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California Supreme Court Survey - A Review of Decisions: December 1985–February 1986

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California Supreme Court Survey December 1985-February 1986

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

I. ATTORNEYS' FEES

The contingency fee limitations of MICRA does not apply where a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA theories in the same suit, and subsequently obtains a recovery on the non-MICRA theory: **Waters v. Bourhis.**

I. INTRODUCTION

In *Waters v. Bourhis*,[1] the court determined the proper application of Business and Professions Code section 6146[2] in a malpractice action for intentional misconduct[3] as opposed to professional negligence.[4] The court determined that intentional misconduct would be a non-MICRA[5] cause of action. The court also concluded that the limitations of section 6146 would not apply if a plaintiff knowingly consents to pursue a non-MICRA and a MICRA[6] action, and subse-

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1. 40 Cal. 3d 424, 709 P.2d 469, 220 Cal. Rptr. 666 (1985). Justice Kaus delivered the majority opinion in which Justices Broussard, Reynoso, Grodin, and Lucas concurred. Justice Mosk wrote a dissenting opinion in which Chief Justice Bird concurred. Justice Kaus, a retired associate justice, was sitting under assignment by the Chairperson of the Judicial Council.

2. Section 6146 provides in pertinent part:

> (a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages *in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence* in excess of the following limits:
> (1) Forty percent of the first fifty thousand dollars ($50,000) recovered.
> (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.
> (3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.
> (4) Ten percent of any amount on which recovery exceeds two hundred thousand dollars ($200,000).
>
> The limitation shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

CAL. BUS. & PROF. CODE § 6146 (West Supp. 1986) (emphasis added).

3. "Misconduct" is defined by Black's Law Dictionary as: "[a] transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness . . . ." BLACK'S LAW DICTIONARY 901 (5th ed. 1979).

4. Section 6146(c)(3) defines professional negligence as:

> [a] negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

CAL. BUS. & PROF. CODE § 6146(c)(3) (West Supp. 1986).

5. MICRA is an acronym for the Medical Injury Compensation Reform Act of 1975. Section 6146 of the Business and Professions Code is a provision of this act.

6. For an overview on how the various states have handled the medical malpractice crisis with legislation, *see* Note, *Medical Malpractice Statutes: A Retrospective Analysis*, 3 ANN. SURV. AM. L. 693 (1984) (limitations on recovery, periodic payments,

quently obtained a recovery based on the non-MICRA theory.[7]

II. FACTUAL BACKGROUND

The defendant, Ray Bourhis, was an attorney who represented the plaintiff, Barbara Waters, in a previous suit for medical malpractice against a psychiatrist, Dr. Shonkwiler, for alleged sexual misconduct.[8] The plaintiff first consulted the defendant about one year after she had stopped seeing Shonkwiler and had helped the police with a criminal investigation of the psychiatrist.

Bourhis contends that when plaintiff described the circumstances of Shonkwiler's sexual activities, he informed her that it was probably not medical negligence. Consequently, he advised plaintiff of section 6146 of the Business and Professions Code, indicating he would not represent her under its limitations. The defendant instead offered to take the case on an hourly or contingency basis.[9] The plaintiff agreed to a contingency basis and signed an agreement to that effect.[10] The plaintiff in the present action claimed that Bourhis never advised her of the lack of medical negligence or the existence of section 6146. The complaint defendant filed against Shonkwiler sought damages on three legal theories: "(1) negligence, (2) breach of duty of good faith, and (3) intentional or reckless infliction of emotional distress."[11]

In discovery, the defendant learned of Shonkwiler's $200,000 limit on his malpractice policy. The insurer subsequently settled with defendant for the $200,000 policy limit. The defendant contended he retained his fee,[12] explaining to the plaintiff how section 6146 did not

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contingency fees, statutes of limitation, arbitration panels, and pretrial screening panels).

7. *Waters*, 40 Cal. 3d at 437, 709 P.2d at 478, 220 Cal. Rptr. at 675.

8. The psychiatrist allegedly induced the plaintiff to engage in sexual conduct with him under the guise of behavior modification therapy. He also allegedly coerced the plaintiff into sexual relations with threats of institutionalization for failure to cooperate. *Id.* at 428, 709 P.2d at 471, 220 Cal. Rptr. at 668.

9. The defendant agreed to work for an hourly rate of $50 or $65 per hour, or on the standard personal injury contingency fee, "which provided for fees of (1) 33 1/3 percent if recovery was obtained before the filing of a lawsuit, and (2) 40 percent after such a suit was filed." *Id.* at 428-29, 709 P.2d at 472, 220 Cal. Rptr. at 669.

10. *See* 7 CAL. JUR. 3D *Attorneys at Law* §§ 252-258 (1973 & Supp. 1985) (contingent fees); 7A C.J.S. *Attorney and Client* §§ 313-323 (1980 & Supp. 1985) (contingent fee contracts).

11. *Waters*, 40 Cal. 3d at 429, 709 P.2d at 472, 220 Cal. Rptr. at 669.

12. The defendant retained 40% of the $200,000 settlement ($80,000) plus his out-of-pocket expenses ($1,797.30), while the plaintiff received the balance of $118,202.70. *Id.* at 430, 709 P.2d at 473, 220 Cal. Rptr. at 670.

apply to her case,[13] and that she should seek outside advice for questions about the fee.

Thereafter, plaintiff sought outside legal advice which led to this action, claiming defendant retained fees of $18,000 more than was allowed under section 6146. The defendant answered, contending that section 6146 was unconstitutional. He also moved for summary judgment on the ground that the previous suit was not based on "professional negligence" as defined by section 6146.[14] The trial court granted summary judgment in the defendant's favor and the plaintiff appealed from the judgment.

III. THE MAJORITY OPINION

The court first disposed of the constitutional claim in accordance with *Roa v. Lodi Medical Group Inc.*,[15] in which the court held that section 6146 was not unconstitutional.[16] The court then focused on the application of section 6146 to the instant case, which was based on intentional misconduct as well as professional negligence.

The defendant advanced several theories in support of summary judgment. He contended that, as a matter of law, the record showed that the earlier action was based on intentional misconduct, and not professional negligence. The court found this theory to be without merit. The court reasoned that because the case was settled, there was no way to determine upon which theory the psychiatrist's liability rested. Even if intentional misconduct had been established, plaintiff probably could have recovered in part on a professional negligence theory.[17]

Second, the defendant argued that because the psychiatrist's acts were restricted by his licensing agency, MICRA did not apply. Section 6146 excludes from its limitations acts or omissions which are

13. The defendant gave a letter to the plaintiff, explaining the fee breakdown and why section 6146 did not apply. The defendant maintained that although both negligence and intentional misconduct were alleged on the complaint, section 6146 only applied to standard medical negligence cases and not in cases such as this where the sexual conduct is in violation of a restriction imposed by Business and Professions Code section 730. *Id.* at 430 n.5, 709 P.2d at 473 n.5, 220 Cal. Rptr. at 670 n.5.

14. CAL. BUS. & PROF. CODE § 6146(c)(3) (West Supp. 1986).

15. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985) (holding that section 6146, which places limitations on the amount of fees an attorney may obtain in a medical malpractice action when he represents a party on a contingency fee basis, is not unconstitutional as a denial of due process, violation of equal protection, or violation of separation of powers doctrine).

16. *See* Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979).

17. *See, e.g.*, Cotton v. Kambly, 101 Mich. App. 537, 300 N.W.2d 627 (1980) (plaintiff could maintain civil action for malpractice against psychiatrist even though psychiatrist could be subject to criminal and professional sanctions); American Employer's Ins. Co. v. Smith, 105 Cal. App. 3d 94, 102, 163 Cal. Rptr. 649, 654 (1980) (showing of willfulness does not as a matter of law negate negligence).

within "any restriction imposed by the licensing agency or licensed hospital."[18] The defendant contended that the psychiatrist's sexual misconduct was a basis for disciplinary action, restricted by the "licensing agency." The court found that section 6146 was only "inapplicable when a provider operates in a capacity for which he is not licensed — for example, when a psychologist performs heart surgery."[19] The court reasoned that, in the instant case, the psychiatrist was licensed to provide the type of treatment out of which the misconduct arose. Therefore, this exception does not apply.

Third, the defendant argued section 6146 does not apply to cases where a plaintiff's recovery was based on both non-MICRA and MICRA actions. The court could find no basis for limiting attorneys' fees where a MICRA and a non-MICRA claim are both asserted in one suit. Therefore, the fee limitations of section 6146 should not apply when the litigant is only successful with the non-MICRA claim.[20] The court did, however, conclude that this finding would apply only in cases where the plaintiff *knowingly* chose to proceed on both causes of action.[21] In the case at bar, the question of whether the plaintiff "knowingly consented" was still in dispute. Therefore, the court determined that summary judgment was not appropriate and reversed the judgment of the trial court.

IV. THE DISSENT

Justice Mosk agreed with the majority holding that section 6146 does not apply to a non-MICRA recovery where the plaintiff knowingly consents to proceed on both types of actions. However, he disagreed with the majority's claim that the psychiatrist's sexual misconduct arose out of the services he was licensed to perform. Justice Mosk asserted that this type of sexual misconduct was "entirely outside the scope of treatment."[22] Most importantly, he felt this court was bound by the finding of the trial court that plaintiff's dam-

18. CAL. BUS. & PROF. CODE § 6146(c)(3) (West Supp. 1986).

19. *Waters*, 40 Cal. 3d at 436-37, 709 P.2d at 477-78, 220 Cal. Rptr. at 674-75.

20. *Id.* at 437, 709 P.2d at 477, 220 Cal. Rptr. at 674.

21. [A]n attorney who in such a case seeks to collect a larger fee than that authorized by section 6146 must specifically advise the client or potential client of the pros and cons of alternative litigation strategies, including potential attorney fees, and obtain the client's consent to pursue and settle a non-MICRA action as well as a MICRA claim.

Id. at 438, 709 P.2d at 479, 220 Cal. Rptr. at 676 (footnote ommitted). *See also* CAL. BUS. & PROF. CODE § 6147 (West Supp. 1986) (regulation of contingency fee contracts).

22. *Waters*, 40 Cal. 3d at 439, 709 P.2d at 480, 220 Cal. Rptr. at 677 (Mosk, J., dissenting). *See, e.g.*, Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 949, 123

age did not result from mere professional negligence, but intentional conduct. Therefore, the summary judgment was correct and should not have been reversed.

V. IMPACT

The court's holding could result in many personal injury attorneys asserting both MICRA and non-MICRA actions in order to avoid the limitations of section 6146. If the case goes to trial, the cause of action that succeeds will determine whether section 6146 applies. However, in the case of a settlement, the limits of section 6146 could be avoided because settlements do not establish on which theory the recovery is based. This could be an area for potential abuse of the limitations imposed by MICRA in malpractice actions. The provision that the plaintiff must knowingly consent to proceed on both theories will hopefully provide a check for potential abuse by attorneys.

MARIE P. HENWOOD

II. CIVIL PROCEDURE

State courts have concurrent jurisdiction with federal courts over alleged violations of civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and the state antitrust statute applies to professionals: **Cianci v. Superior Court.**

I. INTRODUCTION

In *Cianci v. Superior Court*[1] the court addressed two distinct questions. First, the court determined whether state courts have concurrent jurisdiction with federal courts over the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO).[2] In deciding in the affirmative, the court noted that there is a presumption of concurrent jurisdiction between state and federal courts unless Congress either explicitly or implicitly confines jurisdiction to the federal courts.[3] Second, the court examined California's antitrust statute[4] and considered whether it applies to professionals. In over-

Cal. Rptr. 563, 575 (1975) (sexual misconduct was not considered "acceptable psychological treatment").

1. 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985). The majority opinion was by Justice Mosk, with Chief Justice Bird and Justices Broussard, Reynoso, and Kawaichi concurring. Justice Lucas filed a concurring and dissenting opinion. Justice Kawaichi was assigned by the Chairperson of the Judicial Council.

2. 18 U.S.C. § 1964(c) (1982).

3. *Cianci*, 40 Cal. 3d at 910, 710 P.2d at 377-78, 221 Cal. Rptr. at 577-78.

4. CAL. BUS. & PROF. CODE §§ 16700-16758 (West 1964 & Supp. 1986). California's antitrust laws are commonly referred to as the Cartwright Act.

ruling *Willis v. Santa Ana Community Hospital Association*,[5] the court held that, in light of criticism of *Willis*[6] and the United States Supreme Court's subsequent holding in *Goldfarb v. Virginia State Bar*,[7] the Cartwright Act does apply to professionals.

II. FACTS

The case arose out of a dispute over the establishment, funding, and operation of a specialized medical treatment department at a hospital. Several medical doctors filed a complaint against other doctors seeking dissolution of a limited partnership, accounting, damages, and the imposition of a constructive trust. The petitioner, in response to this complaint, filed a cross-complaint alleging, among other things, violation of and conspiracy to violate both the Racketeer Influenced and Corrupt Organizations Act and the state's antitrust statute — the Cartwright Act.

The real parties filed a demurrer to these claims. In response to the RICO claim, the parties argued that federal courts have exclusive jurisdiction over RICO actions. In response to the antitrust claim they argued that, as medical professionals, they were exempt from the application of the Cartwright Act. The trial court sustained the demurrers on these grounds and petitioner, Cianci, sought supreme court review of these rulings by writ.[8]

III. THE COURT'S DECISION

A. The Majority Opinion

1. The RICO Issue

In stating that RICO jurisdiction was an issue of first impression, the court emphasized its importance to the profession and the public because of its impact on the interests of those whose businesses suffer injury as a result of racketeering activities.[9] The object of RICO is to prevent and punish racketeering activity.[10] The statutory scheme includes both criminal and civil provisions. Section 1964(c) of

5. 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962).

6. *See* Comment, *Should the Medical Profession be Exempt from California Antitrust Law? Willis v. Santa Ana Community Hospital Association Reexamined*, 7 W. ST. L. REV. 91 (1979).

7. 421 U.S. 773 (1975) (professionals held to be within the Sherman Act even though they were not expressly included).

8. *Cianci*, 40 Cal. 3d at 908, 710 P.2d at 376, 221 Cal. Rptr. at 576.

9. *Id.*

10. *Id.* Racketeering activity is defined as any act in violation of several classes of

the RICO act provides that: "Any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[11]

Justice Mosk, writing for the *Cianci* majority, concluded that the civil provisions of the statute implicitly granted federal courts jurisdiction over RICO cases.[12] According to the United States Supreme Court, "state courts may assume subject-matter jurisdiction over a federal cause of action absent [a] provision by Congress to the contrary or [a] disabling incompatibility between the federal claim and state-court adjudication."[13]

The presumption that state courts have concurrent jurisdiction with federal courts was then espoused as a rationale for the court's holding that RICO cases can be heard in state courts. The court noted that Congress had not implicitly or explicitly confined jurisdiction to federal courts and that, absent such action by Congress, "some strong showing of need for exclusive jurisdiction is required to overcome [the] presumption."[14] The court added that the language of the statute itself implies that state courts are to have concurrent jurisdiction. "RICO is to be read broadly."[15] The court noted that Congress unmistakably intended that section 1964(c) be widely construed to effectuate its remedial purposes and that exclusive jurisdiction in federal courts would frustrate or limit those purposes.[16]

The court unilaterally rejected all of the policy arguments put forward by the real parties in favor of limiting RICO litigation to federal courts.[17] The parties argued that RICO claims were incompatible with state court adjudication for the following reasons: the necessity of uniform application of the statute; federal judges are superior to state judges because of their familiarity with the RICO stat-

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state criminal laws or of several specified federal criminal provisions. 18 U.S.C. § 1961 (1982).

11. 18 U.S.C. § 1964(c) (West 1984).

12. *Cianci*, 40 Cal. 3d at 910, 710 P.2d at 377-78, 221 Cal. Rptr. at 577-78.

13. *Id.* at 910, 710 P.2d at 377, 221 Cal. Rptr. at 577 (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 477-78 (1981)). *See generally* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976).

14. *Cianci*, 40 Cal. 3d at 910, 710 P.2d at 378, 221 Cal. Rptr. at 578 (quoting Redish & Muench, *supra* note 13, at 325 n.63).

15. *Cianci*, 40 Cal. 3d at 916, 710 P.2d at 382, 221 Cal. Rptr. at 582. *See also* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3292, 3296 (1985). *See also* Note, *Sedima, S.P.R.L. v. Imrex Co.: The Requirement of Prior Criminal Convictions in Private RICO Actions*, 63 N.C.L. REV. 1033 (1985).

16. *Cianci*, 40 Cal. 3d at 912-13, 710 P.2d at 379, 221 Cal. Rptr. at 579.

17. In doing so, the court rejected the reasoning of County of Cook v. Midcon Corp., 574 F. Supp. 902 (N.D. Ill. 1983), and Greenview Trading Co. v. Hershman & Leicher, 108 A.D.2d 468, 489 N.Y.S.2d 502 (1985), stating that their reasoning contained "superficial appeal." *Cianci*, 40 Cal. 3d at 911, 710 P.2d at 378, 221 Cal. Rptr. at 578.

ute; and the greater hospitality of federal courts to federal law claims. The court stated that these arguments did not meet the burden of overcoming the presumption in favor of concurrent jurisdiction. Thus, whether Congress meant to allow RICO litigation in state courts, the California Supreme Court is ready and willing to hear such claims.

2. The Antitrust Issue

After disposing of the RICO issue, the court subsequently advanced to its interpretation of the Cartwright Act and its applicability to professionals.[18] The court recognized that the plain language of the Act reveals that its coverage extends to all economic combinations, regardless of the nature of the occupation of the combining parties.[19] This language is comprehensive, and limiting it to not encompass professionals because they were not specifically stated, would undermine the purpose of the Act.

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18. The Cartwright Act states: "Except as provided in this chapter, every trust is unlawful, against public policy and void." CAL. BUS. & PROF. CODE § 16726 (West 1964).

19. *Cianci*, 40 Cal. 3d at 917, 710 P.2d at 382-83, 221 Cal. Rptr. at 582-83. The act provides:

> A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
> (a) To create or carry out restrictions in trade or commerce.
> (b) To limit or reduce the production, or increase the price of merchandise or of any commodity.
> (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
> (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
> (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following:
> (1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.
> (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.
> (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.
> (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

CAL. BUS. & PROF. CODE § 16720 (West 1964).

The court found that the goal of the Act was to protect consumers[20] and noted that consumer interests are significantly implicated in the provision of services by professionals — especially doctors. Thus, the court reasoned that the legislature in enacting the Cartwright Act must have intended for the Act to apply to professionals.[21]

The court examined the United States Supreme Court's holding in *Goldfarb v. Virginia State Bar*[22] and found its reasoning to be sufficiently persuasive to warrant its application to the Cartwright Act. Consequently, the court proceeded to overrule *Willis v. Santa Ana Community Hospital Association*,[23] reasoning that its rationale was unsound and unconvincing.

The court rejected the real parties' two primary arguments for exempting professionals. First, the parties argued that since the legislature had modified the Act in 1976 and 1984 without changing the provision interpreted by the *Willis* court, it was aware of *Willis* and thereby acquiesced to its holding.[24] The court held that these amendments did not approve the blanket exemption for professionals created by the *Willis* court.

Second, it was argued that the doctrine of *stare decisis* prevented the court's reconsideration of the issue settled by the *Willis* case. The court, in rejecting this argument, again turned to the United States Supreme Court.[25] The court noted that it should not hide behind *stare decisis*, but should reconsider prior court construction of legislative intent when such a reconsideration is dictated by time and experience.[26] The court then concluded that the Cartwright Act applies to professionals and overruled the *Willis* case.[27]

B. The Concurring and Dissenting Opinion

Although he concurred in the majority conclusion that the Cart-

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20. *Cianci*, 40 Cal. 3d at 918, 710 P.2d at 383, 221 Cal. Rptr. at 583.

21. To bolster its reasoning, the court used a statement by a congressman who authored a bill similar to the Cartwright Act that was offered as an unsuccessful substitute to the Sherman Act. *Id.* at 919, 710 P.2d at 394, 221 Cal. Rptr. at 684. In light of the great weight of the arguments existing in United States Supreme Court case law, common law, and analogies to the Sherman Act, this argument appears to be tenuous at best and wholly unnecessary.

22. 421 U.S. 773 (1975).

23. 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962).

24. The court cited People v. Daniels, 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969) for the proposition that mere silence to a court's construction of a statute does not constitute acquiescence. *See also Cianci*, 40 Cal. 3d at 923 n.7, 710 P.2d at 386 n.7, 221 Cal. Rptr. at 586 n.7 (examination of the legislative amendments to the Act).

25. *See* Boys Markets, Inc. v. Clerks Union, 398 U.S. 235 (1970) (rejection of a similar *stare decisis* contention).

26. *Cianci*, 40 Cal. 3d at 924, 710 P.2d at 387-88, 221 Cal. Rptr. at 587-88.

27. Chief Justice Bird concurred with the Mosk opinion, along with Justices Broussard, Reynoso, and Kawaichi.

wright Act applies to the medical profession, Justice Lucas vehemently dissented to the holding that state courts have concurrent jurisdiction with federal courts to decide RICO claims.[28] Arguing that RICO's legislative history clearly establishes exclusive federal jurisdiction, Justice Lucas noted that three of the four cases which have addressed the issue in other jurisdictions have concluded that jurisdiction was exclusive.[29] Lucas believed the reasoning of the three cases in favor of exclusive federal jurisdiction to be analytical and persuasive, while the reasoning of the fourth case[30] contained no analysis of the relevant factors.[31]

RICO's language was then compared to the federal antitrust act.[32] Lucas argued that the similarity of the two statutes, one of which has been uniformly held to confer exclusive federal jurisdiction, indicates that the legislature intended both to grant federal courts exclusive jurisdiction. This similarity was found to provide an "inescapable implication" of exclusive jurisdiction over civil RICO claims.[33]

Lucas then addressed the complexity of the RICO statute and its need for uniformity of interpretation and application.[34] Justice Lucas concluded that the complexity of RICO adjudication necessarily involves the interpretation of other uniquely federal statutes, thereby complicating the already complex statute. Thus, Lucas concurred with the holdings of the cases supporting exclusive federal jurisdiction[35] and declined to join in the RICO "fray."[36]

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28. *Cianci*, 40 Cal. 3d at 925, 710 P.2d at 388, 221 Cal. Rptr. at 588. Justice Grodin concurred with Justice Lucas' dissent.

29. The three cases cited by Justice Lucas to rebut the concurrent jurisdiction presumption are Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365 (E.D. Wash. 1985); County of Cook v. Midcon Corp., 574 F. Supp. 902 (N.D. Ill. 1983); Greenview Trading Co. v. Hershman & Leicher, 108 A.D.2d 468, 489 N.Y.S.2d 502 (1985).

30. Luebke v. Marine Nat'l Bank of Neenah, 567 F. Supp 1460 (E.D. Wis. 1983).

31. *Cianci*, 40 Cal. 3d at 925-26, 710 P.2d at 388-89, 221 Cal. Rptr. at 588-89.

32. 15 U.S.C. § 15 (1982).

33. *Cianci*, 40 Cal. 3d at 926, 710 P.2d at 388-89, 221 Cal. Rptr. at 588-89.

