in this. *Perdue*, 38 Cal. 3d at 935, 702 P.2d at 518, 216 Cal. Rptr. at 360.

The Office of the Comptroller of Currency is charged with the supervision and regulation of national banking associations. 12 U.S.C.A. § 1 (West Supp. 1985). *See also Id.* §§ 4.1-4.19 (1985) (description of the office of Comptroller). Wide discretion is given to the Comptroller in the performance of his duties. His judgment will not be disturbed unless his decision is arbitrary, capricious or contrary to law. First Nat'l Bank of Lamarque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980). The courts should give great weight to any reasonable construction of a regulatory banking statute by the Comp-

lishing its power to review the federal regulations[30] and the congressional acts authorizing them the court rejected all three arguments. It determined that section 7.8000 of the Code of Federal Regulations[31] was not promulgated by the Comptroller of Currency to eliminate state regulation. Further, nothing in the legislative history of the enabling acts evidenced congressional intent to occupy the field of bank service charges to the exclusion of the states.[32]

The court reasoned that proper interpretative regulation is one that interprets the language of the federal statute, fills the gaps in statutory coverage or explains how the Comptroller will exercise his discretion. Section 7.8000, however, went far beyond that by radically altering the roles of the states and the Comptroller in bank regulation, it was therefore contrary to congressional intent.[33]

The court finally stated that information presented at a later stage of the case may result in a different conclusion than what it decided on demurrer. However, at the early stages in the trial nothing indi-

troller, as he is charged with the enforcement of these statutes. Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971).

Generally, a regulatory enactment is only valid if notice of the new regulation is given and a public hearing is held. Administrative Procedure Act, 5 U.S.C. § 553 (1982). An exception to this is for a ruling that is interpretative, as opposed to legislative. *Id.* § 553 (A). For a discussion of the distinction between interpretative and legislative rules, see K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03 (3d ed. 1972).

The *Perdue* court determined that section 7.8000 of the Code was an interpretative rule. Therefore, it is entitled to great weight, but is not binding on the courts. *Perdue*, 38 Cal. 3d at 936, 702 P.2d at 518, 216 Cal. Rptr. at 361. *Cf.* Jacobs v. Citibank, N.A., 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984).

The New York counterpart to the California Supreme Court, in deciding the same issue as in the principal case, held that imposing limits on NSF fees of federally chartered banks is a task properly left with the Comptroller of the Currency. In reaching this decision, deference was given to section 7.8000(a) of the Code. *Id.* at 872, 462 N.E.2d at 1183, 474 N.Y.S.2d at 465.

The *Perdue* court distinguished *Jacobs* by noting the difference in the trial stages. The New York case was on appeal of a motion for summary judgment, while *Perdue* was being decided on a motion of demurrer. It was presumed that the plaintiffs in *Jacobs* simply failed to meet the requisite standard of proof to support their allegations. In *Perdue*, the issue was only the sufficiency of the allegations. *Perdue*, 38 Cal. 3d at 927, 702 P.2d at 513, 216 Cal. Rptr. at 355.

30. The court's analysis of the law authorizing judicial review by the state courts of federal regulatory law, and the appropriate standards, is very comprehensive and lengthy. Particularly notice footnotes 19-43 of the case for the justifications and rationale. *Perdue*, 38 Cal. 3d at 933-44, 702 P.2d at 516-24, 216 Cal. Rptr. at 358-66. But as a general rule states may exercise judicial review of federal laws, but must follow the ruling of the Supreme Court and enforce federal laws over state acts that are inconsistent. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 20 (2d ed. 1983).

31. 12 C.F.R. § 7.8000.

32. *Perdue*, 38 Cal. 3d at 937, 702 P.2d at 520, 216 Cal. Rptr. at 361-62.

33. *Id.* at 941, 702 P.2d at 523, 216 Cal. Rptr. at 365.

cated that allowing plaintiff to proceed on his claims of lack of good faith, unfair competition and unconscionability would impair the Bank's viability.[34]

IV. CONCLUSION

A unanimous court concluded that the superior court erred in sustaining defendant's demurrer to all five causes of action without leave to amend. Federal regulations proffered by the defendant notwithstanding, the plaintiff was permitted to prove his contentions in further proceedings. If the plaintiff can show that the NSF charges are unconscionable and the Bank is involved in deceptive or misleading pratices, he may receive compensatory and injunctive relief.[35]

JAMES B. BRISTOL

III. CIVIL PROCEDURE

A. *California Code of Civil Procedure section 409(a) does not deny equal protection in the context of judicial foreclosures:* **Arrow Sand and Gravel, Inc. v. Superior Court.**

In *Arrow Sand and Gravel, Inc. v. Superior Court,* 38 Cal. 3d 884, 700 P.2d 1290, 215 Cal. Rptr. 288 (1985), the court found that California Code of Civil Procedure section 409(a) did not deny equal protection in the context of judicial foreclosures by limiting the recording of a notice of lis pendens to plaintiffs or to defendants who file a cross-complaint. *See* CAL. CIV. PROC. CODE § 409(a) (West Supp. 1986). This decision was based on the 1982 legislative amendment to the Code of Civil Procedure section 701.680(a) which established that the foreclosure sale of real property "is absolute and may not be set aside for any reason." *Id.* § 701.680(a) (West Supp. 1986).

The plaintiff brought an action for judicial foreclosure on certain property to which the defendant held title. The trial court granted summary judgment for the plaintiff, and the defendant filed a notice of lis pendens announcing his intent to appeal. The court granted plaintiff's motion to expunge the notice pursuant to section 409.1 because defendant had not filed a cross-complaint. *Id.* § 409.1. The defendant appealed from the decision arguing that the trial court's construction of section 409 violated equal protection.

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34. *Id.* at 943-44, 702 P.2d at 524-25, 216 Cal. Rptr. at 366-67.

35. *Id.* at 944, 702 P.2d at 525, 216 Cal. Rptr. at 367. For an in depth analysis of the issues presented by the plaintiff on NSF fees, see Note, *Bank Charges for Insufficient Funds Checks,* 69 CALIF. L. REV. 599 (1981) (authored by a student who was clerk to the counsel representing the plaintiff in an earlier proceeding of *Perdue*).

Under the common law, a lis pendens notice was filed to notify all persons not a party to the action that any interest acquired in the property was subject to the pending judgment. Without such notice the non-party purchaser would not be affected and would hold clear title. *Kendall-Brief Co. v. Superior Court,* 60 Cal. App. 3d 462, 468, 131 Cal. Rptr. 515, 519 (1976).

Applying those principles, the supreme court held that since section 701.680(a) supersedes the party-nonparty distinction, the filing of a lis pendens notice affords no additional protection to real property interests. Thus, equal protection was not denied to defendant. Additionally, for purely academic interest, filing the notice would not have given the defendant any additional protection because, as is usually the case, the plaintiff purchased the property in question. A party to the action is given actual notice when he purchases land subject to a rendered judgment. *Albertson v. Raboff,* 46 Cal. 2d 375, 379, 295 P.2d 405, 408 (1956). The court therefore upheld the trial court's construction of section 409.1 as requiring a party to have filed a complaint before filing a notice of lis pendens.

DAYTON B. PARCELLS III

B. *A foreign manufacturer which makes no direct sales in California may be required to defend a products liability action in California if the corporation has sufficient contacts with California, avails itself of the California market, and it is reasonable to require the corporation to defend a lawsuit in California:* **Asahi Metal Industry Co., Ltd. v. Superior Court.**

I. INTRODUCTION

In *Asahi Metal Industry Co., Ltd. v. Superior Court,*[1] the California Supreme Court considered the issue of whether California can constitutionally exercise personal jurisdiction over a manufacturer of component parts which made no direct sales in California, but had knowledge that a substantial number of its parts would be sold in finished products in California. The defendant, a Japanese corporation, argued that it did not have the required minimum contacts with California to be required to defend a lawsuit there.

1. 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985). Opinion by Chief Justice Bird, with Justices Kaus, Broussard, Reynoso, and Grodin concurring. A dissenting opinion was authored by Justice Lucas, with Justice Mosk concurring.

II. FACTUAL BACKGROUND

In 1978, Gary Zurcher was severely injured when he lost control of his Honda motorcycle and collided with a tractor rig. His wife, a passenger, was killed. The accident was allegedly caused by a sudden loss of air and an explosion in the rear tire of the motorcycle. Both Zurcher and his wife were California residents, and the collision occurred on a California highway.

Zurcher filed a products liability action naming Cheng Shin Rubber Indus. Co., Ltd., the Taiwanese manufacturer of the tube, and Sterling May Co., Inc., the California retailer, as defendants. Cheng Shin then filed a cross-complaint seeking indemnity from its codefendant and from Asahi Metal Indus. Co., Ltd., the manufacturer of the tube's valve assembly.

The trial court denied Asahi's motion to quash service of summons finding that Asahi had the requisite minimum contacts with California and that jurisdiction was fair and reasonable. The trial court relied on a number of factors in its decision: (1) the significant number of tubes with Asahi valve assemblies sold in California, (2) the number of valve assemblies Asahi sold to Cheng Shin, (3) Cheng Shin's substantial business with California, and (4) Asahi's knowledge that its valve assemblies would be incorporated into tubes sold in California. The supreme court denied Asahi's petition for a writ of mandate to compel the trial court to grant its motion to quash service of summons.

III. A BRIEF HISTORY OF MINIMUM CONTACTS

At one time, the power of a state to adjudicate claims and subject persons to its authority only extended to the state's boundaries.[2] It was not until 1945 that this rule was completely overruled in *International Shoe Co. v. Washington.*[3] That case established a new test whereby a state would have jurisdiction over a party if that party had certain minimum contacts with the forum state.[4] The Court later emphasized that "the relationship between the defendant and the fo-

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2. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

3. International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also* Note, *World-Wide Volkswagen v. Woodson: Minimum Contacts in a Modern World,* 8 PEPPERDINE L. REV. 783, 784 (1981); *See generally* Woods, Pennoyer*'s Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson,* 20 ARIZ. L. REV. 861 (1978).

4. *International Shoe,* 326 U.S. at 316-17. The new minimum contacts test was stated as follows:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Id.

rum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.' "[5]

Over the past several years, the minimum contacts doctrine has been "substantially relaxed."[6] In *McGee v. International Life Ins. Co.*,[7] the United States Supreme Court attributed this broadening of the scope of the minimum contacts doctrine to technological advances in transportation and communication and to the development of interstate and international trade.

Although the minimum contacts requirements have been relaxed, they have not entirely disappeared. In *Hanson v. Denckla,* the Court stated, "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."[8]

In *World-Wide Volkswagen Co. v. Woodson,* a recent products liability case, the United States Supreme Court stressed the importance of foreseeability in determining minimum contacts.[9] The Court held that the "foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[10] Furthermore, the Court argued that a state will not be exceeding its powers under the due process clause, "if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[11]

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5. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (quoting *International Shoe*, 326 U.S. at 317).

6. *World-Wide Volkswagen*, 444 U.S. at 292.

7. McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957). The Court ruled that the California resident met the minimum contacts test.

8. Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing *International Shoe,* 326 U.S. at 319). *Hanson* held that it would be a violation of due process to permit a Florida probate court to assert in personam jurisdiction over a Delaware trustee administering a trust established in Pennsylvania by a testatrix who subsequently moved to Florida. *Hanson*, 357 U.S. at 245-56.

9. *World-Wide Volkswagen*, 444 U.S. at 297.

10. *Id.* The plaintiffs in this action were involved in an automobile accident in Oklahoma while travelling from New York to Arizona in a car they had purchased in New York. *Id.* at 295. The Supreme Court held that Oklahoma lacked jurisdiction over the distributor and retailer because neither corporation sold cars to Oklahoma customers nor sought to serve the Oklahoma market in any way. *Id.* at 299.

11. *Id.* at 297-98. *See* Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The plaintiff in *Gray* was injured in Illinois when a

The courts have distinguished between local retailers or distributors and major manufacturers.[12] The courts consider whether the distributor or manufacturer "benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents."[13] Therefore, a manufacturer may be subject to a forum's jurisdiction when a retailer (or maker of component parts) is not, because the manufacturer serves a broader market and it derives a substantial benefit from serving that market.[14]

In addition to the minimum contacts principles discussed above, California has three prerequisites which must be met before a court may properly assert jurisdiction over a person or corporation.[15] There must be adequate notice and the opportunity to be heard, some relationship between the state and the party to establish that the court is competent to hear the case, and compliance with any state-imposed jurisdictional requirements (such as the statutory procedure for service of process).[16] The California long arm statute sets guidelines for one of these state-imposed jurisdictional requirements.[17] In *Asahi,* the court considered the foregoing principles in order to decide whether to assert jurisdiction over the Japanese corporation.

IV. MAJORITY OPINION

In its analysis of Asahi's contacts with California, the court first pointed out that Asahi has no offices, property or agents in California nor does it solicit business or make direct sales in California.[18] However, the court argued that because Asahi knew that some of the valve assemblies it sold to Cheng Shin would be incorporated into

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hot water heater made in Pennsylvania exploded. The court allowed the assertion of jurisdiction over the Ohio manufacturer of the heater's safety valve even though the valve was not directly sold in Illinois. The court held that the valve company derived a substantial benefit from the sales of the water heaters in Illinois and indirectly benefitted from the protection of the Illinois law.

12. *Gray,* 22 Ill. 2d at 432, 176 N.E.2d at 761.

13. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 285 (3d Cir. 1981).

14. Nelson v. Park Indus., Inc., 717 F.2d 1120, 1125-26 (7th Cir. 1983). It was held that Wisconsin could assert jurisdiction over a Hong Kong manufacturer and distributor because they were aware of the retailer's distribution scheme and derived economic benefit from the sales in Wisconsin. *Id.* at 1126-27.

15. 1 B. WITKIN, *California Procedure,* Jurisdiction § 76 (1970). *See also* 16 CAL. JUR. 3D *Courts* §§ 76-83 (1983).

16. WITKIN, *supra* note 15, at 601.

17. Section 410.10 of the California Code of Civil Procedure permits California courts to exercise jurisdiction on any basis not inconsistent with the California or United States constitutions. CAL. CIV. PROC. CODE § 410.10 (West 1973). *See generally* Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard,* 95 HARV. L. REV. 470 (1982); Comment, *Asserting Jurisdiction over Nonresident Corporations on the Basis of Contractual Dealings: A Four Step Proposal,* 12 PAC. L.J. 1039 (1981).

18. *Asahi,* 39 Cal. 3d at 48, 702 P.2d at 549, 216 Cal. Rptr. at 391.

products to be sold in California, it should reasonably have anticipated being haled into the California courts.[19]

Additionally, the court emphasized that Asahi purposefully availed itself of the California market and the benefits and protections of California's laws.[20] The court was evidently not impressed by the dissent's speculation that products sold in California represented only .25% of Asahi's gross income. Rather, the court was impressed by the fact that this .25% equalled approximately 270,000 valves sold in California between 1978 and 1982.[21] The court stressed the fact that *World-Wide Volkswagen* did not require that the defendant endeavor to sell its product in the forum state. Rather, "[i]t required only that the defendant 'delivers its products into the stream of commerce with *the expectation* that they will be purchased by consumer in the forum State.' "[22]

The court noted further that a critical fact is whether a defendant is aware of the distribution system and "[i]f they were aware, they were indirectly serving and deriving economic benefits from the national retail market established by [the retailer], and they should reasonably anticipate being subject to suit in any forum within that market where their product caused injury."[23] The court found that Asahi was aware of the fact that a substantial number of its valve systems were being used in tubes sold in California. Therefore, Asahi had the required minimum contacts with California.[24]

The Court concluded its inquiry with a discussion of whether asserting jurisdiction is fair and reasonable. If minimum contacts exist, the due process clause also requires the court to determine whether the jurisdiction is fair and reasonable.[25] The court must balance the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally

19. *Id.* at 48-49, 702 P.2d at 549-50, 216 Cal. Rptr. at 391-92. *See World-wide Volkswagen*, 444 U.S. at 297.

20. *Asahi*, 39 Cal. 3d at 48-49, 702 P.2d at 549-50, 216 Cal. Rptr. at 391-92. *See* Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155, 159-60 (9th Cir. 1980).

21. *Asahi*, 39 Cal. 3d at 49 n.5, 702 P.2d at 550 n.5, 216 Cal. Rptr. at 392 n.5.

22. *Id.* at 50-51, 702 P.2d at 551, 216 Cal. Rptr. at 393 (emphasis in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 298). *See also* Volkswagenwerk, A. G. v. Klippan, GMBH, 611 P.2d 498 (Ala. 1980) (the stream of commerce theory was applied to manufacturers of components parts, seat belts).

23. *Asahi*, 39 Cal. 3d at 51, 702 P.2d at 551, 216 Cal. Rptr. at 393 (quoting *Nelson*, 717 F.2d at 1126). *See also Plant Food Co-op*, 633 F.2d at 159-60.

24. *Asahi*, 39 Cal. 3d at 53-54, 702 P.2d at 553, 216 Cal. Rptr. at 395.

25. *Id.* at 52, 702 P.2d at 552, 216 Cal. Rptr. at 394. *See World-Wide Volkswagen*, 444 U.S. at 292.

and the interrelated interest of the state in assuming jurisdiction.[26] The court argued that California has a strong interest in protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards. The court held that the inconvenience to Asahi in having to defend an action in California was outweighed by Cheng Shin's interest in litigating all its claims in California and by California's interest in protecting its citizens.[27]

V. THE DISSENT

In the dissent, Justice Lucas emphasized the fact that in order to subject a defendant to in personam jurisdiction, the defendant must purposefully avail itself of the privilege of conducting business in the forum state.[28] He stated that nowhere in the record was it claimed that Asahi had any direct contact with California or any intent to serve that market directly. Also, because Asahi only received approximately .25% of its total revenue from California, it was inconceivable to Lucas that Asahi should have anticipated being haled into a California court.[29] Finally, Lucas argues that Asahi and Cheng Shin entered into their contract outside of California. Because Zurcher settled his claim with Cheng Shin before the jurisdiction issue came before this court, Justice Lucas argues that the overburdened courts should be deciding cases involving California citizens rather than disputes for indemnity between two alien corporations.[30]

VI. CONCLUSION

The court widened the minimum contacts doctrine to include manufacturers that have a reasonable expectation that their product will end up in the California forum via distribution channels. Therefore, California in personam jurisdiction continues to expand with modern technology.

JOHN THOMAS MCDOWELL

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26. *See* Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 899, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969). The plaintiff was injured in California by a product manufactured in Ohio. The assertion of jurisdiction by a California court was upheld because the manufacturer sold its products to an Ohio distributor which had plants in San Francisco. Jurisdiction was deemed fair and reasonable because the plaintiff, the defective product and all the witnesses were located in California. *Id.* at 905-07, 458 P.2d at 65-67, 80 Cal. Rptr. at 121-123.

27. *Asahi*, 39 Cal. 3d at 53-54, 702 P.2d at 553, 216 Cal. Rptr. at 395.

28. *Id.* at 54, 702 P.2d at 554, 216 Cal. Rptr. at 396 (Lucas, J., dissenting). *See Worldwide Volkswagen*, 444 U.S. at 295-97.

29. *Asahi*, 39 Cal. 3d at 54-55, 702 P.2d at 554, 216 Cal. Rptr. at 396 (Lucas, J., dissenting).

30. *Id.* at 56, 702 P.2d at 555, 216 Cal. Rptr. at 397.

C. *When a complaint is amended to charge a doe defendant with a new cause of action arising from different operative facts, the new action commences, for purposes of the three year service and return requirement, on the date the amended complaint is filed:* **Barrington v. A. H. Robins Co.**

In *Barrington v. A. H. Robins Co.*, 39 Cal. 3d 146, 702 P.2d 563, 216 Cal. Rptr. 405 (1985), the court determined that the relation-back doctrine may apply to the statute which requires a defendant to be served with a summons and complaint within three years from the filing of the complaint.

The petitioner, Cheryl Barrington, alleged that she was injured in December 1977. On July 3, 1979, she filed suit alleging causes of action against her doctor, the manufacturer of the drug Darvon, and does 1 through 40 for medical malpractice and the negligent failure to warn of the dangers involved in taking Darvon. In October 1979, the petitioner substituted A. H. Robins Company for doe 40. On February 29, 1980, she filed a first amended complaint which added an entirely new cause of action only against Robins. This new cause of action alleged that the cause of petitioner's injuries was a defective "Dalkon Shield" intrauterine device manufactured by Robins.

The service and return of the summons and amended complaint on Robins was not made until July 19, 1982. This was two years and six months after the filing of the amended complaint, but three years and seven weeks after the filing of the original complaint. The trial court sustained Robins' motion to dismiss the action under former section 581a of the California Code of Civil Procedure, which required that the summons and complaint be served and returned within three years from the filing of the complaint. CAL. CIV. PROC. CODE § 583.210 (West 1985) (current section). The trial court held that a doe defendant must be served with process within three years from the original commencement of the suit.

Although the court agreed with many of the rules relied upon by the trial court, it reversed the order dismissing the petitioner's amended complaint due to the lower court's failure to apply the relation-back doctrine to this case. The court agreed that an action commences for purposes of section 581a on the date of the filing of the complaint. It also conceded that this rule applies when the defendant was named in the original complaint under a fictitious name. However, the court held that even though defendant Robins was named

in the original complaint as a fictitious defendant and was later added as a named defendant, the amended complaint relied on different operative facts than the original complaint. Therefore, the court determined that the relation-back doctrine must be considered in deciding whether an amended complaint relates back to the original complaint, thus requiring the defendant to be served with the amended complaint within three years from the filing of the original complaint.

The relation-back doctrine is stated in the following rule:

> An amended complaint relates back to the original complaint and thus avoids the statute of limitations as a bar against named parties substituted for fictitious defendants, if it
> (1) rests on the same general set of facts as the original complaint; and (2) refers to the same accident and same injuries as the original complaint.

Barrington, 39 Cal. 3d at 151, 702 P.2d at 565, 216 Cal. Rptr. at 407 (citing *Smeltzley v. Nicholson Manufacturing Co.,* 18 Cal. 3d 932, 936-37, 559 P.2d 624, 626-27, 136 Cal. Rptr. 269, 271-72 (1977)). *See also* 3 B. Witkin, *California Procedure,* Pleading §§ 1035, 1066, 1073, 1080 (1971). Although the relation-back doctrine traditionally only applied to the statute of limitations for the filing of the complaint, the supreme court extended the doctrine to apply to the service and return requirements of section 581a (now section 583.210).

The court agreed with the petitioner's argument that the amended complaint was based on different operative facts than the original complaint, and therefore did not relate back to the original complaint. Since the amended complaint did not relate back to the original complaint the action in the amended complaint did not commence for purposes of the statute of limitations until the amended complaint was filed.

The court pointed out that because the petitioner could have filed the amended complaint as a completely separate action, she should not be penalized for merely taking advantage of the liberal joinder rules. Furthermore, the court based its decision on the strong public policy that seeks to dispose of litigation on the merits rather than on procedural grounds.

JOHN THOMAS MCDOWELL

D. *A defective order granting a new trial must be corrected within the sixty-day time period in which it has to be granted, and such order must expressly state that it was granted upon the ground of insufficiency of the evidence; otherwise, an appellate court will vacate the order:* **Sanchez-Corea v. Bank of America.**

I. INTRODUCTION

In *Sanchez-Corea v. Bank of America*,[1] the supreme court reversed an order granting a new trial to the defendant, Bank of America. The court reasoned that the first order did not state the grounds upon which a new trial was granted, and the second order was filed after the sixty-day period provided by the California Rules of Civil Procedure.

II. FACTUAL BACKGROUND

The plaintiffs sued Bank of America for breach of contract, fraud, intentional infliction of emotional distress and several other theories. The trial court awarded the plaintiffs a judgment of over two million dollars. Thereafter, the defendant timely moved the court for a new trial on six grounds: "(1) irregularity in the proceedings of the jury which prevented the defendant from having a fair trial, (2) misconduct of the jury, (3) excessive damages, (4) insufficiency of the evidence, (5) a verdict against the law, and (6) error in the law to which defendant excepted during trial."[2]

Thereafter and exactly sixty days after the notice of entry of judgment, the trial court granted the defendant's motion for a new trial. However, this first order granting a new trial, dated November 27, 1979, stated no grounds upon which the new trial was granted. Later on December 4, 1979, sixty-seven days after the notice of entry of judgment, the trial court filed a second order stating that the ground

1. 38 Cal. 3d 892, 701 P.2d 826, 215 Cal. Rptr. 679 (1985). The opinion was authored by Justice Reynoso with Chief Justice Bird and Justices Mosk, Broussard, Grodin, and Anderson concurring. There was a separate dissenting opinion by Justice Kaus. Justice Anderson was assigned by the Chairperson of the Judicial Council.

2. *Id.* at 898, 701 P.2d at 830, 215 Cal. Rptr. at 683. California statutory law provides that a verdict may be vacated and a new trial granted for the reasons stated herein: (1) Improper proceedings orders, or abuses of discretion of the court wherein the right to a fair trial is impaired; (2) jury misconduct; (3) unavoidable accident or surprise; (4) newly discovered evidence that was not reasonably available at trial; (5) damages are excessive or inadequate; (6) evidence was insufficient to justify the decison; (7) error in the law occurring at the trial. CAL. CIV. PROC. CODE § 657 (West 1976).

for the new trial was based upon insufficiency of the evidence, which was only one of the defendant's six assertions for a new trial. The plaintiffs appealed the order granting a new trial asserting first, that the original order dated November 27, 1979, was defective for failure to state the *grounds* upon which a new trial was granted,[3] and second, that the subsequent order dated December 4, 1979, was invalid because the court filed it after sixty days from notice of entry of judgment.[4]

III. THE COURT'S ANALYSIS

The first issue addressed by the court was whether the first order the trial court granted was void or defective for failure to state the grounds upon which a new trial was granted. In *Mercer v. Perez,*[5] the supreme court outlined circumstances in which an order granting a new trial is void: (1) when a new trial is not available in the proceeding; (2) when a new trial is granted on a ground not prescribed by statute; (3) when a notice of intention is filed too early, too late, or it is not served upon an adverse party, or (4) when a new trial is granted after the sixty-day period prescribed by law. The court in *Mercer* held that the order was not void because it was not granted under any of the listed circumstances in which an order is declared void; the order merely did not state the grounds upon which it was granted as required by statute.[6] The supreme court has stated, "It follows that a failure of the trial judge to specify any ground . . . cannot be held to render the order void from its inception."[7] However, the *Mercer* court reversed the order, not because it was void, but because "the record does not support the order."[8] Following its holding in *Mercer,* the court concluded that the trial court's first order granting Bank of America a new trial was not void, rather it was merely defective for failure to state the ground upon which it was granted.[9]

The court next addressed the second issue of whether the first order's defect was cured by the second order, which stated both the grounds and reasons for granting a new trial. The court concluded

3. California Rules of Civil Procedure require that "[w]hen a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." CAL. CIV. PROC. CODE § 657 (West 1976).

4. Section 660 of the California Civil Procedure Code provides that "the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court." *Id.* § 660.

5. Mercer v. Perez, 68 Cal. 2d 104, 118, 436 P.2d 315, 324, 65 Cal. Rptr. 315, 324 (1968).

6. *Id.* at 118, 436 P.2d at 324, 65 Cal. Rptr. at 324.

7. Treber v. Superior Court, 68 Cal. 2d 128, 134, 436 P.2d 330, 334, 65 Cal. Rptr. 330, 334 (1968).

8. *Mercer,* 68 Cal. 2d at 119, 436 P.2d at 325, 65 Cal. Rptr. at 325.

9. *Sanchez-Corea,* 38 Cal. 3d at 901, 701 P.2d at 832, 215 Cal. Rptr. at 685.

that the second order did not cure the defect of the first because section 657 of the Code of Civil Procedure allows only the specification of reasons to be filed ten days after the order is granted and not the grounds.[10] The grounds must be stated at the time the trial court grants the order. In the case at hand, the grounds for granting a new trial were stated along with the reasons in the second order, which was filed after the sixty-day time period prescribed by section 660.[11] Thus, the defect in the first order was not cured before the sixty-day period expired.

Lastly, the court addressed the issue of whether the defective order should have been affirmed upon appellate review. Section 657 of the California Code of Civil Procedure outlines when an appellate court is required to affirm an order:

> [I]f it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion . . . .[12]

The second order of the trial court stated that the grounds upon which a new trial was granted was insufficiency of the evidence. Pursuant to section 657, insufficiency of the evidence is an exception to the general rule that an order should be affirmed. Thus, the court could not affirm the trial court's order based upon the ground of insufficiency of the evidence.

Thereafter, the court examined the other grounds for granting a new trial and concluded that none of them warranted affirming the trial court's order. Therefore, the court reversed the order granting Bank of America a new trial and reinstated the two million dollar judgment against it.

IV. CONCLUSION

The holding of the supreme court in *Sanchez-Corea* reaffirms the rule that an order granting a new trial is not void because it fails to

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10. Section 657 states that
> if the motion is granted it *must* state the ground or grounds relied upon by the court, and *may* contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specifications of reasons in writing with the clerk.

CAL. CIV. PROC. CODE § 657 (West 1976) (emphasis added).

11. *See supra* note 4.

12. CAL. CIV. PROC. CODE § 657 (West 1976).

state the grounds upon which it was granted. However, it should be noted that the order is considered defective. For the defect to be cured, it must be done within a sixty-day time period after notice of entry of judgment. In *Sanchez-Corea,* the ground for the order was stated after sixty days, thus, the defect was not cured. Furthermore, the appellate court could not affirm the order because the ground upon which it was granted, insufficiency of evidence, fell within one of the exceptions to the statutory rule that an order should be affirmed whether or not the grounds were stated in the order. Therefore, following the Code of Civil Procedure, the court reversed the order granting a new trial and reinstated the judgment of the trial court.

MISSY KELLY BANKHEAD

E. *The legislature constitutionally granted concurrent jurisdiction over the claims of state civil service employees to the State Personnel Board and the agencies operating under the Fair Employment and Housing Act:* State Personnel Board v. Fair Employment & Housing Commission.

I. INTRODUCTION

State Personnel Board v. Fair Employment & Housing Commission[1] considered jurisdictional conflict between state agencies. The question posed was whether the agencies charged with administering the California Fair Employment and Housing Act[2] (hereinafter FEHA or the Act) could exercise jurisdiction over state civil service employees. The court utilized a two-fold analysis in finding that the Department of Fair Employment and Housing (hereinafter DFEH or Department) and the Fair Employment and Housing Commission (hereinafter FEHC or Commission) could exercise concurrent juris-

1. 39 Cal. 3d 422, 703 P.2d 354, 217 Cal. Rptr. 16 (1985). Justice Broussard authored the majority opinion with Justice Kaus and Chief Justice Bird concurring. Justice Grodin wrote a separate concurring opinion with Justice Gilbert, assigned by the Chairperson of the Judicial Council, concurring. Justices Lucas and Mosk each wrote separate dissenting opinions.

2. CAL. GOV'T CODE §§ 12900-96 (West 1980). The court explained the history of FEHA as follows:

> In 1981, the Fair Employment Practice Act and the Rumford Fair Housing Act were combined to form the Fair Employment and Housing Act (§ 12900 et seq.), pursuant to the Governor's Reorganization Plan No. 1 (Stats. 1980, ch. 992, p. 3138). This change abolished the Division of Fair Employment Practices and the Fair Employment Practices Commission, both within the Department of Industrial Relations, and recreated them as the Department of Fair Employment and Housing and the Fair Employment and Housing Commission, respectively.

State Personnel Bd., 39 Cal. 3d at 426 n.1, 703 P.2d at 355 n.1, 217 Cal. Rtpr. at 17 n.1.

diction with the State Personnel Board (hereinafter the Board). First, the court held that the legislature did intend to include civil service employees within the coverage of the Act.[3] Second, the court found that it was constitutional for the legislature to so include the employees.[4]

II. FACTS

The three real parties in interest applied for positions as traffic officers with the California Highway Patrol after the Board had announced openings for cadets. Although they passed all examinations, the three were all subsequently disqualified on the basis of the medical standards, which the Board had established for the position.[5] The rejected applicants sent protest letters to the Board. These letters were treated as "medical appeals," as opposed to complaints of discrimination on the basis of physical handicap. Each of the parties also filed timely complaints with the DFEH.

The Department believed that the Board and the California Highway Patrol had committed an unfair employment practice and issued accusations[6] charging discrimination on the basis of physical handicap. Before a hearing was held, the Board's motion was granted which permanently enjoined the DFEH and FEHC from exercising jurisdiction over such civil service claims. The superior court based its decision on article VII of the California Constitution,[7] interpreting it as a grant of exclusive jurisdiction to the Board for all matters involving state civil service employees. However, subsequent to the trial court's judgment, the California Supreme Court issued a deci-

3. *Id.* at 428-35, 703 P.2d at 357-62, 217 Cal. Rptr. at 19-24.

4. *Id.* at 435-44, 703 P.2d at 362-68, 217 Cal. Rptr. at 24-30.

5. The applicants' reasons for disqualification were mild colorblindness, early changes in thoracic spine which is characteristic of hypertrophic osteoarthritis, and previous intestinal bypass surgery to alleviate a weight problem. *Id.* at 427, 703 P.2d at 356, 217 Cal. Rptr. at 18.

6. The DFEH may issue an "accusation" if it determines that the complaint is valid and cannot be resolved through conciliation. CAL. GOV'T CODE § 12965(a) (West 1980). The DFEH acts as prosecutor on the accusation, the equivalent of a civil complaint, and argues the complainant's case before the FEHC. Alternatively, the DFEH can issue a "right to sue" letter allowing the complainant to pursue a private court action under the FEHA. *Id.* § 12965(b).

7. Article VII provides in relevant part: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." CAL. CONST. art. VII, § 1(b). Also, "[t]he board shall enforce the civil service statutes and . . . shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions." CAL. CONST. art. VII, § 3(a).

sion in *Pacific Legal Foundation v. Brown*,[8] in which it rejected the "exclusive jurisdiction" interpretation of article VII relied on by the trial court.

III. MAJORITY'S ANALYSIS

A. Concurrent Jurisdiction Established

The court began its inquiry by providing an overview of the Fair Employment and Housing Act.[9] Initially, the court described the Act's basic premise:

> The FEHA is a comprehensive scheme for the realization of the state's public policy 'to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap,[10] medical condition,[11] marital status, sex or age.'[12]

In order to carry out this policy, the Act created two administrative bodies. The first agency, the DFEH, performs investigatory, conciliatory and prosecutorial functions in discrimination complaints.[13] The second agency, the FEHC, performs adjudicatory and rulemaking functions.[14] The FEHC has several remedial powers including ordering reinstatement, hiring, promotion, and back pay.[15] Finally, any

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8. Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981). *See generally California Supreme Court Survey*, 9 PEPPERDINE L. REV. 233 (1981).

9. For an overview of the FEHA, presented in a comparative setting, see Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983) (a comparison of Federal Title VII with FEHA), and Saperstein & Siniscalco, *CEB Forum: Employment discrimination claims*, CALIFORNIA LAWYER, Nov. 1982, at 30 (survey article regarding Federal and California discrimination practices, including FEHA claims).

10. CAL. GOV'T CODE § 12926(h) (West 1980) states the following: " 'Physical handicap' includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special educational or related services." *Id.*

The following materials further define the scope of the term "handicap" as it relates to employment: American Nat'l. Ins. Co. v. Fair Employment & Housing Comm'n, 32 Cal. 3d 603, 610, 651 P.2d 1151, 1155, 186 Cal. Rptr. 345, 349 (1982) ("handicap" includes physical conditions which may have a disabling effect in the future); Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d 791, 797, 175 Cal. Rptr. 548, 551 (1981); CAL. ADMIN. CODE tit. 2, R. 7293.8(d) (1985) (employer may not reject individual on a risk of future injury, provided the individual can perform the job over a reasonable length of time); and CAL. ADMIN. CODE tit. 2, R. 7286.7(a) (1985) (employer may exclude handicapped persons on the basis of class only if all, or substantially all, of the persons in that class are unable to perform the job duties safely and efficiently).

11. CAL. GOV'T CODE § 12926(f) (West 1980), states the following: " 'Medical condition' means any health impairment related to or associated with a diagnosis of *cancer*, for which a person has been rehabilitated or cured, based on competent medical evidence." *Id.* (emphasis added).

12. *State Personnel Bd.*, 39 Cal. 3d at 428, 703 P.2d at 357, 217 Cal. Rptr. at 19 (quoting CAL. GOV'T CODE § 12920 (West 1980)).

13. CAL. GOV'T CODE § 12930 (West 1980).

14. *Id.* § 12935.

15. *Id.* § 12970(a). For an explanation regarding a relevant Civil Service Act

FEHC order is reviewable by a competent superior court.[16]

The court addressed four areas in order to ascertain whether the legislature intended to include civil service employees within the framework of the Act. First, the court held that the language of the FEHA's section 12926(c) "clearly manifests an intent to include both public and private employers within its scope."[17] In so holding, the court rejected the Board's argument that it alone had jurisdiction over civil service employees while the DFEH and FEHC only had jurisdiction over "exempt" noncivil service employees.[18] Second, the court held that the Act's record keeping and reporting requirements evidenced a legislative intent to include the state civil service.[19] Third, the court found that the Board had, for twenty years,[20] acknowledged the power of the DFEH and FEHC to enforce the Act within the state civil service.[21] As an example, the Board acknowledged concurrent jurisdiction, in its own 1976 investigator handbook, by emphasizing the continuing policy of not precluding an employee or applicant from filing a complaint with the California Fair Employment Practices Commission.[22]

Under a fourth area of analysis, the court held that it is not "frivolous" to make two forums available to discrimination complainants since the FEHA and the Civil Service Act, under which the Board operates, are different and separate pieces of legislation. The court

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amendment, which grants the Board similar authority, see *infra* note 29 and accompanying text.

