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California Supreme Court Survey - A Review of Decisions: August 1984-November 1984

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California Supreme Court Survey
August 1984-November 1984

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 and judicial misconduct cases have been omitted from the survey.

I. CIVIL PROCEDURE

A. *When a case is submitted to jury for special verdicts, all jurors may participate in each special verdict:* Resch v. Volkswagen of America, Inc.

In *Resch v. Volkswagen of America, Inc.*, 36 Cal. 3d 676, 685 P.2d 1178, 205 Cal. Rptr. 827 (1984), the supreme court was asked to untangle a mathematical riddle created when jurors in a personal injury action were inconsistent among themselves on special verdicts for an automobile manufacturer. The court, in holding that all jurors may participate in each special verdict, attempted to avoid the potentially anomalous effects of applying an "identical nine" rule in multiple issue cases.

In *Resch,* the jury passed special verdicts on three issues related to manufacturer liability. All jurors agreed the automobile was free of design defects, nine of the twelve found a manufacturing defect, but ten of the twelve found that the manufacturing defect was not a substantial factor in causing the plaintiff's injury. Only seven of the jurors finding a manufacturing defect also found that the defect was not a substantial factor in the injuries, meaning that three of the ten jurors voting on the substantiality issue had concluded there was no defect in the automobile at all. The plaintiff moved for a mistrial on the theory that the verdict was improper unless the identical nine jurors who found there was a manufacturing defect also found a lack of causation.

The anomaly lay in the fact that the following results were possible in a multiple issue trial if the "identical nine" rule was applied. A finding in favor of the plaintiff on the first issue by nine of twelve jurors would require the same nine to agree on the second issue in order to render judgment for the plaintiff. The three dissenting jurors would be deprived of one-half their voting power on the second issue since a vote for the plaintiff on the second issue would have no effect as only the initial nine jurors could make any difference as to the second issue. However, a vote for the defendant on the second issue might have an effect since any swing vote from the original majority would destroy the plaintiff's verdict.

To avoid this situation, the court held that all jurors could participate in deliberations on all issues and that for a verdict to be ren-

dered for a party, it was not necessary for the identical nine jurors to agree on all issues of the trial. In so holding, the court relied heavily on the reasoning outlined in *Juarez v. Superior Court,* 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982).

In *Juarez,* the supreme court held that there was no reason to adhere to an "identical nine" rule since such a rule would operate to deny the parties to a lawsuit the right to a jury of twelve persons deliberating on all issues. Allowing all twelve jurors to deliberate on all issues would also further a policy of judicial efficiency, avoiding hung juries.

The effect of this decision will be to allow jurors to participate in all aspects of jury deliberations, streamlining the trial process and avoiding hung juries.

B. *Civil Code section 394 allows appointment of a neutral judge to resolve a trust issue where residence and doing business requirements are met:* San Francisco Foundation v. Superior Court.

In *San Francisco Foundation v. Superior Court,* 37 Cal. 3d 285, 690 P.2d 1, 208 Cal. Rptr. 31 (1984), a unanimous supreme court, pursuant to Civil Code section 394, granted a writ ordering the superior court to appoint a disinterested judge from a neutral county to resolve a trust issue.

The petitioner, trustee of a foundation, sought to modify the terms of a charitable testamentary trust established for a specific county. The county responded by opposing the modifications and sought the removal of the trustee. The trustee, in turn, filed a motion for the transfer of the trust proceedings to a neutral county, or in the alternative, appointment of a disinterested judge from a neutral county to hear the trust issues.

Over the objections of the county, the supreme court held that sections 1123.5 and 1123.7 of the Probate Code did not preclude an application of section 394 of the Civil Code. Section 394 provides that, whenever an action or proceeding is brought by a county against a corporation doing business in another county, the action or proceeding must be, on motion of either party, transferred to another county or, if the action or proceeding is one in which a jury is not a matter of right, in lieu of transferring the case, the court in the original county may request the chairperson of the judicial council to assign a disinterested judge from a neutral county to hear the proceedings.

The court first concluded that the proceeding was one in which a jury was a matter of right. It then determined that the litigation between the county and foundation over whether to modify the trust was a "proceeding brought by the county." Although the foundation

was the first party to file documents in the case, the court concluded it had not filed against the county, but had merely requested instructions from the probate court. Inasmuch as it was the county that filed documents in opposition to the petition, and for removal of the trustee, the county had "brought" the action against the petitioner.

Moreover, the court determined that the foundation qualified as "a resident of another county." This residency requirement had been met because the trustee had filed a statement with the secretary of state under Corporations Code section 24003, listing its office in another county as its principal office. The statement was filed the same day the motion for assignment of a disinterested judge was filed, however, the court determined that the right of a moving party for change of venue depended upon conditions existing *at the time the demand is made.*

In addition to a literal compliance with the residence requirement, the nature and extent of the foundation's activities within the forum county were not so involved that the foundation was reasonably likely to be viewed as having a close relationship with the forum county. As the county had created an atmosphere of hostility between the foundation and the beneficiaries of the forum county, the court concluded the foundation was likely to be viewed as an outsider.

Having met the filing and doing business requirements of Civil Code section 394, the supreme court granted the writ requiring the appointment of a neutral judge to preside over the trust issues.

II. CONSERVATORSHIP

Court appointing conservator has continuing jurisdiction over conservatee until discharge: In re **Gandolfo.**

In *In re Gandolfo,* 36 Cal. 3d 889, 686 P.2d 669, 206 Cal. Rptr. 149 (1984), the conservatee, by court order, had been committed to an institution for the gravely and developmentally disabled pursuant to the provisions of the Lanterman-Petris-Short (LPS) Act, CAL. WELF. & INST. CODE §§ 5000-5500 (West Supp. 1984). Thereafter, on several occasions, he sought release by another trial court also having jurisdiction. That court eventually granted the conservatee's request for a writ of habeas corpus.

In determining whether it was proper for a trial court to grant a writ of habeas corpus in the face of an order by another trial court, the supreme court placed great reliance upon *Browne v. Superior*

Court, 16 Cal. 2d 593, 107 P.2d 1 (1940). As a result, the court held that where several courts have concurrent jurisdiction in a guardianship proceeding, the first one to assume and exercise jurisdiction acquires exclusive jurisdiction.

Additionally, the court held that the LPS Act provided adequate statutory review mechanisms. Other appropriate remedies are provided under the LPS Act, therefore, habeas corpus was not a proper remedy.

Accordingly, the order granting habeas corpus was reversed.

III. CONSTITUTIONAL LAW

Proposed ballot initiative for a balanced federal budget amendment held unconstitutional: **AFL-CIO v. March Fong Eu.**

I. INTRODUCTION

In *AFL-CIO v. March Fong Eu,*[1] the petitioners petitioned the supreme court for writs of mandate to prevent the Secretary of State from instituting measures preparatory to placing on the November, 1984 ballot an initiative measure entitled Balanced Federal Budget Statutory Initiative. The purpose of the proposed initiative was to compel the California Legislature, on penalty of loss of salary, to apply to Congress to convene a constitutional convention for the sole purpose of amending the United States Constitution to require a balanced federal budget.[2] In the event that the legislature failed to act, the Secretary of State would be obligated to apply directly to Congress on behalf of the people of California.[3]

The supreme court, in determining whether to issue the writs of mandate, examined the propriety of the initiative in view of article V of the United States Constitution[4] and article II, section 8 and article

1. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89, *stay denied sub nom.* Uhler v. AFL-CIO, 105 S. Ct. 5 (1984). Opinion by Broussard, J., with Bird, C.J., Mosk, Reynoso and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J. Separate dissenting opinion by Lucas, J.

2. *Id.* at 691, 686 P.2d at 611, 206 Cal. Rptr. at 91.

3. *Id.*

4. The proposed initiative was brought pursuant to article V of the United States Constitution, which provides two alternative means of proposing constitutional amendments. It provides in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.
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> . . .

U.S. CONST. art. V.

IV, section 1 of the California Constitution.[5]

II. BACKGROUND

In recent years, the need for a balanced federal budget has been of utmost concern to many Americans. The enactment of a constitutional amendment requiring a balanced federal budget has been urged by President Reagan and many others.[6] While numerous bills have been introduced in Congress, none have been approved and submitted to the states for ratification.[7]

Proponents of a constitutional amendment requiring a balanced federal budget sought to avoid the necessity for congressional approval by resorting to the alternative method of proposing constitutional amendments by a convention called upon application of two-thirds of the states.[8]

Proponents in California have regularly introduced resolutions to the legislature calling for a convention to propose a balanced budget amendment.[9] While the legislature has held hearings on these measures, it has declined to approve any resolution for a constitutional convention.[10] Supporters of a balanced budget amendment now seek to compel action by the California Legislature by popular initiative.[11]

III. ANALYSIS

A. Propriety of Preelection Review

Preliminary to addressing the constitutional propriety of the proposed ballot initiative, the supreme court examined whether a preelection review was the proper time to address the constitutional challenges to the initiative. Absent some clear showing of invalidity, it is the general rule to deter from constitutional review and other challenges to a ballot initiative until after the electoral process in or-

5. Article II, section 8 of the California Constitution states in pertinent part: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Article IV, section 1 of the California Constitution states: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

6. 36 Cal. 3d at 691, 686 P.2d at 611, 206 Cal. Rptr. at 91.

7. *Id.* at 691-92, 686 P.2d at 611, 206 Cal. Rptr. at 91.

8. *See supra* note 4 and accompanying text.

9. 36 Cal. 3d at 692, 686 P.2d at 612, 206 Cal. Rptr. at 92.

10. *Id.*

11. *Id.*

der to permit the exercise of the people's franchise.[12] Where the *power*[13] of the people to enact the proposal in the first place is in issue, rather than the *substance*[14] of the initiative, preelection review is proper inasmuch as, if the initiative is invalid, it must be excluded from the ballot.[15]

Since the petitioner's challenge involved the *power* of the people to adopt the proposed initiative under article V of the United States Constitution[16] and article II, section 8 of the California Constitution,[17] preelection review of the proposed balanced budget initiative was proper.[18]

B. Issues Arising under Article V of the United States Constitution

The court first briefly discussed the contention raised by amici curiae that none of the federal constitutional issues raised were justiciable as "[t]he [amending] process itself is 'political' in its entirety from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[19] Contrary to the argument presented by amici, the court found authority in the case of *Hawke v. Smith*[20] for the provision that a court can remove a proposal from a state election ballot on the ground it does not conform to article V.[21]

Concluding, therefore, that the issues raised by the petitioners were indeed justiciable, the court turned to the task of interpreting

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12. Brosnahan v. March Fong Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982). This "general rule favoring postelection review contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election . . . . If the measure passes, there will be ample time to rule on its validity. If it fails, judicial action will not be required." Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 666, 669 P.2d 17, 20, 194 Cal. Rptr. 781, 784-85 (1983).

13. *See, e.g.*, Simpson v. Hite, 36 Cal. 2d 125, 129-34, 222 P.2d 225, 228-30 (1950); Fishman v. City of Palo Alto, 86 Cal. App. 3d 506, 509-12, 150 Cal. Rptr. 326, 327-29 (1978).

14. *See, e.g.*, Farley v. Healey, 67 Cal. 2d 325, 328-29, 431 P.2d 650, 652-53, 62 Cal. Rptr. 26, 28-29 (1967).

15. *Brosnahan*, 31 Cal. 3d at 7, 641 P.2d at 202, 181 Cal. Rptr. at 102 (Mosk, J., concurring and dissenting). *See also Deukmejian*, 34 Cal. 3d at 666-67, 669 P.2d at 20-21, 194 Cal. Rptr. at 784-85.

16. *See supra* note 4 and accompanying text.

17. *See supra* note 5 and accompanying text.

18. 36 Cal. 3d at 696, 686 P.2d at 614-15, 206 Cal. Rptr. at 94-95.

19. Coleman v. Miller, 307 U.S. 433, 459 (1939) (Black, J., concurring). *But see* Idaho v. Freeman, 529 F. Supp. 1107, 1123-46 (D. Idaho 1981), *vacated as moot sub nom.* National Org. of Women v. Idaho, 459 U.S. 809 (1982); Dyer v. Blair, 390 F. Supp. 1291, 1299-1303 (N.D. Ill. 1975); Note, *Good Intentions, New Inventions, and Article V Constitutional Conventions*, 58 TEX. L. REV. 131, 158-62 (1979) (discussing *Coleman v. Miller*).

20. 253 U.S. 221 (1920).

21. *Id.*

whether the language of article V permitted the adoption of a resolution for a balanced federal budget by the people.

Article V provides that "[t]he Congress . . . on the Application of the *Legislatures* of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[22] Additionally, the term "Legislatures" also appears in that portion of Article V which specifies that an amendment becomes "valid to all Intents and Purposes . . . when ratified by the *Legislatures* of three fourths of the several states."[23]

In determining whether the term "Legislatures" as used in article V referred to a representative body selected by the people of a state or to the people of a state, the supreme court relied on the rationale and holdings enunciated in *Barlotti v. Lyons*[24] and *Hawke v. Smith*[25] that "Legislatures" referred to a representative body chosen by the people. It was noted that "in view of the initiative and referendum provisions, [wherein] the people of the state may constitute a part of the law making power of the state, they certainly are not a part of 'the legislature' within the meaning of that term as used in our [California] constitution."[26] Further evidence that the term "Legislature" did not mean the people of a state was found in a review of the use of the term in the United States Constitution. Both *Hawke* and *Barlotti* observed that in all cases it clearly appeared "Legislatures" meant a legislative body.[27]

Lastly, although the cases which construed the term "Legislatures" referred to the role of the legislature in ratifying, not in proposing,

22. U.S. CONST. art. V (emphasis added). *See supra* note 4 and accompanying text.

23. U.S. CONST. art. V (emphasis added).

24. 182 Cal. 575, 189 P. 282 (1920).

25. 253 U.S. 221 (1920).

26. 182 Cal. at 578-79, 189 P. at 283-84.

27. 253 U.S. at 227-28; 182 Cal. at 579-81, 189 P. at 283-84. Article I, section 2 prescribes the qualifications of electors of congressmen as those "requisite for electors of the most numerous branch of the state legislature;" former article I, section 3 provided that senators should be chosen in each state by the legislature thereof. This was the method of choosing senators until the adoption of the seventeenth amendment, which made a provision for the election of senators by vote of the people; article IV requires the United States to protect every state against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened; article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States; in article I, section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be; article IV, section 3 provides that no new states shall be carved out of old states without the consent of the legislatures of the states concerned.

constitutional amendments, the court held the term "Legislatures" bore the same meaning throughout article V.[28]

Since section 3 of the proposed Balanced Budget Initiative stated that the *people* adopt a resolution calling for a constitutional convention, and stated that in the event the legislature failed to adopt the resolution within forty legislative days, the Secretary of State was obligated to transmit the resolution adopted by the people, it appeared clear to the court that the method prescribed in article V had not been followed.[29]

While the people could not directly adopt a resolution calling for a Balanced Federal Budget Amendment, the court did observe that the initiative called for direct action by the people *if* the legislature failed to act.[30] The main thrust of the initiative was to command the legislature to adopt a resolution applying for a constitutional convention. The issue then became whether pro forma action by a state legislature, acting under the mandate of an initiative measure, was sufficient to comply with article V.[31] This question was answered in the negative. Acting upon the analysis of the federal Constitution set out in *Barlotti*[32] and *Hawke*,[33] the supreme court concluded that "a state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention. . . . Under article V, the legislators must be free to vote their own judgment, being responsible to their constituents through the electoral process."[34] To the extent that the initiative mandated the *California Legislature* to apply to Congress for a constitutional convention, it violated article V of the United States Constitution.[35]

C. Issues Arising Under the California Constitution

In determining whether the Balanced Federal Budget Initiative passed scrutiny under the California Constitution, the supreme court first looked to article IV, section 1, which provides: "[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."[36]

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28. 36 Cal. 3d at 703-04, 686 P.2d at 620, 206 Cal. Rptr. at 100. *See also* Bonfield, *Proposing Constitutional Amendments by Convention*, 39 NOTRE DAME L. REV. 659, 665 (1963-64); Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 889 (1968).
29. 36 Cal. 3d at 703-04, 686 P.2d at 620, 206 Cal. Rptr. at 100.
30. *Id.* at 704, 686 P.2d at 620, 206 Cal. Rptr. at 100.
31. *Id.*
32. *See supra* note 24 and accompanying text.
33. *See supra* note 25 and accompanying text.
34. 36 Cal. 3d at 706, 686 P.2d at 622, 206 Cal. Rptr. at 102.
35. *Id.*
36. CAL. CONST. art. IV, § 1.

Article II, section 8, subdivision (a) defines an initiative as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."[37] Article II, section 9, subdivision (a) defines referendum as "the power of the electors to approve or reject statutes."[38]

In view of the above, the question facing the court was whether the Balanced Budget Initiative proposed to adopt a "statute" within the meaning of article II of the constitution.[39] Mindful of the court's "duty to jealously guard the people's right of initiative and referendum,"[40] the supreme court set out to interpret the term "statutes." Although the initiative specifically called for a "resolution," the court's analysis looked beyond the form of a resolution to determine if it was in substance a statute[41] or a resolution.[42]

The court noted that, both historically and modernly, the power of initiative and referendum was limited to such measures as "constituted the exercise of legislative power to create binding law—the kind of measure that would be introduced by a bill, duly passed by both houses of the legislature, and presented to the governor for signature."[43] Having set forth the parameters upon which a "resolution" will be deemed in substance a "statute," the supreme court turned to the three substantive sections of the initiative to determine whether the initiative enacted a "statute." All three sections were deemed invalid.

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37. CAL. CONST. art. II, § 8.

38. CAL. CONST. art. II, § 9(a).

39. 36 Cal. 3d at 708, 686 P.2d at 623, 206 Cal. Rptr. at 103.

40. *Id. See, e.g.,* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978); Associated Home Builders of Greater East Bay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976); San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 210 n.3, 529 P.2d 570, 572 n.3, 118 Cal. Rptr. 146, 148 n.3 (1974), *appeal dismissed,* 427 U.S. 901 (1976); Gayle v. Hamm, 25 Cal. App. 3d 250, 258, 101 Cal. Rptr. 628, 634 (1972); Mervynne v. Acker, 189 Cal. App. 2d 558, 563-64, 11 Cal. Rptr. 340, 344 (1961); Martin v. Smith, 176 Cal. App. 2d 115, 117, 1 Cal. Rptr. 307, 309 (1959).

41. "A statute declares law; if enacted by the Legislature it must be initiated by a bill, passed with certain formalities and presented to the governor for signature." 36 Cal. 3d at 708-09, 686 P.2d at 623, 206 Cal. Rptr. at 103 (citations omitted).

42. A resolution merely expresses the views of the resolving body, and does not require the formalities required to enact a statute. *Id. But see* Hopping v. Council of Richmond, 170 Cal. 605, 150 P. 977 (1915) (wherein a "resolution" which in substance enacted a law was subject to referendum).

43. 36 Cal. 3d at 713-14, 686 P.2d at 627, 206 Cal. Rptr. at 107. *See also* Whittemore v. Terral, 140 Ark. 493, 498-99, 215 S.W. 686, 688 (1919); Opinion of the Justices, 118 Me. 544, 549-50, 107 A. 673, 676 (1919); Decher v. Secretary of State, 209 Mich. 565, 576-77, 177 N.W. 388, 392 (1920); Herbring v. Brown, 92 Or. 176, 180-82, 180 P. 328, 330 (1919).

Section 1 of the initiative mandated the legislature to adopt a resolution calling upon Congress to propose a balanced budget amendment and apply for a constitutional convention. Under the court's analysis, the resolution was "in part a simple declaration of policy, without statutory implementation, and in part a step in a federal process which may eventually lead to amendment of the federal Constitution."[44] It neither created a law nor adopted a statute within the meaning of article II of the California Constitution.

Section 2 of the initiative, which provided that if the legislature did not comply with section 1 within twenty legislative days, the legislators' salary would be suspended, was held by the court to be simply a sanction, and invalid as it was an integral part of section 1.[45]

Lastly, section 3, which provided for the adoption of the resolution by the people, and directed the Secretary of State to transmit the resolution to Congress if the legislature failed to adopt it within twenty days was also invalid under article II as it merely called for the adoption of a resolution and not a statute.[46]

IV. CONCLUSION

As all three sections of the Balanced Federal Budget Initiative failed to adopt a statute within the meaning of article II of the California Constitution, and did not come within the meaning of article V of the United States Constitution, the court issued a peremptory writ of mandate commanding the Secretary of State not to take any action to place the proposed Balanced Budget Initiative on the November 6, 1984, General Election Ballot.[47]

IV. CONTRACT LAW

Court creates cause of action in tort against a party who breaches a contract and then in bad faith denies the contract's existence: **Seaman's Direct Buying Service v. Standard Oil Co. of California.**

I. INTRODUCTION

In *Seaman's Direct Buying Service v. Standard Oil Co. of California,*[1] the supreme court considered whether, and under what circumstances, a breach of the implied covenant of good faith and fair

44. 36 Cal. 3d at 714, 686 P.2d at 627-28, 206 Cal. Rptr. at 107-08.
45. *Id.* at 714-15, 686 P.2d at 628, 206 Cal. Rptr. at 108.
46. *Id.* at 715, 686 P.2d at 628, 206 Cal. Rptr. at 108.
47. *Id.* at 716, 686 P.2d at 629, 206 Cal. Rptr. at 109.

1. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984). Opinion by the court (Mosk, Kaus, Broussard, Reynoso, Grodin, JJ.). Separate concurring and dissenting opinion by Bird, C.J.

dealing in a commercial contract might give rise to an action in tort.[2] The court, over an objection by Chief Justice Rose Bird,[3] declined to extend tort liability based on a breach of the implied covenant; rather, it held that an action in tort may exist when a party breaching a contract seeks to shield itself from liability by a bad faith denial of the existence of the contract.[4] The court reasoned it unnecessary to predicate liability on a breach of the implied covenant.[5]

II. FACTUAL SUMMARY

In the early 1970's, the City of Eureka decided to condemn decrepit waterfront property in order to develop a more modern marina. Appellant Seaman's Direct Buying Service (Seaman's) operated as a dealer in ship supplies and equipment on property which the city sought to condemn and saw the condemnation as an opportunity to expand and modernize its own business. To that end, Seaman's proposed to lease a large portion of the redevelopment area, part of which it would use for its own operations, the other part of which it would sublease to other interests. Seaman's and the City signed an initial lease for a small area, with the understanding that the lease could be renegotiated to include the larger area conditioned upon a showing of financial responsibility by Seaman's to the City. A major element of this condition was Seaman's operation of a modern marine fuel dealership. Seaman's sought agreements with major oil companies and finally reached a letter of agreement, dated October 11, 1972, with Standard Oil Company of California (Standard). This letter was presented to the City and shortly thereafter the City and Seaman's signed a forty-year lease for the entire area Seaman's had sought. Things then took a turn for the worse, prompting this litigation.

At the end of 1972, Standard was forced to adopt a policy restricting new business. Since it as yet had not delivered any marine fuel to Seaman's and was subsequently subject to federal regulations man-

2. *Id.* at 758, 686 P.2d at 1160, 206 Cal. Rptr. at 356.

3. *Id.* at 774, 686 P.2d at 1170, 206 Cal. Rptr. at 366 (Bird, C.J., concurring and dissenting).

4. *Id.* at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

5. Indeed, it is not even necessary to predicate liability on a breach of the implied covenant. It is sufficient to recognize that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.

Id.

dating allocation of petroleum products among present customers, Standard indicated to Seaman's that it could not supply Seaman's with fuel, as it had not supplied Seaman's in 1972. Seaman's was able to obtain a supply order from the controlling federal agency and presented it to Standard, who then began contending that no binding agreement had been reached. Standard appealed the supply order on that basis. The order was withdrawn by the agency and Seaman's appealed that decision and was successful, with the proviso that Seaman's had to provide a court decree that a valid contract existed between Standard and Seaman's. Seaman's asked Standard to stipulate to the existence of the contract since it could not continue operations without fuel during the period of time a trial on the contract issue would take. Standard refused. Seaman's subsequently went out of business and filed this suit.

III. MAJORITY OPINION

The court dealt with two issues preliminary to discussing breach of the implied covenant of good faith and fair dealing. Before a breach of the covenant could occur, the court had to decide whether the letter of agreement of October 11, 1972 was sufficient to satisfy the statute of frauds and additionally, whether intent is an element of a cause of action for intentional interference with contractual relations.

A. Statute of Frauds

Under California Civil Code section 1624,[6] an agreement not to be performed within one year will be deemed invalid unless "some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent."[7] As the court noted, the writing must " 'contain the essential elements of a specific, consummated agreement.' "[8] What is "essential" depends on the agreement itself, the context in which it arose, and the conduct of the parties.[9]

Under the facts in this case, the court easily found that the statute of frauds had been satisfied and that a valid contract existed between the parties.[10] The October 11, 1972 letter of agreement from Standard to Seaman's proposed that: (1) the parties would sign a Chevron Marine Dealer agreement for a ten-year term; (2) Standard would advance the cost of building new fueling facilities; (3) Standard would

6. CAL. CIV. CODE § 1624 (West 1973).

7. *Id.*

8. 36 Cal. 3d at 762, 686 P.2d at 1162, 206 Cal. Rptr. at 358 (quoting Franklin v. Hansen, 59 Cal. 2d 570, 574, 381 P.2d 386, 388, 30 Cal. Rptr. 530, 532 (1963)).

9. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 131 comment g (1981)).

10. "The evidence leaves no doubt a contract was made. The requirements of the statute of frauds were more than adequately met here." *Id.* at 765, 686 P.2d at 1164, 206 Cal. Rptr. at 360.

sell the fuel to Seaman's at a discount from the posted price; and (4) the parties would sign an agreement providing Standard with the right to cure upon default by Seaman's.[11]

Standard contended that the letter was not sufficiently precise in terms of price, parties, and quantity to fulfill the statute of frauds requirements. This argument was easily rejected by the court.[12] The parties were clearly indicated, and the provision for sale of fuel at a discount from the posted price was found to clearly indicate price.

The court found, in addition, that as a dealership agreement, the parties had entered into a contract whereby the seller (Standard) would supply the buyer (Seaman's), with as much fuel as the buyer required. Such an agreement was found to be a requirements contract.[13] Requirements contracts were found to be enforced by courts without much problem.[14] Since they are precise enough to be enforced, they are precise enough to satisfy the statute of frauds.[15]

The court, having determined that the October 11th letter satisfied the Civil Code statute of frauds, then turned its discussion to the statute of frauds requirement of the Uniform Commercial Code (U.C.C.).[16] It was necessary to consider the U.C.C. because the letter evidenced a contract for the sale of "goods."[17] Standard contended once more that the letter failed the U.C.C. version of the statute of frauds because a quantity term was not specified. The court, however, noted that requirements contracts are sufficient to satisfy the

11. *Id.* at 760, 686 P.2d at 1160-61, 206 Cal. Rptr. at 356-57.

12. *Id.* at 763, 686 P.2d at 1162, 206 Cal. Rptr. at 358. The court reasoned that the letter contained the elements of parties and price. The letter "evidences an agreement . . . that Seaman's would become a 'Chevron,' i.e., Standard dealer." *Id.* Thus the court took as evidence that the parties were properly identified. Further, the agreement that the price was to be set by discounting the posted price by 4.5 cents was seen as a price term. *Id.* at 763, 686 P.2d at 1162-63, 206 Cal. Rptr. at 358-59.