34. Justice Lucas quoted a statement by Professor G. Robert Blakey, chief counsel to the Senate subcommittee which proposed RICO. Blakey stated that "courts can infer from the statute that if Congress had thought about it, they would have made jurisdiction exclusive." *Cianci*, 40 Cal. 3d at 929, 710 P.2d at 391, 221 Cal. Rptr. at 591.

35. *See supra* note 29.

36. *Cianci*, 40 Cal. 3d at 930, 710 P.2d at 392, 221 Cal. Rptr. at 592. In light of federal case law, the statutory interpretations which support exclusive jurisdiction, and the strong arguments exposed by the dissent in *Cianci*, it is increasingly likely that the Supreme Court of the United States or Congress will take steps to clarify this issue. The result will probably be a finding of exclusive federal jurisdiction in order to quell the increasing amount of confusion surrounding civil RICO litigation.

IV. CONCLUSION

The court's determination to grant parties in civil RICO actions concurrent jurisdiction in state and federal court will allow litigants the opportunity to select the forum in which they choose to bring RICO actions. This will, in all likelihood, give rise to complications and irregularities in the application of federal RICO law. It is too soon, however, to determine the full impact of this decision on RICO litigation.

The court's additional and unanimous ruling that the Cartwright Antitrust Act applies to professionals is a reasonable and justified departure from its previous holding in the *Willis* case. This holding will protect consumers from antitrust violations in all areas, including the medical and legal professions.

CHRISTIE A. MOON

III. CONTRACTS

Arbitration clause in a health service contract that covers any claim "arising from rendition or failure to render services" does not apply to a claim against the health care provider for negligent employment and supervision of an orderly accused of sexually assaulting a patient: **Victoria v. Superior Court.**

In *Victoria v. Superior Court*, 40 Cal. 3d 734, 710 P.2d 833, 222 Cal. Rptr. 1 (1985), the supreme court held that an arbitration clause in a health care service contract that covers any claim "arising from rendition or failure to render services" did not include a claim brought by a patient against the health care provider for negligent hiring and supervision of an employee who had allegedly sexually assaulted that patient. The court based its decision upon the contract's adhesive characteristics and ambiguity, and upon the fact that the health care provider was in the better bargaining position and responsible for the ambiguity.

Petitioner was admitted to Kaiser Foundation Hospital for brain surgery in August of 1984. While recovering from her operation, she was allegedly sexually assaulted on several occasions by a hospital orderly. Petitioner sued both the orderly and Kaiser. Included in the complaint were two causes of action against Kaiser for negligent infliction of emotional distress and negligent selection and supervision of the employee who had allegedly assaulted her. There was a Group Medical and Hospital Agreement between Kaiser and Southern California Edison Company. The petitioner's father was employed by Edison, and as a family dependent, the petitioner became a qualified

Kaiser member under the agreement. Included in the agreement was an arbitration clause which provided that:

> Any claim arising from alleged violation of a legal duty incident to this Agreement shall be submitted to binding arbitration if the claim is asserted: (1) By a Member . . . [;] (2) On account of death, mental disturbance or bodily injury *arising from rendition or failure to render services under the Agreement*, irrespective of the legal theory upon which the claim is asserted; (3) For monetary damages exceeding the jurisdictional limit of the Small Claims Court; and (4) Against one or more of the following . . . : (a) Health Plan, (b) Hospitals, (c) Medical Group, (d) Any Physician, or (e) Any employee of the foregoing.

Victoria, 40 Cal. 3d at 738, 710 P.2d at 834, 222 Cal. Rptr. at 2 (emphasis added).

Kaiser answered the complaint and moved to stay the action and compel arbitration, arguing that the complaint fell within the arbitration clause of the agreement. The trial court granted Kaiser's motion and ordered that the matter be submitted to arbitration. From this order, the petitioner sought a writ of mandate requiring the trial court to set aside its order and exercise its jurisdiction to hear the case.

The petitioner argued that the allegations in her complaint were outside the arbitration clause in the agreement. She claimed that the arbitration clause was not specific enough to satisfy the relevant statutory requirements. She also claimed that, according to the arbitration clause, in order for a claim to be submitted to mandatory arbitration it must arise from services pursuant to the agreement.

Because her suit was not related to the rendition or failure to render medical or hospital services, she claimed that the arbitration clause did not apply. She further argued that the agreement was an adhesion contract, mandating that the ambiguity be resolved against Kaiser since it had the stronger bargaining position. However, Kaiser claimed that the arbitration clause covered all its activities, and therefore the claim for negligent employment arose out of its obligation to provide hospital services within the meaning of the arbitration clause.

In resolving the controversy, the court balanced the general policy in favor of arbitration against ordinary contract principles, which require agreements to be interpreted to reflect the intent of the parties. While policy favors arbitration, the court acknowledged it does so only when the parties voluntarily agree to arbitrate. Using standard contract interpretation principles, the court declared that ambiguities should be resolved against the party responsible for them — the drafter.

The supreme court noted that many arbitration agreements between health care providers and patients are governed by Civil Procedure Code section 1295. *See* CAL. CIV. PROC. CODE § 1295 (West 1982). Kaiser is exempt from this provision, but is still required to comply with Health & Safety Code sections 1363(a)(10) and 1373(i), which require that Kaiser include a disclosure form stating that the plan utilizes arbitration to resolve disputes and stating the types of disputes subject to arbitration. *See* CAL. HEALTH & SAFETY CODE §§ 1363(a)(10) & 1373(i) (West Supp. 1986).

The court held that the agreement was not an adhesion contract because Kaiser and Edison were of apparent equal bargaining strength. While the agreement as a whole was not an adhesion contract, the court held it had "adhesive characteristics." The court noted that the arbitration clause was a small part of a lengthy standardized form contract, and it was unknown whether Edison could have procured coverage for its employees without the arbitration clause.

Because the arbitration clause of the agreement had "adhesive characteristics" and because ambiguities must be construed against the drafter, the court held that the petitioner's claim was not subject to mandatory arbitration. The petitioner's claim did not relate to financial disputes or medical malpractice claims, as it was for breach of a common law duty to exercise due care in the hiring and supervision of an employee. It had nothing to do, held the court, with providing or failing to provide services. Accordingly, the court issued a writ of mandate directing that the order to compel arbitration be set aside and ordered the trial court to exercise its jurisdiction over the matter.

JAMES G. BOHM

IV. CRIMINAL PROCEDURE

A. *Right of an accused misdemeanant to appointed counsel attaches even in informal, inferior courts unless it is effectively waived:* **In re Kevin G.**

In *In re Kevin G.*, 40 Cal. 3d 644, 709 P.2d 1315, 221 Cal. Rptr. 146 (1985), the supreme court was asked to examine the scope of the sixth amendment right to counsel. *See* U.S. CONST. amend. VI. The issue addressed was whether a juvenile accused of a misdemeanor, who elects to proceed informally before a traffic hearing officer, is entitled to court-appointed counsel if he cannot afford to retain counsel. The majority concluded that the defendant, Kevin G., had this right and that he did not effectively waive it.

In 1981, the defendant was convicted of a juvenile charge of driving

under the influence of alcohol in Merced County. He subsequently moved to have the conviction set aside because he was not provided with counsel or given the opportunity to waive this right. At the time of the original conviction, the defendant had signed a juvenile traffic court waiver form. The form stated, in pertinent part: "I freely and voluntarily waive my rights to a hearing by the Juvenile Court . . . and I waive my rights to be represented by an attorney." *Kevin G.*, 40 Cal. 3d at 646, 709 P.2d at 1316, 221 Cal. Rptr. at 147.

As a result of this waiver, the state argued that the defendant elected to have his misdemeanor procedurally converted to an infraction. It was further argued that, due to this election, the defendant's rights were equal to those of one accused of an infraction. Conversely, the defendant maintained that because he had been charged with a misdemeanor, he had the right to court-appointed counsel. Since the defendant was never advised of this right, he also argued that effective waiver was not possible.

In affirming the lower court and upholding the defendant's right to counsel, the court ruled that courts may not replace misdemeanor charges with infraction charges in order to avoid constitutional requirements. Although it recognized the importance of establishing informal traffic proceedings, the court stated that it would not allow constitutional rights to suffer in the name of efficiency. Finally, the court found the waiver form inherently deficient. The court noted that even though a minor charged with a misdemeanor has the right to counsel, he could choose to waive that right and proceed under an informal system. Thus, if the waiver had either included a provision informing defendant of his right to counsel at the informal hearing, or officially converting the charge from a misdemeanor to an infraction, then the Merced County procedure would have been constitutional.

This case is evidence of the unambiguous stand the court has taken when the right to counsel is at issue. The constitutional right of an accused misdemeanant to counsel clearly includes the right to appointed counsel if he cannot afford to retain counsel. This right attaches even in inferior courts, unless a knowing and intelligent waiver is made. The court will not tolerate distortion or manipulation of this rule.

CHRISTIE A. MOON

B. *Public school officials may search a student if they have a reasonable and articulable suspicion that the student has engaged, or is engaging, in proscribed activity:* **In re William G.**

I. INTRODUCTION

In *In re William G.*,[1] the supreme court held that under the fourth amendment to the United States Constitution[2] and article I, section 13 of the California Constitution[3] a public school official can search a juvenile student without a warrant if the school official has reasonable suspicion to believe that the student is violating a school regulation or a criminal statute. The court further required that the reasonable suspicion be supported by articulable facts and that the type of search be "reasonably related" to its objectives and not be "excessively" intrusive.[4]

II. FACTUAL SUMMARY

On the date of the alleged offense, William G. was a sixteen year old high school student. At about 1:00 p.m., when classes were normally in session, the high school's assistant principal saw William and two other students walking through the campus. The assistant principal approached the students to ask them why they were not in class. While approaching them, he noticed that William was holding a small black bag with an odd-looking bulge.[5] Upon asking them why they were not in class, the assistant principal noticed that William had placed the bag behind his back. When asked what he had, the minor replied, "Nothing."[6] After some discussion William was

1. 40 Cal. 3d 550, 709 P.2d 1287, 221 Cal. Rptr. 118 (1985). The opinion was authored by Justice Reynoso, with Justices Broussard, Grodin, and Kaus concurring. Chief Justice Bird wrote a separate concurring and dissenting opinion, and Justice Mosk wrote a separate dissenting opinion.

2. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. This provision states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or afirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13.

4. *William G.*, 40 Cal. 3d at 564, 709 P.2d at 1296, 221 Cal. Rptr. at 127.

5. This bulge was later determined to be a vinyl calculator case. *Id.* at 555, 709 P.2d at 1289, 221 Cal. Rptr. at 120.

6. *Id.*

taken to the assistant principal's office, where the bag was searched. Four baggies of marijuana, weighing in total less than one-half of an ounce, a gram weight scale, and some cigarette papers were found.[7] The police were called, and William was arrested.

At his adjudication hearing William moved to suppress this evidence on the ground that it was obtained by an illegal search, arguing that the constitutional protections against unreasonable searches and seizures applied to public school officials, and that the search which was conducted upon him was unreasonable. At this hearing, the assistant principal testified that he had no prior information which caused him to believe that the minor possessed marijuana, but it was his normal practice to question students who were not in class.[8]

The juvenile court found the search to be not only reasonable, but necessary on the part of the assistant principal in fulfilling his duties. Thus, the court denied the motion and William was declared a ward of the juvenile court and placed on three years probation. He subsequently appealed this ruling.

III. THE COURT'S ANALYSIS

In setting a standard for a legal search of a minor conducted by a school official under relevant state and federal constitutional provisions,[9] the court first determined whether these constitutional provisions applied to the case at hand. This required a finding that: (1) minor school children are "persons" within the meaning of the state and federal constitutions; and (2) the actions of public school officials are considered "governmental action."

In addressing the first preliminary consideration, the court held that "[i]t is well settled that minor students are 'persons' under our state and federal constitutions and therefore possess fundamental constitutional rights which the state must respect."[10] Included in these rights, the court held, was the protection from unreasonable

7. *Id.* In a subsequent police pat-down search for weapons, $135 was discovered in William's pockets.

8. *Id.* at 556, 709 P.2d at 1289, 221 Cal. Rptr. at 120.

9. U.S. CONST. amend. IV.; CAL. CONST. art. I, § 13.

10. *William G.*, 40 Cal. 3d at 556, 709 P.2d at 1290, 221 Cal. Rptr. at 121. The court, in elaborating on this proposition, quoted the United States Supreme Court's holding in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), which stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *William G.*, 40 Cal. 3d at 556-57, 709 P.2d at 1290, 221 Cal. Rptr. at 121 (quoting *Danforth*, 428 U.S. at 74).

searches and seizures provided in the fourth amendment of the United States Constitution and article I, section 13 of the California Constitution.[11] The court acknowledged that the constitutional rights of minors need not necessarily be the same as those of adults.[12] However, the court held that minors still have rights, which they do not lose by entering the school grounds.

In determining that the acts of the assistant principal should be considered "governmental action," thus falling under the constitutional proscriptions against unreasonable search and seizure, the court relied on the recent United States Supreme Court case of *New Jersey v. T.L.O.*[13] In that case, it was held that public school officials were governed by the fourth amendment. Furthermore, the California Supreme Court held that public school officials were subject to the proscriptions of article I, section 13 because they are the agents of the government by the nature of their employment, their licensing is controlled by the state, they must implement state prescribed programs, the educational system is primarily funded by the state, and the state compels students to attend school.[14]

Concluding that minor school children are "persons" within the meaning of the fourth amendment and article I, section 13, and that the acts of public school officials were governmental action, the court next had to determine the proper standard to be applied in deciding whether this type of a search was reasonable. In making this decision, the court used a balancing test — the interests of the government in protecting the health and welfare of all students were weighed against the privacy interests of the individual student.[15]

In determining the rights of the individual student, the court held that "[t]he right to privacy is vitally important," and "[t]he privacy of a student, the very young or the teenager, must be respected."[16] On

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11. The court inferred these rights to privacy. *William G.*, 40 Cal. 3d at 557, 709 P.2d at 1290, 221 Cal. Rptr. at 121. *See* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (holding that minors have a right to obtain contraceptives). For a general discussion of search and seizure law and minors, *see* S. DAVIS, RIGHTS OF JUVENILES §§ 3.6-3.7 (1985).

12. *William G.*, 40 Cal. 3d at 558, 709 P.2d at 1291, 221 Cal. Rptr. at 122. The court noted that minors' rights may be restricted to promote their health and welfare. *See generally In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

13. 105 S. Ct. 733 (1985). For a discussion on "private" searches versus "governmental" searches, *see* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.6 (1978 & Supp. 1986). *See also* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 2.3(c) (1985).

14. *William G.*, 40 Cal. 3d at 559-60, 709 P.2d at 1291-92, 221 Cal. Rptr. at 122-23. The court noted that earlier California cases were contrary to this holding. *See In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969). *See also* J. VANDEKAMP, LAW IN THE SCHOOL: A GUIDE FOR CALIFORNIA TEACHERS, PARENTS & STUDENTS 62-65 (4th ed. 1984).

15. *William G.*, 40 Cal. 3d at 562, 709 P.2d at 1294, 221 Cal. Rptr. at 125.

16. *Id.* at 563, 709 P.2d at 1294-95, 221 Cal. Rptr. at 125-26.

the other hand, in determining the rights of all students, the court stated that "the right of all students to a school environment fit for learning cannot be questioned."[17] With respect to the right to have a fit learning environment, the court stated that public schools assume a duty to protect the students from the dangers of anti-social activities. This restricts the students' zones of privacy.[18]

Weighing these competing interests, the court concluded "that searches of students by the public school officials must be based on a *reasonable suspicion* that the student or students to be searched have engaged, or are engaging, in a . . . violation of a school . . . regulation, or a criminal statute . . . ."[19] The court further held that in support of this reasonable suspicion, there must be supporting articulable facts. Without such facts, the search is unlawful. The court noted that this standard was consistent with that which was recently adopted by the United States Supreme Court in *New Jersey v. T.L.O.*.[20] The court also put limitations on the types of searches which could be conducted, stating that the search methods must be related to its objectives and must not be overly intrusive considering the age and sex of the student and the graveness of the offense. Under this standard, public school officials need not obtain a warrant.

The court specifically rejected previous, "less stringent" standards which have been used by the California Court of Appeal. For example, the court overruled the "reasonable" standard adopted in the decision of *In re Thomas G.*,[21] the "good cause" standard of *In re Fred C.*,[22] and the two-pronged test (the search must have been within the scope of the school's duties and the search must have been reason-

17. *Id.* at 563, 709 P.2d at 1295, 221 Cal. Rptr. at 126. In holding this, the court acknowledged that attendance is mandatory and that learning cannot properly exist without the physical and mental well-being of the children. *Id. See* CAL. CONST. art. I, § 28(c), which provides that "students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." *Id.*

18. *William G.*, 40 Cal. 3d at 563, 709 P.2d at 1295, 221 Cal. Rptr. at 126. *See also* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970) (holding that school authorities have a duty to provide safe schools).

19. *William G.*, 40 Cal. 3d at 564, 709 P.2d at 1295, 221 Cal. Rptr. at 126 (emphasis added). The court specifically avoided the issue of which standard should be applied where law enforcement officials are involved from the beginning of a student search, or where the school officials act in conjunction with law enforcement. *Id.* at 562 n.12, 709 P.2d at 1294 n.12, 221 Cal. Rptr. at 125 n.12.

20. 105 S. Ct. 733 (1985).

21. 11 Cal. App. 3d 1193, 1196, 1199, 90 Cal. Rptr. 361, 362, 364 (1970).

22. 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972).

able) stated in the case of *In re Christopher W.*[23]

In applying the newly articulated "reasonable suspicion" standard to the case at hand, the court determined that the search of William was illegal. There was no prior knowledge of the juvenile's connection with drugs, and the court felt that the assistant principal did not have a reasonable suspicion to conduct the search just because William was not in class.[24] Because the search was illegal, the evidence which was a product of that search was inadmissible, thus mandating reversal of the superior court's order.[25]

IV. THE CONCURRING AND DISSENTING OPINIONS

Chief Justice Bird wrote a separate concurring and dissenting opinion. She dissented on the grounds that she believes article I, section 13 should adhere to a probable cause standard in the school setting.[26] She concurred with the majority in their reversal of the superior court's order.[27]

Justice Mosk, believing that the assistant principal had a reasonable suspicion to conduct the search, wrote a separate dissenting opinion. While he agreed with the "reasonable suspicion" standard, he believed that the court's application of it in the case at hand was improper.[28] He believed the record clearly supported a reasonable suspicion.[29] Justice Mosk believed that the minor's evasiveness when approached by the assistant principal, who was properly acting within his supervisory role, and the juvenile's attempt to conceal the bag gave the assistant principal reasonable suspicion.[30]

V. CONCLUSION

In holding that "reasonable suspicion" was the proper test for determining whether a search by a public school official of a minor student is legal, the supreme court merely adhered to the current federal standard. In holding that a reasonable suspicion did not exist in this case, the supreme court has, in effect, restricted the ability of public school officials to conduct searches of students. It is clear that

23. 29 Cal. App. 3d 777, 782, 105 Cal. Rptr. 775, 778 (1973).

24. *William G.*, 40 Cal. 3d at 566, 709 P.2d at 1297, 221 Cal. Rptr. at 128.

25. *Id.* at 567-68, 709 P.2d at 1298, 221 Cal. Rptr. at 129. For a detailed discussion of the exclusionary rule, *see* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 1.4 - 1.11 (1978 & Supp. 1986). *See also* M. KRAUSE, CALIFORNIA SEARCH & SEIZURE PRACTICE §§ 1.4-1.7 (2d ed. 1977 & Supp. 1985).

26. *William G.*, 40 Cal. 3d at 568, 709 P.2d at 1298, 221 Cal. Rptr. at 129 (Bird, C.J., concurring & dissenting).

27. *Id.* at 570, 709 P.2d at 1300, 221 Cal. Rptr. at 131 (Bird, C.J., concurring and dissenting).

28. *Id.* at 570, 709 P.2d at 1300, 221 Cal. Rptr. at 131 (Mosk, J., dissenting).

29. *Id.*

30. *Id.* at 573-74, 709 P.2d at 1302, 221 Cal. Rptr. at 133 (Mosk, J., dissenting).

the court will not allow just any "suspicion" to justify a warrantless search. How much more that will be required to give rise to a "reasonable suspicion" will have to be determined by subsequent judicial interpretations.

JAMES G. BOHM

C. *An individual has a reasonable expectation of privacy from warrantless aerial searches of his properly enclosed backyard:* **People v. Cook.**

In *People v. Cook*, 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985), the supreme court was called upon to define the controversial contours of the reasonable expectation of privacy aspects of article I, section 13 of the California Constitution. CAL. CONST. art. I, § 13. The court held that an individual possesses a reasonable expectation of privacy from purposeful police surveillance of his enclosed backyard from the air. The court's rationale was that no societal or law enforcement interest is strong enough to justify even aerial police intrusions into such a private area of one's property.

Appellant had been convicted of unlawfully cultivating marijuana in violation of California Health and Safety Code section 11358. CAL. HEALTH & SAFETY CODE § 11358 (West 1977). The appellant moved to suppress the evidence of marijuana on the ground that the warrant under which the marijuana was discovered had been obtained as a result of an unlawful aerial search.

In reversing appellant's conviction, the court first examined the reasonable expectation of privacy standard established by *Katz v. United States*, 389 U.S. 347 (1967). The court noted that the appropriate inquiry is whether the government unreasonably intruded on an expectation of privacy which society would recognize as valid. *People v. Chapman*, 36 Cal. 3d 98, 679 P.2d 62, 201 Cal. Rptr. 628 (1984).

The court recognized that a valid privacy interest exists in the "curtilage" of a private residence. The court defined "curtilage" as the zone immediately surrounding the home in which private exterior life can be expected to extend. The appellant's backyard was thus included within this definition. While the court acknowledged that the recent United States Supreme Court case of *Oliver v. United States*, 466 U.S. 170 (1984), had held valid a warrantless aerial search of an open field, it emphasized that the *Oliver* holding was not applicable to curtilage areas. *Id.* at 180.

The court rejected the People's argument that the plain view doc-

trine was applicable. The People contended that because the area above appellant's backyard was open to routine observation from any passing air flight, it was in plain view. Appellant could therefore have no reasonable expectation of privacy as to his yard. The court disagreed, stating that regardless of whether the yard was within the public view, the constitution still shields landowners from government intrusions where subjective and legitimate privacy expectations exist.

The court found that the appellant did in fact maintain a legitimate and subjective expectation of privacy as evidenced by his efforts to prevent observation. Appellant had installed a high wooden fence around his land. This action was held to be a sufficient privacy-seeking measure in light of the fact that persons could not reasonably be expected to totally enclose their property in order to prevent aerial surveillance by government agents. The court rejected the implication that rights derived from the constitution diminish as the government acquires new technological means of infringing upon such rights.

After analyzing several California cases which had allowed warrantless aerial searches of rural areas at reasonable heights, and recognizing that citizens do not have the right to expect privacy in the conduct of criminal affairs per se, the court found that these cases and arguments were not specifically applicable to the facts in *Cook*. Instead, the court compared *Cook* to *United States v. Karo*, 468 U.S. 705 (1984), and found the latter case's holding and rationale to be applicable. In *Karo*, the court stated that the indiscriminate monitoring of property which has been withdrawn from public view would present far too serious a threat to the privacy interests of the home to escape constitutional oversight. *Id.* at 707. The court in *Cook* adopted this reasoning and applied it to the appellant's backyard situation.

