**THE YEAR'S CASES: 2017-2018**
**INJUSTICE LEAGUE**

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BAIL

Other than a no-bail detention order, judges must set bail taking into account the defendant's ability to post bail and less restrictive alternatives.

In re Humphrey (2018) 19 Cal.App.5th 1006

A court can order no bail (preventive detention) on a finding that the case is a felony involving violence or felony sexual assault where there is a substantial likelihood the person's release will result in great bodily harm to others. There must be sufficient evidence to support a conviction. The substantial likelihood requirement must be more than a mere possibility and cannot be based on speculation, and it must be made by clear and convincing evidence, a high probability. Preventive detention cases are rare and unusual.

In re White (2018) __ Cal.App.5th __ ; D073054

CRAWFORD

The Confrontation Clause is violated by permitting the prosecution to present an expert to testify to the results of a test, where the expert neither performed the test nor observed that test. The test results are not admissible as a business record, since the document was created for an evidentiary purpose.

Bullcoming v. New Mexico (2011) 564 U.S. 647; 131 S.Ct. 2705

A criminalist was allowed to testify to a DNA match with a DNA test done by someone else. The plurality (four votes) says that this is not a violation of confrontation, that the expert's reliance on the other report was not hearsay because it was not offered for its truth. The plurality says that even if the report was being offered for its truth, it did not violate confrontation, because the primary purpose was not to obtain evidence to use against a particular defendant; it was just generated to catch an unknown rapist. The fifth vote (Thomas) says that the report was not formal or solemn enough and thus was not testimonial.

Williams v. Illinois (2012) 567 U.S. 50; 132 S.Ct. 2221

"When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." Admission of those statements from a police gang expert violated Crawford.

People v. Sanchez (2016) 63 Cal.4th 665

Case-specific facts relied on by an expert that are based on hearsay are being offered for their truth, and admission of those facts violates Crawford. Whether hearsay violates the right of confrontation "depends on whether the matter the prosecution seeks to elicit is 'case-specific hearsay" or, instead, part of the 'general background information' acquired by the expert through out-of-court statements as part of the development of his or her expertise." Use of a website here was case-specific hearsay. Reliability is no longer the issue; admissibility is: "If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it." Even background hearsay, while admissible, must be reliable and of the type generally relied on by experts in the field. Even then it is limited by the court's gatekeeping function under Sargon (55 Cal.4th 757).

People v. Stamps (2016) 3 Cal.App.5th 988

CRAWFORD (Con't)

The published compilation hearsay exception, Evidence Code section 1340, permits a criminalist's identification of the drugs from pictures on a website. The foundation for the exception was properly laid by the criminalist. The site is subscription based and login controlled. The information on the site comes from the FDA and prescription pill manufacturers. There is no Crawford violation because the statements on the website are not testimonial.

People v. Mooring (2017) __ Cal.App.5th __; A143470

Cf. People v. Franzen (2012) 210 Cal.App.4th 1193

"Tribble's testimony about the information he received from his informants did not offend the confrontation clause. Tribble's statements were based on his personal knowledge and he was subject to cross-examination."

People v. Vega-Robles (2017) 9 Cal.App.5th 382

The prosecution's gang "expert"relied heavily on field identification cards, in which purported gang members admitted various facts related to the gang to the police who recorded that information. The gang expert relied upon these facts. This is case-specific hearsay and is barred by Sanchez. The field identification cards were created as part of an investigation into a potential crime: "Since the cards were produced in the course of an ongoing investigation, they are akin to police reports and therefore testimonial." Admissions by gang members that they are gang members also qualify as case-specific hearsay, as were their telephone numbers which officers used to connect the gang members together.

People v. Iraheta (2017) 14 Cal.App.5th 1228

Case-specific hearsay from police reports reviewed by an expert used by the prosecutor to impeach the expert was using case-specific hearsay for its truth and this hearsay was testimonial since it was compiled during police investigation of crimes. Use of it was thus barred.

People v. Malik (2017) 16 Cal.App.5th 587

Three of the victims in this child molest prosecution testified with a computer monitor on the witness stand which was raised in order to block the victims and the defendant from being able to see each other. Alternatives to face-to-face confrontation are permitted when the testimony is reliable and when necessary to further an important state interest. There was reliability here: "F.R. testified under oath, subject to cross-examination, and the jury had an unobstructed view of F.R. while she testified." The important state interests: "(1) protecting F.R. from suffering serious emotional trauma while testifying; and (2) obtaining F.R.'s complete and accurate testimony." There must be an evidentiary hearing and findings by the judge. Here there were implied findings and a sufficient record even absent any evidentiary hearing. The fact that F.R. was an adult when testifying does not matter.

People v. Arredondo (2017) 13 Cal.App.5th 950; rev. granted

Cf. Coy v. Iowa (1988) 487 U.S. 1012

Maryland v. Craig (1990) 497 U.S. 836

Crawford actually abrogated Aranda/Bruton. Crawford now articulates the limits of Confrontation, limiting it to testimonial statements. Statements made between co-defendants (here in a jail cell together) are not testimonial. A statement is testimonial if "objective evidence indicates that the statement was obtained for the primary purpose of establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." Thus such statements are now admissible. Due process does not bar admission of this evidence, since these kinds of statements are so trustworthy.

People v. Washington (2017) 15 Cal.App.5th 19

People v. Gallardo (2017) 18 Cal.App.5th 51

DISCOVERY, PITCHESS, AND BRADY

The Court of Appeal is NOT conducting in camera reviews of the actual Pitchess discovery to determine that all relevant information was in fact turned over to the defense. The court is merely reviewing the in-camera proceedings to ensure that the proper procedures were followed.

People v. Nguyen (2017) 12 Cal.App.5th 44

The victim in this pimping and pandering case was filed on by the prosecutor in juvenile court. The victim's case was dismissed and the court sealed the victim's records. The defendant filed a motion to obtain the victim's records under Welfare and Institutions Code section 827. At the hearing on the motion, defense counsel explained that the victim apparently lied to the police. The juvenile court reviewed the files and ordered disclosure, with redactions and a protective order. The victim sought writ review, and wins. Disclosure to a criminal defendant is not one of the exceptions to sealing. The trial judge can be trusted to make appropriate orders to protect a defendant's right to a fair trial.

S.V. v. Superior Court (2017) 13 Cal.App.5th 1174

The defense actually has very limited rights to pre-trial discovery, and claims of privilege and confidentiality overcome those rights when the defense seeks Facebook records. There is very little if any law supporting the defense position that the defense has the right to any pre-trial discovery under the state and federal constitutions. If the prosecutor has information from Facebook, Brady might require the prosecutor to share. During trial the defense might be able to obtain discovery.

Facebook v. Superior Court (2015) 240 Cal.App.4th 203; review granted

Requiring Facebook to disclose information the defense needs would require Facebook to violate a federal statute barring such a disclosure, and since there is no constitutional right to pretrial discovery, the defense loses. But the prosecutor can get this information. A criminal prosecution "is in no sense a symmetrical proceeding." A trial court can order a witness to consent to disclosure by Facebook. And the judge can conduct a review of these materials during trial, and decide then whether to order disclosure.

Facebook v. Superior Court (2017) 15 Cal.App.5th 729

A codefendant's lawyer interviewed a witness. The codefendant pled. The other defendant sought discovery of that interview. The discovery statutes do not provide for compelled discovery between codefendants. Apart from core work product (the attorney's impressions of the witness), witness interviews are only entitled to qualified work product protection. Discovery of qualified work product can be compelled on a showing of good cause, which means a showing of injustice or unfair prejudice. A showing that there is no other source for the information is an important factor though not always required. The defense is not required to disclose interviews of prosecution witnesses to the prosecutor that the defense intends to use to impeach those witnesses.

People v. Hunter (2017) 15 Cal.App.5th 163

The Sheriff's disclosure to the District Attorney of a list of deputies whose personnel files contain sustained allegations of misconduct allegedly involving moral turpitude or other bad acts relevant to impeachment violates Pitchess, which requires a motion setting forth the materiality of the discovery the defense seeks. This does not render that aspect of Pitchess unconstitutional, as being in violation of Brady. Brady says that the prosecutor has a duty to disclose this information, and the police are part of the prosecution team and thus part of this duty. But Pitchess shields this information and so neither the defense nor the prosecutor can get it. But that does not violate Brady.

Assn. for L.A. Deputy Sheriffs v. Superior Court (2017) 13 Cal.App.5th 413

DISCOVERY, PITCHESS, AND BRADY (Con't)

The Brady (373 U.S. 83) duty applies even if counsel does not object, because the duty is self executing. The Brady duty "extends to evidence known to others acting on the prosecution's behalf, including the police."

People v. Harrison (2017) __ Cal.App.5th __; B272132; 10/26/17

The prosecutor's access to police personnel records is the same as the defense's, meaning that the prosecutor has to make a Pitchess (11 Cal.3d 531) motion to get those records just as the defense must. When the police tell the prosecutor that there might be Brady (373 U.S. 83) material in their files, the prosecutor must disclose that to the defense; the defense then makes a Pitchess motion. This satisfies Brady. The 5-year limit on Pitchess discovery in Evidence Code section 1045 does not limit Brady discovery. The burden on the defense to make the showing to get Pitchess discovery is very low.

People v. Superior Court (Johnson) (2015) 61 Cal.4th 696

Serrano v. Superior Court (2017) __ Cal.App.5th __; B282975; 10/30/17

EVIDENCE

Penal Code section 632, passed by two-thirds vote of the Legislature, requires suppression of phone calls recorded without permission of all parties. Prop. 8 bars suppression of evidence unless that exclusion is required as a matter of federal law, or if two-thirds of the Legislature enacts an exclusion statute. The amendments to 632 were technical and not substantive, so suppression is not required.