16. CAL. CIV. PROC. CODE § 1094.5 (West 1980).

17. *State Personnel Bd.*, 39 Cal. 3d at 429, 703 P.2d at 358, 217 Cal. Rptr. at 20. CAL. GOV'T CODE § 12926(c) (West 1980), provides in pertinent part: " 'Employer' . . . includes . . . the state or any political or civil subdivision thereof . . . ." *Id.*

18. *State Personnel Bd.*, 39 Cal. 3d at 429 n.6, 703 P.2d at 358 n.6, 217 Cal. Rptr. at 20 n.6. The court noted that since there are 130,000 classified civil service employees, and 89,000 exempt employees in the state, "[i]t is inconceivable that the Legislature could have silently excluded 130,000 servants from its contemplation when it provided that 'state' employees would be covered by the Act." *Id.*

19. *Id.* at 430, 703 P.2d at 358, 217 Cal. Rptr. at 20. CAL. GOV'T CODE § 12946 (West 1980), requires the Board to retain employment records for one year. The court deemed this requirement meaningful only if the Board's employment decisions were reviewable by DFEH and FEHC. Furthermore, CAL. GOV'T CODE § 19702.5(a)(b) (West 1980), requires the Board to submit affirmative action plans and statistical surveys of employees to the Commission. The court held that these requirements would be "superfluous" unless the FEHC had authority to enforce the Act over the state civil service.

20. The twenty year span started with the passage of the Fair Employment Practices Act in 1959 (*see supra* note 2 regarding the FEHA's history), and ended with the initiation of the case at bar in 1979.

21. *State Personnel Bd.*, 39 Cal. 3d at 430, 703 P.2d at 359, 217 Cal. Rptr. at 21.

22. *Id. See supra* note 2 for an explanation of the FEHA's history.

found that the two laws differ in purpose, enforcement services, type of forum, and procedural rights.

The court began this phase of its analysis by outlining the differing purposes:

> The purpose of the Civil Service Act is to ensure that appointments to state office are made not on the basis of patronage, but on the basis of merit, in order to preserve the economy and efficiency of state service . . . . The purpose of the FEHA is to provide effective remedies for the vindication of constitutionally recognized civil rights, and to eliminate discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex and age.[23]

The court next detailed the different enforcement services available under the two acts. One key feature among many[24] stems from the divergent character of the investigating bodies themselves. When the Board investigates an appeal, the process is handled by the same agency charged with discrimination. However, when there is a DFEH investigation, the Department acts as a neutral, outside investigatory agency.[25] This basic split serves to create two essentially different forums; the FEHC is a disinterested body, whereas "the Board occupies the roles of both defendant and judge."[26]

Finally, the court summarized the different procedural rights afforded under the acts. First, complainants under the FEHA have a private right of action in superior court.[27] This right is not granted under the Civil Service Act. Second, the court noted that at a Board hearing there is no right to cross-examination or direct examination of witnesses and the normal rules of evidence do not apply.[28] Lastly, at the time of the real parties' claims before the Board, the Civil Service Act did not provide for an award of back pay and compensatory

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23. *State Personnel Bd.*, 39 Cal. 3d at 432, 703 P.2d at 360, 217 Cal. Rptr. at 22. The purpose of the Civil Service Act is found in CAL. GOV'T CODE § 18500 (West 1980). The purpose of the FEHA is found in CAL. GOV'T CODE §§ 12920-12921 (West 1980), and in the California Constitution. CAL. CONST. art. I, § 8.

24. Two specific services available under the FEHA, which have no counterpart under the Civil Service Act, are (1) that the Department bears the expense of investigating, conciliating, and where necessary, prosecuting the action on behalf of the claimant (CAL. GOV'T CODE §§ 12961-12963, 12963.1-12963.7 (West 1980)), and (2) that if the Commission decides in the claimant's favor, the Department must conduct a compliance review to ensure the employer is fully obeying the Commission's order. *Id.* § 12973.

25. *State Personnel Bd.*, 39 Cal. 3d at 432, 703 P.2d at 360, 217 Cal. Rptr. at 22.

26. *Id.* at 434, 703 P.2d at 361, 217 Cal. Rptr. at 23.

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

28. *State Personnel Bd.*, 39 Cal. 3d at 433, 703 P.2d at 361, 217 Cal. Rptr. at 23. CAL. ADMIN. CODE tit. 2, R. 547.32(f) (1985), governs the procedures at the appropriate Board hearing. Regarding the court's statement that the rules of evidence do not apply at Board hearings, see Sommer, *Rules of Evidence in Administrative Hearings*, JUDGES JOURNAL, Summer 1983, at 34 (refutes a literal interpretation of the phrase "the rules of evidence do not apply in administrative hearings," stating that even though the exclusionary rules are inapplicable, judges do not have a "carte blanche" to ignore such rules).

damages.[29]

B. The Legislature's Inclusion of State Civil Service Employees Within the FEHA Found Constitutional

The court relied upon its previous decision in *Pacific Legal Foundation*[30] to dismiss the Board's argument that article VII of the California Constitution[31] grants it exclusive jurisdiction over civil service employees. The Board argued that an exercise of jurisdiction by DFEH and FEHC over state employees threatened to "fragment and fractionalize" the merit principle which had been constitutionally delegated to the Board to implement.

In *Pacific Legal Foundation,* the court held that collective bargaining under the State Employer-Employee Relations Act (SEERA) did not conflict with the general merit principle embodied in article VII.[32] After holding that the sole aim of article VII was to enshrine the merit principle in the constitution beyond the reach of political incumbents, the court further stated that "the constitutional provision left the legislature with a 'free hand' to fashion 'laws relating to personnel administration for the best interests of the state.' "[33] Moreover, the court held that the legislature was not precluded from establishing other agencies, besides the Board, "whose specialized watchdog functions might also, in some cases, involve the consideration of . . . disciplinary action."[34]

Following the *Pacific Legal Foundation* logic, the court held that "[j]ust as the 'merit principle' is not infringed upon by the institution of collective bargaining, so it is unharmed by the watchdog functions of the fair employment agencies. Indeed the principle of nondiscrim-

29. Subsequent to the real parties' claims, the Civil Service Act was amended to give the Board authority to issue cease and desist orders and to order hiring, reinstatement, promotion, back pay and compensatory damages. *See* 1984 Cal. Stat. ch. 1754, § 6; CAL. GOV'T CODE § 19702(e) (West Supp. 1985). However, as the court pointed out, "The fact that the Legislature has granted statutory powers to the Board that are already possessed by the Commission (§ 12970) without removing them from the Commission is further evidence of the Legislature's intent to provide parallel, not exclusive forums." *State Personnel Bd.,* 39 Cal. 3d at 434 n.13, 703 P.2d at 361 n.13, 217 Cal. Rptr. at 23 n.13.

30. *See supra* note 8 and accompanying text.

31. *See supra* note 7 and accompanying text.

32. *Pacific Legal Found.,* 29 Cal. 3d at 184-85, 624 P.2d at 1224, 172 Cal. Rptr. at 496.

33. *Id.* at 183, 624 P.2d at 1223, 172 Cal. Rptr. at 495.

34. *Id.* at 198-99, 624 P.2d at 1233, 172 Cal. Rptr. at 505. The first of these "watch dog" agencies discussed was the FEHC. *Id.*

ination reinforces the merit principle."[35] The court concluded that the legislature is not restrained by article VII from establishing other agencies, such as those established under the FEHA, whose jurisdiction may overlap that of the Board.[36] Hence, the Board's jurisdiction is not exclusive and accommodation with other agencies is required.[37]

The court refused to distinguish *Pacific Legal Foundation* from the case at bar on the issue of actual conflict. The court rejected the Board's claim that the two cases were different because there was an actual conflict in this case while none existed in the previous one. The court held that since the FEHC was injunctively stopped from adjudicating the real parties' claims, the two cases were parallel in the fact that there was no actual conflict, that is, no conflicting adjudications.[38] Thus, the mere potentiality of conflict was not sufficient to prohibit the exercise of concurrent jurisdiction.

Finally, the court noted that the case presented no election of remedies problem. The court viewed the operations of the two agencies, and the public policies behind the respective acts, as creating two independently viable forums.[39]

IV. CONCURRING OPINION

Justice Grodin, with Justice Gilbert concurring, wrote a separate opinion which addressed two issues. First, Justice Grodin declared it unnecessary to resolve the issue of election of remedies[40] since the Board's treatment of the real parties' claims[41] effectively avoided any problem of duplicate adjudications.[42] Second, while echoing the majority's view that a mere potential conflict in adjudications is insufficient to preclude the FEHC from exercising jurisdiction,[43] Justice Grodin viewed cases in which hiring criteria are attacked with regard

35. *State Personnel Bd.*, 39 Cal. 3d at 438-39, 703 P.2d at 364, 217 Cal. Rptr. at 26.

36. *Id.* at 439, 703 P.2d at 365, 217 Cal. Rptr. at 27. One insightful collateral comment, which evidences the fact that the court's result naturally flowed from the *Pacific Legal Found.* holding, appears in a 1983 law review article: Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055, 1059 n.32 (1983).

37. *State Personnel Bd.*, 39 Cal. 3d at 440, 703 P.2d at 366, 217 Cal. Rptr. at 28.

38. *Id.* at 441-43, 703 P.2d at 366-67, 217 Cal. Rptr. at 28-29.

39. *Id.* at 443-44, 703 P.2d at 368, 217 Cal. Rptr. at 30.

40. Justice Grodin viewed the court as being in conflict over whether a claimant may utilize the FEHA procedures after being unsuccessful under the Board's process since "[t]he majority imply [sic] that he may do so . . . while Justice Lucas in his dissent assails such a procedure . . . ." *Id.* at 444-45, 703 P.2d at 369, 217 Cal. Rptr. at 31 (Grodin, J., concurring).

41. The Board treated the protests as "medical appeals" rather than as complaints of discrimination on the basis of physical handicap. If they had done the latter, it would have paralleled the FEHC classification. *Id.* at 426-27, 703 P.2d at 356, 217 Cal. Rptr. at 31.

42. *Id.* at 444-45, 703 P.2d at 369, 217 Cal. Rptr. at 31.

43. *See supra* note 38 and accompanying text.

to a whole class, such as the case at bar, as posing a greater potential conflict than in cases where the issue is individual discrimination.[44]

V. DISSENTING OPINIONS

A. Justice Lucas' Dissent

The basic thrust of Justice Lucas' dissent is summarized by the following passage: "To allow rejected civil service applicants the opportunity to pursue [the Board's] elaborate review procedure *plus*, if unsuccessful, the luxury of initiating an entirely new administrative proceeding before the [FEHC], based on identical claims of employment discrimination, gives these applicants an undeserved second bite at the administrative apple."[45] The Justice found, contrary to the majority, that the administrative procedures under both acts were essentially equal[46] and that the Board's past actions did not evidence an acknowledgement of concurrent jurisdiction.[47] Moreover, Justice Lucas viewed the Board's jurisdiction as exclusive since its power to set hiring criteria is "inextricably intertwined" with its constitutional authority to administer the merit principal.[48]

B. Justice Mosk's Dissent

In a brief dissent, Justice Mosk stated that since the real parties in interest are not suffering discrimination on the basis of physical handicap, as defined by California Government Code section 12940,[49] the majority's lengthy analysis is unwarranted.[50] Finally, Justice Mosk "editorialized" that this case should have been settled by interagency agreement and not through the protracted litigation of juris-

44. Where the hiring criteria are at issue, the Board's approval of those criteria is, at least by implication, a determination that they are job related. Thus, there is a heightened potential for conflict if the FEHC exercises its jurisdiction in determining whether the criteria are discriminatory. *State Personnel Bd.*, 39 Cal. 3d at 445, 703 P.2d at 369, 217 Cal. Rptr. at 31 (Grodin, J., concurring).

45. *Id.* at 446, 703 P.2d at 370, 217 Cal. Rptr. at 32 (Lucas, J., dissenting) (emphasis in original).

46. *Id.* at 449, 703 P.2d at 371-72, 217 Cal. Rptr. at 33-34.

47. *Id.* at 449-50, 703 P.2d at 372, 217 Cal. Rptr. at 34.

48. *Id.* at 450-51, 703 P.2d at 373, 217 Cal. Rptr. at 35.

49. *See supra* note 10 and accompanying text.

50. *State Personnel Bd.*, 39 Cal. 3d at 452, 703 P.2d at 374, 217 Cal. Rptr. at 36 (Mosk, J., dissenting). For an elaboration on Justice Mosk's analysis, see his dissent in American National Ins. Co. v. Fair Employment & Housing Comm'n, 32 Cal. 3d 603, 611-20, 651 P.2d 1151, 1156-62, 186 Cal. Rptr. 345, 350-56 (1982) (Mosk, J., dissenting). For a summary of *American National Ins. Co.*, see *California Supreme Court Survey*, 10 PEPPERDINE L. REV. 835 (1983).

dictional "arm-wrestlings."[51]

VI. IMPACT

The court's basic decision, regarding concurrent jurisdiction, gains importance in light of the increasing size and scope of California's administrative agencies. On a practical level, the holding may help clarify the role of the civil service employee's attorney under California law.[52] Yet, there is a more pressing concern. By granting jurisdiction to the two agencies seeking it, albeit for the noble protection of those discriminated against, the court may have "sweetened the pot" for any agency willing to pursue litigation in order to gain power via a favorable statutory interpretation.[53]

JOHN EDWARD VAN VLEAR

F. *Appointment of counsel for an incarcerated, indigent defendant to a civil suit may be required if it is the only way to protect his personal interests and right of access to the courts:* **Yarbrough v. Superior Court.**

The plaintiff in *Yarbrough v. Superior Court,* 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985), sought a writ of mandate to force the appointment of legal counsel to defend him in a civil suit that was brought by the family of the individual he was convicted of murdering. Claiming he was an indigent, Yarbrough asserted that without counsel he would be subject to a two million dollar default judgment and would also be denied his right of access to the courts. In issuing the writ to order the trial court to make a factual finding, the court held that appointment of counsel may be appropriate as a last resort if an adverse judgment would affect the indigent's personal interests, and there are no possible alternatives.

The court relied on an earlier decision, *Payne v. Superior Court,* 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976), that described the possible remedies for an indigent prisoner who is a defendant in a bona fide legal action that threatens his interests. Due process and equal protection provisions require that prisoners not be denied access to the courts. Appointment of counsel may at times be required

51. *State Personnel Bd.,* 39 Cal. 3d at 452-53, 703 P.2d at 374, 217 Cal. Rtpr. at 36 (Mosk, J., dissenting).

52. For a comparative analysis which may prove instructive for the California attorney, see Broida, *Representing Federal Civilian Employees in Discrimination Cases,* THE PRACTICAL LAWYER, Jan. 15, 1983 at 57 (step-by-step analysis of areas such as counseling, complaints, investigation, hearings, and class complaints).

53. For an innovative view of the dynamics involved in such a scenario, see Mallamud, *Courts, Statutes and Administrative Agency Jurisdiction: A Consideration of Limits on Judicial Creativity,* 35 S.C.L. REV. 191 (1984) (analysis of how judicial interpretation of statutes results in granting administrative agencies increased power).

to protect this right, but the key element of the right is access, not appointment of counsel. *See* Annot., 23 A.L.R. FED. 6 (1975) (state prisoners' access to courts under federal law).

The court noted a key factor necessary to justify appointment is that an adverse judgment will affect property rights of the civil defendant. If the indigent has no property, as will usually be the case, it will be difficult to show that he has an interest actually at stake. In evaluating the potential for future loss to the prisoner, a very realistic assessment must be made of relevant economic factors. The prisoner's age, term of incarceration, employment history, education, skills, family background and likelihood of inheriting money are relevant factors of the inquiry. Also to be considered are the prisoner's prospects for earnings while in prison.

Additionally, the trial court must determine that counsel will be helpful in the circumstances of the case. In this case, because of the admissibility of the prior conviction and its collateral estoppel effect, Yarbrough had no chance of escaping liability in the civil suit. Yarbrough had an interest in mitigating the amount of damages assessed him, but the existence of other defendants may have worked to protect his interest.

In short, to determine the necessity for appointing counsel to a prisoner a court must consider the following: (1) the defendant's indigency, (2) whether defendant's interests are actually at stake, and (3) whether counsel would be helpful under the circumstances. Additionally, the court should consider the feasibility of continuing the civil action until the defendant is released and better able to handle his own affairs. After weighing these factors, the court must then decide if there is an alternative besides appointment of counsel that will protect the prisoner's right of access to the courts. *See also* Annot., 23 A.L.R.4TH 590 (1983) (prisoners' access to legal research).

JAMES B. BRISTOL

Fortune-telling is a form of noncommercial speech and not an exclusively commercial activity; thus, it is afforded free speech protections under the Constitution, and any ordinance banning it is unconstitutional: **Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa.**

In *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa,* 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985), the City of Azusa (hereinafter the City) enacted an ordinance prohibiting the practice of fortune-telling for a fee or other consideration. The Spiritual Psychic Science Church of Truth, Inc. (hereinafter the Church) lost its business license under the law after the minister had placed an advertisement in a newspaper regarding her fortune-telling business. The Church and its minister then sued the City to enjoin enforcement of the ordinance asserting that it violated the freedom of speech provisions of the California Constitution. The trial court ruled for the City and upheld the ordinance. The Church appealed.

The City's first argument was that the court of appeal in *In re Bartha,* 63 Cal. App. 3d 584, 134 Cal. Rptr. 39 (1976), had held that fortune-telling for consideration was an exclusively commercial activity, and not speech. Thus, the Azusa ordinance as a regulation of commerce was valid under the constitution. The supreme court rejected the argument and the *Bartha* holding. It concluded that fortune-telling is not an exclusively commercial activity subject to regulation, but it involves speech. Thus, it should be afforded the protections of article 1, section 2 of the California Constitution. CAL. CONST. art. I, § 2.

After deciding that fortune-telling was not exclusively a commercial activity, the court turned to the question of whether the speech involved in fortune-telling was commercial or noncommercial. It reviewed decisions of the United States Supreme Court that distinguished commercial and noncommercial speech. The court concluded that commercial speech involves the advancing of an economic transaction, and noncommercial speech involves activities above and beyond the mere advancing of an economic transaction. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 376, 385 (1973). Using these guidelines, the court concluded that fortune-telling was noncommercial speech because it goes beyond the advancing or proposing of an economic transaction; it concerns the passing of ideas and information. Thus, the court held that fortune-telling constituted noncommercial speech protected by the California Constitution.

The City contended that fortune-telling does not come within con-

stitutional free speech protections because it does not concern the political process. The court, however, rejected the argument stating that the constitution protects more than just political speech. Fortune-telling undoubtedly falls within the scope and protection of the constitution.

In the final analysis as to the constitutionality of the City's ordinance, the court conceded that some speech can be entitled to constitutional protection, and not be completely immune to regulation. However, such a regulation may not go beyond what the constitution allows. The court found that the City ordinance prohibiting fortune-telling for consideration went beyond what was allowed and unconstitutionally impinged the Church's speech rights.

MISSY KELLY BANKHEAD

V. CONTRACT LAW

Parties to a contract concerning illegal business operations in Mexico cannot seek relief under the contract in the courts of California because they come with "unclean hands": **Wong v. Tenneco, Inc.**

In *Wong v. Tenneco, Inc.*, 39 Cal. 3d 126, 702 P.2d 570, 216 Cal. Rptr. 412 (1985), the supreme court refused to grant relief to either of the parties under a breach of contract action since the contract was based upon operations which were illegal under Mexican law. The plaintiff, Wong, was an American citizen and de facto owner of farmlands located in Mexico, despite a Mexican constitutional provision prohibiting foreign ownership of farmlands. Wong continued his farming operations in Mexico despite their illegality by transferring all of the assets to Mexican citizens working as "front men." To market the produce grown on his Mexican farmlands Wong, in 1971, entered into a marketing contract with H-M-T, a subsidiary of Tenneco, Inc. At the time the marketing agreement was entered into, both parties knew of the illicit nature of Wong's business in Mexico. Nevertheless, the parties contracted and continued to do business with one another.

In 1974, Wong's financial status weakened, and he was forced to execute a $300,000 promissory note to H-M-T. The note was secured by a deed of trust on residential property in California. Wong's financial status continued to deteriorate, and the Mexican Government was pressuring and threatening the Mexican "front men" with foreclo-

sure due to outstanding taxes owed on the farmlands. As a result of Wong's severe financial crisis, H-M-T began submitting its sales proceeds directly to the Mexican "front men" instead of to Wong.

Thereafter, Wong brought suit in a California state court for over $10 million in compensatory damages asserting among other things that H-M-T had breached its marketing agreement. After a jury rendered a decision for H-M-T on its cross-complaint for approximately $600,000 and a $1.6 million verdict for Wong, the trial court barred the recovery based upon the "unclean hands" doctrine. The court recognized that the entire business transaction was illegal under Mexican law and left the parties where it found them.

In applying the doctrine of comity the court stated that "the forum state will generally apply the substantive law of a foreign sovereign to causes of action which arise there." *Wong*, 39 Cal. 3d at 134, 702 P.2d at 575, 216 Cal. Rptr. at 417 (following *Loranger v. Nadeau*, 215 Cal. 362, 10 P.2d 63 (1932)). Thus, the court held that under Mexican law, the agreement between the parties was entirely illegal. It is a long standing principle of law that parties to an illegal contract cannot rely upon a court of law to enforce the terms of their illegal contract. *Lee On v. Long*, 37 Cal. 2d 499, 502, 234 P.2d 9, 11 (1951). Therefore, the court refused to grant either party relief under the illegal contract. The court did allow Tenneco to retain approximately $100,000 from the sales proceeds of the residence which was the subject of the trust deed under the promissory note. The court allowed this only because Tenneco had expended such an amount to protect the property during the litigation. Thus, both parties benefited from the preservation of the asset.

The court concluded that the Mexican law prohibiting foreign ownership of farmlands did not violate California public policy. In fact, the court emphasized that the actions of people like Wong, who intentionally seek to violate the laws of one jurisdiction by using another jurisdiction's courts, violate public policy.

MISSY KELLY BANKHEAD

VI. CORPORATE OFFICERS AND DIRECTORS

Corporate director suing for finder's fee in real estate transaction allowed to invoke estoppel to plead the statute of frauds and an action for fraud is available even if subject agreement is made unenforceable under the statute of frauds: **Tenzer v. Superscope, Inc.**

In *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 702 P.2d 212, 216 Cal. Rptr. 130 (1985), a corporate director brought an action against the corporation based upon its refusal to pay a finder's fee for his part in

the successful sale of the corporate headquarters. The director, who was not a licensed real estate broker, personally communicated to the corporation's president that a buyer might be available. He disclosed the prospective buyer's name only after the president had orally agreed to a finder's fee. The director sued the corporation under theories of breach of contract, estoppel and fraud. The corporation raised the defense of the statute of frauds. After a hearing on the merits, the corporation's motion for summary judgment was granted.

As to the corporation's defense, the court held that while there is no finder's fee exception to the statute of frauds, unlicensed finders such as the director may invoke the doctrine of estoppel to plead the statute of frauds. In reaching its conclusion, the court refused to extend the scope of *Keely v. Price,* 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972), which stated that estoppel may not be invoked to plead the statute of frauds where there is a refusal to comply with an oral promise to pay a real estate commission. The court declined to pass on the validity of barring licensed real estate brokers from using the estoppel doctrine in such situations. However, it held the *Keely* rationale inapplicable to "finders;" further, "finders" need not be licensed brokers nor even involved in the real estate business professionally.

The court also held that the director's action for fraud could be maintained even though the agreement in question was oral and made unenforceable by the statute of frauds. In so holding, the court disapproved the rule set out in *Kroger v. Baur,* 46 Cal. App. 2d 801, 117 P.2d 50 (1941), which prohibited an action for fraud under such circumstances. The court reasoned that the *Kroger* rule wrongly assumed the inability of a jury to distinguish between an unkept, but honest, promise and one which the promisor never intended to perform. Furthermore, it deemed the *Kroger* approach inconsistent with the idea that the statute of frauds, which was enacted to prevent fraud, should not be used to shield fraud. The court did not see the *Kroger* rule as necessary to prevent a nullification of the statute of frauds since something more than nonperformance is required to prove a party's intent not to perform his promise.

Finally, the court required the director to establish upon remand, as a condition precedent to invoking the doctrine of estoppel, that his behavior was reasonably consistent with his fiduciary role. Since a corporate director may not drive a harsh and unfair bargain with the corporation he is supposed to represent, the director must show that the contested agreement was inherently fair from the viewpoint of

the corporation. This showing was required to prove that the director's reliance on the president's oral promise was justifiable. Since estoppel is an equitable remedy, the court would not allow the director to enforce the president's promise against the corporation unless the director had fulfilled his fiduciary responsibilities, thereby showing no unclean hands on his part.

JOHN EDWARD VAN VLEAR

VII. CRIMINAL LAW

A. *Section 593e of the California Penal Code no longer prohibits the sale of equipment to intercept intelligible, unscrambled microwave transmissions:* **People v. Babylon.**

In *People v. Babylon,* 39 Cal. 3d 719, 702 P.2d 205, 216 Cal. Rptr. 123 (1985), the supreme court was concerned with interception of over-the-air subscription television transmissions. The United States licenses two types of entities to transmit television programs: commercial television broadcast stations (these use only VHF and UHF frequencies) and Multipoint Distribution Services (subscription television transmitting on frequencies from 2150 to 2162 MHz). With a microwave antenna and other equipment, a subscriber to a Multipoint Distribution Service, such as Home Box Office (HBO), may receive subscription television programs.

To protect the subscription television industry from piracy of its transmissions, California Penal Code section 593e was enacted in 1980. The section prohibits the manufacture, distribution, or sale of any device for the purpose of intercepting or decoding any over-the-air transmission by a subscription television service pursuant to authority granted by the Federal Communications Commission. CAL. PENAL CODE § 593e (West Supp. 1985). The defendants were convicted of selling such equipment to a police investigator to intercept subscription television transmissions. The defendants admittedly knew that the equipment could and would be used to intercept HBO transmissions, and had no consent from HBO to sell the equipment.

While the defendants' appeal was pending, section 593e was amended to prohibit only the sale of devices "designed in whole or in part to decode, descramble, intercept, or otherwise make intelligible any encoded, scrambled or other nonstandard signal carried by that subscription television system." *Id.* § 593e(b). Since the HBO signal was neither encoded nor scrambled, the amended section 593e did not proscribe the defendants' conduct. Thus, the judgment was reversed, because absent a saving clause a defendant is entitled to benefit from a more recent statute that reduces punishment for an offense or

decriminalizes his conduct. *See People v. Rossi,* 18 Cal. 3d 295, 555 P.2d 1313, 134 Cal. Rptr. 64 (1976). It was unnecessary to consider whether the superseded section 593e was preempted by the Federal Communications Act of 1934, 47 U.S.C. §§ 151-610 (1982), as the court concluded that the amended section did not prohibit the defendant's conduct.

Neither broadcast on a microwave frequency nor the inability of an ordinary television set to receive the HBO transmission was held to make the transmission nonstandard. Section 593e, subdivision(g), defines a nonstandard signal as a distorted signal not intended to produce an intelligible program without special equipment provided by the sender. CAL. PENAL CODE § 593e(g) (West Supp. 1985). The court reasoned that distortion involves changing a wave's shape while "microwave" merely denotes a wave length; thus it concluded that microwaves are standard. To find otherwise would mean that a signal is nonstandard if it cannot be viewed in intelligible form by an ordinary television set. All signals except those on VHF and UHF frequencies would therefore be nonstandard, but such is not the case. Thus, the court held that section 593e does not preclude selling equipment designed to receive intelligible microwave transmissions. *See* 53 CAL. JUR. 3D *Radio and Television* § 11 (1979 & Supp. 1985); and 19 CAL. JUR. 3D *Criminal Law* § 2057 (1984 & Supp. 1985).

MARK S. BURTON

B. *A "copurchaser" who is deemed to be an equal partner in a drug transaction for personal use may not be convicted of furnishing a controlled substance to his fellow purchaser:* **People v. Edwards.**

I. INTRODUCTION

In *People v. Edwards,*[1] the court had to determine whether the felony of furnishing heroin to another included the furnishing of heroin by a purchaser to one who appeared to be an equal participant in the drug transaction. The court held that this determination turned on whether the one to whom the heroin was furnished could truly be called a "copurchaser." If so, a purchaser could not be guilty of the felony of furnishing heroin to another, since the other person was

1. 39 Cal. 3d 107, 702 P.2d 555, 216 Cal. Rptr. 397 (1985). Justice Grodin authored the opinion with Justices Mosk, Kaus, Broussard, Reynoso, and Lucas concurring. Chief Justice Bird wrote a separate concurring and dissenting opinion.

also a purchaser. Applying these principles to this case, the court found reversible error in the trial court's failure to give instructions concerning copurchasers.

II. FACTUAL BACKGROUND

Burt Royce driving with Isotta Mullican picked up the defendant, Edwards, and his girlfriend, Victoria Rogers, while they were hitchhiking. Later that evening, Royce, a former heroin user, offered some heroin to the defendant and Rogers. The defendant, who had possession of the couple's combined funds, gave fifty dollars to Isotta Mullican for the drug. The foursome returned to Mullican's house where Mullican prepared the heroin, and injected herself, the defendant, and Rogers. Shortly thereafter, Rogers lost consciousness. She died one week later from a heroin overdose.[2]

After a jury trial, the defendant was convicted under California Health and Safety Code section 11352 for furnishing and/or administering heroin.[3] He was also convicted under California Penal Code section 187 for second degree murder based on the felony-murder rule.[4] The trial court denied the defendant's requested jury instruction on the offense of involuntary manslaughter. The defendant argued that his actions constituted a mere misdemeanor under California Health & Safety Code section 11550[5] since he only aided and abetted Rogers in her use of the heroin and could not be considered to have furnished her drugs. He contended that the trial court committed reversible error since the jury was not given the option of convicting him on the basis of the misdemeanor-manslaughter rule pursuant to California Penal Code section 192.[6]

III. THE COURT'S ANALYSIS

The court found reversible error in the failure to instruct that the defendant could not be convicted for furnishing heroin if he was

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2. After an unsuccessful attempt to find a pulse, the defendant and Royce took Rogers to a local market and unconvincingly told the clerk, and later the police, that they had found Rogers in the dumpster behind the market. *Id.* at 111-12, 702 P.2d at 557-58, 216 Cal. Rptr. at 399-400.

3. CAL. HEALTH & SAFETY CODE § 11352 (West Supp. 1985), provides in relevant part: "[E]very person who . . . furnishes, administers, or gives away . . . any controlled substance . . . shall be punished by imprisonment in the state prison . . . ." *Id.*

4. *See infra* note 36.

5. CAL. HEALTH & SAFETY CODE § 11550 (West Supp. 1985), provides in relevant part: "No person shall use . . . [a] controlled substance except when administered by . . . a person licensed by the state . . . Any person convicted of violating any provision of this subdivision is guilty of a misdemeanor . . . ." *Id.*

6. CAL. PENAL CODE § 192 (West Supp. 1985), provides in relevant part that involuntary "[m]anslaughter is the unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to felony . . . ." *Id.*

merely a copurchaser of the drug. The court further held there was substantial evidence for the jury to have found the defendant was an "equal partner" in the transaction and thus guilty only of involuntary manslaughter for aiding and abetting. Finally, although the defendant's convictions were reversed, the state received the option of conducting a new trial or accepting a remittitur reflecting a conviction of involuntary manslaughter.

A. Furnishing a Controlled Substance and the Concept of "Copurchasers"

Since the defendant did not administer any drug to Rogers,[7] it had to be shown that he furnished her with the heroin to obtain a conviction under California Health and Safety Code section 11352.[8] The felony is a general intent crime,[9] and requires evidence that Edwards in some way supplied Rogers with the drug.[10]

The *Edwards* court found the concepts of "furnishing" and "copurchasing" to be mutually exclusive: "the trial court erred in failing to instruct the jury that defendant could not be convicted of furnishing heroin to Rogers if he and Rogers were merely copurchasers of the heroin."[11] Thus, in reversing the defendant's convictions, the court's analysis necessarily revolved around defining "copurchasers."

The court's use of "copurchasers" was based on the re-affirmation of *People v. Mayfield*[12] which implicitly held that one is not guilty of furnishing if he participates in a group purchase of narcotics, even

7. The homeowner Mullican actually injected Rogers with the lethal dose of heroin. *Edwards*, 39 Cal. 3d at 111, 702 P.2d at 557, 216 Cal. Rptr. at 399.

8. *See supra* note 3. *See also* People v. Taylor, 112 Cal. App. 3d 348, 358, 169 Cal. Rptr. 290, 296 (1980) (the court elaborated, "[W]e do not agree that the prosecution must establish that [defendant] furnished *and administered* the heroin. The mere furnishing is sufficient." *Id.* (emphasis in original) (citations omitted).

9. *See* People v. Daniels, 14 Cal. 3d 857, 862, 537 P.2d 1232, 1236, 122 Cal. Rptr. 872, 875 (1975) (disapproving People v. Holquin, 229 Cal. App. 2d 398, 402-03, 40 Cal. Rptr. 364, 366-67 (1964), which held that furnishing under Health and Safety Code § 11501 was a specific intent crime).

10. "Furnish," as used in the Health & Safety Code means "to supply by any means, by sale or otherwise." CAL. HEALTH & SAFETY CODE § 11016 (West Supp. 1975); CAL. BUS. & PROF. CODE § 4048.5 (West 1974).

11. *Edwards*, 39 Cal. 3d at 110, 702 P.2d at 556, 216 Cal. Rptr. at 398.

12. People v. Mayfield, 225 Cal. App. 2d 263, 37 Cal. Rptr. 340 (1964). In *Mayfield*, the three defendants pooled their funds to purchase heroin. Prior to the purchase, the defendants met the deceased who also offered to contribute his pro rata share. Although it was unclear who made the actual purchase, the deceased injected himself with a lethal dose of heroin.

where the purchase is for individual use.[13] However, the court qualified its finding by stating that the rule only applies when the parties involved are truly "equal partners."[14] In a footnote, which has already become a source of controversy,[15] the court apparently limited a defendant's ability to be deemed a "copurchaser." The limitation increased the possibility that *Edwards* would receive a felony-murder rule conviction, by severely reducing the class of acceptable "equal partners:"

> We expect there will be few cases involving a copurchase by truly equal partners. Where one of the copurchasers takes a more active role in instigating, financing, arranging, or carrying-out the drug transaction, the "partnership" is not an equal one and the more active "partner" may be guilty of furnishing to the less active one.[16]

Despite the limitation on who can be a copurchaser, the court held that the jury might reasonably have concluded that the defendant was an "equal partner" such that he did not furnish Rogers any heroin.[17] The court analyzed the case at bar by applying the requirements for finding "equal partners" as it had expressed them in footnote five quoted above. First, since the couple's funds were pooled, the jury could have found an equally financed drug purchase.[18] Second, since Royce first suggested the heroin sale, and since both the defendant and Rogers appeared equally inexperienced,[19] the decision to buy might have been mutual. Finally, apart from the fact that the defendant actually handed Mullican the purchase money, and in light of the pooled nature of the funds, the jury might have found an equally consummated drug buy.

B. Problem Area: Origin and Meaning Key Terms Used in the Opinion

The ultimate fact which will preclude a conviction for furnishing drugs is the determination that a defendant is a "copurchaser."[20] Strikingly, the *Edwards* court heavily relied on a term that California

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13. *Edwards*, 39 Cal. 3d at 114 n.4, 702 P.2d at 559 n.4, 216 Cal. Rptr. at 401 n.4. The *Edwards* court found that while the *Mayfield* decision expressly held that the defendants had not sold or administered heroin, it implicitly held that they had not furnished the drug either. *Id.*

14. *Id.* at 114, 702 P.2d at 559, 216 Cal. Rptr. at 401.

15. *See infra* note 41.

16. *Edwards*, 39 Cal. 3d at 114 n.5, 702 P.2d at 559 n.5, 216 Cal. Rptr. at 401 n.5.

17. *Id.* at 114, 702 P.2d at 559, 216 Cal. Rptr. at 401.

18. The defendant stated that the couple's funds came from the sale of Rogers' car, that he carried all the money, and that the couple intended to use the cash to buy a new car and rent an apartment. *Id.*

19. The forensic pathologist who performed the autopsy on Rogers, and the police detective who examined the defendant's arm both testified that there was no evidence of chronic intravenous drug use. *Id.* at 115, 702 P.2d at 560, 216 Cal. Rptr. at 402.

20. *See supra* note 11 and accompanying text.

courts have not previously used.[21] However, through its interpretation of the *Mayfield* holding,[22] the court established that a "copurchaser" is at a minimum the equivalent of a "group purchaser." Beyond establishing this threshold issue, the court makes the "equal partnership" limitation the key to defining the meaning of the term "copurchaser."[23]

Even though the court outlines the factors to be examined in determining whether the purchasers are "equal partners,"[24] the basis for the use of this particular phrase is not given. The word "partner" might be used by the court in its everyday sense,[25] but the fact that it is enclosed in quotation marks more than once[26] shows an intent to use the term in a special sense.[27] Also, the normal legal meaning of "partner," participation in a partnership,[28] is not applicable in the case at bar since the heroin purchase was for the individuals' personal use.[29] Similarly, the relationship involved cannot be classified

21. A search of California Supreme Court and appellate level cases revealed that, apart from its usage in *Edwards*, the term "copurchaser" has been mentioned only in a few other cases in the state's legal history. *See, e.g.*, Morris v. Zuckerman, 69 Cal. 2d 686, 692 n.9, 446 P.2d 1000, 1005 n.9, 72 Cal. Rptr. 880, 885 n.9 (1968) (corporate); Munson v. Fishburn, 183 Cal. 206, 209, 190 P. 808, 809 (1920) (real estate); People v. Cline, 270 Cal. App. 2d 328, 332, 75 Cal. Rptr. 459, 462 (1969) (heroin); Burt v. Irvine Company, 237 Cal. App. 2d 828, 855, 47 Cal. Rptr. 392, 409 (1965) (real estate).