13. The court reasoned that as the letter was an agreement that the parties were to enter into a dealership arrangement, "[t]he obvious implication of such an arrangement is that [Standard] will supply as much fuel as [Seaman's] requires." *Id.* at 763, 686 P.2d at 1163, 206 Cal. Rptr. at 359.

14. Fisher v. Parsons, 213 Cal. App. 2d 829, 834, 29 Cal. Rptr. 210, 212-13 (1963).

15. 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-201:113 (3d ed. 1982).

16. CAL. COM. CODE § 2201 (West 1964).

17. 36 Cal. 3d at 764, 686 P.2d at 1163, 206 Cal. Rptr. at 359. The court gave no authority for its statement that fuel or gasoline falls within the definition of "goods" in the U.C.C. In Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 569 P.2d 751, 141 Cal. Rptr. 157 (1977), however, the supreme court dealt with the issue in a footnote, deciding conclusively that gasoline fell within the definition of "goods" in the Commercial Code. *Id.* at 98 n.3, 569 P.2d at 756 n.3, 141 Cal. Rptr. at 162 n.3 (citing Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114, 116 (10th Cir. 1974)).

U.C.C.'s statute of frauds.[18]

B. Intentional Interference with Contractual Relations

The court next considered the role of intent or motive in the tort of intentional interference with contractual relations. Standard contended that the purpose or motive for interfering with Seaman's contract with the City of Eureka was critical in finding liability. Seaman's, on the other hand, asserted that Standard's purpose was irrelevant. Seaman's insisted that a belief to a substantial certainty held by Standard that its acts would interfere with Seaman's contract would be enough to sustain liability. The court rejected both arguments however, stating it felt both parties suffered confusion about the tort.[19]

The court early on described the role of intent in the case of *Imperial Ice Co. v. Rossier*[20] when it said that "[t]he act of inducing the breach must be an intentional one. If the actor had no knowledge . . . of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts."[21] As the court in *Seaman's* properly reasoned, "[i]t is not enough that the actor intended to perform the acts which caused the result—he or she must have intended to cause the result itself."[22] In such an action, therefore, it is essential that the plaintiff plead and prove the defendant intended to induce a breach of contract,[23] or, in the case of an action for interference with prospective economic advantage, the plaintiff must plead and prove "intentional acts . . . designed to disrupt the relationship."[24]

Once the intent of the defendant to interfere is established, the de-

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18. 36 Cal. 3d at 763-64, 686 P.2d at 1162-63, 206 Cal. Rptr. at 359. Since the Statute of Frauds was satisfied, the contract was enforceable. The court affirmed the judgment for Seaman's for breach of contract.

19. *Id.* at 765-67, 686 P.2d at 1164-65, 206 Cal. Rptr. at 360-61.

20. 18 Cal. 2d 33, 112 P.2d 631 (1941). The case involved an action to restrain defendants from inducing the breach of a contract not to compete. The court was asked to decide under what circumstances an action may be had against a defendant who has induced a third party to violate his contract with the plaintiff. *Id.* at 35, 112 P.2d at 632.

21. *Id.* at 37, 112 P.2d at 633 (citing RESTATEMENT OF TORTS § 766 comment e (1939)).

22. 36 Cal. 3d at 765, 686 P.2d at 1164, 206 Cal. Rptr. at 360. The tort has been expanded to include situations where the defendant makes plaintiff's performance "more expensive or burdensome," Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 232, 359 P.2d 465, 469, 11 Cal. Rptr. 97, 101 (1961), or interferes with the formation of a future economic relationship, Buckaloo v. Johnson, 14 Cal. 3d 815, 827, 537 P.2d 865, 870, 122 Cal. Rptr. 745, 750 (1975). This has not had the effect, however, of removing the requirement that the defendant act with culpable intent. 36 Cal. 3d at 766-67, 686 P.2d at 1164, 206 Cal. Rptr. at 360.

23. 36 Cal. 3d at 766-67, 686 P.2d at 1164-65, 206 Cal. Rptr. at 360-61.

24. *Id.* at 766-67, 686 P.2d at 1165, 206 Cal. Rptr. at 361 (citing Buckaloo v. Johnson, 14 Cal. 3d at 827, 537 P.2d at 871-72, 122 Cal. Rptr. at 751-52) (emphasis omitted).

fendant, as an affirmative defense, may plead justification for his actions.[25] Thus, Seaman's was mistaken that intent was not a prerequisite to liability and Standard was mistaken in believing that motive was part of plaintiff's cause rather than an element of defendant's defense. In *Seaman's,* the jury had been given an instruction that the defendant would be deemed to have acted intentionally if it could be shown that it was "substantially certain" that interference with a contractual relationship would result from its actions.[26] This instruction was found erroneous, and the supreme court reversed the judgment for intentional interference with contractual relations, with directions to conduct further proceedings, as it seemed "obvious" to the court that the inducement of the breach was merely an "incidental . . . consequence of Standard's action."[27]

C. Breach of Implied Covenant of Good Faith and Fair Dealing

The most notable of the issues presented to the court was "whether, and under what circumstances, a breach of the implied covenant of good faith and fair dealing in a commercial contract may give rise to an action in tort."[28] The court avoided the question altogether by holding that it was unnecessary to predicate liability on a breach of the covenant. Instead, a party to a contract may expose itself to tort liability when, in order to shield itself from liability for a breach, it denies the existence of the contract in bad faith.[29]

It is not at all clear why or how the court reached this conclusion. In its opinion, the court recognized that the covenant of good faith exists in every contract.[30] In its history, the covenant has given rise

25. This is so because, as the court in *Seaman's* stated, " '[g]iven the intention to interfere with the contract, liability usually will turn upon the ultimate purpose or object which the defendant is seeking to advance.' " 36 Cal. 3d at 766, 686 P.2d at 1165, 206 Cal. Rptr. at 361 (citing W. PROSSER, TORTS § 129 (4th ed. 1971)).

26. 36 Cal. 3d at 767, 686 P.2d at 1165, 206 Cal. Rptr. at 361.

27. *Id.*

28. *Id.* at 767, 686 P.2d at 1166, 206 Cal. Rptr. at 362. It is from this portion of the court's opinion that Chief Justice Bird vigorously dissented, *see infra* note 53.

29. 36 Cal. 3d at 769-70, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

30. *Id.* at 768, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362 (citing 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 576 (8th ed. 1973)). Essentially, the covenant requires that each party refrain from doing anything that will deprive the other from the benefit of the agreement. *Id.* The California courts have recognized the existence of the covenant. *E.g.,* Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 620 P.2d 141, 169 Cal. Rptr. 691 (1979); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). It should be noted that the cases cited herein are those cited by the court, and

to damages in contract for its breach,[31] and in certain circumstances the covenant has given rise to tort damages.[32] The "special relationship" involved in the latter cases was apparently a distinguishing factor between those cases and *Seaman's*.[33] Seaman's argued that a breach of the covenant should not be limited to those of insurance contracts. The supreme court refused to take the bait, arguing that, in effect, the type of "special relationship" which has given rise to tort remedies for breach did not exist in this case.[34] The parties, the court reasoned, were free to agree "upon the standards by which application of the covenant is to be measured."[35] The court did not wish to open a new uncertain area where it might be difficult to distinguish between a breach of the covenant and a simple breach of the contract. To do so might intrude upon the normal expectations of parties to commercial contracts.[36]

Rather than involve itself in such a speculation, the court held that tort remedies may be available when a breaching party tries, in bad faith, to avoid liability for such breach by denying the existence of the contract.[37] The court cited as persuasive authority the Oregon Supreme Court case of *Adams v. Crater Well Drilling, Inc.*,[38] where the court held that punitive, or tort, damages might arise out of the wrongful threat to sue by a defendant with knowledge that he had no rightful claim.[39] The defendant in such a case would be a "wrong-

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that they involve the insured-insurer relationship. This may have proven important to the court, as it found that such relationships involve a "special relationship" between the parties. 36 Cal. 3d at 768-69, 686 P.2d at 1166, 206 Cal. Rptr. at 362 (citing Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d at 820, 620 P.2d at 146, 169 Cal. Rptr. at 696).

31. Brown v. Superior Court, 34 Cal. 2d 559, 212 P.2d 878 (1949); Osbourne v. Cal-Am Financial Corp., 80 Cal. App. 3d 259, 145 Cal. Rptr. 584 (1978); Foley v. U.S. Paving Co., 262 Cal. App. 2d 499, 68 Cal. Rptr. 780 (1968).

32. The seminal cases are Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), and Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). In *Comunale*, the defendant insurance company failed to defend its insured against a claim by the plaintiff for injuries. Additionally, the insurer refused to settle the case. The court, after recognizing that the implied covenant of good faith and fair dealing existed in the contract, noted that it is generally held that, since the insurer controls the litigation it is guilty of bad faith in refusing a settlement. *Comunale*, 50 Cal. 2d at 660, 328 P.2d at 201. Such wrongful refusal to settle is generally treated as a tort, and where the case sounds in both contract and tort, the plaintiff may elect between the actions. *Id.* at 663, 328 P.2d at 203. Tort liability was expressly recognized in *Crisci*. "Liability is imposed . . . for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." 66 Cal. 2d at 430, 426 P.2d at 176, 58 Cal. Rptr. at 16-17.

33. 36 Cal. 3d at 768-69, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63.

34. *Id.* at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

35. *Id.*

36. *Id.*

37. *Id.* "For the purposes of this case it is unnecessary to decide the broad question which Seaman's poses. Indeed, it is not even necessary to predicate liability on a breach of the implied covenant." *Id.*

38. 276 Or. 789, 556 P.2d 679 (1976).

39. *Id.* at 794, 556 P.2d at 681.

doer in a tortious sense."[40] There would be ample reason to apply tort damages in such a case.[41]

The California Supreme Court apparently felt that if Standard had denied the existence of the contract in bad faith to avoid liability, then Standard would be a "wrongdoer in a tortious sense" and subject to tort damages. The court saw little difference between a party who threatened suit without probable cause and knowledge of no rightful claim and a party who "adopts a 'stonewall' position"[42] for no reason, other than to avoid liability. In such a case, the availability of tort remedies would not intrude upon the bargaining relationship or expectations of the parties.[43]

In *Seaman's,* a jury instruction had been given which stated that the law implies a covenant that parties will not deny the existence of a contract since such denial violates the legal prohibition against preventing the other party's realization of benefits of the contract.[44] While it is not a tort to deny existence of a contract if done in good faith,[45] the court found that the jury instruction could lead a juror to find Standard liable for such action. It was, therefore, erroneous. The question remained whether the erroneous instruction required reversal of the judgment against Standard.

Article VI, section 13 of the California Constitution[46] states that error in instructing the jury will be grounds for reversal only after an examination of the entire cause of action leads to the conclusion that the jury instruction resulted in a "miscarriage of justice."[47] The phrase "miscarriage of justice" has been defined in terms of the following test: A miscarriage of justice should only be found where, af-

40. *Id.* In *Adams,* the defendant threatened suit with full knowledge that he had no rightful claim. The jury apparently found that the threat was " 'without probable cause and with no belief in the existence of the cause of action.' " *Id.* The Oregon Supreme Court considered this to be tortious conduct. *Id.*

41. "[T]he same reasons for allowing punitive damages in actions [for damages] for tortious conduct should apply when the action is to recover payment made as a result of essentially tortious conduct." *Id.*

42. Standard refused to discuss the matter of the contract, telling Seaman's it would "see you in court." 36 Cal. 3d at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

43. *Id.* at 770, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

44. *Id.*

45. Sawyer v. Bank of America, 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623, 625 (1978). "[I]t is not a tort for a contractual obligor to dispute his liability under the contract. Rather, the tort of breaching an implied covenant of good faith and fair dealing consists in bad faith action . . . with the motive intentionally to frustrate the obligee's enjoyment of contract rights." *Id.*

46. CAL. CONST. art. VI, § 13.

47. *Id.*

ter examining the entire cause of action, the reviewing court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached without the error.[48] This test is based upon reasonable probabilities rather than mere possibilities.[49]

The supreme court chose to utilize the approach of *LeMons v. Regents of University of California*[50] in determining the prejudicial effect of the jury instruction. A consideration of the five factors considered in *LeMons*[51] led the court to the opinion that the erroneous jury instruction was reversible error, requiring reversal and remand for further proceedings.[52]

Thus, the majority opinion stated the view that a breach of the covenant of good faith and fair dealing will not automatically give rise to an action in tort, but rather that tort liability may be imposed in the rather limited circumstance where a party, in bad faith, denies the existence of a contract to avoid liability. The holding failed to extend tort liability from a breach of the covenant in special relationship contracts to a breach of the covenant in a commercial context. It was from this holding that Chief Justice Bird vigorously dissented.[53]

IV. CONCLUSION

In relying on the Oregon Supreme Court's decision in *Adams v.*

48. People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956).

49. *Id.* at 837, 299 P.2d at 255.

50. 21 Cal. 3d 869, 582 P.2d 946, 148 Cal. Rptr. 355 (1978).

51. *Id.* at 876, 582 P.2d at 950, 148 Cal. Rptr. at 359. The five factors are as follows:

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

Id. (citations omitted).

52. 36 Cal. 3d at 774, 686 P.2d at 1170, 206 Cal. Rptr. at 366.

53. The Chief Justice was concerned that, although the majority recognized a bad faith denial as a tort, the court failed to do so based on past decisions. Further, the majority refused to recognize that, under certain circumstances, a breach of contract may support a tort action for breach of the implied contract. The Chief Justice was of the opinion that the covenant of good faith and fair dealing existed in all contracts and that a tort remedy for its breach could be had in certain contexts not limited to insurance contracts. In determining what conduct a court will find a tortious breach, the courts must focus on the justifiable expectations of the parties. So, while the extent of the implied covenant will vary, the underlying duty it represents exists in all contracts. Chief Justice Bird was of the opinion that cases recognizing a tort remedy based on a breach of the implied covenant did so based on that duty. One basic expectation, the Chief Justice felt, was that a breaching party will compensate for its breach. By denying, in bad faith, the existence of the contract, the breaching party is acting to deny compensation for its breach, frustrating the justifiable expectations of the nonbreaching party. Such conduct is tortious and liability should be imposed based upon a breach of the implied covenant of good faith and fair dealing. 36 Cal. 3d at 784, 686 P.2d at 1177, 206 Cal. Rptr. at 373 (Bird, C.J., concurring and dissenting).

Crater Well Drilling, Inc.[54] for the proposition that bad faith denial of the existence of the contract may give rise to tort liability, the majority avoided expanding the tort of breach of implied covenant of good faith and fair dealing to the commercial setting. In doing so, it arguably failed to acknowledge its own precedent which gave tort remedy for a breach of the implied covenant in certain circumstances. The court's refusal to expand the tort, and its willingness to create a new limited one, perhaps indicates that the court no longer wishes to expand the concept of the implied covenant past limited circumstances which involve a special relationship, where the parties do not deal at arm's length. Until another case involving an arm's length transaction in a non-commercial setting comes along, the court's intentions as to the covenant remain undetermined.

V. CRIMINAL LAW

A. *Court gives retroactive effect to the holding in* Carlos v. Superior Court *which requires a finding of intent to kill or aid in a killing to justify a felony-murder special circumstance:* **People v. Garcia.**

People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied,* 105 S. Ct. 1229 (1985), forced the supreme court to confront questions previously unanswered in *Carlos v. Superior Court,* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). *Carlos* held that a felony-murder special circumstance could only be found if the prosecution proved the defendant's intent to kill or aid in a killing. In *Garcia,* the court determined (1) that *Carlos* should be applied retroactively, and (2) that failure to instruct a jury on intent constitutes a prejudicial denial of due process requiring reversal.

The court determined that *Carlos* should be applied retroactively after concluding that the threshold test of *Donaldson v. Superior Court,* 35 Cal. 3d 24, 672 P.2d 110, 196 Cal. Rptr. 704 (1983) (whether the decision establishes a new rule of law), and the tripartite test of *Stovall v. Dennis,* 388 U.S. 293 (1967) (whether the decision is essential in the fact finding process), were met. The *Carlos* decision required retroactive application, in part, because it was required to vindicate the meaning of a new statute, specifically, a portion of the 1978 death penalty initiative, CAL. PENAL CODE § 190.2(a)(17) (West Supp. 1984).

54. 276 Or. 789, 556 P.2d 679 (1976).

Garcia was convicted of attempted robbery and first degree murder with a felony-murder special circumstance. His accomplice actually committed the intended act and killed the victim; Garcia drove the car and supplied the gun. The jury was not instructed on the issue of intent to kill.

Based on decisions of the United States Supreme Court, the court held that the failure to instruct on the intent element was a denial of due process. By failing to so instruct the jury, the defendant was denied the right to have a determination made of each element of the charged crime. The jury was able to find the felony-murder special circumstance merely by concluding that the defendant attempted a robbery and that a killing occurred. The error was prejudicial and required reversal for a determination of intent so the special circumstance issue could be decided.

B. *Reasonable mistake as to victim's age not a defense to a charge of lewd and lascivious conduct with a child under fourteen years of age:* **People v. Olsen.**

In *People v. Olsen,* 36 Cal. 3d 638, 685 P.2d 52, 205 Cal. Rptr. 492 (1984), the court was asked to decide if a reasonable mistake as to the age of a victim child could be a defense to a charge of lewd and lascivious conduct with a child under fourteen years of age brought under California Penal Code section 288(a). The court rejected the idea of applying the mistake of age defense as enunciated by the court in *People v. Hernandez,* 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964). There, the court had reasoned that one lacks the requisite criminal intent required to support a charge of statutory rape when one commits the act with the good faith reasonable belief that the victim is over eighteen years of age. In refusing to extend *Hernandez* to the facts in this case, the court noted that policy considerations demanded that the crimes of lewd and lascivious conduct with a child under fourteen years of age and statutory rape be accorded different treatment in their defenses. The court was guided in this decision by three decisions from the courts of appeal dealing with the mistake of age defense in the section 288 context.

In *People v. Tober,* 241 Cal. App. 2d 66, 50 Cal. Rptr. 228 (1966), the court had found untenable the idea that one could reasonably be mistaken as to the age of one of such "tender years." In *People v. Toliver,* 270 Cal. App. 2d 492, 75 Cal. Rptr. 819, *cert. denied,* 396 U.S. 895 (1969), the court had reasoned that a different philosophy existed in applying the defense to statutory rape than to section 288. Statutory rape may involve consent, while lewd and lascivious conduct with a child does not involve consent at all. It was also noted that section 288 provided a harsher penalty than that for statutory rape, signify-

ing a concern with the protection of naive young children. In *People v. Gutierrez,* 80 Cal. App. 3d 829, 145 Cal. Rptr. 823 (1979), the court relied on *Tober* and *Toliver* in rejecting the defense in a section 288 case.

The supreme court drew on these cases to illustrate the concern with the need for special protection of young children. The court found additional evidence to support its holding in other legislative provisions. California Penal Code section 1203.066 allows an individual convicted under section 288 to be placed on probation if he has a good faith belief that the victim is over fourteen years old. By adopting this section, the legislature indicated that a mistake concerning age was not a defense to the crime, but merely a mitigating factor in sentencing.

Thus, the defendant's mistaken belief as to the victim's age was not a defense and his conviction was affirmed.

C. *Jury must be instructed to find an intent to kill in "felony-murder" special circumstance case: Briggs Instruction violates California Constitution:* **People v. Ramos.**

I. INTRODUCTION

In *People v. Ramos*,[1] the supreme court considered two issues: first, whether the failure to instruct the jury that an intentional killing is a required element of the "felony-murder" special circumstance set forth in section 190.2(a)(17) of the California Penal Code constitutes reversible error;[2] and second, whether section 190.3 of the California Penal Code[3]—the so-called Briggs Instruction—violates

1. 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984). Opinion by Kaus, J., with Bird, C.J., Mosk, Broussard, Reynoso, and Grodin, JJ., concurring. Separate concurring and dissenting opinion by Lucas, J.

2. Section 190.2(a)(17)(i) of the California Penal Code states:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:
>
> . . . .
>
> (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:
>
> (i) robbery in violation of section 211.

CAL. PENAL CODE § 190.2(a)(17)(i) (West Supp. 1985).

3. Section 190.3 of the California Penal Code states in pertinent part:

the due process clause of the California Constitution.[4] Both inquiries were answered in the affirmative by the court.

II. BACKGROUND

The defendant was convicted by a jury of robbery and first degree murder with a finding of the special circumstance of felony-murder,[5] and after a penalty trial, the jury sentenced the defendant to death.[6]

During the guilt/special circumstances phase of the trial, the defendant's counsel requested a ruling from the trial court that an intentional killing was a required element of the "felony-murder" special circumstance provision with which the defendant was charged.[7] The trial court rejected this request and ruled that the special circumstance could be established under the felony-murder doctrine, in which an intent to kill is not required.[8]

At the penalty phase of the trial, the court instructed the jury, pursuant to the Briggs Instruction, that a sentence of life imprisonment without possibility of parole could be modified or commuted by the Governor.[9]

On a previous appeal,[10] the California Supreme Court concluded that no reversible error occurred when the trial court refused the request to instruct the jury that an intent to kill was a required element of a felony-murder special circumstance.[11] However, it did conclude that the Briggs Instruction violated the United States Constitution and remanded the case.[12]

The United States Supreme Court granted certiorari and held that the Briggs Instruction did not violate the federal Constitution and remanded the matter to the supreme court to consider other un-

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> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole.
>
> . . . .
>
> The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in [the] future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

CAL. PENAL CODE § 190.3 (West Supp. 1985).

4. Article I, section 7 of the California Constitution states in pertinent part: "A person may not be deprived of life, liberty, or property without due process of law . . . ." CAL. CONST. art. I, § 7.

5. 37 Cal. 3d at 144, 689 P.2d at 433, 207 Cal. Rptr. at 803.

6. *Id.* at 145, 689 P.2d at 434, 207 Cal. Rptr. at 804.

7. *Id.* at 144, 689 P.2d at 433, 207 Cal. Rptr. at 803.

8. *Id.*

9. *Id.* at 150, 689 P.2d at 438, 207 Cal. Rptr. at 806.

10. People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982).

11. *Id.* at 583, 639 P.2d at 924-25, 180 Cal. Rptr. at 282-83.

12. *Id.* at 591-92, 639 P.2d at 930, 180 Cal. Rptr. at 288.

resolved issues.[13]

In an intervening decision from the California Supreme Court, *Carlos v. Superior Court*,[14] the court determined that an intentional killing is a required element of the "felony-murder" special circumstance set forth in section 190.2(a)(17).[15]

III. ANALYSIS

A. *An Intentional Killing is a Required Element of the "Felony-Murder" Special Circumstance*

The defendant contended that the *Carlos* decision,[16] which held that an intentional killing is a required element of the "felony-murder" special circumstance set forth in section 190.2(a)(17), required a reversal of the special finding and penalty judgment.[17]

The Attorney General set forth two arguments opposing a reversal, however, the court was not persuaded. First, he contended that the court need not reach the substantive merits of the defendant's claim as the law of the case doctrine prevailed.[18] Because the California Supreme Court in its first review of this case[19] "reversed only the penalty judgment and affirmed the judgment in all other respects . . . that decision . . . upheld the special circumstance finding which defendant may not reopen."[20] However, the court held that the defendant's situation met the exception to the law of the case doctrine inasmuch as the doctrine does not apply where "the controlling rules of law have been altered or clarified by a decision intervening between the first and second determinations."[21] The intervening *Carlos* decision was just such a clarification.[22]

Second, on the merits, the Attorney General argued that a reversal was not required "(1) because *Carlos'* interpretation of the special circumstance provision should not be applied to cases tried before the

13. California v. Ramos, 103 S. Ct. 3446, 3460 (1983).
14. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).
15. *Id.* at 142, 672 P.2d at 869, 197 Cal. Rptr. at 87.
16. *See supra* text accompanying notes 14-15.
17. 37 Cal. 3d at 145, 689 P.2d at 434, 207 Cal. Rptr. at 804.
18. *See generally* People v. Shuey, 13 Cal. 3d 835, 840-48, 533 P.2d 211, 215-20, 120 Cal. Rptr. 83, 87-92 (1975).
19. *See supra* text accompanying notes 10-11.
20. 37 Cal. 3d at 146, 689 P.2d at 434, 207 Cal. Rptr. at 804.
21. *See* DiGenova v. State Bd. of Educ., 57 Cal. 2d 167, 178-80, 367 P.2d 865, 871-72, 18 Cal. Rptr. 369, 375-76 (1962).
22. 37 Cal. 3d at 146, 689 P.2d at 434, 207 Cal. Rptr. at 804.

Carlos decision, or (2) because the error was not prejudicial."[23]

The court held *Carlos* to be applicable as its holding applied "retroactively to all cases not yet final."[24] With regard to prejudicial error, the court determined that absent four narrow exceptions it would have to find reversible error in failing to instruct the jury of the intent to kill element in a special circumstances case. *People v. Garcia*[25] set forth the only instances in which a failure to give a proper intent instruction under *Carlos* does not require a reversal of a special circumstance finding. They are: (1) " 'if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and if the instruction had no bearing on the offense for which he was convicted,' "[26] (2) " 'if the defendant conceded the issue of intent,' "[27] (3) if " 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions,' "[28] or (4) under limited circumstances, if "the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration."[29]

In this case, the *Garcia* exceptions were not applicable. The first three exceptions clearly were inapplicable without further explanation.[30] The fourth exception was also not applicable since the testimony by the defendant that he did not intend to kill the victims but only intended to graze them so as to mislead his accomplice into believing they had been killed, could not be dismissed as "not worthy of consideration."[31]

Finally, although the prosecutor, in his closing argument, told the jury that if they did not feel the murder was an execution murder they should not return the death penalty, the jury was not bound to

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23. *Id.*

24. People v. Garcia, 36 Cal. 3d 539, 547-50, 684 P.2d 826, 829-31, 205 Cal. Rptr. 265, 269-70 (1984).

25. *Id.*

26. *Id.* at 554, 684 P.2d at 833-34, 205 Cal. Rptr. at 273 (quoting Connecticut v. Johnson, 460 U.S. 73, 87 (1983)).

27. *Id.*

28. *Id.* at 554-55, 684 P.2d at 834-35, 205 Cal. Rptr. at 273-74 (quoting People v. Sedeno, 10 Cal. 3d 703, 721, 518 P.2d 913, 924, 112 Cal. Rptr. 1, 13 (1974)).

29. *Id.* at 556, 684 P.2d at 835-36, 205 Cal. Rptr. at 274-75 (footnote omitted) (relying on standard drawn from People v. Thorton, 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974), and People v. Cantrell, 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792, (1973)).

With regard to this last exception, the *Garcia* case added the caveat that this exception shall apply "only to those cases *clearly falling within the ambit of that reasoning*" as it is not clear that this exception will be approved by the United States Supreme Court. 36 Cal. 3d at 556, 684 P.2d at 836, 205 Cal. Rptr. at 275 (emphasis added).

30. 37 Cal. 3d at 147, 689 P.2d at 435-36, 207 Cal. Rptr. at 805-06.