Thus, the warrantless aerial scrutiny of appellant's backyard, for the sole purpose of detecting criminal activity by the occupants of the property, was held unconstitutional. Nevertheless, this case still leaves open the possibility that "inadvertant" aerial discoveries which are not part of a specific search may still be used as evidence against defendants. Since this avenue was left open to the police, they may find it a tempting method to circumvent the *Cook* ruling.

CHRISTIE A. MOON

V. DEATH PENALTY

A. *Failure to instruct the jury that they must find a specific intent to kill before they can find the special circumstance of murder while engaged in the commission or attempted commission of a robbery to be true requires reversal of the death penalty:* **People v. Balderas.**

I. INTRODUCTION

In *People v. Balderas*,[1] the defendant was prosecuted in a single trial for sixteen felonies arising from three separate incidents. For the first incident, the defendant was convicted of two counts each of forcible kidnapping and robbery and one count each of forcible rape, oral copulation, and sodomy. The jury further found that the defendant had used a firearm as to each count. For the second incident, the defendant was convicted of kidnapping for the purposes of robbery, first degree murder, and possession of a sawed-off shotgun. Under the 1978 death penalty law, the jury found true a charged special circumstance that the defendant committed the murder while engaged in the commission or attempted commission of a robbery.[2] With regard to the third incident, the defendant was convicted of two counts each of assault with a deadly weapon on a peace officer and false imprisonment. The jury assessed the death penalty for the murder special circumstance. On appeal, the supreme court upheld the guilty verdict, but reversed the death penalty because the jury was not instructed that the special circumstance requires a finding of a specific intent to kill.[3]

The first incident occurred on Christmas Eve, 1979. Sometime after midnight, the defendant approached a couple, Randy and Corrine, who were in a parked car. He put a gun to Randy's head and ordered him to drive as directed.[4] During their drive, the defendant demanded that Corrine remove her clothes. He then ordered her to get in the back seat where he forced her to engage in oral copulation and

1. 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985). The opinion was written by Justice Grodin, with Justices Broussard, Reynoso, and Kaus concurring. Chief Justice Bird, Justice Lucas, and Justice Mosk each wrote separate concurring and dissenting opinions. Justice Kaus was assigned by the Chairperson of the Judicial Council.

2. *Balderas*, 41 Cal. 3d at 161, 711 P.2d at 485-86, 222 Cal. Rptr. at 189.

3. *Id.* at 162, 711 P.2d at 486, 222 Cal. Rptr. at 190. *See also* People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 105 S. Ct. 1229 (1985); Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

4. *Balderas*, 41 Cal. 3d at 163, 711 P.2d at 487, 222 Cal. Rptr. at 191.

he raped her.[5] This was repeated several times. The defendant then ordered Randy to take off his clothes and to get out of the car.[6] The defendant drove with Corrine in the car and eventually stopped in an isolated area where he forced her to engage in oral copulation and he sodomized her.[7]

The next incident happened later that morning. The defendant approached a man in a parked pickup truck. Using a sawed-off shotgun, the defendant got in the truck where he subsequently robbed and murdered the man. The victim's nude body was found on Christmas morning. He had been shot in the left leg and pelvis.[8]

The third incident occurred on August 20, 1980, when the defendant escaped from custody. The defendant overpowered a deputy sheriff and, with the assistance of another prisoner, tied and bound the officer.[9] After unsuccessfully trying to leave through the ceiling vents, the defendant and the other inmate took a sheriff's aide hostage and stole his keys.[10]

The defendant's sole defense was that of diminished capacity as to the specific intent crimes.[11] There was evidence that the defendant was a chronic drug abuser, regularly using both PCP and "crank."[12] The defense expert testified that in his opinion the defendant would not have committed the crimes had he not been under the influence of drugs.[13] An expert for the prosecution testified that the defendant's capacity to form the specific intent had not been diminished by drug use.[14]

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5. *Id.*
6. *Id.* at 163-64, 711 P.2d at 487, 222 Cal. Rptr. at 191.
7. *Id.* at 164, 711 P.2d at 487, 222 Cal. Rptr. at 191.
8. *Id.* at 165-66, 711 P.2d at 488, 222 Cal. Rptr. at 192.
9. *Id.* at 167, 711 P.2d at 489, 222 Cal. Rptr. at 193.
10. *Id.*
11. *Id.* These included the robberies of the three victims, the kidnapping of the man in the parked pickup truck for the purposes of robbery, and first degree felony murder based on the commission of a robbery. *Id.*
12. *Id.* at 167, 711 P.2d at 490, 222 Cal. Rptr. at 193-94.
13. *Id.* at 167-68, 711 P.2d at 490, 222 Cal. Rptr. at 194.
14. *Id.* at 166, 711 P.2d at 489, 222 Cal. Rptr. at 193. Capacity to form a specific intent is no longer relevant in California because the inability to form a specific intent is not a defense. The only question for consideration is whether the defendant in fact formed that specific intent. *See* CAL. PENAL CODE §§ 25, 28 (West Supp. 1986). *See also* Morse & Cohen, *Diminishing Diminished Capacity in California*, 2 CAL. LAW. 24 (1982); Comment, *Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left After the Reforms of the Diminished Capacity Defense?*, 16 PAC. L.J. 305 (1984).

II. THE MAJORITY OPINION

A. Pretrial Issues

1. Severances and Consolidation of Trial

The defendant contended that the trial court erroneously denied his motion to sever the trial of the crimes against Randy and Corrine from those committed against the man in the parked pickup truck.[15] The defense conceded that charges of the same class may be properly joined.[16] The court, in rejecting the defendant's contention, stated that the crimes shared " 'common element[s] of substantial importance.' "[17] Acknowledging that even where joinder is permitted the trial court has the discretion to sever counts "in the interest of justice,"[18] the court held that the burden is on the defendant to show an abuse of discretion by a clear showing of prejudice.[19]

In holding that the defendant failed to meet his burden, the court applied the test articulated in *Williams v. Superior Court*.[20] Under *Williams*, the first step is to determine whether the evidence admitted in the joined trial would have been admissible in separate trials.[21] The court held it would have been admissible in separate trials.[22] The next step is to weigh the probative value against the prejudicial effect of the admission of evidence of the other crimes.[23] In this case, the court held that the defendant was not unduly prejudiced because the beneficial effects outweighed the potential prejudice.[24]

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15. *Balderas*, 41 Cal. 3d at 170, 711 P.2d at 491, 222 Cal. Rptr. at 195.

16. *Id.* at 170-71, 711 P.2d at 491-92, 222 Cal. Rptr. at 195-96. *See* CAL. PENAL CODE § 954 (West 1985). *See also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 294-299 (1963 & Supp. 1985).

17. *Balderas*, 41 Cal. 3d at 171, 711 P.2d at 492, 222 Cal. Rptr. at 196 (quoting People v. Matson, 13 Cal. 3d 35, 39, 528 P.2d 752, 754, 117 Cal. Rptr. 664, 666 (1974) (quoting People v. Polk, 61 Cal. 2d 217, 230, 390 P.2d 641, 648-49, 37 Cal. Rptr. 753, 760-61 (1964)).

18. *Balderas*, 41 Cal. 3d at 171, 711 P.2d at 492, 222 Cal. Rptr. at 196.

19. *Id.*

20. 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984).

21. *Balderas*, 41 Cal. 3d at 172, 711 P.2d at 493, 222 Cal. Rptr. at 196-97.

22. *Id.* at 173, 711 P.2d at 493. 222 Cal. Rptr. at 197.

23. *Id.* The defendant could be prejudiced where: evidence would not be cross-admissible; certain charges would be unusually likely to inflame the jury; a weak case has been joined with a strong case; and any one of the charges carries the death penalty. *Id.* at 173, 711 P.2d at 494, 222 Cal. Rptr. 197-98. *See also* Williams v. Superior Court, 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984); Coleman v. Superior Court, 116 Cal. App. 3d 129, 172 Cal. Rptr. 86, *cert. denied*, 451 U.S. 988 (1981).

24. *Balderas*, 41 Cal. 3d at 174-75, 711 P.2d at 494-95, 222 Cal. Rptr. at 198-99.

2. Venue

The defendant also argued that he was prejudiced because his motion for change of venue was denied.[25] In articulating the standard for a change of venue, the court held that "[a] change of venue must be granted when the defendant shows a reasonable likelihood that a fair trial cannot be had in the original county."[26] The court listed five factors that are used to make this determination: "the gravity and nature of the crime, the extent and nature of publicity, the size and nature of the community, the status of the victim, and the status of the accused."[27] Based on these factors, the court determined that the defendant failed to demonstrate a reasonable likelihood that he could not obtain a fair trial.[28]

3. Double Jeopardy

The defense's final pretrial contention was that the defendant was placed in double jeopardy. On August 13, 1980, a jury was empaneled and witnesses were sworn. The next day, a juror informed the court that an investigator for the district attorney's office had telephoned his wife to inquire about his views on the death penalty. The trial judge, upon learning of this, declared a mistrial.[29] In holding that the defendant waived any double jeopardy claim, the court noted that he consented to the mistrial.[30]

B. Jury Selection Issues

The defendant also raised several jury selection issues. First, he argued that he was improperly restricted in his voir dire of the jury panel.[31] The trial court did not allow the defense counsel to question jurors about their ability to apply instructions on the legal theories of circumstantial evidence and diminished capacity.[32] In holding that there was neither error nor prejudice, the court stated that the defense counsel's prohibited questions related only to possible peremptory challenges.[33]

Second, the defendant contended that the court, in questioning the jury, made them unduly prone to find guilt and impose a penalty of

25. *Id.* at 177, 711 P.2d at 496, 222 Cal. Rptr. at 200.
26. *Id.*
27. *Id.* at 177-78, 711 P.2d at 496, 222 Cal. Rptr. at 200.
28. *Id.* at 178, 711 P.2d at 497, 222 Cal. Rptr. at 201.
29. *Id.* at 181-82, 711 P.2d at 499, 222 Cal. Rptr. at 203.
30. *Id.* at 182, 711 P.2d at 500, 222 Cal. Rptr. at 204.
31. *Id.*
32. *Id.*
33. *Id.* at 182-83, 711 P.2d at 500, 222 Cal. Rptr. at 204. *But see* People v. Love, 53 Cal. 2d 843, 350 P.2d 705, 3 Cal. Rptr. 665 (1960).

death.[34] The trial court, during the process of death qualification, asked each individual panel member five questions regarding the death penalty.[35] The court, unpersuaded by the defendant's argument, stated that the "questions were reasonable attempts to isolate jurors excludable for cause because of their absolute bias *for or against* the death penalty."[36]

Third, the defendant contended that exclusion of jurors who said they could not vote for the death penalty denied him a representative jury.[37] The court easily disposed of this contention, merely stating that the defendant lacked standing. Even if he had standing, the court acknowledged that that type of contention has been consistently rejected.[38]

C. Guilt and Special Circumstance Issues

First, the defendant contended that he was improperly restricted on cross-examination. In order to impeach one of the prosecution's chief witnesses, the defendant wanted to ask questions regarding the witness's habitual narcotics usage.[39] In holding that the cross-examination was properly limited, the court held that evidence of habitual drug use is not admissible to impeach the memory or perception of a witness unless there is expert testimony on the probable effect of that drug use on memory and perception.[40]

Second, the defendant contended that the prosecutor improperly argued that its chief witness was not an accomplice.[41] The court

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34. *Balderas*, 41 Cal. 3d at 188, 711 P.2d at 504, 222 Cal. Rptr. at 208.

35. *Id.* The questions were as follows:

> (1) Would you automatically refuse to impose the death penalty regardless of the evidence or law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case*?

Id. (emphasis in original).

36. *Id.* (emphasis in original). *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

37. *Balderas*, 41 Cal. 3d at 191, 711 P.2d at 506, 222 Cal. Rptr. at 210.

38. *Id. See* People v. Velasquez, 26 Cal. 3d 425, 606 P.2d 341, 162 Cal. Rptr. 306 (1980).

39. *Balderas*, 41 Cal. 3d at 192, 711 P.2d at 506-07, 222 Cal. Rptr. at 210-11.

40. *Id.* at 192, 711 P.2d at 507, 222 Cal. Rptr. at 211. *See* People v. Pargo, 241 Cal. App. 2d 594, 50 Cal. Rptr. 719 (1966). *See also* B. WITKIN, CALIFORNIA EVIDENCE § 1228 (2d ed. 1966); Comment, *Narcotics as Affecting Credibility*, 16 S. CAL. L. REV. 333 (1943).

41. *Balderas*, 41 Cal. 3d at 194, 711 P.2d at 508, 222 Cal. Rptr. at 212.

noted that the witness assisted the defendant in disposing of evidence, and at most, that would make him an accessory after the fact.[42] Since the witness did not assist the defendant in the commission of the crimes, he was not an accomplice.[43]

Third, the defendant contended that the trial court improperly admitted evidence of his refusal to give blood and pubic hair samples. The defendant, on advice of counsel, refused to give the samples because the demand was "untimely."[44] The court held that this presented no reversible error as there was overwhelming evidence that the defendant committed the sex crimes.[45]

Fourth, the defendant contended that the jury instruction on involuntary manslaughter was improper because it included only the version based on diminished capacity and did not make reference to a killing done in the heat of passion.[46] The court, in rejecting this contention, held that " 'predictable conduct by a resisting victim' of a felony cannot 'constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter. . . .' "[47]

Fifth, the defendant contended that there was reversible error as to his conviction of first degree murder because the jury was not instructed that it was necessary to find a specific intent to kill.[48] The jury found the defendant guilty of first degree murder and found true a special circumstance that the murder occurred while the defendant was engaged in the commission or attempted commission of a robbery.[49] Insofar as the defendant's first degree murder conviction was concerned, the court held that it did not matter whether the killing was intentional so long as it occurred during the commission of a robbery.[50] But insofar as the death penalty was concerned, the court held that failure to instruct the jury that it must find a specific intent to kill was reversible error.[51]

In conclusion, the court upheld the judgment of guilt as to all counts. Insofar as the death penalty was concerned, the court reversed the judgment because the jury was not instructed that it must find a specific intent to kill before it could find true the special cir-

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42. *Id.*

43. *Id.* at 194-95, 711 P.2d at 508, 222 Cal. Rptr. at 212.

44. *Id.* at 195-96, 711 P.2d at 508-09, 222 Cal. Rptr. at 212-13.

45. *Id.* at 196, 711 P.2d at 509, 222 Cal. Rptr. at 213.

46. *Id.* at 196-97, 711 P.2d at 510, 222 Cal. Rptr. at 214.

47. *Id.* at 197, 711 P.2d at 510, 222 Cal. Rptr. at 214 (quoting People v. Jackson, 28 Cal. 3d 264, 306, 618 P.2d 149, 169-70, 168 Cal. Rptr. 603, 623-24 (1980), *cert. denied*, 450 U.S. 1035 (1981)).

48. *Balderas*, 41 Cal. 3d at 198, 711 P.2d at 511, 222 Cal. Rptr. at 215.

49. *Id.*

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

51. *Balderas*, 41 Cal. 3d at 198, 711 P.2d at 511, 222 Cal. Rptr. at 215. *See also* Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

cumstance of first degree murder while engaged in robbery. The case was then remanded to the lower court.

III. THE CONCURRING AND DISSENTING OPINIONS

Justice Lucas authored a concurring and dissenting opinion. He agreed with the defendant's conviction of guilt as to all counts, but disagreed with the court's holding regarding the voir dire of the jury.[52] He did not believe the trial court should permit an inquiry into specific legal prejudices of prospective jurors.[53] The Justice believed that this will create unnecessary delay in the trial which may jeopardize the trial system itself.[54] Justice Lucas further dissented with the reversal of the death penalty.[55]

Justice Mosk also wrote a concurring and dissenting opinion. He concurred insofar as the guilt of the defendant was concerned, but dissented as to the setting aside of the special circumstance finding and reversal of the death penalty.[56] He believed that the requisite intent to kill was sufficiently shown.[57]

Chief Justice Bird wrote a brief concurring and dissenting opinion. She concurred with the setting aside of the special circumstance finding and reversal of the death penalty.[58] She did not join in the remainder of the majority's opinion.

IV. CONCLUSION

This case is another example of the current California Supreme Court's refusal to enforce the death penalty law. It appears that the court is taking an "ideological position against capital punishment, not merely against its implementation in specific cases."[59] On December 31, 1985, a day being termed the "New Year's Eve Massacre," eleven death penalty convictions, including this case, were reversed.[60]

52. *Balderas*, 41 Cal. 3d at 206, 711 P.2d at 517, 222 Cal. Rptr. at 221 (Lucas, J., concurring and dissenting).
53. *Id.*
54. *Id.* at 207, 711 P.2d at 517, 222 Cal. Rptr. at 221.
55. *Id.* at 208, 711 P.2d at 518, 222 Cal. Rptr. at 222.
56. *Id.* at 209, 711 P.2d at 518-19, 222 Cal. Rptr. at 222-23 (Mosk, J., concurring and dissenting).
57. *Id.* at 209, 711 P.2d at 519, 222 Cal. Rptr. at 223 (Mosk, J., concurring and dissenting).
58. *Id.* at 210, 711 P.2d at 519, 222 Cal. Rptr. at 223 (Bird, C.J., concurring & dissenting).
59. Leland, *What's At Stake*, CAL. LAW., Sept. 1985, at 35, 35.
60. *The Beard*, PROSECUTOR'S BRIEF, Winter 1986, at 23.

Whether a systematic reversal of the death penalty will continue to be the case in California will largely be determined by the voters. This November every Supreme Court Justice except Broussard will be facing a retention election. The California District Attorneys Association's Board of Directors have urged voters to reject Chief Justice Bird and Associate Justices Reynoso and Grodin.[61]

JAMES G. BOHM

B. *Trial court in penalty phase of murder trial committed reversible error by instructing the jury not to be swayed by any sympathy for the defendant in determining the appropriate penalty:* **People v. Brown.**

In *People v. Brown*, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), the supreme court ruled that a jury may take sympathy into account in the penalty phase of a murder trial. The court also held that the 1978 death penalty initiative law did not constitutionally restrict the sentencing discretion vested in the jury by requiring the death penalty where aggravating factors outweigh mitigating factors.

After upholding defendant's conviction on evidentiary grounds, the court reversed the verdict of death. The reversal was based upon the eighth amendment of the United States Constitution. Any jury instruction "which denies a capital defendant the right to have the jury consider any 'sympathy factor' raised by the evidence when determining the appropriate penalty" is forbidden. *People v. Lanphear*, 36 Cal. 3d 163, 165, 680 P.2d 1081, 1082, 203 Cal. Rptr. 122, 123 (1983). *See also People v. Easley*, 34 Cal. 3d 856, 875-80, 671 P.2d 813, 823-26, 196 Cal. Rptr. 309, 319-22 (1983). Because the jury had been told only to consider matters relating to the crime itself and to ignore sympathy, the court vacated the death penalty judgment.

Despite this finding the court then proceeded to rule on the constitutionality of the 1978 death penalty initiative law. The court found that sections 190 to 190.5 of the Penal Code did not take away the jury's sentencing discretion by mandating the death penalty where aggravating circumstances outweigh mitigating circumstances. *See* CAL. PENAL CODE §§ 190-190.5 (West Supp. 1986). The jury alone still decides the appropriate penalty by weighing all relevant constitutional factors.

The *Brown* decision may spell almost certain reversal for about 170 other pending death penalty judgments in which trial courts administered similar jury instructions. Perhaps the gratuitous discussion upholding the death penalty statute's constitutionality was spawned by a desire to placate pro-death penalty forces, and cool down the hot

61. Leland, *supra* note 59, at 35.

potato that the death penalty issue has become to a court facing re-election problems. Regardless of any intended political implications, the constitutionality ruling is virtually immune to United States Supreme Court review because the court reversed the penalty of death. *Brown* marked the court's first blanket constitutional approval of the death penalty initiative since its passage in 1978. *See* Carrizosa, *Death Penalty Law Survives Last Test Before High Court*, L.A. Daily J., Dec. 6, 1985, at 1, col. 2.

The *Brown* decision was stayed by Justice Rehnquist of the United States Supreme Court on March 27, 1986.

MICHAEL R. GRADISHER

C. *Jury instructions which omit the element of intent from the offense of aiding and abetting a robbery require not only reversal of the robbery conviction, but also reversal of first degree murder and attempted murder convictions based on the felony murder rule:* **People v. Croy.**

In *People v. Croy*, 41 Cal. 3d 1, 710 P.2d 392, 221 Cal. Rptr. 592 (1985), the supreme court held that absent proof that the jury found specific elements of certain crimes to be present, the convictions of defendant Croy must be reversed and subject to retrial. Since the court could not be sure that the jury found *intent* to aid and abet in a robbery, Croy's conviction for that charge could not be upheld. Therefore, the court held that the murder and attempted murder convictions could not stand under the felony murder rule. The judgment was also erroneous because the court could not say that the jury had found *malice*. Malice requires knowledge of a duty, and in his diminished capacity, Croy may not have been able to comprehend his duty to protect human life.

Patrick Croy was a twenty-three year old logging camp worker who spent the weekend of July 14, 1978, consuming excessive quantities of alcohol and drugs with his friends. On Sunday night at approximately 10:30 p.m., he had a heated confrontation with police officers responding to a neighbor's complaints about the party. Witnesses, both at the party and in the neighborhood, testified that this group of "friends" discussed tearing up the town and shooting the sheriff. Croy went to his girlfriend's house and got his rifle. Aware of his intoxicated state, she pretended not to be able to find any bullets.

Croy and his friends proceeded to a local liquor store where earlier that night he and the clerk had argued over change from a liquor purchase. Another argument occurred resulting in a scuffle in which one of Croy's friends tried to stab the clerk, who ran out of the store screaming for help. When a squad car appeared, Croy sped away with his friends in the car. After a chase by multiple squad cars, a shootout resulted, injuring Croy and one officer, and leaving another officer dead. Ballistics tests confirmed that the bullet which killed the officer was not only stolen from the liquor store during the confrontation with the clerk, but that it had been fired from Croy's rifle.

Croy was convicted of five separate offenses in connection with the events of that night. The supreme court upheld his convictions for assault on a peace officer with a deadly weapon and conspiracy to commit murder. CAL. PENAL CODE §§ 245(b), 182 (West Supp. 1986). The court reversed and ordered a retrial for the other three charges — robbery, attempted murder, and first degree murder — because it found that the erroneous jury instructions made it unclear as to whether the jury had properly considered all the elements of those three crimes. *Id.* §§ 211, 664, 187, 189.