22. The court first concluded: "[t]he distinction drawn by the *Mayfield* court between one who sells or furnishes heroin and one who simply participates in a group purchase seems to us a valid one . . . ." *Edwards*, 39 Cal. 3d at 113-14, 702 P.2d at 559, 216 Cal. Rptr. at 401. From this "group purchase" language, the *Edwards* court found the holding in *Mayfield* to be "that mere copurchasers are not guilty of furnishing . . . ." *Id.* at 117, 702 P.2d at 561, 216 Cal. Rptr. at 403. However, the court in *Mayfield* never used the term "copurchaser(s)."

23. *See supra* note 16 and accompanying text. As a further note, while the full term "copurchaser" is rarely mentioned in other literature, the Oxford English Dictionary 544 (Vol. II C, 1970), does list it under the definition of "co-," a prefix: "Esp. common in the phraseology of Law, with the sense of 'joint' or 'fellow-' as [in] . . . copurchaser. . . ." *Id.*

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

25. The WEBSTER'S UNABRIDGED DICTIONARY 1307 (2nd ed. 1983), defines "partner" as: "one who has a share or part in anything with another or others; a sharer; a participator; a partaker; an associate."

26. *Edwards*, 39 Cal. 3d at 114, 114 n.5, 115, 702 P.2d at 559, 559 n.5, 560, 216 Cal. Rptr. at 401, 401 n.5, 402.

27. The PRENTICE-HALL HANDBOOK FOR WRITERS 128 (7th ed. 1978), states, "Words used in a special sense may be set off by quotation marks."

28. The CAL. CORP. CODE § 15006 (West 1977) states in relevant part that "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." This concept may have been adopted from the common law in Wheeler v. Farmer, 38 Cal. 203, 213 (1869): "to constitute a partnership . . . [t]here must be a joint undertaking to share in the profit and loss." *Id.*

29. *Edwards*, 39 Cal. 3d at 114 n.6, 702 P.2d at 559 n.6, 216 Cal. Rptr. at 401 n.6.

as a "joint venture" since that term encompasses virtually the same qualities that exist in partnerships.[30] The relationship cannot be termed an "association" considering how that term has been interpreted by the California courts and legislature.[31] Finally, the common law criminal terms of "principal" and "accessory" prove equally unhelpful in determining the origin or traditional meaning which should be attached to the phrase "equal partners."[32] Nonetheless, one might be able to tie the criminal concept of "principal" with the court's new concept by analyzing causation and instigation.[33] This semantic inquiry leads to the conclusion that the court in *Edwards* has introduced and applied two terms, "copurchasers" and "equal partners," which lack a discernible origin or present legal usage which might aid in their application.

IV. THE CONCURRING AND DISSENTING OPINION

Chief Justice Bird concurred in the reversal of the defendant's convictions.[34] However, she would have reversed the decision on the basis of her concurring opinion in *People v. Burroughs*.[35] In her *Burroughs* opinion, the Chief Justice advocated the elimination of the judicially created[36] second degree felony-murder rule.[37] After a lengthy historical analysis of the doctrine, she concluded that the

30. The court in Bank of California v. Connolly, 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468, 477 (1973), summarized the point: "[a]lthough a partnership ordinarily involves a continuing business, whereas a joint venture is usually formed for a specific transaction or a single series of transactions, the incidents of both relationships are the same in all essential respects." *Id.* (citations omitted).

31. The court in Estate of Irwin, 196 Cal. 366, 372, 237 P. 1074, 1076 (1925), stated that "[t]he usual meaning of the term 'association' is an 'unincorporated organization composed of a body of men partaking in general form and mode of procedure of the characteristics of a corporation.' " *Id.* CAL. CORP. CODE § 21000 (West 1977), states in relevant part: "[a] nonprofit association is an unincorporated association of natural persons for religious, scientific, social, literary, educational, recreational, benevolent, or other purpose not that of pecuniary profit." *Id.*

32. The Court in Standerfer v. United States, 447 U.S. 10, 15 (1980), appraised the problem as follows: "[a]t common law, the subject of principals and accessories was riddled with 'intricate' distinctions." *Id.* Parties to a crime were either principals in the first or second degree or they were accessories before or after the fact. *Id.* Beginning in 1872, California made all parties to a crime either principal or accessory. CAL. PENAL CODE § 30 (West 1970).

33. Lanham, *Murder By Instigating Suicide*, 1980 Crim. L. Rev. 215; *Developments in the Law, Homicide — Principals and Causation*, 43 La. L. Rev. 371 (1982).

34. *Edwards*, 39 Cal. 3d at 119, 702 P.2d at 562, 216 Cal. Rptr. at 404 (Bird, C.J., concurring and dissenting).

35. People v. Burroughs, 35 Cal. 3d 824, 837-54, 678 P.2d 894, 902-15, 201 Cal. Rptr. 319, 327-40 (1984) (Bird, C.J., concurring).

36. "The second degree felony-murder rule is, 'as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code . . . .' " *Id.* at 837, 678 P.2d at 903, 201 Cal. Rptr. at 328 (quoting People v. Dillon, 34 Cal. 3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1983)).

37. *Burroughs*, 35 Cal. 3d at 837, 678 P.2d at 903, 201 Cal. Rptr. at 328 (Bird, C.J., concurring).

doctrine is a "strict liability concept"[38] which "erodes the important relationship between criminal liability and an accused's mental state."[39]

V. IMPACT

The importance of a legal principle is often tied to current events and institutions. It is possible that this case is a response to the highly publicized John Belushi drug overdose case.[40] Nonetheless, the concept of "copurchasers" for finding a conviction under section 11352 of the Health and Safety Code is novel. Its introduction and application may even exceed drug cases, go beyond the criminal law, and reach other other general areas of the law.

JOHN EDWARD VAN VLEAR

VIII. CRIMINAL PROCEDURE

A. *Objective proof is required to rebut the presumption of prosecutorial vindictiveness when a charge is increased after jeopardy has attached:* In re Bower.

In *In re Bower*, 38 Cal. 3d 865, 700 P.2d 1269, 215 Cal. Rptr. 267 (1985), the court held that to rebut the presumption of vindictiveness in prosecuting an accused, the prosecution must demonstrate that the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process. Furthermore, the new evidence on change in circumstances cannot have been reasonably discoverable at the time the prosecution exercised its discretion to bring the original charge.

The defendant was originally tried for second degree murder. The defendant moved for and was granted a mistrial based on prosecutorial error. On retrial the prosecution did not renew the previously granted stipulation which limited defendant's possible lia-

38. *Id.* at 850, 678 P.2d at 912, 201 Cal. Rptr. at 337.

39. *Id.*

40. People v. Smith, No. A388784 (Los Angeles Municipal Court filed Feb. 12, 1985). Cathy Evelyn Smith is charged with the felony of furnishing Belushi heroin and with second degree murder based on the second degree felony-murder rule. *See also*, Stewart, *Court Ruling Weighed for Its Effect in Belushi Case*, L.A. Times, Sept. 23, 1985, Part II (Metro), at 1. This article uses quotations to show how both the prosecution and the defense are seeking to use *Edwards* in their arguments. The Los Angeles Times piece also reproduces the same portion of footnote 5 which is quoted from *Edwards* in this California Supreme Court Survey article. *See supra* note 16 and accompanying text.

bility to second degree murder. The prosecution testified that this decision was based on a review of the evidence and further conversations with potential witnesses. The same evidence was offered at retrial and the defendant was found guilty of first degree murder.

The supreme court received the petitioner's writ of habeas corpus in lieu of an appeal because reference to matters outside the record were required to establish that the defendant's constitutional rights had been violated. *People v. Pope,* 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979).

Where a moving party claims that the increased or additional charges violate due process, he need only demonstrate facts giving rise to a presumption of vindictiveness. At that time the burden shifts to the prosecution to rebut the presumption. *In re Lewallen,* 23 Cal. 3d 274, 278, 590 P.2d 383, 385-86, 152 Cal. Rptr. 528, 530-31 (1979) (prosecution failed to rebut clear meaning of court's statement that increased punishment was a penalty for exercising right to trial).

In a related case, the United States Supreme Court stated that a greater sentence will be upheld on retrial if affirmative reasons based on objective information appear in the record. The rationale is that a person should be able to pursue his statutory rights without apprehension of state retaliation in the form of substituting a more serious charge for the one originally filed. *North Carolina v. Pearce,* 395 U.S. 711, 726 (1969); *Twiggs v. Superior Court,* 34 Cal. 3d 360, 369-70, 667 P.2d 1165, 1170-71, 194 Cal. Rptr. 152, 157-58 (1983). Such an apprehension would have a chilling effect on the assertion of those statutory rights and could undermine the integrity of the entire proceeding.

The court recognized that an exception to this rule exists for nonjeopardy plea negotiations. In such cases the defendant does not have to decide whether to exercise his legal rights, and as long as the defendant is able to accept or reject the offer, no element of retaliation or punishment exists. *See Bordenkircher v. Hayes,* 434 U.S. 357, 362-63 (1978); *People v. Rivera,* 127 Cal. App. 3d 136, 144, 179 Cal. Rptr. 384, 389 (1981). The important factors to be considered are the attachment of jeopardy, the potential for deterring the exercise of a legal right and the danger of state retaliation. Thus, the court denied the writ of habeas corpus, but reduced the conviction to second degree murder.

DAYTON B. PARCELLS III

B. *Introduction of irrelevant evidence in penalty phase requires reversal of death penalty:* **People v. Boyd.**

I. INTRODUCTION

People v. Boyd,[1] focuses on the changes made in the 1978 death penalty initiative which became codified under California Penal Code sections 190-190.5.[2] Under this section proof of intent to kill or to aid a killing is required for a finding of first degree murder under the felony murder special circumstances theory. Prosecutorial evidence at the penalty phase is also limited to evidence that tends to prove the specifically listed statutory factors relevant to aggravation, mitigation, and sentencing.

II. FACTS

On November 10, 1979, defendant and three friends were approached by David Edsill, the victim, who asked for directions to a nearby residence. They replied they did not know where the residence was and continued to walk by Edsill. The defendant, however, stopped, grabbed Edsill's shirt and demanded money from him. When Edsill said he had no money, defendant pulled a gun and shot him in the chest. As Edsill bent over and ran across the street, defendant fired five more shots killing Edsill. Defendant had previously been drinking and at the time of the incident was on his way to get some "sherms" — cigarettes laced with PCP.

At the guilt phase of the trial, defense counsel attempted to establish a diminished capacity defense as a result of PCP usage. Counsel argued that the killing was not premeditated and was not an attempt to perpetuate a robbery; it was an impulsive act induced by PCP.[3]

At the penalty phase of the trial the prosecution called many witnesses to describe the defendant's past. Many of the witnesses described numerous unarmed assaults perpetrated by defendant. These assaults constituted criminal activity involving the use of force or violence and their admissibility was not raised on appeal. However,

1. 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985). The opinion was authored by Justice Broussard with Chief Justice Bird and Justices Mosk, Kaus, Reynoso, and Grodin concurring.

2. CAL. PENAL CODE §§ 190-190.5 (West Supp. 1985).

3. Expert testimony established that persons who use PCP may engage in bizarre and violent behavior, sometimes long after they have taken the drug. *Boyd*, 38 Cal. 3d at 767, 700 P.2d at 785-86, 215 Cal. Rptr. at 4. Defendant's family testified that defendant was a regular user of PCP and when under the influence of this drug he became irrational and violent. *Id.*

other evidence offered by the prosecution was challenged on appeal on the grounds that it was not relevant to any of the specific aggravating and mitigating factors set forth in the 1978 initiative.[4]

The prosecution recalled Pamela Plummer to the stand at the penalty phase.[5] She testified that defendant did not show any signs of PCP use on the night of the murder. Defense counsel abandoned the planned presentation of evidence supporting diminished capacity at the penalty phase and only argued that defendant acted impulsively.[6]

The jury returned a verdict of death. Defendant appealed as to the jury instructions at the guilt phase and the prejudicial admission of irrelevant evidence at the penalty phase.

III. ANALYSIS

A. Guilt Phase

Defendant first attacked the felony-murder rule as a judge-made law which should be repudiated. However, the court followed an earlier decision which rejected this contention.[7]

Second, the defendant argued that the evidence presented was not sufficient to justify an instruction on premeditated murder.[8] The court rejected this argument as well.[9] Nonetheless, any error in the instruction on premeditation could not have prejudiced the defendant because the jury found all the elements for first degree murder present based on felony murder special circumstances.[10]

The court reversed the decision in the guilt phase because of the prejudicial effect of the jury instruction on the finding of special cir-

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4. One of the defendant's counselors testified that defendant threatened to kill him and to force the vehicle transporting them to juvenile hall to crash. Further testimony told of how defendant threatened to kill a juvenile hall counselor for refusing to give him a peanut butter and jelly sandwich. The incident lead to a small riot in the cafeteria. Deputy Sheriff Silliman testified that circumstantial evidence showed defendant had attempted to escape while being held for this crime by removing an air vent from his cell. Finally, defendant's probation and parole officers testified that defendant failed to benefit from the rehabilitative program and had a community reputation for violence. *Id.* at 767-69, 700 P.2d at 786-87, 215 Cal. Rptr. at 5-6.

5. *Id.* at 769, 700 P.2d at 787, 215 Cal. Rptr. at 6. Plummer was one of the people with the defendant at the time of the incident.

6. Consequently, the penalty jury did not hear any testimony on defendant's PCP use and the irrational and violent behavior this drug can cause.

7. *See* People v. Dillon, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

8. Defendant relied on People v. Velasquez, 26 Cal. 3d 425, 606 P.2d 341, 162 Cal. Rptr. 306 (1980), where proof of a sudden killing in the course of an argument and struggle was not sufficient to establish deliberate and premeditated murder.

9. The only evidence of argument and struggle resulted from the victim pushing defendant's gun away from his head. Defendant's deliberate acts, especially firing five additional shots, were held to be sufficient to warrant an instruction on premeditation. *Boyd,* 38 Cal. 3d at 770, 700 P.2d at 787-88, 215 Cal. Rptr. at 6-7.

10. The victim was killed by the defendant during the commission of a felony (robbery).

cumstances. Proof of intent to kill or to aid a killing is essential to a finding of felony murder special circumstances.[11] Thus, a trial court's failure to instruct on intent to kill is reversible error per se.[12]

Defense counsel argued that the defendant did not intend to kill the victim. Rather, the killing was an unintentional, impulsive, and drug-induced act. Without the instruction on intent to kill, defendant could have been found guilty of first degree murder simply because the murder occurred during the commission of a robbery. The argument was worthy of consideration and the trial court's failure to instruct on intent to kill was held to be reversable error.

B. Penalty Phase

The court discussed the penalty phase issues to give guidance to the lower court since reversal at the guilt phase necessarily reversed the penalty phase. The one issue raised by the defense which had not been resolved by prior precedent was whether the prosecution, under the 1978 initiative, could present evidence at the penalty phase which was not relevant to any specific aggravating or mitigating factors listed in the 1978 law.[13]

The language of section 190.3 of the 1978 initiative permits the introduction of evidence relevant to aggravation, mitigation, and sentencing with the exception of criminal activity not involving violence, except felony convictions and criminal activity of which defendant

11. *See* Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). This holding applied retroactively to all cases not yet final. People v. Garcia, 36 Cal. 3d 539, 544, 684 P.2d 826, 827, 205 Cal. Rptr. 265, 266 (1984).

12. *Garcia* recognizes four exceptions, two of which have arguable relevance to the case at hand: (1) that the factual question was necessarily resolved adversely to the defendant under other, properly given instructions, *Garcia*, 36 Cal. 3d at 554-55, 684 P.2d at 835, 205 Cal. Rptr. at 274, and (2) that "the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and . . . the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration." *Id.* at 556, 684 P.2d at 835-36, 205 Cal. Rptr. at 275.

The court found neither of those exceptions justified affirmance. *Boyd*, 38 Cal. 3d at 771, 700 P.2d at 788, 215 Cal. Rptr. at 7.

13. The 1978 initiative enacted a crucial change in jury determination as to the imposition of the death penalty. Prior to this initiative the jury could, after considering the listed aggravating and mitigating factors, consider any other matter it thought relevant. The 1978 initiative requires the jury to determine the appropriateness of the death penalty by weighing the specific factors listed in the statute. To impose the death penalty the aggravating circumstances must outweigh the mitigating circumstances. Thus, any matters not within the statute's list are not entitled to any weight in the penalty phase.

was acquitted.[14] Relevant evidence is defined as having "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[15] Since the jury must decide the penalty on the basis of the specific factors listed in the statute, any prosecutorial evidence of the defendant's history not probative of a specifically listed factor would be irrelevant.[16]

Four pieces of prosecutorial evidence were considered by the trial court. The appellate court held that evidence of a nonviolent escape attempt was barred under the act and properly excluded at trial.[17] Evidence of threat of violence, it held, was also barred and should have been excluded because the act resulted in no charges and the prosecution failed to offer substantial evidence to prove the elements of the crime.[18] The evidence of defendant's failure in rehabilitative programs was not relevant to any of the listed aggravating and mitigating factors and should not have been admitted. Finally, evidence of defendant's reputation in the community was also irrelevant to any of the listed factors and should not have been admitted.

IV. CONCLUSION

The *Boyd* court held that under the 1978 death penalty initiative, the trial court must instruct the jury that intent to kill is an essential element of a finding of first degree murder under felony-murder special circumstances. Additionally, the 1978 initiative prohibits the

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14. CAL. PENAL CODE § 190.3 (West Supp. 1985) states in part:

> [E]vidence may be presented . . . as to any matter relevant to aggravation, mitigation and sentence . . . [excluding] criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence . . . [but] innocent evidence of prior criminal activity shall be admitted for an offense for which the defendant was prosecuted and acquitted.

15. CAL. EVID. CODE § 210 (West 1966). *See* People v. Ortiz, 95 Cal. App. 3d 926, 933, 157 Cal. Rptr. 448, 454 (1979).

16. The constitutional requirement set down in Locket v. Ohio, 438 U.S. 586, 604 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), required the court to interpret section 190.3(K) as allowing the *defense* to offer any mitigating evidence "which *extenuates* the gravity of the crime." *Id.* (emphasis added). However, the prosecution is limited to evidence relevant to the listed factors exclusive of section 190.3(K) unless the defense opens the door to prosecutorial rebuttals through the presentation of mitigating evidence under section 190.3(K). *Boyd*, 38 Cal. 3d at 775, 700 P.2d at 792, 215 Cal. Rptr. at 11.

17. There was no evidence that defendant used or threatened to use force. Violent injury or threat of injury to property is not sufficient to justify admissibility. *Boyd*, 38 Cal. 3d at 776, 700 P.2d at 792, 215 Cal. Rptr. at 11-12.

18. Instructions of reasonable doubt or proof of uncharged crimes are required at the penalty phase. People v. Robertson, 33 Cal. 3d 21, 53-55, 655 P.2d 279, 311-312, 188 Cal. Rptr. 77, 109-110 (1982). This implies the trial court will not permit the jury in the penalty phase to consider an uncharged crime as an aggravating factor unless "a rational trier of fact could have found the essential element of the crime beyond a reasonable doubt." People v. Johnson, 26 Cal. 3d 557, 576, 606 P.2d 738, 750, 162 Cal. Rptr. 431, 443 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979)).

prosecution from introducing evidence in the penalty phase which is not probative of any of the statutorily listed factors for aggravation or mitigation. Nonetheless, the defense could introduce such evidence by extenuating the gravity of the crime through Penal Code section 190.3(K).

DAYTON B. PARCELLS III

C. *Search warrant which was not supported by facts contained within an affidavit was considered overbroad and justified reversal of death sentence:* **People v. Frank.**

I. INTRODUCTION

In *People v. Frank*,[1] the court was faced with determining the legitimacy of a search warrant. The search warrant, used to obtain the defendant's personal papers and diaries, ultimately led to a lower court judgment of death under the California death penalty act.[2] The supreme court, holding that the section of the warrant which referred to the seizure of the defendant's papers, documents and writings was overbroad, only reversed the lower court's judgment as to the death penalty.[3]

II. FACTUAL BACKGROUND

On March 14, 1978, at approximately 10:15 a.m., the defendant, a known child molester,[4] abducted a two and one-half year old girl

1. 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985). The majority opinion was written by Justice Mosk, with Justices Broussard and Reynoso concurring. Separate concurring and dissenting opinions were filed by Chief Justice Bird and Justice Kaus.

2. *Id. See* former CAL. PENAL CODE §§ 190-190.6 (West 1970) (current version at CAL. PENAL CODE §§ 190-190.5 (West Supp. 1985)).

3. *Frank*, 38 Cal. 3d at 719, 700 P.2d at 416, 214 Cal. Rptr. at 802.

4. The trial court admitted evidence of the defendant's prior involvement with two other acts of child molesting. The first incident, which took place on May 15, 1973, involved the abduction of a four year old girl. The defendant drove the girl to a secluded area, forced her to drink beer, took off her clothes and tied her hands. The defendant subsequently scraped her stomach with a knife, inserted a knife into her vagina and attached locking pliers to her vaginal area. The victim was then immersed in water, but eventually escaped to a nearby house.

The second incident, which occurred on July 5, 1978, involved an eight year old girl whom the defendant abducted. The defendant forced the girl to drink four beers. He then pinched her breasts, inserted a pen into her vagina, and inserted a tire gauge into her anus. After forcing her to orally copulate with him, the defendant immersed her in a nearby stream, and left her alone long enough for her to summon help. The vic-

from her baby sitter's home.[5] Two days later the body of a little girl was discovered near a gully in Woodland Hills.[6] Later investigation revealed that this was the girl who had been abducted by the defendant. An autopsy revealed that the child's cause of death was strangulation; however, she had suffered numerous injuries[7] prior to death which evidenced rape.[8]

On October 18, 1978, approximately seven months after the abduction, a superior court judge issued a warrant listing various items to be seized from the defendant's apartment.[9] Two police officers served the warrant on the defendant's wife while four criminalists searched every room in an attempt to find *any* evidence which would possibly link the defendant to the crime, "whether or not it was described in the warrant."[10] This search led to the discovery of three notebooks which the defendant used while he was a patient at the Atascadero State Hospital to write down his thoughts of his emotional and sexual life. At trial the prosecutor moved to admit these notebooks into evidence.[11]

III. MAJORITY OPINION

The court initially stated that it subscribed to the rule which states that courts should not invalidate warrants by interpreting the affidavit in a "hyper-technical, rather than a common sense, manner."[12] In viewing the warrant at hand, the court stated that while it listed items, the existence of which could be "properly inferred from the condition of the body and the circumstances of the crime,"[13] other items listed came from "apparently boilerplate lists routinely incor-

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tim later positively identified the defendant as her assailant. *Id.* at 720, 700 P.2d at 417, 214 Cal. Rptr. at 803.

5. The babysitter lived in a community which is approximately three miles from the Camarillo State Hospital, where the defendant's wife worked. The defendant regularly took his wife to work. The court stated that if the defendant took the most direct route to his wife's place of employment, he would have gone through an area which was very close to the neighborhood from which this victim was abducted. *Id.* at 719-20, 700 P.2d at 416-17, 214 Cal. Rptr. at 802-03.

6. The court noted that the defendant lived in Woodland Hills. *Id.* at 719, 700 P.2d at 417, 214 Cal. Rptr. at 803.

7. The entrance to her vagina was torn, hymen broken and sperm was discovered in her vaginal area. *Id.*

8. The court found that the victim's blood had a .03 percent alcohol content. *Id.*

9. *Frank*, 38 Cal. 3d at 722, 700 P.2d at 419, 214 Cal. Rptr. at 805.

10. *Id.* at 723, 700 P.2d at 419, 214 Cal. Rptr. at 806.

11. *Id.* at 723-24, 700 P.2d at 420, 214 Cal. Rptr. at 806.

12. *Id.* at 722, 700 P.2d at 419, 214 Cal. Rptr. at 805. The court further stated that doubtful or marginal cases, in the area of determining whether an affidavit demonstrates probable cause, should be "determined by the preference to be accorded to warrants." *Id.* (quoting People v. Mesa, 14 Cal. 3d 466, 469, 535 P.2d 337, 339, 121 Cal. Rptr. 473, 475 (1975)).

13. *Frank*, 38 Cal. 3d at 722, 700 P.2d at 419, 214 Cal. Rptr. at 805.

porated into the warrant without regard to the evidence."[14]

The court cited clauses one, two, and eight of the search warrant as prime examples of boilerplate clauses authorizing the police to search for and seize the evidence in question.[15]

In viewing the activity of the police criminalists who indiscriminately seized items from the defendant's apartment, the court concluded that the notebooks in question were seized only because an officer suspected, *after* looking at them, that they might be incriminating and they were not seized because they were listed in the warrant.[16] As a result, the court stated that the warrant was "impermissibly overbroad" on two grounds: first, it failed to particularly describe the place to be searched and the things to be seized; second, its issuance was not supported by probable cause to believe the items were at that place.[17]

The court's discussion of the requirement of particularity relied heavily upon *Burrows v. Superior Court*[18] and *Aday v. Superior Court.*[19] These cases established that the policy behind the requirement is to "prevent general exploratory searches which unreasonably

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14. *Id.*

15. These clauses provided in relevant part:

> 1. Evidence tending to establish the identities of the occupants, users or owners of the residence, including, but not limited to utility bills or receipts, envelopes, traffic tickets, insurance papers or vehicle registration;
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> 2. Documentary evidence tending to show the whereabouts of Theodore Frank during March 14 and 15, 1978, including, but not limited to credit card receipts, receipts from businesses, records of telephone toll calls made during that period of time; cancelled checks made out or cashed on those dates, ledgers or personal diary notations which would indicate the whereabouts of Theodore Frank on those dates;
>
> 3. Scrapbooks, newspaper clippings, photographs (developed or undeveloped), tape recordings or writings which could relate to the death of Amy [(S.)] and would indicate either participation and/or an interest in that death by Theodore Frank . . . .

Frank, 38 Cal. 3d at 722-23, 700 P.2d at 419, 214 Cal. Rptr. at 805.

16. *Id.* at 724, 700 P.2d at 420, 214 Cal. Rptr. at 806.

17. *Id.* In stating this, the court based its decision upon CAL. CONST. art. I, § 13.

18. Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). In *Burrows*, the court unanimously held that a search of a lawyer's office, which was not limited to the documents specified in the warrant, was unreasonable. In reaching this conclusion, the *Burrows* court stated that the unreasonableness of the search was a direct result of the warrant's broad description of the things to be seized. *Id.*

19. Aday v. Superior Court, 55 Cal. 2d 789, 362 P.2d 47, 13 Cal. Rptr. 415 (1961). In *Aday*, the warrant authorized the police to search for general categories of documentary evidence. The court stated, in holding that the warrant description was fatally overbroad, that the various categories were so broad that they failed to place any sort of meaningful restriction on the items which were to be seized. *Id.* at 796, 362 P.2d at 51, 13 Cal. Rptr. at 419.

interfere with a person's right to privacy."[20] Clauses two and eight of the warrant in the case at bar failed to satisfy the particularity requirement. The overbreadth of the warrant was demonstrated by the fact that so many innocent items were taken from the defendant's home.[21] Further, the court stated that "[t]he vice of an overbroad warrant is that it invites the police to treat it merely as an excuse to conduct an unconstitutional general search."[22]

In viewing the requirement that the warrant must be supported by probable cause, the court reiterated the following six point standard for probable cause: "whether the affidavit [1] states facts [2] that make it substantially probable [3] that there is specific property [4] lawfully subject to seizure [5] presently located [6] in the particular place for which the warrant is sought."[23]

The affidavit supporting issuance of the warrant contained twenty-four pages of factual allegations which focused on the acts allegedly committed by the defendant. The court emphasized that there was not a "single fact" contained within the affidavit which would give probable cause to support the boilerplate allegations contained within clauses one, two and eight of the warrant.[24] The court further emphasized that the affidavit completely lacked any facts which would support a belief that the defendant possessed the diaries or writings which were listed in clauses two and eight of the warrant.[25] In concluding that the lower court's finding of probable cause to support the search for the notebooks was based upon "mere speculation" or on boilerplate allegations, the court stated that the warrant impermissibly authorized a search for the notebooks in question; the warrant was in fact broader than the facts upon which it was issued.[26]

As to the effect of the use of the notebooks by the prosecution at

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20. *Frank*, 38 Cal. 3d at 724, 700 P.2d at 420, 214 Cal. Rptr. at 806.

21. *Id.* at 727, 700 P.2d at 422, 214 Cal. Rptr. at 808.

22. *Id.* at 726, 700 P.2d at 422, 214 Cal. Rptr. at 808.

23. *Id.* at 727, 700 P.2d at 422-23, 214 Cal Rptr. at 808-09 (quoting People v. Cook, 22 Cal. 3d 67, 84 n.6, 583 P.2d 130, 134 n.6, 148 Cal. Rptr. 605, 614 n.6 (1978)). The court stated that the first requirement (that the affidavit state facts) is a precondition of the other requirements. Further, the court emphasized that a warrant may not authorize any type of search which is broader than the particular facts which support the issuing of the warrant. *Frank*, 38 Cal. 3d at 728, 700 P.2d at 423, 214 Cal. Rptr. at 809 (citation omitted).

24. *Id.* at 728, 700 P.2d at 428, 214 Cal. Rptr. at 809 (emphasis omitted). *See also supra* note 14 and accompanying text.

25. *Frank*, 38 Cal. 3d at 728, 700 P.2d at 423, 214 Cal. Rptr. at 809. *See also supra* note 14 and accompanying text. The court stated that there was nothing in the affidavit to give the magistrate any factual basis to find that it was substantially probable that the defendant's apartment contained any type of documentary evidence of his location at the time of the crime or any special interests in the crime. *Id.* at 728, 700 P.2d at 423, 214 Cal. Rptr. at 809.

26. *Id.* at 729, 700 P.2d at 424, 214 Cal. Rptr. at 810. The court based this conclusion on Burrows v. Superior Court, 13 Cal. 3d 238, 250-51, 529 P.2d 590, 598, 118 Cal. Rptr. 166, 174 (1974). *See supra* note 17.

trial, the court stated that in the guilt phase, only two percent of the notebook entries were introduced as evidence.[27] This combined with strong evidence establishing the defendant's modus operandi and that he in fact had committed the murder of the two and one-half year old girl, lead the court to conclude that it was not reasonably probable that a more favorable result to the defendant would have been reached if the notebooks had not been introduced.[28] Thus, no prejudice resulted at the guilt phase from the lower court's denial of defendant's motion to suppress the notebooks.

However, the court stated that the introduction had a "very different effect" on the penalty phase of the trial. Prejudice resulted from the prosecution's repeated use and reference to the notebooks throughout the entire penalty phase.[29] Thus, the court reversed the lower court's judgment with respect to the penalty of death but affirmed it in all other aspects.[30]

IV. SEPARATE OPINIONS

Chief Justice Bird, in her concurring and dissenting opinion,[31] emphasizes four main points: first, it has been a long recognized principle that an individual's papers must be free from governmental intrusion;[32] second, the affidavit completely failed to state facts sufficient for probable cause to search for the diaries in question;[33] third, the warrant failed to meet the constitutional requirement of particularly describing the places to be searched and the persons or things to be seized, and therefore did not place any sort of meaningful restriction on the scope of the search through the defendant's personal papers;[34] and fourth, the jury instructions given during the penalty stage were constitutionally deficient. As to the last point, the Chief Justice stated that there is no way to state with certainty that the sentencing jury considered all of the mitigating evidence since the lower court presented them with a list of enumerated mitigating factors which would appear to the average reasonable juror to be

27. *Frank*, 38 Cal. 3d at 729, 700 P.2d at 424, 214 Cal. Rptr. at 810.
28. *Id.* at 730-31, 700 P.2d at 425, 214 Cal. Rptr. at 811.
29. *Id.* at 734, 700 P.2d at 427, 214 Cal. Rptr. at 813.
30. *Id.* at 735, 700 P.2d at 428, 214 Cal. Rptr. at 814.
31. *Id.* at 735-55, 700 P.2d at 428-442, 214 Cal. Rptr. at 814-828 (Bird, C.J., concurring and dissenting).
32. *Id.* at 742, 700 P.2d at 433, 214 Cal. Rptr. at 819.
33. *Id.* at 744-45, 700 P.2d at 435, 214 Cal. Rptr. at 821.
34. *Id.* at 745-47, 700 P.2d at 435-37, 214 Cal. Rptr. at 821-23.

exclusive.[35]

In his separate concurring and dissenting opinion,[36] Justice Kaus stated that he only dissented as to the "more mundane matters" involved in the majority opinion. The main focus of his opinion dealt with the defendant's objection, raised at the trial court level, to the overbreadth of the warrant. Justice Kaus concluded that the defendant did not properly raise the issue and thus did not preserve the objection for appeal.[37]

V. CONCLUSION

While the effect of the court's decision may only be limited to its facts, the court appeared to be issuing a two-pronged warning to magistrates and law enforcement officials regarding the issuance and execution of search warrants in the future. First, trial courts should avoid boilerplate clauses which compel a search broader than the facts contained within the affidavit will support. Second, law enforcement officials must refer to the warrant for guidance when conducting a search; otherwise the evidence will be excluded.

JESSICA L. LEMOINE

D. *Reversible error exists when the court fails to instruct jury on need to find intent to kill as a prerequisite to finding special circumstances:* **People v. Hayes.**

In *People v. Hayes,* 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985), the supreme court reviewed the defendant's conviction and death sentence as required by the death penalty law of 1978. The defendant had been charged with three counts of murder in connection with shooting deaths that occurred in an armed robbery of a hamburger stand and market. Upon arrest the defendant made a confession which was tape recorded and played at the time of trial to the jury. The jury found the defendant guilty as to each murder count. At the conclusion of the penalty phase of the trial, the jury returned a verdict of death on two of the three counts, but they were unable to agree on a penalty for the third count. The defendant was later sentenced to life imprisonment without possibility of parole.

Defendant claimed error as to both the guilt phase and penalty phase of the trial. The claim of error as to the guilt phase was that the tape recording should have been suppressed on *Miranda* grounds. The defendant argued that his statement, "Do I still gotta tell you af-

35. *Id.* at 750, 700 P.2d at 439, 214 Cal. Rptr. at 825.

36. *Id.* at 755-62, 700 P.2d at 442-46, 214 Cal. Rptr. at 828-32 (Kaus, J., concurring and dissenting).

37. *Id.*

ter I admit it?", constituted an attempt to invoke his *Miranda* right to cut-off further questioning. The court rejected this contention. It stated that the trial court reasonably could have found the inference of the defendant's statement to be that he was willing to talk about the crimes but unwilling to go into the details. The court therefore affirmed the verdict of guilt.

The defendant's claim of error as to the penalty phase was that the trial court did not instruct the jury that a finding of "special circumstances" required a prior finding that the defendant intended to kill the robbery victims. The court held that the absence of such an instruction constituted error under *Carlos v. Superior Court,* 35 Cal. 3d 131, 672 P.2d 62, 197 Cal. Rptr. 79 (1983). The *Carlos* court held that the absence of proof of intent to kill made the death penalty cruel and unusual punishment under the United States Constitution. The *Hayes* court stated that failing to instruct the jury of that requirement was reversible error except in four situations, none of them were found to apply. Further, since the specific intent to kill is a question of fact, the court stated it was not a proper one for them to decide. The court thus set aside the special circumstances finding and reversed the trial court as to the penalty phase.

KEITH F. MILLHOUSE

E. *The authority in Penal Code section 3041.5(b)(2)(A) to review parole applications biennially instead of annually is a procedural change that is not limited by prohibitions against ex post facto applications of penalites:* **In re Jackson.**

Because of ex post facto prohibitions, the constitutionality of a law that changed the frequency that a prisoner could petition for parole hearings was considered by the court in *In re Jackson,* 39 Cal. 3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (1985). The legislature amended section 3041.5 of the Penal Code in 1982 to permit the Board of Prison Terms [hereinafter "Board"] to conduct parole hearings semi-annually, instead of yearly, in cases that the Board finds it reasonable to expect parole will be denied. CAL. PENAL CODE § 3041.5(b)(2)(A) (West Supp. 1985). The court determined that the change was merely procedural since it affected the right to have a parole hearing, and thus it was not within the purview of ex post facto prohibitions. However, the court also held that the Board must consider the ques-

tion of a two year postponement from the issue of applicant's parole request.

Lawrence Jackson, convicted of first degree murder for a killing that took place in 1961, sought habeas corpus relief to compel the Board to conduct his parole hearings on an annual basis. In 1977, the determinate sentencing law went into effect to require an annual parole suitability hearing for prisoners that did not have a set parole date. CAL. PENAL CODE § 3041.5(b)(2) (West Supp. 1985). For an analysis of the administrative procedures of the law, see Comment, *Senate Bill 42 - The End of the Indeterminate Sentence,* 17 SANTA CLARA L. REV. 133 (1977). This law was amended in 1982 by section 3141.5(b)(2)(A) to allow administrative discretion in handling parole requests in which the Board finds it is not reasonable to expect a grant of parole. Jackson was determined unsuitable for parole; additionally, he was found to have no reasonable chance of becoming suitable by the next year's hearing.

The reasons for the grant of discretion in postponing a prisoner's next parole hearing was to relieve the Board from the heavy and costly burden of conducting annual parole hearings when the result is very predictable. Statistics were offered to show that nearly all parole hearings resulted in a denial of release or the setting of a parole date three to nineteen years in the future.

Jackson argued that changing the 1977 law to apply to prisoners convicted before the 1982 amendment would impose a penalty ex post facto, and was invalid under federal and state constitutions. His reasoning was that the provision permitting the Board to refuse to hear a petition for parole for two years instead of one amounted to the possibility of a prisoner being denied release that otherwise would have been forthcoming. The Attorney General, arguing for the state, contended that the change was to relieve an administrative burden and was only a procedural change.