31. *Id.* at 148, 689 P.2d at 436, 207 Cal. Rptr. at 806.

accept this suggestion.[32] The fact that the jury returned the death penalty did not automatically indicate the jury found intent.[33] Moreover, there was nothing in the remark which told the jury it had to find beyond a reasonable doubt that the defendant intended to kill before it could return a death penalty.[34] The jury could have believed it was required to return a death sentence so long as it found the aggravating factors outweighed the mitigating factors without regard to whether the killing was intentional.[35]

In light of the above, the defendant was entitled to a reversal of the special circumstance finding and penalty judgment.[36] The case was remanded for a new trial of the special circumstance phase before a jury to be instructed that in order to find a felony-murder special circumstance, it must find beyond a reasonable doubt that the defendant intended to kill the victim.[37]

B. The Constitutionality of the Briggs Instruction

Although the United States Supreme Court held that the Briggs Instruction did not violate the federal Constitution,[38] the Court made it clear that the validity of the Briggs Instruction under the California Constitution was to be decided by the California Supreme Court.[39]

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32. *Id.* at 149-50, 689 P.2d at 437, 207 Cal. Rptr. at 807.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 150, 689 P.2d at 437, 207 Cal. Rptr. at 807.
37. *Id.*
38. In response to the claim that the instruction's focus on the Governor's commutation power conflicted with the eighth amendment requirement that the decision whether a defendant shall live or die be based upon a "consideration of the character and record of the individual offender and circumstances of the particular offense." *Ramos*, 30 Cal. 3d at 595-96, 639 P.2d at 932-33, 180 Cal. Rptr. at 290-91, the United States Supreme Court reasoned that the Briggs Instruction invited the jury to consider the " 'future dangerousness' of the defendant rather than the actions of some future Governor," California v. Ramos, 103 S. Ct. at 3453-54. *See also* Jurek v. Texas, 428 U.S. 262 (1976).

With regard to the California Supreme Court's conclusion that the omission of the fact that the death penalty, as well as life without possibility of parole, is subject to gubernatorial commutation violates federal constitutional standards, the Supreme Court held that advising the jury that a death sentence may also be commuted would not necessarily benefit a defendant because then the jurors—informed that their decision was not final—might "approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers." *Ramos*, 103 S. Ct. at 3458.
39. 103 S. Ct. at 3451 n.7.

Upon a review of prior California decisions and related precedents in other states, the court concluded that the Briggs Instruction was incompatible with the fundamental fairness guarantee of article I, section 7[40] and article I, section 15[41] of the California Constitution because it was misleading and prompted jury speculation.

1. Misleading character of the Briggs Instruction

Under article V, section 8 of the California Constitution, the Governor's power of commutation or pardon extends equally to a sentence of life without possibility of parole and a sentence of death.[42] In view of article V, section 8, the court found the Briggs Instruction, which informs the jury only that a sentence of life without possibility of parole may be commuted, to be a "half truth."[43]

The court reasoned that

> since the instruction is only given in a penalty trial—when the jury's attention is narrowly focused on two alternative punishments—the instruction would be reasonably understood by the average juror to mean . . . that while a sentence of life without possibility of parole may be commuted, a sentence of death may not.[44]

Because of its tendency to mislead, the Briggs Instruction denied the defendant due process.[45]

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40. *See supra* note 4 and accompanying text.

41. Article I, section 15, clause 7 states: "[The defendant in a criminal case shall not] be deprived of life, liberty, or property without due process of law." CAL. CONST. art. I, § 15, cl. 7.

42. Article V, section 8, provides in full:

> Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in the case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.

CAL. CONST. art. V, § 8.

43. 37 Cal. 3d at 153, 689 P.2d at 440, 207 Cal. Rptr. at 810.

44. *Id.* at 153-54, 689 P.2d at 440, 207 Cal. Rptr. at 810.

45. *Id.* at 155, 689 P.2d at 440, 207 Cal. Rptr. at 810. The Attorney General presented a number of theories in opposition to this conclusion. First, he suggested that a jury that is concerned about a defendant's possible release through the Governor's power of commutation would not be any less inclined to vote for the death penalty if it were informed that even a death sentence would not necessarily prevent such release. *Id.*

Second, the Attorney General asserted the "half-truth" of the Briggs Instruction may be justified on the grounds that the "other half of the truth—informing the jury that a death sentence can also be commuted—would inject additional prejudice." *Id.* at 154, 689 P.2d at 441, 207 Cal. Rptr. at 811. The jury might be less hesitant to impose the death penalty if it realized the Governor had the power to commute a death sentence because he believed the jury made a mistake in sentencing. *Id.*

Third, the Attorney General argued the incomplete nature of the Briggs Instruction was not likely to be prejudicial because jurors can be expected to know, as a matter of common knowledge, that a death sentence, as well as a sentence of life without the

2. Speculative nature of the Briggs Instruction

Hypothesizing that if the Briggs Instruction was modified so that it was completely accurate, the court concluded that the instruction would still violate the state constitution's due process guarantee because the Instruction's reference to the commutation power invited the jury to speculate on matters not within the jury's province.[46]

The most obvious problem was that the instruction invited the jury to speculate on what a particular defendant would be like in the future when commutation may be considered, i.e., what a Governor would do in response to the defendant's condition.[47]

Furthermore, the instruction diverted the jury from its proper function. First, it may tend to diminish the jury's personal sense of responsibility for its action.[48] Second, "an instruction on the possibility of commutation invites the jury to go beyond its proper role and attempt to 'preempt' the Governor's constitutional authority by imposing a sentence that will at least minimize the opportunity for such a commutation."[49]

Thus, upon this analysis, it was clear to the court that the Briggs

possibility of parole, may be commuted by the Governor. *Id.* at 155, 689 P.2d at 441, 207 Cal. Rptr. at 811.

46. *Id. See also* People v. Morse, 60 Cal. 2d 631, 636-53, 388 P.2d 33, 36-47, 36 Cal. Rptr. 201, 204-15 (1964) (wherein the court held it was improper for the jury to consider a variety of potential post-conviction actions by other government entities in determining the sentence a defendant shall receive). The great majority of courts to consider the issue have "concluded that the jury should not consider the possibility of pardon, parole, or commutation." 37 Cal. 3d at 156 n.10, 689 P.2d at 442 n.10, 207 Cal. Rptr. at 812 n.10 (listing decisions from twenty-five jurisdictions). *But see* State v. Jackson, 100 Ariz. 91, 412 P.2d 36 (1966); Brewer v. State, 417 N.E.2d 889 (Ind. 1981); and Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930), wherein courts have held to the contrary.

47. 37 Cal. 3d at 156, 689 P.2d at 442, 207 Cal. Rptr. at 812. *See also* People v. Murtishaw, 29 Cal. 3d 733, 767-75, 631 P.2d 446, 466-71, 175 Cal. Rptr. 738, 758-63 (1981) (general expert testimony of a defendant's alleged future dangerousness is not sufficiently reliable to be considered at the penalty phase of a capital trial); State v. Linsey, 404 So. 2d 466, 487 (La. 1981) (death sentences imposed by jury speculation renders the decision arbitrary); Farris v. State, 535 S.W.2d 608, 614 (Tenn. 1976) (jury speculation constitutes trial "by guess and by golly").

48. 37 Cal. 3d at 157, 689 P.2d at 443, 207 Cal. Rptr. at 813. *See also* People v. Linden, 52 Cal. 2d 1, 27, 338 P.2d 397, 410 (1959) (prosecutor should not advise jury of automatic appeal when death penalty is imposed because such advice tends to diminish seriousness of the jury's function); Smith v. State, 317 A.2d 20, 25 (Del. 1974) ("knowledge on the part of a jury that there is possible review by other governmental authorities may cause that jury to avoid its responsibility . . .").

49. 37 Cal. 3d at 158, 689 P.2d at 443, 207 Cal. Rptr. at 813. *See also Linsey*, 404 So. 2d at 487; State v. White, 27 N.J. 158, 177-79, 142 A.2d 65, 76 (1958) (jury could conclude governor will improperly pardon an offender, thereby encouraging it to preempt the governor's power by opting for the death penalty).

Instruction in reality serves no legitimate purpose. By directing the jury's attention to the Governor's commutation power, the instruction invites the jury to second-guess a future Governor's exercise of his commutation powers. The jury might impose a harsher sentence out of a fear that the Governor might be too lenient and release the defendant while he is still a danger to society.[50] These factors were deemed not within the province of the jury and therefore inconsistent with the defendant's rights under the California Constitution.[51]

IV. CONCLUSION

Based upon the foregoing analysis, the California Supreme Court reversed the judgment insofar as it related to the felony-murder special circumstance. The defendant was entitled to have the case remanded for a new trial of the special circumstance phase before a jury that was properly instructed. The court also held that the law of the case doctrine did not preclude the defendant from raising this claim.

Finally, the court held that the Briggs Instruction violated the due process clause of the California Constitution as it was misleading and invited the jury to consider speculative and impermissible factors in reaching its decision.

VI. CRIMINAL PROCEDURE

A. *Erroneous jury instruction may not serve as basis for reversal when defense counsel knowingly acquiesces in the giving of the incorrect instruction as a tactical decision:* **People v. Avalos.**

In *People v. Avalos,* 37 Cal. 3d 216, 689 P.2d 121, 207 Cal. Rptr. 549 (1984), the supreme court was asked to determine whether the trial court erred in giving an instruction that the jury could return a verdict of murder without specifying the degree and then in deeming the subsequent conviction to be second degree murder. While the court held the instruction to be erroneous, it also held that defense counsel could not ask for a reversal on appeal as he acquiesced in the jury instruction as a tactical decision.

The defendant was found guilty of two counts of assault with a deadly weapon, and the jury found true the allegations he personally used a firearm and inflicted great bodily injury. The jury also returned a verdict of murder without specifying a degree. The jury deliberated for a full day and then requested instruction on the intent element of first degree murder. In addition, the jury inquired to de-

50. 37 Cal. 3d at 158, 689 P.2d at 443, 207 Cal. Rptr. at 813.
51. *Id.* at 158, 689 P.2d at 443-44, 207 Cal. Rptr. at 813-14.

termine the validity of a verdict that held the defendant guilty of murder but failed to specify a degree. The court instructed the jury it might return a verdict on those points on which it unanimously agreed and as to portions it could not agree upon, the jurors were to indicate on the jury form their lack of unanimity. Neither counsel commented on this instruction, although the prosecutor requested that the record reflect that authority for such an instruction was California Penal Code section 1157. The court then offered the additional citation of *Stalcup v. Superior Court,* 24 Cal. App. 3d 932, 101 Cal. Rptr. 467 (1972).

As the *Avalos* court noted, however, *Stalcup* had been expressly disapproved by the supreme court in *People v. Dixon,* 24 Cal. 3d 43, 592 P.2d 752, 154 Cal. Rptr. 236 (1979). The *Dixon* court indicated that Penal Code section 1157 was not intended to apply in situations where the jury was deadlocked on the question of degree. The trial court erred, therefore, in assuming that it could simply decree that the defendant was guilty of second degree murder (the lesser degree) if the jury returned a degreeless guilty verdict. Its instruction, based on *Stalcup,* was in error.

The record showed, however, that defense counsel knew of the error yet acquiesced in the hope his client would receive the lesser degree. His purpose was to avoid a mistrial with the resulting exposure of his client to a new trial and possible first degree murder verdict. "This deliberate tactical motive for encouraging the trial court to proceed with an erroneous instruction precludes defendant from asserting this error as a basis for reversal of his conviction." *See* People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) (treats application of section 1157 when jury fails to set degree due to mistake by trial court rather than as a result of deadlock) (*McDonald* is discussed in this survey at 12 PEPPERDINE L. REV. 851 (1985)).

B. *Warrant issued was without probable cause and an arrest made pursuant to the warrant was illegal where affidavit in support of the application was based on an untested informant's hearsay evidence:* **People v. Campa.**

The supreme court in *People v. Campa,* 36 Cal. 3d 870, 686 P.2d 634, 206 Cal. Rptr. 114 (1984), was asked to decide whether the trial court was correct in suppressing statements made by the defendant on the grounds that the arrest of the defendant was without probable cause. The warrant which police used to arrest the defendant in his home

was based on hearsay evidence provided by an informant who was untested as to credibility. The supreme court held that the trial court was correct to suppress the defendant's statements, relying on established California precedent dealing with hearsay evidence from informants.

Defendant Campa was arrested in his home and charged with murder and attempted murder pursuant to a warrant based on hearsay evidence obtained by police from another person charged in connection with the crime. At the station house, the defendant admitted having committed the crimes of which he had been charged. Since these statements were the state's principal evidence, the trial court's suppression of the statements left the state without enough evidence to sustain a conviction. The trial court, on its own motion, dismissed the charges and the state appealed.

The supreme court based its decision, among other things, on precedent established in *People v. Hamilton,* 71 Cal. 2d 176, 454 P.2d 681, 77 Cal. Rptr. 785 (1969). In *Hamilton,* the court held that when an affidavit in support of an application for a warrant is based on hearsay evidence the affidavit must contain underlying factual information from which the magistrate could reasonably conclude the informant was credible or his information reliable. The court in *Campa* found the affidavit to contain no factual background sufficient to allow a magistrate to draw the conclusion that the informant's information was reliable.

The informant's testimony against his own interests was not enough to prove reliability since he had been arrested and was possibly subject to police pressure, or hoped to bargain with the information. The affidavit needed to show underlying factual information supporting the informant's reliability. As it failed to do so, the warrant issued was without probable cause, and Campa's arrest based on that warrant was illegal. Any statements made by him subsequent to the illegal arrest were therefore properly suppressed by the trial court.

The defendant's additional claim that his rights under *Miranda v. Arizona,* 384 U.S. 436 (1965), were violated was disallowed by the court, as the Penal Code section under which the defendant had made his motion to suppress dealt only with search and seizure issues. *See* CAL. PENAL CODE § 1358.5 (West Supp. 1984).

C. *Failure to use reasonable diligence in obtaining testimony not sufficient basis for denial of defendant's motion for retrial; such testimony may have affected outcome of trial:* **People v. Martinez.**

In *People v. Martinez,* 36 Cal. 3d 816, 685 P.2d 1203, 205 Cal. Rptr.

852 (1984), the court looked at whether the trial court had abused its discretion in denying a motion for new trial when the defendant attempted to bring a new witness. In holding the denial an abuse of discretion, the court found that the testimony might well have changed the outcome, and that the defendant's counsel's lack of reasonable diligence in obtaining such testimony was not a sufficient basis for denial of the motion.

The defendant Martinez was convicted of second degree burglary. The prosecution's case essentially rested on the discovery of the defendant's handprint on a stolen drill press and the testimony of a maintenance person of the company from which the press was stolen that he had painted the drill press the afternoon before the burglary. The defendant had testified that he was at home with friends the entire evening of the burglary. Following the jury's finding of guilt, the defendant moved for a new trial based on newly discovered evidence. A former foreman of the company from which the press was stolen was prepared to testify that the drill press had not in fact been painted the day of the burglary. The defendant, a former employee and frequent visitor of the company, had had ample opportunity to leave his handprint on the drill press prior to the burglary. The trial court denied the motion on the grounds the defendant did not use due diligence in locating the foreman and that the court was not convinced the foreman's testimony would have changed the outcome in any event.

The bases the trial court used in denying the motion for a new trial came from the 1887 case of *People v. Sutton,* 73 Cal. 243, 15 P. 86 (1887). The supreme court, in deciding whether the trial court had abused its discretion therefore examined the two bases used by the trial court based on the facts of the case.

The first basis discussed was that the newly discovered evidence was considered by the trial court to not affect the outcome of the trial. As the supreme court observed, this reasoning was simply not plausible. The prosecution's entire case rested on the palm print found on the drill press. Since the company maintenance man testified that he had painted the drill press the afternoon of the burglary the print had to have been placed there the night of the theft. The new witness turned up by the defense would have testified that in fact the drill press was not painted the day of the burglary, and as the defendant had ample opportunity to use the drill press in his work for a neighboring company, the palm print could have been placed on the press at a time other than the time of the burglary.

Such evidence would cast serious doubts in the jury's mind as to the weight the prosecution placed on the palm print. It would, therefore, have much opportunity to affect the outcome of the trial, and the supreme court could not uphold a denial of the defendant's motion on the theory the evidence would not affect the outcome.

The second basis was that the defense failed to use reasonable diligence to discover the witness. Although the facts could reasonably indicate the defense *did* fail to exercise reasonable diligence, the court felt this alone would not be a sufficient basis for denial of a motion for new trial. Once it was found the new evidence could affect the outcome, there was no reason to run the risk of wrongfully convicting an innocent person. To do so would punish the defendant for the lack of diligence of his counsel, working a "manifest miscarriage of justice."

D. *An accused's invocation of rights bars all further interrogations; corpus delicti of felony-based special circumstance can not be established solely by defendant's extrajudicial statements:* People v. Mattson.

In *People v. Mattson,* 37 Cal. 3d 85, 688 P.2d 887, 207 Cal. Rptr. 278 (1984), the supreme court refused to erode the principle that once a defendant has invoked his privilege against self-incrimination the police cannot question him again, even if the *Miranda* warnings are repeated and subsequently waived.

The defendant was in custody in Nevada on suspicion of kidnapping, rape, and armed robbery of a young woman. When advised of his *Miranda* rights, the defendant replied that he did not wish to speak and requested an attorney. Although the defendant had been appointed an attorney, during the next six weeks he was in custody, various police officers from both Nevada and California questioned the defendant about various other felony sex crimes. Each time the defendant waived his *Miranda* rights and implicated himself. He was subsequently convicted on two first degree murders and received the death penalty.

On appeal, the defendant asserted that because he invoked his constitutional rights to remain silent and to be represented by counsel when he was initially advised of his *Miranda* rights, his subsequent confessions were inadmissible.

Since California state officials were involved in the interrogations, the supreme court held California law was applicable. In addition to the fact that the police officials knew the defendant had been appointed a public defender, under the rule enunciated in *People v. Pettingill,* 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978), neither the delay between the initial assertion of the privilege to remain si-

lent nor the fact that the renewed questioning concerned different crimes in another jurisdiction absolved the state from violating the defendant's rights subsequent to an initial assertion of his *Miranda* rights.

Inasmuch as it was prejudicial error to admit the ensuing confessions, the judgment of conviction was reversed. The court addressed another issue to guide the trial court on retrial. The court concluded that "the corpus delicti of felony-based special circumstances must be established independently of an accused's extrajudicial statements."

E. *Defendant whose sentence is enhanced by prior conviction may collaterally attack the constitutional validity of that conviction by means of a motion to strike on the ground that the defendant was unaware of his constitutional rights:* People v. Sumstine.

In *People v. Sumstine*,[1] the supreme court was asked to decide whether a defendant could utilize a motion to strike to collaterally attack a prior conviction. The motion was based on the grounds that the court in the prior proceeding had accepted a guilty plea without first determining if the defendant was aware of the rights being waived by the guilty plea and if his waiver was a knowing one.[2] In holding in the affirmative, the court delineated the procedure for collaterally attacking a prior conviction.

I. FACTUAL SITUATION

In February of 1982, the defendant was charged in Los Angeles County with nine counts of committing lewd and lascivious acts on

1. 36 Cal. 3d 909, 687 P.2d 904, 206 Cal. Rptr. 707 (1984). Opinion by Mosk, J., with Kaus, Broussard, Reynoso and Grodin, JJ., concurring. Separate concurring and dissenting opinion by Lucas, J. Separate dissenting opinion by Bird, C.J.

2. *Id.* at 914-15, 687 P.2d at 907, 206 Cal. Rptr. at 710. The defendant cited Boykin v. Alabama, 395 U.S. 238 (1969), and *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969), *cert. denied*, 398 U.S. 911 (1970). In *Boykin*, the United States Supreme Court held that a court may not accept a guilty plea from a defendant until it determines the defendant was aware of the rights waived by the plea and the waiver was a knowing and voluntary one. Such a determination had to be made even if the defendant was represented by counsel. *Boykin*, 395 U.S. at 240-44. In *Tahl*, the California Supreme Court interpreted the *Boykin* Court's refusal to presume a knowing waiver from a record silent on the point to mean that the record must show on its face that the defendant knew his rights and knowingly and voluntarily waived them. *In re* Tahl, 1 Cal. 3d at 130, 460 P.2d at 455, 81 Cal. Rptr. at 583.

the body of a child under age 14.[3] The information alleged a prior conviction in Kern County for the same offense. Initially, the defendant pled innocent to all nine counts, but subsequently entered a plea of guilty to three. He allowed the trial court to read the transcript of the preliminary hearing to provide a factual basis for the charges. Further, he admitted the facts of the prior conviction, reserving the right to challenge its constitutional validity.[4] At the sentencing hearing, he made a motion to strike the prior conviction.[5] The trial court denied the motion to strike based on its reading of *People v. Reeves.*[6]

In *Reeves,* the court of appeal held that the use of motions to strike was limited to situations where the defendant clearly alleged that he was not represented by counsel and had not waived the right to be represented.[7] In the instant case, the defendant had been represented by counsel in the Kern County proceeding. Based on *Reeves,* the trial court denied the motion to strike the prior. It then passed sentence, enhanced by the three year additional term imposed by Penal Code section 667.5[8] The defendant appealed, contesting the denial of the motion to strike and the additional three years of incarceration.

II. OPINION OF THE COURT

A. Availability of Motion to Strike

The supreme court reasoned that the trial court's reliance on *People v. Reeves* had been erroneous.[9] Relying on *People v. Coffey,*[10] the

3. 36 Cal. 3d at 914, 687 P.2d at 907, 206 Cal. Rptr. at 710. The charges were brought under California Penal Code section 288.

4. 37 Cal. 3d at 914, 687 P.2d at 907, 206 Cal. Rptr. at 710.

5. *Id.* The defendant's motion to strike the prior conviction was an attempt to avoid the automatic enhancement of his sentence provided by section 667.5 of the Penal Code, which makes mandatory an additional and consecutive three years for each prior conviction of certain violent felonies, including a section 288 offense. CAL. PENAL CODE § 667.5 (West Supp. 1985).

6. 123 Cal. App. 3d 65, 176 Cal. Rptr. 182 (1981).

7. *Id.* at 68, 176 Cal. Rptr. at 184. The court in *People v. Reeves* found controlling the decision of People v. Coffey, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967). The *Coffey* court, in discussing the kind of allegation necessary to challenge a prior conviction stated, "the issue must be raised by means of allegations which, if true, would render the prior conviction devoid of constitutional support." *Id.* at 215, 430 P.2d at 23, 60 Cal. Rptr. at 465. The *Coffey* court went on to quote People v. Merriam, 66 Cal. 2d 390, 397, 426 P.2d 161, 166, 58 Cal. Rptr. 1, 6 (1967), for the proposition that a defendant's challenge to a prior conviction may be made " 'only through a clear allegation to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented.*' " 67 Cal. 2d at 215, 430 P.2d at 23, 60 Cal. Rptr. at 465 (emphasis in original).

8. 36 Cal. 3d at 915, 687 P.2d at 907, 206 Cal. Rptr. at 710.

9. *Id.* at 915, 687 P.2d at 907-08, 206 Cal. Rptr. at 710-11.

10. 67 Cal. 2d 204, 215, 430 P.2d 15, 23, 60 Cal. Rptr. 457, 465 (1967).

court of appeals in *Reeves* based its opinion on the notion that a defendant could only challenge a prior conviction if he had not been represented by counsel or had not waived the right to such counsel.[11] However, the *Reeves* court failed to read the *Coffey* decision properly.[12] It had failed to take into account the *Coffey* court's ultimate holding that a defendant could raise *any* challenge that undermined a prior conviction's constitutionality.[13] In *Coffey,* the supreme court had reasoned that if the state, by statute, were to impose additional sentences upon defendants because of prior convictions, the defendant must be allowed every opportunity to challenge the constitutional basis of those convictions.[14] To impose additional sanctions based on prior convictions, the state must assume the burden of meeting any attacks on the constitutionality of such prior convictions.[15] Although the court in *Coffey* spoke only in terms of the lack of counsel, or lack of waiver of the right to counsel, motions to strike prior convictions are not limited by such language.[16]

At the time *Coffey* was decided, courts assumed that the presence of counsel ensured that the defendant was well aware of his rights to a jury trial, his privilege against self-incrimination, and his right to confront accusers.[17] In the absence of counsel, the courts were required only to determine whether the defendant had been informed of his right to counsel and had waived that right.[18] The *Reeves* court failed to recognize that in speaking of the right to counsel, the *Coffey* court was impliedly also referring to the other constitutional rights as well.[19] By limiting the motion to strike prior convictions only to

11. People v. Reeves, 123 Cal. App. 3d at 69, 176 Cal. Rptr. at 184-85. Relying on *Merriam,* the *Reeves* court reasoned that "the court in *Coffey* apparently limited use of the motion to strike to situations where a defendant clearly alleged that he neither was represented by counsel nor waived his right to be so represented." *Id.* at 68, 176 Cal. Rptr. at 184.

12. 36 Cal. 3d at 916, 687 P.2d at 908, 206 Cal. Rptr. at 711 ("Such a reading of *Coffey* is unduly strained").

13. *Id.* at 917, 687 P.2d at 908-09, 206 Cal. Rptr. at 711-12.

14. People v. Coffey, 67 Cal. 2d at 214-15, 430 P.2d at 22, 60 Cal. Rptr. at 464. "[T]o the extent that statutory machinery relating to penal status or severity of sanction is activated by the presence of prior convictions, it is imperative that the constitutional basis of such convictions be examined if challenged by proper allegations." *Id.* (citing *In re* Woods, 64 Cal. 2d 3, 409 P.2d 913, 48 Cal. Rptr. 689 (1966)).

15. 67 Cal. 2d at 214-15, 430 P.2d at 22, 60 Cal. Rptr. at 464.

16. 36 Cal. 3d at 917, 687 P.2d at 909, 206 Cal. Rptr. at 712.

17. *In re* Tahl, 1 Cal. 3d 122, 128-29, 460 P.2d 449, 453-54, 81 Cal. Rptr. 577, 581-82 (1969).

18. *Id.* at 129, 460 P.2d at 453-54, 81 Cal. Rptr. at 581-82.

19. 36 Cal. 3d at 917, 687 P.2d at 909, 206 Cal. Rptr. at 712. "[T]he court was impliedly seeking to protect the defendant's other constitutional rights [such as right to

situations where either counsel was not present or the defendant had not waived counsel, the *Reeves* court set out a rule too limited in its scope.[20]

Further, in *Boykin v. Alabama,*[21] the United States Supreme Court held that the mere presence of an attorney did not establish that a defendant's guilty plea was knowing and voluntary.[22] It is up to the trial court to "make sure [the defendant] has a full understanding of what the plea connotes and of its consequence."[23] Under these circumstances, even if the *Coffey* court had intended to limit motions to strike to instances involving right to counsel, that approach would no longer be valid after *Boykin.*[24] A court seeking to enhance a sentence because of a prior conviction would have to look beyond whether counsel had been present or a waiver had been made. It would instead be required to determine whether the defendant had a "full understanding" of the plea.[25]

The attorney for the state urged that *Coffey,* in light of *Boykin,* should still be limited to right to counsel claims because of the peculiar importance of the right to counsel.[26] The court found this argument to be without weight,[27] and held a motion to strike a prior conviction based on a challenge to the constitutionality of the proceeding under *Boykin* and *In re Tahl*[28] to be "equally permissible."[29]

B. Timeliness of Motion

Having established that a motion to strike prior convictions could be based on rights enunciated in *Boykin* and *Tahl,* the court was left to determine the procedural limitations on such motions. Initially,

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jury trial] indirectly by protecting his right to counsel." *Id.* at 918, 687 P.2d at 909, 206 Cal. Rptr. at 712.

20. *See supra* text accompanying notes 12-16. Consequently, the *Reeves* decision was disapproved. *Id.* at 919 n.6, 687 P.2d at 910 n.6, 206 Cal. Rptr. at 714 n.6.