Both the United States and California Supreme Courts have held that it is prejudicial error to fail to instruct a jury on the elements of an offense. *Connecticut v. Johnson*, 460 U.S. 73 (1983); *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 105 S. Ct. 1229 (1985). The court determined that the jury instruction used in this case to determine if Croy aided and abetted in a robbery required only knowledge and encouragement of the criminal act. However, the court had recently decided that an appropriate instruction on aiding and abetting should require the jury to find the defendant acted with: 1) "knowledge of the unlawful purpose of the perpetrator; and 2) the *intent or purpose of committing, encouraging, or facilitating the commision of the offense*, 3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime." *People v. Beeman*, 35 Cal. 3d 547, 561, 674 P.2d 1318, 1326, 199 Cal. Rptr. 60, 68-69 (1984) (emphasis added).

The *Beeman* decision applies to all cases not yet finally resolved. Therefore, the court determined that Croy could not be convicted of the robbery unless it could be shown that he intended to either commit the crime or have someone else steal the bullets. The court could find no evidence that Croy even knew that the bullets were going to be stolen from the liquor store, or that he himself intended to commit any criminal act in the store. The majority felt that his explanation of fleeing the scene because he was afraid his probation would be revoked for being drunk was legitimate.

Because Croy was convicted under the special circumstance of com-

mitting a murder in the course of a robbery, he contended that reversal of the robbery conviction also necessitated reversal of the first degree and attempted murder convictions. Under the felony-murder rule, if there is not an independent felony, like robbery, the special circumstance condition will fail. Croy could then have been convicted of the murder charges only by a showing of malice. Since the court did not find all of the elements of malice, it reversed the murder convictions.

The requisite state of mind necessary to convict for first degree murder requires a showing that a defendant acted with malice aforethought. Distinct from willful, deliberate, and premeditated action, malice requires wanton disregard for human life. *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966). "An intentional act that is highly dangerous to human life, done in disregard of the actor's awareness that society requires him to conform his conduct to the law, is done with malice. . . ." *Id.* at 322, 411 P.2d at 918, 111 Cal. Rptr. at 822. *See also People v. Poddar*, 10 Cal. 3d 750, 759, 518 P.2d 342, 351, 11 Cal. Rptr. 910, 919 (1974).

The court found that because Croy was probably intoxicated during the night's events, his diminished capacity would have made it difficult for him to comprehend the duty of preservation of human life. Since it was unclear whether the jury considered all the elements to find malice aforethought, the court overturned the decision and remanded the case for retrial.

CYNTHIA A. WALKER

D. *Penal Code section 190.2(a)(18)'s special circumstance of torture requires the commitment of an intentional act calculated to cause extreme physical pain prior to death:* **People v. Davenport.**

In *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985), the supreme court held that proof of murder with the special circumstance of torture pursuant to Penal Code section 190.2(a)(18) requires a finding of intent to cause extreme physical pain in the victim before death. Furthermore, the court rejected the defendant's argument that section 190.2(a)(18) required the prosecution to prove that the victim actually suffered extreme pain.

Section 190.2(a)(18) defines torture as "the infliction of extreme physical pain no matter how long its duration." CAL PENAL CODE § 190.2(a)(18) (West Supp. 1986). Although the statute does not ex-

pressly require the prosecution to prove intent to torture, the court reasoned that the well-established meaning of "torture" necessarily includes an element of scienter. The inquiry must focus on "the state of mind of the torturer — the cold-blooded intent to inflict pain for personal gain or satisfaction. . . ." *People v. Wiley*, 18 Cal. 3d 162, 173, 554 P.2d 881, 887, 133 Cal. Rptr. 135, 141 (1976). The court further noted that proof of pain subjectively felt by the victim would be impossible to prove. Interpreting section 190.2(a)(18) to require such proof would also raise constitutional questions about the validity of torture as a special circumstance. The court held where a statute could possibly be construed as being constitutional, the court has a duty to construe it as such. *Carlos v. Superior Court*, 35 Cal. 3d 131, 147-48, 672 P.2d 862, 873, 197 Cal. Rptr. 79, 90-91 (1983).

The court also vacated the defendant's death sentence, citing numerous penalty phase errors. Of particular interest was the prosecutor's prejudicial remarks made in the penalty phase closing argument. The prosecutor referred to the governor's power to commute any death penalty sentence to a sentence of life without parole, despite the trial court's ruling that the jury could not be so instructed. The court noted this reference was just as prejudicial as the jury instruction would have been because it invited the jury to speculate on improper considerations. *See People v. Ramos*, 37 Cal. 3d 136, 153, 689 P.2d 430, 439-40, 207 Cal. Rptr. 800, 809-10 (1984).

MICHAEL R. GRADISHER

E. *Defense counsel's failure to present mitigating evidence during the penalty phase resulted in a miscarriage of justice causing reversal of death penalty:* **People v. Deere.**

In *People v. Deere*, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985), the supreme court found that defense counsel had an affirmative duty to present mitigating evidence in the penalty determination for a capital offense. Imposition of the death penalty was a miscarriage of justice because of defense counsel's failure to present any mitigating evidence, notwithstanding the defendant's wish to the contrary.

The defendant, Ronald Lee Deere, pleaded guilty and was convicted of one count of first degree murder and two counts of second degree murder, together with a finding of a multiple-murder special circumstance. *See* CAL. PENAL CODE § 190.2(a)(3) (West Supp. 1986). The defendant had admittedly shot and killed an old girlfriend's sister's husband and two children, evidently because she had terminated

their relationship. The appeal to the supreme court was automatic from the imposition of the death sentence.

The court held that the trial court did not err by failing to hold a competency hearing to determine whether defendant was competent to plead guilty and waive his right to a jury in the penalty phase. The court reasoned that the trial court did not have a duty to order a competency hearing *sua sponte* because it had previously appointed a psychiatrist who had found that the defendant was competent to understand the rights he had waived. The court also held that defense counsel's assistance was not ineffective because he allowed the defendant to waive his penalty phase jury. The court reasoned that defense counsel's consent seemed to be motivated by good tactical notions and not solely out of a desire to expedite defendant's "death wish."

The court, however, found that defense counsel's failure to offer mitigating evidence at the penalty phase was a miscarriage of justice which required the sentence of death to be set aside. *See* 22 Cal. Jur. 3d *Criminal Law* § 3346 (1985). The court concluded that the State of California could not be forced by someone to use all its means to take that person's life. Despite defendant's desire to die for atonement of his murders, strong public policy cannot condone a state-aided suicide. The court referred to a similar case where the defendant wished to dismiss his automatic appeal of the death sentence. *See People v. Stanworth*, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969). Stanworth's attempt to waive his appeal was rejected by the court because of its well-defined duty to determine whether the defendant has had a fair trial by looking at the entire record on appeal.

The court reasoned that the automatic appeal from the death sentence and the requirement to present mitigating evidence are rules established by public policy and could not be circumvented by a defendant's personal desire to the contrary. The court also mentioned the strong public interest in capital cases of taking every precaution against mistaken judgments.

The court held that the defendant was deprived of effective assistance of counsel by defense counsel's failure to call witnesses who could present mitigating evidence on behalf of defendant during the penalty phase. The attorney had a duty to control the proceedings and call the witnesses, fulfilling his duty to present a case in mitigation to assure reliability in the penalty determination, and also to attempt to convince the sentencer that defendant should not die in spite of his guilt.

The defense counsel conceded that members of the defendant's family wanted to testify on his behalf to present evidence of his good character and give reasons defendant should live. Thus, the defendant was deprived of effective assistance of counsel because no attempt was made to call witnesses on his behalf. Therefore, the imposition of the death sentence was a miscarriage of justice requiring reversal. The sentence was affirmed in all other aspects.

MARIE P. HENWOOD

F. *Failure to give explicit instructions to the jury that it must find an intent to kill in a felony murder special circumstance case constitutes reversible error in penalty phase:* **People v. Fuentes.**

In *People v. Fuentes*, 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985), the supreme court held that a special circumstance finding must be reversed absent explicit instructions to the jury that it find an intent to kill. Since there must be a specific finding of intent to kill to support a conviction of a felony murder special circumstance, the court's failure to give those instructions constituted reversible error. Therefore, the court affirmed the judgment as to guilt but reversed the judgment imposing the death penalty.

During an attempted robbery of a Brinks guard by the appellant and an accomplice, the guard was fatally shot. The appellant was charged with first degree murder with the special circumstance that the murder was committed during the attempted commission of a robbery. During voir dire, the trial court precluded defense counsel from questioning prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. At the conclusion of the trial, the court did not explicitly instruct the jury that it had to find an intent to kill if it believed the defendant was the actual killer.

In *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), the court held that there must be a specific finding of intent to kill to support a felony murder special circumstance finding pursuant to Penal Code section 190.2(a)(17). Although the statutory language may be unclear, the court in *Carlos* held that such intent is an essential element. Thus, the supreme court concluded that the trial court's failure to explicitly instruct the jury that it had to find an intent to kill if it believed that appellant was the actual killer was error under *Carlos*.

The court stated that this error requires reversal unless one of the four narrow exceptions set forth in *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), apply. The court analyzed the

Cantrell-Thornton exception as it was the only exception applicable. *See People v. Thornton*, 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974), *cert. denied*, 420 U.S. 924 (1975); *People v. Cantrell*, 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973). Pursuant to this exception, *Carlos* error does not require reversal if the parties recognized that intent to kill was in issue and if the record clearly establishes this intent. However, the record failed to establish that the parties recognized that an intent to kill was in issue. Since there was a dispute as to who fired the actual shot, defense counsel concentrated on raising a reasonable doubt as to who did the actual shooting. The appellant's intent to kill was never raised as an issue because the trial occurred prior to the *Carlos* decision. Therefore, the exception was not applicable and the special circumstance finding was reversed.

The court's reversal of the special circumstance finding eliminated the need to determine whether the restriction of defense counsel's voir dire questioning provided an independent ground for reversal. However, the court did conclude that defense counsel's questions should have been permitted on the grounds that they incorporated a legal doctrine which appeared to be relevant to the special circumstance and the penalty provision. The court held that reasonable inquiries regarding a potential juror's willingness to apply a particular doctrine of law must be allowed if counsel is to effectively exercise his peremptory challenges.

TAMI J. TAECKER

G. *Failure to prove intent requires reversal of death penalty conviction under special circumstances:* **People v. Hamilton.**

In *People v. Hamilton*, 41 Cal. 3d 211, 710 P.2d 937, 221 Cal. Rptr. 858 (1985), the supreme court held that failure to instruct the jury that intent to kill is a necessary element of a special circumstances conviction requires reversal of the death penalty judgment. However, the petitioner's rights were not violated by: 1) a second booking search of his belongings; 2) the court's refusal to recuse the district attorney's office; and 3) the prosecution's arrest and subsequent granting of immunity to the defendant's witness who then proceeded to testify for the prosecution.

Hamilton, the petitioner, had entered Fran's Market in Fresno armed with a sawed-off shotgun. After forcing employees into a back room, he ordered one by name to show him where the safe was lo-

cated. He then shot three of the employees at close range. A fourth employee and a neighbor were wounded. Hamilton was arrested six days later in Modesto after a second robbery. Following his transfer to Fresno, a second booking search uncovered a slip of paper containing the name of Fran's Market and that of one of the victims. From this evidence the prosecution theorized that Hamilton committed the murders in retaliation for the burglary conviction of former fellow inmate Clarence Allen. Allen had been serving time at Folsom for his burglary of Fran's Market at the time Hamilton was released in 1980.

Hamilton was convicted of three counts of first degree murder, CAL. PENAL CODE §§ 187, 189 (West 1970 & Supp. 1986), one count of attempted robbery, *id.* §§ 211, 664, two counts of assault with a deadly weapon, *id.* § 245(a), and was sentenced to death, *id.* § 190.1-190.4. Special circumstances were found for each of the three murder counts. There were two multiple murder findings based on the other two murder verdicts, and one finding that the murder was committed in the course of an attempted robbery. *See id.* §§ 190.2(a)(3); (a)(17)(i).

Although the defendant objected to the search that uncovered his "hit list," the court held that the second search was proper in conjunction with the second booking at the second jail. The officer in Fresno was merely fulfilling his statutory duty to search for valuables or items detrimental to jail security. CAL. GOV'T CODE § 26640 (West 1968 & Supp. 1986); CAL. PENAL CODE §§ 1412, 4003 (West 1982 & Supp. 1986).

The court also denied the defendant's motion to recuse the district attorney's office whose members, while in private practice, had defended Clarence Allen in his burglary charge of Fran's Market. The court noted that a recusal motion need not be granted unless the conflict of interest indicates that the defendant is unlikely to obtain a fair trial. CAL. PENAL CODE §§ 1424 (West 1982 & Supp. 1986). Since the court found no evidence of a conflict of interest, it held that the trial court did not abuse its discretion by denying the recusal motion. *See Chadwick v. Superior Court*, 106 Cal. App. 3d 108, 164 Cal. Rptr. 864 (1980).

Hamilton also objected to the coercion of his prime guilt phase witness, Callaway. After Callaway had testified favorably for the defense, he was arrested on outstanding misdemeanor warrants. After being promised immunity from prosecution for perjury, Callaway recanted his testimony and instead testified for the prosecution. Although courts have concluded that judicial coercion leading to a recanting is a denial of due process, the court felt it could not find that coercion had occurred in this case due to the untimeliness of the

charge. *See Webb v. Texas*, 409 U.S. 95 (1972). Because Hamilton failed to make a timely objection at the trial, and because the supreme court did not find any actual government threat to file perjury charges against Callaway, the court concluded that coercion had not occurred.

The court agreed with the defendant's claim of erroneous jury instructions and reversed the murder under special circumstance conviction. It held that its decision in *Carlos* was both retroactive and applicable to this case. *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). Under *Carlos*, a jury must find intent to kill in order to find a defendant guilty under special circumstances. Although the dissent clearly found an intent to kill by the meticulous reloading of the shotgun and the firing at point blank range, the majority reasoned that Hamilton's diminished capacity due to drug use may have hampered his intent-forming ability. Therefore, the judgment of death was reversed.

CYNTHIA M. WALKER

H. *Conviction of felony murder special circumstances must be supported by a specific finding of intent to kill:* **People v. Hamilton.**

In *People v. Hamilton*, 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (1985), the supreme court held that the trial court's special circumstance finding should be reversed absent explicit instructions to the jury that it had to find an intent to kill. The court's failure to give these instructions constituted reversible error because a conviction of felony murder special circumstances must be supported by a specific finding of intent to kill. Therefore, the court affirmed the judgment as to guilt, but reversed the judgment imposing the penalty of death.

The victim was last seen alive while walking to her car at night in a college parking lot. The victim's body was found the next day with both head and hands cut off, and the ankles bound together with white cord. After stealing the victim's vehicle, the defendant on several occasions used the victim's credit cards to buy food and gas. The defendant was apprehended a few days later in Oklahoma while driving the van.

A felony murder special circumstance conviction must be supported by a specific finding of intent to kill. *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). Thus, the court

concluded that the trial court's failure to explicitly instruct the jury that it had to find an intent to kill was error under *Carlos*.

Carlos error is reversible unless one of the four narrow exceptions apply as set forth in *People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 105 S. Ct. 1229 (1985). The exception, applied where evidence establishes intent to kill as a matter of law, was held to be inapplicable because the coroner could not determine whether the victim's head and hands were cut off before or after death. Thus, the error was reversible and necessitated reversal of the judgment imposing the death penalty.

The defendant made three other claims of error. First, the defendant argued that he was denied his constitutional right of self-representation. In *People v. Windham*, 19 Cal. 3d 121, 137 P.2d 1187, 137 Cal. Rptr. 8 (1977), *cert. denied*, 434 U.S. 848 (1977), the court held a motion to proceed in propria persona does not invoke the constitutional right of self-representation unless it is made within a reasonable time before the trial begins. Since the defendant's motion was untimely, it was within the trial court's discretion to deny the motion.

Second, the defendant contended that the trial court's decision to physically restrain him by shackles was unmeritorious. The court dismissed this claim. The trial court has discretion to order physical restraints. Thus, since the trial court properly complied with all procedural requirements and there was no abuse of discretion, the court rejected the defendant's argument.

Finally, the defendant objected to the admission into evidence of three letters. The court concluded that the admission of these letters into evidence to illustrate the defendant's fear of prison constituted error. This conclusion was premised on the theory that it required too much speculation. However, this error was not prejudicial.

TAMI J. TAECKER

I. *Failure to instruct jury regarding torture-murder special circumstance that defendant must have intended to inflict extreme pain is reversible error; instructing jury not to consider sympathy for defendant in penalty phase is reversible error:* **People v. Leach.**

In an automatic appeal from the death penalty, the supreme court in *People v. Leach*, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985), reversed the penalty while reaffirming the defendant's guilt. Reversible error resulted in two instances: (1) the court failed to instruct the jury that, as an element of the torture-murder special cir-

cumstance, defendant must have intended to inflict extreme pain; and (2) the trial court instructed the jury not to consider any sympathy for defendant in reaching its verdict.

Defendant Michael Todd Leach was convicted of the first degree murder of Michael Messer, whose body had been found in a fig orchard with forty eight stab wounds. Defendant was also convicted of one count of robbery, use of a deadly weapon in the commission of that murder and robbery, intentional murder involving the use of torture, and murder committed during the commission of a robbery. The trial court entered a judgment of death against defendant.

Defendant's acquaintances, who had been granted immunity, testified to the alleged drug deal that led to the ultimate robbery and murder of Messer. After telling friends he was going to rob and kill Messer, defendant and Patrick Jones took Messer out to an orchard where they faked engine trouble in order to stop. The three began throwing knives at a tree stump. When one knife disappeared and Messer began looking for it, the two others began stabbing him numerous times, ending with defendant slitting his throat. The police arrested defendant the next day, charging him with planning and instigating the robbery and murder. Defendant was convicted of the charges brought against him.

On appeal, the court considered eleven of defendant's thirteen contentions. The court gave serious consideration to only three contentions.

One of the defendant's major contentions was that the court erred in failing to instruct the jury on the necessity of an intent to kill in the felony-murder special circumstance as required by *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1985). This error requires per se reversal unless one of the following four exceptions is met:

> (1) where the defendant was acquitted of the relevant charge;
> (2) where the defendant conceded the issue of intent;
> (3) where the jury necessarily found the requisite intent to kill as a result of other properly given instructions (the so-called *Sedeno* exception); and
> (4) where 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 (the so-called *Thornton-Cantrell* exception).

Leach, 41 Cal. 3d at 108, 710 P.2d at 902, 221 Cal. Rptr. at 835 (citing *People v. Garcia*, 36 Cal. 3d 539, 554-56, 684 P.2d 826, 834-36, 205 Cal. Rptr. 265, 273-75 (1984)).

The court determined that this case fell within the *Sedeno* excep-

tion because the jury necessarily found the requisite intent to kill as a result of the instruction on the special circumstance of intentional murder involving torture. Therefore, the court held the *Sedeno* exception worked to "cure" the *Carlos* error.

Furthermore, the court held that defendant's contention that the court erred by failing to instruct the jury regarding the torture-murder special circumstance was reversible error. The court failed to instruct the jury that the defendant must intend to inflict extreme pain upon his victim. The court's rationale for this finding was that none of the *Garcia* exceptions applied to cure this instruction. The court suggested one possible inference from multiple stab wounds was that the defendant had great difficulty in killing his victim.

An instruction to the jury at the penalty phase of the trial that they should not be swayed by mere sympathy was also found to be reversible error. Where there is evidence of mitigating factors, the jury should be instructed that it may consider sympathy and compassion in its deliberation. In this case, this was defendant's first offense and he was only eighteen years old. The defendant was also raised by an invalid mother, and his father had died when the defendant was fifteen. These circumstances were mitigating, and the instruction may have precluded the jury from properly considering such factors in the penalty trial.

MARIE P. HENWOOD

J. *In penalty phase of murder trial, the jury must be instructed to consider and weigh the defendant's mitigating evidence of character and background:* **People v. Lucky.**

Due to a finding of prejudice in the penalty phase of a murder trial, the court reversed the death sentence, but sustained the guilty verdict, in *People v. Lucky*, 41 Cal. 3d 315, 710 P.2d, 959, 221 Cal. Rptr. 880 (1985). The court found an improper use of statutory jury instructions. *See* CAL. PENAL CODE § 190.3 (West Supp. 1986). However, only three justices agreed upon the errors of the trial court. The Chief Justice concurred in the judgment, and three justices dissented from the decision to reverse the death penalty. Thus, that portion of the opinion does not have the force of law. *Compare People v. Walker*, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985) (plurality opinion for reversal of the death penalty).

Allegations of multiple counts of robbery, attempted robbery, and two murders that occurred in a series of incidents were consolidated into one trial. A considerable amount of evidence, including the testimony of several eye witnesses, was introduced by the prosecution.

Little evidence was offered by the defendant beyond his own testimony. The jury found that the murders were premeditated and convicted the defendant on all counts. The jury also found special circumstances of multiple murder and of murder in the course of an attempted robbery, even though there was only one incident of murder.

A substantial amount of evidence in the penalty phase of the trial was offered to show the defendant's long history of criminal conduct, incarceration, and belligerence toward his parole officer. In contrast, the defense emphasized the defendant's difficult personal background. This plea for sympathy did little to sway the jury.

None of the challenges to the guilty conviction merited serious consideration by the court. However, errors made in the penalty phase were deemed to be of such import that the sentence of death was reversed. First, the trial court failed to fully instruct the jury that any evidence of mitigating factors related to the defendant's background and character must be carefully weighed in a death penalty case. The supreme court relied upon the decisions of *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 601-05 (1978), as authority for requiring this instruction. Error was also found in an instruction that required the jury to reach a just verdict regardless of what the consequences may be. Such an instruction, designed for the guilt phase of a trial, should never be given at the penalty phase.

Of further disturbance to the court was the allegation of two special circumstances for one double murder. This tactic had the effect of shifting the jury's focus away from the objective considerations of the particular case. Only one special circumstance can be alleged separately from the multiple murder allegation itself. *See People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984) (*construing Jurek v. Texas*, 428 U.S. 262 (1976)).

Finally, the testimony of the defendant's parole officer was deemed to have been improperly admitted. Instead of relating to specific acts of misconduct, the officer gave only his opinion of the defendant's character. Unless such testimony is probative of a specific aggravating factor, the court ruled that the prosecution may only offer evidence of past acts to show the defendant's character in the case in chief. A combination of these errors was ruled sufficient to show prejudice that required reversal of the death penalty. Nonetheless, the minimum sentence upon remand would have to be life imprisonment without possibility of parole.

The court distinguished between the standard for harmless error in the guilt phase of a trial versus the standard in the penalty phase when the sentence imposed is death. Since death is profoundly different from all other penalties, and the jury does not function as the fact finder in this stage, the standard of review must be different. Any substantial error occurring during the penalty phase must be deemed to have caused unfair prejudice.

The court again expressed a willingness to overturn the imposition of the death penalty, even though there was a lack of agreement on what the basis for reversal should be. Extreme care should be used in citing this case as authority because it does not have the effect of law. The court granted a rehearing in this case on February 20, 1986.

JAMES B. BRISTOL

K. *Under Penal Code section 1018, a capital offense plea of guilty made with reluctant consent of counsel and in spite of counsel's best independent judgment constitutes reversible error:* **People v. Massie.**

In *People v. Massie*, 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985), the defendant appealed a judgment imposing the death sentence. At trial, defendant pled guilty and was convicted of murder with special circumstances, assault with a deadly weapon, four counts of possession of a concealed weapon by an ex-felon, and three counts of robbery. The defendant appealed, placing into issue the circumstances under which his plea of guilty was entered and consented to by defense counsel at trial.