People v. Guzman (2017) 11 Cal.App.5th 187; review granted

The admissibility of declarations against interest against a criminal defendant turns on: "Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true." The statements here, "were so disserving to his interests that a reasonable person in his position would not have made them unless they were true." When the declarant minimizes his guilt and lays the case off on others, that will not qualify, while if the declarant accepts responsibility and diminishes the responsibility of others, that will qualify.

People v. Grimes (2016) 1 Cal.5th 698

In ruling on the admission of declarations against interest, the court is supposed to weigh various factors, the key one being whether the declarant was taking responsibility and mentioning the defendant, or laying the blame primarily on the defendant. Here the declarant was laying the primary blame on the defendant. But another factor is reliability, and the statement here was really reliable.

People v. Smith (2017) 12 Cal.App.5th 766

A timeline was created by a therapist with the child victim, which contained detailed statements describing the alleged abuse written by the therapist at the victim's direction. The victim was allowed to read statements from the timeline into evidence. The timeline included inadmissible out-of-court statements that were improperly offered for their truth and to bolster the victim's credibility. Anything can be used to refresh the recollection of a witness, but whatever is so used does not thereafter become admissible in evidence, unless the opponent offers it.

People v. Vasquez (2017) 14 Cal.App.5th 1019

EVIDENCE (Con't)

Evidence Code section 1108 allows prior sex crimes evidence to be used to show the defendant's propensity to commit sex crimes, which in turn can be used to find guilt of charged sex crimes. In this case the only evidence of the prior sex crimes was the testimony of the victim in the charged offenses. So the jury was told that they could find the priors true to a preponderance of the evidence but they could only convict if they found the current offense true beyond a reasonable doubt. Affirmed, with an excellent concurring opinion describing how impractical it is to expect jurors to follow these instructions.

People v. Gonzales (2017) 16 Cal.App.5th 494

The judge instructed this jury to decide if the currently charged offenses were true to a preponderance, then they could find propensity, and then they could use that to determine whether the other charged offenses were true beyond a reasonable doubt. Thus the jury had to make two decisions on each charge, whether it was proved to a preponderance, and then whether it was proved beyond a reasonable doubt. These jury instructions were unintelligible.

People v. Cruz (2016) 2 Cal.App.5th 1178

Contra, People v. Garcia (2017) __ Cal.App.5th __; B270574; 11/6/17

The testifying police officer provided a sufficient authentication of an ankle monitor's information, and the defense failed to present any evidence casting doubt on the accuracy of the tracking data. "Data that is automatically generated by a computer is not hearsay because it is not a statement of a person."

People v. Rodriguez (2017) 16 Cal.App.5th 355

The defendant's right to confrontation and cross examination was violated; the defense did not have the required full and fair opportunity to challenge the testimony of a five-year old girl who testified by closed-circuit television and failed to answer hundreds of questions, including 150 which sought substantial information on important issues.

People v. Giron-Chamul (2016) 245 Cal.App.4th 932

The defendant and a co-arrestee were prosecuted for murder. At her trial, the defendant testified, putting primary blame on the co-arrestee, who had since died. The prosecutor was permitted to impeach the defendant with the now-dead co-arrestee's confession to the police, which placed blame on the defendant. It is clear that the prosecutor offered the co-arrestee's confession for its truth, and this was inadmissible.

People v. Hopson (2017) 3 Cal.5th 424

The judge instructed the jury that the evidence relating to texts and phone calls only had to be proved to a preponderance, treating this evidence as Evidence Code section 1101 evidence of uncharged acts. This evidence was the evidence of gross negligence. This was a misinstruction on the burden of proof, it is reversible error per se.

People v. Nicolas (2017) 8 Cal.App.5th 1165

The defendant's girlfriend, who was in the car, told a defense investigator that she, not the defendant, was driving. The girlfriend took the Fifth Amendment when called as a witness. The defense offered the admission as a declaration against interest. The trial court excluded it. A court has discretion to exclude declarations against interest if they are untrustworthy. The statement here was by the defendant's girlfriend, who never went to the police. She told the emergency responders that she had been in the back seat.

People v. Smith (2017) 10 Cal.App.5th 297

DUI

Is misdemeanor veterans' diversion available on driving under the influence cases?
Yes. Hopkins v. Superior Court (2016) 2 Cal.App.5th 1275; review granted
No. People v. VanVleck (2016) 2 Cal.App.5th 355; review granted
Cf. Penal Code section 1001.80; SB 725

The defendant here was convicted of driving under the influence of alcohol causing injury (Vehicle Code § 23153(a)), and driving under the influence of the combined influence of alcohol and drugs causing injury (Vehicle Code § 23153(f).) A defendant could take drugs that impair him and drink alcohol which would not be enough to impair him standing alone, but together with the drugs results in impairment. Thus, the (a) offense is not a necessarily lesser-included offense within (f), permitting convictions for both.
People v. Cady (2017) 7 Cal.App.5th 134

BATSON/WHEELER

Racial discrimination resulting in striking any prospective juror violates Batson: "Two peremptory strikes on the basis of race are two more than the Constitution allows."
Foster v. Chatman (2016) __ U.S. __, 136 S.Ct. 1737

"Excluding by peremptory challenge even a single juror on the basis of race or ethnicity is an error of constitutional magnitude." Trial judges are required to make a clear record, and prosecutors have to explain their reasons sufficiently to justify the challenges. In addition, trial judges must conduct a comparative analysis: "a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group."
People v. Gutierrez (2017) 2 Cal.5th 1150

Conviction reversed on Batson/Wheeler grounds. The prosecutor repeatedly claimed that an African-American juror was not African-American. "Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." (McClain v. Prunty (9th cir., 2000) 217 F.3d 1209, 1221.)
People v. Arellano (2016) 245 Cal.App.4th 1139

JURY MISCONDUCT AND REBUTTING PREJUDICE

The jurors in this case discussed the failure of the defendant to testify at trial. This is jury misconduct. The trial court found no prejudice, balancing the misconduct against the strength of the prosecution's case. This is not appropriate: the strength of the prosecutor's case is not relevant to the determination of prejudice. Once there's a presumption of prejudice such as that shown here, the prosecution has to rebut that presumption with evidence that no prejudice actually resulted. There are three factors possible to rebut prejudice. First, whether jurors drew adverse inferences of guilt from the defendant's failure to testify. Second, the length of discussion of the topic; a transitory comment isn't enough. Third, whether jurors were reminded not to consider the defendant's failure to testify. The presumption of prejudice was not rebutted. The court reverses.
People v. Solorio (2017) __ Cal.App.5th __; D070794; 11/16/17

TRIAL JUDGES CAN'T CREATE THEIR OWN NONSTATUTORY DIVERSIONS

Trial judges cannot create their own nonstatutory diversion programs. After an indicated sentence, a trial judge can only sentence the defendant or grant probation, but cannot dismiss the case.
People v. Marroquin (2017) __ Cal.App.5th Supp. __; BR053056

SENTENCING

"While a trial court can determine the fact of a prior conviction without infringing on the defendant's Sixth Amendment rights, it cannot determine disputed facts about what conduct likely gave rise to the conviction." A preliminary hearing transcript cannot establish a fact necessary to make a prior a strike prior. The only way a prior can qualify is if the defendant actually admitted whatever fact is necessary during the plea. There cannot be a jury trial on the facts necessary to make a prior a strike prior.

People v. Gallardo (2017) 4 Cal.5th 120

The defendant was convicted of gross vehicular manslaughter while intoxicated. This qualifies as a serious felony (and thus a strike) under Penal Code section 1192.8 only if it involved personal infliction of great bodily injury on someone other than an accomplice. The judge here examined the record, consisting of the preliminary hearing transcript, and found that the defendant had personally inflicted great bodily injury. "A sentencing court's finding of priors based on the record of conviction implicates the Sixth Amendment under Apprendi." "We hold that the Sixth Amendment under Apprendi precluded the court from finding the facts - here in dispute - required to prove a strike prior based on the gross vehicular manslaughter offense." "A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense."

People v. Wilson (2013) 219 Cal.App.4th 500

See Descamps v. U.S. (2013) __ U.S. __; 133 S.Ct. 2276

"[W]hen the elements of a prior conviction do not necessarily establish that it is a serious or violent felony under California law (and, thus, a strike), the court may not under the Sixth Amendment make a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime."

People v. Saez (2015) 237 Cal.App.4th 1177

Various documents (the information, jury instructions, plea colloquy, plea agreement) may be used to establish the statutory elements of a prior, but disputed facts can only be resolved by a jury trial.

People v. Marin (2015) 240 Cal.App.4th 1344

An affidavit establishing probable cause to obtain an arrest warrant is not part of the record of conviction and cannot establish facts. Finally, the affidavit cannot be relied on because doing so would violate the 6th Amendment right to a jury trial: "[T]he Sixth Amendment prohibits reliance on the Florida probable cause affidavit as the basis for determining that appellant's second degree felony manslaughter conviction constitutes a strike under California law."

People v. Denard (2015) 242 Cal.App.4th 1012

A court cannot find facts not determined by a jury or admitted by the defendant in a previous case in order to establish that a prior qualifies as a strike.

People v. Navarette (2016) 4 Cal.App.5th 829

Penal Code section 1170, subdivision (f), provides that any disqualifier from a Realignment sentence cannot be dismissed under Penal Code section 1385. This precludes a court from dismissing a great-taking enhancement (Pen. Code § 186.11, subd. (a)(2)) and then imposing a Realignment sentence.