21. 395 U.S. 238 (1969).

22. The defendant in *Boykin* was represented by counsel when he pled guilty to charges of robbery. The trial record showed no instance where the judge asked the defendant questions about his plea, and the defendant never addressed the court. *Id.* at 239. From this, and the fact that the *Boykin* Court refused to presume a waiver even though the defendant was represented at trial, it can be assumed that the presence of counsel was not determinative. *Id.* at 243.

23. *Id.* at 244. In Alabama at that time, a guilty plea to a charge of common law robbery could result in the imposition of the death penalty. *Id.* at 240.

24. 36 Cal. 3d at 918, 687 P.2d at 910, 206 Cal. Rptr. at 713. "If we could once have assumed that by protecting a defendant's right to counsel we were preserving his other rights, we could no longer have so assumed." *Id.*

25. *Id.* at 918, 687 P.2d at 909, 206 Cal. Rptr. at 712.

26. *Id.* at 918, 687 P.2d at 910, 206 Cal. Rptr. at 713.

27. "[R]espondent suggests no reason for distinguishing . . . the right to counsel from the rights protected in *Boykin/Tahl* . . . ." *Id.*

28. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969), *cert. denied,* 398 U.S. 911 (1970).

29. 36 Cal. 3d at 919, 687 P.2d at 910, 206 Cal. Rptr. at 713.

the state contended that Sumstine's motion to strike was untimely. The state relied primarily on *People v. Lewis*,[30] which had affirmed a denial of a motion to strike a four year old conviction because the defendant "made no showing whatsoever that he had ever attempted to attack or set aside the plea in a timely or appropriate manner, or that he had an excuse for failing to do so."[31] In the absence of such a showing, the *Lewis* court reasoned that the defendant had waived any possible challenge to the prior conviction, and the conviction "could not be collaterally attacked."[32] The supreme court in *Sumstine* found, however, that the court of appeal in *Lewis* had erred in its reliance on certain authority for its holding.[33]

The *Lewis* court relied on the supreme court's decision in *In re Ronald E.*,[34] where a juvenile sought release by way of writ of habeas corpus.[35] While the state conceded that the initial jurisdictional hearing failed to comply with *Boykin-Tahl* requirements, the supreme court found that the juvenile was not entitled to raise such issues in connection with the writ of habeas corpus.[36] The challenge was held to be untimely, and the defendant's failure to justify his failure to make a prompt challenge caused the court to disallow the writ.[37] Based on this holding, the *Lewis* court reasoned that where a motion to strike is made in an untimely manner, without justification for the delay, then the motion should be denied.[38]

However, the *Lewis* court erred in failing to make a crucial distinction between the facts in *In re Ronald E.* and the facts in *Lewis*.[39] In *In re Ronald E.*, the defendant sought release by writ of habeas corpus. In *Lewis*, the defendant merely attempted to strike a prior conviction which the court intended to use to enhance his sentence.[40] Denial of the writ for untimeliness was consistent with habeas corpus law.[41] Writs of habeas corpus, however, bear little resemblance to

30. 74 Cal. App. 3d 633, 141 Cal. Rptr. 614 (1977).
31. *Id.* at 640, 141 Cal Rptr. at 617 (citing *In re* Ronald E., 19 Cal. 3d 315, 321-23, 562 P.2d 684, 692, 137 Cal. Rptr. 781, 785 (1977)).
32. *Id.*
33. 36 Cal. 3d at 919, 687 P.2d at 910, 210 Cal. Rptr. at 714.
34. 19 Cal. 3d 315, 562 P.2d 684, 137 Cal. Rptr. 781 (1977).
35. *Id.* at 319, 562 P.2d at 686, 137 Cal. Rptr. at 783.
36. *Id.* at 321-22, 562 P.2d at 692, 137 Cal. Rptr. at 785.
37. *Id.* at 322, 562 P.2d at 692, 137 Cal. Rptr. at 785.
38. 74 Cal. App. 3d at 640, 141 Cal. Rptr. at 617.
39. 36 Cal. 3d at 919, 687 P.2d at 910-11, 206 Cal Rptr. at 713.
40. *Id.* at 919, 687 P.2d at 911, 206 Cal Rptr. at 713-14.
41. *In re* Walker, 10 Cal. 3d 764, 773, 518 P.2d 1129, 1134, 112 Cal. Rptr. 177, 182 (1974).

motions to strike prior convictions.[42] Thus, the court in *Sumstine* held that if the *Boykin/Tahl* challenges were raised properly at or prior to trial, the trial court must make a determination on the merits.[43] Thus, the defendant's motion was timely.

C. Sufficiency of Motion

All that remained for the court was a determination of the sufficiency of the motion. The defendant's motion was based on the silence of the record.[44] The defendant claimed that there was no indication from the record that he had been informed of any of his rights or knowingly waived them.[45] Such a record would be a cause for reversal of the conviction under *Boykin* and *Tahl*.[46] The defendant argued that the result should be no different on a motion to strike. The court disagreed, holding that the standard established in *People v. Coffey* would apply,[47] and that a "defendant seeking to challenge a prior conviction on *any* ground must allege actual denial of his constitutional rights."[48]

Under *Coffey*, when a defendant, by his motion to strike, has made allegations of constitutional infirmity sufficient to justify a hearing, the state bears the burden of proving the previous conviction.[49] Following such a showing, the burden shifts to the defendant to show that his *Boykin/Tahl* rights were violated in the preceeding convic-

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> The general rule is that "habeas corpus cannot serve as a substitute for appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction."

Id. (citations omitted).

42. "When the issuance of a writ of habeas corpus vacates the underlying judgment of conviction, the judgment ceases to exist for all purposes. . . . On the other hand, motions to strike do not vacate the underlying conviction . . . ." 36 Cal. 3d at 920, 687 P.2d at 911, 206 Cal. Rptr. at 714.

43. *Id.* (citing People v. Coffey, 67 Cal. 2d at 215, 430 P.2d at 23, 60 Cal. Rptr. at 465). Consequently, the *Sumstine* court disapproved of *People v. Lewis*. 36 Cal. 3d at 919 n.6, 687 P.2d at 910 n.6, 206 Cal. Rptr. at 713 n.6.

44. *Id.* at 921, 687 P.2d at 912, 206 Cal. Rptr. at 715. The trial record presumably had been destroyed after five years pursuant to Government Code section 69955(d).

45. 36 Cal. 3d at 922, 687 P.2d at 912-13, 206 Cal. Rptr. at 715-16. *Tahl* required the trial record to be specific and expressly enumerate the three constitutional rights waived by a guilty plea. The record must clearly show that the defendant knew his rights and voluntarily waived them by a guilty plea. *In re* Tahl, 1 Cal. 3d at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584. The purpose was to establish a clear record for an appellate court to review. *Boykin*, 395 U.S. at 244. Further, an otherwise valid conviction could not fall because of an incomplete record. *Tahl*, 1 Cal. 3d at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584.

46. *Boykin*, 395 U.S. at 244. "[T]here was reversible error 'because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty.' " *Id.*

47. 36 Cal. 3d at 922, 687 P.2d at 913, 206 Cal. Rptr. at 716.

48. *Id.*

49. 67 Cal. 2d at 317, 430 P.2d at 24, 60 Cal. Rptr. at 466.

tion.[50] If the defendant bears this burden, the state may bring evidence to rebut such a showing.[51] The *Coffey* requirements demand a more assiduous effort on the part of a moving defendant than the standard urged by the defendant. The defendant argued that the mere showing of an insufficient record should be enough, under *Boykin,* to uphold a motion to strike. However, the court applied the more stringent *Coffey* requirements, which the defendant could not hope to satisfy solely on the basis of a silent trial court record.[52] The court refused to presume from a silent record that the defendant's *Boykin/Tahl* rights had been violated.[53] Thus, the defendant's motion failed to allege actual denial of his constitutional rights,[54] and was properly denied by the trial court.[55]

F. *Use of peremptory challenges to exclude a specific bias from the jury does not violate the right to have a jury drawn from a representative cross-section of the community:* People v. Turner.

In murder trials where the death penalty may be invoked, it is common practice for the prosecution, during voir dire, to exercise peremptory challenges to exclude all persons with reservations about capital punishment. This practice was challenged in *People v. Turner,* 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984). The defendant, Turner, was convicted on two counts of first degree murder during the commission of a burglary. He was subsequently sentenced to death.

On appeal, Turner claimed the People's exclusion by peremptory challenge of all persons with reservations about capital punishment denied him his constitutional right to a jury chosen from a representative cross-section of the community.

While the use of peremptory challenges to exclude potential jurors because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds violates the right to trial

50. *Id.*
51. *Id.*
52. The defendant in *Sumstine* acknowledged that a *Boykin* reversal would not result in this case were the evidentiary requirements of *Coffey* to apply. 36 Cal. 3d at 922, 687 P.2d at 912, 206 Cal. Rptr. at 715.
53. *Id.* at 924, 687 P.2d at 914, 206 Cal. Rptr. at 717. Indeed, there need be no such presumption, just as *Boykin* refused to presume a waiver of the defendant's rights from a silent record. *Boykin,* 395 U.S. at 243.
54. 36 Cal. 3d at 924, 687 P.2d at 914, 206 Cal. Rptr. at 717.
55. *Id.*

by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, the supreme court refused to condemn the practice of using peremptory challenges to eliminate a specific bias from the jury. A specific attitude relating to the particular case on trial transcends racial, religious, ethnic and other similar grounds. That a specific juror attitude has been eliminated from the jury is the natural result of the parties' historic and important right to exclude a limited number of jurors for fear of bias.

Since the court was unable to find a constitutional infirmity in the use of peremptory challenges on the basis of specific juror attitudes on the death penalty, the defendant's challenge failed.

G. *Cellmate informant held not to be a police agent; error not to instruct on intent to kill element of felony-murder special circumstance:* People v. Whitt.

In *People v. Whitt*,[1] the supreme court, in addition to reviewing the effects of a failure to instruct the jury concerning the intent to kill element in a special circumstances case, and adequacy of a jury instruction on jury note-taking, also further defined the circumstances under which an accused's statements to a cellmate, who passes the information on to the police, will be admissible at trial.

The defendant was charged with murder.[2] A special circumstance was alleged in connection with the murder charge as the killing was committed while the defendant was engaged in a robbery.[3] While in custody, the defendant revealed to his cellmate, DeLoach, the details of the offense.[4] DeLoach reported the appellant's confessions to the police.[5] The trial court denied the defendant's motion to suppress the statements made to DeLoach. At trial, DeLoach testified against the defendant. The jury found the defendant guilty and sentenced him to death.

In its review of the defendant's appeal, the supreme court first considered the trial court's failure to instruct the jury that proof of intent to kill is essential to sustain a felony-murder special circumstance allegation under the 1978 death penalty law.[6]

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1. 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984). Opinion by Bird, C.J., with Mosk, Kaus, Broussard, Reynoso, and Grodin, JJ., concurring. Separate concurring and dissenting opinion by Lucas, J.

2. *Id.* at 728, 685 P.2d at 1162, 205 Cal. Rptr. at 811.

3. *Id.*

4. *Id.* at 730, 685 P.2d at 1163-64, 205 Cal. Rptr. at 812-13.

5. *Id.*

6. *See* Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). In *Carlos*, the court held that under the 1978 death penalty initiative, which enacted California Penal Code section 190.2(a)(17), proof of an intent to kill is required. Although the statutory provision was unclear as to whether intent to kill was

Pursuant to *Carlos v. Superior Court,*[7] a jury instruction that the jury must find proof of intent to kill in a felony murder special circumstance is required unless one of the four exceptions enunciated in *People v. Garcia* is present.[8] In this case, none of the exceptions were applicable. First, the defendant was not acquitted of the special circumstance allegation.[9] Second, he never conceded the issue of intent in the guilt phase—he simply did not realize intent was in issue.[10] Third, while the parties *did* recognize that the defendant's intent to kill was in issue in the penalty phase, the defense evidence could not be dismissed as "not worthy of consideration."[11] Finally, no other instruction squarely presented the question of intent to kill.[12]

Accordingly, as there was no basis for concluding that the omission of the intent-to-kill element from the special circumstance instruction was harmless, the death penalty judgment was reversed.[13]

Next, the supreme court considered the more difficult and controversial issue of whether the defendant's statements to his cellmate should have been suppressed under the fifth and sixth amendments to the United States Constitution.[14]

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an essential element of the felony-murder circumstance, the court held such construction was required by the language of the initiative and by applicable principles of statutory construction requiring ambiguities in penal statutes to be interpreted in favor of the defendant and statutes to be construed to avoid constitutional problems.

7. *Id.*

8. 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984). The jury need not be instructed that it must find proof of an intent to kill in a felony-murder special circumstances case if: 1) The jury instruction eliminating the issue of intent is given in connection with an offense for which the defendant was acquitted and does not affect the offense for which the defendant was convicted; 2) The defendant concedes the intent issue; 3) The question of intent was resolved against the defendant under other properly given jury instructions; or 4) The record shows sufficient evidence to find intent as a matter of law. *Id.* at 554-56, 684 P.2d at 834-36, 205 Cal. Rptr. at 273-75. *See* Connecticut v. Johnson, 460 U.S. 73, 87 (1983) (regarding exceptions 1 & 2 *supra*); People v. Thornton, 11 Cal. 3d 738, 768 n.20, 523 P.2d 267, 287 n.20, 114 Cal. Rptr. 467, 487 n.20 (1974), *cert. denied sub nom.* Thornton v. California, 420 U.S. 924 (1975) (regarding exception 4); People v. Sedeno, 10 Cal. 3d 703, 721, 518 P.2d 913, 924, 112 Cal. Rptr. 1, 13 (1974) (regarding exception 3); People v. Cantrell, 8 Cal. 3d 672, 685, 504 P.2d 1256, 1264, 105 Cal. Rptr. 792, 800 (1973).

9. 36 Cal. 3d at 735, 685 P.2d at 1167, 205 Cal. Rptr. at 816.

10. *Id.*

11. *Id.* (quoting *Garcia,* 36 Cal. 3d at 556, 684 P.2d at 836, 205 Cal. Rptr. at 275).

12. 36 Cal. 3d at 736, 685 P.2d at 1167, 205 Cal. Rptr. at 816.

13. *Id.*

14. The defendant claimed his fifth amendment right was violated because DeLoach was a police agent and had to give *Miranda* warnings before any interrogation. *Id.* at 744, 685 P.2d at 1173, 205 Cal. Rptr. at 822. The defendant's sixth amendment challenge of a violation of his right to counsel was based on the fact that since he

The circumstances surrounding the defendant's statements to his cellmate were of particular importance to the court. DeLoach, having escaped from prison, was being escorted back to California by a detective. While en route, the detective gave DeLoach his card and asked him to contact him if he heard about any homicides. Unbeknownst to the detective, DeLoach was a police informant.[15] DeLoach was placed in a cell with the defendant. Both men recognized one another from San Quentin and within hours the defendant had revealed his offense and guilt to DeLoach, whereupon DeLoach requested a meeting with the detective.[16] DeLoach gave the detective a brief version of the defendant's story and also mentioned that the defendant intended to present a defense that he was drunk at the time of the robbery.[17] At the conclusion of the meeting, the detective warned DeLoach not to solicit any further details from the defendant, but if he happened to hear anything else from the defendant, nothing could be done about that.[18]

Some weeks later, DeLoach met with another detective and told him he had had further conversations with the defendant. DeLoach then gave a detailed account of the defendant's story.[19] Although DeLoach eventually testified about the defendant's statements, he was never given any favorable treatment in exchange for the information.[20]

In its examination of the relationship between the Sheriff's Department and DeLoach, and whether it was significant that the detective expressly told DeLoach not to question the defendant any further about the crime, the court began with *United States v. Henry.*[21] That decision "explained what conduct on the part of the government and/or an informant would amount to deliberate elicitation."[22] From *Henry,* the court concluded that "in deciding whether information has been 'deliberately elicited,' the courts must focus on the state's conduct as a whole, rather than on the informant's."[23] Under *Henry,* "it is not significant whether the informant or the ac-

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was represented by counsel at the time of his statements to DeLoach, the government was not free to question him without the presence of his attorney. *Id.* at 739 n.10, 685 P.2d at 1169 n.10, 205 Cal. Rptr. at 818 n.10.

15. *Id.* at 737, 685 P.2d at 1168, 205 Cal. Rptr. at 817.

16. *Id.*

17. *Id.* at 737-38, 685 P.2d at 1168, 205 Cal. Rptr. at 817.

18. *Id.* at 738, 685 P.2d at 1168, 205 Cal. Rptr. at 817.

19. *Id.* at 738, 685 P.2d at 1169, 205 Cal. Rptr. at 818.

20. *Id.*

21. 447 U.S. 264 (1980).

22. In *Henry,* government agents contacted and paid a prisoner, who was housed in the same cell with Henry, to report any statements made by Henry. However, the authorities expressly advised the informant not to initiate any conversation with Henry or question him about the charges against him. *Id.* at 268.

23. 36 Cal. 3d at 741, 685 P.2d at 1170, 205 Cal. Rptr. at 819.

cused initiated the conversation."[24] What is significant is "whether the state has created a situation likely to provide it with incriminating statements from an accused. If it has, it may not disclaim responsibility for this information by the simple device of telling an informant to 'listen but don't ask.' "[25]

Another factor critical in determining whether the government has deliberately elicited statements is whether the government has provided any kind of incentive to the informant to obtain the information.[26] Where the informant interrogates an accused on his own initiative rather than at the request of the government, the government cannot be said to have deliberately elicited the statements.[27] Moreover, if the informant was not paid in cash or in the form of a lenient sentencing, the informant cannot be found to have acted at the behest of the government.[28]

In light of the foregoing, the court concluded that the defendant's statements to DeLoach were not deliberately elicited by the government. The question was a very close and difficult one because the detective who spoke with DeLoach offered to speak to the prosecutor on DeLoach's behalf.[29] This fact raised a serious concern as to whether DeLoach had an incentive to extract more statements from the defendant.[30] Moreover, the police must have realized that DeLoach hoped for a reward in exchange for the information.[31]

However, since the detectives were never aware that DeLoach was

24. *Id.* "Nichols was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.' " 447 U.S. at 271. *See also* Massiah v. United States, 377 U.S. 201 (1964) (no inquiry was made into whether Massiah or the informant first raised the subject of the crime under investigation).

25. 36 Cal. 3d at 742, 685 P.2d at 1171, 205 Cal. Rptr. at 820. *See also* United States v. Sampol, 636 F.2d 621, 642 (D.C. Cir. 1980) (confirming that it is immaterial that the informant did not initiate the conversation).

26. 36 Cal. 3d at 742, 685 P.2d at 1172, 205 Cal. Rptr. at 821. Another consideration is that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." United States v. Henry, 447 U.S. at 274. *See also* Cahill v. Rushen, 501 F. Supp. 1219, 1228 (E.D. Cal. 1980), *aff'd*, 678 F.2d 791 (9th Cir. 1982); People v. Superior Court (Sosa), 145 Cal. App. 3d 581, 597, 194 Cal. Rptr. 525, 535 (1983).

27. *See* Thomas v. Cox, 708 F.2d 132 (4th Cir.), *cert. denied*, 104 S. Ct. 284 (1983) (informant collected information out of curiosity).

28. *Id.* at 135-36; *see also* United States v. Malik, 680 F.2d 1162, 1164-65 (7th Cir. 1982); United States v. Sampol, 636 F.2d at 632-38.

29. 36 Cal. 3d at 744, 685 P.2d at 1172-73, 205 Cal. Rptr. at 821-22.

30. *Id.*

31. *Id.* at 744, 685 P.2d at 1173, 205 Cal. Rptr. at 822.

a government informant, "the mere acceptance of his information, even with the promise to talk to the prosecutor, [was] not sufficient encouragement to hold the police accountable."[32] The police neither made any promises in exchange for the information, nor took any action that would indicate leniency.[33] In spite of the close facts, the court concluded that DeLoach's conduct was not attributable to the state.[34]

Additionally, the argument that DeLoach was a police agent and therefore required to give *Miranda*[35] warnings before any interrogation failed to persuade the court that the statements were obtained in violation of the appellant's fifth amendment rights. The supreme court refused to disturb the trial court's conclusion that DeLoach was not a government agent but was a private citizen.[36]

Lastly, the supreme court briefly considered whether the court had erred in failing to provide the jury with a cautionary instruction on jury note-taking. Although section 1137 of the Penal Code expressly allows note-taking,[37] the defendant contended a cautionary instruction should have been given to inform the jury of the inherent dangers of note-taking.[38] Inasmuch as the trial court did provide a brief cautionary instruction, the court held there was no prejudicial error.[39]

Having found that a jury instruction regarding proof of intent to

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32. *Id.*

33. *Id.*

34. *Id.* The defendant argued on appeal that he was denied effective counsel at trial because his attorney did not raise a sixth amendment claim against DeLoach's testimony. In light of the supreme court's conclusion that the defendant's rights were not violated, this argument was rejected. *Id.*

35. Miranda v. Arizona, 384 U.S. 436 (1966).

36. 36 Cal. 3d at 745, 685 P.2d at 1173, 205 Cal. Rptr. at 822. *See also In re* Deborah C., 30 Cal. 3d 125, 130-31, 635 P.2d 446, 448, 177 Cal. Rptr. 852, 854 (1981).

37. Section 1137 states in pertinent part: "Upon retiring for deliberation, the jury may take with them . . . notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person." CAL. PENAL CODE § 1137 (West Supp. 1984). A court of appeal has held that the use of note pads by the jurors "is endorsed by section 1137 of the Penal Code." People v. Cline, 222 Cal. App. 2d 597, 601, 35 Cal. Rptr. 420, 422-23 (1963).

38. *See, e.g.*, United States v. MacLean, 578 F.2d 64, 66 (3d Cir. 1978) (jurors might rely on notes which are inaccurate, meager, careless, loosely deficient, partial and altogether incomplete; use them for the purpose of misleading fellow jurors; or not listen to important testimony because of concern with note-taking); People v. DiLuca, 85 A.D.2d 439, 444-45, 448 N.Y.S.2d 730, 734 (1982).

39. 36 Cal. 3d at 747-48, 685 P.2d at 1175, 205 Cal. Rptr. at 824. The trial judge cautioned the jurors thusly:

> [b]e careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes. . . . [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [*sic*] as to what a witness may have said, we can reread that transcript back by that witness back to you. Remember that aspect of it.

Id. (*sic* in original).

kill in a felony-murder special circumstance allegation was lacking, the judgment of death was reversed. As the court found no violation of the defendant's fifth and sixth amendment rights, the judgment of guilt was affirmed.

VII. EVIDENCE

A. *Newsperson has qualified privilege in a civil case to withhold disclosure of identity of confidential sources and unpublished information:* Mitchell v. Superior Court.

In *Mitchell v. Superior Court*,[1] the court was asked to decide whether in California a reporter or publisher has a qualified privilege in a civil case to withhold disclosure of the identity of confidential news sources and of unpublished information provided by those sources. In deciding in the affirmative, the court felt that while it could not ignore first amendment values, it had to recognize the policy of full disclosure of all relevant evidence.[2] The court therefore concluded, as other courts had before it, that reporters and publishers have a qualified privilege in a civil case to withhold their sources.[3] The scope of the privilege will differ from case to case, and depend upon an examination of certain interrelated factors.[4]

I. FACTS

The Synanon Church (Synanon) filed a libel action against the Reader's Digest, David and Cathy Mitchell, David McDonald and others when the Reader's Digest published an article describing how the Mitchells had won the Pulitzer Prize for reports and editorials critical of Synanon appearing in a weekly newspaper.[5] The Digest article, Synanon contended, was libelous since writer David McDonald had written in the article that Synanon had obtained donations for a string of drug rehabilitation centers, and that little rehabilitation work had occurred although donations were solicited on that basis. Synanon claimed the statements implied that Synanon fraudulently

1. 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984). Opinion by Broussard, Acting C.J., expressing the unanimous view of the court.

2. *Id.* at 276, 690 P.2d at 629, 208 Cal. Rptr. at 156.

3. *Id.* at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159.

4. *Id.*

5. A full recitation of the facts and a description of the Reader's Digest article appears in the companion case of Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. 137 (1984).

attempted to make money on the basis of rehabilitation centers that were not successful.

In the trial court, the Reader's Digest disclosed its sources for the article written by McDonald, but Synanon wished to go beyond that point and force discovery of the Mitchell's sources. Synanon wished to show that the Mitchells were selective in their reliance on some evidence in contrast to other evidence favorable to Synanon. The Mitchells objected, and uncertain whether the court had decided on the issue of privilege, withheld the documents requested by Synanon's discovery motions even after the court ordered their production. The Mitchells asked the court to clarify the order and the court responded that the privilege the Mitchells asserted "does not exist in California."[6] The Mitchells then sought a writ of prohibition to bar enforcement of the court's order.

II. ANALYSIS OF THE CASE

The Mitchells, as a party to the lawsuit, sought to assert a nonstatutory privilege based on protections of freedom of the press found in the United States Constitution and the California Constitution.[7] The supreme court recognized that a balance would have to be struck between the competing considerations of a free, unfettered press, and the need for all relevant evidence in a civil case. A free press is necessary as a source of public information to allow citizens to make informed choices in their lives, and removes the deterring effect of compelled disclosure.[8] On the other side of the ledger, however, an individual who has been libelled is legitimately interested in his reputation and the assertion of a reporter's privilege would impede that individual's ability to prove actual malice.[9] Further, the "concept that it is the duty of a witness to testify in a court of law has roots fully as deep in [this nation's] history as does the guarantee of a free press."[10]

The conflict could not be resolved by a blanket rule, the court preferring to hold that each case must be examined by the trial court "balancing the asserted interests in light of the facts of the case before it."[11] The overwhelming majority of courts deciding the privi-

6. 37 Cal. 3d at 274, 690 P.2d at 627-28, 208 Cal. Rptr. at 155.

7. *Id.* at 274, 690 P.2d at 628, 208 Cal. Rptr. at 155. *See* U.S. CONST. amend. I; CAL. CONST. art. I, § 2(a).

8. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Baker v. F & F Investment, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973).

9. Herbert v. Lando, 441 U.S. 153, 170 (1979) ("it is plain enough that the . . . privilege . . . would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice").

10. Garland v. Torre, 259 F.2d 545, 548 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

11. 37 Cal. 3d at 276, 690 P.2d at 632, 208 Cal. Rptr. at 159.

lege issue had taken that position.[12] A California court of appeal had also taken the case-by-case position.[13] The balancing test that the court contemplated involved a consideration of factors it believed were interrelated.[14] The court set out five factors in determining the scope of the qualified reporter's privilege.