To determine whether the challenged statute was only a procedural change, the court examined the actual effect of the amendment. First, it noted that the criteria for a finding of parole suitability was the same as before the amendment. Most importantly, though, the new rule does not deprive an inmate of the right to a suitability hearing. Further, no practical change would occur in the release date because even when suitability for parole is found, experience shows that release does not take place for several years.

Thus, the change of parole review frequency could not have a realistic possibility of denying a prisoner's chances for early release or any other opportunity for parole. The court further buttressed its reasoning by the fact that postponement may occur only on those occasions that the Board is able to articulate reasons for denial of pa-

role at the next hearing. Also, several procedural guarantees operate to insure that the parole hearing itself is conducted fairly. Since the amendment was deemed to have no substantive effect on the right to parole and found to serve a valid state interest, the court held that it was procedural and not an ex post facto imposition of a penalty.

However, the court found that the Board had acted deficiently in one area. When Jackson applied for parole and was denied, the Board based its reasoning for postponing the hearing for two years by the same statement it used to deny parole at the present hearing. Looking at the language in section 3041.5 of the California Penal Code, the court decided that the legislature intended for the questions of parole suitability and postponement of the next hearing to be decided upon independent grounds. In this case, the Board's written decision merely cited the reasons for denying parole without showing that the postponement question was even considered. Since this procedure did not satisfy the requirements of section 3041.5 of the California Penal Code, the court instructed the Board to clearly state the factors that lead to the decision to postpone the next hearing. For a discussion of factors that are valid for a finding of parole unsuitability, see *Allen v. United States Parole Commission,* 671 F.2d 322 (9th Cir. 1982).

JAMES B. BRISTOL

F. *Death sentence reversed because trial court abused its discretion in not granting discovery of police records:* **People v. Memro.**

I. INTRODUCTION

In *People v. Memro,*[1] the supreme court reviewed an automatic appeal from a judgment imposing a sentence of death under the 1977 death penalty legislation.[2] The court reversed the conviction because the trial court abused its discretion in summarily denying the defendant's discovery motion.[3] The court also used the case as an opportu-

1. 38 Cal. 3d 658, 700 P.2d 446, 214 Cal. Rptr. 832 (1985). Chief Justice Bird authored the majority opinion with Justices Mosk, Broussard, and Reynoso concurring. Justice Grodin wrote a separate concurring and dissenting opinion with Justices Kaus and Lucas concurring.

2. *See* 1977 Cal. Stat. ch. 316, § 14 (former CAL. PENAL CODE § 190.6; current version at CAL. PENAL CODE § 1239(b) (West Supp. 1985)).

3. *See infra* notes 20-40 and accompanying text.

nity to examine the breadth of police record discovery in general,[4] to further define "attempt" in the context of lewd or lascivious conduct,[5] and to pronounce a rule requiring a special waiver of jury trial on the special circumstances issue.[6]

II. FACTS

Shortly after the disappearance of seven year old Carl Jr. in October of 1978, Detective Sims of the South Gate Police Department used a psychic to prepare a sketch of the person whom she visualized as having been with Carl Jr. at the time of his disappearance. Carl Jr.'s parents said the sketch resembled the defendant who had dropped off a car for Carl Sr. to repair, an occasional business practice between the two men, on the night of the boy's disappearance. Upon visiting the residence of the defendant, the officers contend they saw "literally hundreds" of photographs, on the walls and shelves, of clothed and partially clothed young boys.[7] After the officers returned to Carl Jr.'s home, the defendant arrived to drop off another vehicle for repair. The defendant reportedly said that he had last seen Carl Jr. on the night of his disappearance when he took the youth to get a soft drink at a local restaurant. The officers contend that they immediately arrested the defendant and took him to the station in handcuffs. The defendant denied telling the officers that he took the boy to a restaurant. Furthermore, the defendant asserted that he was taken to the station, without handcuffs, after agreeing to submit to a polygraph test.[8]

The discrepancies between the story of the police and that of the defendant continued regarding the subsequent events at the city jail. The officers contended that several hours after voluntarily waiving his constitutional rights, and reiterating what he had previously told the officers, the defendant confessed to killing Carl Jr. and two other youths in Bell Gardens in 1976.[9] The officers denied making threats or any form of promises during the interrogation.[10] Later that evening, the defendant led the police to Carl Jr.'s body.

The defendant claimed there were four separate interrogation ses-

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4. *See infra* notes 41-49 and accompanying text.

5. *See infra* notes 50-63 and accompanying text.

6. *See infra* notes 64-69 and accompanying text.

7. While the defendant admitted that photographs of nude boys were in his apartment, he asserted that the officers found them only after a warrantless general search of the premises. The officers denied any search of the apartment on that occasion. *Memro*, 38 Cal. 3d at 667 n.4, 700 P.2d at 452 n.4, 214 Cal. Rptr. at 838 n.4.

8. *Id.* at 668 n.6, 700 P.2d at 453 n.6, 214 Cal. Rptr. at 839 n.6.

9. *Id.* at 669-70, 700 P.2d at 453-54, 214 Cal. Rptr. at 839-40.

10. For a synopsis of the confession, including details of the earlier killings, see *infra* notes 54-56 and accompanying text.

sions, none of which were proceeded by *Miranda* warnings.[11] During the third session, stated the defendant, Detective Carter made threatening references to the ability of Detective Greene, a large officer in the room who was fond of weightlifting, to fight and get answers. Finally, after pointing out a hole in the wall of the interrogation room[12] and making other intimidating maneuvers,[13] Detective Carter " 'reminded' [defendant] that Greene was nearby and . . . '[m]aybe [defendant] would like [his] head to make a matching hole in the wall . . . .' "[14] The defendant subsequently confessed.

III. PROCEDURAL HISTORY

After the defendant waived his right to a jury trial, the court, at a hearing on a motion *in limine,* denied the defendant's renewed attempt to suppress the confession on the ground of involuntariness.[15] At the trial the court found the defendant guilty of three murders: (1) first degree murder as to the Carl Jr. and Ralph C. killings, and (2) second degree murder as to the Scott F. homicide. Additionally, the trial court held that the multiple murder special circumstance allegation was true;[16] however, it found that the felony-murder special circumstance allegation was not true.[17] Finally, after the defendant waived his right to a jury trial on the question of penalty, the trial court imposed a judgment of death for the Carl Jr. murder.

The defendant's appeal stemmed from the trial court's denial of his discovery motion.[18] In his motion, the defendant sought information

11. *Id.* at 670-72, 700 P.2d at 454-56, 214 Cal. Rptr. at 840-42.

12. This four or five inch hole in the plaster was located to the defendant's right, about shoulder level as he sat at the table. *Id.* at 671, 700 P.2d at 454, 214 Cal. Rptr. at 840. Defense counsel investigated the interrogation room several weeks later and instead of finding a hole, he found a fresh plaster patch covering the area where the hole was reported to be. A photograph of the patched wall was later admitted into evidence. *Id.* at 673 n.11, 700 P.2d at 456 n.11, 214 Cal. Rptr. at 842 n.11.

13. For instance: "The officers then directed [defendant] to stand up, pull up his shirt, and drop his pants to his knees. One of the officers stated that they had found some pictures, and 'were just comparing what they could see against the pictures.' [Defendant] complied." *Id.* at 671, 700 P.2d at 455, 214 Cal. Rptr. at 841.

14. *Id.* at 672, 700 P.2d at 455, 214 Cal. Rptr. at 841.

15. *Id.* at 666, 700 P.2d at 451, 214 Cal. Rptr. at 837. For the statutory treatment of *in limine* motions, see CAL. EVID. CODE § 405 (West 1966).

16. Regarding the felony-murder special circumstance of lewd or lascivious conduct, see 1977 Cal. Stat. ch. 316, § 9 (former CAL. PENAL CODE § 190.3(c)(3)(iv); current version at CAL. PENAL CODE § 190.2(a)(17)(v) (West Supp. 1985)).

17. Regarding the multiple murder special circumstance, see 1977 Cal. Stat. ch. 316, § 9 (former CAL. PENAL CODE § 190.3(c)(5); current version at CAL. PENAL CODE § 190.2(a)(2) (West Supp. 1985)).

18. *Memro,* 38 Cal. 3d at 675, 700 P.2d at 457, 214 Cal. Rptr. at 843.

regarding complaints against the South Gate Police Department for use of excessive force or violence and information contained in the officers' personnel files, including psychiatric reports, relating to such incidents. In ruling on the motion, the trial court limited the number of testifying witnesses, who claimed previous mistreatment at the hands of the South Gate Police Department, to two. The court excluded fifteen other possible witnesses because their statements failed to implicate any of the interrogating officers.[19]

IV. MAJORITY'S ANALYSIS

A. Abuse of Trial Court's Discretion

The supreme court quickly dismissed two arguments offered in support of the trial court's ruling. First, the court declined to condition appellate review of discovery on the satisfaction of a pretrial writ requirement. Mentioning lack of supporting authority, additional delay and expense, and the importance of discovery rights, the court held that failure to seek pretrial review of a discovery ruling will not preclude appellate review on the merits.[20] Second, the prosecution argued that the discovery motion was properly denied since the declaration accompanying the motion wrongfully omitted a personal averment by the defendant regarding the involuntariness of his confession. However, the court rejected this argument because California Evidence Code section 1043, subdivision (b)(3)[21] contained no such requirement for a "personal" affidavit by the defendant.[22]

In finding that the trial court erred in denying the discovery motion, the court focused on refuting the prosecution's argument that the defendant had failed to demonstrate a "plausible justification" for the information sought.[23] After emphasizing the importance of dis-

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19. *Id.* at 673, 700 P.2d at 456, 214 Cal. Rptr. at 842. The two witnesses testified to being beaten by Detective Greene. Moreover, they both stated that Greene threatened to put their heads through the wall with the hole in it. *Id.* at 674, 700 P.2d at 456-57, 214 Cal. Rptr. at 842-43.

20. *Id.* at 675-76, 700 P.2d at 457-58, 214 Cal. Rptr. at 843-44.

21. The motion required by section 1043(b) of the California Evidence Code was to contain the following:

> (1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace officer whose records are sought, the governmental agency which has custody and control of such records, and the time and place at which the motion for discovery or disclosure shall be heard;
>
> (2) A description of the type of records or information sought; and
>
> (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.

CAL. EVID. CODE § 1043(b) (West Supp. 1985).

22. *Memro*, 38 Cal. 3d at 676, 700 P.2d at 458, 214 Cal. Rptr. at 844.

23. *Id.* at 676-84, 700 P.2d at 458-64, 214 Cal. Rptr. at 844-50.

covery in criminal trials,[24] the court cited *Pitchess v. Superior Court*[25] as judicial precedent for allowing the discovery of police personnel records.[26] In addition to the *Pitchess* standards, the court stated that the complimentary provisions of California Evidence Code sections 1043[27] and 1045[28] provided the backdrop for evaluating the trial court's ruling.[29]

The court proceeded to validate the defendant's theory of discovery and summarized it by concluding: "Plainly, evidence that the interrogating officers had a custom or habit[30] of obtaining confessions by violence, force, threat or unlawful aggressive behavior[31] would have

24. For example, the court adopted the following statement by former chief Justice Traynor: " '[I]n the absence of a countervailing showing by the prosecution that the information may be used for an improper purpose, discovery is available not merely in the discretion of the trial court, but as a matter of right.' " *Id.* at 677, 700 P.2d at 459, 214 Cal. Rptr. at 845 (quoting Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 244 (1964)).

25. Pitchess v. Superior Court, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974). In *Pitchess*, the accused sought discovery of statements by complainants against the arresting officers and disciplinary records in the police department's possession concerning the officers' tendency towards violent acts. The court held both types of information discoverable. *See generally* Comment, *Discovery of Complaints Alleging Police Brutality*, 63 CALIF. L. REV. 181 (1975) (comprehensive summary, including discussion of *Pitchess*, somewhat outdated due to lack of discussion regarding subsequently passed California Evidence Code section 1043 in 1978).

26. *Memro*, 38 Cal. 3d at 677-78, 700 P.2d at 459-60, 214 Cal. Rptr. at 845-46.

27. *See supra* note 21.

28. CAL. EVID. CODE § 1045 (West Supp. 1985). The court summarized the effect of this provision as follows: "[T]he trial court conducts an *in camera* examination of the material to determine its relevance to the case at hand. Certain information is immune from disclosure, while other information may be released according to the guidelines provided . . . ." *Memro*, 38 Cal. 3d at 679, 700 P.2d at 460, 214 Cal. Rptr. at 846-47. *See generally Review of Selected 1978 California Legislation*, 10 PAC. L.J. 247, 431 (1979) (reviews newly enacted California Evidence Code sections 1043, 1044, and 1045).

29. *Memro*, 38 Cal. 3d at 680, 700 P.2d at 461, 214 Cal. Rptr. at 847. The correlation between *Pitchess* and the statutes is evidenced in the court's holding that the interpretation of "good cause," i.e., "plausible justification," applied by *Pitchess* and its progeny was adopted by the legislature in enacting California Evidence Code section 1043. *Id.* at 678-79 n.19, 700 P.2d at 460 n.19, 214 Cal. Rptr. at 846 n.19.

30. The court stated, " 'Habit' means a person's regular or consistent response to a repeated situation. 'Custom' means the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual." *Id.* at 681 n.22, 700 P.2d at 462 n.22, 214 Cal. Rptr. at 848 n.22 (quoting 2 JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 33.8 (2d ed. 1982)). *See generally* Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982) (evidentiary focus on rules governing methods for proving character; details rationales for continued use of such techniques).

31. Regarding the effectiveness of predicting violent behavior, see generally Harding & Adserballe, *Assessments of Dangerousness: Observations in Six Countries*, 6 INT'L J.L. & PSYCHIATRY 391 (1983) (summarizes results from collaborative study by teams in Brazil, Denmark, Egypt, Swaziland, Switzerland, and Thailand); Middleton,

been admissible on the issue of whether the confession had been coerced."[32] The court also held that *People v. Navarro*[33] "is not authority for the proposition that a claim of coercion can never be grounds for discovery of police personnel records."[34] The court further found that since evidence concerning complaints of prior violence by the interrogating officers was of an admissible type,[35] the counsel's declaration, which asserted that the confession had been coerced by promises of leniency and threats of violence, sufficiently "set forth the materiality" of the information sought.[36] Additionally, the court held that the defendant was not required to furnish additional "foundational facts" about the information sought in his motion, as was required in *Tyler v. Superior Court,*[37] since to require such specificity would "place the accused in the Catch-22 position of having to allege with particularity the very information he is seeking."[38] Finally, the court summarized its holding by stating:

> Counsel's allegations were sufficient to put the court on notice that the voluntariness of the confession would be in issue. The declaration articulated a theory as to how the information would be used in litigating that question. While undoubtedly the factual allegations could have been more specific, they went far beyond expressing "a mere desire for the benefit of all the information" which was in the prosecution's hands . . . . Since counsel demonstrated good cause for the information regarding the interrogating officers, the trial court erred in summarily denying the motion.[39]

The court held that discovery may have produced evidence which

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Predicting Violence: Can Psychiatrists Be Seers?, 66 A.B.A. J. 829 (1980) (reviews New York case where psychiatrists wrongly believed patient was no longer a threat to ex-wife); Wilkins, *Problems with Existing Prediction Studies and Future Research Needs*, 71 J. CRIM. L. & CRIMINOLOGY 98 (1980) (surveys use of predictive statement and details steps needed for improvements in prediction).

32. *Memro*, 38 Cal. 3d at 681, 700 P.2d at 462, 214 Cal. Rptr. at 848.

33. People v. Navarro, 84 Cal. App. 3d 355, 146 Cal. Rptr. 672 (1978).

34. *Memro*, 38 Cal. 3d at 682, 700 P.2d at 462, 214 Cal. Rptr. at 848.

35. The court stated, "Evidence of coercion is relevant both to the admissibility of a confession and the weight it is to be given by the trier of fact." *Id.* (citing Jackson v. Denno, 378 U.S. 368, 386 n.13 (1964); People v. Jimenez, 21 Cal. 3d 595, 607, 580 P.2d 672, 678, 147 Cal. Rptr. 172, 179 (1978); CAL. EVID. CODE § 607 (West 1966)).

With respect to admissibility of confessions under coercive circumstances, see generally Note, *The Compelled Confession: A Case Against Admissibility*, 60 NOTRE DAME LAW. 800 (1985) (overviewing standards for voluntariness of confessions in connection with *Miranda* warnings); Note, *Admissibility of Confessions: The Voluntariness Requirement and Police Trickery in North Carolina*, 20 WAKE FOREST L. REV. 251 (1984) (while focusing on a North Carolina case, this article presents well composed summary of voluntariness requirements for confessions in relation to coercive police behavior); *California Supreme Court Survey, A Review of Decisions*, 10 PEPPERDINE L. REV. 835 (1983) (reviews People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982), where implied promises of leniency and psychological coercion rendered incriminating statements involuntary and thus inadmissible).

36. *Memro*, 38 Cal. 3d at 682, 700 P.2d at 463, 214 Cal. Rptr. at 849. Regarding the necessity of setting forth the materiality of the requested information in order to show good cause, as required by California Evidence Code section 1043, see *supra* note 21.

37. Tyler v. Superior Court, 102 Cal. App. 3d 82, 162 Cal. Rptr. 82 (1980).

38. *Memro*, 38 Cal. 3d 684, 700 P.2d at 464, 214 Cal. Rptr. at 850.

39. *Id.* at 682-83, 700 P.2d at 463, 214 Cal. Rptr. at 849.

would have disproved the voluntariness of the defendant's confession; therefore, the judgment was reversed.[40]

B. Police Record Discovery

The court made a four part holding regarding the scope of the defendant's discovery request. First, the court found that the defendant's request for all complaints of excessive force was overly broad. The court stated that since the defendant "sought the information to bolster his claim of involuntariness in the interrogation setting, only complaints by persons who alleged coercive techniques in questioning were relevant."[41] Second, the court held that absent a showing which linked any of the twelve non-interrogating officers of the South Gate Police Department to the interrogating officers, the defendant was not entitled to discover information regarding those officers.[42] Additionally, the court concluded that the defendant needed to establish the above-mentioned link as a prerequisite to the introduction of testimony regarding the conduct of the twelve non-interrogating officers.[43] Third, the court found that although conclusions resulting from internal police investigations were discoverable under *Pitchess* principles, California Evidence Code section 1045, subdivision (b)(2) now precludes such discovery.[44]

The fourth part of the court's effort to define the scope of police record discovery dealt with statements of psychiatrists or psychologists contained in personnel files. The court noted that at first blush the information appeared to be protected by the psychotherapist-patient privilege contained in California Evidence Code section 1014.[45]

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40. *Id.* at 685, 700 P.2d at 464, 214 Cal. Rptr. at 850. With respect to the admissibility of evidence showing coercion, including the citations which the court repeats at this point in its analysis, see *supra* note 35 and accompanying text. Note 35 also contains a summary of Justice Grodin's concurring and dissenting opinion regarding the majority's "reversal" holding.

41. *Id.* at 685, 700 P.2d at 465, 214 Cal. Rptr. at 851.

42. *Id.* at 686, 700 P.2d at 465-66, 214 Cal. Rptr. at 851-52. The court further stated that the trial court should determine, as a preliminary matter, whether the information sought may be obtained from other department records kept in the course of normal business. This would effectively bypass the disclosure of personnel records. *Id.* at 687 n.30, 700 P.2d at 466 n.30, 214 Cal. Rptr. at 852 n.30 (citing CAL. EVID. CODE § 1045(c) (West Supp. 1985)). *See also supra* note 28.

43. *Memro*, 38 Cal. 3d at 689-90, 700 P.2d at 468, 214 Cal. Rptr. at 854.

44. *Id.* at 687, 700 P.2d at 466, 214 Cal. Rptr. at 852. *See* CAL. EVID. CODE § 1045(b)(2) (West Supp. 1985). The court found a similar statutory prohibition against discovery of complaints occurring more than five years before the defendant's interrogation. *See* CAL. EVID. CODE § 1045(b)(1) (West Supp. 1985). *See also supra* note 28.

45. CAL. EVID. CODE § 1014 (West Supp. 1985).

However, the court held that *in camera* review of the material by the trial court[46] was proper to determine if the statutory exception to the privilege[47] required disclosure of the information.[48] The court adopted the following statement and held that it applied with equal force to officers who allegedly obtained confessions by unlawful methods: " '[T]he peril to which the public is exposed by a police officer who is suffering from a mental or emotional condition which renders him violence prone . . . is a danger of sufficient gravity to justify the invocation of the exception provided by Evidence Code section 1024.' "[49]

C. *Attempted Lewd or Lacivious Conduct Found*

The double jeopardy principles announced in *Burks v. United States*,[50] prohibiting retrial of a defendant after an appellate court has reversed the conviction on the ground of insufficiency of the evidence, are followed in California.[51] Thus, the court found it necessary to address the sufficiency of evidence supporting the murder charges against the defendant.[52] The parties focused on the sufficiency of the premeditation and deliberation evidence needed to support the first degree murder conviction for Carl Jr.'s killing. However, the court deemed it unnecessary to reach that issue since it found sufficient evidence to support the verdict under a felony-murder theory based upon the special circumstance of attempted lewd or lascivious conduct.[53]

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46. *Id.* § 1045(b)(3), (d). *See supra* note 28.

47. CAL. EVID. CODE § 1024 (West Supp. 1966). No privilege applies "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." *Id.*

48. *Memro*, 38 Cal. 3d at 688-89, 700 P.2d at 467, 214 Cal. Rptr. at 853. *Accord* Lemelle v. Superior Court, 77 Cal. App. 3d 148, 143 Cal. Rptr. 450 (1978) (while trial court properly denied discovery of psychiatric or psychological opinions regarding officers' tendency towards violence, accused could properly move for *in camera* inspection of record). *But cf.* Arcelona v. Municipal Court, 113 Cal. App. 3d 523, 169 Cal. Rptr. 877 (1980) (discovery denied of psychological test results showing tendencies of officers to use excessive force and bias against homosexuals due to lack of probative value; privacy rights of officers outweighed value of information to accused).

49. *Memro*, 38 Cal. 3d at 688, 700 P.2d at 467, 214 Cal. Rptr. at 853 (quoting *Lemelle*, 77 Cal. App. 3d at 168, 143 Cal. Rptr. at 462-63 (Tamura, J., dissenting)).

50. Burks v. United States, 437 U.S. 1 (1978). *See generally Criminal Law Survey*, 15 LOY. L.A.L. REV. 688 (1982) (reviews post-conviction proceedings; uses *Burks* as framework for analyzing double jeopardy issue with regards to insufficient evidence).

51. *See, e.g.*, Stone v. Superior Court, 31 Cal. 3d 503, 515, 646 P.2d 809, 817, 183 Cal. Rptr. 647, 655 (1982); People v. Shirley, 31 Cal. 3d 18, 71, 641 P.2d 775, 807, 181 Cal. Rptr. 243, 275 (1982).

52. *Memro*, 38 Cal. 3d at 690-700, 700 P.2d at 468-75, 214 Cal. Rptr. at 854-61.

53. The special circumstance of lewd or lascivious conduct is set out in 1977 Cal. Stats. ch. 316, § 9 (current version at CAL. PENAL CODE § 190.2(a)(17)(v) (West Supp. 1985)). The relevant felony-murder provision states in part: "All murder . . . which is

In order to assess whether there had been an "attempt," the court detailed the defendant's confession.[54] In brief, the defendant stated that he initially offered to take Carl Jr. to a local restaurant for a Coke. Instead, the defendant drove directly to his apartment and "had it in the back of his mind he was going to try to take some pictures of [Carl Jr.] in the nude because that is how he got his sexual satisfaction, photographying [sic] young boys in the nude."[55] After the defendant had guided Carl Jr. into the bedroom, turning on strobe lights as he did so, the boy said he wished to go home. The defendant, angered by this request, grabbed a clothesline and strangled the youth to death. Finally, the defendant attempted to have anal intercourse with the dead body.[56]

Since the case law regarding the types of acts necessary for an attempt under California Penal Code section 288 is limited,[57] the court resorted to traditional definitions for the crime of attempt.[58] While the court mentioned several tests for determining whether an act

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committed in the perpetration of, or attempt to perpetrate . . . any act punishable under section 288, is murder of the first degree." CAL. PENAL CODE § 189 (West Supp. 1985). At the time of the Carl Jr. killing, section 288 provided in relevant part:

> Any person who shall willfully and lewdly commit any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions of sexual desires of such person or of such child, shall be guilty of a felony . . . .

1976 Cal. Stats. ch. 1139, § 177 (current version at CAL. PENAL CODE § 288(a) (West Supp. 1985)).

54. *Memro*, 38 Cal. 3d at 690-93, 700 P.2d at 468-71, 214 Cal. Rptr. at 854-57.

55. *Id.* at 691, 700 P.2d at 469, 214 Cal. Rptr. at 855.

56. The defendant also confessed to killing Scott F., 12 years old, and Ralph C., 10 years old, in Bell Gardens two years earlier. Essentially, after meeting the boys in a park, and after making an unsuccessful advance toward Scott, which produced the fatal response of "fucking faggot," the defendant murdered Scott by slitting his throat. Realizing that Ralph would recognize him as being the last person seen with Scott, the defendant tracked him down and similarly slit his throat. *Id.* at 692-93, 700 P.2d at 470, 214 Cal. Rptr. at 856.

57. *Id.* at 697 n.48, 700 P.2d at 473 n.48, 214 Cal. Rtpr. at 859 n.48. The court cited three cases involving attempts under California Penal Code section 288: People v. Granados, 49 Cal. 2d 490, 319 P.2d 346 (1957) (no attempt where dead girl's body found with apron pulled below genitals, skirt considerably above genitals, and no physical evidence of sexual activity); People v. La Fontaine, 79 Cal. App. 3d 176, 144 Cal. Rptr. 729 (1978) (no attempt where no touching of boy hitchhiker); People v. Worthington, 38 Cal. App. 3d 359, 113 Cal. Rptr. 322 (1974) (attempt instructions allowed where victim's mother had ordered accused to leave victim's bedroom combined with "extremely weak" medical testimony indicating sexual misconduct).

58. For an intriguing view on the British approach to attempts, see generally Dennis, *The Criminal Attempts Act 1981*, 1982 CRIM. L. REV. 5 (overview of British statutory solution, including definition of attempt plus actus reus and mens rea elements); *Case and Comment: Attempt*, 1984 CRIM. L. REV. 675 (summarizing 1984 British case,

constitutes an attempt, it appeared to find the necessary factors under a two-part formula. First, since "to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances,"[59] the court found that "[b]ut for Carl Jr.'s abrupt decision to leave the apartment, it is likely that [the defendant's] steps would have resulted in a completed violation of section 288."[60] Second, although the defendant's act of accompanying the youth to the apartment probably only fell within the "zone of preparation," his ushering of the boy into the bedroom, while always staying close by, was an attempt since it constituted "actual commencement of his plan."[61] The court thus concluded that there was sufficient evidence of attempted lewd or lascivious conduct, under a felony-murder theory, to support the trial court's first degree murder verdict.[62] Hence, the court found no double jeopardy bar to a reprosecution of the defendant.[63]

D. Waiver of Jury Trial on Special Circumstances

The court used the present case to pronounce the requirements of a personal waiver of a jury on a special circumstances allegation since the issue was important and because it was one which would likely arise upon retrial as well as in other death penalty cases.[64] The court used the following quote from *People v. Granger*[65] to frame the problem of inherently conflicting statutory provisions:

> [W]here . . . a jury has . . . been waived as to the guilt phase of the case, it is . . . impossible to comply with the requirements of section 190.4, that the special circumstances be tried by a jury, and also comply with the requirement of section 190.1 that the guilt and special circumstances be determined 'at the same time.[66]

The court held that since, for jury waiver purposes, special circumstance allegations should be given the same deference as charges of

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analyzing the meaning of intent within the attempt context, and commentary regarding effects of Criminal Attempts Act 1981 on common law attempt).

59. *Memro*, 38 Cal. 3d at 698, 700 P.2d at 474, 214 Cal. Rptr. at 860 (citing People v. Werner, 16 Cal. 2d 216, 221-222, 105 P.2d 927, 931 (1940)).

60. *Memro*, 38 Cal. 3d at 699, 700 P.2d at 475, 214 Cal. Rptr. at 861 (citing *Werner*, 16 Cal. 2d at 221-222, 105 P.2d at 931).

61. *Memro*, 38 Cal. 3d at 699, 700 P.2d at 475, 214 Cal. Rptr. at 861 (citing People v. Staples, 6 Cal. App. 3d 61, 68, 85 Cal. Rptr. 589, 594 (1970)).

62. *Memro*, 38 Cal. 3d at 699, 700 P.2d at 475, 214 Cal. Rptr. at 861.

63. *Id.* at 700, 700 P.2d at 475, 214 Cal. Rptr. at 861. The court also rejected the defendant's sufficiency claims regarding malice for the Bell Gardens killings. *Id.*

64. Id. at 700-05, 700 P.2d at 475-78, 214 Cal. Rptr. at 861-64.

65. People v. Granger, 105 Cal. App. 3d 422, 164 Cal. Rptr. 363 (1980).

66. *Memro*, 38 Cal. 3d at 701, 700 P.2d at 476, 214 Cal. Rptr. at 862 (quoting *Granger*, 105 Cal. App. 3d at 427-28, 164 Cal. Rptr. at 366). *See also* CAL. EVID. CODE §§ 190.1(a), 190.4(a) (West Supp. 1985).

substantive offenses,[67] the court in *Granger* was correct in deciding that California Evidence Code section 190.4 should prevail and that the trial court should have required a separate, personal waiver of the right to jury trial on the special circumstances issue.[68] Thus, although the court found that the trial court had erred in not requiring such a waiver, it did not reach the issue of prejudice since the defendant's conviction was reversed on other grounds.[69]

V. SEPARATE CONCURRING AND DISSENTING OPINION

Although he concurred in the majority's holding that the trial court erred in denying defendant's discovery motion, Justice Grodin parted with the majority on two distinct points.[70] First, the justice withheld his approval from that portion of the majority opinion holding which permitted the discovery of psychiatric or psychological statements or reports in the officers' personnel file. Justice Grodin would impose a heightened "good cause" requirement for obtaining the records in order to avoid impermissible invasions of privacy. Among other things he suggested having routine scrutiny of officers' therapy sessions, whether the reports were in police files, for possible indications of violent tendencies.[71] Second, the justice dissented from the majority's apparent holding that the defendant received an unqualified reversal and new trial regardless of what any new discovery would reveal.[72]

VI. IMPACT

While the court used this case as a vehicle to clarify several important aspects of California's death penalty laws, the acts of the defendant in this case, like those in so many sexual deviation/murder scenarios, surely tempt the average citizen to bury reason with rage. However, the court has again proclaimed that our system of justice must prevail over our sense of justice. Yet at some point, in spite of correct legal reasoning, the continual reversal of death sentences for

67. *Memro*, 38 Cal. 3d at 703, 700 P.2d at 477, 214 Cal. Rptr. at 863 (citing People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984)).

68. *Memro*, 38 Cal. 3d at 701, 704, 700 P.2d at 476, 478, 214 Cal. Rptr. at 862, 864.

69. *Id.* at 704-05, 700 P.2d at 478, 214 Cal. Rptr. at 864. Regarding the reversal on other grounds, i.e., the denial of discovery, see *supra* note 3 and accompanying text.

70. *Id.* at 705-710, 700 P.2d at 479-82, 214 Cal. Rptr. at 865-68 (Grodin, J., concurring and dissenting).

71. *Id.* at 705-07, 700 P.2d at 479-80, 214 Cal. Rptr. at 865-66.

72. *Id.* at 710, 700 P.2d at 482, 214 Cal. Rptr. at 868.

those convicted of unconscionable acts may produce a backlash which slides the laws of California closer toward the sense of justice end of the scale.

JOHN EDWARD VAN VLEAR

G. *Erroneously admitted evidence of prior incidents similar to those upon which current criminal charges are based found prejudicial:* **People v. Ogunmola.**

In *People v. Ogunmola*, 39 Cal. 3d 120, 701 P.2d 1173, 215 Cal. Rptr. 855 (1985), a certified gynecologist appealed from his conviction for the rape of two patients. The patients were allegedly raped while "unconscious of the nature of the act," a violation of section 261 of the California Penal Code. CAL. PENAL CODE § 261 (West Supp. 1985). Each rape allegedly occurred during the performance of a bimanual vaginal examination. The defendant argued that the patients mistook the normal insertion of two fingers for a sexual penetration. At trial, the prosecution was permitted to introduce evidence of similar previous incidents involving two different patients. The defendant had been tried and acquitted of the charges stemming from the prior incidents. The issue before the court was whether the trial court had committed reversible error in admitting the evidence concerning the previous acts.

The court reversed the defendant's convictions since it found prejudice in the erroneously admitted evidence. The court found, and the State conceded, that under *People v. Tassell*, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984), the evidence was erroneously admitted for corroboration since neither identity nor intent was at issue. The court also held that the evidence was not independently admissible for the purpose of establishing a necessary element of the crime charged, that is the defendant's opportunity to achieve penetration. Moreover, since the case pitted the credibility of the complaining witnesses against that of the defendant and his nurses, the court found prejudicial error based on the great weight that the corroborating testimony must have carried with the jury. The court's strongest evidence of prejudice came from the fact that the defendant was acquitted when charged with only two similar offenses, but convicted when the jury learned of four similar incidents.

JOHN EDWARD VAN VLEAR

H. *When there is evidence to justify a conviction of a lesser offense than the one for which the defendant is being tried, the trial court must give jury instructions on that lesser included offense:* **People v. Ramkeesoon.**

In *People v. Ramkeesoon,* 39 Cal. 3d 346, 702 P.2d 613, 216 Cal. Rptr. 455 (1985), the supreme court reversed the defendant's conviction of murder and robbery because the trial court committed reversible error when it failed to instruct the jury on the lesser offense of larceny and theft. The defendant testified that he did not have the intent to steal any of the murder victim's property until after the assault had occurred. After presentation of the defendant's testimony, the defense counsel requested that jury instructions on larceny and grand theft be given as lesser offenses included in the robbery. Despite this request, the trial court did not give the instructions. Thereafter, the defendant was convicted of robbery and murder.

In reversing the trial court, the supreme court reiterated that,

> [i]t is well settled that the trial court is obligated to instruct [the jury] on necessarily included offenses — even without a request — when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.

Ramkeesoon, 39 Cal. 3d at 351, 702 P.2d at 616, 216 Cal. Rptr. at 458 (following *People v. Wickersham,* 32 Cal. 3d 307, 325, 650 P.2d 311, 320, 185 Cal. Rtpr. 436, 445 (1982)). The defendant's testimony that he did not form the intent to steal until after the attack warranted an instruction of an offense lesser than robbery. Since an instruction on the lesser offense was not given to the jury, the trial court erred.

The supreme court further held that such error was not merely "harmless error" but reversible error. Because the defendant admitted to taking the victim's property, and the only theft charge instruction given to the jury was robbery, the jury was certain to convict the defendant on the robbery charge. The trial court gave the jury no opportunity to consider whether the defendant had formed the necessary intent for robbery or whether he had simply committed a lesser theft crime. The conviction was therefore reversed.

MISSY KELLY BANKHEAD

I. *The warrantless search of the defendant's briefcase found in the trunk of his vehicle after his arrest was held to be a violation of article I, section 13 of the California Constitution:* **People v. Ruggles.**

In *People v. Ruggles*, 39 Cal. 3d 1, 702 P.2d 170, 216 Cal. Rptr. 88 (1985), the court considered the admissibility of evidence obtained in the warrantless search of a briefcase and two tote bags found in the locked trunk of the defendant's automobile. The court held that the search of the interior of the defendant's automobile was permissible. However, the search of the briefcase and the tote bags without a search warrant violated article I, section 13 of the California Constitution. The court also held that because the crime for which the defendant was charged was committed before the passage of Proposition 8 (CAL. CONST. art. I, § 28), the defendant's motion to suppress should have been granted.

The defendant, David Wendell Ruggles, was a parolee who had been imprisoned for armed robbery. The Los Angeles Police Department received information that the defendant and an accomplice were going to commit an armed robbery on January 3, 1979. The informant also indicated that the defendant would use two handguns in the robbery; one would be carried by the defendant on the small of his back and the other would probably be carried in a briefcase or sachel.

On the morning of January 3, 1979, the police surveillance team observed the defendant placing a brown briefcase in his trunk. When the surveillance team decided that the defendant was about to leave the county, they arrested him and conducted a search of his vehicle after spotting drug paraphernalia in plain view on the back seat. The police seized keys to the car and opened the trunk. In the trunk, they found the brown briefcase and two tote bags. In the briefcase, the police found two guns, ammunition, a holster, handcuffs, gloves, a flashlight and a bandana. In the tote bags, the police found various other robbery equipment. The trial court denied the defendant's motion to suppress all the evidence found in the vehicle because it held that the officers had probable cause to arrest the defendant, to stop his vehicle, and to search his vehicle, including the trunk.

The supreme court first considered the case in light of *United States v. Ross*, 456 U.S. 798 (1982). In *Ross*, the United States Supreme Court expanded the "automobile exception" to the warrant requirement of the fourth amendment. The Court adopted the rule that police officers, who lawfully stop a vehicle, and have probable cause to believe that contraband is located somewhere in the vehicle, may conduct a warrantless search of the vehicle as thorough as that which a magistrate could authorize by warrant. *Id.* at 824.

The California court concluded that the trial court did not err in finding that the police officers had probable cause to search Ruggles' vehicle, including the trunk. However, the court accepted the defendant's argument that this case is distinguishable from *Ross* because here the officers knew which container was likely to contain at least one of the weapons. In *Ross*, there was probable cause to believe that narcotics were somewhere in the vehicle, not in a specific container in the trunk. The supreme court pointed out that a warrant is required for the search of a particular container, even in a car, when it is known that this container holds the sought-after evidence. Therefore, the court held that the fact the briefcase was found in a trunk did not justify a warrantless search unless there was both probable cause and exigent circumstances.