People v. Avignone (2017) __ Cal.App.5th __; D070012, D070388; 11/8/17

SENTENCING (Con't)

When a defendant is sentenced to prison, restitution in a hit and run case can be ordered only for damages caused by the defendant fleeing, not from the accident itself.
People v. Martinez (2017) 2 Cal.5th 1093

"Hearsay that bears a substantial guarantee of trustworthiness is admissible in probation revocation proceedings."
People v. Buell (2017) 16 Cal.App.5th 682
Contra, People v. Arreola (1994) 7 Cal.4th 1144

The Information alleged a first-degree burglary with a first-degree burglary prior. The prior was alleged as a strike prior, but not as a serious felony prior under Penal Code section 667, subdivision (a). The prosecutor caught the omission during sentencing and got the judge to impose the five years anyway. The prosecutor never filed the prior as a Penal Code section 667, subdivision (a), prior but only as a strike prior, so the court could not impose the five years.
People v. Nguyen (2017) __ Cal.App.5th __; E066293; 12/11/17

The Penal Code section 666.5 enhancement (for prior auto thefts) applies only when the court imposes a felony sentence, but at sentencing these offenses remain wobblers and can be reduced to misdemeanors.
People v. Lee (2017) __ Cal.App.5th __; F072173; 10/31/17

The defendant pointed a gun at four victims and demanded their wallets. One victim refused. The defendant shot him, causing great bodily injury (GBI). The defendant was convicted of four counts of assault with a firearm. And one GBI enhancement. The court also imposed GBI enhancements on the other three counts of assault, even though those victims were not injured. The Penal Code section 654 ban on multiple punishments for a single event has an exception for multiple victims of violent crimes. That exception applies, permitting GBI enhancements for all four robberies, even though only one victim actually suffered GBI.
People v. Reyes-Tornero (2016) 4 Cal.App.5th 368

Once probation expires, the criminal justice system loses jurisdiction to incarcerate the defendant. This bars the Sheriff from incarcerating the defendant for a claimed failure to complete work release.
In re Barber (2017) 15 Cal.App.5th 368

The defendant rammed the victim's truck to prevent the victim from stopping the defendant from stealing the victim's marijuana plants. The trial judge ordered restitution for the decrease in the fair market value of the truck and also ordered restitution for the amount it cost to repair the truck. This is improper; both of these cannot be ordered for the same damage.
People v. Sharpe (2017) 10 Cal.App.5th 741

Penal Code section 1203.067 requires anyone placed on probation who has to register as a sex offender under Penal Code section 290 to waive the self incrimination and psychotherapist-patient privileges and participate in polygraph exams. The use of statements in criminal proceedings obtained through this waiver is barred, so forced extraction of the statements does not violate the Fifth Amendment and does not violate the defendant's right to privacy. Any compelled disclosures cannot be exploited to discover other evidence of guilt. The court cites Kastigar (406 US 441), which says that once the defense demonstrates a compelled disclosure, the burden shifts to the DA to show that any evidence was "derived from a legitimate source wholly independent of the compelled testimony."
People v. Garcia (2017) 2 Cal.5th 792

SENTENCING (Con't)

"Where a trial court concludes that a mandatory minimum sentence is grossly disproportionate to the circumstances of the crime, it has the constitutional authority – indeed, the constitutional duty – not to impose an unconstitutional sentence."
People v. Baker (2018) __ Cal.App.5th __; D071383

The repeal of the three-year enhancement for drug priors applies to all cases not yet final, including those on appeal.
People v. Millan (2018) 20 Cal.App.5th 450

Probation conditions not to possess any concealable weapon and not to possess any illegal drugs implicitly include a knowledge requirement: "In the context of conditions barring the possession, custody, or control of firearms, illegal drugs, and related items, revocation requires knowledge."
People v. Hall (2017) 2 Cal.5th 494

Courts retain the power to dismiss a Penal Code section 186.22, subdivision (b), enhancement under Penal Code section 1385.
People v. Fuentes (2016) 1 Cal.5th 218

A defendant is on bail in felony case A and picks up felony case B. The defendant is convicted of a felony in case B, but pleads to a misdemeanor in case A. The Penal Code section 12022.1 out-on-bail enhancement does not apply when the defendant is only convicted of a misdemeanor in case A.
People v. Reyes (2016) 3 Cal.App.5th 1222

In 2013 the judge imposed a felony realignment sentence of 11 years in the county jail. In 2015, the court vacated the sentence and reimposed the sentence, this time imposing a "split sentence" of time served with the remainder to be served on mandatory supervision. The trial court cannot do that. Realignment sentences cannot be modified.
People v. Antolin (2017) 9 Cal.App.5th 1176
Effective January 1, 2016, Penal Code section 1170, subdivision (d), was amended to provide that realignment sentences, just like felony state prison sentences, can be recalled within 120 days of the initial sentence.

Penal Code section 667.61, subdivision (f), specifically bars courts from striking the specified circumstances in order to avoid the life without parole sentence required for violation of the One-Strike sex law.
People v. Reyes (2016) 246 Cal.App.4th 62

The defendant was undocumented and subject to deportation. The judge denied any period of mandatory supervision, reasoning that if deported, the defendant would not be able to obtain probation services. This was proper.
People v. Arce (2017) 11 Cal.App.5th 613

The minor was found a delinquent ward of the juvenile court for a purse snatch. The judge imposed a probation condition barring the minor from knowingly associating with gang members. There is no evidence that the minor is in a gang or that the crime was gang related. The condition is improper because it prohibits legal conduct and because it is neither related to the minor's offense nor reasonably related to preventing his future criminality.
In re Edward B. (2017) 10 Cal.App.5th 1228

SENTENCING (Con't)

North Carolina makes it a felony for a registered sex offender to access an Internet social networking site where the offender knows that the site permits minors to become members or allows them to create or maintain personal web pages. This defendant was convicted for posting a statement on his personal Facebook page about a positive experience he had in traffic court. This law violates the 1st Amendment, but a narrower, more tailored law might survive.

Packingham v. North Carolina (2017) __ U.S. __; 137 S.Ct. 1730

A great bodily injury (GBI) enhancement applies only when the "GBI is directly caused by the offender in his or her commission of a felony." The defendant sold the heroin but the victim personally inflicted GBI on himself, so no GBI enhancement lies.

People v. Slough (2017) 11 Cal.App.5th 419

In 2011 the Legislature enacted realignment, which, among other things, changed the parole revocation process. Superior Courts now conduct many parole revocation hearings. The statute so providing (Pen. Code § 1203.2) does not expressly provide for probable cause hearings for folks alleged to be in violation of their parole. Due process requires such hearings. "Morrissey requires that the parolee be given notice of the preliminary hearing and an opportunity to appear, be heard, present documents and witnesses, and question adverse witnesses, absent good cause to deny cross-examination."

People v. DeLeon (2017) 3 Cal.5th 640

Cf. Morrissey v. Brewer (1972) 408 U.S. 471

People v. Vickers (1972) 8 Cal.3d 451

The defendant pulled out a gun and ordered the victim out of his van. The defendant then drove away in the van, which had $70,000 in rare coins inside. The defendant was convicted of robbery and carjacking. These two crimes were committed by a single act and thus Penal Code section 654 bars multiple sentences for the two crimes: "Where the same physical act accomplishes the actus reus requirement for more than one crime, that single act cannot give rise to multiple punishment."

People v. Corpening (2017) 2 Cal.5th 307

The defendant had a prior conviction. The conviction was a strike prior, but the prosecutor, when filing the prior, never invoked the strike statute or alleged that this conviction was a strike, only alleging that it was a serious felony. The defendant admitted the prior. The judge imposed a strike sentence. The prosecutor never filed an amended Information alleging that the prior was a strike, nor did the prosecutor seek to orally amend the Information. Therefore the court improperly sentenced the defendant by using the prior as a strike.

People v. Sawyers (2017) __ Cal.App.5th __; B266897

The defendant did substantial work and got substantial payments. The Appellate Division had ruled that the victim was entitled to restitution for all the work she paid for, even though she actually got a lot of work done. But the law for criminal cases is quite clear: the victim is entitled to full restitution, to be made whole, but the victim is not entitled to a windfall, which is what the Appellate Division's opinion would have resulted in.

Walker v. Appellate Division (2017) 14 Cal.App.5th 651

Revocation of probation did not preserve the court's jurisdiction, so when the court failed to respond within the time limits after a Penal Code section 1203.2a demand was made, the court lost jurisdiction to impose a sentence on that case.

In re Mancillas (2016) 2 Cal.App.5th 896

CRIMES

Since Penal Code section 422 (criminal threats) only applies to "the statement, made verbally, in writing, or by means of an electronic communication device," a non-verbal gesture alone does not violate the statute. A "threat made through nonverbal conduct falls outside the scope of section 422."

People v. Gonzales (2017) 2 Cal.5th 1138

For the gang enhancement to apply, where there is a gang which is a subset of a larger gang, the prosecutor has to present evidence of the connection between the big gang and the subset gang, and that the gang that the defendant was helping was the gang at issue: "When, as here, the prosecution relies on the conduct of subsets to show a criminal street gang's existence, the prosecution must show a connection among those subsets, and also that the gang those subsets comprise is the same gang the defendant sought to benefit."