The first factor was the "nature of the litigation and whether the reporter is a party" to the lawsuit.[15] The court held that, in a civil suit wherein the reporter is a party, disclosure is appropriate.[16] As the court noted, successful assertion of the privilege may shield a party reporter from liability, since proof of actual malice in cases involving public figures might depend on knowing the reporter's informant.[17] In the present case, the Mitchells were parties to the case, suggesting disclosure. The District of Columbia Circuit Court in *Zerelli v. Smith* noted, however, that in such cases disclosure should not be automatic; rather, the reporter's privilege should be recognized where other factors suggest disclosure is inappropriate.[18]

The second factor is "the relevance of the information sought to plaintiff's cause of action."[19] Mere relevance would not be enough to compel disclosure; the information must go " 'to the heart of [a] plaintiff's claim.' "[20] In the present case, there was a dispute over the relevance of the information sought by Synanon. Synanon urged that the information would reveal that the Mitchells lacked any reliable sources. The Mitchells argued that the real issue was whether they conspired with Reader's Digest to publish the article, making the identity of sources irrelevant. The court, however, reasoned that the identity of informants would be relevant in the event the Mitchells had furnished defamatory material to Reader's Digest with expectations that it would be published. If so, the Mitchells would have acted with actual malice and could be held liable on a republication theory.[21] The suit failed to allege republication, however, and the scope of the materials Synanon sought disclosed was too broad to

12. *Id.* (See cases cited in the opinion).
13. *Id.* (citing KSDO v. Superior Court, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982)) (balance the right of freedom of the press with a citizen's obligation to testify).
14. 37 Cal. 3d at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159.
15. *Id.*
16. *Id.*
17. *Id.* (citing Zerelli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981)).
18. *Zerelli*, 656 F.2d at 714.
19. 37 Cal. 3d at 280, 690 P.2d at 632, 208 Cal. Rptr. at 159.
20. *Id.* (citing *Garland*, 259 F.2d at 550).
21. 37 Cal. 3d at 281, 690 P.2d at 633, 208 Cal. Rptr. at 160.

"justify overriding the reporter's privilege."[22]

A third consideration is that discovery is usually denied unless the plaintiff has exhausted all alternatives to obtain the information.[23] Plaintiff Synanon had failed to exhaust its alternatives in this case.

Fourth, courts will be required to "consider the importance of protecting confidentiality" in each case.[24] This consideration amounts to a balancing test of its own, as the court reasoned that "when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure."[25]

The final consideration is that courts may require the plaintiff to prove a prima facie case that the alleged defamatory statements are false before disclosure is required.[26] This requirement would, in effect, insure that the previous considerations were all relevant to the case. To require disclosure where the plaintiff had not even been libelled would be injurious to the concept of a free press.[27] Here, Synanon failed to even attempt a prima facie showing of falsity.[28]

Since Synanon's request failed each of the considerations the court deemed important, it was held the privilege should stand in this case. The court issued the writ of prohibition requested by the Mitchells.[29]

III. IMPACT OF THE DECISION

This case was one of first impression,[30] and the court's decision set out for the first time in California guidelines to be followed by courts in civil cases where a party or witness claims the qualified reporter's privilege.

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22. *Id.* at 281-82, 690 P.2d at 633-34, 208 Cal. Rptr. at 160-61.

23. *Id.* at 282, 690 P.2d at 634, 208 Cal. Rptr. at 161. It seems logical that this requirement must be read in conjunction with other relevant factors. Although a party may have exhausted all recourse, the information may be completely irrelevant as required by the second factor, so that the reporter's privilege might prevail.

24. *Id.*

25. *Id.* at 283, 609 P.2d at 634, 208 Cal. Rptr. at 161. Perhaps a clearer case for the privilege could be made where the information is *not* of public importance while the harm to the informant may be great. At the other extreme, it may matter little to the informant if he is exposed.

26. *Id.*

27. *See* Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986, 993 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

28. *Mitchell,* 37 Cal. 3d at 283, 690 P.2d at 635, 208 Cal. Rptr. at 162.

29. *Id.* at 284, 690 P.2d at 635, 208 Cal. Rptr. at 162.

30. *Id.* at 272, 690 P.2d at 626, 208 Cal. Rptr. at 153.

B. *Evidence of prior sex crimes was improperly admitted since it failed to show a characteristic method, plan or scheme:* **People v. Alcala.**

In *People v. Alcala,* 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984), the defendant was convicted of one count of first degree murder, and one count of forcible kidnapping. Inasmuch as the murder was committed in the course of a kidnapping, the special circumstances provision of Penal Code section 190.2(a)(17)(ii) applied. The defendant was sentenced to death, leading to an automatic appeal.

The fundamental issue in this case was the identity of the twelve year old female victim's abductor and killer. The jury's determination that the defendant was guilty was based upon the hotly disputed testimony of jailhouse informants and a forest service worker who discovered the mutilated body seven days before it was discovered by someone else but failed to report it. Additionally, evidence of the defendant's prior child molestation offenses were admitted to show a consistent modus operandi. *See* CAL. EVID. CODE § 1101(a), (b) (West 1966).

On appeal, the defendant argued that the evidence at trial was legally insufficient to convict him of premeditated murder and forcible kidnapping. In addition, the defendant argued that the improper introduction of his prior crimes constituted reversible error.

The supreme court rejected the defendant's argument of insufficient evidence. Circumstantial evidence made it highly unlikely that the victim willingly accompanied the defendant to the death scene. Also, the evidence presented about the murder met the planning, motive, and methodology requirements needed to establish a prima facie case of premeditated murder. The defendant's methodology to kill the victim was very "particular and exacting," he had the requisite motive to kill—to eliminate the only witness to the crime—and there was, most importantly, substantial evidence of a plan calculated to result in a killing.

However, it was the introduction of the defendant's prior crimes of child molestation that provided the pivotal point in the court's review of the defendant's case. The court concluded that evidence of the defendant's past crimes served only to reveal a predisposition to child molesting rather than a consistent and particular modus operandi. Therefore, the evidence was inadmissible under California Evidence Code section 1101(a).

Admission of the prior crimes evidence constituted reversible error

since the prejudicial nature of the crimes may have improperly influenced the jury. Thus, the defendant's convictions were reversed.

C. *Testimony aided by hypnosis is barred in all pending cases as of March 11, 1982:* People v. Guerra.

I. INTRODUCTION

In *People v. Guerra*,[1] the supreme court determined whether its ruling in *People v. Shirley*[2] that the use of hypnosis to restore or improve the memory of a potential witness is not accepted as a reliable procedure by a consensus of the relevant scientific community, and hence the testimony of such a witness is inadmissible as to all matters that were the subject of the hypnotic session,[3] applied to witnesses who were hypnotized before the *Shirley* ruling.[4] Upon reviewing its own settled retroactivity precedent and that of the United States Supreme Court, the court determined that *Shirley* applied to all cases not yet final as of the date of its determination—March 11, 1982.[5]

II. BACKGROUND

The defendants were convicted, by jury trials, of forcible rape and attempted forcible oral copulation, with allegations that they " 'voluntarily acted in concert' to commit the offense charged."[6] Due to the fact that the victim's story and that of the co-defendants were contradictory,[7] the police employed hypnosis on the victim to im-

1. 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984). Opinion by Mosk, J., with Bird, C.J., and Broussard, Reynoso, and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J., with Grodin, J., concurring. Separate dissenting opinion by Lucas, J.

2. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

3. *Id.* at 66-67, 641 P.2d at 804-05, 181 Cal. Rptr. at 272-73.

4. 37 Cal. 3d at 390, 690 P.2d at 637, 208 Cal. Rptr. at 164.

5. *Id.* at 385, 690 P.2d at 635, 208 Cal. Rptr. at 162.

6. *Id.* at 391, 690 P.2d at 637, 208 Cal. Rptr. at 164. *See also* CAL. PENAL CODE §§ 264.1, 288a(d) (West Supp. 1985).

7. The victim maintained that, upon realizing a possible rape, she asked Murkidjanian if she could get her diaphragm; both defendants removed her upper clothing; Murkidjanian tried to attain an erection by masturbating; when his attempts failed, he tried to force her to orally copulate him; that his flaccid penis penetrated her; and that Guerra sat in a chair observing and later comforted her. *Id.* at 392-93, 690 P.2d at 638-39, 208 Cal. Rptr. at 165. During subsequent interviews, the victim told the same story except that she stated there had been no penetration. *Id.* at 394-95, 690 P.2d at 640, 208 Cal. Rptr. at 167.

One of the defendants, Guerra, denied helping Murkidjanian take off the victim's clothing and further testified that he found the victim and Guerra lying naked on the bed. *Id.* at 393-94, 690 P.2d at 639, 208 Cal. Rptr. at 166. He also confirmed that Murkidjanian did not have an erection, was attempting to masturbate and that he (Guerra) later comforted the victim. *Id.* Murkidjanian's defense was consent. He denied that the victim resisted; his belief that the victim had consented was due to the fact that the victim volunteered to get her diaphragm; he was too drunk to get an erec-

prove or restore her memory of the events in question, particularly as to whether penetration had actually occurred.[8] Through hypnosis, the victim was able to remember that penetration occurred.[9] The defendants moved to suppress the victim's testimony on the ground that hypnotically induced evidence is too unreliable to be admitted into criminal trials.[10] These motions were denied. On appeal to the supreme court, both defendants contended that the case was controlled by the rule enunciated in *People v. Shirley*,[11] and that application of the *Shirley* rule would require the court to hold that admission of the posthypnotic testimony was erroneous and prejudicial.[12]

III. ANALYSIS

A. Rules of Retroactivity

In determining whether the *Shirley* rule should be retroactively applied to all cases not yet final as of the date of the decision, the court first discussed the rules of retroactivity. The first step in determining retroactivity is to ask whether the rule in question establishes a new rule of law.[13] If it does not, " 'no question of retroactivity arises' because there is no material change in the law."[14] The decision merely becomes part of the body of case law of the state, and "under ordinary principles of stare decisis applies in all cases not yet final."[15]

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tion; after failing in his attempt to masturbate, he asked the victim if she would orally copulate him. The victim refused. He got angry, the victim began to cry and this scared him into giving up the effort. He denied penetration. *Id.* at 394, 690 P.2d at 639, 208 Cal. Rptr. at 166-67.

8. *Id.* at 394-98, 690 P.2d at 640-42, 208 Cal. Rptr. at 167-69.

9. *Id.* at 396-97, 690 P.2d at 641, 208 Cal. Rptr. at 168.

10. *Id.* at 397, 690 P.2d at 641, 208 Cal. Rptr. at 168.

11. *See supra* notes 2-4 and accompanying text.

12. 37 Cal. 3d at 398, 690 P.2d at 642-43, 208 Cal. Rptr. at 169-70.

13. *Id.* at 399, 690 P.2d at 643, 208 Cal. Rptr. at 170.

14. *Id. See also* United States v. Johnson, 457 U.S. 537, 549 (1982); People v. Garcia, 36 Cal. 3d 539, 547-48, 684 P.2d 826, 830, 205 Cal. Rptr. 265, 268-69 (1984); Donaldson v. Superior Court, 35 Cal. 3d 24, 36, 672 P.2d 110, 117, 196 Cal. Rptr. 704, 711-12 (1983).

15. 37 Cal. 3d at 399, 690 P.2d at 643, 208 Cal. Rptr. at 170. Common examples of decisions that do not establish new law are those which explain or refine the holding of a prior case, those which extend the rule of law to a different fact situation, those which draw a conclusion that was clearly implied in or anticipated by previous opinions, or those in which the court gave effect to a statutory rule that had previously been misinterpreted or not definitely addressed. *See, e.g., Garcia*, 36 Cal. 3d at 549, 684 P.2d at 831, 205 Cal. Rptr. at 269 (effect given to a statutory rule not previously definitively addressed); Gallick v. Superior Court, 5 Cal. 3d 855, 859-60, 489 P.2d 573, 575, 97 Cal. Rptr. 693, 695 (1971) (reaffirmation of a settled principle which intervening appel-

If the decision establishes a new rule, the second inquiry become whether there was a prior rule to the contrary.[16] If no prior rule exists, the new rule applies in all cases not yet final, the rationale being that "there cannot have been any *justifiable* reliance on an old rule when no old rule existed."[17] Since unjustified reliance is not a bar to retroactivity,[18] in all such cases the ordinary assumption of retrospective application takes full effect.[19] Common examples of situations which establish a new rule, where there was no prior rule to the contrary, include cases in which the court resolves a conflict between lower court decisions[20] or addresses an issue not previously presented to the courts.[21] Additionally, if the court finds a new rule constitutes a "clear break with the past," the court may choose to make, on the grounds of public policy, an exception to the general rule of retrospective application.[22] Such clear breaks with the past occur in limited situations, i.e., when the decision explicitly overrules a precedent of the supreme court, disapproves a practice impliedly sanctioned by a prior decision of the supreme court, or disapproves a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities.[23]

If one of the three limited situations exists, the California courts weigh three factors, summarized in *Stovall v. Denno*,[24] to determine whether to make an exception to the rule of retroactive application on the ground of public policy: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[25]

The *Stovall* test, which has been labeled functionally as a bipartite test[26] and on certain occasions as a unipartite test,[27] has been most

late court decisions weakened); People v. Mutch, 4 Cal. 3d 389, 394, 482 P.2d 633, 636, 93 Cal. Rptr. 721, 724 (1971) (misconstrued statutory rule is clarified).

16. 37 Cal. 3d at 399-400, 690 P.2d at 643, 208 Cal. Rptr. at 170.

17. *Id.* (emphasis in original).

18. Solem v. Stumes, 104 S. Ct. 1338, 1343 (1984).

19. 37 Cal. 3d at 399-400, 690 P.2d at 643, 208 Cal. Rptr. at 170.

20. *See, e.g.*, People v. Beeman, 35 Cal. 3d 547, 556-60, 674 P.2d 1318, 1323-26, 199 Cal. Rptr. 60, 65-68 (1984).

21. 37 Cal. 3d at 400, 690 P.2d at 644, 208 Cal. Rptr. at 171.

22. *Id.* at 401, 690 P.2d at 644, 208 Cal. Rptr. at 171.

23. *Id. See also* United States v. Johnson, 457 U.S. 537, 551 (1982); Donaldson v. Superior Court, 35 Cal. 3d 24, 37, 672 P.2d 110, 118, 196 Cal. Rptr. 704, 712 (1983).

24. 388 U.S. 293, 297 (1967).

25. *Donaldson*, 35 Cal. 3d at 38, 672 P.2d at 118, 196 Cal. Rptr. at 712-13. *See also In re* Joe R., 27 Cal. 3d 496, 511-12, 612 P.2d 927, 936-37, 165 Cal. Rptr. 837, 846-47 (1980); People v. Kaanehe, 19 Cal. 3d 1, 10, 559 P.2d 1028, 1034, 136 Cal. Rptr. 409, 415 (1977).

26. Although the *Stovall* test is traditionally described as tripartite, that is misleading. The second and third factors are essentially the same, thus functionally making the test bipartite. 37 Cal. 3d at 401-02, 690 P.2d at 645, 208 Cal. Rptr. at 172.

[W]hen the retroactive application of a new rule causes a substantial effect on

consistently applied in cases in which the main purpose of a new rule is "to promote reliable determinations of guilt or innocence."[28]

> Where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.[29]

> the administration of justice, it is primarily because there was a substantial reliance on the old rule by law enforcement authorities; conversely, when that reliance was minimal, retroactive application will usually have a similarly minimal effect on the administration of justice.

Id.

27. The bipartite test is reduced to a unipartite function where "the first factor—the purpose of the new rule—points plainly towards retroactivity or prospectivity." *Id.* at 401-02, 690 P.2d at 645, 208 Cal. Rptr. at 172. "[T]he factors of reliance and burden on the administration of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered." *In re* Johnson, 3 Cal. 3d 404, 410, 475 P.2d 841, 844, 90 Cal. Rptr. 569, 572 (1970). When that purpose clearly favors retroactivity or prospectivity, it will be given effect without regard to the weight of the remaining factors. *Accord* Desist v. United States, 394 U.S. 244, 251 (1969).

28. 37 Cal. 3d at 402, 690 P.2d at 645, 208 Cal. Rptr. at 172.

29. Williams v. United States, 401 U.S. 646, 653 (1971) (footnote omitted).

Since *Williams*, the United States Supreme Court has held a new rule retroactive on this ground in the following instances: United States v. Johnson, 457 U.S. 537 (1982) (fourth amendment decisions in general, and Payton v. New York, 445 U.S. 573 (1980), in particular, are retroactive in the sense that they apply on direct appeal to all judgments not final); Brown v. Louisiana, 447 U.S. 323 (1980) (wherein the Court gave retroactive effect to the rule of Burch v. Louisiana, 441 U.S. 130 (1979), which required unanimity for conviction of a nonpetty offense by a six-person jury); Hankerson v. North Carolina, 432 U.S. 233 (1977) (wherein the issue was the retroactivity of the rule enunciated in Mullaney v. Wilbur, 421 U.S. 684 (1971), which barred the states from shifting to the defendant the burden of persuasion on any element of the crime); and Ivan v. City of New York, 407 U.S. 203 (1972) (where the Court determined whether the rule in *In re* Winship, 397 U.S. 358 (1970), which required the states to comply with the standard of proof beyond a reasonable doubt in juvenile proceedings, was retroactive).

For decisions by the California Supreme Court which are in accord with the United States Supreme Court, see Pryor v. Municipal Court, 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979) (interpretation of Penal Code section 647(a) given retroactive effect); People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977) ("Allen-type charge" overruled and applied retroactively); People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) (major purpose of retroactive rule is to overcome an aspect of the proceeding which substantially impairs the truth-finding process); *In re* Montgomery, 2 Cal. 3d 863, 471 P.2d 15, 87 Cal. Rptr. 695 (1970) (full retroactive effect given to the rule of Barber v. Page, 390 U.S. 719 (1968), where the court found that a defendant's constitutional right of confrontation and cross-examination is violated when he is convicted on the transcript of the preliminary hearing testimony of an absent witness, unless the prosecution has made a good faith attempt to secure the witness' presence at trial).

B. *Application of Retroactivity Rules to the* Shirley *Decision*

Having set forth the circumstances under which a decision will be given retroactive effect, the court began its analysis as to whether the *Shirley* rule should be applied retroactively to the date of its decision. First, the court found that *Shirley* established a new rule of law.[30] Second, there was no previous California rule which, contrary to *Shirley,* held that the testimony of a witness who has been hypnotized to restore his memory is admissible in California courts.[31]

Moreover, since *Shirley* did not explicitly overrule a precedent of the court, it did not represent a clear break with the past.[32] Nor did *Shirley* fall within the second category of decisions which disapprove a practice impliedly sanctioned by prior decision of the court.[33] "[T]he repeated references in . . . opinions to the unreliability and inadmissibility of hypnotically induced testimony make it inconceivable that anyone could fairly have read them as encouraging the use of hypnosis to refresh a witness' memory."[34]

Finally, *Shirley* did not represent a "clear break from the past." It did not fall within the third category of cases which disapprove a long-standing and widespread practice expressly approved by a near unanimous body of lower court authority.[35] While "prior to *Shirley* there were a number of instances in which certain police departments in California used hypnosis in an attempt to restore or improve a witness' memory, it does not appear that it was both a 'longstanding' and 'widespread' practice within the meaning of the retroactivity precedents."[36] "More important, there was no express approval of any such practice by a near-unanimous body of lower-court precedents."[37]

Inasmuch as the court's analysis found there was no " 'old rule' to the contrary in California, *Shirley* did not constitute a 'clear break

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30. 37 Cal. 3d at 406, 690 P.2d at 648, 208 Cal. Rptr. at 175.

31. *See, e.g.,* People v. Blair, 25 Cal. 3d 640, 665, 602 P.2d 738, 753-54, 159 Cal. Rptr. 818, 833-34 (1979) (exclusion of a tape recording of statements made by a defense witness while hypnotized); People v. Modesto, 59 Cal. 2d 722, 733, 382 P.2d 33, 39-40, 31 Cal. Rptr. 225, 231-32 (1963) (exclusion of a tape recording of statements made by the defendant while hypnotized); People v. Busch, 56 Cal. 2d 868, 878, 366 P.2d 314, 319-20, 16 Cal. Rptr. 898, 903-04 (1961) (physician not permitted to testify about the defendant's mental state at time of crimes which was elicited through hypnosis); Cornell v. Superior Court, 52 Cal. 2d 99, 102, 338 P.2d 447, 449 (1959) (statements a defendant makes under hypnosis are inadmissible but may serve as leads to the discovery of other admissible evidence); People v. Ebanks, 117 Cal. 652, 665-66, 49 P. 1049, 1053 (1897) (law of United States does not recognize hypnotism).

32. 37 Cal. 3d at 408-09, 690 P.2d at 649-50, 208 Cal. Rptr. at 176.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

with the past' and hence must be given normal application to all cases not yet final."[38]

In spite of the above holding, the court hypothesized that, assuming arguendo *Shirley* did amount to a "clear break" which in appropriate circumstances could be limited to prospective operation, it would proceed to apply the *Stovall* test to determine whether prospective application was warranted on the grounds of public policy.[39] Using the rule enunciated in *People v. Kelly*[40] and *Frye v. United States,*[41] that evidence based on a new scientific technique is admissible only on a showing that it is generally accepted as reliable in the scientific community in which it was developed,[42] the court determined that the use of hypnosis to restore a witness' memory was generally held to be unreliable in the scientific community.[43]

Additionally, the purpose of *Shirley* was "to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials."[44] Accordingly, whether or not *Shirley* replaced a prior rule to the contrary, the decision applied to all cases not yet final in California courts at the time it was decided.[45]

C. *Respondent's Attack on the* Shirley *Rule Itself*

In the alternative, the respondent also attacked the *Shirley* rule itself. The respondent contended that subsequent developments in scientific literature and case law had undermined *Shirley* to the extent that the decision should be reconsidered or overruled.[46]

With regard to developments in scientific literature, the respon-

38. *Id.* at 411, 690 P.2d at 651, 208 Cal. Rptr. at 178. The respondent relied on two cases: People v. Diggs, 112 Cal. App. 3d 522, 169 Cal. Rptr. 386 (1980); People v. Colligan, 91 Cal. App. 3d 846, 154 Cal. Rptr. 389 (1979). However, the court held these cases, at most, gave "implied support" for the use of hypnosis to restore a witness' memory. 37 Cal. 3d at 410, 690 P.2d at 651, 208 Cal. Rptr. at 178. To constitute a "clear break from the past" such practice must be *expressly* sanctioned by the lower courts. *Id.*

39. 37 Cal. 3d at 411, 690 P.2d at 651-52, 208 Cal. Rptr. at 178-79.

40. 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

41. 293 F. 1013 (D.C. Cir. 1923).

42. *Frye,* 293 F. at 1013-14; *Kelly,* 17 Cal. 3d at 30-32, 37, 549 P.2d at 1250, 130 Cal. Rptr. at 148. *See also* People v. Diggs, 112 Cal. App. 3d 522, 169 Cal. Rptr. 386 (1980) (wherein the *Kelly-Frye* test was not met).

43. 37 Cal. 3d at 412, 690 P.2d at 652-53, 208 Cal. Rptr. at 179.

44. *Id.* at 412-13, 690 P.2d at 652-53, 208 Cal. Rptr. at 179-80 (citing Hankerson v. North Carolina, 432 U.S. 233, 243 (1977)).

45. 37 Cal. 3d at 413, 690 P.2d at 653, 208 Cal. Rptr. at 180.

46. *Id.* at 417, 690 P.2d at 656, 208 Cal. Rptr. at 183.

dent attempted to substantiate its argument with two articles by professionals in the behavioral sciences.[47] The first article, *The* Shirley *Decision: The Cure is Worse than the Disease,* was found to be a frontal assault on the *Shirley* decision itself. It represented the minority view on the risks of admitting posthypnotic testimony.[48] Since it was only the minority view,[49] this piece of literature did not provide any evidence that use of hypnosis was supported by a clear majority of members in the scientific community.[50]

The second article relied upon by the respondent, *Hypnotic Hypermnesia: A Critical Review,* by Helmut Relinger, Ph.D., was even less persuasive because the studies on which its premise was based all predated the *Shirley* decision.[51]

The court, less than satisfied with the respondent's authorities, then conducted its own survey of articles addressing the use of hypnosis to restore a witness' memory.[52] It concluded that the literature was "remarkably uniform in [its] conclusion that if there is any increased recall in hypnotic hypermnesia, it is purchased at the price of increased errors and probably also an increase in the subject's misplaced confidence in those errors."[53]

Nor did the respondent's argument that recent case law dictated a change in the *Shirley* rule serve as a pivotal point in the court's analysis. While courts of other states had declined to follow *Shirley,* the court held that the authorities relied upon by the respondent[54] did

47. At the time of the article, neither article was in print yet, however, the respondent advised the court both were "soon to be published," but could only provide the court with information as to where one article would appear. *Id.* at 417 n.28, 690 P.2d at 656 n.28, 208 Cal. Rptr. at 183 n.28.

48. *Id.* at 418, 690 P.2d at 656-57, 208 Cal. Rptr. at 183-84.

49. For articles discussing the minority view, see Kroger & Douce, *Hypnosis in Criminal Investigation,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358 (1979); Schafer & Rubio, *Hypnosis to Aid the Recall of Witnesses,* 26 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 81 (1978); Spiegel, *Hypnosis and Evidence: Help or Hindrance?,* 347 ANNALS N.Y. ACAD. SCI. 73 (1980).

50. 37 Cal. 3d at 418, 690 P.2d at 656, 208 Cal. Rptr. at 183.

51. *Id.* at 418-19, 690 P.2d at 657, 208 Cal. Rptr. at 184.

52. *Id.* at 419-24, 690 P.2d at 657-61, 208 Cal. Rptr. at 184-88.

53. *Id.* at 419, 690 P.2d at 657, 208 Cal. Rptr. at 184. *See also* Wagstaff, *Hypnosis and the Law: A Critical Review of Some Recent Proposals,* 1983 CRIM. L. REV. (LONDON) 152, 157.

54. *See* State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984) (state rejected all other tests and adopted its own procedures); State v. Seager, 341 N.W.2d 420 (Iowa 1983) (posthypnotic testimony admissible when it is "substantially the same" as witness' prehypnotic statements); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (hypnotic testimony must comply with safeguards); State v. Brown, 337 N.W.2d 138 (N.D. 1983) (rejection of *Hurd* test); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983) (requiring a pre-trial hearing on the "suggestiveness" of the hypnotic session in each case). *But see* United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); State *ex rel* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Quintanar, 659 P.2d 710 (Colo. App. 1982); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982); People v. Hughes, 59 N.Y.2d 523, 453

not represent a "new trend" as they sharply disagreed with one another as to their holdings.[55]

Finally, the court entertained the respondent's final argument that "many . . . courts have . . . declared a willingness to allow, under a variety of restrictions, the introduction of 'prehypnotic evidence;' i.e., in certain circumstances the witness may be permitted to testify to facts that he remembered *before* he was hypnotized."[56] The court took a dim view of this suggestion.[57] While the evidence is recalled *before* hypnosis, it may be tainted since the evidence is put before the jury *after* the witness has been hypnotized. Although *Shirley* did hold one type of prehypnosis testimony admissible,[58] the court was unwilling to further extend *Shirley* due to the fact that the soundness of that exception had been questioned in the scientific community,[59] thus preventing the court from changing its position.[60]

IV. CONCLUSION

Under the above analysis, the supreme court held steadfast to the *Shirley* rule. The court held that the trial court had erred in denying the defendants' motions to exclude the victim's posthypnotic testimony.[61] Since the victim's posthypnotic testimony was "virtually the sole incriminating evidence against each defendant,"[62] the court was compelled to reverse the judgments.

N.E.2d 484, 466 N.Y.S.2d 255 (1983); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984), and Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981), wherein the courts are consistent with the *Shirley* rule.

55. 37 Cal. 3d at 425, 690 P.2d at 661, 208 Cal. Rptr. at 188.

56. *Id.* at 427, 690 P.2d at 663, 208 Cal. Rptr. at 190.