Rather than wait for the United States Supreme Court to direct this court on how to apply *Ross*, the California Supreme Court looked to article I, section 13 of the California Constitution because it establishes a higher standard for searches and seizures than the United States Constitution. The court stated that this decision was in the interest of protecting the privacy of California citizens. It reasoned that because the police can impound an item until a search warrant is obtained, requiring a warrant in cases such as *Ruggles*, absent consent or some exigency, will cause no excessive burden on the police.

Because the court did not rely on Proposition 8 in formulating its opinion, this case will have little or no precedential effect. Proposition 8 establishes that all relevant evidence will now be admissible in criminal proceedings. *In re Lance W.*, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985), interpreted Proposition 8 as abrogating the defendant's right to object to and suppress evidence seized in violation of the California Constitution, but not the Federal Constitution. Therefore, federal standards will probably now be controlling in all California cases involving the warrantless search of containers found in vehicles subsequent to the passage of Proposition 8.

JOHN THOMAS MCDOWELL

J. *Defendant proceeding pro se held not to have been denied due process:* **People v. Smith.**

In *People v. Smith*, 38 Cal. 3d 945, 702 P.2d 180, 216 Cal. Rptr. 98 (1985), the court upheld a trial judge's decision to deny the defendant's motions for continuance. On appeal the defendant claimed he was denied a fair trial because he was not given sufficient time to ex-

amine jury instruction materials and was denied eight hours sleep the night before trial.

At trial the defendant had represented himself and was convicted of burglary. The conviction rested upon an eyewitness identification, the defendant's arrest in a getaway car with stolen goods, and an incriminating statement made at trial. During the trial the defendant stated he did not have adequate access to legal materials and moved for continuance, which the judge denied. On appeal the record indicated that the defendant had access to legal materials via books circulated in the jail library, a deputy's daily run to a law library, and the photocopying of noncirculating materials by a "runner." The defendant used the libraries almost daily for three months. The supreme court held that *Faretta v. California,* 422 U.S. 806 (1974) only required that a defendant proceeding pro se be treated the same as an attorney. The defendant's access to a law library was therefore adequate under the due process clause. *See also Stewart v. Gates,* 450 F. Supp. 583, 589 (C.D. Cal. 1978).

At the end of the trial, the defendant had again moved for a continuance, claiming that he never had an opportunity to examine the California Jury Instructions For Criminal Trials (CALJIC) or to prepare jury instructions. The court upheld the trial court's denial of the motion because the defendant admitted six weeks before trial that he had knowledge of CALJIC and wanted to use the volume. The defendant also knew that his "runner" could photocopy CALJIC for his use. The court further stated that the jury instructions given at trial were not prejudicial. The charge was simple, and the evidence of guilt was overwhelming. Moreover, the trial judge modified or refused many of the instructions proposed by the prosecution, and the defendant could find no error in the instructions. *See* 21 CAL. JUR. 3D *Criminal Law* §§ 2908-2923 (1985).

The defendant's second ground for a continuance was a lack of sleep the night before trial. The defendant claimed that he had not been allowed eight hours sleep and that he was too tired to present a case. The defendant relied on *Stewart v. Pitchess,* 457 F. Supp. 104 (C.D. Cal. 1978), in which the defendants challenged jail conditions and the court gave orders that prisoners be allowed eight hours sleep before court appearances. The court held that the case did not require the trial judge to delay the trial. *Stewart* did not mandate eight hours sleep but only that a defendant not be so tired that he lacked alertness to present his best defense. The overwhelming evidence against the defendant, and not a lack of sleep, accounted for the defendant's failure to cross-examine or to present a defense. Thus, there was no due process violation in not granting a continuance for lack of sleep.

The court summarily dismissed the defendant's other contentions as having no merit. The pretrial hearings for discharging the public defender and allowing the defendant to represent himself were adequate. The defendant was not entitled to a legal research firm, and the trial judge did not abuse his discretion in refusing to replace a court-appointed investigator. Further, the trial judge had properly refused to subpoena certain witnesses requested by the defendant, the evidence was sufficient to support the verdict, a motion for a new trial was properly denied, and the defendant had no right to cross-examine the probation officer who prepared the probation report. The court viewed the case as an example of a street-wise defendant employing every possible tactic to delay his conviction and induce error into the proceedings.

MARK S. BURTON

K. *The rule which operates to exclude probation revocation hearing testimony from the subsequent trial on the underlying criminal charge was not abrogated by the adoption of article I, section 28 of the California Constitution:* **People v. Weaver.**

In *People v. Weaver,* 39 Cal. 3d 654, 703 P.2d 1139, 217 Cal. Rptr. 245 (1985), the court decided the issue of whether the adoption of article I, section 28 of the California Constitution (also known as the Victim's Bill of Rights and Proposition 8) abrogated the rule which excludes testimony given at a probation revocation hearing from the subsequent criminal trial on the related criminal charges.

The defendant in this case was on probation for possessing a sawed-off shotgun, a crime to which he pled guilty in 1981. One of the conditions of his probation was that he could not possess any dangerous weapons during the probation period. In August, 1982, the defendant allegedly accused a man of looking at his girlfriend which prompted the defendant to slash the tires and dent the roof of the man's car with a sheath knife he was carrying. In February, 1983, the district attorney initiated revocation proceedings against the petitioner for this conduct, which also served as the basis for independent criminal charges. The petitioner offered no evidence at the hearing because his attorney felt that Proposition 8 would make that evidence admissible at the subsequent criminal trial on the related charges.

The trial court held that the defendant had violated his probation

and sentenced him to two years in state prison. On appeal the defendant claimed "that the trial court's refusal to continue the revocation hearing until after trial forced him to choose between testifying at the hearing and jeopardizing his privilege against self-incrimination, or remaining silent and surrendering his due process right to present evidence in his own behalf." *Weaver,* 39 Cal. 3d at 657, 703 P.2d at 1141, 217 Cal. Rptr. at 247.

In affirming the order revoking the petitioner's probation, the supreme court first noted that Proposition 8 only applies to prosecutions for crimes committed after its passage in June, 1982. *See People v. Smith,* 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983). The court therefore held that although Proposition 8 came into effect after the gun possession crime had been committed, it still applied to the revocation hearing and subsequent trial because the crime giving rise to the parole violation was committed after the passage of Proposition 8.

The court next analyzed the following rule developed by the supreme court in 1975:

> [T]he testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal . . . .

People v. Coleman, 13 Cal. 3d 867, 889, 533 P.2d 1024, 1042, 120 Cal. Rptr. 384, 402 (1975). *See also* 22 CAL. JUR. 3D *Criminal Law* §§ 3478-3481 (3d ed. 1985). The purpose of this rule was to give the probationer the opportunity to be heard at his probation revocation hearing without fear of self-incrimination. The problem which faced the court in the application of the *Coleman* rule lay in the interpretation of the language of article I, section 28, subdivision (d) of the California Constitution. "[R]elevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings . . . ." CAL. CONST. art. I, § 28(d). This section had recently been interpreted so as to limit a court's power to exclude relevant evidence. *In re Lance W.,* 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). *See also* Comment, *Proposition 8: California Law After In re Lance W. and People v. Castro,* 12 PEPPERDINE L. REV. 1059 (1985).

Nonetheless, despite the constitution's language, the court held that the rule expressed in *Coleman* still operated to exclude probation revocation hearing testimony from subsequent criminal trials. The court used the language in article I, section 28 to justify its holding. The article states: "Nothing in this section shall affect any existing statutory rule of evidence relating to privilege . . . ." CAL. CONST. art. I, § 28(d). The court held that the *Coleman* rule may be

deemed a statutory rule because it is codified in section 940 of the California Evidence Code. CAL. EVID. CODE § 940 (West 1966). Therefore, the *Coleman* rule survived the adoption of Proposition 8, and because the court found that the petitioner would be protected by the *Coleman* rule in any subsequent criminal trial, he could not attack the probation revocation hearing on that basis.

Although this decision has the effect of saving the *Coleman* rule from being abolished by Proposition 8, the decision has a harsh effect on the defendant. Because of his initial belief that Proposition 8 would allow his probation revocation hearing testimony to be used in his subsequent criminal trial, the defendant was punished for his silence at that hearing.

JOHN THOMAS MCDOWELL

L. *Defendant's murder conviction cannot be reversed on appeal even though admissible evidence regarding the victim's use of heroin was excluded at the trial because the omission constituted harmless error:* **People v. Wright.**

In *People v. Wright,* 39 Cal. 3d 576, 703 P.2d 1106, 217 Cal. Rptr. 212 (1985), defendant Wright was convicted of first degree murder. The defendant and victim lived in the same trailer park. On the night of the murder, the two had a heated argument which caused the defendant to retrieve a gun from his trailer and shoot the victim four times, killing him. At trial, the jury convicted the defendant of first degree murder. Wright appealed the conviction on several grounds.

First, Wright contended that the trial court erred when it refused to admit evidence regarding the victim's use of heroin in two situations: at the time of his death, and two years prior thereto when the victim had resisted arrest while under the influence of heroin. Defendant's purpose in offering evidence of the victim's use of heroin was to establish that the victim had an irrational behavior while under the influence of heroin that justified defendant's self-defense.

The trial court refused to admit all evidence regarding the victim's use of heroin because its prejudicial nature outweighed its probative value. The supreme court held that the trial court did err when it refused to admit evidence which would show that the victim had used heroin within twenty four hours of his death, because at the very least, such evidence would have impeached the victim's wife's testimony. At trial she testified for the State and declared that her

husband had not used heroin within two years. Furthermore, such evidence would not have been that prejudicial because the victim's wife had already testified that the victim had used heroin in the past. Therefore, even though the supreme court found that the trial court had erred in not admitting particular evidence regarding the victim's use of heroin the day of his murder, the error was harmless. The judgment was not reversed on defendant's first contention.

Wright's second contention was that the trial court gave improper instructions to the jury on deliberate and premeditated murder. The trial court did err in one set of the instructions given to the jury on deliberation and premeditation; however, other instructions given correctly explained the meaning of deliberation and premeditation. Thus, again the error was harmless.

Thirdly, the defendant asserted that he should have been granted a mistrial and dismissal because the prosecution failed to disclose evidence that tended to exculpate the defendant to his defense counsel. The undisclosed pieces of evidence were the police reports from the night of the murder. The court refused to grant Wright a mistrial because the undisclosed evidence was discovered before a verdict had been reached and before jury deliberations had begun. Once the nondisclosure was discovered, the trial court allowed defense counsel an opportunity to introduce the evidence, remedying any prejudice caused by the nondisclosure.

Finally, Wright claimed that the evidence presented at trial was insufficient to justify the jury's finding that the murder was in fact premeditated and deliberate. On review, the supreme court noted that it was "required to 'review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence . . . from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' " *Wright*, 39 Cal. 3d at 592, 703 P.2d at 1116, 217 Cal. Rptr. at 222 (quoting *People v. Green*, 27 Cal. 3d 1, 55, 609 P.2d 468, 501, 164 Cal. Rptr. 1, 34 (1980)). Using this standard of review, the court held that substantial evidence did exist regarding Wright's planning to kill the victim. After a heated verbal encounter with the victim, the defendant returned to his trailer and procured the murder weapon. Instead of staying safe and secure in his trailer, Wright returned to the scene of the argument and without hesitation shot the victim as soon as he saw him. Based upon these facts, the supreme court found substantial evidence to support the jury's first degree murder conviction. Therefore, the conviction was affirmed.

MISSY KELLY BANKHEAD

IX. EMPLOYEE BENEFITS

A. *Special pay given after retirement, pursuant to a collective bargaining agreement, and not previously accrued while working, may be deducted from unemployment compensation benefits:* Evans v. Unemployment Insurance Appeals Board.

I. INTRODUCTION

In *Evans v. Unemployment Insurance Appeals Board,*[1] the court had to determine whether a special payment of money to retired workers was a pension payment that was to be deducted from unemployment compensation. The issue arose because federal and state laws on unemployment insurance[2] require that certain categories of retirement pay be deducted from the amount of unemployment compensation to which an individual would otherwise be entitled. The court ruled that the special payments, which were automatically given to every employee upon retirement, were pension payments. The payments were deductible from unemployment benefits because they were given for a specific period of time and did not represent vacation time the employees had accrued while working. The court stated, however, that any amounts that represented unused vacation time accruing before retirement could not be deducted from unemployment compensation.

Charles Evans, one of three employees who sought relief in this action, retired from Kaiser Steel Corporation on August 9, 1980. His regular pension payments were scheduled to begin in December, 1980. Evans applied for unemployment insurance benefits for the meantime. However, before the unemployment benefits were given, Evans received a special lump sum payment from Kaiser as provided in the company's pension agreement. The amount of the special payment to be given any employee under the plan had some relation to that employee's vacation time and pay.[3] Evans received an amount

1. 39 Cal. 3d 398, 703 P.2d 122, 216 Cal. Rptr. 782 (1985). Opinion by Justice Grodin with Chief Justice Bird, Justices Mosk, Kaus, Broussard, Reynoso, and Lucas concurring.

2. 26 U.S.C.A. § 3304(a)(15) (West Supp. 1985). This statute mandated the enactment of its provisions by state legislatures. *See* CAL. UNEMP. INS. CODE § 1255.3 (West Supp. 1985).

3. The calculation of special payments is confusing. In some cases the payment to an employee is reduced by the amount of vacation time and pay he has accrued and taken. In other cases where an employee has accrued vacation time but not used it or an employee is ineligible for vacation he will receive an amount equal to thirteen

equal to thirteen weeks of vacation pay. When the Employment Development Department heard of the payment, it denied Evans unemployment benefits; it considered the special payments as retirement pay. The California Unemployment Insurance Appeals Board affirmed.

The Department and Board made similar rulings regarding the other two Kaiser retirees. Stanton Weitzel retired after being placed on a ninety day layoff and after completing an extended vacation. His special payment was reduced by the amount of vacation pay received and so was his unemployment insurance. Robert Goist elected to retire when given a choice between retirement and taking another position. Goist had taken five weeks of vacation with pay in his final year before retiring. Thus, instead of receiving thirteen weeks of salary upon retirement, he received only eight weeks of pay in the special payment plan. Nonetheless, the Department ruled, and the Appeals Board affirmed, that Goist was ineligible for any benefits.

II. THE COURT'S ANALYSIS

A. Statutory History

In 1976, Congress enacted legislation to address an inequity then existing in some states. Individuals who retired under certain conditions were able to draw unemployment benefits in addition to social security and other pension payments.[4] The Senate Finance Committee decided that the law should be uniform in all states to prevent retirees from collecting both types of benefits from the same employer.[5] Congress therefore determined that pension payments should be deducted from unemployment benefits.[6]

Before the new law was to take effect, the National Commission on Unemployment Insurance [hereinafter Commission] was given an opportunity to review the proposed legislation. The Commission was highly critical of the plan, stating that it is inappropriate to limit unemployment compensation in the present economy when many people are forced into early retirement by industry-wide layoffs.[7] In spite of this condemnation by the Commission, the proposed legisla-

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weeks of vacation pay. *Evans*, 39 Cal. 3d at 412-13, 703 P.2d at 128-29, 216 Cal. Rptr. at 789-90.

4. S. Rep. No. 1265, 94th Cong., 2d Sess. 21-22, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6015-16.

5. *Id.*

6. *Id. See also* Annot., 56 A.L.R.3D 520 (1974) (right to unemployment compensation as affected by receipt of pension); Annot., 56 A.L.R.3D 552 (1974) (right to unemployment compensation as affected by receipt of social security benefits).

7. National Comm'n on Unemployment Compensation, Final Report (July, 1980). For background on the right to receive unemployment compensation when laid off according to a mandatory retirement plan, see Annot., 50 A.L.R.3D 880 (1973).

tion passed as an amendment to the Federal Unemployment Tax Act, became effective March 31, 1980, and is codified in Title 26 of the United States Code, section 3304(a)(15).[8]

Section 3304(a)(15) requires retired employees who are eligible for unemployment insurance benefits to deduct the amount of any pension received from weekly insurance benefits.[9] The Act defines pension payments as income that is paid from a plan maintained or contributed to by an employer, and made periodically after retirement.[10] As required by the federal law, the same offset provision was then enacted by the states that did not have such a law or whose law was inconsistent with the provision; California was among them.[11]

The *Evans* court commented that the California Legislature shared the Commission's view but under Congressional mandate reluctantly approved section 1255.3 of the Unemployment Insurance Code in 1979.[12] In order to minimize the effect of the law the legislature included a self-destruct clause that would void or limit the statute if Congress ever limited or repealed section 3304(a)(15).[13] The history of the California statute indicates that the legislature intended only to comply with the minimum requirements of the federal law, and nothing more.[14]

Alongside the deduction statute is section 1265 of the Unemployment Insurance Code, which defines "vacation time earned but not paid prior to termination" in such a manner that it precludes deduction of post termination vacation pay from unemployment benefits.[15] Therefore, the court decided that the determination of whether to treat the special payment given by Kaiser to its retired employees as a retirement benefit must be made in light of this legislative policy towards accrued vacation pay and legislative resistance in passing section 1255.3.[16]

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8. 26 U.S.C.A. § 3304(a)(15).

9. *Id.*

10. 26 U.S.C.A. § 3304(a)(15) (West Supp. 1985); CAL. UNEMP. INS. CODE § 1255.3(c)(1) (West Supp. 1985).

11. CAL. UNEMP. INS. CODE § 1255.3 (West Supp. 1985).

12. *Evans*, 39 Cal. 3d at 409, 703 P.2d at 127, 216 Cal. Rptr. at 787.

13. CAL. UNEMP. INS. CODE, § 1255.3(b), (c) (West Supp. 1985).

14. *Evans*, 39 Cal. 3d at 410, 703 P.2d at 127, 216 Cal. Rptr. at 787.

15. CAL. UNEMP. INS. CODE § 1265.5 (West Supp. 1985).

16. *Evans*, 39 Cal. 3d at 410, 703 P.2d at 127, 216 Cal. Rptr. at 787. For background on the right of an employee to receive unemployment compensation upon voluntary retirement, see Annot., 88 A.L.R.3D 274 (1978). For general eligibility requirements,

B. Characterization of the Special Payment

The court noted that the special payment given to the employees upon retirement is characterized in the pension agreement in specific terms. It is made in a lump sum and equal to thirteen weeks of vacation pay. The sum is reduced by the amount of any vacation pay received in the retirement year, and any unused vacation pay is not added to the amount of the special payment.[17]

Nearly all retiring employees from Kaiser receive the special payment, regardless of their vacation eligibility status, and it is disbursed from the pension trust fund. The payment is received only once and only upon retirement, even if the person is later re-employed by Kaiser. Thus, the employees' argument that the special payment is not a pension, but only compensation earned for previous work, is not persuasive in regards to retiring employees with no accrued vacation.[18]

However, for those employees who have accrued vacation time upon retirement, the portion of the special payment that represents accrued vacation pay cannot be a retirement benefit; the accrued amount would have been paid even if the employee had not retired.[19] The right to vacation pay becomes vested as the employee's services are rendered and is not forfeitable.[20] Accordingly, the court determined that the portion of the special payment not equivalent to accrued vacation pay is properly characterized as a pension payment for purposes of reducing unemployment benefits. The part of the special payment that is equivalent to accrued vacation pay, however, must be exempted from the statutory offset provision.[21]

C. Allocation of the special payment

In the cases of all three employees, the special payment was allocated to the entire three month period immediately following retirement. This was done primarily on the basis of the pension agreement that stated the payment was to cover a thirteen week period. The employees urged that since the payment is a lump sum, it is not a pe-

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see 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 65-72 (8th ed. 1973 & 1984 Supp.); 2 UNEMPLOYMENT INSURANCE REPORTER (CCH) California ¶ 8507.5 (1983).

17. *Evans*, 39 Cal. 3d at 410-11, 703 P.2d at 127-28, 216 Cal. Rptr. at 788.

18. *Id.* at 414-15, 703 P.2d at 130, 216 Cal. Rptr. at 790.

19. *Id.*

20. Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 780-81, 647 P.2d 122, 125-26, 183 Cal. Rptr. 846, 849-50 (1982). For the related matter of the rights of non-unionized, private employees to vacation pay, see Annot., 33 A.L.R.4TH 264 (1984).

21. *Evans*, 39 Cal. 3d at 416, 703 P.2d at 131, 216 Cal. Rptr. at 719. For a comparison of how other states treat this issue, see Annot., 14 A.L.R.4TH 1175 (1982) (right to unemployment compensation as affected by vacation or payment in lieu thereof). *See also* Annot., 3 A.L.R.4TH 557 (1981) (right to unemployment compensation as affected by claimant's receipt of holiday pay); Annot., 93 A.L.R.2D 1319 (1964) (severance payments as affecting the right to unemployment compensation).

riodic pension payment and is not subject to the offset provisions of section 1255.3.[22] The court ruled that this payment should be treated as the first installment of the pension plan, covering the first quarter of retirement. Such an allocation is reasonable in cases where the employee is receiving thirteen weeks of pay for a thirteen week period.[23]

However, this formula is not proper for those individuals who do not receive a full thirteen weeks of vacation pay upon retirement. Persons like Goist, who used their accrued vacation during their retirement year, had that amount of vacation pay deducted from the special payment. The five weeks Goist took during his final year caused him to receive only eight weeks of vacation pay in the special payment. The proper allocation of his retirement bonus should have been only over an eight week period. He should have received five weeks of unemployment benefits with his eight weeks deducted.[24]

III. CONCLUSION

The court's holding is narrowly drawn to the circumstances of Kaiser Company's special retirement payments. Under the Unemployment Insurance Code, the court concluded that to the extent special retirement payments do not include earned but unused vacation pay, they are pension payments. They must therefore be deducted from unemployment benefits. The court also ruled that the deduction from unemployment benefits must be fair. If a payment equal to eight weeks of vacation pay is classified as a pension payment, only eight weeks of unemployment benefits may be withheld.[25]

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22. CAL. UNEMP. INS. CODE § 1255.3(c) (West Supp. 1985). This argument was part of a larger contention that the lump sum should be allocated to a single week in offsetting the unemployment benefits. The court held that the allegation was largely rendered moot by the determination in Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983), *cert. denied sub. nom.*, International Union, United Auto., Aerospace and Agricultural Implement Workers of Am. v. Donovan, 465 U.S. 1099 (1984).

23. *Evans*, 39 Cal. 3d at 419, 703 P.2d at 133-34, 216 Cal. Rptr. at 793-94.

24. *Id.* at 420, 703 P.2d at 134, 216 Cal. Rptr. at 794.

25. *Id.* at 420-21, 703 P.2d at 134, 216 Cal. Rptr. at 794. The court also considered the emplyees' request for attorney fees from the Board under CAL. GOV'T CODE § 800 (West 1980). This was denied, as the recovery of fees must be based upon a finding that the public entity engaged in "conduct not supported by fair or substantial reason." Seghesio v. County of Napa, 135 Cal. App. 3d 371, 377, 185 Cal. Rptr. 224, 228 (1982). The record did not reflect arbitrariness or capriciousness on the part of the Board.

B. *By withdrawing retirement contributions, an employee does not waive his right to apply for disability retirement unless it is proved that he made an informed decision:* **Hittle v. Santa Barbara County Employees Retirement Association.**

I. INTRODUCTION

In *Hittle v. Santa Barbara County Employees Retirement Association*,[1] the court faced two major issues: whether the retirement association's sixty day time limit for judicial review was valid and whether an employee had knowingly waived his right to apply for disability retirement when he withdrew his contributions to an employee retirement plan. The court held that the time limit was invalid in light of Government Code section 31727.[2] It also found no substantial evidence to support the trial court's decision that the employee had waived his rights. The court based this decision on the fact that the only notice the employee had of his options under the plan was a brief handwritten notation on a form letter.[3] This led to the court's finding that the retirement association failed to fulfill its fiduciary duty to inform the employee of his retirement options.[4]

II. FACTS

William T. Hittle began working as a heavy truck operator for the Santa Barbara County Public Works Department in July, 1977, and joined the Santa Barbara County Employees Retirement Association (SBCERA). Two months later, Hittle injured his lower back while working.[5] His chiropractor authorized him to return to work on June 21, 1978. However, a second chiropractor recommended that Hittle refrain from working until August, 1978, at which time his level of disability would be reexamined. On August 14, 1978, an orthopedic surgeon reexamined Hittle and reported that the industrial injury had totally disabled Hittle.[6]

When Hittle did not report to work, SBCERA sent him two form

Furthermore, the Board's judgment was partially upheld. *Evans*, 39 Cal. 3d at 411, 703 P.2d at 128, 216 Cal. Rptr. at 788.

For further information on recovery of attorney fees, see Comment, *Government Code 800 Reimbursement of Counsel Fees*, 1 PEPPERDINE L. REV. 287 (1974).

1. 39 Cal. 3d 374, 703 P.2d 73, 216 Cal. Rptr. 733 (1985). Opinion by Justice Reynoso with Chief Justice Bird and Justices Mosk, Broussard, and Grodin concurring. A separate concurring opinion by Justice Grodin and a separate concurring and dissenting opinion by Justice Lucas were also filed.

2. *Id.* at 385, 703 P.2d at 79, 216 Cal. Rptr. at 739.

3. *Id.* at 389, 703 P.2d at 81, 216 Cal. Rptr. at 742.

4. *Id.* at 393, 703 P.2d at 84, 216 Cal. Rptr. at 745.

5. *Id.* at 380, 703 P.2d at 75-76, 216 Cal. Rptr. at 736. Hittle injured his back when he slipped while dismounting from his truck. *Id.*

6. *Id.* at 380-81, 703 P.2d at 76, 216 Cal. Rptr. at 736.

letters concerning his contributions to the retirement system. The first letter dated August 22, 1978, gave Hittle two options: (1) to withdraw from SBCERA and be refunded his contributions, or (2) to take deferred retirement if he had at least five years service.[7] The second letter dated September 24, 1978, bore a handwritten notation: "[I]f you have filed or intend to file for disability retirement you should not withdraw the above contribution."[8] However, the accompanying form, entitled "Disposition of Retirement Contribution," failed to list the disability retirement as an option available to Hittle.[9]

In October, 1978, Hittle requested and was refunded his retirement contribution. When Hittle discovered two and one-half years later that he might have been eligible for disability benefits, he applied to SBCERA for disability retirement and offered to repay his retirement contributions.[10] Both the personnel director of SBCERA and the retirement board denied Hittle's request. The board also refused to reconsider its decision.[11] Within eighty-five days of this refusal to consider, Hittle sought judicial relief.[12]

The trial court exercised its independent judgment in ruling that the evidence did not support Hittle's claim that, when he withdrew his contributions, he was ignorant of his right to file for disability retirement. The trial court held that an employee cannot apply for disability retirement once he removes his retirement contributions and thus ceases to be a member of SBCERA.[13] The trial court upheld the sixty day time limit for judicial review provided by article XI, section R of the SBCERA bylaws and found Hittle's petition to be

7. *Id.* at 381, 703 P.2d at 76, 216 Cal. Rptr. at 736. Because Hittle had worked just two months, the first letter provided him only one real choice.

8. *Id.* at 382, 703 P.2d at 76, 216 Cal. Rptr. at 737. Before sending this second letter, SBCERA had received a doctor's report indicating Hittle's total disability. *Id.*

9. *Id.* Hittle limited himself to the options on this form when he withdrew his retirement contributions. *Id.*

10. *Id.*

11. *Id.* at 382-83, 703 P.2d at 77, 216 Cal. Rptr. at 737. The personnel director stated that the doctors' medical reports were neither timely nor satisfactory evidence of good cause for Hittle's absence, and the board gave no reason for denying Hittle's request. *Id.*

12. *Id.* at 383, 703 P.2d at 77, 216 Cal. Rptr. at 737.

13. *Id.* *See* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (if a local or state agency's decision substantially affects a fundamental vested right, the court must use its independent judgment to determine whether the agency's findings were supported by evidence). The trial court relied on Dodosh v. County of Orange, 127 Cal. App. 3d 936, 179 Cal. Rptr. 804 (1981) (an employee who voluntarily resigned and withdrew his retirement contributions was ineligible to apply for a disability pension).

untimely.[14]

III. THE MAJORITY OPINION

The first issue was whether an exhaustion of administrative remedies was necessary.[15] The SBCERA bylaws generally provided that if the retirement board rejected an application for benefits, the applicant was entitled to an administrative hearing upon request. Hittle was excused from exhausting his administrative remedies because he repeatedly sought relief from appropriate administrative officials, and because the board failed to advise him of other available administrative procedures after it formally rejected his application.[16]

The next question was whether SBCERA's sixty day limit for seeking judicial review was a private statute of limitations contrary to law.[17] The Code of Civil Procedure section 1094.6 allows local agencies either to adopt a ninety day statute of limitations or to remain subject to the longer statute of limitations for civil actions. It allows a limitation period of less than ninety days "only if the shorter statute of limitations is a state or federal law."[18] Thus, SBCERA had exceeded its authority since its sixty day limitation period did not come within this exception. The court noted that the legislation creating local retirement associations does not provide for local choice of limi-

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14. *Hittle*, 39 Cal. 3d at 383, 703 P.2d at 77, 216 Cal. Rptr. at 738. Article IX, section R of the SBCERA bylaws provide:

> [W]here the party or applicant is entitled to a judicial review of the proceedings before this Board, the petition to the court shall be filed within sixty (60) days from the date the notice of this Board's decision is delivered to the party or applicant, or served by mail upon him or his attorney.

Id. at 385, 703 P.2d at 79, 216 Cal. Rptr. at 739.

15. *Id.* at 384-85, 703 P.2d at 78, 216 Cal. Rptr. at 738. The general rule is that courts have no jurisdiction over an agency's decision until the appellant has exhausted his administrative remedies. However, there are exceptions. *See* 2 CAL. JUR. 3D *Administrative Law* §§ 262-266 (1973).

16. *Hittle*, 39 Cal. 3d at 384, 703 P.2d at 78, 216 Cal. Rptr. at 738. SBCERA did not contend that Hittle had to exhaust his administrative remedies. *Id. See also* Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 477-78, 551 P.2d 410, 417, 131 Cal. Rptr. 90, 97 (1976) (a hospital's bylaws were ambiguous, and a doctor denied staff privileges was not notified of her right to appeal; thus, the doctor was not required to exhaust her administrative remedies).

17. *Hittle*, 39 Cal. 3d at 385, 703 P.2d at 80, 216 Cal. Rptr. at 739. *See supra* note 14 regarding SBCERA's bylaws.

18. *Hittle*, 39 Cal. 3d at 386-87, 703 P.2d at 80, 216 Cal. Rptr. at 740. *See* CAL. CIV. PROC. Code § 1094.6(a), (b), (g) (West Supp. 1985). Section 1094.6 was enacted because local and state agencies had substantially different limitation periods for judicial review. Before section 1094.6, local agencies followed the statutes of limitation for civil actions which is three years for statutory liability and four years in most other cases. *Hittle*, 39 Cal. 3d at 386, 703 P.2d at 79, 216 Cal. Rptr. at 739. *See* City of Sacramento v. Superior Court, 113 Cal. App. 3d 715, 722 n.6, 170 Cal. Rptr. 75, 79 n.6 (1980) (Carr, J., concurring and dissenting); Note, *Review of Selected 1976 California Legislation*, 8 PAC. L.J. 165, 247 (1977).

tation periods except those provided by section 1094.6.[19] Moreover, the local regulation affecting state courts' jurisdiction was held to intrude impermissibly on a legislative function.[20] The court reasoned that a ninety day statute of limitations barred stale claims and that a shorter period offered no extra benefit; it might even preclude some meritorious actions.[21]

The main issue was whether Hittle knowingly waived his right to apply for disability retirement. Any county employee who belongs to the retirement system and retires for a service-connected disability has a statutory right to a retirement allowance.[22] That employee cannot waive his right unless he knowingly and intelligently relinquishes it.[23] Since the law favors pension rights in order to make a pensioner and his dependents economically secure, courts should be especially careful to decide doubtful cases against waiver.[24]

Applying those principles to the case, the court found no substantial evidence to support the trial court's finding that the handwritten notation on the second letter made Hittle's waiver informed and valid.[25] The court relied upon Hittle's statement to the trial court

19. *Hittle*, 39 Cal. 3d at 387, 703 P.2d at 80, 216 Cal. Rptr. at 740. *See generally* County Employees Retirement Law of 1937, CAL. GOV'T CODE §§ 31450-898 (West Supp. 1985). Sections 31526 and 31527 define the scope and content of local retirement board regulations.

20. *Hittle*, 39 Cal. 3d at 387, 703 P.2d at 80, 216 Cal. Rptr. at 741. "It is well settled . . . that laws passed by the Legislature under its general police power will prevail over regulations made by [an agency] with regard to matters which are not exclusively [that agency's] affairs." *Id.* (quoting Tolman v. Underhill, 39 Cal. 2d 708, 712, 249 P.2d 280, 282 (1952)).

21. *Hittle*, 39 Cal. 3d at 388, 703 P.2d at 80, 216 Cal. Rptr. at 741. Had SBCERA adopted the ninety day limitation period of section 1094.6, Hittle's filing eighty-five days after the board denied his application would have been timely. *See supra* note 12.

22. CAL. GOV'T CODE § 31727.4 (West 1973).

23. *Hittle*, 39 Cal. 3d at 389, 703 P.2d at 82, 216 Cal. Rptr. at 742. A county employee may apply for disability retirement "unless one member waives the right to retire for disability and elects to withdraw contributions . . . ." CAL. GOV'T CODE § 31721 (West Supp. 1985). For discussions about the requirement that a waiver be knowing and intelligent, see 30 CAL. JUR. 3D *Estoppel and Waiver* § 22 (1976); Bauman v. Islay Invs., 30 Cal. App. 3d 752, 758, 106 Cal. Rptr. 889, 893 (1973); and Jones v. Brown, 13 Cal. App. 3d 513, 519, 89 Cal. Rptr. 651 ,654 (1970).

24. *Hittle*, 39 Cal. 3d at 390, 703 P.2d at 82, 216 Cal. Rptr. at 742. The party claiming waiver must prove waiver by clear and convincing evidence. Public policy dictates that pension legislation be construed liberally. *Id. See also* Eichelberger v. City of Berkeley, 46 Cal. 2d 182, 188, 293 P.2d 1, 4 (1956); Heaton v. Marin County Employees Retirement Bd., 63 Cal. App. 3d 421, 429, 133 Cal. Rptr. 809, 813 (1976).

25. *Hittle*, 39 Cal. 3d at 389, 703 P.2d at 81, 216 Cal. Rptr. at 741-42. While a trial court uses an independent judgment test to review an administrative finding, an appellate court normally employs the substantial evidence test in reviewing the trial court. A judgment is upheld if any substantial evidence supports each essential finding of the

that when he withdrew his retirement contributions, he did not know that he might qualify for disability retirement.[26] This statement was found to be the only rational explanation of his conduct.[27]

The court also determined that SBCERA failed to meet its fiduciary duty to fully inform members of their retirement options.[28] A pension plan creates a trust relationship between the pension beneficiary and the trustees of the pension funds. Trustees must therefore exercise their fiduciary trust in good faith and "may not obtain any advantage . . . over the beneficiary by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."[29] SBCERA had not fulfilled its fiduciary duty because using only the "obscure" handwritten notation to inform Hittle of his possibility for disability retirement was "tantamount to . . . misrepresentation and concealment, however 'slight.' "[30] It would have been little trouble to include the retirement option in the form letter or in the "Distribution of Retirement Contribution" form.[31]

IV. CONCURRING AND DISSENTING OPINIONS

Justice Kaus concurred in the finding that substantial evidence was insufficient to uphold the trial court's finding of a knowing waiver. However, he thought it unnecessary to hold that SBCERA had not fulfilled its fiduciary duty.[32]

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trial court; all contrary evidence is ignored. 6 B. WITKIN, CALIFORNIA PROCEDURE APPEAL § 245 (2d ed. 1971). Since no substantial evidence supported the trial court's finding, it was necessary to decide whether the court might employ the independent judgment test requested by Hittle. *Hittle*, 39 Cal. 3d at 389, 703 P.2d at 81, 216 Cal. Rptr. at 741-42.

26. *Id.* at 390, 703 P.2d at 82, 216 Cal. Rptr. at 742-43. Hittle stated:

> At the time I withdrew the contributions, I had absolutely no knowledge of the fact that I might qualify for a service-connected disability retirement . . . . At no time that I can recall had anyone ever told me that a County employee with less than five years of service credit had any form of retirement benefits. Had I been aware of the fact that a County employee who incurs a service-connected disability may apply for service-connected disability retirement regardless of the length of employment, I would not even have considered withdrawing the $187.49 that the County was offering me.

Id.

27. *Id.* at 390-91, 703 P.2d at 82-83, 216 Cal. Rptr. at 743.

28. *Id.* at 391, 703 P.2d at 83, 216 Cal. Rptr. at 743. Hittle first raised this issue on appeal. A new issue ordinarily may not be raised on appeal because the opposing party would be prejudiced in defending against the new theory; however, "this rule does not apply when the facts are not disputed and the party merely raises a new question of law." *Id.* at 392 n.10, 703 P.2d at 83 n.10, 216 Cal. Rptr. at 743 n.10 (quoting UFITEC, S.A. v. Carter, 20 Cal. 3d 238, 249 n.2, 571 P.2d 990, 996 n.2, 142 Cal. Rptr. 279, 285 n.2 (1977)).

29. *Hittle*, 39 Cal. 3d at 392-93, 703 P.2d at 84, 216 Cal. Rptr. at 744 (quoting CAL. CIV. CODE § 2228 (West 1985)). *See generally* CAL. CIV. CODE §§ 2216-2222 (West 1985).

30. *Hittle*, 39 Cal. 3d at 394, 703 P.2d at 84-85, 216 Cal. Rptr. at 745.

31. *Id.*

32. *Id.* at 395, 703 P.2d at 85-86, 216 Cal. Rptr. at 746 (Kaus, J., concurring).