Under California Penal Code section 1018, a defendant is not permitted to plead guilty to a capital charge *"without the consent of the defendant's counsel."* CAL. PENAL CODE § 1018 (West 1985) (emphasis added). This section is constitutional and not violative of an accused's right of self-representation. *See People v. Chadd*, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981). *See also Faretta v. California*, 422 U.S. 806 (1975) (right of an accused to self-representation). Before trial, defendant Massie decided to change his plea from "not guilty" to "guilty" when he was informed that the court had accepted as true damaging testimony concerning his confession. Several times during the plea proceeding defendant's counsel made it clear that he opposed a plea of guilty. However, the client was adamant about pleading guilty. Therefore, defense counsel reluctantly gave his formal consent to the guilty plea and the court then accepted it.

Although the attorney gave formal consent as required by statute, the supreme court found that he had done so in error. At the time of

trial, the supreme court had not yet clarified the requirements of section 1018. In *People v. Chadd*, the court clarified the statute, and emphasized the legislature's statutory intent to eliminate arbitrariness in death penalty statutes and to maximize the importance of the independent consent of counsel in capital cases. *Chadd*, 28 Cal. 3d at 739, 621 P.2d at 837, 170 Cal. Rptr. at 798. The *Chadd* decision required defense counsel to exercise their independent professional judgment in capital cases and withhold consent to guilty pleas despite their client's wishes where appropriate. At the time of the defendant's trial, his defense counsel was still unaware of these guidelines.

The court dismissed the fact that Massie's attorney may have consented to the plea because he feared his own dismissal. Furthermore, it was irrelevant that he wished to protect his client's right of self-representation, or may have given his consent because the evidence against his client was overwhelming. The court thereupon held that although Massie's attorney acted in accordance with his client's wishes, his consent to the plea in violation of his best professional judgment was reversible error. Similarly, through the same lack of understanding for the statute, the trial court's acceptance of defendant's guilty plea was also reversible error.

BRENDA L. THOMAS

L. *To uphold death penalty for conviction of murder in connection with robbery special circumstances, the trial court must instruct the jury on intent to kill:* **People v. Silbertson.**

In *People v. Silbertson*, 41 Cal. 3d 296, 709 P.2d 1321, 221 Cal. Rptr. 152 (1985), the court reversed the death penalty conviction, but upheld the judgment as to guilt because the trial court failed to instruct the jury that it must find an intent to kill. The defendant had been charged and convicted of first degree murder and robbery special circumstances, and the court imposed the death penalty. The jury was instructed on two theories with which it could convict the defendant of first degree murder — premeditated murder and felony murder. The defendant contended that the felony murder rule created an unconstitutional presumption of malice. The supreme court was unpersuaded and easily disposed of the issue by stating that it was settled in *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1980).

However, with regard to the special circumstance finding, the court

held that the trial court committed reversible error, insofar as the death penalty was concerned, when it failed to instruct the jury that it must find that the defendant intended to kill in order to find the robbery special circumstance to be true. *See generally Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

Defense counsel also argued that this was a murder with an incidental robbery. The defendant made this contention because under the reasoning of *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980), it would preclude the death penalty. The People argued that the issue of intent was raised, the parties presented evidence on the issue, and the evidence established the requisite intent to kill as a matter of law. Therefore, the People asserted that the case fell within the *Cantrell-Thornton* exception. *See People v. Garcia*, 36 Cal. 3d 539, 556, 684 P.2d 826, 835-36, 205 Cal. Rptr. 265, 274-75 (1984).

In rejecting the People's contention, the court stated that because the defense counsel was unaware of the "intent to kill" element of the felony-murder special circumstance, he may have failed to present evidence which might have negated that element. Accordingly, the court reversed the death penalty, but affirmed the guilt of the defendant.

This is yet another example of the current court's unwillingness to enforce the death penalty. On December 31, 1985, when this opinion was rendered, ten other death penalty convictions were reversed. It is now known as the "New Year's Eve Massacre." *See The Beard*, Prosecutor's Brief, Winter 1986, at 23.

JAMES G. BOHM

M. *Any substantial error in the penalty phase must be considered to have been prejudicial in a criminal trial involving capital punishment:* **People v. Walker.**

In *People v. Walker*, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985), the court affirmed the guilt conviction of the defendant but reversed the imposition of the death penalty. Justices Reynoso and Kaus joined in the plurality opinion, written by Justice Broussard, finding error in the trial court's use of jury instructions contained in the relevant statute. *See* CAL. PENAL CODE § 190.3 (West Supp. 1986). Chief Justice Bird concurred in this result only. Justices Mosk and Grodin dissented from the decision to reverse the death penalty. Therefore, the reasoning of the court in reversing the death sentence in this case does not have the force of the law. *Compare People v. Lucky*, 41 Cal. 3d 315, 710 P.2d 959, 221 Cal. Rptr. 880 (1985), *reh'g*

granted, Crim. No. 22572 (Feb. 20, 1986) (reversal of the death penalty in a plurality opinion).

The defendant was convicted of first degree murder, which took place during the commission of an armed robbery. He was also found guilty of several assaults with the intent to commit murder. Evidence presented by the prosecution at trial was substantial, and included the testimony of the assault victims. None of the issues raised by the defense on appeal regarding the guilt trial were given serious consideration by the court. However, the court found prejudicial error in the penalty phase of the trial and reversed the death sentence imposed by the jury. This reversal was based on two grounds.

First, the trial court incorrectly admitted evidence of death threats made by the defendant to the district attorney handling the case. These threats were used by the prosecutor in the penalty phase as aggravating factors against the defendant.

Reasonable notice must be given to the defendant of any evidence to be offered which is not to prove the commission of the offense or special circumstances subjecting him to the death penalty. CAL. PEN. CODE § 190.3 (West Supp. 1986). The prosecutor did not notify the defense of his intent to use the evidence of the death threats until one month after the guilt trial had begun, and only one week before the penalty trial. Although the evidence itself was not proper, the defense had not been notified in a timely fashion.

The girlfriend and relatives of the defendant testified at the penalty trial, vocalizing their desire that the defendant be allowed to live. Each witness testified as to their love for him as well as kind things he had done in his lifetime. The trial judge permitted the jury to hear this testimony and instructed them that sympathy for the defendant was a proper consideration in determining an appropriate punishment.

On this second ground, the plurality found that the trial judge failed to adequately instruct the jury of its duty to weigh and consider the evidence of mitigating circumstances. The trial judge had instead relied upon the instruction in Penal Code section 190.3 to admonish the jury to return the verdict of death if they concluded that aggravating factors outweigh mitigating circumstances. The court noted that such an instruction creates the risk that a jury will balance aggravating and mitigating factors in a mechanical fashion. *See People v. Brown*, 40 Cal. 3d 512, 542, 709 P.2d 440, 456, 220 Cal. Rptr. 637, 653 (1985). However, the court indicated that curative instructions which properly explain to the jury its role in deciding the ap-

propriate penalty will eliminate this type of risk. However, there was no curative instruction given by the trial judge. This error, when combined with the improper admission of evidence, was deemed to be prejudicial, and thus warranted the reversal of the death penalty.

According to the plurality, prejudice is found whenever the error in the penalty phase is substantial. *See People v. Robertson*, 33 Cal. 3d 21, 54, 655 P.2d 279, 298, 188 Cal. Rptr. 77, 196 (1982). "Substantiality" was said to mean that there must be a consideration of any possibility that the error affected the verdict. The court held that the minimum penalty that could be imposed on remand would be life imprisonment without possibility of parole.

It should be noted that there is disagreement on the court as to the correct basis for reversal of the death sentence. The definition for "substantiality," therefore, does not have the force of law.

JAMES B. BRISTOL

VI. ELECTION LAW

Regulation prohibiting write-in voting in general municipal elections held unconstitutional: **Canaan v. Abdelnour.**

I. INTRODUCTION

In *Canaan v. Abdelnour*,[1] the supreme court held that San Diego's regulation prohibiting write-in voting in general municipal elections was unconstitutional. The court declared that the right to vote and to run for public office are fundamental, and that the prohibition impinged upon these rights absent sufficient justification.

II. FACTUAL BACKGROUND

In San Diego's mayoral election of 1974, nine candidates including the incumbent mayor, qualified for the primary ballot. Prior to the primary election but subsequent to the filing deadline, the San Diego District Attorney filed a civil suit against the mayor alleging irregularities in campaign contributions. As a result of this suit, petitioner William Brotherton sought to become a write-in candidate for mayor in the June primary election, and petitioner Jack Canaan sought to cast a write-in vote for Brotherton.[2]

Pursuant to San Diego's Municipal Code, write-in voting was pro-

1. 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985). The opinion was written by Chief Justice Bird, with Justices Mosk, Broussard, and Kaus concurring. Justice Grodin authored a separate concurring opinion, with Justice Reynoso concurring. Justice Lucas filed a dissenting opinion.

2. *Id.* at 709, 710 P.2d at 270, 221 Cal. Rptr. at 470.

hibited in all primary and general elections.[3] Any ballot containing the name of any person not formally printed on the official ballot would be counted as if the name did not appear. The petitioners filed a petition for writ of mandate in the supreme court in May of 1984, seeking to compel respondents to accept petitions for write-in candidates and to give effect to any write-in votes that might be cast in the general election.[4] The petitioners alleged that the prohibition on write-in voting was unconstitutional. The case was transferred to the court of appeal, which did not render a decision prior to the primary election.[5]

The incumbent mayor was one of the two candidates who qualified in the primary election for placement on the ballot in the general election.[6] However, prior to the general election, the incumbent mayor was indicted for several alleged felonies.[7] The petitioners continued to seek the opportunity to permit write-in voting in the general election.[8] In September of 1984, the court of appeal upheld San Diego's prohibition on write-in voting.[9] The petitioners then ap-

3. At the time this action was brought, section 27.2205 of San Diego Municipal Code prohibited write-in voting in all primary and general elections. San Diego amended this section after the California Supreme Court heard oral argument. The amended section permitted write-in candidates and write-in voting in municipal primary and special primary elections, but still prohibited write-ins in general municipal, special general, and recall elections.

Specifically, the amended section provides that a candidate who files a nominating petition not later than 60 days will be placed on the ballot. Write-in candidates can file nominating papers within 14 days of the election. The candidate who receives the majority of votes in the primary election is elected; however, if no single candidate receives a majority of votes, then the two candidates receiving the most votes will be placed on the ballot in the general election. Only those ballots cast for candidates whose names appear on the ballot will be considered valid. SAN DIEGO MUN. CODE §§ 27.3201-27.3211 (1985).

San Diego enacted section 27.2205 of the San Diego Municipal Code pursuant to the California Constitution, which authorizes charter cities to enact regulations irrespective of the California Elections Code to provide procedures for write-in voting in all federal, state, and local elections. *See* CAL. CONST. art. XI, § 5(b)(3); CAL. ELEC. CODE §§ 7300-7313, 17100-17102 (West 1985).

4. *Canaan*, 40 Cal. 3d at 708-09, 710 P.2d at 270, 221 Cal. Rptr. at 470. The following were named as respondents: City of San Diego; Charles G. Abdelnour, city clerk in charge of administering municipal elections; Raymond Oriz, San Diego County Registrar of Voters; and all the mayoral and city attorney candidates who had qualified for placement on the primary ballot. *Id.*

5. *Id.*

6. *Id.* at 709, 710 P.2d at 270, 221 Cal. Rptr. at 470.

7. *Id.*

8. *Id.*

9. *Id.*

pealed to the supreme court.[10]

III. HISTORICAL BACKGROUND

An inherent principle of our nation's constitutional form of democracy is the right to self-government. This right encompasses the right to vote for the candidate of one's choice and the ability to displace an incumbent in favor of a representative of a recently coalesced majority. The federal and state governments, however, have the power and authority to regulate certain aspects of the electoral process. For example, many regulations have been enacted that restrict a candidate's access to the ballot.[11] These restrictions are premised on the grounds that they are necessary to reduce voter confusion and maximize the probability that the winning candidate will receive a majority of the popular vote.[12]

When ballot access regulations have been challenged on constitutional grounds, courts have either applied an equal protection[13] or first amendment analysis.[14] Traditionally, courts have applied an equal protection analysis. Yet a clear formula for deciding these cases has never been conclusively determined.[15]

IV. THE CANAAN DECISION

A. Equal Protection or First Amendment Analysis

The initial question faced by the court was whether an equal protection analysis or a first amendment analysis should apply. The court noted that the United States Supreme Court has traditionally applied an equal protection analysis.[16] However, the application of this analysis has resulted in dramatically inconsistent results.[17] This inconsistency is due to the fact that the court has not conclusively determined which standard of review to apply.

The court speculated that growing discontent with the equal pro-

10. *Id.* The supreme court explained that this case was not considered moot although the election was completed. The court has frequently decided various recurring election issues subsequent to the completion of the elections. *See* Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

11. *See* SAN DIEGO MUN. CODE § 27.2205 (1985).

12. *See infra* notes 34-39 and accompanying text.

13. *See* American Party of Tex. v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 957 (1968); Clements v. Fashing, 457 U.S. 957 (1982).

14. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983); Schuster v. Mun. Court, 109 Cal. App. 3d 887, 167 Cal. Rptr. 477 (1980).

15. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 777 (1978). *See also* Note, *Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines*, 11 HOFSTRA L. REV. 691 (1983).

16. *Canaan*, 40 Cal. 3d at 711, 710 P.2d at 272, 221 Cal. Rptr. at 472.

17. *Id. See* L. TRIBE, *supra* note 15, at 777-84.

tection approach prompted the United States Supreme Court to begin utilizing a first amendment analysis.[18] In *Anderson v. Celebrezze*,[19] the Court applied a first amendment balancing test and struck down Ohio's early filing deadline. The *Anderson* Court noted that a first amendment analysis does not preclude consideration of equal protection concerns.[20] They still relied heavily on cases emphasizing fundamental rights. The *Anderson* Court explained its analysis by stating that a court " 'must first consider the character and magnitude of the asserted injury to the rights protected by the first and fourteenth amendments that the plaintiff seeks to vindicate.' "[21]

In deciding to use an *Anderson* analysis in the present case, the court stated that this analysis is much more appropriate than the traditional two-tiered equal protection analysis.[22] The court further commented that this approach focuses the inquiry on the real issues because it concentrated directly on infringement of first and fourteenth amendment rights.[23]

B. Rights to Vote and Seek Public Office

The court agreed with the petitioner's major contention that the regulation significantly affected two important rights: the right of candidates to pursue public office, and the right to vote.[24] The court recognized both rights as fundamental and worthy of constitutional protection.[25] The court noted that the right to vote is inextricably in-

18. *Canaan*, 40 Cal. 3d at 711, 710 P.2d at 272, 221 Cal. Rptr. at 472. Unfortunately, the United States Supreme Court has never clearly defined which standard of review to apply in analyzing election laws. In Williams v. Rhodes, 393 U.S. 23 (1968), the Court applied strict scrutiny in striking down Ohio's ballot access requirements. Although relying heavily on *Williams* in Jenness v. Fortson, 403 U.S. 431 (1971), the Court utilized minimal scrutiny in summarily upholding Georgia's ballot access restrictions. In American Party of Tex. v. White, 415 U.S. 767 (1974), and Storer v. Brown, 415 U.S. 724 (1974), the Court purportedly subjected the ballot access restrictions to strict scrutiny, while actually utilizing minimal scrutiny.

19. 460 U.S. 780 (1983).

20. *Id.* at 786-87.

21. *Canaan*, 40 Cal. 3d at 712, 710 P.2d at 273, 221 Cal. Rptr. at 474 (quoting *Anderson*, 460 U.S. at 789-90).

22. *Canaan*, 40 Cal. 3d at 713, 710 P.2d at 272, 221 Cal. Rptr. at 473.

23. *Id.*

24. *Id.* at 714-15, 710 P.2d at 274-75, 221 Cal. Rptr. at 474-75.

25. *Id.* While the California Supreme Court recognized the right to be a candidate as a fundamental right, the United States Supreme Court has refused to acknowledge the right to candidacy as fundamental. While the Court alluded to such a right in Williams v. Rhodes, 393 U.S. 23 (1968), this interpretation was explicitly rejected in Bullock v. Carter, 405 U.S. 134 (1972).

tertwined with a candidate's right to seek public office.[26] It is this close relationship, the court stated, that necessitates careful judicial scrutiny of regulations which affect these rights.[27]

Next, the court examined the extent to which the prohibition affected these two separate but related rights. While both rights were affected, the court concluded that the right to vote was more seriously injured.[28] The court explained that the prohibition seriously injured the right to vote in two ways. First, the candidate that is preferred by the majority of voters may be precluded from winning the election.[29] The court recognized that this situation is highly probable in this case because major developments occurred in the interim between the primary and the general elections.[30]

Second, voters are prevented from voting for their preferred candidate, regardless of the candidate's chances of winning.[31] The court dismissed the respondents' contention that a voter could still write a person's name on the ballot.[32] The court responded that, pursuant to the regulations, such a ballot would be counted as if the name did not appear. The court noted that the first amendment "guarantees the right to *public* political expression."[33] Thus, if the vote is not officially counted, then it is not given recognition.

C. The Balancing Test

In concluding that the prohibition seriously injured the right to seek public office and the right to vote, the court then applied a balancing test. The court weighed the severity of the injuries against the respondents' justifications for the prohibition. The respondents asserted that the prohibition was necessary to prevent the disruption that write-in voting creates.[34] It was also necessary to ensure that: 1) candidates meet charter requirements; 2) candidates have displayed a willingness to serve; 3) the public will have sufficient time to investigate and evaluate the candidate; and 4) one candidate will receive a majority of votes.[35]

In reviewing the respondents' contentions, the court concluded

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26. *Canaan*, 40 Cal. 3d at 714-15, 710 P.2d at 274-75, 221 Cal. Rptr. at 474-75.
27. *Id.*
28. *Id.* at 716, 710 P.2d at 276, 221 Cal. Rptr. at 476.
29. *Id.*
30. *Id.* at 717, 710 P.2d at 276, 221 Cal. Rptr. at 476.
31. *Id.* Professor Tribe states that "although groups of voters have a right to associate and advance a candidate to represent their interests, these associational rights do not seem to require that any *particular* individual serve as that candidate." L. TRIBE, *supra* note 15, at 775.
32. *Canaan*, 40 Cal. 3d at 717, 710 P.2d at 276, 221 Cal. Rptr. at 476.
33. *Id.*
34. *Id.* at 718, 710 P.2d at 277, 221 Cal. Rptr. at 477.
35. *Id.*

that a complete prohibition of write-in voting was too overbroad to achieve the stated goals. The court characterized the ban as too "crude and imprecise" to assure that candidates meet charter qualifications and display a willingness to serve.[36] The court further held that the desire to insure that a successful candidate wins a majority of the vote in the general election was insufficient to justify such a drastic measure.[37]

The court conceded to respondents' concern that voters have a sufficient amount of time to investigate. The court concluded, however, that limiting the possible candidates to those who signed up five months prior to the election is unnecessary.[38] The court recognized that voters receive a tremendous amount of knowledge during the month prior to an election. Write-in voting actually increases the knowledge of the voters by encouraging discussion of public issues and candidates.

Respondents further contended that to strike down the prohibition would severely disrupt their scheme for city council elections.[39] The court responded by emphasizing that the respondents failed to demonstrate that a total ban is necessary to achieve their goals.

In balancing the rights of the candidates and voters against the asserted justifications, the court held that the prohibition is unconstitutional.[40] The court stated that the rights to vote and seek public office are fundamental, and respondents' interests are insufficient to justify the burdens placed upon these rights. The court concluded that decisions in other jurisdictions support their opinion.

V. CONCURRING AND DISSENTING OPINIONS

Justice Grodin concurred in the judgment and analysis of the majority as it pertains to elections for mayor and other individually elected officers.[41] Since the quasi-district scheme for city council elections presents different problems, he concurred in the judgment

36. *Id.* at 719, 710 P.2d at 278, 221 Cal. Rptr. at 478.
37. *Id.* at 720, 710 P.2d at 278, 221 Cal. Rptr. at 478.
38. *Id.*
39. Pursuant to San Diego's system, a primary is held in each of eight districts. The two candidates from each district who receive the most votes run citywide in the general election. While one candidate is elected from each district, they are elected from voters citywide. The respondents argued that to allow a write-in candidate in the citywide election would permit a candidate to be elected who had no support in the district that he or she was to represent.
40. *Canaan*, 40 Cal. 3d at 724, 710 P.2d at 281, 221 Cal. Rptr. at 481.
41. *Id.* at 727-28, 710 P.2d at 284, 221 Cal. Rptr. at 484 (Grodin, J., concurring).

as to the validity of the write-in prohibition as it pertains to that special system.

In his dissent, Justice Lucas advocated the application of an equal protection analysis.[42] He declared that the real issue is whether the regulation has "a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process."[43] Strict scrutiny should only be used to review regulations with such impact. In determining the appropriate equal protection analysis, Justice Lucas adopted and restated the opinion of the court of appeal.[44] Lucas recognized that while the prohibition did not restrict the right to vote, it did regulate procedures for prospective candidates.[45] Since the rights to vote and to be a candidate are interrelated, strict scrutiny should be used only if the impact on the right to vote is severe enough. Mere existence of any restrictions, however, did not require the invocation of the strict scrutiny standard. The court of appeal and Justice Lucas, therefore, declared the regulation as nondiscriminatory and having no appreciable impact on the electoral process. The court of appeal applied the rational basis test, and because the regulation was rationally related to legitimate governmental interests, that court held that the ordinance was constitutional.[46]

VI. CONCLUSION

The supreme court's decision indicates that ballot access regulations will now be subjected to a first amendment analysis rather than an equal protection analysis. The court's summary disposition of the respondents' contentions evidences a willingness to subject *all* ballot access regulations to such severe analysis. The court no longer appears willing to consider the appreciable impact of a regulation in determining the severity of the analysis to be applied. A heavy burden is placed upon those enacting the regulation to show that the restriction is the least restrictive alternative possible.

TAMI J. TAECKER

42. *Id.* at 728, 710 P.2d at 284, 221 Cal. Rptr. at 484 (Lucas, J., dissenting).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

VII. EVIDENCE

A. *Evidence of criminal activity introduced in the penalty phase of a murder trial is limited to evidence of conduct that demonstrates the commission of an actual crime in violation of the Penal Code:* **People v. Phillips.**

Former Penal Code section 190.2(b) permits the prosecution to introduce evidence of violent criminal activity committed by a defendant in the penalty phase of a murder trial. In *People v. Phillips*, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985), the supreme court imposed two requirements on evidence of criminal activity sought to be admitted without an accompanying conviction: 1) the activity must be in violation of the Penal Code; and 2) the prosecution must introduce sufficient evidence to prove that the defendant would have been convicted beyond a reasonable doubt had he been charged with a crime.