57. *Id.*

58. Where a witness has testified at a preliminary hearing before being hypnotized, the witness' preliminary hearing testimony is admissible in lieu of the inadmissible posthypnotic testimony, provided only that the witness' disqualification has not been procured by the prosecution for the purpose of preventing him from testifying. *Shirley*, 31 Cal. 3d 18, 71-73 & n.60, 641 P.2d 775, 806-08 & n.60, 181 Cal. Rptr. 243, 274-76 & n.60 (1982).

59. *See, e.g.*, Beaver, *Memory Restored or Confabulated by Hypnosis—Is It Competent?*, 6 U. PUGET SOUND L. REV. 155, 195-202 (1983); Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony In Criminal Trials*, 34 SYRACUSE L. REV. 927, 969-74 (1983).

60. 37 Cal. 3d at 428-29, 690 P.2d at 664-65, 208 Cal. Rptr. at 191-92. An additional factor that prohibited the court from carving out an exception to the *Shirley* rule was that the respondent had not fully briefed the issue. *Id.*

61. *Id.* at 429-30, 690 P.2d at 664-65, 208 Cal. Rptr. at 192.

62. *Id.*

D. *Cumulative effect of evidentiary and prosecutorial errors require reversal of first degree murder and robbery conviction:* **People v. Holt.**

In *People v. Holt,* 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984), the supreme court reversed convictions for first degree murder and robbery on the grounds that numerous evidentiary and prosecutorial errors, which occurred during the trial, had a cumulative prejudicial effect.

First, the court held it was error to allow testimony which portrayed the defendant as a drug abuser. The object of the crime involved was not to obtain money to procure drugs. Since this testimony only had a remote relation to the material facts of the robbery and subsequent murder, the probative value of the defendant's drug use was "outweighed by the inflammatory effect of this kind of testimony on the jury."

Second, the trial court erred in admitting testimony that the defendant had committed numerous burglaries with his co-defendant. The relationship between the co-defendants was never in issue, hence not relevant. The only purpose of this testimony was to show propensity to commit crimes in general. Under Evidence Code section 1101, the trial court should have excluded the testimony.

Third, evidence of the defendant's five prior burglary convictions was held inadmissible. The supreme court determined that the record did not reflect any attempt by the trial court to weigh the probative value of using more than one prior conviction against the prejudicial effect of such evidence. Additionally, a conviction for burglary does not necessarily involve an intent to deceive, defraud, lie, or steal. Accordingly, use of these prior convictions for impeachment was permissible only if the prosecution had demonstrated this evidence involved theft or a dishonest act.

Fourth, it was error to admit evidence of the defendant's knowledge of prison gangs. There was no showing that the defendant was a member of any gang or that he shared a common membership with any party to the action. Other than blackening the defendant's character, this evidence had no probative value.

Fifth, the trial court erred in permitting a defense witness to be improperly impeached with four murder convictions and three counts of conspiracy to commit murder. While these crimes indicated, at most, a character trait for violence, they did not indicate the witness was disposed to falsifying.

Sixth, in the closing argument of the guilt phase of the trial, the prosecutor committed prejudicial misconduct by stating that if the jury accepted the defense's theory, they would be guaranteeing the defendant a parole date. Although the trial court had instructed the

prosecutor not to talk about a parole date, the trial court failed to properly admonish the jury not to consider the defendant's possible punishment.

Based upon all of the above, the court determined the cumulative effect of these errors amounted to prejudicial error, thereby warranting the setting aside of the convictions for first degree murder and robbery.

E. *On proper showing, testimony of psychologist who is qualified expert on factors that may influence eyewitness identification is admissible, and it was reversible error for trial court to bar such testimony:* **People v. McDonald.**

In the first of a rather unusual pair of decisions dealing with the place of psychology in the courtroom,[1] the court in *People v. McDonald*[2] was asked to decide whether the testimony of a psychologist who is qualified as an expert on the various factors that may influence eyewitness identification is admissible in a criminal trial. In answering in the affirmative,[3] the court decided the time had come for such scientific evidence to be presented to juries as an aid in reaching proper verdicts.[4]

I. FACTS OF THE CASE

Largely on the strength of eyewitness identifications, defendant McDonald was convicted and sentenced to death for the murder of another man in Long Beach. Four witnesses positively identified McDonald as the murderer, three others identified him tentatively and one categorically testified that the defendant was not the murderer. There was also conflicting testimony by others claiming that McDonald was in fact near Mobile, Alabama the day of the shooting.

1. The sister case is People v. Guerra, 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984), which deals with the use of hypnotically induced testimony in criminal cases. *Guerra* is analyzed in this survey at 12 PEPPERDINE L. REV. 842 (1985).

2. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984). Opinion by Mosk, J., with Bird, C.J., and Kaus, Broussard, Reynoso and Grodin, JJ., concurring.

3. 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

4. *Id.* Also noteworthy is the court's treatment of the secondary issue dealing with the jury's failure to specify a degree in its conviction. *Id.* at 379-82, 690 P.2d at 728-31, 208 Cal. Rptr. at 255-58. The jury's failure brought into operation California Penal Code section 1157. In another case decided this term, People v. Avalos, 37 Cal. 3d 216, 689 P.2d 121, 207 Cal. Rptr. 549 (1984), the court dealt with the issue in detail. An analysis of the opinion appears in this survey at 12 PEPPERDINE L. REV. 820 (1985).

Prior to trial, defense counsel offered as a witness Dr. Robert Shomer, a qualified expert in the psychology of eyewitness identification. Dr. Shomer stated that he intended to inform the jury of psychological factors that may influence the validity of an eyewitness identification. The trial court refused to allow Dr. Shomer to testify, based on its reading of *People v. Johnson*,[5] as it felt that to admit Dr. Shomer's testimony would usurp the jury's function of deciding issues relative to the case.[6]

II. ANALYSIS OF THE CASE

The supreme court attacked the reasoning of the trial court through an examination of the role psychological testimony would play in a criminal trial. The court first noted that eyewitness identification is notorious for its inaccuracies.[7] History is full of instances where mistaken identification has led to a miscarriage of justice, leaving the suspect vulnerable to the powers of suggestion.[8] As the court noted, distinguished federal jurists have called for caution in the area.[9] One judge has called for the courts to inform themselves of scientific studies of eyewitness identification problems and "to allow juries access to that information in aid of their factfinding tasks."[10] Substantial study has been done in the area and "the courts can no longer remain oblivious to their implications for the administration of justice."[11]

In order to allow the jury to hear such information, the traditional method of allowing the testimony of expert witnesses is called for.[12] The judicial tradition, however, has been to disallow such testimony when the subject is the psychological factors that affect the accuracy of eyewitness identification.[13] The court wondered whether the judicial reluctance of admitting such testimony was justified. As the leading case in the area, and the case relied upon by the trial court, *People v. Johnson* proved to be an excellent point of departure for the court's inquiry.

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5. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974).

6. 37 Cal. 3d at 362, 690 P.2d at 716, 208 Cal. Rptr. at 243.

7. *Id.* at 363, 690 P.2d at 717, 208 Cal. Rptr. at 244 (citing United States v. Wade, 388 U.S. 218, 229 (1967)).

8. *Id.*

9. 37 Cal. 3d at 363-64, 690 P.2d at 717, 208 Cal. Rptr. at 244 (citing Jackson v. Fogg, 589 F.2d 108 (2d Cir. 1978) (Lumbard, J.)); United States v. Smith, 563 F.2d 1361 (9th Cir. 1977) (Hufstedler, J., concurring), *cert. denied*, 434 U.S. 1021 (1978); United States v. Russell, 532 F.2d 1063 (6th Cir. 1976) (McCree, J.)).

10. 37 Cal. 3d at 364, 690 P.2d at 717, 208 Cal. Rptr. at 244 (citing United States v. Brown, 461 F.2d 134, 145-46 n.1 (D.C. Cir. 1972) (Bazelon, C.J., concurring and dissenting)).

11. 37 Cal. 3d at 365, 690 P.2d at 718, 208 Cal. Rptr. at 245.

12. *Id.*

13. *Id.* (*see* cases cited therein).

In *Johnson,* the court of appeal upheld the trial court's exclusion of evidence pertaining to the psychology of identification on four grounds.[14] The supreme court found these grounds to be suspect.[15] First, the *Johnson* court reasoned that while the Evidence Code suggests the credibility of an eyewitness may be considered by a jury,[16] it did not follow that a party could call "another witness to testify as to the former's capacity."[17] However, in *McDonald,* Dr. Shomer was prepared only to educate the jury with the *potential* for improper identification of a suspect due to various factors; his testimony was not intended to directly attack the credibility of any particular witness.[18]

Secondly, the *Johnson* court was concerned that section 801 of the Evidence Code[19] limited expert testimony to subjects "beyond the range of common experience."[20] Section 801, however, applies only to testimony coming from the opinion of the expert.[21] As to matters of fact, the expert may testify if he qualifies as an expert[22] and his testimony would be relevant to the issues.[23] Dr. Shomer's testimony would have related primarily to facts and such facts were relevant to the case.

Further, section 801 only limits expert testimony to matters "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ."[24] The *Johnson* court flatly limited such testimony to matters "beyond common experience."[25] The supreme court found this too limited a view.[26] The *McDonald* court preferred the test for admissibility of *People v. Cole,*[27] which would exclude expert testimony if it would add nothing to the jury's common everyday knowledge.[28] Applying this test in this case, it is obvi-

14. *Johnson,* 38 Cal. App. 3d at 13, 112 Cal. Rptr. at 841.
15. 37 Cal. 3d at 366, 690 P.2d at 719, 208 Cal. Rptr. at 246.
16. *See* CAL. EVID. CODE § 780(c) (West 1966). This section permits the trier of fact to consider a witness' ability to perceive, recollect and communicate in determining his credibility.
17. *Johnson,* 38 Cal. App. 3d at 6, 112 Cal. Rptr. at 837.
18. 37 Cal. 3d at 366, 690 P.2d at 719, 208 Cal. Rptr. at 246.
19. CAL. EVID. CODE § 801(a) (West 1966).
20. *Johnson,* 38 Cal. App. 3d at 6-7, 112 Cal. Rptr. at 837.
21. CAL. EVID. CODE § 801(a) (West 1966).
22. CAL. EVID. CODE § 720 (West 1966).
23. "[A]ll relevant evidence is admissible." CAL. EVID. CODE § 351 (West 1966).
24. CAL. EVID. CODE § 801(a) (West 1966).
25. *Johnson,* 38 Cal. App. 3d at 6, 112 Cal. Rptr. at 836.
26. 37 Cal. 3d at 367, 690 P.2d at 720, 208 Cal. Rptr. at 246-47.
27. 47 Cal. 2d 99, 301 P.2d 854 (1956).
28. 37 Cal. 3d at 367, 690 P.2d at 720, 208 Cal. Rptr. at 247.

ous that a jury could not be aware of the vagaries of eyewitness identification. Many factors including time, lighting, personal feelings, racial background, etc., might influence an identification and the court concluded that, while jurors "might not be totally unaware" of these factors, the information on such factors is " 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.' "[29]

The third and fourth suggestions of the *Johnson* court were that, if such testimony is admitted, it would be contrary to cases rejecting attempts to impeach witnesses in non-sex offense cases, and would otherwise invade the province of the jury.[30] The *McDonald* court disposed of these arguments rather summarily. As to the non-sex offense cases, the court felt *Johnson* missed the point since, again, Dr. Shomer did not intend to attack the credibility of any witness.[31] With some disdain, the fourth suggestion was dispatched as the empty rhetoric of an old cliche.[32]

Thus, the trial court's refusal to admit Dr. Shomer's testimony was in error.[33] The proclamation of such error, however, was not intended to open the gates to a flood of expert evidence on eyewitness identification, as the admission would remain a matter of the trial court's discretion.[34] But when eyewitness identification is a key to the prosecution's case, and is not corroborated by evidence showing its reliability, it would normally be error to exclude offered testimony of the psychological factors affecting the accuracy of such identifications.[35]

VIII. FAMILY LAW

A. *Custodial rights of a natural father cannot be denied unless placing the child in its father's custody would be detrimental to the child: In re* Baby Girl M.*

I. INTRODUCTION

What is the extent of a natural father's parental rights after the mother has relinquished their child for adoption? This was the question before the California Supreme Court in *In re Baby Girl M.*[1] The

29. *Id.* at 369, 690 P.2d at 721, 208 Cal. Rptr. at 248 (quoting CAL. EVID. CODE § 801(a) (West 1966)).

30. *Johnson*, 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

31. 37 Cal. 3d at 370, 690 P.2d at 722, 208 Cal. Rptr. at 249.

32. *Id.* That is, the fear that the testimony would "invade the province" or "usurp the function" of a jury.

33. *Id.* at 371-72, 690 P.2d at 723, 208 Cal. Rptr. at 250.

34. *Id.* at 373, 377, 690 P.2d at 725, 727, 208 Cal. Rptr. at 251, 254.

35. *Id.* at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

* Submitted by Emery J. Mishky, Law Review Staff Member.

1. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984). Opinion by Sonenshine,

court's majority held that where a natural father has not shirked his obligation of support, and the mother has relinquished custodial rights, the natural father's parental custodial rights may not be severed unless awarding custody to the natural father would be detrimental to the child.[2] The dissenting justices adhered to the view that the natural father should only receive custody when it is in the best interests of the child.[3]

II. BACKGROUND

As a precursor to a discussion relating to the custody of children, certain precepts must be established. There are two stages in the process of the placement of minors. First, there must be a termination of the custodial rights of the person(s) having custody of the child in question. Second, there must be an award of custodial rights to the person(s) with whom the child is to be placed.

A number of the rules that govern the system of child custody are clear. There are two ways in which a mother's custodial rights may be severed. The mother may voluntarily consent to the termination of her parental custodial rights[4]—as is the case when a mother gives

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J., with Bird, C.J., Broussard, Reynoso, and Grodin, JJ., concurring. Separate dissenting opinion by Mosk, J., with Kaus, J., concurring. Sonenshine, J., assigned by the Chairperson of the Judicial Council.

2. *Id.* at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316. The standard of "detriment to the child" was borrowed from a California statute dealing with the custody of children after dissolution proceedings.

> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be *detrimental to the child* and the award to a nonparent is required to serve the best interests of the child.

CAL. CIV. CODE § 4600 (West Supp. 1985) (emphasis added).

3. 37 Cal. 3d at 76, 688 P.2d at 926, 207 Cal. Rptr. at 317 (Mosk, J., dissenting).

4. Unless otherwise indicated, custodial rights will be considered in the light of the facts of the case of *In re* Baby Girl M. In this case, custodial rights were being examined in the context of adoption proceedings.

California Civil Code section 7017 deals with the rights of mothers and fathers in adoption proceedings.

> (a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who has (1) a presumed father . . . or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under [the pertinent civil code], unless the father's relationship to the child has been previously terminated or determined by a court not to exist or the father has voluntarily relinquished or consented to the adoption of such child.
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> . . . .
>
> (b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father

up her child for adoption. Alternatively, a mother's rights may be severed if a court finds that it would be detrimental to the child to remain with the mother.[5]

The role of the father in this scheme is more complicated. Fathers can be classified into three distinct groups for purposes of determining custody. These groups are: (1) presumed fathers;[6] (2) natural fathers[7] who have assumed support burdens for the child; and (3)

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under [the pertinent civil code] or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or unless the father has been served as prescribed . . . with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to [the pertinent civil code] within 30 days of service of such notice or the birth of the child, whichever is later.

CAL. CIV. CODE § 7017(a)-(b) (West 1983).

5. *See, e.g.,* Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975) (a mother's lesbianism and criminal record provided sufficient support for the finding that it would be detrimental for the child to remain with the mother).

6. A rebuttable presumption arises under the following circumstances:

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated . . . .

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

CAL. CIV. CODE § 7004(a) (West 1983) (part of the Uniform Parentage Act).

Evidence Code section 621 creates a conclusive presumption that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is . . . a child of the marriage" unless a blood test obtained within two years of the child's birth proves "that the husband is not the father of the child." CAL. EVID. CODE § 621 (West Supp. 1985).

7. Natural fathers are biological fathers who are not presumed fathers.

natural fathers who have not assumed support burdens. Presumed fathers have parental rights in their children that are concurrent with the mother's parental rights.[8] Thus, a presumed father's parental custodial rights may only be terminated pursuant to his voluntary consent,[9] or upon a court finding that it would be detrimental to the child to remain in his custody.[10]

In contrast, a natural father's parental rights are not concurrent with the mother's parental rights.[11] A natural father's parental rights, if any, arise only *after* the mother has given up her parental right to custody.[12] A natural father who has not assumed parental

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8. Section 197 of the California Civil Code provides in pertinent part:

> The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor.

CAL. CIV. CODE § 197 (West 1982).

9. If a father relinquishes or consents to or proposes to relinquish a child for adoption, the mother shall be given notice of the adoption proceeding and have the rights provided under [the pertinent civil code], unless the mother's relationship to the child has been previously terminated by a court or the mother has voluntarily relinquished or consented to the adoption of such child.

CAL. CIV. CODE § 7017(a)(2) (West 1983).

10. *See, e.g., In re* Michele C., 64 Cal. App. 3d 818, 135 Cal. Rptr. 17 (1976) (father was convicted of second degree murder of child's half-sister); *In re* Reyna, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976) (habeas corpus petition by unmarried father denied after illegitimate child relinquished by mother and adopted by a family).

11. If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship within 30 days of serving such notice or the birth of the child, whichever is later. If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.

CAL. CIV. CODE § 7017(d) (West 1983).

12. Once the mother has relinquished her rights, a natural father must be notified, and his parental custodial rights must be determined before an adoption can proceed. This determination is made at a section 7017 hearing, and is required before an adoption can take place. CAL. CIV. CODE § 7017(d) (West 1983). *See supra* note 11 for the text of section 7017(d).

duties does not gain parental rights to custody unless it is in the best interests of the child.[13] Additionally, he need not be given notice of proceedings to place the child.[14] Under the due process clause, he has no constitutionally protected right to either notice of proceedings to place his child, or the opportunity to be heard in such proceedings.[15]

Prior to this case, the *extent* of the parental right to custody which a natural father who assumed the duty of support had achieved was unclear,[16] i.e., what standard should be applied in denying this acquired parental right. This was the precise question before the California Supreme Court in *In re Baby Girl M.*[17] The majority determined that the natural father's right is so strong as to require a "detriment to the child" standard[18] in the case of a natural father who had not shirked his burden of support for the child.[19] This right cannot be severed unless it would be detrimental to the child to have custodial rights remain in the natural father. The dissent maintained that the parental right to custody in the natural father was only as strong as "the best interest of the child,"[20] and thus the right to custody could be severed if it was merely in the best interests of the child not to be in the custody of the natural father.

III. FACTUAL BACKGROUND

Baby Girl M. was born on July 18, 1981.[21] After dating in the fall of 1980, Edward, the natural father, and Baby Girl M.'s mother broke up in November, without knowledge of the mother's pregnancy.[22]

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13. Such a father is treated as a nonparent, and is included in the pool of nonparents seeking custody. The standard in deciding between nonparents is the "best interests of the child." CAL. CIV. CODE § 4600(b) (West Supp. 1985).

14. Lehr v. Robertson, 463 U.S. 248 (1983); *see also* Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313 (1984).

15. Lehr v. Robertson, 463 U.S. 248 (1983).

16. Although California Civil Code section 7017(d) provides for a hearing to determine the parental custody rights of the natural father, the standard by which this right was to be determined was not indicated in the statute.

17. 37 Cal. 3d at 69, 688 P.2d at 921, 207 Cal. Rptr. at 312.

18. *Id.* at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.

19. Although the court did not explicitly state that its holding applied only to natural fathers who had provided support, the court made clear that fathers who had shirked their parental responsibilities did not have a protected parent-child relationship. Fathers who shirked their responsibilities were not given notice or an opportunity to be heard. *Id.* at 73-75, 688 P.2d at 923-25, 207 Cal. Rptr. at 314-16. Further, in its holding, the majority stressed the similarity between a natural father who shouldered parental responsibility and a presumed father. "[B]oth classes of fathers share the same *burdens* of support for the child . . . ." *Id.* at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316 (emphasis in original).

20. *Id.* at 77, 688 P.2d at 926, 207 Cal. Rptr. at 317 (Mosk, J., dissenting).

21. *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

22. *Id.*

During her hospital stay, the mother requested adoption assistance, and after the birth placed the child in a foster home.[23] She did not inform Edward of the child's birth until August 1, 1981.[24]

On August 5, 1981, Edward met with a social worker. On that same day, the mother formally relinquished the child for adoption.[25] When Edward met with the social worker he requested that his new daughter be placed with a family who was then providing day care for his sons.[26] Edward did not express any desire for custody during his visit with the social worker on August 10, 1981, and only later did he make his first request for custody.[27] It was unclear whether this request for custody came before or after the child had been placed in an adoptive home.[28] On August 17, 1981, Edward specifically requested custody of the child, and the child was placed with prospective adoptive parents of the mother's choice on August 24.[29]

On August 10, 1981, a petition to terminate Edward's parental rights had been filed pursuant to section 1017 of the California Civil Code.[30] At the hearing on the petition, the court terminated Edward's parental custodial rights.[31] The court determined that it was

23. At this time Edward still had no knowledge of the existence of his child. *Id.*

24. *Id.*

25. The mother wished the child placed with a family neither she nor Edward knew. *Id.*

26. *Id.*

27. By this time the mother had already signed the consent for adoption, and thus arguably relinquished her parental rights to custody. If so, at the same time the mother relinquished custody, Edward's parental rights to custody commenced and Edward forfeited his right to custody by not asserting his right. Furthermore, under a narrow interpretation of the relevant United States Supreme Court cases, Edward may have fallen into a situation where he no longer possessed a protected parent-child interest because he had declined to accept parental responsibility. *See* Lehr v. Robertson, 463 U.S. 248 (1983) (father had no protected right because he had failed to strictly comply with the state's putative father registry, and therefore no protected parent-child relationship was formed); *cf.* Quilloin v. Wolcott, 434 U.S. 246 (1978) (a natural father was denied a legitimation petition when for eleven years he had only provided sporadic support and did not live with the child).

28. 37 Cal. 3d at 76, 688 P.2d at 926, 207 Cal. Rptr. at 317. The majority, however, was able to make a finding on the evidence as to the date the child was placed with adoptive parents. *See infra* note 29 and accompanying text.

29. This placement was contrary to Edward's wishes. *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

30. On this date Edward had not specifically requested custody, however he had expressed fear that he would be unable to see the child. *Id.*

31. This was done despite the fact Edward was found to be "the biological father and 'a good parent [who] can provide a good, loving home for this child.'" *Id.* (quoting the Honorable Judith McConnell of the San Diego Superior Court).

in the child's best interests[32] to remain with the adoptive parents. The court made no finding that it would be detrimental to the child to award custody to Edward.[33]

IV. OPINIONS

A. *Majority Opinion*

Not only was this a case of first impression, there existed little authority either in case law or from legislative sources to guide the court. The majority was forced to rely on the "chronology" of the developments in the area of the law, and on pulling "narrow" rules from broad statements of policy, despite the existence of extensive statutes dealing with custodial rights.[34]

Section 4600 of the California Civil Code, enacted as part of the Family Law Act, commands that in a *dissolution* proceeding the awarding of a child to nonparents can only be accomplished with the parents' consent, or if awarding the child to a parent would be detrimental to the child.[35] As between persons with equal rights (e.g., between parents, or between nonparents), custody of children is awarded according to the best interests of the child.[36] The court looked to the case of *In re B.G.*,[37] in which, after the legislative history of section 4600 was analyzed, it was concluded that as between

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32. By using the "best interests" standard, Edward was grouped with nonparents. He had no parental preference to custody of the child.

33. *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

34. *See, e.g.*, CAL. CIV. CODE §§ 4600-4608 (West 1983 & Supp. 1985).

35. *See supra* note 2.

36. (b) Custody should be awarded in the following order of preference according to the best interests of the child pursuant to section 4608:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

CAL. CIV. CODE § 4600(b) (West Supp. 1985).

Before enactment of this section, in contested custody proceedings, a mother, by virtue of her gender, obtained a preference for custody. For criticism of this system, see Comment, *Custody Rights Of Unwed Fathers*, 4 PAC. L.J. 922 (1973).

The application of the "best interests of the child" standard is left to the broad discretion of the trial court. *In re* Marriage of Russo I, 21 Cal. App. 3d 72, 86, 98 Cal. Rptr. 501, 511 (1971); *see also* Sanchez v. Sanchez, 55 Cal. 2d 118, 121, 358 P.2d 533, 535, 10 Cal. Rptr. 261, 263 (1961) (no abuse if record contains substantial evidence in support of custody award). However, decision on the custody issue is limited to this standard, and other factors cannot be determinative. *In re* Marriage of Stoker, 65 Cal. App. 3d 878, 135 Cal. Rptr. 616 (1977).

37. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

parents and nonparents, parents would be preferred.[38] This led the court to the conclusion that Edward, a parent, should be preferred to other persons. Preference could be achieved by applying a different standard to Edward. A standard for custody that would give Edward custody only if it was in the best interests of the child would equalize his status with that of nonparents. However, the "detriment to the child" standard would elevate him to a preferred status over nonparents.[39]

The majority also relied on inferences drawn from legislative actions. A bill that was vetoed by the governor,[40] and then reintroduced, declared that section 4600's parental preference would not apply to a natural father.[41] However, the court held that this portion of the bill was never considered by the Assembly Judiciary Committee because the provision was only amended into the bill after it left the committee.[42] Further, the court pointed out that the bill passed the Senate Judiciary Committee after being heard the same day eighty other bills were on the calendar.[43] An interim hearing on the bill before the Select Committee on Children and Youth produced a consensus among the witnesses that the rights of alleged fathers were important and should be protected.[44] Finally, the author of the bill agreed to eliminate the portion denying alleged fathers section 4600 protection.

The court also noted that in enacting section 7017 of the Civil Code, the legislature was aware of court decisions extending the section 4600 standards. Yet the legislature failed to avail itself of opportunities to keep section 4600 from influencing section 7017.[45]

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38. *Id.* at 698, 523 P.2d at 257, 114 Cal. Rptr. at 457.

39. This standard, taken from California Civil Code section 4600, was also applied at the appellate court level in *In re* Adoption of Baby Boy D., 159 Cal. App. 3d 218, 221, 205 Cal. Rptr. 361, 369 (1984) ("necessary to avert harm to the child"). *Contra* W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 311, 160 Cal. Rptr. 862, 867 (1979) (use of detriment standard would go against legislative intent by giving the natural father veto powers over adoptions); Adoption of Marie R., 79 Cal. App. 3d 624, 629, 145 Cal. Rptr. 122, 125 (1978) (only a presumed father has a statutory right to object to an adoption sought by the natural mother).

40. 37 Cal. 3d at 71, 688 P.2d at 922, 207 Cal. Rptr. at 313.

41. A.B. No. 1782, 1983-84 Reg. Sess. 2-6 (as amended in Senate, January 17, 1984).

42. 37 Cal. 3d at 71, 688 P.2d at 922, 207 Cal. Rptr. at 313. The portion of the bill pertaining to the order of preference of an alleged natural father seeking custody was amended out of the bill on February 23, 1984. A.B. No. 1782, 1983-84 Reg. Sess. 2-6 (as amended in Senate, February 23, 1984).

43. 37 Cal. 3d at 71, 688 P.2d at 922, 207 Cal. Rptr. at 313 (quoting and interpreting report on A.B. No. 1782 to the Senate Committee on the Judiciary).