Justice Lucas concurred and dissented. He agreed that Hittle need not exhaust his administrative remedies, that the sixty day statute of limitations was contrary to law, and that the court's standard of review should be the substantial evidence test.[33] But Lucas asserted that the trial court's finding of a knowing waiver should have been upheld under the substantial evidence test.[34] The court should have disregarded Hittle's statement[35] because a reviewing court should look only to evidence supporting the successful party.[36] Moreover, the trial judge could have disbelieved Hittle in light of the handwritten notation and Hittle's access to counsel when he withdrew his contributions.[37] Lucas also attacked the inference that Hittle's decision was not informed because it was contrary to his economic interest.[38] Finally, the court should not have considered the breach of SBCERA's fiduciary duty since this issue was not raised at the trial court level.[39]

V. CONCLUSION

The *Hittle* case should make government associations more careful in enumerating all retirement options available to employees. Associations can simply update their retirement forms and form letters. Also, associations will be forced to choose a statute of limitations permitted by Government Code section 31727.

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33. *Id.* (Lucas, J., concurring and dissenting).
34. *Id.*
35. *See supra* note 26.
36. *Hittle*, 39 Cal. 3d at 395, 703 P.2d at 85-86, 216 Cal. Rptr. at 746. *See supra* note 22.
37. *Hittle*, 39 Cal. 3d at 396, 703 P.2d at 86, 216 Cal. Rptr. at 746-47. The trier of fact decides all issues of credibility. Nestle v. City of Santa Monica, 6 Cal. 3d 920, 925, 496 P.2d 480, 483, 101 Cal. Rptr. 568, 571 (1972).
38. *Hittle*, 39 Cal. 3d at 396-97, 703 P.2d at 87, 216 Cal. Rptr. at 747. Justice Lucas argued that if Hittle had known all his options and their consequences and had still withdrawn his contribution, the majority's logic would nevertheless have made the waiver unknowing. *Id.*
39. *Id.* Justice Lucas noted that Hittle had provided no evidence on SBCERA's fiduciary duty or on whether this duty had been met. *Id.*

X. EVIDENCE

A. *At probation and parole revocation hearings, documentary hearsay evidence that does not fall within an exception to the hearsay rule is admissible if it is sufficiently reliable:* **People v. Maki.**

In *People v. Maki,* 39 Cal. 3d 707, 704 P.2d 743, 217 Cal. Rptr. 676 (1985), Donald L. Maki was on probation and was required to obtain written consent from his probation officer before leaving the County of San Diego or the State of California. At probation revocation proceedings, a court found that Maki had violated his probation requirements by traveling to Chicago, Illinois, without obtaining his probation officer's consent.

Over Maki's objections, the court admitted into evidence copies of a car rental invoice and a hotel receipt, which had been seized during Maki's arrest on unrelated charges. Maki's name appeared three times on the invoice showing that he had rented a Hertz car at Chicago's O'Hare Airport for two days. The judge and Maki's probation officer compared the signature on the invoice to Maki's signatures on two probation reports and concluded that the same person made all three signatures. The hotel receipt was unsigned, but it bore Maki's name and showed payment for services at the Hyatt Regency O'Hare in Chicago.

No attempt was made to admit the two documents as business records under California Evidence Code section 1271; rather, the prosecution argued that the documents were properly admitted as "adoptive admissions." The "adoptive admission" doctrine creates an exception to the hearsay rule where a party, who knows a statement's content, "has by words or other conduct manifested his adoption or his belief in its truth." CAL. EVID. CODE § 1221 (West 1966).

The court found that the documents were not admissible as adoptive admissions. Without testimony as to the invoice's preparation or its purpose, Maki's signature alone could not authenticate the contents of the invoice. There could be no adoptive admission unless it were proven that Maki had read the invoice (knowledge) and then signed it (a manifest adoption).

The court criticized *People v. Whittaker,* 41 Cal. App. 3d 303, 115 Cal. Rptr. 845 (1974), which side-stepped the adoptive admission issue by holding that a rental receipt was not hearsay because it was used to prove that a defendant possessed a paper indicating that he had rented an automobile. The court quoted with approval Justice Jefferson, who argued that possession alone should not be grounds to circumvent the hearsay problem. Invoices should be admissible only when there is a hearsay exception and additional evidence. *See* 1 B.

Jefferson, *California Evidence Benchbook* § 1.3 (2d ed. 1982). Unlike the receipts in *People v. Goodall,* 131 Cal. App. 3d 129, 182 Cal. Rptr. 243 (1982), Maki's car invoice was used to prove the truth of the matter stated therein (that Maki was in Chicago).

The court stated that procedures at a parole revocation hearing should be flexible and accommodating; thus, a court may consider documents that are reliable yet would be inadmissible at a criminal trial. The substance of such hearsay must be considered before it provides grounds for revocation. *See* 22 CAL. JUR. 3D *Criminal Law* § 3480 (1985).

The court concluded that the invoice and the receipt were admissible and constituted sufficient grounds to revoke probation. Maki's uncontroverted signature on the invoice was the significant factor. From this signature, plus the fact that the parties relied on this type of invoice for billing and payment, the court could infer that Maki was in Chicago. While the hotel receipt had little probative value alone, it served to corroborate the invoice. Moreover, no evidence contradicted the inference that Maki went to Chicago.

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B. *Hearing report made by a mental health counselor is inadmissible hearsay in a contested trial to determine if an individual is gravely disabled:* **Conservatorship of Manton.**

The court, in *Conservatorship of Manton,* 39 Cal. 3d 645, 703 P.2d 1147, 217 Cal. Rptr. 253 (1985), ruled on the admissibility of a report prepared by a mental health counselor after conducting an investigation of the appellant, James Manton. The report contained information from Mr. Manton's hospital and medical records, statements of doctors and hospital attendants, and interviews with Manton and his father. The court ruled that statutory authority permitting use of the report at a hearing to determine the necessity of conservatorship did not authorize its use as evidence in a trial contesting the result of that hearing. *See* CAL. WELF. & INST. CODE §§ 5008(h), 5350(d) (West 1984). Therefore, the report on Manton should have been excluded as hearsay from the trial that followed the hearing.

Procedures for conservatorship and institutionalization are codified in the Welfare and Institutions Code, as the Lanterman-Petris-Short Act. *Id.* §§ 5000-5550 (West 1984). If a recommendation for conservatorship is made by an appropriate person, an inquiry is begun to de-

termine the mental capability of the proposed conservatee. *Id.* §§ 5352, 5354. A report containing all relevant aspects of the person's background and medical and social condition must be prepared for the court. The investigator preparing the report must also comment on any suitable alternatives to conservatorship. If there are none, a conservator should be designated and the scope of his powers articulated. *Id.* §§ 5354.5-5356. *See also* Kelitz, Fitch & McGraw, *A Study of Involuntary Civil Commitment in Los Angeles County,* 14 SW. U.L. REV. 241 (1984).

A hearing must be scheduled as part of this process to evaluate the findings of the mental health professional who submits the report. Section 5354 of the Act requires that the report be filed with the court prior to the hearing. CAL. WELF. INST. CODE § 5354 (West 1984). In order to find that conservatorship is appropriate, a court must determine that the person is gravely disabled because of a mental disorder or alcoholism. *Id.* §§ 5008(h), 5350. The conservatee may then request a jury trial to decide the issue of grave disability. *Id.* § 5354. *See* Comment, *Mental Health Professionals as Civil Commitment Hearing Officers: Procedural Due Process Problems,* 17 U.C.D.L. REV. 653 (1984).

The Act only mentions the use of the investigator's report in the hearing, not in a subsequent trial. Based upon this language and the lack of any evidence showing legislative intent to create another exception to the hearsay rule, the court determined that the report must be excluded from a trial contesting the finding of the hearing.

The court also ruled that the contents of the report in the current case would not be admissible under any other exception to the hearsay rule. Furthermore, much of the report was found to be multiple hearsay (e.g., the father's descriptions of the mother's feelings about her son's condition). Because admission of the report was highly prejudicial, the court ordered a new trial to determine whether Manton was gravely disabled under the Act. For general information on conservatorship, see 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§ 584-699A (8th ed. 1974 & Supp. 1984).

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C. *Failure to seize evidence does not preclude admission of eyewitness testimony:* In re Michael L.

In the case of *In re Michael L.*, 39 Cal. 3d 81, 702 P.2d 222, 216 Cal. Rptr. 140 (1985), the court refused to extend a police officer's duty to preserve evidence beyond the duty to *seize* evidence which may favorably resolve the issue of a defendant's guilt or innocence. Thus, the court affirmed the lower court's holding that the failure of police

officers to *seize* evidence, which provided the basis for witnesses' in-court identifications of the defendant, did not make the identifications inadmissible at trial.

The defendant, a minor, appealed his robbery conviction on the grounds that the in-court identifications made by witnesses after they had viewed a videotape of the robbery were not admissible at trial because the police officers failed to *seize* the videotape. Thereafter, the videotape was inadvertently erased; thus, it was not available at trial. Furthermore, the defendant asserted that the police officers had a duty to *seize* the videotape pursuant to *People v. Hitch*, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). *Hitch* imposes a duty upon police officers to *preserve* evidence when there is a "reasonable possibility that . . . [the evidence would constitute] favorable evidence on the issue of guilt or innocence . . . ." *Id.* at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15.

On the facts of this case, the court refused to extend an officer's duty of preserving evidence to include a duty to *seize* evidence. The court's reasoning was two-fold. First, the police officer, by not seizing the videotape which was the basis for the witnesses' in-court identifications, did not act in bad faith nor did he intentionally deprive the defendant of the videotape as evidence. The owners of the videotape, after the investigating police officer's request, agreed not to erase the tape. Thereafter, it was inadvertently erased by the owner. The police officer made a good faith effort to *preserve* the tape by obtaining the owner's consent not to erase the tape after the owner refused to let the police have custody of the tape.

Second, the court asserted that the effects of excluding the in-court identification would be wholly disproportionate to the alleged police misconduct. The court was satisfied with the reliability of the in-court identifications because they were made by witnesses who knew the defendant, and who had viewed the videotape several times immediately following the robbery. Other witnesses, who viewed the tape but did not know the defendant, testified that the tape was in fact clear. Thus, the court refused to exclude the in-court identification.

In its opinion, the court did not hold that it would never exclude evidence resulting from a police officer's failure to seize. However, it refused to do so under the facts of this case. Thus, in the future the

court may hold the police officers to a duty to seize evidence, not merely to preserve it.

MISSY KELLY BANKHEAD

XI. GOVERNMENT LAW

The supreme court vacates an injunction prohibiting the Department of Fair Employment and Housing and the Fair Employment and Housing Commission from handling civil service discrimination claims: **MacPhail v. Court of Appeal, Third Appellate District.**

In *MacPhail v. Court of Appeal, Third Appellate District,* 39 Cal. 3d 454, 703 P.2d 374, 217 Cal. Rptr. 36 (1985), the supreme court, pursuant to California Constitution, article VI, section 10, invoked its original jurisdiction to review an injunction issued in the related case of *State Personnel Board v. Fair Employment & Housing Commission,* 39 Cal. 3d 422, 703 P.2d 354, 217 Cal. Rptr. 16 (1985). This injunction prevented the Department of Fair Employment and Housing (DFEH) and the Fair Employment and Housing Commission (FEHC) from processing any employment discrimination claims against the state civil service.

Alec MacPhail had twice applied to become a traffic officer cadet with the California Highway Patrol. After passing all written and oral examinations, MacPhail was disqualified because an X-ray allegedly revealed spinal anomalies that the State Personnel Board (the Board) believed created a higher than average risk of a future back injury. Although MacPhail claimed that he had never had back problems and four physicians reported that MacPhail was healthy and fit for cadet duties, the Board rejected MacPhail's appeals. MacPhail next appealed to the DFEH. The Department, however, would not hear his complaint because of the superior court's injunction in *State Personnel Board.*

For the reasons given in *State Personnel Board,* the court dissolved the injunction as applied to MacPhail and other state civil service employees and applicants similarly situated. A peremptory writ of mandamus was issued directing the lower courts to vacate their orders in *State Personnel Board. See* 43 CAL. JUR. 3D *Mandamus and Prohibition* § 28 (1978).

The court did not need to consider MacPhail's due process claims. MacPhail had argued that the injunction denying him adjudicatory procedures guaranteed him by the Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1985), deprived him of property without due process. *See Logan v. Zimmerman,* 455 U.S. 422 (1985). MacPhail claimed due process had also

been denied because the Board could not impartially judge the fairness of its own employment standards. *See Mennig v. City Council,* 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (1978).

Additionally, the court noted that "handicap" as defined in California Government Code, section 12926, subdivision (h) includes physical conditions that may cause a future handicap but are presently causing no disability. CAL. GOV'T CODE § 12926(h) (West Supp. 1986). *See American National Insurance Co. v. Fair Employment & Housing Commisssion,* 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982).

MARK S. BURTON

XII. FAMILY LAW

The statutory presumtion that a child born by a married woman while living with her husband is the child of the husband does not violate the due process or equal protection clauses of the California or United States Constitutions: **Michelle W. v. Ronald W.**

In *Michelle W. v. Ronald W.,* 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985), the court was asked to decide the constitutionality of section 621 of the California Evidence Code. It states, "[T]he issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. EVID. CODE § 621(a) (West Supp. 1985). *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 215-42 (8th ed. 1974).

Defendants Ronald and Judith W. were married and lived together when Judith gave birth in 1974 to Michelle, the subject of this action. Ronald W. treated Michelle as his daughter and provided the necessary support for her until Ronald and Judith W. were divorced about five years later. Judith was given custody of Michelle. During Judith's marriage to Ronald, she was having sexual relations with Donald R., the second claimant to this paternity action. Donald R. and Judith were married in 1980. After the marriage, Donald R. held Michelle out as his natural child and brought this action to establish paternity in 1981. The trial court applied the presumption that because Ronald and Judith W. were married when Michelle was born, and Ronald W. was neither impotent nor sterile, Michelle was Ronald W.'s child. Plaintiffs then appealed.

The presumption of paternity established by section 621 is limited by the following prerequisites: (1) The mother must be married; (2)

the mother must be cohabitating with her husband; (3) the husband must be neither impotent nor sterile; (4) two years must have passed since the birth of the child and during those two years, the husband or the mother together with the supposed father must have failed to rebut the presumption in court. *See* CAL. EVID. CODE § 621 (West Supp. 1985). The plaintiffs, Michelle W. by her guardian ad litem and Ronald W., contended that the fourth prerequisite was unconstitutional. First, they argued that since this claim was brought six years after the birth of Michelle, the two year limitation prevented them from establishing the biological parent-child relationship in a court of law. They claimed that this deprived them of a liberty interest protected by the due process clause. Second, they contended that the gender-based classification in the statute, which allows the mother and child to rebut the presumption of paternity but not the natural father, violated the equal protection guarantees of the California and United States Constitutions.

The supreme court rejected both contentions after weighing the competing public and private interests. The court rejected Donald R.'s due process claim holding that the public interest in protecting the family unit and promoting familial stability outweighed Donald R.'s interest in establishing a biological relationship in a court of law. The court also refused to adopt Michelle W.'s due process claim. The rationale for denying her claim was that the state's interest in preserving and protecting developed parent-child and sibling relationships which give young children social and emotional strength and stability, outweighed Michelle W.'s interest in establishing paternity. The court noted that Michelle W.'s association with Donald R. was not threatened and she was not prohibited from obtaining information as to who her biological father was. Therefore, the court saw no violation of due process.

The court quickly dismissed the equal protection attack on section 621. It held that the wording of section 621 does not give the natural mother greater rights to rebut the presumption of paternity than the supposed father. The rights of the natural married mother and the rights of the natural unwed father are conditioned upon each other because the mother may raise the motion for blood tests only if the biological father files an affidavit with the court acknowledging paternity. Neither party has any rights over the other. Therefore, the court determined that section 621 of the California Evidence Code did not violate the constitutional rights of the plaintiffs, and the judgment of the trial court was affirmed.

JOHN THOMAS MCDOWELL

XIII. FOOD AND DRUG LAW

The language of Health and Safety Code section 11055, the general purpose behind the narcotic statutes, and important public policy concerns all dictate a finding that D-cocaine is a "controlled substance" within the meaning of the statute: **People v. Aston.**

In *People v. Aston*, 39 Cal. 3d 481, 703 P.2d 111, 216 Cal. Rptr. 771 (1985), the court was asked to interpret section 11055 (b)(4) of the California Health and Safety Code. CAL. HEALTH & SAFETY CODE § 11055 (b)(4) (West 1975 & Supp. 1985). Besides interpreting the statute's actual wording, the court focused on key state-wide policy concerns in holding that the synthetically derived D-cocaine is a controlled substance under the act.

The two defendants were arrested and subsequently convicted of possession of cocaine for sale after a warranted search of their residence yielded several grams of white powder. At trial, an expert for the prosecution testified that while his tests on the seized substance confirmed the presence of cocaine in salt form, his lack of access to a "polarimeter" made it impossible to determine whether or not the substance was D- or L-cocaine. An expert for the defense next testified that D-cocaine is an "isomer," a compound with the same molecular formula as cocaine but with a different molecular structure. The expert also testified that D-cocaine does not affect the central nervous system as does the "pharmacologically active" L-cocaine. The trial court, in refusing to admit the latter expert's testimony, found that it was not relevant or credible as evidence since the chance of finding D-cocaine on the street was extremely rare. The crux of the defendants' argument was that the trial court committed reversible error in failing to give the jury a defense-requested instruction regarding the prosecution's burden. The defendants asserted that the state must prove beyond a reasonable doubt that the seized substance was in fact L-cocaine, a specifically listed controlled substance, and not merely D-cocaine.

The court immediately held that the "independently by means of chemical synthesis" language of Health and Safety Code section 11055(b)(4) served to include D-cocaine within the category of "controlled substance." Moreover, by outlining the general purpose behind California's narcotics statutes, and by emphasizing key public policy considerations, the court reaffirmed the state's commitment to wage war on drug abuse. With regard to the war on cocaine usage,

the court detailed the "evils" to be remedied: distribution by organized crime, the negative impact of cocaine's untaxed sale trade on the monetary and taxation systems of the state, and the burden cocaine distribution places on the state's law enforcement officers. Finally, the court rejected the defendants' arguments that subsequent amendments to the narcotic statutes, which expressly identified cocaine "isomers" and "D-cocaine" as controlled substances, showed an original lack of legislative intent to include such items. However, the court found that since these amendments were merely administrative corrections, the defendants' hypertechnical reading of the earlier statute could not stand. Hence, the court held that because the legislature intended to give "cocaine" its popular, common sense meaning, both L- and D-cocaine were deemed controlled substances under the act.

The court also rejected several additional issues raised on appeal by the defendants. First, because the trial court made the state's paid narcotics assistant available to the defense prior to a hearing on the motion to suppress, the defendants claimed that the assistant should have been made available at the preliminary hearing. However, the court held that there was no reversible error in the magistrate's failure to make that person available at the preliminary hearing because the defendants could not show that they were denied a fair trial or otherwise suffered prejudice at the preliminary hearing. Second, the court held that the trial court properly refused to suppress the seized cocaine as evidence. The court rejected the defendants' arguments that the affidavit, upon which the warrant was issued, did not meet the requirements set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964), since the affidavit adequately informed the magistrate of the underlying circumstances. The court also rejected the defendants' contentions that the affidavit contained misstatements and omitted material facts.

JOHN EDWARD VAN VLEAR

XIV. JURY SELECTION

A. *By meeting the three* Wheeler *requirements, the defendant made a prima facie showing that the prosecution used peremptory challenges in order to accomplish a discriminatory exclusion of jurors:* **People v. Motton.**

In *People v. Motton*, 39 Cal. 3d 596, 704 P.2d 176, 217 Cal. Rptr. 416 (1985), the court found reversible error in the defendant's conviction for second degree murder, since the trial court did not require the prosecution to justify its peremptory challenges after the defendant

made a prima facie showing of discriminatory exclusion. The defendant made the prima facie showing by meeting the three requirements set forth in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

The defendant initially objected to the prosecutor's exercise of his peremptory challenges to exclude all black females from the jury. The judge rejected this contention. On the following day, after the prosecutor had dismissed a black male by a peremptory challenge, the defendant objected that the prosecution was in fact excluding all blacks from the jury. In addition to rejecting this revised contention, the judge also refused to allow the record to reflect the previous challenges, since she thought such a request should have been made before the jury selection process began. Finally, the judge was not going to allow either attorney to place something on the record which she could not verify by "recollections."

Under *Wheeler*, "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias [as distinguished from a permissible specific bias] violates the right to trial by a jury drawn from a representative cross-section of the community . . . ." *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The court held that the defendant had clearly met the three *Wheeler* requirements necessary to make a prima facie showing of discriminatory exclusion.

First, the defendant met the "adequacy of record" requirement by making as complete a record as possible. The court held that it was unnecessary to establish the true racial identity of the challenged jurors as a prima facie case may be established merely by showing that the prosecution was systematically excusing persons who appeared to be black. In response to the fact that the deficiencies in the record could be attributed, at least in part, to the actions of the trial judge, the court articulated a cooperation standard: "When a *Wheeler* motion is made, we believe it to be the duty of the court, and both counsel as officers of the court, to cooperate to construct as complete a record as is feasible." *Motton*, 39 Cal. 3d at 605, 704 P.2d at 181, 217 Cal. Rptr. at 421.

Second, the defendant met the "exclusion of a cognizable group" requirement since black women do represent a cognizable group which has a definite composition and corresponding factors defining and limiting the group. The court also noted the fact that if blacks comprise a portion of the population, then they are an important seg-

ment of an "ideal cross-section of the community" which should be on a jury panel.

Third, the defendant met the "likelihood that persons were challenged because of their membership in a cognizable group" requirement since the prosecutor used a disproportionate number of his challenges to exclude black women and blacks in general. At the time of the first *Wheeler* motion, the prosecutor had used four of eight challenges to remove all black women. Moreover, by the close of jury selection, he had used seven of his thirteen challenges to eliminate all black jurors.

JOHN EDWARD VAN VLEAR

B. *Peremptory challenges cannot be used to exclude a group of persons from a jury based upon a group, rather than a specific, bias:* **People v. Trevino.**

In *People v. Trevino*, 39 Cal. 3d 667, 704 P.2d 719, 217 Cal. Rptr. 652 (1985), the two defendants appealed their first degree murder convictions. Defendant Trevino contended that his constitutional right to have a jury composed of a representative cross-section of the community was violated as a result of the prosecutor's misuse of peremptory challenges. The prosecutor used six of his twenty-one peremptory challenges to exclude potential jurors with Spanish surnames. As a result, no Spanish surnamed jurors were on the panel; one of the alternates did have a Spanish surname.

The supreme court, in an opinion written by Justice Reynoso, reversed Trevino's murder conviction holding that his state constitutional right to a trial by a jury which represented a cross-section of the community was violated. The court followed its ruling set out in *People v. Wheeler*, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978), where the court stated "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." *Id.* It is necessary to distinguish between a specific bias and a group bias. Attorneys are allowed to use peremptory challenges to exclude a potential juror on the basis of specific bias but cannot exclude a potential juror based upon a group bias.

The main issue in *Trevino* was whether the term "Spanish surname" adequately describes Hispanics as a cognizable class within the community. The United States Supreme Court has noted that "just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class."

Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954). The California court also noted that Hispanics are frequently categorized by the term "Spanish surname" in government forms and other statistical forms. Thus, there was binding authority to hold that the term "Spanish surname" categorized Hispanics as a cognizable class.

The court analyzed the facts and found that the prosecutor did, in fact, abuse his use of the peremptory challenge. The prosecutor removed all potential Hispanic jurors (six of them) by peremptory challenge except for one alternate juror who had a Spanish surname. The Spanish surnamed alternate was left on the panel only after defense counsel asked the court to rule on a *Wheeler* motion. Therefore, the court had reason to conclude that the prosecutor's peremptory challenges excluding six Hispanics were based upon a group bias rather than a specific bias. Because the jury did not represent a cross-section of the community, as required by the California Constitution, Trevino's murder conviction was reversed.

Regarding defendant Rivas, the court affirmed the trial court's finding that there was insufficient evidence as a matter of law to convict him. The primary evidence that connected Rivas with the murder was that he had been seen with Trevino the day of the murder. The court found this evidence highly speculative, and thus, affirmed Rivas' acquittal.

MISSY KELLY BANKHEAD

XV. JUVENILE LAW

Juvenile's record insufficient to outweigh a Youth Authority recommendation for commitment in lieu of state prison: **People v. Javier A.**

In *People v. Javier A.*, 38 Cal. 3d 811, 700 P.2d 1244, 215 Cal. Rptr. 242 (1985), the court found the trial court abused its discretion in rejecting the recommendation for Youth Authority commitment of a juvenile who had committed murder. The court ruled that there were no legal grounds to reject the defendant's Youth Authority treatment. Under *People v. Carl B.*, 24 Cal. 3d 212, 218, 594 P.2d 14, 17, 155 Cal. Rptr. 189, 192 (1979), it must be determined on appeal "whether there was substantial evidence to support the trial court's implied finding of defendant's unamenability or unsuitablity 'to training and treatment offered by the Youth Authority.'" CAL. WELF. & INST. CODE, § 707.2 (West 1984). The decision to sentence a defend-

ant to prison instead of the Youth Authority cannot be founded upon hostility toward the Youth Authority's mission of rehabilitating serious offenders or doubt as to its ability to perform that mission. *See In re Jeanice D.*, 28 Cal. 3d 210, 216, 617 P.2d 1087, 1089-90, 168 Cal. Rptr. 455, 457-58 (1980) (defendant guilty of murder given Youth Authority commitment). The court also stressed that this decision cannot be based upon fear that the period of the Youth Authority confinement will be too short to protect society's interests. The court must assume that the Youth Authority will properly perform its function.

The appellate court found that the trial court had based its rejection of Youth Authority confinement upon the inadequacy of the facility to train and treat serious offenders, and upon its desire to impose a substantial period of confinement upon the defendant. The countervailing considerations provided by the probation officers were insufficient to overcome the recommendation of the Youth Authority. Consequently the court found that the lower court believed that a vicious murderer deserves nothing less than a prison sentence. This, the court concluded, was inconsistent with the rehabilitative philosophy of juvenile law and thus an abuse of discretion. *See* CAL. WELF. & INST. CODE § 202 (West 1984).

DAYTON B. PARCELLS III

XVI. LABOR LAW

A. *Even if a union has not won a secret ballot election the ALRB has authority to certify the union and to issue a bargaining order to remedy an employer's egregious unfair labor practices:* Harry Carian Sales v. Agricultural Labor Relations Board.

I. INTRODUCTION

In *Harry Carian Sales v. Agricultural Labor Relations Board*,[1] the Agricultural Labor Relations Board (hereinafter the ALRB) cited an employer for thirty unfair labor practices and ordered the employer to bargain with the union. The employer challenged the board's authority to issue such an order. The supreme court held that the ALRB has authority to issue bargaining orders and that the present

1. 39 Cal. 3d 209, 703 P.2d 27, 216 Cal. Rptr. 688 (1985). The majority opinion was written by Justice Grodin with Justices Broussard, Reynoso, Levins, and Acting Chief Justice Kaus concurring. There was a separate dissenting opinion by Justice Mosk, with Justice Lucas concurring. Justice Levins was assigned by the Acting Chairperson of the Judicial Council. The ALRB had never before issued a bargaining order. *Id.* at 218, 703 P.2d at 32, 216 Cal. Rptr. at 693.

ALRB order was valid.[2] Although the Agricultural Labor Relations Act (hereinafter the ALRA) expressly states that a union may only be recognized by a secret ballot election,[3] the court found that the California Legislature intended to prevent employers from voluntarily recognizing unions without employee consent, and not to prohibit bargaining orders.[4] Federal precedent supported the bargaining order.[5] Since the employer's past unfair labor practices made a fair rerun election unlikely, union authorization cards showing employee sentiment were sufficient to support the bargaining order.[6]

The court held that a reviewing court should not consider events subsequent to an order (e.g., passage of time and employee turnover).[7] It also reaffirmed that an agency's findings should not be overturned if substantial evidence supports those findings.[8]

II. FACTUAL BACKGROUND

Harry Carian Sales (hereinafter HCS) grows table grapes in the Coachella Valley. In January, 1977, the United Farm Workers (hereinafter the UFW) began an organizational campaign among HCS employees. The UFW soon filed charges that HCS was committing unfair labor practices in violation of the ALRA, section 1153, subdivisions (a) and (c).[9] While the decision of an administrative law judge of the ALRB was pending, the UFW filed a certification petition and held a secret ballot election among HCS employees. Both HCS and the UFW filed objections to the election.[10]

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2. *Id.* at 218, 703 P.2d at 32-33, 216 Cal. Rptr. at 693-94.

3. "Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives . . . ." CAL. LAB. CODE § 1156 (West Supp. 1985). For an overview of the ALRA, see 41 CAL. JUR. 3D *Labor* §§ 214-25 (1984).

4. *Harry Carian*, 39 Cal. 3d at 224, 703 P.2d at 37, 688 Cal. Rptr. at 697.

5. *Id.* at 227, 703 P.2d at 39, 688 Cal. Rptr. at 699. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

6. *Harry Carian*, 39 Cal. 3d at 236, 703 P.2d at 45-46, 688 Cal. Rptr. at 706.

7. *Id.* at 238, 703 P.2d at 47, 688 Cal. Rptr. at 707.

8. *Id.* at 219, 703 P.2d at 34, 688 Cal. Rptr. at 694.

9. *Id.* at 218, 703 P.2d at 33, 688 Cal. Rptr. at 693. Section 1153 reads: "It shall be an unfair labor practice for an agricultural employer to do any of the following: (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152. (b) . . . (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." CAL. LAB. CODE § 1153 (West Supp. 1985).

10. *Harry Carian*, 39 Cal. 3d at 218, 703 P.2d at 33, 688 Cal. Rptr. at 693. This first administrative judge eventually found that HCS had committed many of the 23 unfair

In December, 1978, a second administrative law judge found several unfair labor practices and recommended UFW certification and a bargaining order.[11] In October, 1980, the ALRB affirmed and modified the decisions of the administrative law judges. After finding thirty unfair labor practices, the Board certified the UFW as the employee's sole bargaining representative and ordered HCS to bargain with the UFW.[12] HCS appealed, challenging the ALRB's authority to issue the order to remedy unfair labor practices.[13]

III. THE MAJORITY OPINION

A. The Standard of Review for Agency Findings

The supreme court stated that it would uphold the ALRB's findings concerning unfair labor practices if substantial evidence supported those findings.[14] The Board's findings needed only a plausible basis and would not be disturbed unless the testimony was "incredible or inherently improbable."[15] Applying this review standard, the court found substantial evidence to support the Board's findings.[16]

B. The ALRB's Authority to Issue Bargaining Orders

The court looked to the United States Supreme Court decision in *NLRB v. Gissel Packing Co.*[17] as the primary authority on bargaining orders. *Gissel* affirmed that the National Labor Relations Board (hereinafter the NLRB) may issue bargaining orders where an employer commits unfair labor practices that make a fair election unlikely or that undermine a union's majority and cause an election to be set aside.[18]

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labor practices alleged by the UFW. *Id.* The election showed 80 votes for and 88 votes against the UFW; 142 ballots were challenged. *Id.*

11. *Id.* at 219, 703 P.2d at 33, 216 Cal. Rptr. at 693. This second judge stated that the election should be set aside and that HCS's conduct precluded a fair rerun election. *Id.*

12. *Id.* The unfair labor practices included "surveillance of union activities; unlawful interrogation of HCS employees; threats of discharge and deportation; discriminatory hirings, layoffs and discharges; acts of violence against UFW organizers; an illegal wage increase; and election-eve promises made to HCS employees." *Id. See also id.* at 241-52, 703 P.2d at 48-56, 216 Cal. Rptr. at 709-16.

13. *Id.* at 219, 703 P.2d at 34, 216 Cal. Rptr. at 694.

14. *Id.* at 220, 703 P.2d at 34, 216 Cal. Rptr. at 694. The court respected the ALRB's expertise and thus gave special deference to the ALRB's findings. *Id. See* Rivcom Corp. v. Agricultural Labor Relations Bd., 34 Cal. 3d 743, 756-58, 670 P.2d 305, 312, 195 Cal. Rptr. 651, 658, *cert. denied*, 104 S. Ct. 2345 (1983).

15. *Harry Carian*, 39 Cal. 3d at 220, 703 P.2d at 34, 216 Cal. Rptr. at 694. *See* Montebello Rose Co., Inc. v. ALRB, 119 Cal. App. 3d 1, 20, 173 Cal. Rptr. 856, 866 (1981).

16. *Harry Carian*, 39 Cal. 3d at 220, 703 P.2d at 34, 216 Cal. Rptr. at 694.

17. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

18. *Id.* at 610. *See* Levine & Martin, *The* Gissel *Doctrine Revisited: Should N.L.R.B. Bargaining Orders or Representation Elections Determine Union Status?*, 34

For determining whether a bargaining order may be issued when a union has not won an election, the *Gissel* Court divided unfair labor practices into three categories. First, in "exceptional" cases of "outrageous" or "pervasive" unfair labor practices, the NLRB may issue a bargaining order even if the union has not shown a card majority.[19] Second, in cases of less pervasive practices, the Board may issue a bargaining order if (1) the union once enjoyed a majority, and (2) the Board finds that past unfair labor practices make a fair rerun election unlikely and that a bargaining order best protects employee sentiment expressed through cards.[20] Third, in cases of minor or less extensive unfair labor practices, an election is hardly affected and a bargaining order is not allowed.[21]

The court stated that the ALRA, like the National Labor Relations Act (NLRA), neither expressly authorized nor prohibited the *Gissel* bargaining order.[22] The ALRB had relied on its general remedial authority to justify a bargaining order.[23]

HCS contended that the legislative intent behind the ALRA precluded issuing *Gissel* bargaining orders. HCS noted that the ALRA specifies the secret ballot as the method by which a union becomes the exclusive bargaining representative of a group of employees.[24] Moreover, in legislative committee hearings, the drafters of the ALRA indicated that a union could be recognized under the ALRA only if it won a secret ballot election.[25]

LAB. L.J. 371 (1983); Note, *The* Gissel *Bargaining Order, the NLRB, and the Courts of Appeals: Should the Supreme Court Take a Second Look?*, 32 S.C.L. REV. 399 (1980).

19. *Gissel*, 395 U.S. at 613-14. *See* United Dairy Farmers Co-op. Ass'n v. NLRB, 633 F.2d 1054, 1066, 1069 (3d Cir. 1980) ("card majority" means that a majority of the employees sign cards authorizing a union to represent them in collective bargaining); *Harry Carian*, 39 Cal. 3d at 221 n.4, 703 P.2d at 35 n.4, 216 Cal. Rptr. at 695 n.4.

20. *Harry Carian*, 39 Cal. 3d at 221, 703 P.2d at 35, 216 Cal. Rptr. at 695. *See* Salem, *Nonmajority Bargaining Orders: A Prospective View in Light of United Dairy Farmers*, 32 LAB. L.J. 145 (1981); Note, *N.L.R.B. Bargaining Orders in the Absence of a Union Majority: Time to Enforce* Gissel, 26 N.Y.L. SCH. L. REV. 291 (1981).

21. *Harry Carian*, 39 Cal. 3d at 221, 703 P.2d at 35, 216 Cal. Rptr. at 695.

22. *Id.*

23. *Id.* at 221-22, 703 P.2d at 35, 216 Cal. Rptr. at 695. Section 1160.3 allows the ALRB to issue cease and desist orders, to reinstate employees, and "to provide such other relief as will effectuate the policies of this part." CAL. LAB. CODE § 1160.3 (West Supp. 1985).

24. *Harry Carian*, 39 Cal. 3d at 222, 703 P.2d at 35, 216 Cal. Rptr. at 696. *See supra* note 3.

25. *Harry Carian*, 39 Cal. 3d at 222, 703 P.2d at 35-36, 216 Cal. Rptr. at 696. In hearings before the Senate Industrial Relations Committee on May 21, 1975, Chief Justice Bird, then Secretary of Agriculture and Services, stated, "under our Act, we only allow one way of recognition and that's through a secret ballot election." *Id.* Senator Dunlap, an author of the bill, said that under the ALRA, unlike the NLRA, "there is a

While agreeing that a union can only gain recognition through a secret ballot election, the court held that "limiting the means of union recognition was unrelated to the issue of bargaining orders."[26] The court stated that the ALRA should be interpreted to promote and not defeat the general purpose of the Act.[27] This purpose was to keep agricultural employees "free from the interference, restraint, and coercion of employers" in selecting a union.[28] The court feared that if the ALRB could not issue bargaining orders, employers would commit egregious unfair labor practices to defeat union organization.[29] According to the court, the secret ballot requirement was not concerned with bargaining orders but was intended to prevent "sweetheart" deals.[30] The court stated that bargaining orders did not conflict with worker self-determination where an employer's conduct precluded employees from having a fair election.[31]

The court next decided that *Gissel* was applicable precedent even though the NLRA implicitly allows certification without a secret ballot election,[32] and the ALRA limits certification to a secret ballot

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secret ballot [election] in all cases." *Id.* A labor consultant to the Agriculture and Services Agency in drafting the ALRA, Professor Herman M. Levy wrote, "The sole means by which a labor organization can achieve certification as bargaining representative is to win a secret ballot election conducted by the board." *Id. See* Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro*, 15 SANTA CLARA L. REV. 783, 789-90 (1975).

26. *Harry Carian*, 39 Cal. 3d at 223, 703 P.2d at 36, 216 Cal. Rptr. at 696.

27. *Id. See* People v. Centr-O-Mart, 34 Cal. 2d 702, 214 P.2d 378 (1950).

28. *Harry Carian*, 39 Cal. 3d at 223, 703 P.2d at 36, 216 Cal. Rptr. at 697. Section 1140.2 reads more fully, "[T]he policy of the State of California [is] to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing . . . and to be free from the interference, restraint or coercion of employers . . . in the designation of such representatives . . . ." CAL. LAB. CODE § 1140.2 (West Supp. 1985).