The court reached this conclusion after examining the legislative history behind former Penal Code section 190.3(b). The court held that the legislature did not intend to have evidence of nontriable offenses introduced at the penalty phase. Although evidence of unrelated criminal activity can be introduced even where the defendant had not been convicted of any crimes, the jury cannot consider it as an aggravating factor in assessing the death penalty unless the prosecution proves beyond a reasonable doubt that the activity constituted a Penal Code violation. *See People v. Stanworth*, 71 Cal. 2d 820, 840, 457 P.2d 889, 903, 80 Cal. Rptr. 49, 63 (1969).

The court's decision in *Phillips* will in all probability apply to the present section 190.3(b) because of its similar wording. *See* CAL. PENAL CODE § 190.3 (West Supp. 1986). The court did not state whether a jury must explicitly find the defendant guilty of a crime before considering the evidence as an aggravating factor; the "reasonable doubt" requirement may prove to be *prima facie* requirement within the realm of the court and not the jury. Neither did the court address the res judicata implications of what could become a "trial within a trial."

MICHAEL R. GRADISHER

B. *To be admissible, characteristics of a past crime must be unique or demonstrate a 'signature' which indicates the defendant perpetuated both the past and present crimes; a juvenile's request to speak with a parent implies invocation of the privilege against self-incrimination:* **People v. Rivera.**

In *People v. Rivera*, 41 Cal. 3d 388, 710 P.2d 362, 221 Cal. Rptr. 562 (1985), defendant David Rivera had been convicted by a jury of murder and burglary. When defendant was arrested three months after the crime, he asked the arresting officer to contact his father. The defendant was properly advised of his *Miranda* rights. Although he first denied involvement in the crime, Rivera later confessed and was charged with murder under the felony-murder rule. At trial, the defendant argued his confession was a lie, made only to avoid his being labeled a "snitch." After his conviction, Rivera was sentenced to a concurrent sentence of twenty-five years to life. On appeal, defendant challenged the admission of his confession, and a statement made to another police officer, by claiming that these statements were involuntary and only made upon promises received from the police. The defendant also challenged the evidence admitted at trial concerning his prior armed robbery conviction. The trial court admitted the prior offense into evidence to establish identity. A prior offense showing identity, knowledge, common scheme, or design is admissible under the California Evidence Code. CAL. EVID. CODE § 1101(b) (West 1966).

The court determined that the evidence regarding defendant's prior offense should not have been admitted at trial. The court held that in order for a prior offense to be admitted in a later offense suit, "the two acts must have enough shared characteristics to raise a strong inference that they were committed by the same person. It is not enough that the two acts contain common marks. . . ." *Rivera*, 41 Cal. 3d at 392, 710 P.2d at 364, 221 Cal. Rptr. at 564. The court concluded that there were not enough "highly distinctive similarities" between the present and past offenses to justify admission of the prior offense evidence. Although some similarities existed, the court pointed out enough dissimilarities between the two offenses such that no unique, distinctive, or "signature" similarities could be drawn. The court found that the admission of the prior offense evidence was sufficient to prejudice the jury against the defendant, since no witnesses were able to identify the defendant, and no physical evidence was presented which linked him to the crime. Because the prior offense evidence was likely to have greatly influenced the jurors, its admission was therefore reversible error. *See* Roth, *Understanding*

Admissibility of Prior Bad Acts: A Diagrammatic Approach, 9 PEPPERDINE L. REV. 297 (1982).

Second, the court gave guidance to the trial court, which would hear the case on retrial, by applying a rule first formulated in *People v. Burton*, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971). The court determined that a juvenile defendant's request to see his father made prior to his confession must be interpreted as a desire to invoke the fifth amendment privilege against self-incrimination. U.S. CONST. amend. V. Since the police in this case did not cease their questioning of the defendant immediately after this request, any statement or confession made subsequently should have been inadmissible against the defendant. The court noted that there may exist unusual circumstances in which a juvenile defendant may, through a request to see a parent, *not* invoke the privilege against self-incrimination. However, in the absence of unusual facts, the *Burton* rule requires that law enforcement officers automatically cease the questioning of a juvenile in custody upon a request to see a parent. Evidence gathered in violation of the *Burton* rule is inadmissible under Evidence Code section 940. *See* CAL. EVID. CODE § 940 (West 1966). *See generally* Levy & Skacevic, *What Standard Should Be Used To Determine A Valid Juvenile Waiver?*, 6 PEPPERDINE L. REV. 767 (1979).

BRENDA L. THOMAS

VIII. FAMILY LAW

Disability payments from private disability insurance policies purchased with community funds are community property to the extent that they represent retirement benefits: **In re Marriage of Saslow.**

In re Marriage of Saslow, 40 Cal. 3d 848, 710 P.2d 346, 221 Cal. Rptr. 546 (1985), involved the question whether disability payments from private disability insurance policies paid for with community funds constituted separate property of a disabled spouse. The court held that the portion of the disability benefits intended by the parties to provide retirement support must be denominated as community property. The portion of the benefits intended to replace the husband's lost earnings in the event of his disability must be deemed separate property. The supreme court remanded the case to the trial court to apportion the retirement and disability payments.

During the marriage, Earnest Saslow purchased several disability insurance policies with community funds. Saslow, a self-employed allergist, had no retirement or pension plans. Severe psychological problems forced him to discontinue his medical practice while he was still married. Payment of the benefits under the disability policies commenced during the marriage, and certain payments were scheduled to continue until his death.

In tracing the development of the characterization of disability payments, the court noted that the decision of *In re Marriage of Jones*, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), was no longer valid. Courts no longer distinguish between vested and nonvested pension rights. In addition, section 5126 of the Civil Code currently provides that personal injury damages, which are analagous to disability payments, are now classified as community assets. CAL. CIV. CODE § 5126 (West Supp. 1986).

The court had previously decided that United States military disability payments are community property to the extent that they represent retirement benefits; that portion representing disability payments are deemed separate property. *See In re Marriage of Stenquist*, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978). The court noted that while this approach necessitates several difficult factual determinations, it provides the most equitable distribution of disability insurance benefits. To classify certain benefits as either always community or always separate creates numerous inequities that are not justified on the grounds of administrative convenience.

The court stated that in determining the extent to which the disability payments represented retirement benefits, the trial court should consider several factors on remand. First, the intent of the parties regarding the purpose of the benefits should be examined. This is important to illustrate the extent to which the couple relied on the disability payments to substitute for retirement benefits. In the present case, the husband had no retirement or pension plan; thus, the trier of fact could infer that the husband had intended the disability payments to serve as a substitute for retirement benefits.

Absent evidence of actual intent, the trial court should determine at what age the spouse would likely have retired had there been no disability. In the present case, where the spouse is self-employed and no clear retirement age is provided in any contract, the trial court may consider the average retirement age of self-employed allergists in the community with similar experience and education.

The existence of any retirement or pension plans is another relevant factor. The court stated that this is important to determine whether the disability insurance was purchased in lieu of a retire-

ment plan. In conclusion, the court applied *Stenquist* to private disability plans in apportioning community and separate property.

TAMI J. TAECKER

IX. INSURANCE LAW

A. *'Anti-stacking' statute is fully applicable to two or more policies issued by the same insurer:* Wagner v. State Farm Mutual Automobile Insurance Co.

In *Wagner v. State Farm Mutual Automobile Insurance Co.*, 40 Cal. 3d 460, 709 P.2d 462, 220 Cal. Rptr. 659 (1985), the plaintiff, Susan Welch, had been seriously injured in an automobile collision with an uninsured motorist. The plaintiff was covered under two liability policies issued by the defendant, State Farm Insurance, to Ms. Welch's parent and step-parent, also plaintiffs in this suit. Each policy provided for uninsured motorist coverage up to $15,000 and contained a condition clause known as an "anti-stacking clause," used by insurance companies to prevent claimant's recovery in excess of actual damages, or double recovery for the same injury.

Under California Insurance Code section 11580.2(d), anti-stacking clauses are permitted. *See* CAL. INS. CODE § 11580.2(d) (West Supp. 1986) (hereinafter the Anti-stacking Statute). The plaintiff's injuries were in excess of $15,000. The plaintiffs argued: 1) the anti-stacking clause under the policy was incomprehensible and therefore did not comport with the Anti-stacking Statute; and 2) the Anti-stacking Statute should not apply here because both policies were issued by the same insurer. Therefore, plaintiff should be entitled to collect the maximum amount payable under *both* policies — $15,000 from each for a total of $30,000. Defendant State Farm paid plaintiff $15,000, the policy limit on *one* policy, but refused to pay more. At trial, defendant was granted summary judgment, from which plaintiffs appealed.

First, the supreme court found that the language used by defendant State Farm in the clause was as clear as the Anti-stacking Statute would allow. The difficult language inherent in both the clause and statute is a result of explaining the pro-rating scheme which applies when different insurance companies are involved in one claim. However, both the clause and the statute clearly limit claimant's damages to the higher of the applicable policies held. Second, the issue was whether such a condition under the statute, although clearly worded,

is applicable to two policies drawn by the *same* company. The court held that the statute was applicable in this situation.

Plaintiffs argued that if the limit on the first policy was the maximum amount defendant insurer would have to pay, then plaintiffs' payment of the uninsured motorist premium on the second policy was without purpose. Therefore, the defendant company received two premiums but would pay only one uninsured motorist benefit. Since the defendant insurer issued both policies to plaintiffs and reaped two premiums, plaintiffs argued that in fairness they should be able to collect on both policies as issued, regardless of the Anti-Stacking Statute.

The court did not agree with plaintiffs' analysis. First, plaintiffs did receive something for the second premium paid — additional coverage for the additional risks involved in the ownership of two vehicles. Furthermore, this additional coverage protected drivers of the second vehicle, not necessarily covered by the premium paid under the first policy. Second, although the pro-rating portion of the statute does not take effect with one company as insurer, the legislative purpose behind the Anti-stacking Statute was to prevent squabbles between insurance companies, not to make pro-rating an end in and of itself. The court noted the insured, after being paid the full limit on the greatest policy, is compensated and is no worse off because pro-rating was avoided. Additionally, if the Anti-stacking Statute was not applicable to insurance companies, insurance companies could not rely upon decreased exposure through contribution by other insurers or in this case themselves. Therefore, uninsured motorist coverage would be more costly to claimants such as the plaintiffs.

Lastly, plaintiffs argued that the defendant insurance company owed a duty to inform them of the limitations contained in the clause and its applicability when two such policies are held concurrently. The court held that because defendant insurance company complied with the required language and protection demanded under the Anti-Stacking Statute, and clearly stated the limitations in its policies, the defendant did not breach its duty to plaintiffs and no cause of action for breach is justified. Defendant's summary judgment was therefore affirmed. *See generally* P. Eisler, *California Uninsured Motorist Law Handbook* § 8.7 (3d ed. 1979 & Supp. 1982).

BRENDA L. THOMAS

B. *Settlement offers made after trial's commencement are admissible to prove a title insurance company's failure to employ good faith and fair dealing:* White v. Western Title Insurance Co.

In *White v. Western Title Insurance Co.*, 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985), the plaintiffs wished to purchase property which, unbeknownst to them, was encumbered by a duly recorded water easement. The plaintiffs requested and received preliminary title reports from the defendant which purported to list all easements, liens, and encumbrances of record. However, the reports failed to disclose the recorded water easement. Believing the property was free of encumbrances, the plaintiffs and the seller closed escrow and were then issued two title insurance policies by the defendant. The policies generally insured the plaintiffs against losses, damages, costs, and attorneys' fees incurred if title to the property proved contrary to that stated in the policy, or if title as described was encumbered by defect, lien, or other encumbrances. Schedule B of the policies contained exclusion provisions limiting defendant's liability as to unrecorded easements, liens, or encumbrances, and to unpatented mining claims, reserved patents, or water rights.

Approximately six months after escrow closed, the owner of the easement encumbering plaintiffs' property notified the plaintiffs of his intent to implement the easement. The plaintiffs retained separate counsel, although the defendant offered to defend plaintiffs in the easement suit. After the easement suit was dismissed, the plaintiffs sought compensation of $62,947 from the defendant, which was the potential loss created by the undiscovered easement through loss of groundwater. The defendant contested the plaintiffs' claim of loss, whereupon the plaintiffs filed a suit for breach of insurance contract and negligent preparation of the preliminary title reports.

After the suit was filed, the defendant attempted to settle by offering $3,000; this amount was based upon its appraiser's $2,000 estimate of the loss. The plaintiffs, who never received a copy of the appraiser's report, declined the offer. The defendant's second settlement offer, made pursuant to Civil Procedure Code section 998, was for $5,000. *See* CAL. CIV. PROC. CODE § 998 (West 1980). The plaintiffs rejected this second offer since they had incurred litigation expenses exceeding that amount. They instead chose to amend their

complaint to include a cause of action for breach of the covenant of good faith and fair dealing.

In 1981, the trial court, without a jury, found the defendant liable for breach of contract and negligence. A third offer of $15,000 by the defendant to settle the case was rejected by plaintiffs. A jury trial began in 1982 to decide the case's remaining issues. The court admitted testimony as to the extent of losses and the defendant's attempted settlement offers that were made without the plaintiffs' knowledge of the appraiser's report. The jury found the defendant in breach of the covenant of good faith and fair dealing, and awarded $20,000 in compensatory damages. The jury denied punitive damages. Defendant appealed the judgment.

The supreme court first determined that the title insurance policy in question must be construed in a light most favorable to the insured. *Reserve Insurance Co. v. Pisciotta*, 30 Cal. 3d 800, 640 P.2d 764, 180 Cal. Rptr. 628 (1982). The purpose of the policy was to insure the plaintiffs against undisclosed recorded interests, thereby specifically including the recorded water rights at issue, since such rights were within the scope of an ordinary title search. The court described the defendant's duty broadly to include protection of the title insurance policyholder's reasonable expectation as against all recorded water rights. Although the insurance policy made reference to excluded water rights protection, these excluded rights were *unrecorded* water rights. Therefore, protection against the recorded easement here in question was part of the bargained-for protection the defendant owed to the plaintiffs.

The general duty required of all title insurers includes a professional abstraction of title. *Wilkinson v. Rives*, 116 Cal. App. 3d 641, 650, 172 Cal. Rptr. 254, 258 (1981). A title report prepared by such an insurer who fails to list all recorded encumbrances is prima facie proof of negligence. Yet in this case, although the defendant's negligence was evident by its lack of adequate title search, the defendant attempted to free itself from liability through Insurance Code section 12340.11. This section provides that preliminary title reports cannot be construed as a final guarantee of the state of title. CAL. INS. CODE § 12340.11 (West Supp. 1986). Although this section could have exculpated the defendant's liability, the court found it inapplicable to the present case, since the statute came into effect on January 1, 1982, and was without retroactive effect upon the defendant's conduct, which occurred in 1981. Therefore, the court affirmed the finding that the defendant negligently breached its duty to the plaintiffs.

Every title insurance contract implies a covenant of good faith and fair dealing between the parties. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470, 486 (1975). The de-

fendant argued that in order to disprove the alleged breach of this implied covenant, all evidence of its dealings with plaintiffs after suit was filed should have been excluded, since upon commencement of the suit, the plaintiffs and the defendant entered into adversary positions which were naturally contradictory to the covenant. However, the court held that the contractual relationship between an insured and an insurer continues after suit is commenced. To hold otherwise would encourage insurers to engage in early suit and to forego investigation, negotiation, and settlement. The court expressed confidence in the jury's ability to distinguish the parties' adversary roles from the insurer's duty to continue to deal fairly and in good faith with its insured.

The defendant also argued that the admission of the two settlement offers was in violation of California Evidence Code section 1152. *See* CAL. EVID. CODE § 1152 (West Supp. 1986). Although this section generally prohibits introduction of settlement offers into evidence, the court determined that the section does not preclude settlement offers as evidence to prove failure to process an insurance claim fairly and in good faith. On similar grounds, the court found that the defendant's compromise offer, made pursuant to section 998, was also admissible. *See* CAL. CIV. PROC. CODE § 998 (West 1980).

The court additionally rejected the defendant's argument that its communications to the plaintiffs were absolutely privileged as being part of a judicial proceeding. *See* CAL. CIVIL CODE § 47(2) (West 1982). The court found that the defendant's conduct and communications were not introduced as proof of defamation or intent to cause emotional distress — causes of action which invoke the privilege. Instead, proof was offered to evidence the defendant insurer's overall conduct in its resolution of insureds' claims, which is relevant to a cause of action for breach of good faith and fair dealing. For the purpose of demonstrating this type of conduct, section 47(2) does not act to bar such evidence.

The court found that the defendant's "entire pattern of conduct shows a clear attempt by defendant to avoid responsibility for its obvious failure to discover and report the recorded easement. . . ." *White*, 40 Cal. 3d at 889, 710 P.2d at 319, 221 Cal. Rptr. at 519. Although the defendant was confronted with a unanimous body of law against it, it offered only limited damages in its settlement offer and refused to adequately assess plaintiffs' losses until the court decided in plaintiffs' favor. The jury's finding of breach of the covenant of good faith and fair dealing was therefore justified. An award for

attorneys' and witness fees, and other litigation expenses was justified because the plaintiffs were entitled, in light of insurer's unreasonable conduct, to recover for damages that proximately resulted from the bad faith. *See generally* J. Hosack, D. Wescott & A. Knox, *Preliminary Title Reports, Title Policies, and Closing Procedures* (1985) (general guidelines regarding preliminary title reports and filing title insurance).

BRENDA L. THOMAS

X. LABOR LAW

A. *City personnel rule which prohibits "unbecoming conduct" is not unconstitutionally vague when viewed in light of specific case facts:* Cranston v. City of Richmond.

In *Cranston v. City of Richmond*, 40 Cal. 3d 755, 710 P.2d 845, 221 Cal. Rptr. 779 (1985), appellant Eric Cranston challenged his discharge as a police officer by the respondent City of Richmond. Cranston was discharged when he drove his mechanically unsafe automobile in a high speed chase while off-duty and while being pursued by fellow police officers. The chase occurred during the dark, early morning hours, on wet, slippery roads, increasing the danger to the other officers, motorists, himself, and a passenger. When finally stopped, Cranston treated the incident as a joke. Although he had clearly violated the law, Cranston was not issued a citation. The police department conducted an investigation and reviewed Cranston's past record of several official reprimands. Cranston had previously received notice that his performance was unacceptable and was told to improve it. In view of the chase incident and Cranston's past misconduct, Cranston was terminated for "conduct unbecoming an employee of the City Service" under Richmond City Personnel Rule XII, section 2(a) (hereinafter the City Rule).

After his discharge, Cranston was granted a hearing before the city personnel board. After hearing the evidence, the board affirmed his discharge. Cranston thereupon filed a petition for writ of administrative mandamus with the superior court to compel his reinstatement. Cranston's petition was denied and this appeal was subsequently brought.

The supreme court had to determine whether a police officer, who continued to engage in further misconduct, although warned about past misconduct, may escape discipline under a municipal personnel rule which contains an arguably vague term. The court upheld the discharge in a narrow interpretation of law under the specific facts presented in this case.

Cranston's main argument before the court was that the City Rule

was unconstitutionally vague, and hence did not provide Cranston with his essential due process rights. The City Rule provided that any city employee could be discharged for conduct unbecoming a City Service employee. Cranston argued that the City Rule's use of the term "unbecoming" was so vague that reasonable people would have to guess as to its meaning.

Under established constitutional law principles, vague laws violate basic due process because they may trap the unknowing, and tend to lead to arbitrary and discriminatory applications of law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Although normally applied in criminal cases, the "void for vagueness" doctrine is also applicable to administrative regulations and was therefore applied here. *See Bence v. Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975).

Although the court accepted the basic "void for vagueness" doctrine as Cranston argued, it determined that the doctrine must be applied to the City Rule in light of the specific facts of the case, and not in the abstract. Although Cranston then argued that the City Rule was so patently vague as to provide no standard at all, the court disagreed. Although the term "unbecoming" alone provided no specific, objective measurement of appropriate conduct for city employees, the court held that this word provides adequate meaning when "the required specificity . . . [is] provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies." *Cranston*, 40 Cal. 3d at 765, 710 P.2d at 851, 221 Cal. Rptr. at 784. The court affirmed a line of cases in which fitness within a specific occupation was at issue. Claims of vagueness over the applicable rule were rejected because the common knowledge of profession members provided notice of the fitness standards within that profession.

Cranston attempted to distinguish the City Rule from similar rules upheld by the court by arguing that the City Rule applied to *all* city employees instead of only one category of employees. Cranston argued that because the City Rule included such a broad category of employees, it failed to give any particular guidance or incorporate any specific profession. The court distinguished the cases which identified such an overbroad employee category, and found that the grounds for discharge in each case lacked the kind of close relationship to the employee's professional standard of fitness present in the case at hand. The City Rule was held to conform more closely to the

line of cases where the rule or regulation identified a specific occupation because the City intended the City Rule to apply to and depend upon the specific occupation involved.

The court thus interpreted the City Rule as if it read "conduct unbecoming a *city police officer*." By so incorporating the intended application of a standard within a chosen occupation, and then determining the meaning of "unbecoming conduct" within *that profession*, the City Rule was held sufficiently clear, having a "core" upon which prohibited "hard core" conduct could be disciplined.

Having decided that the City Rule passed the constitutional test and was therefore not void for vagueness, Cranston's conduct in light of his profession was found to be clearly prohibited under the rule. Because Cranston's reckless and blatant disregard for the law was the type of conduct which any reasonable police officer would know was "unbecoming," his conduct was "hard core" and clearly violative of the City Rule. Cranston had received ample verbal notice regarding past misconduct and had notice through a police department manual that his conduct was prohibited.

Under the specific circumstances in this case, discharge was for just cause and within the discretion of the administrative agency. The court found no abuse of discretion by the agency and no denial of Cranston's right to representation during the investigatory proceeding. The court therefore affirmed the superior court's denial of Cranston's petition and upheld his discharge.

BRENDA L. THOMAS

B. *The National Football League's arbitration agreement for player grievances is valid under both federal and state law:* **Dryer v. Los Angeles Rams.**

Ruling on a question of federal law, the court in *Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 709 P.2d 826, 220 Cal. Rptr. 807 (1985), upheld the validity of the arbitration agreement in the National Football League (hereinafter the NFL) collective bargaining agreement. Fred Dryer sued the Los Angeles Rams for removing him from the player roster before the expiration of his contract, even though the team continued his salary. The Rams responded in superior court by petitioning to compel arbitration pursuant to the NFL collective bargaining agreement.

The trial court recognized that federal law is controlling in labor questions involving the NFL, but also determined that California and federal laws were compatible. Upon that basis, the lower court ruled the arbitration agreement invalid. Most objectionable to the superior and also the appellate courts was a provision in the agreement that

authorized the NFL Commissioner to arbitrarily intervene in any dispute that threatens public confidence in professional football. The arbitration agreement was held to be a contract of adhesion, and unconscionable for failing to meet minimum levels of integrity as set forth in *Graham v. Scissor-Tail Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981).

In reversing the decision, the supreme court stated that there is no federal precedent that embodies the fairness inquiry mandated by the California court in *Graham*. On the contrary, national labor policy strongly encourages all methods of private dispute resolution. Inconsistent state laws result in crippling the effectiveness of labor arbitration and weakening the status of a union in the collective bargaining process. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). *See also* 29 U.S.C. § 173(d) (1982) (congressional preference for contractual procedures to solve labor grievances).