44. *Id.*

45. *Id.*

From these indistinct indications, the majority divined the legislative intent that a natural father's parental custodial rights cannot be terminated except upon a showing of detriment to the child.[46]

United States Supreme Court cases dealing with the interests of unwed fathers offered little aid in the determination of the case. Supreme Court cases in this sphere addressed situations in which fathers assumed responsibility for their children to an extent that would have qualified them as presumed fathers in California,[47] or at the other extreme, failed to assume parental responsibilities altogether.[48] No Supreme Court authority dealt with the rights of a father who did not qualify as a presumed father and yet had not shirked his responsibilities as a parent. This predescribed situation was posed in Edward's case by the fact that Edward was kept in ignorance of the child's existence. After reviewing United States Supreme Court cases, the majority merely noted that the California custody scheme fell within constitutional bounds of due process by giving adequate rights to notice.[49]

B. Dissenting Opinion

The crux of the dissent's disagreement with the majority's legal analysis lay in the perceived neglect of statutory language. The dissent pointed to the fact that the legislature had established a sharp rift between presumed fathers on the one hand and natural fathers on the other.[50] By employing the same standard for the natural father as that used for a presumed father, the majority erased any distinction between the two. Further, it was maintained that by using the detriment to the child test to sever the natural father's parental custodial rights, the natural father had been granted a veto power over adoption proceedings that was never envisioned by the legisla-

46. *Id.* at 72, 688 P.2d at 923, 207 Cal. Rptr. at 314. In a previous case at the appellate court level, it was implied that the use of a detriment standard would be tantamount to a veto. *W.E.J.*, 100 Cal. App. 3d at 311, 160 Cal. Rptr. at 369. However, the supreme court found that because a natural father did not possess *any* rights until the mother relinquished custody of the child, there was no veto power over adoption proceedings as contemplated by the *W.E.J.* court. 37 Cal. 3d at 72-73, 688 P.2d at 923, 207 Cal. Rptr. at 314.

47. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

48. *See* Quilloin v. Wolcott, 434 U.S. 246 (1978). For a closer case, where a father had merely failed to strictly comply with putative father legislative laws, see Lehr v. Robertson, 463 U.S. 248 (1983).

49. The majority pointed out that its holding was not based on a lack of federal due process. The court did feel it important, however, to note a law review article which discussed the constitutional rights of unwed fathers, Buchanan, *supra* note 14. 37 Cal. 3d at 74, 688 P.2d at 924-25, 207 Cal. Rptr. at 315-16.

50. 37 Cal. 3d at 77-78, 688 P.2d at 926-27, 207 Cal. Rptr. at 317-18 (Mosk, J., dissenting).

ture.[51] The dissent also criticized the inferences the majority drew from indistinct indicators of legislative policy.[52]

Upon examination of the majority's evaluation of United States Supreme Court decisions, Justice Mosk pointed out that the Supreme Court cases require no more than the notification of a natural father who has assumed parental responsibilities before his rights are terminated.[53] The United States Supreme Court cases were seen as differentiating between developed relationships—which were closely protected—as contrasted with cases in which the father had not developed a relationship—which were not protected.

Justice Mosk seemed sufficiently concerned with Baby Girl M.'s specific case to devote a significant portion of his dissent to delineating the course of the trial court upon remand.[54] By marshalling forth strong language and authority dealing with the problem of child placement,[55] Justice Mosk attempted to supply future courts with weighty ammunition with which to handle the detriment standard.

V. CONCLUSION

The majority relied on a two point foundation for its ruling. It relied on broad statements of policy on the status of parents in case law, and indistinct indicators of legislative intent. Discussion of United States Supreme Court cases was merely used as an opportunity to furnish dicta on the issue of notice to an unwed father. From its analysis, the majority was able to construct a statutory scheme

51. *Id.* at 78, 688 P.2d at 927, 207 Cal. Rptr. at 318 (Mosk, J., dissenting).

52. This, however, did not keep the dissent from employing similar tactics. Drawing inferences from indistinct legislative indicators, the dissent concluded that it was not the legislative intent to use the detriment standard in the case of natural fathers. *Id.* at 79-80, 688 P.2d at 927-28, 207 Cal. Rptr. at 318-19 (Mosk, J., dissenting).

53. *Id.* at 81, 688 P.2d at 929, 207 Cal. Rptr. at 320 (Mosk, J., dissenting) (looking at Lehr v. Robertson, 463 U.S. 248 (1983)). However, this was the same proposition put forth by the majority. *See supra* note 49 and accompanying text.

54. 37 Cal. 3d at 83-84, 688 P.2d at 930-31, 207 Cal. Rptr. at 321-22 (Mosk, J., dissenting). The dissent noted that the situation after trial is different than that before trial, and that even if it may not have been detrimental to the child to give custody to Edward in August of 1981, the child had now lived almost all of its young life with its adoptive parents and thus it may have become detrimental to the child to give custody to Edward. *Id.*

55. The dissent focused on cases which gave a determinative effect to the removal of a child from a settled home in adoption proceedings. *In re* Volkland, 74 Cal. App. 3d 674, 141 Cal. Rptr. 625 (1977); *In re* Adoption of Michelle T., 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1975); Williams v. Neumann, 405 S.W.2d 556 (Ky. Ct. App. 1966); *In re* Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973). *See also* Connolly v. Connolly, 214 Cal. App. 2d 433, 29 Cal. Rptr. 616 (1963) (custody of young child should not be changed unless there are compelling reasons).

governing the rights of natural fathers. Within this scheme, *after* a mother has relinquished custody rights to her child, a natural father who has not shirked his child support duties cannot be denied the custody of his child without a finding that it would be to the child's detriment to remain with the natural father.[56]

The dissent justifiably attacked the majority's reliance on indistinct indicators of legislative policy. However, the foundation of the dissent was based upon the majority's erasure of the differentiation between a presumed father and a natural father. The dissent maintained that this was contrary to legislative intent. However, the majority's ruling does not erase all distinction between a presumed father and a natural father. A presumed father has concurrent rights of custody with the mother. Initially, a natural father has *no* rights to custody. Only when the mother has relinquished her right to custody does a natural father's right to custody arise.[57] The blunt argument that the majority's decision is incorrect because it removes differentiation between the two types of fathers is untenable. That there is a differentiation is clear. The question is: to what extent are presumed fathers differentiated from natural fathers? Besides the concept of concurrent custodial rights, did the legislature *also* intend to provide for different standards of custody as between the two classifications of fathers? Other than maintaining the argument that by adopting the majority's point of view *all* distinction is erased between the two classes of fathers, the dissent does little to address this point. Justice Mosk did attempt to draw inferences from indistinct legislative indicators in support of the best interest of the child standard, the same method which was condemned in analyzing the majority's reasoning.

Finally, the dissent erroneously attacked the majority's reliance on United States Supreme Court cases. The dissent maintained that the majority's conclusion could not be supported by the cited Supreme Court cases, and that the cases merely gave direction on giving notice to natural fathers. However, this was not the proposition the majority was putting forth. The majority was merely advancing the proposition that the California scheme of custody relating to natural fathers was within the notice requirements of due process, *not* that the United States Supreme Court cases established the standard to be employed in determining the natural father's parental custodial rights.

Neither the majority opinion nor the dissent rests on solid foundations. However, upon examination of case law and legislative sources, it becomes easy to see why this is so. In addition to little

56. 37 Cal. 3d at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.

57. CAL. CIV. CODE § 7017(a)-(b) (West 1983) (text appears *supra* note 4).

case law on the subject, the difficulty in analysis is exacerbated by the lack of specific legislative attention to the situation. The statutes that have been promulgated add confusion because of inconsistencies.[58] With such little precedent and authority, the court's decision could only be founded on the most basic concepts.

The majority view of the natural father is one in which he is coequal with the mother in the desire, or knowledge, of the conception of their child.[59] Parents' actions after the birth of their child are deemed important, especially the willingness to assume parental responsibility. The dissent viewed the natural father as a hostile stranger with no bonds to his child.[60] He is merely a stranger who is given a right to have significant control over the lives of people with whom he has no real connection. In such a basic metaphysical divergence of views, both views are valid. Therefore, the "correct" view is that of the majority of the people. Thus the legislature, the elected representatives of the people, should be the proper body to decide the question. However, until this happens, the rule is: after a mother has relinquished custodial rights, a natural father who has not shirked his parental responsibilities cannot be deprived of the custody of his child unless it is determined that it is detrimental to the child to remain in his custody.[61]

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58. For example, one of the primary purposes of the Uniform Parentage Act, enacted in 1976, was to eliminate distinctions between legitimate and illegitimate children. CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1985). To accomplish this goal, the parent-child relationship is deemed to extend "equally to every child and to every parent, regardless of the marital status of the parents." CAL. CIV. CODE § 7002 (West 1983). But in apparent contradiction to this principle is the language of the statute. For example, in section 7017 it is stated that in the case of a presumed father, his consent is needed before adoption. On the other hand, if there is no presumed father, "only the mother's consent shall be required for the adoption of the child." CAL. CIV. CODE § 7017(d) (West 1983).

59. The actions of *both* parents after the birth of their child determine their ability to accept parental responsibility. An unwed mother may have had no more desire to conceive or knowledge of the conception than the unwed father . . . . Her decision to release the child for adoption should not deprive the father of a meaningful opportunity to retain and develop his relationship.

37 Cal. 3d at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.

60. The result [of the majority decision] is to grant to a biological father, who may have had a single night's liaison with a stranger, who may not have known about the child's birth until long after it occurred, and who may not have ever seen the child, the very same custodial rights [as a presumed father in a section 7017 proceeding].

Id. at 76-77, 688 P.2d at 926, 207 Cal. Rptr. at 317 (Mosk, J., dissenting).

61. *Id.* at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.

B. *Couple's reconciliation cancels child custody order contained in interlocutory judgment of dissolution:* **People v. Howard.**

In *People v. Howard,* 36 Cal. 3d 852, 686 P.2d 644, 206 Cal. Rptr. 124 (1984), the supreme court ruled on the effect of a reconciliation by husband and wife upon a child custody provision contained in an interlocutory judgment of dissolution.

The defendant and his wife obtained an interlocutory decree of dissolution which contained child custody and visitation provisions. Prior to the final judgment, the parties reconciled, then separated two years later, at which time the wife obtained a final judgment of dissolution. Shortly thereafter, the defendant took the children and refused to return them to his ex-wife. He was subsequently arrested, charged, and convicted of child stealing pursuant to Penal Code section 278.5.

On appeal, the defendant contended that the reconciliation invalidated the interlocutory judgment, therefore he had not taken the children "in violation of a custody order" as required by section 278.5.

The supreme court, in determining whether a valid custody order existed at the time the defendant took the children, looked to the case of *In re Marriage of Modnick,* 33 Cal. 3d 897, 663 P.2d 187, 191 Cal. Rptr. 629 (1983), which held that reconciliation cancels an interlocutory decree. To establish that a reconciliation actually occurred, clear and cogent proof that the spouses mutually intended to permanently unite, thereby restoring each party's marital rights, is necessary.

Inasmuch as the testimony of the parties established a mutual intent to resume the marital relationship on a permanent basis, the decree containing the child custody order was cancelled. Thus, the defendant's conviction was reversed because he did not violate an existing child custody order.

Chief Justice Bird, in her concurring opinion, addressed the defendant's argument that his good faith belief that a reconciliation had nullified the interlocutory judgment constituted a defense to the section 278.5 violation. The Chief Justice believed that section 278.5 required a specific intent to deprive the other parent of custody or visitation. Thus, according to the Chief Justice, since a good faith but mistaken belief is a defense to specific intent crimes, if the accused has a good faith but mistaken belief that a child custody order has been nullified by a reconciliation, he does not have the specific intent to deprive the legal custodian of custody.

IX. GOVERNMENTAL TORT IMMUNITY

Public entities have a duty to exercise due care to protect and to warn the public against the reasonably foreseeable tortious conduct of third parties on public property: **Peterson v. San Francisco Community College District.***

I. INTRODUCTION

A split has existed between the California appellate courts as to the liability of public entities to persons injured by the intentional acts of third parties while on public property.[1] Some courts have held that public entities have a duty to protect users of public property against any risk, including the intentional torts of third parties, where the conditions of the public property make such risks reasonably foreseeable.[2] Other courts have held that the intentional torts of third parties are not a risk which the legislature intended public entities to be liable for, and have held public entities to be immune from liability for such acts.[3] The supreme court in *Peterson v. San Francisco Community College District*[4] rejected the latter appellate view and held that a public entity owes a duty of care to members of the public whom it invites to use public property.[5] The court found that this duty extended to warning the public about reasonably foreseeable criminal conduct by third parties,[6] and taking measures to correct conditions of public property which encourage such criminal conduct.[7]

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* Article submitted by Paul Bauducco, Law Review Staff Member.

1. *Cf.* Slapin v. Los Angeles Int'l Airport, 65 Cal. App. 3d 484, 490, 135 Cal. Rptr. 296, 299 (1977) (poor lighting in parking structure constituted a dangerous condition), *with* Sykes v. County of Marin, 43 Cal. App. 3d 158, 117 Cal. Rptr. 466 (1974) (poor lighting not a dangerous condition).

2. *Slapin*, 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (second district decision holding that a public entity may be liable for failing to properly light a public parking lot where such conditions create an opportunity for criminal third party acts).

3. *Sykes*, 43 Cal. App. 3d 158, 117 Cal. Rptr. 466 (first district decision finding no legislative intent to include third party criminal acts within the definition of dangerous conditions of public property).

4. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984). Opinion by Broussard, J., with Mosk, Kaus, Reynoso, and Grodin, JJ., and Smith (P.A.), J., concurring. Bird, C.J., concurred in the judgment. Smith (P.A.), J., assigned by the Chairperson of the Judicial Council.

5. *Id.* at 814, 685 P.2d at 1201-02, 205 Cal. Rptr. at 850-51.

6. *Id.* at 815, 685 P.2d at 1202, 205 Cal. Rptr. at 851.

7. *Id.*

II. FACTS

In *Peterson,* the plaintiff sued the San Francisco Community College District for injuries she received as the result of an attempted rape which occurred in a campus parking lot. The plaintiff was attacked as she ascended a stairway leading to the parking lot. Her assailant used thick foliage adjacent to the stairway to conceal himself, attacking the plaintiff as she walked by. The attacker's modus operandi was similar to that of previous assaults which had occurred at the same location.[8]

The Community College District knew of these prior attacks and had taken measures to protect students using the stairway. The plaintiff was a student at the college and had purchased a parking permit for the area in which she was attacked.[9]

The trial court found that the plaintiff's complaint failed to state a cause of action under the Tort Claims Act and dismissed the case. On appeal, the Court of Appeal for the First District affirmed the dismissal,[10] holding that the college had no duty to warn the plaintiff of possible criminal attack and that the criminal acts of third parties were not reasonably foreseeable occurrences protected against under the Tort Claims Act.[11]

III. HISTORICAL ANALYSIS

In 1963, the California legislature passed what has become known as the Tort Claims Act.[12] The Act set out a comprehensive legislative scheme of governmental tort liability.[13] The tort liability of public entities was limited to that specifically set out in the Act.[14]

Liability of public entities for dangerous conditions of public prop-

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8. *Id.* at 805, 685 P.2d at 1195, 205 Cal. Rptr. at 844.

9. *Id.*

10. Peterson v. San Francisco Community College Dist., 141 Cal. App. 3d 456, 190 Cal. Rptr. 335 (1983).

11. *Id.* at 462-63, 190 Cal. Rptr. at 338-39.

12. 1963 Cal. Stat. 3266 (CAL. GOV'T CODE §§ 810-895.8 (West 1980 & Supp. 1984)) (dealing with substantive liabilities and employees); 1963 Cal. Stat. 3369 (CAL. GOV'T CODE §§ 900-978.8 (West 1980 & Supp. 1984)) (dealing with procedural provisions concerning public utilities and public employees). The statutes have no official short title but have come to be known as the 1963 Tort Claims Act.

13. *Id. See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY PRACTICE 25 (1980) for an exhaustive study of the legislative and case history of the California Tort Claims Act.

14. CAL. GOV'T CODE § 815 (West 1980). Section 815 provides that "except as provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." *See also* the accompanying Legislative Committee Comment—Senate, which states that "the practical effect of this section is to eliminate any common law liability for damages arising out of torts." *Id.*

erty is defined by Government Code sections 830[15] and 835.[16] The two sections generally limit public entity liability for dangerous conditions of public property to those injuries which: (1) are proximately caused by a dangerous condition of public property; *and* (2) occur after the public entity or agency responsible for the property has had actual notice and adequate time to correct the defect.[17]

Initially, public entities were held not to be liable for injuries caused by third party criminal acts on public property.[18] In *Hayes v. State,* the California Supreme Court found no governmental liability for injuries resulting from an attack which occurred upon a state-owned beach. In making its decision, the court found that the injuries were not caused by any condition of the property, but solely by the actions of third party assailants.[19] However, the court did recognize the possibility that a "*combination* of defect in the property and acts of third parties" could create liability under section 835.[20]

Following the *Hayes* decision, a split developed between the appellate courts upon the issue of whether criminal third party acts were a

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15. As used in this chapter:
(a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.
(b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.
(c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.
CAL. GOV'T CODE § 830 (West 1980).

16. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
CAL. GOV'T CODE § 835 (West 1980).

17. *Id.*

18. Hayes v. State, 11 Cal. 3d 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974) (suit on behalf of two men, attacked by unknown assailants while sleeping on a state-owned beach).

19. *Id.* at 472, 521 P.2d at 857, 113 Cal. Rptr. at 601. The court found the beach to be unimproved property which did not contribute to the attacks.

20. *Id.*

"dangerous condition" within the meaning of section 835. The conflicting appellate approaches are best illustrated by *Sykes v. County of Marin*[21] and *Slapin v. Los Angeles International Airport.*[22]

In *Sykes,* the Court of Appeal for the First District held that the intentional acts of third parties were not within the "dangerous condition" definition of section 835. The plaintiff had been attacked and robbed in an unlit school parking lot. The court found no liability for a dangerous condition of public property, stating that:

> In the instant case the harm was caused not by the condition of the parking lot but by the criminal acts of third parties. The fact that the parking area was not lighted is not the kind of dangerous condition contemplated by the Legislature in its legislation concerning defective dangerous conditions of public property. Nor is the legislation designed to protect against activities of third persons on public property who disregard the law.[23]

In reaching its conclusion, the *Sykes* court interpreted the legislature's intent in passing sections 830 and 835 as that of *limiting* public entity liability.[24] The *Sykes* court also read the proximate cause portion of section 835 narrowly, excluding liability for injuries not directly caused by a condition of public property.[25]

In *Slapin,* the Court of Appeal for the Second District held that public entities were liable for the criminal acts of third parties where conditions of public property created a substantial risk of such acts. *Slapin* involved facts similar to *Sykes,* the plaintiff being attacked in a dimly lit airport parking lot. The *Slapin* court based its decision of liability upon two principles:

> (1) A governmental entity may be liable for injuries caused by a *combination* of a dangerous condition of public property and the wrongful acts of third parties . . . and
>
> (2) a defendant may not successfully defend that the plaintiff's injuries were caused by the wrongful criminal act of a third party, where the very basis upon which the defendant is claimed to be negligent is that the defendant created a reasonably foreseeable risk of such third party conduct.[26]

In stating the first principle, the court cited the decisions in *Hayes* and *Baldwin v. State of California.*[27] In *Baldwin,* the supreme court found that a defect in a highway combined with a third party's negligence produced the plaintiff's injury and subjected the defendant public entity to liability under section 835.[28] *Slapin* extended this lia-

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21. 43 Cal. App. 3d 158, 117 Cal. Rptr. 466 (1974).

22. 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (1977).

23. 43 Cal. App. 3d at 164, 117 Cal. Rptr. at 470.

24. *Id.* By holding that the legislative intent was to exclude the criminal acts of third parties from the definitions of dangerous conditions of public property, the court foreclosed any future judicial expansion of liability under sections 830 and 835 to include such acts.

25. *Id.*

26. 65 Cal. App. 3d at 490, 135 Cal. Rptr. at 299.

27. 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972).

28. *Id.*

bility to injuries resulting from a combination of property defects and criminal acts of third parties.

IV. THE COURT'S ANALYSIS

In *Peterson,* the supreme court adopted the position of the *Slapin* court, holding that public entities may be liable for injuries caused by a criminal agency when conditions of public property made such criminal conduct reasonably foreseeable.

The supreme court found that a public entity owes a special duty of care to members of the public which it "invites" to enter public property.[29] This "special relationship" was created in the present case by the defendant college district's acceptance of tuition and a parking fee from the plaintiff.[30]

The creation of this relationship imposes an affirmative duty upon the public entity to take reasonable steps to protect its invitees from risks which are reasonably foreseeable.[31] This duty includes the obligation to warn invitees of reasonably foreseeable criminal acts by third parties and to correct conditions of public property which contribute to such acts.

In requiring public entities to warn of foreseeable criminal acts, the court distinguished the *Hayes* case, which found such warnings harmful to the public interest.[32] In the present case, the court found that public warnings would not deter use of public property, but would alert public invitees to the foreseeable risks of such use.[33]

Furthermore, the court found that Government Code section 845, which grants immunity for failure to provide adequate police protection, does not immunize public entities against a failure to warn of reasonably foreseeable criminal acts.[34] Consequently, the court held that the plaintiff's allegation that the defendant is liable for failure to warn the plaintiff of earlier attacks stated a cause of action.[35]

The supreme court held that the Tort Claims Act did create liability for criminal acts occurring on public property.[36] The court read sections 835 and 830 broadly in finding a duty to correct conditions of

29. 36 Cal. 3d at 805-06, 685 P.2d at 1195-96, 205 Cal. Rptr. at 845-46.
30. *Id.* at 805-06, 685 P.2d at 1196-97, 205 Cal. Rptr. at 845-46.
31. *Id.* at 810-11, 685 P.2d at 1199-1200, 205 Cal. Rptr. at 848-49.
32. *Id.* at 813-14, 685 P.2d at 1201, 205 Cal. Rptr. at 850.
33. *Id.*
34. *Id.* at 814-15, 685 P.2d at 1202, 205 Cal. Rptr. at 851.
35. *Id.*
36. *Id.* at 815, 685 P.2d at 1202-03, 205 Cal. Rptr. at 851-52.

public property which contribute to the risks of criminal acts upon such property. The court stated: "Nothing in the provisions of section 835 . . . specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property."[37]

The court noted that the defendant college district had actual notice of the criminal assaults in this case and that, in similar circumstances, a private party would be liable for injuries caused by such reasonably foreseeable criminal acts upon its property.[38] It cited *Slapin* in finding that criminal acts were not intervening causes relieving public entities from liability for injuries where a condition of public property contributed to the risk that such acts would occur.[39]

V. CONCLUSION

The *Peterson* decision establishes public entity liability for a failure to warn public invitees of reasonably foreseeable criminal conduct upon public property where the condition of the property contributes to such conduct.[40] Furthermore, the decision ends the conflict between California appellate courts regarding the application of Government Code section 835 liability to injuries caused by criminal acts upon public property.[41] The decision places additional duties upon public entities to ensure that conditions of public property do not contribute to criminal acts. It will increase public expenditures for improvements upon public property and payment of judgments resulting from increased public entity liability.

X. INTESTATE SUCCESSION

Putative spouse entitled to share of decedent's separate property: **Estate of Leslie.**

In *Estate of Leslie,*[1] the supreme court was asked to decide whether a putative spouse would be entitled to a share of the separate property of a decedent who died intestate. In deciding in the affirmative, the court noted that cases have consistently afforded a surviving putative spouse the same rights as a surviving legal spouse.[2]

Fay Leslie and William Garvin married in Tijuana, Mexico in 1972. The marriage was invalid under Mexican law as it was never re-

37. *Id.* at 811, 685 P.2d at 1199, 205 Cal. Rptr. at 848.
38. *Id.* at 809, 685 P.2d at 1198-99, 205 Cal. Rptr. at 847-48.
39. *Id.* at 812, 685 P.2d at 1200, 205 Cal. Rptr. at 849.
40. *Id.* at 815, 685 P.2d at 1202-03, 205 Cal. Rptr. at 851-52.
41. *See supra* note 1 and accompanying text.
1. 37 Cal. 3d 186, 689 P.2d 133, 207 Cal. Rptr. 561 (1984). Opinion by Bird, C.J., expressing the unanimous view of the court.
2. *Id.* at 203, 689 P.2d at 144, 207 Cal. Rptr. at 572.

corded.[3] Leslie and Garvin lived together as husband and wife for approximately nine years, until Leslie died intestate in 1981. At her death, petitions for letters of administration were filed by Leslie's son from a prior marriage and, in opposition, by Garvin. At trial, the court held the marriage between Leslie and Garvin to be putative, denied Garvin's letters of administration, and held he was not entitled to succeed to any portion of Leslie's separate property.[4] Garvin appealed, contending he was entitled to an intestate share of the decedent's separate property, and that he should have been appointed administrator of the estate.[5] The principal issue was whether a putative spouse is entitled to a share of a decedent's separate property.[6]

The court began its decision by drawing guidance from decisions which had awarded a putative spouse a share of quasi-marital property.[7] In *Feig v. Bank of America*,[8] the decedent had obtained a divorce from the surviving spouse a year after marriage, but had continued to live with the spouse as husband and wife. In 1921, decedent remarried the spouse and later died intestate.[9] The court held in *Feig* that although the property acquired by the Feigs during the period in which they were divorced was not community property, the property should be marked by all the incidents of marriage.[10] Therefore, Mr. Feig was allowed to inherit all the property.[11] The *Feig* decision was extended in *Estate of Krone*,[12] where the court of appeal held that when a putative spouse dies intestate, the surviving spouse takes the same share to which that spouse would have been entitled had the marriage been valid.[13] This share of the quasi-marital prop-

3. *Id.* at 190-91, 689 P.2d at 135, 207 Cal. Rptr. at 563. Since the marriage was invalid in Mexico it was also invalid in California. CAL. CIV. CODE § 4104 (West 1983).

4. 37 Cal. 3d at 191-92, 689 P.2d at 136, 207 Cal. Rptr. at 564.

5. *Id.*

6. *Id.* The case was one of first impression for the court. A "putative" spouse is one who believes in good faith that the marriage was valid when in fact it is not valid. CAL. CIV. CODE § 4452 (West 1983). The parties in *Leslie* did not dispute the trial court's finding of a putative marriage. 37 Cal. 3d at 191 n.4, 689 P.2d at 136 n.4, 207 Cal. Rptr. at 564 n.4.

7. 37 Cal. 3d at 192, 689 P.2d at 137, 207 Cal. Rptr. at 565. Quasi-marital property is property acquired during the putative marriage which would have been community or quasi-community property if acquired in the course of a valid marriage. CAL. CIV. CODE § 4452 (West 1983); Estate of Vargas, 36 Cal. App. 3d 714, 717, 111 Cal. Rptr. 779, 780 (1974).

8. 5 Cal. 2d 266, 54 P.2d 3 (1936).

9. *Id.* at 270, 54 P.2d at 5.

10. *Id.* at 273, 54 P.2d at 7.

11. *Id.* at 273-74, 54 P.2d at 7.