People v. Prunty (2015) 62 Cal.4th 59
People v. Cornejo (2016) 3 Cal.App.5th 36
People v. Garcia (2017) 9 Cal.App.5th 364
People v. Resendez (2017) 13 Cal.App.5th 181

There was sufficient evidence that the defendant was a gang member and that the gang qualified under the statute for a gang enhancement. But there was insufficient evidence that the crimes here were done for the benefit of the gang. There was also no evidence to link the defendant's gang to another gang, whose members joined with the defendant to commit this crime.

People v. Franklin (2016) 248 Cal.App.4th 938

There was insufficient evidence of the gang enhancement: "while the shooter was a validated and heavily tattooed gang member, there is no evidence the party was in gang territory, there were no rival gangs present or involved, there were no gang epithets or gang attire, and there is no evidence the shooting was in retaliation or for revenge." "Not every crime committed by a gang member is gang related. Nor can a crime be found to be gang related simply because the perpetrator is a gang member with a criminal history. Although a lone actor is subject to a gang enhancement, merely belonging to a gang at the time of the commission of the charged conduct does not constitute substantial evidence to support an inference the sole actor specifically intended to promote, further, or assist any criminal conduct by gang members."

People v. Perez (2017) __ Cal.App.5th __; C078452; 12/18/17

Larceny is the trespassory taking away of personal property with the intent to permanently deprive. Embezzlement occurs when an owner entrusts property to the defendant and the defendant fraudulently converts the property for his or her own benefit, intending to deprive the owner of the use of the property. False pretenses is when a defendant makes a false representation to an owner of property, with the intent to defraud the owner, and then the owner, in reliance on that representation, transfers the property to the defendant.

People v. Kaufman (2017) 17 Cal.App.5th 370

In Chiu (59 Cal.4th 155), the court ruled that an aider may be convicted of a first degree premeditated murder only if he or she aids the murder; the natural and probable consequences doctrine cannot be used to make an aider guilty of a first degree premeditated murder. When a jury was instructed on both correct and incorrect theories of liability, there is a presumption that the error affected the conviction. When the defense files a habeas corpus petition on an old case on this issue, Chiu "error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder."

People v. Martinez (2017) __ Cal.5th __; S226596; 12/4/17

Burglary tools (possession of which are barred by Penal Code section 466) are limited to items used to gain access, not also items used inside to facilitate the crime.

People v. Shaw (2017) __ Cal.App.5th __; A148997; 12/7/17

The minor here stabbed at the victim with a metal butter knife; the victim was in bed and covered by a blanket. All the victim felt was pressure. This was an assault with a deadly weapon: "an assault with a deadly weapon is complete when the defendant, with the requisite intent, uses an object in a manner which is capable of producing great bodily injury upon the victim."

In re B.M. (2017) 10 Cal.App.5th 1292; review granted

Contra, In re Brandon T. (2011) 191 Cal.App.4th 1491

In 2007, the defendant pled to Health and Safety Code section 11352, transportation of heroin. The plea form specifically stated that the transportation was for personal use. The defendant was placed on Prop. 36 diversion, she absconded, and ended up back in court in 2015. By then 11352 had been amended (effective 1/1/2014) so that it only applied to transportation for sale, not personal use, so she moved to withdraw her plea. Even though generally defendants get the benefit of statutory changes favorable to them unless their cases are final, Penal Code section 1018 requires a motion to withdraw a plea within six months of the plea. The failure of the defendant to make the motion within six months of the plea divested the trial court of jurisdiction to grant the motion.

People v. Superior Court (Rodas) (2017) 10 Cal.App.5th 1316

Effective January 1, 2014, the applicable statute defined transportation of drugs as meaning to transport the drugs for sale. (Health & Saf. Code § 11379.) This defendant gets the benefit of this change; defendants get the benefit of favorable changes in the law unless the conviction is final. This defendant's conviction is not final because he was still on probation.

People v. Eagle (2016) 246 Cal.App.4th 275

A burglary can be committed inside a home where a defendant has consent to be, if the defendant enters other rooms in the house to commit felonies. Although the victim here consented to the defendant's entry into the sister-in-law's bedroom where the crimes were committed, she did not consent to entry to commit sex offenses against her. Thus, the burglary conviction is affirmed.

People v. Garcia (2017) __ Cal.App.5th __; A139924; 11/14/17

Force to establish a carjacking (Pen. Code § 215) is established even where no force is used on the victim, since the defendant sped off, using more speed than necessary to escape, and, "We therefore hold that a perpetrator accomplishes the taking of a motor vehicle by means of force, as defined under section 215, when the perpetrator drives the vehicle while a victim holds on or otherwise physically attempts to prevent the theft."

People v. Lopez (2017) 8 Cal.App.5th 1230

Simply moving the car is sufficient force for a carjacking: "once Mr. Ruiz-Maldonado resisted the theft by telling appellant to stop, banging on the trunk, and opening the driver's door, the movement of the car was actual force applied by appellant to overcome the victim's resistance."

People v. Hudson (2017) 11 Cal.App.5th 831

IMMIGRATION AND SENTENCING

The failure to advise a criminal defendant in state court of the federal immigration consequences of his plea is ineffective assistance of counsel, if the consequences are "succinct and straightforward."

Padilla v. Kentucky (2010) 559 U.S. 356 ; 130 S.Ct. 1473

Padilla requires that a defendant show "a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation." Just having the defendant make this claim is not enough: "judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." This defendant made the necessary showing based on things that happened at the time of the plea showing that avoiding deportation was the determinative issue in deciding to take the plea.

Lee v. U.S. (2017) __ U.S. __; 137 S.Ct. 1958

Penal Code section 1016.5 directs the judge to advise defendants that their pleas "may" have immigration consequences. The judge told Mr. Patterson this when he pled. Patterson's criminal defense lawyer did not know the consequences of the plea and told Patterson that, saying only that there could be immigration consequences from his plea. Patterson pled. Six months later he moved to withdraw his plea, saying he did not know that his plea (to possession of MDMA (ecstasy)) would result in his mandatory deportation. The trial judge rejected his motion. The Penal Code section 1016.5 advisement that deportation was possible did not automatically bar Patterson from seeking a withdrawal of his plea based upon grounds of mistake or ignorance where deportation was in fact a certainty.

People v. Patterson (2017) 2 Cal.5th 885

With respect to Penal Code section 1473.7 petitions based on ineffective assistance of counsel, the statute effectively codifies the Strickland (466 US 668) incompetency of counsel standards: the defendant has to show "(1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) that he or she was prejudiced by that deficient performance." The duties articulated in Padilla created new obligations to accurately advise clients of immigration consequences. Those duties have been held not to apply retroactively. (Chaidez, 568 US 342.) This means that counsel in this case had no affirmative obligation to advise the defendant of immigration consequences in the absence of client inquiry at the time of the plea, in 1998.

People v. Landaverde (2018) 20 Cal.App.5th 287

A trial court has no jurisdiction to grant a Penal Code section 1385 request on a case that was final long ago.

People v. Espinoza (2014) 232 Cal.App.4th Supp. 1

EXCLUDING THE DEFENDANT'S FAMILY MEMBERS DURING TRIAL

The right to a public trial includes the defendant's right to have family and friends present during the proceedings. A judge can close a trial by making findings on four points: "(1) the existence of an overriding interest that is likely to be prejudiced absent the closure; (2) the closure is narrowly tailored, i.e., no broader than necessary to protect that interest; (3) no reasonable alternatives to closing the proceeding are available; and (4) the trial court must make findings adequate to support the closure." Here, the judge excluded the defendant's family members based on a finding that they had threatened the prosecutor's witnesses. But there was no actual evidence that the family members were the source of the threats; this amounted to suspicion based on nothing. The only counts reversed were the counts connected to witness testimony during which the family members were excluded.

People v. Scott (2017) 10 Cal.App.5th 524

DEATH PENALTY AND MURDER ISSUES

Prop. 66 is upheld against a variety of challenges. There is no violation of the single subject limitation, no violation of equal protection, and no separation of powers violation. There is no problem with the requirement that the Courts of Appeal now have jurisdiction over original habeas corpus petitions in death cases. The jurisdiction over that initial habeas corpus petition is in the trial court, and either side can appeal from the ruling on the habeas petition; that appeal goes to the Court of Appeal, not to the Supreme Court. The judicial time limits are directory, not mandatory. However, the time limits on counsel are mandatory. Only facial challenges to the initiative and the issues raised by the parties are resolved. Individual as-applied challenges may still be raised.

Briggs v. Brown (2017) 3 Cal.5th 808

Defense counsel here called a psychologist who testified that the defendant would not be dangerous in the future. However, the defense expert also said that there was an increased probability of future violence because the defendant is Black. The expert's report stated this and the expert testified to it. This was ineffective assistance of counsel, "No competent defense attorney would introduce such evidence about his own client."

Buck v. Davis (2017) __ U.S. __; 137 S.Ct. 759

The prosecutor here told the jurors that they could find heat of passion to reduce this murder to voluntary manslaughter only if they found that a reasonable person would have shot the victim. This is wrong: "Framed another way, provocation is not evaluated by whether the average person would act in a certain way: to kill. Instead, the question is whether the average person would react in a certain way: with his reason and judgment obscured."