29. *Harry Carian*, 39 Cal. 3d at 223-24, 703 P.2d at 36-37, 216 Cal. Rptr. at 697. The court believed that no other sanction was sufficient to deter employers. *Id.* at 224, 703 P.2d at 37, 216 Cal. Rptr. at 697. *See also supra* note 23.

30. *Id.* In a "sweetheart" deal, an employer voluntarily recognizes a union which lacks employee support. *Id. See* Englund v. Chavez, 8 Cal. 3d 572, 504 P.2d 457, 105 Cal. Rptr. 521 (1972) (employees were not consulted when growers recognized the Teamsters Union; violence then broke out between the UFW and the Teamsters); Highland Ranch v. Agricultural Labor Relations Bd., 29 Cal. 3d 848, 633 P.2d 949, 176 Cal. Rptr. 753 (1981) (held that section 1153, subdivision (f) of the ALRA prohibits "sweetheart" deals). *See also* Comment, *California's Attempt to End Farmworkers Voicelessness: A Survey of the Agricultural Labor Relations Act of 1975*, 7 PAC. L.J. 197, 206-11, 221-23 (1976).

31. *Harry Carian*, 39 Cal. 3d at 226, 703 P.2d at 38, 216 Cal. Rptr. at 698-99.

32. *Id.* at 227, 703 P.2d at 39, 216 Cal. Rptr. at 699. It is "an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 159(a) . . . ." 29 U.S.C. § 158(a)(5) (1982). "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees . . . for the purposes of collective bargaining . . . ." 29 U.S.C. § 159(a) (1982). The "designated or selected" language in Section 159 (a) is not specific and thus suggests that a union can be certified without a secret ballot election. *Harry Carian*, 39 Cal. 3d at 226-27, 703 P.2d at 39, 216 Cal. Rptr. at 699.

election.[33] In upholding the NLRB's authority to issue bargaining orders, *Gissel* had not relied on its conclusion that the NLRA allows union recognition without a secret ballot.[34] Although *Gissel* involved an unlawful refusal to bargain, the court cited numerous cases where bargaining orders were issued to remedy violations of NLRA sections identical to ALRA section 1153, subdivisions (a) and (c).[35]

The court rejected several other arguments advanced by HCS. One argument it rejected was that the legislature's failure in 1979 to enact a bill expressly authorizing the ALRB to issue bargaining orders showed that the ALRA does not permit such orders.[36]

C. The Propriety of This Bargaining Order

Courts normally reverse the Board's remedy only for abuse of discretion;[37] however, courts must examine a bargaining order more critically because it is an extraordinary remedy.[38] The court in this case found the bargaining order appropriate because it fit *Gissel's* "second category."[39]

HCS argued unsuccessfully that the authorization cards signed by over half HCS's employees were improperly admitted into evidence by the administrative law judge.[40] HCS also urged that the cards did not reliably show majority support. To conclude that the cards estab-

33. *See supra* note 3.

34. *Harry Carian*, 39 Cal. 3d at 228, 703 P.2d at 39, 216 Cal. Rptr. at 700. The court stated that *Gissel* had conducted two independent inquiries: "whether an employer's duty to bargain under NLRA section 8(a)(5) can arise without a Board election, and, if so, whether a bargaining order is an appropriate remedy where an employer rejects a card majority and refuses to bargain . . ." and commits unfair labor practices. *Id.* at 227, 703 P.2d at 39, 216 Cal. Rptr. at 699. In the second inquiry, the NLRB did not rely on section 159(a). *Id.* at 228, 703 P.2d at 39, 216 Cal. Rptr. at 699-700.

35. *Id.* at 228, 703 P.2d at 40, 216 Cal. Rptr. at 700.

36. *Id.* at 230, 703 P.2d at 41, 216 Cal. Rptr. at 701. The court countered that the legislature's action in 1979 revealed nothing about legislative intent in 1975. Moreover, the legislature may have considered the 1979 bill unnecessary because the ALRA section 1148 requires the Board to follow applicable precedent and "bargaining orders were already well-established precedent under the NLRA." *Id.* at 231, 703 P.2d at 42, 216 Cal. Rptr. at 702.

37. *Id.* at 232, 703 P.2d at 42, 216 Cal. Rptr. at 702. *See* Butte View Farms v. ALRB, 95 Cal. App. 3d 961, 967, 157 Cal. Rptr. 476, 479 (1979). Because the ALRB draws on its knowledge and expertise, the court respected the ALRB's choice of remedy. *Harry Carian*, 39 Cal. 3d at 232, 703 P.2d at 42, 216 Cal. Rptr. at 702.

38. *Harry Carian*, 39 Cal. 3d at 232 n.17, 703 P.2d at 42 n.17, 216 Cal. Rptr. at 702 n.17.

39. *Id.* at 232, 703 P.2d at 43, 216 Cal. Rptr. at 703. *See supra* note 20 and accompanying text.

40. *Harry Carian*, 39 Cal. 3d at 233, 703 P.2d at 43, 216 Cal. Rptr. at 703. Although the UFW never alleged majority status in its complaint, the court held that since the

lished a majority, the ALRB had relied on *NLRB v. Cumberland Shoe Corp.*,[41] which held that an unambiguous card would be used *solely* to obtain an election.[42] While *Gissel* cautioned against applying *Cumberland Shoe* too mechanically,[43] the court had only to decide whether the cards were "*reliable enough* to support a bargaining order" where a fair election was improbable or where an election had been set aside.[44] The cards were pronounced reliable because the HCS employees had been told the cards indicated support for the UFW as well as for an election.[45]

The court next held that a reviewing court should not consider events occurring subsequent to an employer's unfair bargaining practices.[46] HCS had contended that a bargaining order was not needed because the passage of time and employee turnover had erased the effects of past unfair labor practices.[47] Citing *NLRB v. L. B. Foster Company*,[48] the court explained that if courts considered worker turnover, employers would prolong litigation until the effects of unfair labor practices dissipated.[49] This reasoning was especially relevant to the ALRA because agricultural employees often work for several employers annually and frequently do not work for the same employers each year.[50]

The court noted a potential conflict between bargaining orders and an employee's free choice. However, it valued the deterrent effect of bargaining orders and remarked that employees could decertify an unwanted union.[51]

IV. THE DISSENT

Justice Mosk accused the majority of violating longstanding princi-

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ALRB has broad discretion in choosing a remedy and is not limited by the ALRA to remedies requested in a complaint, evidence as to a potential remedy is relevant. *Id.*

41. NLRB v. Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), enforced, 351 F.2d 917 (6th Cir. 1965).

42. *Harry Carian*, 39 Cal. 3d at 234, 703 P.2d at 44, 216 Cal. Rptr. at 704. *See Gissel*, 395 U.S. at 584.

43. *Gissel*, 395 U.S. at 608 n.27.

44. *Harry Carian*, 39 Cal. 3d at 236, 703 P.2d at 45-46, 216 Cal. Rptr. at 706 (quoting *Gissel*, 395 U.S. at 601 n.18).

45. *Id.* at 236, 703 P.2d at 46, 216 Cal. Rptr. at 706.

46. *Id.* at 237-38, 703 P.2d at 46, 216 Cal. Rptr. at 707.

47. *Id.* at 237, 703 P.2d at 46, 216 Cal. Rptr. at 706. *See* Comment, *"After All, Tomorrow is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 STAN. L. REV. 505, 512-21 (1979).

48. 418 F.2d 1 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

49. *Harry Carian*, 39 Cal. 3d at 238, 703 P.2d at 46, 216 Cal. Rptr. at 707. The employer "will have . . . an ally, in addition to the attrition of union support inevitably springing from delay in accomplishing results, the fact that turnover itself will help him, so that the longer he can holdout the better his chances of victory will be." *Id.* (quoting *Foster*, 418 F.2d at 5).

50. *Harry Carian*, 39 Cal. 3d at 239, 703 P.2d at 47, 216 Cal. Rptr. at 708.

51. *Id.* at 239-40, 703 P.2d at 48, 216 Cal. Rptr. at 708.

ples of statutory construction to justify a punitive action against an employer who committed egregious unfair labor practices.[52] One such principle is that courts should not interpret clear, unambiguous statutory language.[53] Another is that legislative intent is of prime importance,[54] and a third is that specific statutes prevail over general provisions.[55] Mosk believed that sections 1156.3 and 1159 clearly mandated that bargaining agents can be selected only through secret ballot elections.[56]

Mosk also argued that *Gissel* was inapposite because the NLRA does not specify how to choose bargaining representatives, and thus an employer must bargain whenever a union presents "convincing evidence of majority support."[57] In contrast, the ALRA requires a bargaining representative to be chosen by secret ballot. Mosk argued that the NLRB derives its authority to issue bargaining orders solely from the NLRA's ambiguity as to how representatives are to be chosen.[58] Thus, it follows that the ALRB lacks authority to designate representatives.[59]

V. CONCLUSION

The authority to issue bargaining orders gives the ALRB a potent new remedy to an employer's unfair labor practices. But it is unclear how frequently the ALRB will employ this remedy. One suspects that bargaining orders will be reversed for egregious employer conduct such as in this case. However, since the *Gissel* tests of "outrageous" unfair labor practices and the improbability of fair rerun elections are highly subjective, the ALRB may issue bargain orders to less culpable employers. Yet, because the courts scrutinize extraordinary remedies closely, the ALRB will probably not become overzealous.

Employers should be substantially deterred from committing unfair labor practices. Because California courts will not consider

52. *Id.* at 252, 703 P.2d at 56, 216 Cal. Rptr. at 716 (Mosk, J., dissenting).
53. *Id. See supra* note 3.
54. *Harry Carian*, 39 Cal. 3d at 253, 703 P.2d at 56, 216 Cal. Rptr. at 717 (Mosk, J., dissenting). *See supra* note 25.
55. *Id.* at 252-53, 703 P.2d at 57, 216 Cal. Rptr. at 717. *See supra* note 3 (the specific statute) and note 23 (the general provision).
56. *Harry Carian*, 39 Cal. 3d at 252-53, 703 P.2d at 56, 216 Cal. Rptr. at 716-17 (Mosk, J., dissenting).
57. *Id.* at 253-54, 703 P.2d at 57, 216 Cal. Rptr. at 717.
58. *Id.*
59. *Id.* at 254, 703 P.2d at 58, 216 Cal. Rptr. at 718.

events occurring subsequent to unfair labor practices, employers now have less incentive to prolong litigation and incur additional legal fees. Finally, the ALRA's "secret ballot election" language is not dead. It still acts to discourage "sweetheart" deals that deny employees the right to freely choose a union.

MARK S. BURTON

B. *Agent shop service fees may be required to be put in escrow to insure that the constitutional rights of objecting members will not be violated by contributions unrelated to collective bargaining:* San Jose Teachers Association v. Superior Court.

I. INTRODUCTION

San Jose Teachers Association v. Superior Court[1] arose when the San Jose Teachers Association (hereinafter the Association) and San Jose Unified School District entered into a collective bargaining agreement in 1981. Under the terms of the agreement every employee was required to become a member of the Association or pay a "service fee" to the union.[2] A number of members refused to join the Association or pay the service fee.[3] The Association then brought suit to collect these fees.[4] The Association filed a motion for summary judgment which the lower court denied. After the court of appeal refused to enter a writ of mandate, the Association petitioned the supreme court for a hearing.[5]

II. THE COURT'S ANALYSIS

The unanimous court first recognized that under the United States Supreme Court ruling in *Abood v. Detroit Board of Education,*[6] a union or agency shop agreement in the field of public employment does not violate constitutional rights of association. To comply with

1. 38 Cal. 3d 839, 700 P.2d 1252, 215 Cal. Rptr. 250 (1985). The majority opinion was authored by Justice Grodin with Justices Mosk, Kaus, Broussard, Reynoso, Lucas, and Chief Justice Bird concurring.

2. *Id.* at 842, 700 P.2d at 1253, 215 Cal. Rptr. at 251. The service fee was an amount equal to unified membership dues, initiation fees and general assessments payable to the association. *Id.* The provision for a service fee was authorized by the Educational Employment Relations Act (EERA). CAL. GOV'T CODE §§ 3540-3349.3 (West 1980 and West Supp. 1983).

3. The members alleged that some amount of this money would be used for political and ideological purposes unrelated to collective bargaining. The members argued that such a use would violate their rights of free expression and association guaranteed by the 1st and 14th amendments to the Constitution.

4. The fee alleged to be owing from each defendant was $302, with the exception of eight defendants who owed half that amount.

5. *San Jose Teachers,* 38 Cal. 3d at 843-44, 700 P.2d at 1254, 215 Cal. Rptr. at 252.

6. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

Abood a union service charge must be used to finance collective bargaining, contract administration or grievance adjustment functions.[7]

While the collection of these fees may interfere somewhat with constitutional rights, the court indicated that under *Railway Employees Department v. Hanson*[8] and *Machinists v. Street*[9] such an interference is justifiable. A contrary rule would result in confusion and conflict since a number of unions might seek agreements with terms different from those of the same school district.[10]

The court recognized that employees working under such an agreement would have the first amendment right to object to the use of funds for ideological or political purposes that they oppose.[11] The difficulty would lie in determining which activities constituted collective bargaining and which were unrelated.[12] An additional problem would be devising methods by which employees could object to political uses of their fees.[13]

After an exhaustive analysis of federal authority, the court made its decision. The court sought a practical compromise between the interests of dissident employees, who were entitled not to finance political or ideological purposes which they opposed, and unions, which were entitled under collective bargaining agreements to collect service fees.[14] The court held that the union had to make a good faith effort to estimate the amount used for non-collective bargaining purposes. The union was then required either to provide a reduction in the service fee for dissident employees or to adopt a procedure for a

7. *Id.* at 234-35.

8. Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956). *Hanson* involved a union shop agreement made pursuant to the Railway Labor Act, which authorized such agreements. The agreement was ruled valid because the provisions of the Act authorizing it did not violate any state or federal constitutional provisions.

9. Machinists v. Street, 367 U.S. 740 (1961). In *Street* a number of railroad employees sued to enjoin enforcement of a union shop agreement. The Supreme Court held that the agreement itself was not unlawful and the employees remained obligated as a condition of employment to make the payments called for in the agreement.

10. *San Jose Teachers*, 38 Cal. 3d at 845, 700 P.2d at 1255, 215 Cal. Rptr. at 253.

11. *Id.* at 846, 700 P.2d at 1256, 215 Cal. Rptr. at 253. In Buckley v. Valeo, 424 U.S. 1, 22-23 (1976), the Supreme Court held that the first amendment protected the freedom to contribute to an organization for the purpose of spreading a message. The Supreme Court recognized in *Abood* that compelling contributions for political purposes works no less an infringment of first amendment rights than does prohibiting one from making political contributions of his choice. *Abood*, 431 U.S. at 234.

12. Based on the case of the same name, the term "*Abood* amount" refers to that portion of a union service fee used for ideological or political activities unrelated to collective bargaining.

13. *San Jose Teachers*, 38 Cal. 3d at 847, 700 P.2d at 1257, 215 Cal. Rptr. at 255.

14. *Id.* at 850-57, 700 P.2d at 1259-64, 215 Cal. Rptr. at 259-62.

"reasonably prompt and efficient determination of this amount."[15]

The teachers contended that the Association could not obtain relief until the *Abood*[16] amount had been determined.[17] The court rejected their contention. It noted that the United States Supreme Court in *Street* and *Allen* was concerned that releasing employees from paying their service fees, pending litigation of the *Abood* amount, would shackle the union in its collective bargaining.[18] The court understood the Supreme Court's decisions to mean that the union was entitled to the full agency fee, provided they place in escrow or deduct in advance that portion of the objecting employees' fee that the union estimated would be spent for political and ideological purposes. The union would then additionally provide a fair procedure for determining the *Abood* amount and rebating it to the employee.[19]

The advantages of placing a portion of the service fee in an escrow account are twofold: 1) the employee's constitutional rights are protected since the union cannot spend this portion for political or ideological purposes, and 2) the union still has access to that portion estimated to be used for collective bargaining purposes.[20]

Since the union is entitled to collect the entire service fee, it makes no difference what the *Abood* total is eventually determined to be. The *Abood* amount is therefore not a triable issue of material fact that would preclude a summary judgment. The teachers' contention that they were entitled to withhold the service fee pending litigation of the *Abood* amount was thus not valid.[21]

The court's opinion next focused on who was best suited to determine the *Abood* amount.[22] The court noted that it had previously held that the Public Employment Relations Board (PERB) had to hear a grievance where the conduct in question was "arguably protected or prohibited by the EERA [Educational Employment Relations Act]" and where the PERB could furnish the equivalent relief as a court.[23] The court also noted that state appellate courts had de-

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15. *Id.* at 857, 700 P.2d at 1264, 215 Cal. Rptr. at 262.

16. *See supra* note 12.

17. The teachers argued that in *Street, Allen* and *Abood* the Court held that a plaintiff in an agency fee action could not obtain relief until the *Abood* amount had been determined by the court. The plaintiffs in those cases were teachers, but in this case the union is the plaintiff.

18. *San Jose Teachers,* 38 Cal. 3d at 859, 700 P.2d at 1265, 215 Cal. Rptr at 263. The court pointed out in a footnote that the issue of withholding agency fees during the determination of the *Abood* amount was not raised by the court in *Abood. San Jose Teachers,* 38 Cal. 3d at 859 n.10, 700 P.2d at 1265 n.10, 215 Cal. Rptr. at 263 n.10.

19. *Id.* at 859-60, 700 P.2d at 1266, 215 Cal. Rptr. at 264.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id. See also* El Rancho Unified School Dist. v. National Educ. Ass'n, 33 Cal. 3d 946, 663 P.2d 893, 192 Cal. Rptr. 123 (1983); San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

termined that disputes involving the collection and use of agency fees from non-members concerns conduct "arguably protected or prohibited by the EERA" and therefore must be initially adjudicated by the PERB.[24] The PERB has also recognized that disputes as to the *Abood* amount and adequacy of escrow and rebate procedures are within its jurisdiction.[25]

In light of the judgments of the court of appeals, PERB and the court's own prior decisions, the court decided that the PERB was in the best position to decide which union activities were reasonably related to collective bargaining. The court also stated that having the PERB decide the issue would further the policy of uniformity in the remedies and administration of the EERA.[26]

III. CONCLUSION

The court's opinion protects both the employees' constitutional rights and the unions' ability to continue to participate in collective bargaining. By placing an amount in escrow, employees are assured that their funds are only being used for collective bargaining purposes and not for ideological or political purposes they oppose. The union, on the other hand, receives its funds without delay and can still bargain collectively. The court, in deciding that the PERB is the appropriate body to determine the *Abood* amount, not only chose the agency possessing the most knowledge on the subject, but also insured that the lower courts would not be the tribunal to decide this question.

KEITH F. MILLHOUSE

XVII. PROFESSIONAL RESPONSIBILITY

Court reporters required to diligently comply with deadlines for transcript preparation: **In re Watson.**

In re Watson, 38 Cal. 3d 655, 699 P.2d 869, 214 Cal. Rptr. 485 (1985) arose out of a certified shorthand reporter's failure to timely prepare and deliver a transcription of a lower court proceeding to a court

24. Two California Court of Appeal decisions reaching the same conclusion are Link v. Antioch Unified School Dist., 142 Cal. App. 3d 765, 191 Cal. Rptr. 264 (1983), and Leek v. Washington Unified School Dist., 124 Cal. App. 3d 43, 177 Cal. Rptr. 196 (1981).

25. *Kings City Joint Union High School Dist.,* 6 P.E.R.B. ¶ 13065 (1982).

26. *San Jose Teachers,* 38 Cal. 3d at 863, 700 P.2d at 1268, 215 Cal. Rptr. at 266.

clerk. The case came before the California Supreme Court because the proceedings being transcribed involved an automatic capital appeal.

The supreme court issued an order directing the reporter to show good cause why he should not be declared incompetent to act as an official reporter in any court. After many delays, the reporter finally filed all portions of the transcript for which he was responsible. Thus, the case became technically moot, and the orders to show cause were discharged.

The supreme court reiterated the importance of a court reporter's diligent compliance with deadlines for transcript preparation, especially where a capital appeal is involved. The court also admonished Watson, indicating that unreasonable delays in preparing the transcripts could not and would not be tolerated.

KEITH F. MILLHOUSE

XVIII. PUBLIC UTILITIES

In a proceeding to change a public utility's customer rates for the purpose of taking significant and unforeseeable economic changes into account, the Public Utilities Commission may consider data which is more recent than that used in the general rate proceeding: **City and County of San Francisco v. Public Utilities Commission.**

In *City and County of San Francisco v. Public Utilities Commission,* 39 Cal. 3d 523, 703 P.2d 381, 217 Cal. Rptr. 43 (1985), the California Supreme Court reviewed the issue of whether the Public Utilities Commission (hereinafter the P.U.C.) acted properly in granting a rate increase to the Pacific Telephone and Telegraph Company (hereinafter the Pacific). The rate increase was granted to offset the effects of an accounting revision by the Federal Communications Commission (hereinafter the F.C.C.). The City and County of San Francisco and the City of San Diego (hereinafter the cities) petitioned the supreme court for a writ of review to contest the actions of the P.U.C.

The case arose in August 1980, when Pacific filed an application for a general rate increase. Such applications may be initiated once every three years by a public utility to raise its rates. *See generally* 53 CAL. JUR. 3D *Public Utilities* §§ 54-63 (1979). In a general rate setting proceeding, the P.U.C. relies on historical data to set a rate which will fairly approximate the utility's cost and allows a fair rate of return during the next few years. In an offset proceeding, the P.U.C. may allow a rate increase between general rate proceedings

to compensate for significant and unforeseeable economic changes in the utility's operating expenses. The P.U.C. in this case authorized a rate increase of $160 million in the general rate proceeding. The P.U.C. recognized that Pacific would lose $63.7 million in installation revenues due to the increasing public use of phone-center stores, which would allow a greater number of consumers to install their own phones. However, it failed to consider the fact that the use of phone-center stores would reduce installation costs. Because of this oversight, the cities applied for a rehearing with the P.U.C. The application was denied in October, 1981.

The California Supreme Court granted a petition for a writ of review to examine the P.U.C.'s findings. However, before the case could be heard on oral argument, Pacific settled with the cities. Pacific agreed to reduce its rate increase to account for the reduction of installation costs resulting from the use of phone-center stores.

While the general rate increase was being contested by the cities, another problem arose. The F.C.C. adopted a decision in 1980 which altered the accounting procedures for telephone companies. The F.C.C. changes provided for the treatment of installation costs as current expenses rather than capital expenditures resulting in an immediate increase in Pacific's installation costs. These costs were to be immediately tabulated as costs of service instead of being recognized over time as capital costs. Therefore, the F.C.C. accounting changes created an immediate need for an increase in revenue to offset the increased costs.

Pacific initiated the present offset proceeding by filing an application for increased revenues to offset the increased costs arising from the accounting revisions. The P.U.C. agreed with Pacific and allowed a rate increase of $264 million. The cities then applied for a rehearing alleging that the offset rate increase could be affected by the then pending general rate proceeding. In 1982, the P.U.C. denied the cities' application for rehearing and declined to reduce the additional rate increase. The supreme court granted the cities' application for a writ of review.

In its majority opinion, the supreme court emphasized that there is a strong presumption favoring the validity of a P.U.C. decision. Furthermore, the court's review of P.U.C. decisions is limited to a determination of whether the P.U.C. "has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution . . . ." *City and County of San Francisco,* 39 Cal. 3d at 530, 703 P.2d

at 384, 217 Cal. Rptr. at 46 (quoting CAL. PUB. UTIL. CODE § 1757 (West 1975)). The court held that the cities failed to carry their burden of proof in showing that the P.U.C. had abused its authority. Therefore, the court affirmed the P.U.C. decision.

In affirming the P.U.C. decision, the court systematically rejected four contentions made by the cities. They were all based on the allegation that the offset rate increase was unreasonably high. First, the court rejected the cities' claim that the offset rate increase should automatically be reduced by the same amount that the general rate increase was reduced in the settlement between Pacific and the cities. The court pointed out that the offset and general rate proceedings were separate and distinct actions based on different sets of data. Because the data used in the offset proceeding was current and took into account the effect of the phone-center stores, the cities did not show that the error in the general rate proceeding automatically affected this offset rate proceeding.

Second, the cities did not show that the installation cost estimate was unreasonable in itself. The P.U.C.'s estimate was supported by testimony and the cities presented virtually no evidence to support its lower estimate.

Third, the cities contended that the P.U.C. findings were inconsistent regarding the installation costs and revenues in the offset proceeding because it took into account the cost of installation rather than the revenues generated. The court held that the accounting revision, which gave rise to the offset rate proceeding, merely treated installation costs as an expense item. Therefore, it only effected costs, not revenue.

Finally, the court rejected the cities' contention that the P.U.C. may not use estimates based on different sets of data in different proceedings. The court held that the P.U.C. properly used the more recent data in the offset proceedings in order to get as close an estimate of future conditions as possible. Also, the court held that the P.U.C. should not have used the higher estimate of installation revenues that could have been contrived from the more recent data in the general rate proceeding because to do so would have reopened the general rate proceeding. The general rate proceeding was a final decision not subject to review. This reopening would have posed a threat of impermissible, retroactive ratemaking. Thus, the court affirmed the P.U.C. decision.

JOHN THOMAS MCDOWELL

XIX. REAL PROPERTY LAW

A. *If a city ordinance regulating the conversion of apartments is reasonably related to the accomplishment of a legitimate governmental objective within the scope of the city's police power, it does not violate due process nor constitute a confiscatory taking:* **Griffin Development Co. v. City of Oxnard.**

I. INTRODUCTION

In *Griffin Development Company v. City of Oxnard,*[1] the court decided whether an Oxnard ordinance, which required that conversions of apartment buildings to condominiums conform to the standards applicable to new condominiums, is a valid exercise of municipal authority. The appellant argued that the ordinance was invalid for three reasons: 1) it violated the California Subdivision Map Act;[2] 2) it was inconsistent with the requirements of due process; and 3) it resulted in a confiscatory "taking" of the appellant's property.

II. FACTUAL BACKGROUND

The appellant, Griffin Development Company, owned a seventy-two unit apartment complex in the City of Oxnard. When the complex was completed in 1979, it complied with all city standards applicable to apartments and condominium projects. In 1980, Oxnard adopted new standards for new condominium projects. Oxnard eventually applied these standards to condominium conversions as well. The regulations required that a special use permit be obtained from the city before conversion would be allowed. To obtain such a permit, the applicant had to show that the project met certain mandatory requirements and "substantially conformed" to other advisory standards.[3]

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1. 39 Cal. 3d 256, 703 P.2d 339, 217 Cal. Rptr. 1 (1985). The majority opinion was written by Justice Kaus with Chief Justice Bird and Justices Broussard, Reynoso, and Grodin concurring. There was a dissenting opinion by Justice Mosk with Justice Lucas concurring.

2. *See* CAL. GOV'T CODE § 66410 (West 1983). The term "subdivision" includes condominium projects in California. CAL. GOV'T CODE § 66424 (West 1983). *See also* Note, *Municipal Regulation of Condominium Conversions in California,* 53 S. CAL. L. REV. 225, 230 (1979).

3. *Griffin,* 39 Cal. 3d at 260, 703 P.2d at 340, 217 Cal. Rptr. at 2. The advisory standards apply to new condominiums as well as condominium conversions. These standards require that,

> (1) A housing unit shall contain not less than two separate bedrooms; (2) a housing unit shall not be smaller than 1,000 square feet; (3) each unit shall

Griffin applied for a special use permit to convert the apartment complex to a condominium complex. Because the complex did not conform to the parking requirements nor substantially conform to the advisory standards, Oxnard denied Griffin's application. Griffin then petitioned for a writ of mandate to compel the City to allow the conversion. The trial court determined that Oxnard had authority to regulate condominium conversions. It also held that the regulations neither deprived Griffin of its constitutional rights nor conflicted with the Subdivision Map Act.

III. THE MAJORITY OPINION

A. The California Subdivision Map Act

The court quickly dismissed Griffin's claim that the Subdivision Map Act preempted the Oxnard condominium conversion ordinance. Because the state constitution gives all cities and counties the power to make and enforce ordinances and regulations that do not conflict with general laws,[4] a city may adopt an ordinance which involves matters covered in the Map Act. The adopted ordinance, however, may not conflict with any of the provisions of the Map Act.[5]

The Map Act limits the power of local governments to disapprove final or tentative maps of a condominium or community apartment project on the basis of design or location of the buildings.[6] However, this limitation is only effective in the absence of an ordinance to the contrary.[7] The court concluded that although the Oxnard ordinance deals with condominiums (which are mentioned in the Map Act), the ordinance does not conflict with any provision of the Map Act.

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contain adequate space for a washer, dryer, and water heater; (4) parking shall be provided at a ratio of two spaces in a garage per dwelling unit, such parking to be located no further than 50 feet from the unit served; (5) visitor parking shall be required at a ratio of one space per dwelling unit, such parking to be located no further than 100 feet from any unit; (6) major entrances to residences shall be separated from entrances of adjacent units; and (7) a private storage area shall be provided each residence.

Id.

4. *Griffin*, 39 Cal. 3d at 261, 703 P.2d at 341, 217 Cal. Rptr. at 3 (citing CAL. CONST. art. XI, § 7).

5. *Griffin*, 39 Cal. 3d at 261, 703 P.2d at 341, 217 Cal. Rptr. at 3 (citing Friends of Lake Arrowhead v. Board of Supervisors, 38 Cal. App. 3d 497, 505, 113 Cal. Rptr. 539, 543-44 (1974)). The court stated, "The power to adopt supplemental ordinances or regulations in connection with matters covered by the act, though not expressly granted, may also be implied provided they bear a reasonable relation to the purposes and requirements of the act and are not inconsistent with it." *Friends of Lake Arrowhead*, 38 Cal. App. 3d at 505, 113 Cal. Rptr. at 543-44 (citations omitted).

6. CAL. GOV'T CODE § 66427 (West 1983). *See Griffin*, 39 Cal. 3d at 262, 703 P.2d at 341, 217 Cal. Rptr. at 3.

7. CAL. GOV'T CODE § 66427 (West 1983). The code states, "Nothing herein shall be deemed to limit the power of the legislative body to regulate the design or location of buildings in such a project by or pursuant to local ordinances." *Id.*

Therefore, the Oxnard ordinance regulating condominium conversions was not preempted by state law.[8]

B. The Authority of Oxnard to Regulate Condominium Conversions

Griffin's main contention was that a conversion is simply a change in the form of ownership, not a change in use. Thus, because its changes to the apartment complex involved no change in use, the city's requirement of a special use permit amounted to a violation of due process of law.[9]

The court began its analysis of whether regulation of condominium conversions is consistent with the requirements of due process by pointing out that "[s]o far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[10] The court elaborated that unless a city regulation infringes upon a fundamental constitutional right or relies upon a suspect classification, the regulation is generally upheld as consistent with the requirements of due process.[11] Consequently, California courts have consistently held that condominium conversion regulations are a legitimate exercise of police power.[12] The court stressed that Griffin's claim was not based on any violation of a fundamental right such as privacy or freedom of expression, but rather on the infringement upon its property rights.[13]

A law review commentator has noted that most condominium conversion regulations would be considered a valid application of the

8. *Griffin*, 39 Cal. 3d at 262, 703 P.2d at 341, 217 Cal. Rptr. at 3. *See also* Santa Monica Pines, Ltd. v. Rent Control Bd., 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984) (held that the Subdivision Map Act did not preempt the city's attempt to regulate condominium conversions in connection with its rent control laws).

9. *Griffin*, 39 Cal. 3d at 262-63, 703 P.2d at 342, 217 Cal. Rptr. at 4.

10. *Id.* at 263, 703 P.2d at 342, 217 Cal. Rptr. at 4 (quoting Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 155, 550 P.2d 1001, 1020, 130 Cal. Rptr. 465, 484 (1976)). *See* Nebbia v. New York, 291 U.S. 502, 537 (1934).

11. *Griffin*, 39 Cal. 3d at 263, 703 P.2d at 342, 217 Cal. Rptr. at 4.

12. *See* Santa Monica Pines, Ltd. v. Rent Control Bd., 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984) (condominium conversion regulations upheld as part of the city's rent control laws); Kalaydjian v. City of Los Angeles, 149 Cal. App. 3d 690, 197 Cal. Rptr. 149 (1983) (an ordinance requiring landlords who convert apartments to condominiums to pay relocation costs to displaced tenants upheld); Soderling v. City of Santa Monica, 142 Cal. App. 3d. 501, 191 Cal. Rptr. 140 (1983) (the imposition of special requirements for condominium conversions upheld as a valid exercise of police power).

13. *Griffin*, 39 Cal. 3d at 264, 703 P.2d at 343, 217 Cal. Rptr. at 5.

city's police power under a "rational basis" test.[14] That test requires the exercise of the police power to be reasonably necessary to accomplish a legitimate governmental purpose.[15] Generally, those purposes involve the public health, safety, morals or general welfare of the people of the community.[16] The *Griffin* court used that test to review the legitimacy of the Oxnard regulation and found the ordinance a valid exercise of the police power to restrict property rights.[17]

The policies which the court expressed in upholding the Oxnard regulations emphasized the necessary and legitimate governmental purposes behind the ordinance. First, Oxnard had an interest in maintaining a healthy supply of rental housing for residents who cannot afford to purchase property.[18] Second, the ordinance had the reasonable goal of assuring high construction standards and adequate facilities in develolping residential areas.[19]

The court based its findings on a memorandum from the Oxnard planning director to the city attorney. The planning director claimed that auto ownership statistics showed that the average owner has more than one car and that burglaries can be directly related to open, as opposed to enclosed, parking structures. These statistics supported the parking requirements in the ordinance. Furthermore, because condominiums provide low and moderate income families with owner-occupied housing, the planning director argued that a two bedroom requirement was necessary.[20]

To counter Griffin's argument that condominiums are merely a change in ownership, the court pointed out that the legitimate concerns which prompt a city to regulate condominium conversions could not be overlooked.[21] The argument that the conversion was not a change in use "simply ignore[d] the legitimate concerns which may prompt a city to regulate condominium conversions."[22] The court stated that the police power, in addition to promoting public peace, safety, health and welfare, is an elastic concept that may be

14. Note, *supra* note 2, at 239.

15. Miller v. Board of Public Works, 195 Cal. 477, 484, 234 P. 381, 383 (1925).

16. *Id.*

17. *Griffin*, 39 Cal. 3d at 266, 703 P.2d at 344, 217 Cal. Rptr. at 6.

18. *Id.* at 265, 703 P.2d at 343, 217 Cal. Rptr. at 5. *See also Santa Monica Pines*, 35 Cal. 3d at 869, 679 P.2d at 34, 201 Cal. Rptr. at 600 (an ordinance restricting the removal of apartments from the rental housing market through condominium conversion upheld as a valid exercise of police power).

19. *Griffin*, 39 Cal. 3d at 265, 703 P.2d at 343, 217 Cal. Rptr. at 5.

20. *Id.* The court pointed out in its own footnote that there is no meaningful distinction between Griffin's inability to convert its apartment complex and the mobility of any other landowner who is using his building for one purpose to upgrade or modify his building to some other use. *Id.* at 265 n.7, 703 P.2d at 344 n.7, 217 Cal. Rptr. at 6 n.7.

21. *Id.* at 265, 703 P.2d at 344, 217 Cal. Rptr. at 6.

22. *Id.*

expanded to meet the changing conditions of modern life.[23] The court held that a city's desire to grow at an orderly pace and manner comes within the concept of public welfare.[24] It was convinced that a city's interest in maintaining an adequate supply of rental housing and in controlling its growth rate at an orderly pace are legitimate governmental purposes. Therefore, it concluded that the ordinance was a valid exercise of Oxnard's police power.

C. Confiscatory Taking

Griffin contended that the ordinance prevented it from using its land as it wished and, therefore, mandated a confiscatory "taking." The court dismissed this contention, stating that "[a] land use measure may be unconstitutional and subject to invalidation 'only when its effect is to deprive the landowner of substantially all reasonable use of his property.' "[25] Because Griffin could continue to rent its apartments, it was not deprived of all reasonable use of its property.[26]

The court suggested that a taking might be found under a diminution in value theory.[27] However, it quickly closed that avenue by stating most land use regulations "have the inevitable effect of reducing the value of regulated properties."[28] The mere fact that property values are reduced by an ordinance does not render the ordinance

23. *Id.* at 266, 703 P.2d at 344, 217 Cal. Rptr. at 6 (citing *Birkenfeld,* 17 Cal. 3d at 160, 550 P.2d at 1023, 130 Cal. Rptr. at 487).

24. *Griffin,* 39 Cal. 3d at 266, 703 P. 2d at 344, 217 Cal. Rptr. at 6. *See* Dateline Builders, Inc. v. City of Santa Rosa, 146 Cal. App. 3d 520, 528, 194 Cal. Rptr. 258, 264 (1983) (a city's refusal to allow a builder to connect its housing development beyond city limits to the existing sewer system upheld).

25. *Griffin,* 39 Cal. 3d at 266, 703 P.2d at 344, 217 Cal. Rptr. at 6-7 (quoting Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980)). The court held that zoning ordinances permitting owners of valuable unimproved land to devote their land only to one-family dwellings, accessory buildings, and open space uses did not effect a "taking" without just compensation in violation of the fifth and fourteenth amendments. *Id. See also* Comment, *Fifth Amendment Takings and Condominium Conversion Regulations that Restrict Owner Occupancy Rights,* 62 B.U.L. REV. 467 (1982).

26. *Griffin,* 39 Cal. 3d. at 267, 703 P.2d at 344-45, 217 Cal. Rptr. at 6-7. *See* Penn. Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The Supreme Court held that because the owners of Grand Central Station could continue to use their property as a train station, the New York law which prohibited the building of an office complex over the station did not effect a "taking." 438 U.S. at 137-38.