12. 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

13. *Id.* at 769, 189 P.2d at 742-43.

erty would amount to all the inheritable property.[14] As the court reasoned, "it would . . . be contrary to established law to deny to this putative wife her rights as a surviving spouse to inherit the total of the gains of the putative marriage."[15]

As the court in *Leslie* noted, *Krone* has been read by other courts " 'to recognize a putative [spouse] as a legal spouse for the purpose of succession.' "[16] Examples of the application of this recognition were cited by the *Leslie* court. These were *Estate of Goldberg,*[17] *Garrado v. Collins,*[18] and *Estate of Shank.*[19]

In *Estate of Goldberg,* the court of appeal affirmed a trial court's award of all community property and one-third of decedent's separate property to a putative spouse.[20] The holding was based on a finding that Edith Goldberg was entitled to the same share of the quasi-marital or "community" property as any legal spouse would be.[21] In *Garrado,* the court of appeal dismissed an appeal which contended that the trial court erred by granting a putative husband one-third of decedent's separate property.[22] The appeal was dismissed based on the appellants' lack of standing as aggrieved parties.[23] In dictum, however, the court of appeal stated that even if the appellants did have standing, their claim to the putative husband's one-third might fail anyway, as *Estate of Krone* might allow the putative spouse to inherit as if a legal spouse.[24] Finally, in *Estate of Shank,*[25]

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14. *Id.* at 769-70, 189 P.2d at 743. California Probate Code section 201 provided that upon "death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse . . . ." CAL. PROB. CODE § 201 (West 1956) (repealed as of Jan. 1, 1985, *see* CAL. PROB. CODE §§ 100, 6101, 6401(a) (West Supp. 1984) for current provisions). The court in *Krone* reasoned that parity compels the conclusion that if the statute entitles the survivor of a valid marriage to take all of the community estate, then, as a putative spouse takes to the same degree as a valid spouse, a putative spouse ought to be entitled to all the property. 82 Cal. App. 2d at 769-70, 189 P.2d at 743. The *Leslie* court agreed with such reasoning. 37 Cal. 3d at 193, 689 P.2d at 137-38, 207 Cal. Rptr. at 565-66.

15. *Krone,* 83 Cal. App. 2d at 770, 189 P.2d at 743.

16. 37 Cal. 3d at 194, 689 P.2d at 138, 207 Cal. Rptr. at 566 (quoting Kunakoff v. Woods, 166 Cal. App. 2d 59, 65-66, 332 P.2d 773, 777 (1958)).

17. 203 Cal. App. 2d 402, 21 Cal. Rptr. 626 (1962).

18. 136 Cal. App. 2d 323, 288 P.2d 620 (1955).

19. 154 Cal. App. 2d 808, 316 P.2d 710 (1957).

20. 203 Cal. App. 2d at 412, 21 Cal. Rptr. at 632. The court was actually silent as to the trial court's award of separate property, stating merely that Edith Goldberg, as a putative spouse, was "entitled to the same share of the 'community' property as she would receive as an actual wife." *Id.* The *Leslie* court took this silence as an acquiescence to the proposition that putative spouses are legal spouses for purposes of succession, especially since the *Goldberg* court cited *Krone* in support of that proposition.

21. *Id.*

22. Garrado v. Collins, 136 Cal. App. 2d 323, 326, 288 P.2d 620, 622 (1955).

23. *Id.* at 325-26, 288 P.2d at 621-22.

24. *Id.*

25. 154 Cal. App. 2d 808, 810, 316 P.2d 710, 711 (1957).

decedent had obtained a Mexican divorce from her legal husband, which was invalid, and married her putative husband. Her legal husband acquiesced and relied upon the Mexican divorce, which estopped him from asserting that she was the surviving spouse for the purpose of inheriting decedent's separate property.[26] The surviving putative spouse was awarded one-half of decedent's separate property and surviving siblings were awarded proportionate shares of the remaining half.[27] As the *Leslie* court noted, while *Shank* was decided on estoppel principles, it was another example of a putative spouse "permitted to succeed to a share of the decedent's separate property."[28]

In addition to the cases mentioned above, the court noted that, in other analogous contexts, the courts had granted surviving putative spouses the same rights as legal spouses.[29] Putative spouses have been allowed to bring actions for wrongful death,[30] and have been held to be a surviving spouse within California Government Code section 21364.[31] In addition, putative spouses have been held to be "surviving widow[s]" under former Labor Code section 4702, and have been awarded spousal benefits under the federal civil service retirement statute.[32]

One case, *Estate of Levie*,[33] a court of appeal decision, was contrary to the proposition that putative spouses are entitled to a share of decedent's separate property. *Levie* gave three reasons for denying a putative spouse the right to succeed to separate property. It concluded that there were no California decisions compelling such a result, the equities of quasi-marital property do not apply to separate property since joint efforts are not required for the acquisition of separate property, and third, to give a share of separate property would do violence to the statutory scheme of intestate succession to separate

26. *Id.* at 811-12, 316 P.2d at 712. Subsequent to the Mexican divorce, the legal husband bought property "as a single man," and lived with another woman. *Id.* at 811, 316 P.2d at 712.

27. *Id.* at 812, 316 P.2d at 712. The siblings were estopped from denying the validity of the Mexican divorce as well. Since decedent had relied on the divorce, she would have been estopped to deny the validity of the divorce, and her siblings, being in privity with decedent, also could not deny its validity. *Id.*

28. 37 Cal. 3d at 195, 689 P.2d at 139, 207 Cal. Rptr. at 567.

29. *Id.* at 195-96, 689 P.2d at 139, 207 Cal. Rptr. at 567.

30. *Id.* (and authorities cited therein).

31. *Id.* at 196, 689 P.2d at 139, 207 Cal. Rptr. at 567.

32. *Id.* at 196, 689 P.2d at 139-40, 207 Cal. Rptr. at 567-68.

33. 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975).

property.[34] The *Leslie* court rejected *Levie,* citing criticism by commentators of the *Levie* decision.[35]

The *Leslie* court reasoned that the foregoing cases clearly pointed to one conclusion: "a surviving putative spouse is entitled to succeed to a share of his or her decedent's separate property."[36] This result, it felt, was "inherently fair."[37]

Perhaps in the final analysis it was the fairness of the result which compelled the conclusion. It is cautioned that *Leslie* be given careful application, avoiding the opposite set of facts wherein the survivor *knows* of the invalidity of the marriage.

XI. LABOR RELATIONS

Regulation requiring employer to give list of employees to labor organization upheld; not necessary to prove both intent and effect in charging employer with interfering with employees' rights: **Carian v. Agricultural Labor Relations Board.**

In *Carian v. Agricultural Labor Relations Board,* 36 Cal. 3d 654, 685 P.2d 701, 205 Cal. Rptr. 657 (1984), the supreme court was asked to determine whether the Agricultural Labor Relations Board (ALRB) was within its authority in promulgating regulations requiring employers to furnish employee lists upon certain notice, and what showing was required to establish a violation of a statute prohibiting interference with employee rights.

The employers were found guilty of having violated a regulation made by the ALRB which required them to supply "prepetition employee lists" to the ALRB upon notice that a labor organization intended to organize their agricultural employees. Also, the employers were found to have committed unfair labor practices when they wrongfully interrogated their employees as to their union sympathies. The employers contended on appeal that the ALRB had no authority to promulgate the "prepetition employee list" requirement, and that a showing of actual effect on identifiable employees was required to establish unfair labor practices.

The supreme court held that the ALRB did in fact have authority to promulgate the "prepetition list" requirement, as it had the statutory power to make rules and regulations necessary to carry out the Agricultural Labor Relations Act (ALRA). As one of the rights

34. *Id.* at 576-77, 123 Cal. Rptr. at 447.

35. 37 Cal. 3d at 197-200, 689 P.2d at 140-42, 207 Cal. Rptr. at 568-70. *See* Laughran & Laughran, *Property and Inheritance Rights of Putative Spouses in California: Selected Problems and Suggested Solutions,* 11 LOY. L.A.L. REV. 45 (1977).

36. 37 Cal. 3d at 197, 689 P.2d at 140, 207 Cal. Rptr. at 568.

37. *Id.*

granted employees by the ALRA was the right to organize or join labor organizations, it was reasonably necessary to require employers to provide the lists to facilitate the organization. The court further drew upon the fact that the federal labor relations act requires such lists from employers when union elections are called, and has done so for nearly twenty years.

The court also rejected the contention that a showing of actual effect on identifiable employees was necessary to establish violations of the ALRA. The court drew upon the corresponding section of the National Labor Relations Act, which proscribes a wide range of employer conduct. The test for a violation of the NLRA is two-fold. First, it is only necessary to show that an employer's actions would *tend* to coerce a reasonable employee, and second, it is sufficient to show that effect. It is not necessary to show the employer *intended* to produce the effect. Thus, a particularized showing of intent and effect was unnecessary. As a result, the ALRB's findings and remedial order were sustained.

XII. LAND USE

California Coastal Act does not preclude public referendum on local land use measures: **Yost v. Thomas.**

In *Yost v. Thomas,* 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984), the supreme court was asked to decide whether the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West 1977), preempted the power of referendum. The court concluded that it did not.

The petitioners appealed from the trial court's denial of their writ of mandate to compel the Santa Barbara city clerk to process a referendum petition opposing resolutions and an ordinance adopted by the city council affecting the coastal zone. The appellees contended that the clerk need not have processed the petitions since the actions of the city council were pursuant to authority delegated by the state, were administrative, and were immune from referendum. The authority delegated to the city council derived from the California Coastal Act of 1976. A ruling that the exercise of such authority by the city council was beyond referendum would in effect be a statement that the Coastal Act preempts the exercise of the power of referendum.

The supreme court held that the Coastal Act did not in fact preempt the exercise of the power of referendum, and the trial court

was directed to issue a writ of mandate ordering the clerk to process the petitions and place the referendum on the ballot. In so holding, the court determined that the legislature did not intend for the Coastal Act to preempt local planning authority either expressly or impliedly since it was intended that each community would autonomously propose its own land use plan and submit the proposed plan to the coastal commission for approval. The commission merely had discretion to approve or disapprove proposals based on standards set forth in the act. Communities may conform to those standards or be more restrictive in their approach.

Since wide discretion was left to local government to determine and implement land use plans, any actions taken by such governments would be legislative in nature rather than administrative. Legislative actions are subject to the power of referendum. Since the city council's resolutions and ordinance were legislative and subject to that power, the Santa Barbara city clerk erred in failing to process the referendum petitions.

XIII. LIBEL

Actual malice does not exist where the source of the author's information is reputable: **Reader's Digest Association v. Superior Court.**

In *Reader's Digest Association v. Superior Court*, 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. 137 (1984), (*see Mitchell v. Superior Court*, 12 PEPPERDINE L. REV. 837 (1985)), a unanimous court affirmed the importance of literary license to a competent and free press.

A foundation established for the rehabilitation of drug addicts and its founder filed a defamation suit against a magazine company and its employee for publishing an article concerning the foundation. The article was based upon the critical observations of two authors who were awarded the Pulitzer Prize for their series of reports and articles about the foundation. Although the article contained many serious allegations against the foundation, the plaintiffs' suit only alleged that three sentences in the article were defamatory. These sentences arguably stated that the plaintiffs had never been successful in rehabilitating drug addicts and that the foundation's publicity concerning its success rate was a fraudulent attempt to further the personal interests of the individual plaintiffs.

The supreme court first concluded that the plaintiffs were public figures since they had engaged in massive publicity and self-promotion efforts. Thus, the court applied the standard of actual malice. It concluded that the defendants had not entertained serious doubt as to the reliability of the sources or the truth of the challenged statements. None of the alleged defamatory statements were beyond

what a responsible staff writer might write on the basis of information provided to him by persons of good and distinguished reputation.

Accordingly, the supreme court issued a writ of mandate ordering the trial court to vacate its order denying the defendant's motion for summary judgment and to enter an order granting the motion.

XIV. LOCAL GOVERNMENT

City council must "meet and confer" with employee representatives before proposing charter amendments affecting public employment: **People *ex rel.* Seal Beach Police Officers Association v. City of Seal Beach.**

In *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach,* 36 Cal. 3d 591, 685 P.2d 1145, 205 Cal. Rptr. 794 (1984), the supreme court was asked to decide whether the city council of a charter city must "meet and confer" with representatives of city workers before it proposes an amendment to the city charter concerning the terms and conditions of public employment.

In 1977, the voters of the City of Seal Beach approved three amendments which dealt with "terms and conditions" of public employment. The Seal Beach City Council proposed the amendments without conferring with representatives of the city's employees.

Several public employee unions sought to have the amendments declared invalid by reason of non-compliance with California Government Code section 3505. Section 3505 requires "[t]he governing body of a public agency . . . to meet and confer [with representatives of employee organizations] in good faith regarding wages, hours, and other terms and conditions of employment . . . and [to] consider fully such presentations as are made by the employee organization . . . prior to arriving at a determination of policy or course of action." CAL. GOV'T CODE § 3505 (West 1980).

In response, the City advanced two defenses: first, it argued the "meet and confer" requirement of section 3505 was incompatible with the power granted to the City under article XI, section 3, subdivision (b) of the California Constitution. Second, the City argued that California Government Code section 3504 exempted it from the "meet and confer" requirements.

Although the supreme court did concede that article XI, section 3, subdivision (b) of the California Constitution grants the governing body of a charter city the right to propose charter amendments to its electorate, the court was quick to add that "few legal rights are so

'absolute and untrammeled' that they can never be subjected to peaceful coexistence with other rules." The "meet and confer" requirement, the purpose of which is to foster better employer-employee relations, is a matter of statewide importance and cannot be overshadowed by a city's right to carry out its democratic functions.

No actual conflict existed between the city council's power to propose charter amendments and section 3505. At most, section 3505 was a minor inconvenience upon a city council's constitutional governing powers, as the City retained the ultimate power to make its own independent decisions.

The court also held that the City was not exempt under section 3504 as this argument was inconsistent with section 3504's legislative intent to forestall any expansion of the language of "wages, hours and other terms and conditions of employment" to include more general managerial policy decisions.

Accordingly, the supreme court directed the trial court to enter an order overruling the city council's demurrer.

XV. MEDICAL MALPRACTICE

Statute denying subrogation for a collateral source in a medical malpractice suit held constitutional: **Barme v. Wood.**

Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984), resolved the second in an expected string of challenges to the Medical Injury Compensation Reform Act of 1975 (MICRA). MICRA was passed during the medical malpractice insurance "crisis" of the mid-1970's. At the time, increasing insurance rates were blamed for rising costs of health care and for causing some physicians to practice without malpractice insurance.

Among MICRA's provisions was a limitation on damages a plaintiff could be awarded where he was covered by collateral sources (sources of insurance coverage or other benefits to which the plaintiff has a right in addition to his claim against the defendant). Specifically, Civil Code section 3333.1(a) allows a health care provider defendant to introduce evidence of benefits the plaintiff received from collateral sources to compensate her for her injury. Subsection (b) denies a collateral source the right to be subrogated to the plaintiff's position in an action against the defendant for benefits paid. *Barme* involved a challenge to subsection (b) only.

The plaintiff, a Huntington Park police officer, suffered a heart attack while on duty. He underwent open heart surgery and suffered brain damage allegedly caused by the negligence of the health care providers performing the surgery. The City, a self-insured workers' compensation provider, paid benefits to Barme and intervened in

Barme's suit against the health care provider defendants. The City sought to be subrogated to Barme's rights against the defendants for that which it paid by way of workers' compensation. The defendants were granted summary judgment against the City from which the City appealed.

The City of Huntington Park argued that Civil Code section 3333.1(b) constituted a due process violation because it arbitrarily eliminated the City's right to subrogation and bore no rational relation to a legitimate public purpose. The City unsuccessfully contended that the statute merely shifted the cost of medical malpractice insurance from negligent health care providers to innocent employers and their insurers. The City also argued that the statute violated equal protection provisions because it conferred on health care provider defendants benefits not shared by other tort defendants, thereby burdening collateral sources forced to pay benefits to those injured at the hand of health care provider defendants.

In affirming the trial court, the supreme court closely adhered to its reasoning in *American Bank & Trust Co. v. Community Hospital,* 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984), in which it found that the portion of MICRA permitting periodic payments of medical malpractice damages in excess of $50,000.00, CAL. CIV. PROC. CODE § 667.7 (West 1980), did not violate either due process or equal protection rights of plaintiffs.

In rejecting the due process argument, the court applied the rational basis test as it had in *American Bank,* and held that the legislature could have concluded that eliminating collateral source subrogation rights would lower malpractice insurance rates by reducing defendants' potential liability. Likewise, the court noted that the statute can still be rationally related to the objective of reducing malpractice insurance rates even though the practical effect may only be to redistribute the burden among insurers; such redistribution could, in itself, be a legitimate goal. The legislature is not required to apportion liability on the basis of fault, as the court might be.

The court summarily disposed of the City's equal protection argument by restating, in essence, its *American Bank* argument that the legislature is entitled to deal with evils that it sees on a piecemeal basis if it so chooses. The legislature saw the need for medical malpractice insurance reform and countered with MICRA; it was not obligated to go further in taming the rising costs of society's other ills.

In dissent, Justice Mosk opined that the statute does not even pass

the rational relation standard and is a violation of due process and equal protection. He urged that the statute's effect was to pass the burden of health care providers' negligence on to third parties, primarily the victim and her employer or its workers' compensation carrier. Justice Mosk suggested that it would be far more reasonable for the tortfeasor's carrier to shoulder the burden of the negligence than to pass it on to the employer or its carrier. He also suggested that the majority may have been somewhat short-sighted in approving of the legislation. Noting the increasing costs of workers' compensation, even during the malpractice insurance crisis, Justice Mosk said that placing an additional burden on workers' compensation carriers abrogated the goal of gaining greater health care for Californians.

XVI. RENT CONTROL

Ordinance requiring a permit to demolish an apartment building held not a deprivation of due process: **Nash v. City of Santa Monica.**

In *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed*, 105 S. Ct. 1740 (1985), the supreme court considered the validity of an ordinance in a city charter which prohibited removal of rental units from the housing market by conversion or demolition absent a removal permit from the City's Rent Control Board.

A residential landlord who did not qualify for a permit to demolish his building petitioned for a writ of mandate. The trial court held the ordinance constituted a deprivation of property without due process of law in violation of the fourteenth amendment of the United States Constitution and article I, section 7, subdivision (a) of the California Constitution.

The supreme court reversed the lower court's decision by applying the traditional tests used to determine the validity of economic regulations. It held that the impact of the ordinance on the landlord was outweighed by the relationship of that provision to the objectives of the rent control ordinance. All regulation of property entails some limitation upon the liberty of the owner. Although the landlord could not demolish his building, the ordinance was only an indirect and minimal burden imposed upon the landlord's asserted liberty interest. The landlord was not being restricted from netting a fair return on his investment in the property since the building was occupied. On the other hand, demolishing the building would have a severe impact on the city's housing shortage.

Inasmuch as the ordinance was reasonably related to the legitimate goal of maintaining adequate housing, and the relationship of the ordinance was both "real and substantial," the supreme court deter-

mined the ordinance was constitutionally sound, thereby reversing the trial court's decision.

XVII. TORTS

Trial court erred in granting nonsuit in wrongful death action against city, builder, and homeowner's association for causing automobile accident by maintaining an address sign which allegedly obstructed decedent's view of traffic: **Carson v. Facilities Development Co.**

Carson v. Facilities Development Co., 36 Cal. 3d 830, 686 P.2d 656, 206 Cal. Rptr. 136 (1984), was a wrongful death and personal injury lawsuit brought by the decedent's surviving husband and children. The decedent was killed, and her children injured, when her car was struck by another vehicle while she attempted to make a left turn.

Suit was brought against the driver of the other car for driving in a negligent manner. The plaintiffs also sued the City of San Diego (City), Facilities Development Company (FDC), and the Friars Hollow Homeowners Association (Friars Hollow), claiming that an address sign for the Friars Hollow condominiums erected by FDC on City property adjacent to the intersection obstructed the decedent's view and caused the fatal accident. Judgments of nonsuit were entered on behalf of the City, FDC, and Friars Hollow at the close of the plaintiff's case. At the end of the trial, the jury found in favor of the defendant driver.

The main issue on appeal was whether the trial court erred in granting nonsuit in favor of the three defendants. The supreme court reviewed the evidence in the light most favorable to the plaintiff and concluded that the trial court had in fact erred.

The plaintiff's action against the City was based on Government Code section 835. The City presented three arguments in support of the trial court's judgment: 1) the City was not liable under section 835 since it did not erect the sign, 2) the City had no notice of the sign's existence; and 3) the plaintiffs failed to use expert testimony to prove that the sign constituted a dangerous condition.

The court rejected each argument in turn. First, it made no difference that the City had not erected the sign since the city property at issue was the intersection which was made dangerous by the sign. The City's liability could be based on the dangerous condition of the intersection, even though the sign which made the intersection dangerous was on adjacent property and was not owned by the City. Sec-

ond, there was sufficient evidence from which the jury could have determined that the City had constructive notice of the sign and the dangerous condition it created. Finally, lay witnesses were competent to testify that a driver's view would be obstructed by the sign when making a left turn.

The court also rejected the arguments presented by FDC and Friars Hollow. Their argument against non-expert testimony was quickly rejected on the same grounds as the City's argument. Next, the court determined that the trial court could not find as a matter of law that the sign did not cause the accident. Finally, there was also sufficient evidence from which the jury could conclude that Friars Hollow was responsible for the obstructing sign, even though FDC had erected the sign on city property.

Since the plaintiffs' evidence would support a verdict for the plaintiffs, the supreme court reversed the judgments in favor of the City, FDC, and Friars Hollow. The judgment in favor of the other driver was affirmed.

XVIII. UNEMPLOYMENT COMPENSATION

A. *Employee who wishes to accompany a nonmarital partner to another state in order to maintain family relationship with their child has good cause to leave employment:* MacGregor v. Unemployment Insurance Appeals Board.

In *MacGregor v. Unemployment Insurance Appeals Board,* 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984), the supreme court determined that a worker who leaves her employment to accompany her "nonmarital partner" to another state in order to preserve the familial relationship they have established with their child is deemed to have met the good cause requirement of California Unemployment Insurance Code section 1256 if compelling circumstances are present.

The court, recognizing the importance of the fundamental familial relationship created when two parents establish a home for their natural child, looked beyond whether or not the parents were legally married. Where a nonmarital relationship exists, a party may receive unemployment benefits if substantial, credible, and competent evidence demonstrates an established family unit consisting of the natural parents and their child, and that the party chose to relocate in order to preserve the family unit. In addition to evidence that the appellant and her mate had maintained a common household for over two years prior to the birth of their child, evidence that the parents received the child into their home when she was born and was given the father's surname at birth further served to persuade the court

that compelling circumstances existed which justified the appellant's departure from her job.

Accordingly, the supreme court affirmed the lower court's order that the Unemployment Insurance Appeals Board reconsider its decision and award benefits to the applicant if she met the other eligibility requirements.

B. *Employee who is subjected to a continuing course of illegal discrimination by an employer has "good cause" to resign if he has reasonable belief that the discrimination will continue as long as his employment continues:* Sanchez v. Unemployment Insurance Appeals Board.

Suppose an employee in the face of continuing harassment and threatened dismissal in retaliation for her union activities and "whistle blowing" to public authorities quits her job in anticipation of being fired. Is the employee rendered ineligible for unemployment benefits under California Unemployment Insurance Code section 1256? This issue presented itself in *Sanchez v. Unemployment Insurance Appeals Board,* 36 Cal. 3d 575, 685 P.2d 61, 205 Cal. Rptr. 501 (1984), and was answered in the negative.

The appellants, two women, were employed by the respondent, a publicly-funded and privately-operated non-profit corporation. Government investigations into the respondent's handling of government funds revealed mismanagement and misuse of public funds in addition to numerous other employee violations. This led to termination of its government funding. The appellants were instrumental in alerting state and federal agencies to these abuses, and were also active union officials.

As a result of the appellants' activities, the respondent's president embarked on a plan to gather enough evidence that would warrant the appellants' termination. The appellants were aware of this scheme to have them fired.

Over a short period of time, one of the appellants was reprimanded, harassed and placed under continuing surveillance in retaliation for her union activities. Rather than wait for her termination, she resigned.

The other appellant witnessed the systematic harassment of her fellow union officials. Realizing that she had become the prime tar-

get of the president's antiunion animus, upon the other appellant's resignation, she also resigned.

The appellants' claims for unemployment compensation were denied by the Unemployment Appeals Board. The Board's decision was affirmed by the superior court inasmuch as it was determined both had voluntarily quit their jobs without the good cause required in Unemployment Insurance Code section 1256.

The supreme court determined that the administrative denials of the appellants' claims for unemployment compensation were based upon the legally erroneous standard that a worker about to be discharged for cause may not anticipate a discharge and still collect unemployment benefits. Instead, the court held, an employee who is subject to a continuing course of illegal discrimination by an employer and who reasonably believes such discrimination will continue as long as employment continues, has "good cause" to leave employment voluntarily under the terms of section 1256.

Under this new rule, the appellants were entitled to unemployment compensation. The judgment was reversed and the trial court was directed to issue its writ of mandate ordering the respondent to pay the appellants their unemployment benefits.

XIX. WORKERS' COMPENSATION

Employee has right to award of reasonable costs incurred in answering an employer's petition for writ of review denied by appellate court: **Johnson v. Workers' Compensation Appeals Board.**

In *Johnson v. Workers' Compensation Appeals Board,* 37 Cal. 3d 235, 689 P.2d 1127, 207 Cal. Rptr. 857 (1984), the supreme court was asked to decide whether an employee could be granted reasonable costs by the Workers' Compensation Appeals Board incurred in answering a petition for writ of review sought by an employer which was denied. In holding that such an award was available, the court liberally construed the Workers' Compensation Act in order to give maximum benefits to injured workers. Allowing the board of appeals to grant costs was consistent with such a construction.

Arthur Johnson was injured while employed by Trans-World Airlines (TWA) in 1972 and 1977. He applied to the Workers' Compensation Appeals Board for adjudication of his permanent disability claims. In 1981, the judge issued Johnson awards which he disputed as insufficient. His appeal was then heard and the relief he sought was granted. An insurance carrier for TWA filed a petition for writ of review in the court of appeal which was answered by Johnson. Johnson's answer requested a remand to the Appeals Board for an award of attorney's fees incurred in opposing the petition. As author-

ity for the request, Johnson cited California Labor Code section 5801 which requires a court reviewing a petition for review to remand the cause to the appeals board to make a supplemental award of attorney's fees should the reviewing court find no reasonable basis for the petition. The court of appeal denied both the petition of the insurer and Johnson's request for costs. Johnson petitioned the appeals board for an award and was denied there. He then petitioned the court of appeal to order the insurer to reimburse him for printing costs. The court denied the petition and Johnson appealed to the supreme court.

The Workers' Compensation Appeals Board may award costs as provided in section 5811 of the Workers' Compensation Act. The Act does not clearly define whether such costs may properly include costs of defending against a petition in an appellate court since section 5811 contemplates awards of costs incurred in actions before the board itself.

Historically, the board itself had defended its awards in appellate review. No costs would therefore be incurred by employees. This policy was changed, however, leaving employees to fend for themselves. The supreme court reasoned that it would be unfair to place the burden of cost on the employee. The California Constitution gave the legislature the right to administer workers' compensation legislation "without encumbrance of any character." CAL. CONST. art. XIV, § 4. To force workers to absorb the costs of defending petitions would diminish their awards and frustrate the constitutional intent.

Further, section 5811 awards costs in actions "before the appeals board." The court reasoned that actions before the board do not cease until an appellate court *grants* a petition for review; when such petitions are denied, the action remains before the board. Given the liberal construction to be afforded the Act, the award of costs would therefore be available, as the action was "before the appeals board." Thus, Johnson could recover the $531.93 cost incurred in printing his answer.

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