People v. Forrest (2017) 7 Cal.App.5th 1074

See also People v Beltran (2013) 56 Cal.4th 935

JUROR MISCONDUCT: PREJUDICE

During jury deliberations, one of the jurors told the other jurors that she had worked in prisons, and that if the jury convicted the defendant of 2nd degree murder, the defendant would get time served and walk out of prison tomorrow, but would do more time if convicted of 1st degree murder. The jury convicted of a 1st. "[J]uror misconduct raises a presumption of prejudice. The People may rebut the presumption by showing no prejudice actually resulted from the misconduct. If the People fail in their rebuttal, then prejudice exists." The record is reviewed by an appellate court to see if "there is a reasonable probability of actual harm to the [defendant] resulting from the misconduct," and reversal is required unless there was no "substantial likelihood of harm." The greater the misconduct, the more affirmative evidence the prosecutor needs to rebut the presumption of prejudice. In determining the seriousness of the misconduct, the courts should look at: "(1) whether the jury was discussing an issue within the scope of their duties, e.g., discussing sentence information during penalty deliberations or during guilt deliberations; (2) whether the extraneous information appeared to come from a person with authority, e.g., a police officer; (3) whether it was an abstract discussion or if the defendant was discussed directly, e.g., an abstract discussion about the cost of imprisonment versus a discussion about imprisoning the defendant; and (4) the length of the discussion concerning the extraneous information." Three of the factors here establish seriousness; only the fact that the discussion on this was brief is to the contrary.

People v. Echavarria (2017) 13 Cal.App.5th 1255

MIRANDA

The officer rattled off the rights. The officer said he was going to read the minor his rights "before we talk," stating as a fact that the minor would talk to the officer, even though the Miranda rights say the minor has the right not to talk. The officer first discussed an unrelated warrant, about which the minor was confused, then shifted topics to this case. No express waiver is required, but the minor's actions did not clearly show that he was fully aware of the nature of his rights or what he was giving up. The minor was 15 and had one prior contact, but it was not clear that he had ever been arrested or interrogated before. He cried and said he was scared. The confession was involuntary and admission of it violated Miranda. The officer's interrogation was dominating, unyielding, and intimidating. The officer was deceptive and kept exhorting the minor to be honest and say what happened.

In re T.F. (2017) 16 Cal.App.5th 202

The officer told the defendant he was not in custody and could leave at any time, but then closed the door and spent 40 minutes interrogating the defendant in a confrontational and adversarial manner. The officer kept telling the defendant that the officer knew the defendant was guilty and provided face-saving excuses for the conduct. On these facts the defendant was in custody and Miranda was required. The failure to give Miranda warnings required exclusion of the resulting admission.

People v. Saldana (2018) 19 Cal.App.5th 432

The police interrogated the minor about his involvement in a murder, telling the minor twice that if he admitted the shootings he would only "do a little time in camp." This offer did not render the minor's statement involuntary; it was a brief and isolated comment and thus did not "support a finding that such promise proximately caused Jones's confession." The police lied to the minor about the evidence they had, but the lies "did not have the effect of coercing Jones into an involuntary and unreliable confession."

People v. Jones (2017) 7 Cal.App.5th 787

Routine booking questions do not require Miranda, but any questions, including during booking, which the police know or reasonably should know are likely to elicit an incriminating response, do require Miranda. The fact that the Miranda violation was in unrelated cases over a decade ago does not matter; the passage of time does not "cleanse" the violation.

People v. Roberts (2017) 13 Cal.App.5th 565; D069355

A motion to suppress denied under Penal Code section 1538.5 cannot be appealed, even in a misdemeanor case, if the defendant receives deferred entry of judgment (DEJ).

People v. Cortez (2017) 16 Cal.App.5th Supp. 1

The DUI defendant gave a limited consent to test for alcohol, so there was no consent to test for drugs. Moreover, "the secondary testing for drugs was a procedural recurring or systematic failure by the law enforcement agency's personnel to abide by the Fourth Amendment," and suppression of the results of the drug test is thus required.

People v. Pickard (2017) 15 Cal.App.5th Supp. 12

The police can only conduct an inventory search of a vehicle if the police have a preexisting inventory procedure and they follow that procedure. Here the prosecutor presented evidence of an inventory procedure which would satisfy the requirements. But the prosecutor did not present any evidence that the officer was complying with these procedures when he searched the defendant's car. Thus the search here cannot qualify as a valid inventory search.
There was no evidence that the car was actually going to be towed or was towed. So this cannot qualify under inevitable discovery either.

People v. Wallace (2017) 15 Cal.App.5th 163

SEARCH AND SEIZURE

The trial court denied the defense suppression motion for lack of standing (actually, "LEPAS": a Legitimate Expectation of Privacy in the Area Searched. "Defendant, however, is not challenging the lawfulness of the search that yielded the gun. He is arguing that he was unlawfully detained by police, and that the gun found in the subsequent search should be suppressed as the fruit of the unlawful detention." The defendant can challenge the gun as the fruit of an unlawful detention.

Brewer v. Superior Court (2017) 16 Cal.App.5th 1019

The dissipation of alcohol in the blood does not qualify as an exigency justifying the forcible extraction of blood. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

Missouri v. McNeely (2013) __ U.S. __; 133 S.Ct. 1552

A warrant is required for a nonconsensual blood draw. There was no warrant here or any valid consent. This defendant was told he had a choice of a breath or blood test. He did not choose. The officer brought the defendant to a police station where only a blood test was available. The officer then had someone take the defendant's blood. The defendant did not complain or object. This was a submission to authority, not consent: "The evidence instead shows that defendant submitted to a blood draw and that this submission was due to the officer's expression of lawful authority." The court reverses the denial of the defendant's motion to suppress and orders suppression of the results of the blood draw.

People v. Ling (2017) 15 Cal.App.5th Supp. 1

Absent a warrant, the police have to show that consent to take a blood test was free and voluntary: "the People cannot meet the burden of showing free and voluntary consent by simply demonstrating that a defendant submitted to a claim of lawful authority, as such circumstances may be inherently coercive, thus vitiating consent." The defendant had a right to refuse and take the consequences. The officer here did not even advise the defendant of the consequences of a refusal. The implied consent law does not fix this.

People v. Mason (2017) 8 Cal.App.5th Supp. 11

The defendant was arrested for DUI. The police officer told him he could take a blood test, and a sample would be retained, and the crime lab would test the blood for alcohol. The defendant selected the blood test. The blood was tested for drugs and came back positive. The defendant was charged with driving under the combined influence of alcohol and drugs. The test for drugs was illegal. The defendant gave a limited consent to test for alcohol, so there was no consent to test for drugs.

People v. Pickard (2017) 15 Cal.App.5th Supp. 12

A police officer's implied consent advisement does not make a blood draw forcible. This is even if the advisement is incorrect.

People v. Harris (2015) 234 Cal.App.4th 671

"A 'brief, investigatory stop' is justified where an officer has 'reasonable, articulable suspicion that criminal activity is afoot,' implicating the suspect. While the more demanding standard of probable cause requires a basis to suspect someone of having committed a particular crime, reasonable suspicion to detain only requires facts connecting the suspect to 'criminal activity' more generally."

Cornell v. Superior Court (2017) 17 Cal.App.5th 766

SEARCH AND SEIZURE (Con't)

The police here legally stopped the minor. The police smell the odor of marijuana on the minor's clothes and breath. The minor admits to having just smoked marijuana. The police search the minor for more marijuana and find a revolver. At the time of this search, possession of less than an ounce of marijuana was an infraction and was a non-jailable offense. After Prop. 64 it remains an infraction for minors, but is actually lawful for those age 21 and up. "[I]t would have been mere conjecture to conclude that he possessed enough to constitute a jailable offense" and the search is thus unconstitutional.

In re D.W. (2017) 13 Cal.App.5th 1249

Cf. People v. Waxler (2014) 224 Cal.App.4th 712

People v. Strasburg (2007) 148 Cal.App.4th 1052

The police repeatedly ignored the defendant's invocations of Miranda and browbeat him, eventually getting consent to search his residence. Under the totality of the circumstances, the consent was invalid. The police went into the defendant's residence without a warrant and there was no exigency. So the entry was illegal. "[T]the fact that a warrant could have been obtained does not excuse the failure to obtain it." "[T]the inevitable discovery doctrine does not apply when officers have probable cause to apply for a warrant but fail to do so."

People v. Superior Court (Corbett) (2017) 8 Cal.App.5th 670

The police can enter a home without a search warrant under the emergency aid exception: "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." The emergency aid exception applies here. The officers had a radio call that there was a report of a screaming woman and distressed moaning coming from the location. They arrived and could hear male and female voices loudly arguing and saw two males gesturing as if arguing.

People v. Pou (2017) 11 Cal.App.5th 143

A probation search is not limited to the passenger on probation and his/her seat, but is "confined to those areas of the passenger compartment where the officer reasonably expects that the probationer could have stowed personal belongings or discarded items when aware of police activity." The officer has to reasonably believe that the probationer owns the items or has the ability to exert control over them. The inevitable discovery rule does not require certainty; the standard is whether the prosecutor can show a "reasonable probability that [the challenged evidence] would have been procured in any event by lawful means."

People v. Cervantes (2017) 11 Cal.App.5th 860

A defendant granted deferred entry of judgment (DEJ) cannot appeal denial of a Penal Code section 1538.5 motion unless he or she fails on DEJ and is sentenced. This is true even in a misdemeanor.

People v. Cortez (2017) 16 Cal.App.5th Supp. 1

The police cannot rely on a probation or parole search condition to conduct a search unless they know about the condition before the search. Where the defendant gives the police a false name and if he had not, the police would have found out about his search condition, this conduct estops the defendant from challenging the search on the basis that the police did not have prior knowledge of his search condition.

People v. Mathews (2017) 16 Cal.App.5th 601

Contrary, Myers v. Superior Court (2004) 124 Cal.App.4th 1247

SEARCH AND SEIZURE (Con't)

There was probable cause to arrest partygoers because, a reasonable officer could believe that the partygoers knew that they did not have permission to be in the house.