Furthermore, the court found that the NFL arbitration provisions met the *Graham* integrity test. The intervention by the NFL Commissioner that the lower courts found so blatantly arbitrary was, in reality, limited by the agreement to a narrow set of exigent circumstances involving such things as drug abuse and gambling. The notion that there could be intervention in this case was pure speculation on the part of the lower courts. Additionally, no precedent was found for application of the doctrine of adhesion to collective bargaining agreements.

In summary, the supreme court found error in the lower courts' failure to find that state law was preempted by federal law in deciding an NFL labor dispute. After applying the federal standard, the court found the arbitration agreement to be consistent with national policy. Federal law aside, the agreement was also found to be in compliance with California law.

This decision will undoubtedly have a profound impact on the remedies available to players of the NFL teams, if not to all professional sports franchises located in California. For an overview of NFL labor arrangements, see Lock, *Employer Unfair Labor Practices During the 1982 National Football League Strike: Help on the Way*, 6 U. BRIDGEPORT L. REV. 189 (1985).

JAMES B. BRISTOL

C. *The make-whole remedy is properly imposed upon an employer who refuses to bargain with a newly-elected union where there is no reasonable, good faith belief that the election will be set aside:* **George Arakelian Farms, Inc. v. Agricultural Labor Relations Board.**

I. INTRODUCTION

In finding that the employer's efforts to set aside the results of a union election were not based upon a reasonable belief of eventual success, the statutory make-whole remedy was permitted in *George Arakelian Farms, Inc. v. Agricultural Labor Relations Board*.[1] The court held that the election challenge brought by Arakelian Farms was wholly lacking in merit even though it was not expressly stated that it was brought as a mere dilatory tactic to stifle union organization.[2]

II. FACTS

In December of 1976, the employees of Arakelian Farms voted on their desire to be represented by the United Farm Workers of America (UFW). Of the 168 ballots cast, 139 favored the UFW and twelve were opposed to representation by any union. Seventeen ballots were challenged and unresolved. Arakelian then petitioned to set aside the election.[3] After most complaints in the petition were dismissed by the executive secretary of the Agricultural Labor Relations Board (ALRB), Arakelian sought review of the denial by the full board. Unfortunately, this request for review was not filed within the five day time limit. Arakelian did not seek reconsideration of the earlier petition,[4] nor did it present reasons for the lateness of the review request.

One objection in the first petition was not dismissed by the ALRB. Arakelian complained that the UFW had interfered in the election process and that the ALRB's participation in the pre-election confer-

1. 40 Cal. 3d 654, 710 P.2d 288, 221 Cal. Rptr. 488 (1985). The opinion was authored by Justice Kaus, with acting Chief Justice Broussard and Justices Mosk, Reynoso, and Grodin concurring. Justice Lucas wrote a separate dissent in which Justice Sabraw concurred.

Justice Kaus was a retired associate justice of the supreme court sitting under assignment by the Chairperson of the Judicial Counsel. Justice Sabraw was assigned by the Chairperson of the Judicial Counsel.

2. *Id.* at 667, 710 P.2d at 296, 221 Cal. Rptr. at 496.

3. This petition was filed in a timely fashion with the California Agricultural Labor Relations Board (ALRB) pursuant to statutory and administrative provisions. *See* CAL. LAB. CODE § 1156.3(c) (West Supp. 1986); CAL. ADMIN. CODE tit. 8, R. 20365 (1981). Most of the objections were summarily dismissed by the executive secretary of the ALRB as deficient.

4. Such review is permitted under the California Administrative Code. CAL. ADMIN. CODE tit. 8, R. 20393(c) (1981).

ence was biased and openly supportive of the union. Specifically, the agent of the ALRB delayed the conference with the employees for ninety minutes to wait for the UFW representatives to arrive, and then permitted a union organizer to act as interpreter to the Spanish speaking employees. Other alleged misconduct by the agent included strategic placement of the voting sites in accordance with the union's wishes.

The ALRB agreed that there was misconduct in the election, but found it to be inconsequential. Certification was soon granted to the UFW as the bargaining representative for Arakelian's employees. After several failed attempts to get a more favorable result from the ALRB, Arakelian refused to negotiate with the UFW. This refusal to bargain was found to be an unfair labor practice, and the ALRB imposed the statutory make-whole remedy.[5] Arakelian petitioned the court of appeal to set aside the certification of the UFW or, in the alternative, to find that the ALRB had abused its discretion in granting the make-whole remedy.

III. THE MAJORITY OPINION

While the writ of review was being considered, the supreme court decided a similar case. In *J.R. Norton Co. v. Agricultural Labor Relations Board*,[6] the court ruled that the make-whole remedy would be appropriate only where the employer's conduct in contesting union election results was a mere pretense to avoid bargaining with the union.[7] It must appear that the employer had a reasonable good faith belief that the election violation would have effected the outcome of the vote.[8] Such an evaluation requires a careful examination by the ALRB of the facts and equities of each case.[9]

In applying the *Norton* rule, the ALRB set forth evidentiary standards that employers would have to meet in order to show a good faith belief in the merits of their challenge to the union election. The court gave tacit approval to these standards. A challenge and re-

5. *See* CAL. LAB. CODE § 1160.3 (West Supp. 1986). Under the make-whole remedy, the ALRB is empowered to take any affirmative action necessary. This includes ordering the employer to pay any amount adequate to make the employees whole from the losses suffered during the refusal to bargain period. *See* Note, *Make Whole Under the Agricultural Labor Relations Act: Its Applicability and Scope*, 13 U.S.F.L. REV. 971 (1979).

6. 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 710 (1979).

7. *Id.* at 39, 603 P.2d at 1328, 160 Cal. Rptr. at 732.

8. *Id.*

9. *Id.* at 38, 603 P.2d at 1327, 160 Cal. Rptr. at 731.

fusal to bargain is considered reasonable only if the employer believed in good faith that the results of an election would eventually be set aside. Pertinent to the determination of reasonableness are the size of the election, the extent of voter turnout, and the margin of victory. Additionally, common sense and legal precedent for the employer's contentions are vital in the analysis.[10]

Thus, the court examined the circumstances of the Arakelian election to determine if the facts supported a reasonable, good faith belief that the election would be set aside. In applying this standard of review, it was emphasized that the issue is not the bias or misconduct of the ALRB, or their alleged error in dismissing Arakelian's objections. Rather, the proper inquiry into the propriety of Arakelian's refusal to bargain with the union is whether there was a reasonable chance of winning on appeal.[11]

Of primary importance to the court was the union's overwhelming margin of victory. The court was not convinced that the misconduct of the ALRB agent could have had a significant impact on the election results. Furthermore, Arakelian failed to exhaust administrative remedies before refusing to bargain with the UFW.[12] Therefore, the statutory make-whole remedy imposed by the ALRB upon Arakelian was upheld.[13]

IV. THE DISSENTING OPINION

Justice Lucas dissented from the imposition of the make-whole remedy. His objection to the finding of the majority was their willingness to impose such a severe and costly sanction in a case where the employer's refusal to bargain was based upon actual ALRB misconduct.[14]

In light of the standard of review described in *Norton*,[15] Lucas viewed Arakelian's acts as falling far short of being frivolous, or a

10. *Arakelian*, 40 Cal. 3d at 664-65, 710 P.2d at 294-95, 221 Cal. Rptr. at 494-95.
11. *Id.* at 665-66, 710 P.2d at 295, 221 Cal. Rptr. at 495.
12. *Id.* at 668, 710 P.2d at 297, 221 Cal. Rptr. at 497.
13. *Id.*
14. *Id.* (Lucas, J., dissenting).
15. *See Norton*, 26 Cal. 3d at 36, 603 P.2d at 1326, 160 Cal. Rptr. at 730. The *Norton* court stated that the pursuit of judicial review was not itself contrary to the policies of the Agricultural Labor Relations Act. The make-whole remedy was therefore appropriate only where the employer sought review of an election as a "dilatory tactic designed to stifle union organization." In deciding when the make-whole remedy should be imposed, concerns of avoiding unnecessary delays as well as providing a check on arbitrary ALRB action should be considered. *Id.*

Lucas was apparently disturbed by the majority's willingness to ignore the unquestioned misconduct of the ALRB agent during the pre-election conference. This objection is particularly significant when one remembers that the ALRB is the body that reviews allegations of ALRB misconduct, and has the corresponding power to impose the make-whole remedy.

bad faith attempt to thwart the will of its employees to unionize.[16] On the contrary, the *Norton* decision expressly forbade imposing a hindsight test in which a make-whole remedy is imposed simply because the employer failed in its attempt to adequately state a prima facie case of consequential misconduct.[17]

Furthermore, Lucas did not think the make-whole remedy should be applied to an election that occurred almost ten years ago. The statutory damages that could be imposed upon Arakelian from such a drastic measure could be financially ruinous. The dissenting Justice saw this type of action as particularly inappropriate in this case because the delay was not wholly the fault of the employer.[18]

V. CONCLUSION

In light of this decision, an agricultural employer should proceed with caution before refusing to bargain with a newly elected labor union. The majority opinion comes very close to stating that seeking election review and refusing to bargain with a union is appropriate only where the ALRB's misconduct is so egregious that there is a definite, quantifiable impact upon the actual vote count.[19] If there is any merit in the dissenting opinion, then this could have a chilling effect upon the bringing of meritorious claims for election misconduct against the ALRB. This result would be contrary to the policies expressed in the carefully reasoned *Norton* opinion.

JAMES B. BRISTOL

D. *A police officer cannot be discharged for refusing to testify at an administrative police misconduct hearing unless he is informed that his statements cannot be used against him at a subsequent criminal proceeding:* **Lybarger v. City of Los Angeles.**

In *Lybarger v. City of Los Angeles*, 40 Cal. 3d 822, 710 P.2d 329, 221

16. *Arakelian*, 40 Cal. 3d at 670, 710 P.2d at 298, 221 Cal. Rptr. at 498 (Lucas, J., dissenting).

17. *Id.* (citing *Norton*, 26 Cal. 3d at 39, 603 P.2d at 1328, 160 Cal. Rptr. at 732).

18. *Arakelian*, 40 Cal. 3d at 671, 710 P.2d at 299, 221 Cal. Rptr. at 499 (Lucas, J., dissenting).

19. This is the standard the UFW argued for in its brief to the ALRB in this case. *Id.* at 664, 710 P.2d at 294, 221 Cal. Rptr. at 494. *See also* California Supreme Court Survey, *The Proper Test for Determining a Violation of the A.L.R.A.: Martori Brothers Distributors v. Agricultural Labor Relations Board*, 9 PEPPERDINE L. REV. 764 (1982).

Cal. Rptr. 529 (1985), the supreme court was asked to interpret various provisions of the Public Safety Officers Procedural Bill of Rights Act. CAL. GOV'T CODE §§ 3300-3304 (West 1980 & Supp. 1986) (hereinafter the Act). The case arose after Lybarger, a police officer, was denied a peremptory writ of mandate to set aside an administrative decision removing him from his position for misconduct.

In 1980, appellant Lybarger reported to work and was informed of a major misconduct investigation involving his work unit. He was then transported to an administrative interview and provided with counsel by his union. Appellant was informed of the allegations of misconduct and that his failure to cooperate in the investigation could result in the loss of his job. After consulting his attorney, appellant stated that he would not cooperate even though his refusal could result in a charge of insubordination. Based upon the investigative interview, the administrative board found appellant guilty of insubordination and as a result removed him from his position.

Appellant moved to have the discharge set aside because his rights under the Act had been violated. First, appellant argued that he could not be disciplined for exercising his constitutional right to remain silent under section 3.304(a) of the Government Code. The court rejected this argument and held that a public employee has no right to refuse to answer an employer's "potentially incriminating questions." The court justified its position by noting that the right against self-incrimination is adequately protected by the rule prohibiting the use of such statements at any subsequent criminal proceeding. *See Lefkowitz v. Turley*, 414 U.S. 70, 77-79 (1973).

Second, appellant argued that if he had no right to remain silent, he should have been informed, pursuant to section 3033(g) of the Act, that any statements he chose to make at the investigation could not be used in a subsequent criminal proceeding. *See Lefkowitz*, 414 U.S. at 79. Section 3303(g) provides that "if it is deemed that [an officer] may be charged with a criminal offense, he shall be immediately informed of his constitutional rights." CAL. GOV'T CODE § 3303(g) (West 1980).

However, in interpreting section 3303(g), the court noted that, given the context of an administrative investigation of potential criminal misconduct, the legislature had intended that officers be advised of their *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The court determined that appellant should have been informed that, despite his constitutional right to remain silent, his silence could be deemed insubordination, which could result in administrative discipline.

The court added that appellant should have been advised that any statement made under the threat of administrative discipline could

not be used against him in any subsequent criminal proceeding. This particular omission was of critical importance to the court. The appellant's failure to understand this rule in conjunction with the general *Miranda* rights was determined to have an unlawful effect on appellant's decision to remain silent.

Consequently, the court concluded that the trial court erred in denying the peremptory writ of mandate to set aside the employment termination decision, and it reversed the judgment. In affording even police officers the right to *Miranda* warnings, this case verifies the strong stand of the court when such constitutional rights are at issue.

CHRISTIE A. MOON

XI. PROBATE LAW

Even in the absence of a timely contest, courts may exercise their equitable jurisdiction to set aside orders and decrees of probate proceedings where extrinsic fraud has been committed by an executor: **Estate of Sanders v. Sutton.**

In *Estate of Sanders v. Sutton*, 40 Cal. 3d 607, 710 P.2d 232, 221 Cal. Rptr. 432 (1985), the supreme court held that concealment and misrepresentation by an executor constitutes extrinsic fraud. Because a confidential relationship existed between the beneficiaries of the will and the executor, breach of the executor's duty to disclose was considered to be extrinsic fraud. Therefore, equity permitted the order admitting the decedent's will to probate to be set aside.

The decedent, Mary Sanders, suffered an aneurysm and was declared mentally incompetent in 1957. Her son was appointed the conservator of her estate and was the sole beneficiary of her holographic will. He died in 1978, and the decedent's nephew, Sutton, was appointed conservator. The son's widow, Sara Sanders, expected her sons to inherit the entire estate by right of representation. Sutton, after becoming conservator in 1978, took the decedent to his attorney where she executed a will leaving him all of her one-third interest in a panel of real property located in downtown San Diego. Her interest in this property, referred to as the "Market Street property," was worth about $475,000 and made up the bulk of her estate.

After Mary Sanders died in January of 1983, Sara Sanders questioned Sutton about potential tax liabilities of the real estate. He was evasive in his answers, telling her not to worry. He told her that he

would work with the attorney to ensure everything was handled properly. In February, upon notice that the will was offered for probate, Sara again questioned Sutton, who further assured her that he was handling the matter and that her sons' interests were being properly represented.

In April, July, and September of 1983, Sara and her son attempted to contact Sutton to find out why the statements they received did not mention the Market Street property. In January of 1984, Sara was finally able to talk to Sutton about the notice of final hearing and taxes due on the property. Sutton continued to assure her that she need not worry because he was handling the matter. He also told her that she need not attend the hearing. Finally, after repeated inquiries, Sutton admitted that Mrs. Sanders had changed her will leaving her interest in the Market Street property to him. Sara immediately contacted an attorney, who contested the petition at the final hearing. The court rejected the contest and entered a decree of final distribution, awarding the decedent's interest in the Market Street property to Sutton. Sara and her sons appealed, arguing that Sutton's misrepresentations and concealments prevented a timely contest of the will and constituted extrinsic fraud.

Sutton did not dispute the facts as presented and the court therefore accepted them as true. Sutton instead claimed that even if the allegations were true, they did not support a claim of extrinsic fraud, and in the absence of a timely appeal, a plaintiff is required to prove extrinsic fraud in order to secure equitable relief from a judgment. *See generally Caldwell v. Taylor*, 218 Cal. 471, 23 P.2d 758 (1933).

The court found evidence of extrinsic fraud under its varied definitions. The court held that fraud includes false promises, deprivation of a fair hearing, being kept in ignorance of proceedings, and being induced not to appear, all of which were present in this case. *See United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878); *In re Marriage of Park*, 27 Cal. 3d 337, 342, 612 P.2d 882, 886, 165 Cal. Rptr. 792, 796 (1980). Since courts are more likely to grant relief from a judgment violating a fiduciary duty, Sutton's misleading behavior as both executor and confidential family advisor indicated that relief was in order.

Sutton committed fraud when he breached his fiduciary duty to disclose the material changes which occurred in the will. *See, e.g., Larrabee v. Tracey*, 21 Cal. 2d 645, 134 P.2d 265 (1943) (executor told beneficiary that she would receive the estate by right of representation, then asked the court to distribute it to himself). Therefore, the supreme court set aside the order admitting the decedent's will to probate, and remanded the case to determine the validity of the will.

CYNTHIA M. WALKER

XII. PUBLIC UTILITIES

A publicly-owned carrier must exercise the utmost care in protecting riders from assaults by fellow passengers, governmental tort immunity notwithstanding: **Lopez v. Southern California Rapid Transit District.**

In denying a defense of governmental tort immunity, the supreme court held that a public transportation corporation owes the same high duty of care for its passengers as does a private carrier. *Lopez v. Southern California Rapid Transit District*, 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985). The action came on appeal of a demurrer that had been granted in favor of the defendant in the trial court. Based upon the special relationship between a common carrier and its passengers, the court found that there is a duty requiring a carrier to exercise a high degree of care to ensure the safety of its riders. Accordingly, the carrier must make reasonable efforts to protect its passengers from the criminal actions of third parties.

The five plaintiffs brought this suit against the Southern California Rapid Transit District (hereinafter RTD), a public corporation, after being injured when a fight broke out on board an RTD bus. The plaintiffs alleged that a group of juveniles began harrassing other riders while the plaintiffs were on the bus as passengers. A violent argument ensued between the youths and passengers, while the bus driver continued driving as if nothing had happened. The plaintiffs further alleged that such violent incidents had occurred frequently on that particular bus route, so that the RTD had notice of the risk of danger to the passengers. In spite of this history, RTD did nothing to prevent the further endangerment of passengers from the allegedly known criminal elements. In defense of the action, RTD claimed it was immune due to the provision of Government Code section 815. The code states that "[e]*xcept as otherwise provided by statute* . . . [a] public entity is not liable for an injury [which] . . . arises out of an act or omission of the public entity or a public employee or any other person." CAL. GOV'T CODE § 815 (West 1980) (emphasis added). Conversely, section 2100 of the Civil Code provides that a carrier of persons for reward must use the utmost care for the safety of the passengers, and must exercise that care with reasonable skill. CAL. CIV. CODE § 2100 (West 1985).

The court examined these statutes and prior case law imposing liability upon public corporations and came to the conclusion that Civil Code section 2100 is an express statutory exception to the general

grant of immunity in Government Code section 815. Therefore, the court held that RTD was not immune from liability if it had in fact failed to exercise a sufficient degree of care.

Even though common carriers must exercise a high degree of care, the court stated that they are not insurers of passenger safety. The degree of care and diligence which they must exercise is only that which can be reasonably exercised in light of the mode of transportation and the practical operations of the carrier. *See* 11 Cal. Jur. 3d *Carriers* § 63 (1974). Nonetheless, the duty imposed upon carriers includes the responsibility to use reasonable efforts to protect passengers from assaults by other riders. *Terrell v. Key System*, 69 Cal. App. 2d 682, 159 P.2d 704 (1945). In affirming the *Terrell* decision, the court noted that this majority rule is supported by virtually all courts and commentators.

RTD asserted three defenses to possible liability. First, it claimed that imposing the duty to protect passengers from criminal assaults would create an undue financial burden upon the transit system. They argued that nothing short of an armed security force could be expected to effectively curb criminal violence on board its buses.

The court rejected this argument stating that the duty to exercise reasonable care in protecting passengers is not the functional equivalent of requiring armed security on every bus. On the contrary, there are a number of actions which the court suggested might be sufficient to fulfill the carrier's obligation. For example, the driver could, in appropriate situations, warn unruly passengers to quiet down or get off the bus. A two-way radio could be provided to allow the driver to summon help from police or RTD security. Alarm lights could be installed on the outside of the bus to alert the police of an emergency, and bus drivers could be trained to recognize and handle potentially volatile situations.

The court did not make these recommendations, however, to suggest that such actions would always be sufficient to absolve the common carrier, or that a failure to do any or all of the actions would result in liability. The court was only listing precautionary measures which a carrier could take, and would impose little, if any, financial hardship.

Second, RTD asserted that there could be no duty to protect passengers from third party assaults because there was no special relationship between the transit district and the riders. The court flatly rejected this contention. The court stated that a common carrier has a special relationship with its passengers by the very nature of the business in which they are engaged, whether or not the customer detrimentally relies upon the carrier. *See Peterson v. San Francisco Community College District*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal.

Rptr. 842 (1984) (special relationship between college administration and students); *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (special relationship between psychiatrist and patient). *But cf. Williams v. State*, 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983) (police officer and motorists have no special relationship giving rise to an affirmative duty).

Third, the court rejected arguments by RTD that they were immune from liability under other statutory provisions. *See* CAL. GOV'T CODE §§ 820.2 (West 1980) (no liability for negligent exercise of discretionary authority); *id.* § 845 (no liability for failure to provide adequate police protection). These contentions were rejected on the basis of the statutory duty of care imposed upon common carriers in Civil Code section 2100. Because the court deemed section 2100 to be a statutory exception to government tort immunity, RTD was given no shield of protection by the Government Code provisions.

The court concluded that all carriers, public or private, have a duty of utmost care and diligence to protect their riders from assaults by fellow passengers. The court reiterated that carriers will not be strictly liable for all harm suffered by a passenger at the hands of others. Liability will be imposed only in those situations where the carrier knows or should have known that an assault was likely to occur, and it had the ability, in the exercise of reasonable care, to prevent the injury.

Although the court ruled against RTD on its claims of governmental tort immunity based upon the Government Code provisions, the ruling was a limited one. The holding was based only upon appeal of a demurrer. During discovery it may be possible for RTD to unfold facts that support their claim of immunity. The court decided only that the complaint was sufficient to show the existence of a duty owed to the plaintiffs, and that Government Code sections 820.2 and 845 did not bar the action.

JAMES B. BRISTOL

XIII. REAL PROPERTY LAW

A. *In a commercial lease which conditions assignment on the prior consent of the lessor, consent may not be unreasonably or arbitrarily withheld:* **Kendall v. Ernest Pestana, Inc.**

In *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 709 P.2d 837, 220

Cal. Rptr. 818 (1985), the court, in a case of first impression, was faced with the issue of whether an assignment consent clause gives a commercial lessor absolute discretion to withhold consent to an assignment of a lease. Taking the position held by a minority of the state courts, the court held that there was an implied reasonableness standard in the consent clause and that consent could not unreasonably be withheld unless the lessor has a valid objection to the assignee or the proposed use.

The original lessee and the prospective lessee, Kendall, initiated suit to compel the lessor, Ernest Pestana, Inc., to consent to an assignment of the lease. The lease contained a provision which required written consent of the lessor in order to assign the lease. The lease also stated that failure to obtain such consent rendered the lease voidable. From this the lessor asserted an absolute right to arbitrarily and unreasonably refuse consent, and attempted to use the consent provision to obtain increased rent and additional terms. As a result, the potential assignees claimed that the lessor's arbitrary refusal to consent to the assignment of the lease was an unreasonable and unlawful restraint on alienation.