27. *Griffin,* 39 Cal. 3d at 267, 703 P.2d at 345, 217 Cal. Rptr. at 7.

28. *Id.* (quoting Fisher v. City of Berkeley, 37 Cal. 3d 644, 686, 693 P.2d 261, 264, 209 Cal. Rptr. 682, 715 (1984)).

unconstitutional.[29] Even significant diminution in value has consistently been held to be insufficient to establish a confiscatory taking.[30] Therefore, because Griffin was left with the right to continue renting its apartments and the diminution in value of Griffin's property due to the condominium conversion restriction was not substantial, the court held that the ordinance did not result in a "taking" of property.

IV. THE DISSENT

Justice Mosk's dissent charged the Oxnard ordinance with turning the American dream of home ownership into a nightmare.[31] He claimed that the ordinance would have a harmful effect on "those frugal families who prefer at the end of the year to have an enhanced equity in a piece of property instead of 12 rent receipts."[32]

Justice Mosk contended that the City of Oxnard did not establish the rational basis necessary to uphold the ordinance. The city relied solely on the experience and opinions of the Planning Director, not on statistics. Justice Mosk stated that an ordinance may impose new requirements on property when it is converted from an apartment complex to a condominium complex "only if conversion has adverse effects that justify the imposition of such requirements under the police power."[33] He saw no way in which a change in the form of ownership could affect the health, safety, or welfare of the city.[34] Mosk used the following example to stress his point: "[T]oday the John Doe family occupies the corner apartment on the second floor as a renter; tomorrow the John Doe family occupies the corner apartment on the second floor as an owner."[35]

In addressing the due process issue, Justice Mosk argued that the city's power to establish zoning ordinances and interfere with a property owner's rights, restricting the character of the land use, is limited.[36] He pointed out that the chief limitations on the exercise of

29. *Griffin*, 39 Cal. 3d at 267, 703 P.2d at 345, 217 Cal. Rptr. at 7.

30. *Id.* *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1976) (a 75 percent reduction in value because of a zoning law insufficient to establish a taking); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (a 90 percent reduction considered insufficient).

31. *Griffin*, 39 Cal. 3d at 268, 703 P.2d. at 345, 217 Cal. Rptr. at 7 (Mosk, J., dissenting).

32. *Id.*

33. *Id.* at 268, 703 P.2d at 346, 217 Cal. Rptr. at 8. *See* Note, *supra* note 2, at 238-55. Although Mosk refers to this law review article in support of his statement, the article conceded that "courts generally require only that the act have some rational tendency to promote the public health, safety or welfare even if that tendency is quite speculative and tenuous . . . . In light of this judicial posture, very few condominium conversions will be invalidated . . . ." Note, *supra* note 2, at 239-40.

34. *Griffin*, 39 Cal. 3d at 268, 703 P.2d at 346, 217 Cal. Rptr. at 8 (Mosk, J., dissenting).

35. *Id.* at 269, 703 P.2d. at 346, 217 Cal. Rptr. at 8.

36. *Id.* at 270, 703 P. 2d at 347, 217 Cal. Rptr. at 9. *See* Nectow v. Cambridge, 277 U.S. 183, 188 (1928).

the police power are the due process and equal protection clauses of the federal and state constitutions.[37] To clarify this, he stated, "Where the exercise of that power results in consequences which are oppressive and unreasonable, courts do not hesitate to protect the rights of the property owner against the unlawful interference with his property."[38] Stated another way, if an ordinance is arbitrary, unreasonable and is not substantially related to a legitimate governmental objective, it is invalid.[39]

Justice Mosk argued that although fundamental rights are sometimes considered more important than property rights in zoning cases, the protection of property rights is also a legitimate constitutional right.[40] He emphasized the fact that courts have held that where constitutional rights are at issue, a zoning authority " 'must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed de minimus.' "[41] Mosk contended that the bare conclusions of a city engineer formed an insubstantial basis to authorize the deprivation of Griffin's constitutionally protected property rights.[42]

Finally, Mosk concluded that a conversion is a mere change of ownership, not a change in occupancy or use.[43] The word "use" does not pertain to the ownership of a building, but to the physical use of the building.[44] Whether Griffin's building remained an apartment building or was converted to a condominium, the property would continue to be used as dwelling units. The special use permit was an unreasonable requirement and the trial court's decision should have

37. *Griffin*, 39 Cal. 3d at 270, 703 P.2d at 347, 217 Cal. Rptr. at 9 (Mosk, J., dissenting). Article I, section 7 of the California Constitution states, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." CAL. CONST. art. I, § 7.

38. *Griffin*, 39 Cal. 3d at 270, 703 P.2d at 347, 217 Cal. Rptr. at 9 (Mosk, J., dissenting) (quoting Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 215-216, 93 P.2d 93, 95-96 (1939)).

39. *Id.* at 272, 703 P.2d 348, 217 Cal. Rptr. at 10.

40. *Id. See also id.* at 273-74, 703 P.2d at 349, 217 Cal. Rptr. at 11.

41. *Id.* at 274, 703 P.2d at 349-50, 217 Cal. Rptr. at 11-12 (quoting Schad v. Mt. Ephraim, 452 U.S. 61, 77 (1981)). Although *Schad* was concerned with the right of free speech rather than property rights, Mosk believed that the principles of the case were applicable to the *Griffin* case. *Griffin*, 39 Cal. 3d at 273, 703 P.2d at 349, 217 Cal. Rptr. at 11 (Mosk, J., dissenting).

42. *Id.* at 274-75, 703 P.2d at 350, 217 Cal. Rptr. at 12.

43. *Id.* at 278, 703 P.2d at 352, 217 Cal. Rptr. at 14.

44. *Id.* at 278-79, 703 P.2d. at 353, 217 Cal. Rptr. at 15.

been reversed.[45]

V. CONCLUSION

Griffin signals the court's willingness to expand a municipality's powers. A city may, to further the public health, safety and welfare, institute reasonable restrictions on conversions so long as there are no constitutional violations.

JOHN THOMAS MCDOWELL

B. *The summary nature of unlawful detainer actions must give way to "good cause" requirements for franchise termination which are established for the protection of a franchise:* E.S. Bills, Inc. v. Daniel Tzucanow.

E.S. Bills, Inc. v. Daniel Tzucanow, 38 Cal. 3d 824, 700 P.2d 1280, 215 Cal. Rptr. 278 (1985), involved an unlawful detainer action brought by a franchisor to recover possession of a gasoline station leased to the franchisee. Under California Code of Civil Procedure section 1174(a), CAL. CIV. PROC. CODE § 1174(a) (West 1982), a petroleum distributor may not recover possession from a gasoline dealer in an unlawful detainer action without establishing good cause for termination or nonrenewal. *See also* CAL. BUS. & PROF. CODE § 2099.1 (West Supp. 1985).

Prior to termination of the franchise, a dispute arose between the parties as to the "applicable Dealer Purchase Price" for gasoline under the franchise agreement. The franchisee filed suit for breach of contract claiming that the franchisor's price was not fixed in good faith in accordance with reasonable commercial standards. He claimed the franchisor's prices were too high for achieving a profit. When the franchisor refused to sell gasoline at the price demanded, the franchisee purchased gasoline from another supplier. The franchisor informed the franchisee that the agreement was to be terminated, but when the franchisee continued to operate the gasoline station the franchisor filed the action for unlawful detainer.

The issue at trial was whether the franchisee's refusal to pay the "applicable Dealer Purchase Price" had given franchisor "good cause" to terminate the franchise agreement. The franchisee offered evidence of retail prices at stations operated directly by the franchisor (claiming the retail prices were lower than the dealer price charged to him) and the Lundberg report on refiner's prices; the trial court refused to admit any of that evidence. It limited evi-

45. *Id.* at 279, 703 P.2d at 353, 217 Cal. Rptr. at 15.

dence to the dealings between the parties and the prices the franchisor charged in other lessee dealerships. The trial court's decision was based on the concern for preserving the summary nature of unlawful detainer actions to ensure timely restoration of possession.

The supreme court stated that the "good cause" requirement is not just a defense to be balanced against preserving the summary nature of unlawful detainer actions. Rather, it is a prerequisite to such a judgment. Section 1174(a) was amended to assure the gasoline dealer a trial on the merits concerning his rights under the franchise before the franchisor may retake possession. *See* CAL. CIV. PROC. CODE § 1174(a) (West 1982). The court's interest in the summary nature of an unlawful detainer action must give way to this policy.

The franchisee's proffered evidence was relevant to whether the franchisor's fixed prices were in accordance with the reasonable standard. If these prices are found to be unreasonable then the franchisee's failure to purchase did not give the franchisor the "good cause" required to terminate the agreement. Consequently, it was prejudicial error for the trial court to exclude the proffered evidence.

JESSICA A. LEMOINE

C. *In a nonjudicial foreclosure a trustee has no common law duty to make reasonable efforts to provide a trustor actual notice; Civil Code section 2924(6) alone defines a trustee's duties to give notice:* **I.E. Associates v. Safeco Title Insurance Co.**

In *I.E. Associates v. Safeco Title Insurance Co.*, 39 Cal. 3d 281, 702 P.2d 596, 216 Cal. Rptr. 438 (1985), the trustor partnership received no notice of default before its property was sold through nonjudicial foreclosure. Although the deed of trust and the grant deed listed addresses for the trustor, notices sent to these places were returned "address unknown." The trustee also searched the telephone book for the trustor's address and posted a notice of sale on the property. Even though each partner had signed the deed of trust, the trustee never attempted to find any partner's address. The trustor sued for damages, but the trial court granted summary judgment for the trustee.

The supreme court affirmed, holding that the trustee had satisfied the notice requirements of California Civil Code section 2924b. CAL. CIV. CODE § 2924b (West Supp. 1985). Section 2924b requires a trustee to mail notices to the trustor's last known address. The

trustee will have actual knowledge if he has received express information about the address. *Id.* The signatures on the deed of trust did not supply the actual knowledge of the partners' addresses required by the statute, though they may have been sufficient to give constructive knowledge of the addresses.

The court also stated that common law imposes no duty upon a trustee to make reasonable efforts to provide actual notice to a defaulting trustor. Rather, a trustee's rights, duties, and liabilities emanate solely from the nonjudicial foreclosure statutes. *Id.* §§ 2924 - 2924(i). By drafting comprehensive, detailed statutes the legislature intended these statutes to wholly replace the common law in this area. *See* 27 CAL. JUR. 3D *Deeds of Trust* § 211 (1976).

The court cited several policies against expanding a trustee's statutory duties. In drafting the nonjudicial foreclosure statute, the legislature carefully balanced the interests of beneficiaries, trustors, and trustees. Moreover, trustees need clearly defined responsibilities in order to perform their duties officially and avoid litigation. Finally, costs and time are spared if the trustor has the duty to notify the trustee of an address change.

MARK S. BURTON

D. *In prejudgment condemnation cases, an award of interest at the legal rate violates constitutional just compensation if this rate is lower than the prevailing market rate:* **Redevelopment Agency of Burbank v. Gilmore.**

In *Redevelopment Agency of Burbank v. Gilmore,* 38 Cal. 3d 790, 700 P.2d 794, 214 Cal. Rptr. 904 (1985), the court held that in condemnation proceedings involving the prejudgment taking of property, an award of "legal interest" at a rate lower than the prevailing market rate is unconstitutional. Additionally, the calculation of the prevalent market rate of interest is to be based on the rates that a reasonably prudent investor can obtain.

As permitted by "quick-take" provisions of California eminent domain law, the Redevelopment Agency (hereinafter the Agency) deposited "probable compensation" with the court for Gilmore's condemned property and took possession of the land prior to trial and judgment. CAL. CIV. PROC. CODE § 1255.010 (West 1982). At trial it was determined that the value of the property was significantly greater than the amount deposited by the Agency. The trial court awarded Gilmore the difference between the court determined value of the land and that deposited by the Agency; it also awarded interest at the "legal rate" of seven percent from the date the Agency took

possession. At that time the prevailing market rate was significantly higher than the "legal rate." Gilmore appealed, challenging the legality of the statutory interest rate. *See* CAL. CIV. PROC. CODE § 1268.310 (West 1982). He claimed that the statute which set interest rates was inconsistent with the just compensation clauses of the United States and California Constitutions. *See* U.S. CONST. amend. V, cl. 4; CAL. CONST art. I, § 19.

The court based its decision on the United States Supreme Court decision of *Seaboard Airline Railway v. United States,* 261 U.S. 299, 304 (1923), which held that when property is taken for public use "[t]he just compensation to which the owner is constitutionally entitled is the *full and perfect* equivalent of the property taken . . . . [This] means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Redevelopment Agency,* 38 Cal. 3d at 797, 700 P.2d at 799, 214 Cal. Rptr. at 909 (quoting *Seaboard Airline Railway v. United States,* 261 U.S. 299, 304 (1923) (emphasis added and citations omitted)). When the application of the statutorily defined lower ceiling on interest rates denies the condemnee the full equivalent of his property's value, it falls short of constitutionally required just compensation.

The calculation of interest compatable with just compensation is left to the discretion of the trial court. That determination, however, should be based upon the rate which would have been earned by "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal . . . ." *Washington Metropolitan Area Transit Authority v. One Parcel of Land,* 706 F.2d 1312, 1322 (4th Cir. 1983). The court should also consider the prevailing rate on all money market obligations, governmental or private, which prudent depositors and investors normally purchase for income purposes and whose terms or maturities fall within the period the condemnation payment was delayed. Applying these principles to the case at bar, the court reversed the lower court but denied Gilmore's motion for costs and attorney's fees. Gilmore had not shown that the Agency's condemnation offer was not reasonable. *See* CAL. CIV. PROC. CODE § 1250.410 (West 1985).

DAYTON B. PARCELLS III

A taxpayer who makes a partial payment to a taxing authority cannot sue for a refund until he has paid all amounts claimed due for the reporting period: **State Board of Equalization v. Superior Court.**

In *State Board of Equalization v. Superior Court*, 39 Cal. 3d 633, 703 P.2d 1131, 217 Cal. Rptr. 238 (1985), it was held that a taxpayer who makes a partial payment to a taxing authority cannot bring an action for a refund until he has paid all amounts claimed due for the reporting period. This holding was based on the section of the California Constitution which bars courts from issuing any "legal or equitable process . . . against this State or any officer thereof to prevent or enjoin the collection of any tax." CAL. CONST. art. XIII, § 32. Public policy demands that revenue collection continue during litigation so that essential public services are not interrupted. Moreover, res judicata would force a taxing authority to raise all claims during the litigation or to forego the right to ever collect taxes from the disputed period.

O'Hara & Kendall Aviation, Inc. (hereinafter O'Hara) sold small aircraft and held a seller's permit as required by Revenue and Taxation Code section 6066. *See* CAL. REV. & TAX CODE § 6066 (West 1970). Customers are required either to pay a California sales tax or to execute a written declaration that the conditions for exemption are met. To be exempt, a customer must be a non-resident of California, and must not use the aircraft in California except to remove it from the state. *Id.* § 6366. Section 6421 provides that a seller has no sales tax liability if he in good faith accepts the customer's written declaration. *Id.* § 6421 (West Supp. 1985).

The Board of Equalization (hereinafter the Board) sent O'Hara a notice of determination that it owed approximately $187,000 for several quarterly reporting periods. It further stated that thirty-one sales for which O'Hara had claimed sales tax exemptions under section 6366 were taxable. O'Hara filed a petition for redetermination and insisted that each disputed sale was sufficiently documented to be exempt under section 6366. O'Hara also sent the Board a $250 check as partial payment of the determination and requested in a letter that the $250 be apportioned according to the amount of tax claimed due on each sale. The Board accepted the check but did not expressly agree to apportion the money. O'Hara later claimed that the $250 was an overpayment, demanded a refund, and filed a complaint in the superior court. The case finally reached the supreme court.

The California Constitution, article XIII, section 32 allows one to sue to recover on an allegedly excessive tax bill after paying the tax,

and bars courts from issuing any "legal or equitable process . . . against this State or any officer thereof to prevent or enjoin the collection of any tax." CAL. CONST. art. XIII, § 32. The court construed these provisions to mean that section 32 makes postpayment refund actions the only way to resolve tax disputes.

The public policy behind section 32 demands that "revenue collection . . . continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted." *Pacific Gas & Electric Co. v. State Board of Equalization*, 27 Cal. 3d 277, 283, 611 P.2d 463, 467, 165 Cal. Rptr. 122, 126 (1980). Section 32 is construed broadly to bar injunctions and any other prepayment judicial declarations or findings that hinder prompt tax collection. *Modern Barber College v. California Employment Stability Commission*, 31 Cal. 2d 720, 192 P.2d 916 (1948). Likewise, O'Hara was not allowed to sue because a court ruling exempting the disputed sales would in effect enjoin tax collection. *See* 56 CAL. JUR. 3D *Sales and Use Taxes* §§ 22-23 (Supp. 1985).

The court reasoned that, if O'Hara could bring a prepayment judicial action, the court would have to determine the tax due in order to rule whether tax paid exceeded tax due. Thus, res judicata would bar the Board from later litigating the validity of the unpaid tax. *Pope Estate Co. v. Johnson*, 43 Cal. App. 2d 170, 110 P.2d 481 (1941), was cited as holding that a refund claim opens all questions about a given tax year, and that neither taxpayer nor the taxing authority may split up these questions among separate suits. Since the Board would have to litigate fully all questions concerning the unpaid taxes, tax collection would be unconstitutionally delayed. However, the court added that the Board could still accept partial payments.

JOHN EDWARD VAN VLEAR

XXI. TORTS

A. *Section 877 of the California Code of Civil Procedure does apply to alter ego situations; an employee's settlement with a subsidiary does not release the parent corporation from liability:* **Mesler v. Bragg Management Co.**

The plaintiff in *Mesler v. Bragg Management Co.*, 39 Cal. 3d 290, 702 P.2d 601, 216 Cal. Rptr. 443 (1985), after having part of his arm amputated by a dozer's engine fan, sued several parties, including the

dozer's previous owner, Bragg Crane. Two years after the plaintiff filed his complaint, discovery revealed that Bragg Crane was a wholly owned subsidiary of Bragg Management. The plaintiff attempted to amend his complaint in order to assert the liability of Bragg Management as the alter ego of Bragg Crane.

The trial court denied the plaintiff's request to amend and granted a summary judgment for the defendant. The plaintiff appealed. Bragg Management argued that the plaintiff's appeal was moot since he had previously settled the claim against Bragg Crane. The plaintiff responded that his action against the parent corporation was still viable under California Code of Civil Procedure section 877. CAL. CIV. PROC. CODE § 877 (West 1980). That section abrogates the common law rule that a settlement with one alleged tortfeasor releases all other tortfeasors implicated in the same claim. The court determined that if section 877 applied to alter ego situations, then the plaintiff's suit would be allowed.

The court laid the ground work for its decision by defining the scope of California's alter ego theory. It stated that the alter ego theory rested on the assumption that two corporate entities were really one, and in order to "pierce the corporate veil," there must be such a unity of interest and ownership that the separate personalities of the two corporations can no longer exist. The court questioned the federal district court's analysis of the alter ego theory in *Fuls v. Shastina Properties*, 448 F. Supp. 983 (N.D. Cal. 1978). There the district court found that a release of one corporation required the dismissal of both corporations. However, the supreme court held that the *Fuls* decision misinterpreted California law; when a California court finds that the subsidiary and parent corporations are really one, it does not dissolve the corporation. Thus, the alter ego theory allows a finding that the parent corporation is liable as a separate entity for the acts of its subsidiary.

The court next examined the history of section 877 and discovered legislative intent to expand the application of section 877 beyond mere tortfeasors. It analogized a principal's vicarious liability for the torts of his agent with a parent corporation's liability for the acts of its subsidiary. To support its expansion of section 877, the court stated that since the legislature had acquiesced in the application of section 877 to agency law, the doctrine should also apply to the analogous alter ego situations. It found acquiescence in the fact that the legislature, when it enacted the section, had not overturned *Ritter v. Technicolor Corp.*, 27 Cal. App. 3d 869, 103 Cal. Rptr. 686 (1972), which applied section 877 to agency situations.

The court further supported the application of section 877 to alter ego situations by examining the policies behind the provision. First, a

plaintiff must receive full recovery to the extent that others are responsible for his injuries. Thus, the dismissal of an alter ego corporation, which is based on a settlement with its subsidiary, would frustrate that purpose. Moreover, there is an increased danger of unfairness in settlement if a subsidiary is undercapitalized. Second, the statute was designed to facilitate early and final settlement of claims. Hence, by including both corporations in the settlement, multiple tortfeasors may avoid indemnity problems. Third, since equity is required as between defendants, a settling subsidiary cannot be allowed to shift a disproportionate burden of payments to any remaining defendants by having its settlement fulfill the obligations of two corporations, itself and the parent corporation.

JOHN EDWARD VAN VLEAR

B. *Recovery for emotional distress possible when mother is foreseeably present to observe defendant's act of negligently failing to provide necessary medical care to her son:* **Ochoa v. Superior Court.**

I. INTRODUCTION

The *Dillon v. Legg*[1] requirements for recovery for negligent infliction of emotional distress were reinterpreted in *Ochoa v. Superior Court.*[2] A youth in a juvenile detention infirmary was negligently denied treatment, despite his mother's plea for a physician. The mother watched her son's condition degenerate while those in charge of health care did very little to assist. On a motion for demurrer the supreme court held that the mother's presence while this was taking place was sufficient to state a cause of action, even though the injury was not inflicted in a sudden occurrence. Additionally, the parents were allowed to pursue a claim for cruel and unusual punishment under the survival statute.

Rudy Ochoa, the thirteen-year-old son of the plaintiffs, was in the custody of the Santa Clara County Juvenile Hall when he became ill with an apparent cold. Two days later Rudy was admitted to the ju-

1. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See also* Annot., 29 A.L.R.3D 1337 (1970).

2. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985). The opinion was written by Justice Broussard with Justices Mosk, Kaus, Reynoso, and Girard concurring. There was a separate concurring opinion by Justice Grodin and a concurring and dissenting opinion by Chief Justice Bird. Justice Girard was assigned by the Chairperson of the Judicial Council.

venile hall infirmary with a temperature of 105 degrees. His mother came to visit him and saw that he was going into convulsions and hallucinating.

Being very concerned, Mrs. Ochoa requested that her son be taken to the family physician. This request was denied until the probation officer could be contacted. Mrs. Ochoa applied cold compresses and tried to reassure her son, but his condition worsened. He began vomiting, coughing up blood and complained of intense pain in the chest area. Mrs. Ochoa was eventually required to leave, but was assured that her son would be cared for by a doctor. Rudy was eventually diagnosed as having bilateral pneumonia, and died that night after his mother left. The complaint alleged that Rudy Ochoa's needs were completely ignored, and that his mother experienced extreme mental distress during the entire period she was with him.

II. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A. *Recovery under* Dillon v. Legg

The plaintiff's first cause of action was for negligent infliction of emotional distress.[3] For the mother to recover as a bystander, she must have shown that her presence at her son's bedside was foreseeable under the following guidelines established in *Dillon:* (1) The nearness of the plaintiff to the scene of the accident, (2) whether the shock resulted from the contemporaneous observance of the accident and (3) the closeness of the relation between the plaintiff and victim.[4]

There was no question about the plaintiff's ability to meet the first and third *Dillon* guidelines. However, prior interpretations of the contemporaneous observance factor could be used to deny Mrs. Ochoa recovery. In *Jansen v. Children's Hospital Medical Center,*[5] the court found that *Dillon* required observance of an injury being inflicted in a sudden occurrence for the plaintiff to recover for

3. Plaintiffs also asserted a claim for intentional infliction of emotional distress. The court distinguished the intentional and negligent torts as completely different. To recover under the intentional count there must be outrageous conduct especially calculated to cause very serious mental distress. *Id.* at 165 n.5, 703 P.2d at 4 n.5, 216 Cal. Rptr. at 664 n.5.

4. *Id.* at 166, 703 P.2d at 5, 216 Cal. Rptr. at 665 (citing Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968)). For a discussion and comparison of the relationship necessary in order to be allowed recovery, see Leong v. Tuksaki, 55 Hawaii 398, 520 P.2d 758 (1974). *See also* Annot., 94 A.L.R.3D 486 (1979).

5. 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 884-85 (1973). The plaintiff in *Jansen* was denied recovery because her observance of her daughter's deterioration due to negligent misdiagnosis was not in keeping with *Dillon's* contemporaneous observance requirement. The event causing the injury was not a sudden occurrence and was not subject to sensory perception. *Jansen* was implicitly approved in Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

mental distress. Rudy Ochoa's injury was not the result of a sudden occurrence, but allegedly from lack of medical attention.

The court stated that any implication that *Dillon* requires a sudden occurrence is unwarranted. Such a restriction arbitrarily limits recovery even when mental distress flowing from a natural event is highly foreseeable. A degree of flexibility is required in applying the *Dillon* guidelines.[6] Recovery for emotional distress will be permitted when the plaintiff observes the defendant's action or inaction that causes injury to the victim. The plaintiff need only have a contemporaneous awareness that the observed behavior is the cause of the injury to meet the second *Dillon* guideline.[7]

The court overruled the previous distinction between the voluntary and involuntary presence of the plaintiff at the scene of the injury. All that is necessary is that the plaintiff be at the scene of the injury in the ordinary course of events.[8] Mrs. Ochoa's presence at her son's bedside was therefore sufficient to permit relief for negligent infliction of emotional distress.[9]

B. Recovery as a direct victim

In *Molien v. Kaiser Foundation Hospitals*,[10] the plaintiff was a married man whose wife was negligently misdiagnosed as having syphillis. As this would foreseeably be the source of marital discord and emotional anguish, the court allowed the husband to recover for mental distress, even though he did not observe the tortious conduct. The reasoning was that the negligent act was, by its very nature, di-

6. *Ochoa*, 39 Cal. 3d at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667.

7. *Id.* at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668. *Compare* Annot., 5 A.L.R.4TH 833 (1981) (immediacy of observation of injury affecting right to recover for emotional distress).

8. *Ochoa*, 39 Cal. 3d at 171, 703 P.2d at 9, 216 Cal. Rptr. at 669. *Justus* was the particular case being partially overruled. However, the *Ochoa* court did not remove the possibility of a voluntary bystander assuming the risk of traumatic shock. Emphasis was put on the plaintiff's presence being in the natural course of events.

9. *Ochoa*, 39 Cal. 3d at 171-72, 703 P.2d at 9, 216 Cal. Rptr. at 669. To give their only answer to the criticism that anything less than a strict application of *Dillon* will result in infinite liability, the court cited *Dillon:*

> "[We] should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which [we] do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

Id. (quoting *Dillon*, 68 Cal. 2d at 744, 441 P.2d at 923, 69 Cal. Rptr. at 84.)

10. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). *See also* Annot., 16 A.L.R.4TH 537 (1982) (necessity of physical injury to recover for loss of consortium).

rected at the husband as well as the wife. The *Ochoa* court held that Mrs. Ochoa did not fall into the direct victim category. In *Molien* the wife had to tell her husband of the disease and ask him to subject himself to tests. Mrs. Ochoa, in contrast, was only a foreseeable, helpless bystander in watching her son suffer mistreatment.[11]

III. CRUEL AND UNUSUAL PUNISHMENT

Mrs. Ochoa also brought an action as special administrator of her son's estate. She sought recovery on the theory that having medical treatment withheld while being detained for a criminal offense constitutes cruel and unusual punishment. The right to bring this claim was based on 42 U.S.C. § 1983.[12]

Because section 1983 is silent on the question of survival of claims, courts must refer to state law in making the determination.[13] California Probate Code section 573 allows for survival of all causes of action.[14] However, not every claim of inadequate medical care rises to the level of cruel and unusual punishment. There must be a deliberate indifference to the serious medical needs of the prisoner to constitute the prohibited mistreatment.[15]

The court cited a litany of cases that discussed standards for recovery under section 1983. Care that is woefully inadequate may result in the infliction of cruel and unusual punishment. Based upon the allegations of the complaint, there was no question that Rudy Ochoa's care was woefully inadequate. Therefore, the allegation was deemed sufficient to state a cause of action under section 1983.[16]

IV. SEPARATE OPINIONS

Justice Grodin offered a short concurrence to focus some attention on the policy considerations he deemed important in the development of the relevant law.[17] The *Dillon* rules were not intended to be rigid but were to set flexible guidelines for limiting liability. However, mechanical application of *Dillon* has led to arbitrary limitations that are not consistent with the principles of foreseeability in the

11. *Ochoa*, 39 Cal. 3d at 172-73, 703 P.2d at 10, 216 Cal. Rptr. at 670.

12. 42 U.S.C. § 1983 (1982). Cruel and unusual punishment is prohibited under federal and state constitutions. U.S. CONST. amend. VIII; CAL. CONST. art. I, § 17.

13. Robertson v. Wegmann, 436 U.S. 584, 588-90 (1978) (construing 42 U.S.C. § 1988 (1982)).

14. CAL. PROB. CODE § 573 (West Supp. 1985). *See also* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 14-15 (8th ed. 1974 & Supp. 1984).

15. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

16. *Ochoa*, 39 Cal. 3d at 176-77, 703 P.2d at 13, 216 Cal. Rptr. at 673. *See also* Annot., 28 A.L.R. FED. 279 (1976) (see particularly section 10 for cases discussing recovery under 42 U.S.C. § 1983 (1982)).

17. *Ochoa*, 39 Cal. 3d at 178, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J., concurring).

decision.[18]

The Justice stated that one alternative to the confusion that has resulted in the law would be to treat emotional distress like any other tort injury and base recovery on negligence, foreseeability and proximate cause.[19] Such an approach would be consistent with the English approach to the problem of having the court determine the elements of foreseeability. Mental injury would have no more limitations of recovery than does physical injury.[20]

Another suggested rule would be to only limit the amount that a plaintiff may recover for emotional distress to economic loss.[21] A return to the zone of danger rule has also been advocated on the theory that it is better to arbitrarily restrict liability than to have no limit.[22]

Chief Justice Bird concurred in the result but dissented on the ground that the majority's new guidelines of liability for emotional distress are no clearer than before. Though the separate opinion was lengthy, the main thrust was to cite examples showing the arbitrariness and inconsistencies reached with liability limiting devices. Her suggestion was that restrictions placed on recovery for mental injuries should be removed to the same extent that they are for physical injuries.

Citing *Molien v. Kaiser Foundation Hospitals*,[23] the Chief Justice suggested that the fairest analysis would be to view those who suffer emotional distress in terms of whether or not the defendant owed the plaintiff a duty to use reasonable care.[24] As exemplified in the Eng-

18. *Id.* at 179, 703 P.2d at 15, 216 Cal. Rptr. at 675.

19. *Id. See* Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984). This article was extensively relied on by Chief Justice Bird in her separate opinion.

20. McLoughlin v. O'Brian, [1982] 2 All E.R. 298. The solution would not be entirely parallel in the American system because the British courts usually do not employ a jury. *Ochoa*, 39 Cal. 3d at 179, 703 P.2d at 15, 216 Cal. Rptr. at 675 (Grodin, J., concurring).

21. *Ochoa*, 39 Cal. 3d at 180, 703 P.2d at 16, 216 Cal. Rptr. at 676 (Grodin, J., concurring). *See* Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making the Punishment Fit the Crime*, 1 U. HAWAII L. REV. 1 (1979) (recovery limited to medical expenses and disability).

22. *Ochoa*, 39 Cal. 3d at 180, 703 P.2d at 16, 216 Cal Rptr. at 676 (Grodin, J., concurring). *See* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982).

23. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). Bird accused the majority of limiting *Molien* to its facts. *Ochoa*, 39 Cal. 3d at 190, 703 P.2d at 23, 216 Cal. Rptr. at 682 (Bird, C.J., concurring and dissenting).

24. *Ochoa*, 39 Cal. 3d at 191, 703 P.2d at 23, 216 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

lish House of Lords opinion cited by Justice Grodin,[25] common law principles of reasonable foreseeability can be used to determine when this duty exists. Space, time and family relationship are not legal limitations; they are factors to be weighed when the foreseeability test is applied.[26]

To answer the charge of opponents that this approach will open the flood gates of liability, the answer in the majority opinion was again articulated.[27] Bird's primary argument was that the jury, as representative of a cross section of society, is in the best position to determine the particular circumstances under which society should permit recovery for mental distress.[28] Hawaii's experience in this area is very instructive. In the most recent Hawaii Supreme Court opinion, it recognized that the fears of unlimited liability from removal of the arbitrary limiting devices have not proven to be true.[29]

Stating that the majority opinion only adds another layer of confusion to the formula for recovery, the Chief Justice suggested that all distinctions between direct victims and bystanders be removed. Recovery should be allowed if (1) the emotional distress was reasonably foreseeable, and (2) the distress suffered was serious. These factors considered together will not only serve to protect against unlimited liability, but will provide a principled basis for finding recovery. "*Dillon* should remain a guidepost to assist the trier of fact in determining liability."[30]

V. CONCLUSION

The majority opinion established relaxed guidelines for recovery of negligent infliction of emotional distress. It is no longer necessary for a plaintiff to show that he witnessed a sudden occurence of injury. A contemporaneous observance of the defendant's behavior with an understanding that it is causing the injury is all that a person

25. McLoughlin v. O'Brian, [1982] A11 E.R. 298, 311.

26. *Id.*

27. *Ochoa*, 39 Cal. 3d at 194, 703 P.2d at 26, 216 Cal. Rptr. at 686 (Bird, C.J., concurring and dissenting). See *supra* note 9, for the now famous quote used as a rationale for extending liability.

28. *Ochoa*, 39 Cal. 3d at 194, 703 P.2d at 26, 216 Cal. Rptr. at 686 (Bird, C.J., concurring and dissenting) (citing Rodriguez v. State, 52 Hawaii 156, 472 P.2d 509 (1970)).

29. *Ochoa*, 39 Cal. 3d at 195, 703 P.2d at 26, 216 Cal. Rptr. at 686 (citing Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981) (award for mental distress upheld for plaintiffs who were told on the telephone about how their dog was killed the day before while en route to the veterinarian)).

30. *Ochoa*, 39 Cal. 3d at 196, 703 P.2d at 27, 216 Cal. Rptr. at 687 (Bird, C.J., concurring and dissenting). The Chief Justice also dissented from the majority's holding that Mrs. Ochoa had failed to state a cause of action for intentional infliction of emotional distress. Stating that the intentional count can rest on conduct that is in reckless disregard of the plaintiff's emotional well-being, the Chief Justice thought denial of recovery on this basis is inconsistent with the approval of the action for cruel and unusual punishment. *Id.* at 196 n.13, 703 P.2d at 27 n.13, 216 Cal. Rptr. at 687 n.13.

closely related to the victim need show.[31]

Recovery is also possible for cruel and unusual punishment to a person under legal custody who is negligently denied medical care. The required showing is that the care received by the detainee was woefully inadequate under the circumstances.

JAMES B. BRISTOL

XXII. WORKERS' COMPENSATION

Failure to notify an employee of his workers' compensation rights will toll the statute of limitations, even when the party bringing the suit is the medical provider: **Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board.**

In *Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board,* 39 Cal. 3d 57, 702 P.2d 197, 216 Cal. Rptr. 115 (1985), the court determined that tolling the one year statute of limitations in workers' compensation cases is the proper remedy where an employee has not been notified of his rights. For more than two months the employer failed to give the required notice of legal rights to an injured employee. Further, there was no evidence that the employee was actually aware of his rights, so the court held that the medical provider was not barred from initiating the suit fourteen months after the injury.

On February 25, 1981, Marvin Martin injured his leg while employed at Daly City. Kaiser Hospital treated Martin and then filed an injury report with the insurance adjuster for the city on April 23.

31. Negligent infliction of emotional distress is a topic that has received a great deal of attention in legal periodicals. In addition to the articles cited *infra*, the following is a partial list of studies that have appeared most recently: Bell, *The Bell Tolls: Toward Full Tort Recovery For Psychic Injury,* 36 U. FLA. L. REV. 333 (1984); Bell, *Reply to a Generous Critic,* 36 U. FLA. L. REV. 437 (1984); Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell,* 36 U. FLA. L. REV. 413 (1984); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos,* 33 HASTINGS L.J. 583 (1982); Comment, *Recovery of Damages for the Negligent Infliction of Emotional Distress in Products Liability Cases,* 8 AM. J. TRIAL ADVOC. 137 (1984); Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases,* 54 S. CAL. L. REV. 847 (1981); Comment, *Negligent Infliction of Emotional Distress: Development in the Law,* 14 U. BALT. L. REV. 135 (1984); Comment, *After the Impact Rule- Limiting Defendant's Liability in Negligent Infliction of Emotional Distress Cases: Bass v. Nooney Co.,* 18 U. RICH. L. REV. 413 (1984).

Daly City sent Martin and Kaiser a letter on July 2, that rejected this claim and also advised Martin of his legal rights.

After considering the Labor Code, CAL. LAB. CODE § 5405 (West 1971) and *Reynolds v. Workmen's Compensation Appeals Board,* 12 Cal. 3d 726, 527 P.2d 631, 117 Cal. Rptr. 79 (1974), the supreme court determined that the appropriate remedy for an employer's breach of duty in this area was to toll the statute of limitations until proper notice was given. The rationale for the decision was to avoid unfair prejudice to the employee who has no knowledge of his rights. Therefore, notice is not necessary when the employee already has such knowledge.

In this case, the party actually bringing the claim may have been aware of the employee's workers' compensation rights. However, the rights of Kaiser as a lien claimant were derived solely from those of the employee. In bringing the lien claim, Kaiser stood in the shoes of the injured employee. The court therefore held that the statute of limitations was tolled at least until July 2, 1981, when the employee received notice, making Kaiser's claim of April 15, 1982 timely. For more information, see Mastoris, *The Statutes of Limitation in Workers' Compensation Proceedings,* 15 CAL. W.L. REV. 32 (1979), and 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 233-246 (8th ed. 1973 & Supp. 1984).

JAMES B. BRISTOL