Note Justice Ginsberg's concurring opinion, suggesting that the court reconsider Whren (517 US 806). Whren ruled that it does not matter if a stop is a pretext stop; if there is objectively reasonable suspicion, the police can stop no matter what the actual motive.

D.C. v. Wesby (2018) __ U.S. __; 138 S.Ct. 577

SUPREME COURT CASES IN THE PIPELINE

This is a list of cases which are pending in the United States Supreme Court.

Carpenter v. U.S., No. 16-402; Argued 11/29/2017

Issue: Whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment.

Collins v. Virginia, No. 16-1027; Argued 1/9/2018

Issue: Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house.

Byrd v. U.S., No. 16-1371; Argued 1/9/2018

Issue: Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

Class v. U.S., No. 16-424; Argued 10/04/2017

Issue: Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

McCoy v. Louisiana, No. 16-8255; To Be Argued 1/17/2018

Issue: Whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

Currier v. Virginia, No. 16-1348; To Be Argued 2/20/2018

Issue: Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the double jeopardy clause to the issue-preclusive effect of an acquittal.

City of Hays, Kansas v. Vogt, No. 16-1495; To Be Argued 2/20/2018

Issue: Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

THE NEW PROPOSITION 36; 3-STRIKES INITIATIVE

The definition of dangerousness in Prop. 47 does not apply to Prop. 36.
People v. Valencia (2017) 3 Cal.5th 347

The determination of whether a defendant is dangerous so as to justify denial of Prop. 36 3-Strikes relief refers to the release date of the defendant, not the current date.
People v. Williams (2018) 19 Cal.App.5th 1057

"To find that an inmate was armed with a firearm during the commission of the inmate's third strike offense, a court reviewing a Proposition 36 recall petition may rely on facts underlying counts dismissed pursuant to the inmate's plea agreement – so long as those facts establish the defendant was armed during his offense of conviction." "[A] court may consider at least some facts not encompassed by the relevant judgment of conviction." "[A] court determining whether a third strike offender is ineligible for resentencing under [Pen. Code] section 1170.12, subdivision (c)(2)(C)(iii) may consider facts connected to dismissed counts, but only if those facts also underlie a count to which the defendant pleaded guilty."
People v. Estrada (2017) 3 Cal.5th 661
People v. Cruz (2017) 15 Cal.App.5th 1105

If a defendant with two or more strike priors commits a new non-serious felony, Prop. 36 makes that offense a non-life sentence, specifically, it is only a doubled sentence. But there are exclusions, one of which is a prior for assault with intent to commit rape, but only if that prior was committed by force or duress. Is the mere conviction of assault with intent to commit rape enough to disqualify the defendant from relief? No, force is not an element of the offense. However, the prosecutor can present evidence from the entire record of conviction, relying on relevant, reliable, admissible portions of that record to establish that force was in fact used.
People v. Cook (2017) 8 Cal.App.5th 309

A prior conviction for one of the super strikes listed in Penal Code section 1170.12(c)(2)(C)(iv) disqualifies a defendant from Prop. 36 relief. The defendant here has such a conviction, but that conviction occurred after conviction for the Prop. 36 offense. The general rule is that a prior conviction can only qualify as a prior if the conviction on the prior offense is entered before commission of the new offense. The general rule applies here.
People v. Spiller (2016) 2 Cal.App.5th 1014

The burden of proof to establish ineligibility under Prop. 36 (3-Strikes) is beyond a reasonable doubt. Where the initial trier of fact already found a reasonable doubt on the claim that the defendant was armed, this finding precludes the prosecutor or the judge from now finding that the defendant was armed to disqualify him from 36.
People v. Arevalo (2016) 244 Cal.App.4th 836

Where a defendant was committed to prison and his committing offense was ex-con with a firearm, the defendant is deemed to be "armed" and thereby disqualified from relief under the Prop. 36 initiative. The record has to show that the defendant was personally armed; it cannot be based on constructive possession.
People v. White (2014) 223 Cal.App.4th 512
People v. Hicks (2014) 231 Cal.App.4th 275
People v. White (2016) 243 Cal.App.4th 1354
People v. Caraballo (2016) 246 Cal.App.4th 936
People v. Elder (2014) 227 Cal.App.4th 1308

PROPOSITION 47

A. SERVING A SENTENCE

A defendant on probation is "serving a sentence" and thus can obtain Prop. 47 relief by filing the same kind of petition an inmate can file.

People v. Garcia (2016) 245 Cal.App.4th 555

A defendant on parole or PRCS is still "currently serving a sentence" under Prop. 47.

People v. Lewis (2016) 4 Cal.App.5th 1085

B. SHOPLIFTING

Shoplifting under Penal Code section 459.5 is not limited to the theft of openly displayed merchandise. It applies to any theft in a commercial establishment during regular business hours. The term "larceny" in Penal Code section 459.5 is to be read as "theft." The conduct underlying an identity theft charge would be the same as shoplifting, namely cashing a stolen check to get less than $950. If a defendant can show that his conduct is misdemeanor shoplifting, he is entitled under Prop. 47 (Pen. Code § 1170.18) to a reduction to a misdemeanor.

People v. Gonzales (2017) 2 Cal.5th 858

The defendant entered a store with the intent to obtain drugs by using a forged prescription. She was convicted of second-degree commercial burglary. The defendant's intent was to violate the statute banning forging medical prescriptions, and that is not larceny and thus that is not shoplifting, within the meaning of Penal Code section 459.5.

People v. Brown (2017) 7 Cal.App.5th 1214

The defendant went into a commercial laundromat and tried to break into a coin-operated soap dispenser. He was convicted of second-degree burglary. The issue is not what the commonsense meaning of shoplifting is, it is the statutory definition, which is entering a commercial establishment with intent to steal $950 or less.

People v. Bunyard (2017) 9 Cal.App.5th 1237

C. PLEA BARGAINS

When a defendant obtains a reduction from a felony to a misdemeanor using Prop. 47, and a plea bargain was involved initially, the prosecutor does NOT have the right to have the plea bargain set aside and the original charges reinstated.

Harris v. Superior Court (2016) 1 Cal.5th 984

D. ELIGIBILITY DETERMINATIONS

A super strike conviction bars a Prop. 47 reduction so long as the super strike conviction occurs before the ruling on the Prop. 47 petition. The conviction triggers exclusion even if that conviction is on appeal.

People v. Casillas (2017) 13 Cal.App.5th 745

The defendant here was disqualified from Prop. 47 because he has to register as a sex offender. Prop. 47 disqualifies a defendant who has to register as a sex offender under Penal Code section 290, subdivision (c). But juveniles who have to register as sex offenders have to register under Penal Code section 290.008. Juvenile priors are disqualifying priors under Prop. 47 only if they qualify as priors under Penal Code section 667, subdivision (d), which requires a finding that the then minor have been found a delinquent ward for an offense listed in Welfare and Institutions Code section 707, subdivision (b), and was 16 or older at the time of the offense.

People v. Fernandez (2017) 11 Cal.App.5th 926

The rules of evidence at a Prop. 47 evidentiary hearing are those applicable to sentencing hearings, and hearsay may be admitted if it is reliable. The burden of proving a prior conviction is on the prosecutor, to a preponderance. The prosecutor can present "facts from any source" to establish a disqualifying prior conviction. The probation report is reliable enough to establish that the defendant did suffer a juvenile wardship finding for rape.
People v. Sledge (2017) 7 Cal.App.5th 1089

This defendant's Prop. 47 petition claimed that the amount was not over $950, but the defendant did not "indicate the factual basis of his claim" regarding the amount. The court can make a determination of whether the amount qualifies a defendant for Prop. 47 relief on the basis of the record of conviction or "evidence submitted by the parties."
People v. Perkins (2016) 244 Cal.App.4th 129

Who has the burden on the issue of the amount of the loss in a Prop. 47 case? The defense has that burden. Since no evidence at all was presented to the trial court on the amount of the loss, the defense loses.
People v. Sherow (2015) 239 Cal.App.4th 875

When the defendant claims Prop. 47 eligibility for a conviction for receiving stolen property, the court should conduct a hearing to determine whether the amount is $950 or less.
People v. Bush (2016) 245 Cal.App.4th 992

The defendant petitioned under Prop. 47 for resentencing as a shoplifter (Pen. Code § 459.5). That statute requires that the amount stolen (or intended to be stolen) not exceed $950. The defense had the burden of showing that the defendant was eligible for 47 but failed to meet that burden.
People v. Rivas-Colon (2015) 241 Cal.App.4th 444

A probation report is not part of the record of conviction and is thus unusable to establish facts disqualifying a defendant from Prop. 47 relief. Moreover, even if a probation report was part of the record of conviction, the facts relied on here were recited in the probation report based on a police report. This was double hearsay, and there was no proof that these claimed facts were reliable, so it could not have been used anyway.
People v. Burnes (2015) 242 Cal.App.4th 1452

A Prop. 47 resentencing is "akin to a plenary sentencing hearing," and thus the defendant is entitled to counsel at this resentencing.
People v. Rouse (2016) 245 Cal.App.4th 292

Trial courts are not limited to the record of conviction in determining facts necessary to resolve whether a defendant qualifies for Prop. 47 relief, here, whether the amounts of the forgeries exceeded $950. A police report may be used. Many checks charged in a single count cannot be aggregated to disqualify a defendant from Prop. 47 even where the amount exceeded $950.
People v. Salmorin (2016) 1 Cal.App.5th 738

Health and Safety Code section 11368, medical prescription forgery to obtain a narcotic drug, is not covered by Prop. 47, even if the drug obtained is worth $950 or less.
People v. Gollardo (2017) __ Cal.App.5th __; A146961; 11/17/17

Prop. 47 applies to embezzlement.
People v. Warmington (2017) 16 Cal.App.5th 333

E. JOYRIDING, ATTEMPTED AUTO BURGLARY, AND RECEIVING

Prop. 47 enacted Penal Code section 490.2, mandating misdemeanor punishment for "theft" of not more than $950. Vehicle Code section 10851 can be a form of theft. Thus it qualifies. Vehicle Code section 10851 covers theft of vehicles, but also driving without the owner's consent but without intent to steal. Merely driving will not qualify for Prop. 47. The court holds: "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged."