At trial the lessor demurred to the lessee's complaint and admitted that its refusal was arbitrary and capricious. The trial court sustained the lessor's demurrer without leave to amend. The court of appeal affirmed this decision and applied the majority common law rule that where an assignment clause conditions assignment on the consent of the lessor, the lessor may withhold consent arbitrarily and without regard to the qualifications of the proposed assignee, unless there is a provision in the lease which provides that consent may not be unreasonably or arbitrarily withheld. *Kendall v. Ernest Pestana, Inc.*, 163 Cal. App. 3d 11, 209 Cal. Rptr. 135 (1984).

The supreme court reversed and adopted the minority rule, finding that the policy reasons espoused by Ernest Pestana, Inc. in support of the majority rule were no longer compelling. The decision to reject the majority rule was based on the dual nature of a lease in contemporary society as both a conveyance of a leasehold interest and a contract.

First, the court recognized that the rationale behind the majority rule allowing arbitrary withholding of consent by lessors was to protect the lessor by giving him a necessary element of control over his property and the parties to whom he must look to for performance of the lease. However, the court found that in modern society this concern is no longer of greater importance than the ban against unreasonable restraints on alienation. CAL. CIV. CODE § 711 (West 1982). To bolster its decision, the court noted that several other jurisdictions, both statutorily and judicially, have adopted the minority rule

and that the minority rule is the position taken by the Restatement. *Restatement (Second) of Property* § 15.2(2) (1977).

Second, the contractual nature of a lease and the increased recognition of the duty of good faith and fair dealing inherent in all contracts led the court to find that, where a lessee is entitled to assign his interest but has agreed to first obtain the lessor's consent, the lessee has a contractual right to expect that consent will be exercised in accordance with reasonable good faith standards.

The court then focused on the determination of when a lessor's refusal to consent to assignment is reasonable. Although the court held that denial based on personal taste and denial in order to raise rent were commercially unreasonable, the ultimate determination was determined to be a question of fact. Thus, the court in *Kendall*, by adopting the minority rule, has joined the growing trend to value the commercial lessee's right to assign or sublease over the lessor's right to withhold consent at will.

CHRISTIE A. MOON

B. *Where HUD takes over a project because permit obtainer defaults on federally insured financing, and subsequently sells the project, a conditional use permit is not applicable to the present owners of the property:* Sports Arenas Properties, Inc. v. City of San Diego.

In *Sports Arenas Properties, Inc. v. City of San Diego*, 40 Cal. 3d 808, 710 P.2d 338, 221 Cal. Rptr. 538 (1985), the supreme court overturned an injunction which restricted the plaintiffs, owners of an apartment complex, from renting their apartments to anyone except senior citizens on a non-profit basis. The court determined that the conditional use permit, which was formerly obtained by a nonprofit organization for the purpose of constructing nonprofit senior citizen apartments, did not limit plaintiffs in their use of the apartments because of subsequent transfers of ownership.

The Foundation for Specialized Group Housing applied to the City of San Diego for a conditional use permit to construct a nonprofit senior citizen apartment complex. The plans were approved and the conditional use permit was issued but not recorded. *See* 66 Cal. Jur. 3d *Zoning and Other Land Use Controls* §§ 127, 128 (1981); 82 Am. Jur. 2d *Zoning and Planning* § 281-87 (1976 & Supp. 1985). However, the Foundation did not follow through on its plans. The complex was ultimately built by Universal City, Inc., a profit-making corporation

with private financing, and insured under section 221 of title II of the National Housing Act. 12 U.S.C. § 1715(l) (1982). The developers subsequently defaulted on this federally insured financing, and the Department of Housing and Urban Development (hereinafter HUD) took over and operated the complex for three years, renting the property to people twenty one and over.

The property was eventually refinanced by the plaintiffs, who later applied to the City to convert the apartments into condominiums. When their application was denied, they initiated this action to compel the City to approve the conversion. The City filed a cross-complaint seeking an injunction, which the trial court granted.

A conditional use permit is required when a use desired and permitted could be incompatible with the applicable zoning. *See County of Imperial v. McDougal*, 19 Cal. 3d 505, 564 P.2d 14, 138 Cal. Rptr. 472 (1977). Thus, a permittee may make whatever uses of the property the zoning ordinance allows, along with those uses authorized by the permit, but nothing more or nothing less. *See* 101A C.J.S. *Zoning and Land Planning* §§ 228-233 (1979); 5 B. Witkin, *Constitutional Law* §§ 465-480 (8th ed. 1964 & Supp. 1984).

The court rejected the plaintiffs' contention that the nonprofit and senior citizen requirements were not expressly enumerated as conditions, but were mentioned only to describe the project, and thus, should not be limitations. The court held that the uses of the property, after the permit was issued, were limited to those allowed by the zoning ordinance and those authorized by the permit, which stated that the building was to be "a nonprofit senior citizen housing project."

The court also found that, when read in light of its application, the conditional use permit was not vague, uncertain, or unambiguous, but was clear as to its terms because the permit incorporated the provisions of section 231 of the Federal Housing Act. 12 U.S.C. § 1715(v) (1982). Nevertheless, the court could not sustain the injunction on the basis of the permit.

The court found that because the permit incorporated the provisions of section 231, it had incorporated the provision which allowed HUD to sell property in its discretion to profit-making organizations to protect the financial interests of the government. 12 U.S.C. § 1715(l) (1982). The court reasoned that plaintiffs were, therefore, not in violation of any HUD restrictions.

The court concluded that the original owners did not build or operate the project in accordance with the permit. The failure of the developer to comply with the permit did not, however, justify regulations other than those provided for by the permit because the present owners did not fail to comply with the permit. Furthermore,

the subsequent events made the failure to comply with the permit insubstantial. Therefore, the judgment enjoining plaintiffs from renting, except to senior citizens on a nonprofit basis, was reversed.

MARIE P. HENWOOD

XIV. SECURED TRANSACTIONS

Interest of a bona fide purchaser of a vehicle subject to registration under the Vehicle Code prevails over a technically perfected security interest not disclosed on the certificate of ownership: **T & O Mobile Homes, Inc. v. United California Bank.**

In *T & O Mobile Homes, Inc. v. United California Bank*, 40 Cal. 3d 441, 709 P.2d 430, 220 Cal. Rptr. 627 (1985), the supreme court held that a bona fide vehicle purchaser has priority over a perfected security interest which is not listed on the ownership certificate. Pursuant to the actual notice system employed by the vehicle code, a purchaser may rely solely on the certificate of ownership. Because the lender was responsible for insuring that the security interest was actually recorded and listed on the certificate of ownership, the court held that the lender should sustain the loss.

The Morgans obtained a personal loan from United California Bank (hereinafter UCB) to finance the purchase of a mobile home. UCB, which retained a security interest in the mobile home to secure repayment, mailed a request to the Department of Motor Vehicles (hereinafter DMV) to issue a new certificate identifying UCB as the legal owner. However, the DMV erroneously mailed a new certificate which failed to state that UCB was the legal owner. The Morgans subsequently sold the mobile home to T & O Mobile Homes, Inc. without informing them of UCB's security interest. When the DMV issued another certificate, correctly identifying UCB as the legal owner, UCB demanded possession of the mobile home. T & O then brought this action against the bank to have it declared the legal owner and to enjoin the bank from repossessing the mobile home. The trial court entered a judgment declaring UCB as the legal owner and the supreme court reversed.

Pursuant to the commercial code, a security interest attaches when the following conditions have been satisfied: 1) there is an express or implied agreement that the security interest attach; 2) value must be given; and 3) the debtor has rights in the collateral. *See* CAL. COM.

CODE § 9203 (West Supp. 1986). Once a security interest has attached, it must be perfected in order to be effective against creditors and purchasers of the collateral. Generally, an attached security interest is perfected when a financing statement has been filed in the office under the secretary of state. *Id.* § 9401. Thus, under the constructive notice system, a purchaser must check a centralized system to determine whether a security interest has been recorded.

However, at the time of the transaction, perfection of security interests in mobile homes was governed by section 6301 of the Vehicle Code. CAL. VEH. CODE § 6301 (West Supp. 1986). This section, which relies on actual notice, requires that the secured party register directly with the DMV. Therefore, since all security interests are identified on the vehicle's certificate of ownership, a party may rely solely on this certificate.

The principal dispute was whether T & O, a bona fide purchaser, or UCB, which maintained a perfected security interest, should sustain the loss. In resolving this dispute, strong emphasis was placed on T & O's right to rely solely on the certificate of ownership presented by the Morgans. Since the certificate of ownership did not list any security interests, T & O did not have a duty to investigate the DMV's records. Further inquiry is required only if the seller is unable to produce a certificate of ownership.

This holding applies to transactions involving vehicles subject to registration under the vehicle code and to mobile home transactions occurring prior to July 1, 1981. On this date, the registration of mobile homes became subject to the Department of Housing and Community Development. The registration procedures are set forth in the Health and Safety Code. *See* CAL. HEALTH & SAFETY CODE §§ 18000-18124.5 (West 1984 & Supp. 1986). The new statutory scheme provides for constructive rather than actual notice. Thus, since July 1, 1981, a prospective purchaser of a mobile home can no longer rely on the certificate of ownership. A purchaser now has a duty to search the centralized housing system.

TAMI J. TAECKER

XV. TORTS

Pharmacies are immune from strict liability in tort and the market share theory was held inapplicable to a manufacturer with only a ten percent market share: **Murphy v. E.R. Squibb & Sons, Inc.**

I. INTRODUCTION

In *Murphy v. E.R. Squibb & Sons, Inc.*,[1] the supreme court held that pharmacies are immune from strict liability in tort because pharmacists provide professional services in contrast to merely facilitating a sale.[2] The court also held that a ten percent share of the DES market was not substantial enough to allow the plaintiff to recover under the market share doctrine articulated in *Sindell v. Abbott Laboratories*.[3] Because the jury held that Squibb was not in fact the manufacturer of the drug, the plaintiff was denied recovery on all of her claims.[4]

This case arose after Christine Murphy filed a complaint alleging that the drug DES,[5] taken by her mother in 1951 and 1952 to prevent a miscarriage, was the current cause of her clear cell adenocarcinoma. She sought damages from both the Exclusive Prescription Pharmacy Corporation and E.R. Squibb & Sons, Inc. on the basis of strict liability for a defectively designed product.[6] The plaintiff initially named Squibb as the manufacturer, but after the *Sindell* decision she amended her complaint to allege that she was not able to identify the manufacturer, but that Squibb should nevertheless be responsible because it supplied a substantial percentage of the market with the drug.[7]

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1. 40 Cal. 3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985). The opinion was written by Justice Mosk with Justice Reynoso concurring. Justices Grodin and Lucas both filed separate concurring opinions. Justice Kaus filed a dissenting opinion, as did Chief Justice Bird. Justices Kaus and Broussard concurred with the Chief Justice.

2. The court analogized pharmacy services to those of blood banks. The legislature has declared that the sale of blood is a service rather than a sale, thus allowing immunity from strict liability in tort. Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977).

3. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

4. The jury returned a special verdict determining that the DES purchased by the plaintiff's mother was not manufactured, processed, or distributed by Squibb. *Murphy*, 40 Cal. 3d at 676, 710 P.2d at 249, 221 Cal. Rptr. at 449.

5. "DES" is the common name for the drug Diethylstilbestrol, which is also known as Stilbestrol.

6. The original complaint named Squibb as the manufacturer and Exclusive as the retailer of the drug.

7. Market share liability is partially based on the risk-spreading theory. Since

II. THE MAJORITY OPINION

The first issue before the court was whether a pharmacy was the type of retailer that should be held strictly liable in tort for injuries caused by a defective product. California case law has consistently held that retailers, as well as manufacturers, are liable for such injuries.[8] The defendant pharmacy claimed, however, that a pharmacist performs a professional service rather than a retail sale, and therefore, should be exempt from strict liability for injuries from defective drugs.[9]

Although this was a case of first impression in California, other states have failed to find pharmacies strictly liable.[10] Since the benefits of prescription drugs outweigh the potential injuries which may occur, unavoidably unsafe drugs are not defective if an adequate warning is provided.[11] The court found that a pharmacist engages in a "hybrid enterprise" by performing services in counseling patients, as well as the actual sale of prescription drugs.[12] The court held that the legislative characterization of a pharmacy as a health service can be closely analogized to a similar characterization of blood transfusions as a type of service exempt from strict liability. Relying on legislative enactments, the court found that making sales would not necessarily mean that a pharmacy should be strictly liable when it performs a service just because a pharmacy is a retailer. Moreover, a pharmacy's "services" are not limited to laboratory tests and injections, but are broadly defined to include the dispensing of drugs.[13]

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each manufacturer gains from the sale of the product to the consumer, it should be responsible for any negative consequences which may result. *See Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

8. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

9. 40 Cal. 3d at 676, 710 P.2d at 249, 221 Cal. Rptr. at 449. Exclusive argued that, just as doctors and hospitals are not liable for faulty drugs or needles because they provide a care service rather than a sale of those items, so too should a pharmacist who provides the care and service in dealing with the drug be exempt from strict liability. *Id.*

10. *See* McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965); Bichler v. Willing, 58 A.D.2d 331, 397 N.Y.2d 57 (1977); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977).

11. These cases rely on the *Restatement of Torts*, which requires a seller to warn of defects he knew or should have known of. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1977).

12. 40 Cal. 3d at 678, 710 P.2d at 251, 221 Cal. Rptr. at 451. The court acknowledged that the pharmacist engages in the business of selling drugs, and that the services performed are only in connection with the sale. *Id.* at 678-79, 710 P.2d at 251, 221 Cal. Rptr. at 451.

13. CAL. BUS. & PROF. CODE § 4046(b)(c) (West Supp. 1986). The court compared this section with Health & Safety Code section 1606, which provides that the distribution of blood and blood products is to be considered a service and not a sale. CAL. HEALTH & SAFETY CODE § 1606 (West 1979).

In finding the pharmacy immune from strict liability for the sale of defective drugs, the court relied on policy considerations which affect prescription drugs. The court reasoned that most pharmacies, as small business operations, would be unable to survive the potential onslaught of lawsuits. This would result in the loss of a range of drugstores and drugs, including experimental drugs now available to the public.[14] The court theorized that the legislature may have intended pharmacies to be exempt from strict liability because the ability to obtain prescription drugs outweighs the "advantage to the individual consumer of being able to recover . . . on a strict liability basis rather than . . . negligence."[15] One commentator has pointed out, however, that strict liability has not made small food dealers extinct, but has forced food retailers to exert a high duty of care. Because retailers can transfer liability to the manufacturers, the argument favoring the retailer over the injured consumer is contrary to the principles of tort liability.[16]

The second issue decided by the court was whether a ten percent share of the consumer market was sufficient to allow recovery based on the *Sindell* market share theory.[17] Under the *Sindell* approach, a plaintiff need not prove which company manufactured the DES causing the injury. However, if enough manufacturers are joined as defendants so that a "substantial share" of the market was represented, damages are apportioned according to each manufacturer's market share.[18] The court held that because Squibb had only a ten percent

14. *Murphy*, 40 Cal. 3d at 680-81, 710 P.2d at 252-53, 221 Cal. Rptr. at 452-53. The court also did not want the pharmacist, who merely fulfills the doctor's order, to bear the burden in the event both the doctor and manufacturer escape liability. *Id.* at 681, 710 P.2d at 253, 221 Cal. Rptr. at 453.

15. *Id.* at 680, 710 P.2d at 252, 221 Cal. Rptr. at 452. The court also feared that druggists might use only the most expensive drugs from the most reputable companies in order to lessen their risks, thereby forcing the consumer to incur higher costs. *Id.* at 681, 710 P.2d at 253, 221 Cal. Rptr. at 453.

16. *See* Comment, *Retail Druggist's Warranty of Drugs*, 15 CLEV.-MAR. L. REV. 285, 291 (1966). Retailers are also able to transfer any losses to the public as a whole instead of having individuals bear the burden of injuries. This is one of the fundamental policies of tort law. Rather than guarding consumers against high drug prices, the concern for human life and safety should require druggists to deal only with legitimate wholesalers offering the maximum in consumer protection against defective drugs. *Id.*

17. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); *see also* Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982).

18. The *Sindell* court held that it was necessary to join as defendants a group of manufacturers having a "substantial share" of the DES market. Market share apportionment was also adopted in New Jersey in a similar case. *See* Ferringo v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980).

market share, there was a ninety percent chance some other company or companies were responsible for the injuries.[19] Therefore, since the plaintiff failed to meet the "threshold" requirements for application of the market share doctrine, and since she could not prove that Squibb had caused the injuries, her claims for relief failed.[20]

III. THE CONCURRING AND DISSENTING OPINIONS

In his concurrence, Justice Grodin noted that pharmacists are already subjected to a strict regulatory scheme that other retailers are not. Furthermore, it would be unfair to hold a pharmacist liable for following the orders of a doctor who is exempt from strict liability.[21] He emphasized that there is nothing in any decision of any state, including California, that either directly or even by analogy suggests that pharmacists selling prescription drugs should be held strictly liable.[22]

Justice Lucas wrote a separate concurring opinion stating that the rule should be that the "sale of a service does not render one liable 'in the absence of negligence or intentional misconduct.' "[23] Justice Lucas further added that since the legislature has specifically held that pharmacists provide services, they cannot be held strictly liable.[24]

Justice Kaus authored a dissenting opinion. He noted that under the *Restatement of Torts*, which has generally held retailers strictly liable, there exists no reason to exempt retail pharmacists because they certainly constitute a link in the marketing chain.[25] He likened prescription drugs to other tools used by doctors and dentists, and concluded that just because such a tool is used in connection with a service, there is no reason to exempt a retailer from liability if the product causes injuries.[26] Under the market share theory, each manufacturer is liable for its proportionate share of the damages. Therefore Justice Kaus argued that failing to join other manufacturers should not defeat the cause of action. He would simply limit plain-

19. For a discussion of whether Squibb should nonetheless have been liable for ten percent of the plaintiff's injuries see Robinson, *supra* note 17, at 752-53.

20. *Murphy*, 40 Cal. 3d at 676, 710 P.2d at 249, 221 Cal. Rptr. at 449.

21. CAL. BUS. & PROF. CODE § 4036(a) (West 1974 & Supp. 1986); *see also* Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971).

22. *Murphy*, 40 Cal. 3d at 686, 710 P.2d at 256, 221 Cal. Rptr. at 456 (Grodin, J., concurring).

23. *Id.* at 687-88, 710 P.2d at 257, 221 Cal. Rptr. at 457 (Lucas, J., concurring).

24. *See* CAL. BUS. & PROF. CODE § 4046(b), (c) (West Supp. 1986).

25. *Murphy*, 40 Cal. 3d at 700-01, 710 P.2d at 267, 221 Cal. Rptr. at 467 (Kaus, J., dissenting). *See* RESTATEMENT (SECOND) OF TORTS § 402(a) comment f (1977).

26. Justice Kaus would not find retailer liability if the manufacturer was found blameless. However, if the manufacturer is found strictly liable, so too should the retailer bear the burden of marketing a defective product.

tiff's recovery to Squibb's market share.[27]

Chief Justice Bird also wrote a dissenting opinion. She would have reversed the judgment in favor of the defendant pharmacy "because every one of the policies served by strict liability would be advanced by applying the doctrine to the sale of a defective prescription drug by a retail druggist. . . ."[28] According to the Chief Justice, strict liability serves as an effective incentive to produce safe products and to spread the loss among all consumers to avoid having individuals incur overwhelming misfortunes.[29] The retailer is best situated to control the risk, to prevent and warn of the danger, and to assume the cost of the injury, all of which would be incentives to design and disseminate safe products. According to the court in *Sindell*, "[t]hese considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal injuries caused by deleterious drugs."[30] The major policies for creating strict liability, which are compensation, incentive, and cost spreading, are not even addressed in the majority opinion even though they are applicable in this case.[31]

Chief Justice Bird also noted that the court's reliance on comment k of the *Restatement of Torts* is an interpretation inconsistent with the seminal strict liability case of *Barker v. Lull Engineering Co.*[32] Comment k assumes that all prescription drugs are unavoidably unsafe, and therefore are not subject to strict liability if there is an adequate warning. The court in *Barker*, on the other hand, held that strict liability can attach if a product is unsafe, even upon hindsight, if the defective design caused the injury, and if the benefits do not outweigh the risks.[33] Furthermore, the court had previously reached a conclusion contrary to the Restatement, and therefore should rely on the *Barker* reasoning to find DES a defective product under a strict liability theory.[34]

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27. *Murphy*, 40 Cal. 3d at 701-02, 710 P.2d at 267-68, 221 Cal. Rptr. at 467-68 (Kaus, J., dissenting).

28. *Id.* at 639, 710 P.2d at 258, 221 Cal. Rptr. at 458 (Bird, C.J., dissenting).

29. *Id.*

30. *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 145.

31. Both the *Sindell* and the *Escola* courts identified these policy considerations. *See id.*; Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

32. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). *See also* RESTATEMENT (SECOND) OF TORTS § 402(a) comment k (1977).

33. *See generally* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

34. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

Chief Justice Bird criticized the court's conclusion that a pharmacist performs a service when, as the majority clearly states, the service is incidental to the sale.[35] The court claimed that the pharmacist is a highly skilled professional, but then discounted any professional responsibility by claiming that the prescriptions are merely filled on the order of a doctor.[36] She also found fault with the statutory comparisons because a blood transfusion is clearly "not to be considered a sale" and no such comparable language exists for the transfer of a prescription drug.[37]

Finally, Chief Justice Bird added that there was no evidence to show that imposing strict liability on a retail pharmacy would put them out of business, leave thousands of persons without essential drugs, or raise the prices so high as to confer great hardships. For example, auto retailers remain in business, and automobiles are available at affordable prices even though those retailers have been subject to strict liability since 1964.[38] Therefore, Chief Justice Bird would hold the retail pharmacy responsible for shouldering the burden of strict liability and not the injured consumer.

IV. CONCLUSION

A sharply divided court did not allow the plaintiff to recover against either the pharmacy which dispensed the drug or a manufacturer who had ten percent of the market share of the product. The court reached this decision despite the fact that other types of retailers have been subject to strict liability claims for over twenty years, and despite the five year old doctrine of market share liability. The court offered no reasoning as to why the plaintiff could not collect against Squibb for ten percent of her damages in relation to their ten percent of the market other than the fact that manufacturers with a substantial share of the market were not joined. Nor did the court adequately address the plaintiff's inability to name the manufacturer. This contrasts its previous acceptance of a recovery based on a market share. The court did not even attempt to reconcile its decision with previous policies of allowing the closest link, the retailer, to be sued in order to spread the cost and diminish the individual burden.

35. *Murphy*, 40 Cal. 3d at 678-79, 710 P.2d at 251, 221 Cal. Rptr. at 451 (Bird, C.J., dissenting).

36. *Id.*

37. *See* CAL. BUS. & PROF. CODE § 4046 (West 1984 & Supp. 1986); CAL. HEALTH & SAFETY CODE § 1606 (West 1979 & Supp. 1986).

38. *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

This decision is a definite step backward in California's previously progressive products liability trend.

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