People v. Page (2017) 3 Cal.5th 1175

Reversal is required when it is impossible to determine whether the jury found that the defendant stole a car worth $950 or less or merely drove the car.

People v. Gutierrez (2018) __ Cal.App.5th __; B275509

Attempted auto burglary (Penal Code section 664/459) is not on the Prop. 47 list. A conviction for attempted auto burglary cannot be reduced to a misdemeanor. "[T]heft is not an element of the offense" of auto burglary. There is no equal protection violation for making stealing a car a misdemeanor but breaking into a car a felony, because "the electorate could rationally conclude that car burglary should be treated more harshly because entry must be made into a locked vehicle, an element not required of vehicle theft."

People v. Acosta (2015) 242 Cal.App.4th 521

The defendant stole a $700 car, drove it into a reservoir, and abandoned it. Post-theft driving will not qualify for Prop. 47. But taking the car and dumping it is driving theft, theft accomplished by driving the vehicle away. That does qualify for Prop. 47 relief.

People v. Van Orden (2017) 9 Cal.App.5th 1277; review granted

F. VALUATION ISSUES

The sales tax must be added to determine the value of stolen property in order to determine whether the theft comes within Prop. 47.

People v. Seals (2017) 14 Cal.App.5th 1210

The trial court found that the value of the check was the amount for which it was written.

This is wrong: it is the actual monetary value of the check. Where, as here, the cashier refused to cash the check because it was obviously forged, the value of the check was not the amount on its face. The defense can show that the forgery was so bad that the value was nominal, or that the value of the check would be discounted on the street. The "value" in Penal Code section 473 refers "to the actual monetary worth of the check – that is, the amount the defendant could obtain for the check, not the amount for which it was written."

People v. Lowery (2017) 8 Cal.App.5th 533

If, as here, a thief succeeds in stealing, the value the defendant got for the goods is the amount to be used to determine Prop. 47 eligibility.

People v. Pak (2016) 3 Cal.App.5th 1111

The defendant had counterfeit bills with a face value of $260. The trial judge denied Prop. 47 relief finding that the defendant had materials which could have been used to make thousands of dollars in counterfeit bills. The statute only applies to the face value of the counterfeit bills; material that could be used to make counterfeit bills "has no bearing" on forgery, and even "blank pre-cut paper money has no value."

People v. Rendon (2016) 5 Cal.App.5th 422

G. ACCESS CARDS

Possession of a stolen access card or stolen access card information is covered by Prop. 47 so long as the value of the card or the information does not exceed $950. The value of the card/information is fair market value; this means the value on the black market.
People v. Romanowski (2017) 2 Cal.5th 903

Access card forgery (Pen. Code § 484f(a)) is not on the Prop. 47 list, and a defendant convicted of access card forgery cannot obtain Prop. 47 relief. Exclusion from Prop. 47 does not raise any equal protection problem.
People v. Bloomfield (2017) 13 Cal.App.5th 647

H. IMPACT ON PRIORS

Reduction of a felony prior to a misdemeanor under Prop. 47 does not eliminate the one-year enhancement provided for in Penal Code section 667.5, subdivision (b), for serving a term of imprisonment.
People v. Ruff (2016) 244 Cal.App.4th 935; rev. granted
People v. Valenzuela (2016) 244 Cal.App.4th 692; rev. granted
People v. Carrea (2016) 244 Cal.App.4th 966; rev. granted
People v. Williams (2016) 245 Cal.App.4th 458; rev. granted
People v. Abdallah (2016) 246 Cal.App.4th 736; it does for the washout
People v. Acosta (2016) 247 Cal.App.4th 1072; rev. granted
People v. Diaz (2017) 8 Cal.App.5th 812; rev. granted
People v. Johnson (2017) 8 Cal.App.5th 111; rev. granted

It does if the felonies were reduced before the defendant is sentenced on the new case.
People v. Call (2017) 9 Cal.App.5th 856

In 2015 the judge imposed a sentence including the prior, then reduced the prior to a misdemeanor. Defendants get the benefit of changes in the law when the cases are not yet final, and this defendant does get the benefit of the change here.
People v. Evans (2016) 6 Cal.App.5th 894; rev. granted

The defendant committed the crime before Prop. 47 was passed, but a court reduced his prison priors to misdemeanors before the trial on those priors happened in the new case. When the trial on the priors happened, the priors were no longer felonies and thus couldn't be found true and used.
People v. Kindall (2016) 6 Cal.App.5th 1199

I. COMMERCIAL ESTABLISHMENT

The minor here stole a cell phone from a school locker. "A commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services." "A public high school is not an establishment primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students."
In re J.L. (2015) 242 Cal.App.4th 1108

"[W]e find no indication that shoplifting can occur only in specific areas of a commercial establishment. Nor does there appear any requirement that the business's commercial activity must be taking place in the area from which the theft occurs in order to qualify the offense as shoplifting."
People v. Hallam (2016) 3 Cal.App.5th 905
Contra, People v. Colbert (2016) 5 Cal.App.5th 385; rev. granted

PROPOSITION 47 (Con't)

I. COMMERCIAL ESTABLISHMENT (Con't)

A country club is "primarily engaged in the sale of goods and services," and is thus a commercial establishment within the meaning of the shoplifting crime enacted by Penal Code section 459.5, even though the country club is exclusive.
People v. Holm (2016) 3 Cal.App.5th 141

The victim rented a locked storage unit in a storage facility. The defendant was convicted of burglary for entering the storage unit. This is not a shoplift under Penal Code section 459.5. The locked storage unit is not a commercial establishment. And the locked storage unit was not open to the public.
People v. Stylz (2016) 2 Cal.App.5th 530

J. ELIGIBLE OFFENSES

Embezzlement is theft and thus comes within Prop. 47.
People v. Warmington (2017) __ Cal.App.5th __; C082556

Health and Safety Code section 11368 is medical prescription forgery to obtain a narcotic drug. Prop. 47 amended many sections but not 11368, thus Prop. 47 relief is not available for this offense.
People v. Gollardo (2017) 17 Cal.App.5th 547

Conspiracy to commit a theft is not on the Prop. 47 list and thus a defendant is not eligible for 47 relief. Conspiracy to commit a theft is a substantially worse crime than just theft.
People v. Segura (2015) 239 Cal.App.4th 1282
Contra, People v. Huerta (2016) 3 Cal.App.5th 539

A defendant convicted of forgery is entitled to a reduction of a felony to a misdemeanor for forging a check so long as the value of the check doesn't exceed $950. The prosecutor cannot aggregate checks to disqualify the defendant.
People v. Hoffman (2015) 241 Cal.App.4th 1304

Counterfeit currency qualifies as "bank bills," and thus Prop. 47 applies to possession of counterfeit currency.
People v. Mutter (2016) 1 Cal.App.5th 429
People v. Maynarich (2016) 248 Cal.App.4th 77

Entering a commercial establishment with the intent to commit a theft by false pretenses is shoplifting, Penal Code section 459.5.
People v. Fusting (2016) 1 Cal.App.5th 404

A defendant is disqualified from Prop. 47 relief if the defendant is convicted of an enumerated sex offense, including rape. The defendant here had suffered a juvenile wardship finding for rape; that disqualifies a defendant from 47. Prop. 47 refers to disqualifying convictions by referring to Penal Code section 667. That statute, in defining strikes, includes some juvenile priors, including the one at issue here.
People v. Sledge (2017) 7 Cal.App.5th 1089

K. MISC.

Prop. 47 enacted Penal Code section 1170.18. This is an offense reclassification provision, and this applies as much to juveniles as adults because Welfare and Institutions Code section 602 "incorporates the entire body of laws defining criminal offenses as the basis for juvenile wardship jurisdiction." The minor's DNA sample and information are also ordered removed from the database.

Alejandro N. v. Superior Court (2015) 238 Cal.App.4th 1209
Contra, In re C.B. (2016) 2 Cal.App.5th 1112; rev. granted
In re C.H. (2016) 2 Cal.App.5th 1139; rev. granted

When a defendant files a petition seeking Prop. 47 relief when his direct appeal is currently pending in the Court of Appeal, the appellate court will grant a limited remand to the trial court to hear the Prop. 47 claim.

People v. Awad (2015) 238 Cal.App.4th 215

Where a defendant's case is on appeal, he cannot file for Prop. 47 relief directly in the Court of Appeal. He must first pursue Prop. 47 relief in the trial court.

People v. Shabazz (2015) 237 Cal.App.4th 303

A Prop. 47 petition need not be in writing.

People v. Amaya (2015) 242 Cal.App.4th 972

A defendant has to make the Prop. 47 motion in the courts where he suffered the prior convictions. A defendant cannot reach the issue of Prop. 47 on prior convictions by a challenge in a new, non-Prop. 47 case

People v. Marks (2015) 243 Cal.App.4th 331

Where a defendant is charged with an information, indictment, or a complaint certified to the superior court, appeal lies with the Court of Appeal, even after a Prop. 47 reduction

People v. Rivera (2015) 233 Cal.App.4th 1085
People v. Lynall (2015) 233 Cal.App.4th 1102

The defendant was convicted of forgery and drug possession. She did time in prison and was then released to PRCS. A petition to revoke her PRCS was filed. She filed a Prop. 47 petition. The order in which these petitions are resolved is irrelevant. Once Prop. 47 relief is granted, the case becomes a misdemeanor and there's no PRCS.

People v. Elizalde (2016) 6 Cal.App.5th 1062

The defendant was convicted in 2007 of felony grand theft person. In 2008, when he completed his prison sentence, he was committed as a mentally disordered offender (MDO). In 2015, he applied under Prop. 47 and his felony was reclassified as a misdemeanor. Later in 2015 the DA sought a recommitment of the defendant's MDO status. The Prop. 47 reduction does not bar MDO status, the recommitment procedures do not require an underlying felony conviction.

People v. Goodrich (2017) 7 Cal.App.5th 699

"Because [Penal Code] section 2933.1 applies to the offender and not the offense, the statute limits a violent felon's conduct credits for all counts of conviction that encompass the entire prison term, regardless of whether each count falls under section 667.5."

In re Mallard (2017) 7 Cal.App.5th 1220

K. MISC.

Penal Code section 1203.4a, the misdemeanor dismissal statute, does not have a provision providing for disqualification when a defendant has served a prison sentence on the offense, so even where a defendant did prison time, Prop. 47 is still available.
People v. Khamvongsa (2017) 8 Cal.App.5th 1239

When a court reduces a felony to a misdemeanor under Prop. 47, and the defendant receives credits in excess of his prison term, the excess credits do not get deducted from the defendant's parole supervision period.
People v. Morales (2016) 63 Cal.4th 399

The defendant was charged with possession of cocaine. He was later charged with attempted murder. He pled to both and was sentenced to both simultaneously. The attempted murder is a super prior; super priors disqualify an inmate from Prop. 47 relief. It is a prior if the conviction occurred before the Prop. 47 petition was filed, which makes it a prior here.
People v. Montgomery (2016) 247 Cal.App.4th 1385
People v. Zamarripa (2016) 247 Cal.App.4th 1179

An otherwise eligible inmate can be denied reduction of his felony to a misdemeanor under Prop. 47 if the court finds the inmate dangerous. Unlike the generic definition of dangerousness found in Prop. 36, Prop. 47 specifically provides that dangerousness in this context means an unreasonable risk to public safety, specifically, an unreasonable risk that the inmate would commit a super prior, a small list of offenses found in Penal Code section 667(e)(2)(C)(iv). This inmate's priors show an increasing level of violence, and that is enough. This is nonsense.
People v. Hall (2016) 247 Cal.App.4th 1255

The defendant got 16 months in prison for a felony. He completed the time and is off probation. Prop. 47 passes; he qualifies. He obtains reduction of the felony to a misdemeanor. He is not entitled to have his 16-month sentence vacated; he is not serving any sentence, so his exclusive relief is reduction to a misdemeanor.
People v. Vasquez (2016) 247 Cal.App.4th 513

The defendant was resentenced after obtaining Prop. 47 relief; but the sentence was the same overall as that imposed initially. This is not error.
People v. Roach (2016) 247 Cal.App.4th 178
People v. McDowell (2016) 2 Cal.App.5th 978
People v. Cortez (2016) 3 Cal.App.5th 308

In re Guiomar (2016) 5 Cal.App.5th 265; rev. granted

The trial judge here erred by denying Prop. 47 relief on felonies for which Penal Code section 1203.4 relief had been previously granted. 1203.4 relief does not preclude 47 relief.
People v. Tidwell (2016) 246 Cal.App.4th 212

When a case is transferred between counties, where is a Prop. 47 motion required to be filed?
In the trial court. People v. Curry (2016) 1 Cal.App.5th 1073; rev. granted
In the receiving court. People v. Adelmann (2016) 2 Cal.App.5th 1188; rev. granted

K. MISC.

This defendant got Prop. 47 relief from his state prison sentence and was resentenced to 360 days, credit for time served, and one year of parole. The defendant violated parole and was reinstated with 60 days in custody. Can he get a parole violation term that exceeds the maximum for the underlying crime? Yes; Penal Code section 3008.08, which provides for a parole period for realignment sentences, permits parole violations of up to 180 days in custody, and this defendant agreed to that when he filed his 47 petition.
People v. Hronchak (2016) 2 Cal.App.5th 884

A defendant seeking Prop. 47 is barred if he was convicted of a super prior, on the Penal Code section 667(e)(2)(c)(iv) list, one of which is murder. This defendant was convicted of murder previously. Was it improper to exclude him from 47 relief because the murder conviction occurred after the drug possession conviction? Yes, even though there is a case to the contrary on Prop. 36, because 36 is completely different from 47. The two do share "some similar language," but their differences are "profound."
People v. Walker (2016) 5 Cal.App.5th 872
Contra on Prop. 36, People v. Spiller (2016) 2 Cal.App.5th 1014

A court order requiring a sex offender to register, even under the discretionary sex registration statute, precludes Prop. 47 relief.
People v. Dunn (2016) 2 Cal.App.5th 153

The limitation in Prop. 47 barring any extra "term" longer than the original sentence (Pen. Code § 1170.18(e)) bars a parole period (for PRCS) of a year if that would be a longer parole period than would otherwise apply. Excess credits can be used to reduce a defendant's fine.
People v. Pinon (2016) 6 Cal.App.5th 956

What happens when the felony on which the substantive street gang crime is based is reduced to a misdemeanor under Prop. 47? Unlike the gang enhancement, the substantive street gang crime only requires that "the conduct that resulted in the conviction was felonious at the time it was committed," so a later reduction to a misdemeanor does not matter.
People v. Valenzuela (2016) 5 Cal.App.5th 449; rev. granted

The defendant was convicted as a juvenile for sexual battery, which does not require Penal Code section 290 registration. Prop. 47 does not exclude juveniles who were found wards for offenses which, if it had resulted in an adult conviction, would have required registration as a sex offender.
People v. Zamora (2017) 11 Cal.App.5th 728

A request to reduce a Penal Code section 666 petty theft with a prior to a misdemeanor under Prop. 47 does not require that there be an entry into a commercial establishment, which would be required under PC 459.5, shoplifting.
People v. Sloat (2017) 10 Cal.App.5th 761

A defendant is excluded from Prop. 47 if he has a prior conviction for an offense punishable by a life sentence. The prior here was robbery for which he got a life sentence under the 3-Strikes law. The determination of whether an offense is punishable by a life sentence is not made based on what sentence was imposed, but on what the sentence for the underlying offense was. Robbery, absent strikes, is not an offense for which a defendant can get a life sentence. Thus a robbery prior does not disqualify a defendant from Prop. 47, even if the defendant got a life sentence.
People v. Hernandez (2017) 10 Cal.App.5th 192

Prop. 57 applies to cases pending for trial, requiring juveniles directly filed on in adult court to be sent to juvenile court for transfer hearings.
People v. Superior Court (Lara) (2018) __ Cal.5th __; S241231

The rules governing treatment of incompetent adults apply to incompetent juveniles. This presumably means that incompetent minors have to be treated, and at some point if they cannot be treated, they must be released. The L.A. Superior Court protocol, which lists dates by which services must be provided, can provide useful guidance to juvenile courts, but does not independently give rise to any claim because it does not have any binding force of law. It was not adopted as a court rule.
In re Albert C. (2017) 3 Cal.5th 483

Welfare and Institutions Code section 786, which became effective January 1, 2015, requires automatic sealing of records in juvenile cases where the defendant successfully completes probation for any offense not listed in Welfare and Institutions Code section 707(b). The minor here successfully completed probation on his grand theft wardship finding; grand theft is not a 707(b) offense. The minor's case was dismissed. He became an adult and picked up an attempted murder case. The prosecutor filed a WIC 827 petition for disclosure of the defendant's juvenile records so that the prosecutor could impeach the defendant at his trial. The minor sought sealing under Welfare and Institutions Code section 786. Any sealing request made after 1/1/15 is covered by 786, not 781 (which was discretionary). 786 requires sealing here.
In re I.F. (2017) 13 Cal.App.5th 679

The procedures created by Penal Code section 1170, subsection (d)(2), do not satisfy Miller because they do not include some of the delineated Miller factors.
In re Kirchner (2017) 2 Cal.5th 1040

The minor was 14, with no prior record. She was in a car, her brother was driving. There was a stop and the police find a gun. She was detained. The prosecutor offered a package deal, which had the impact of barring her brother from testifying on her behalf. She refused to plead. She was detained for 15 days. On the 15th day her lawyer asked for release; this was denied. She then pled to a misdemeanor and was immediately released. The minor here was forced into a plea. It is obvious that the plea was used to extort a guilty plea, so the minor could be released.
A.T. v. Superior Court (2017) 10 Cal.App.5th 314

When a minor qualifies as both a dependent ward and a delinquent ward, the court is supposed to comply with Welfare and Institutions Code section 241.1, which sets forth various procedures. Probation and child welfare services are required to make recommendations and a noticed hearing is required. The minor here was a dependent ward in Imperial County. A delinquency petition was filed in Kern County. Kern County found the minor a delinquent ward without the required notice and reports. The Kern County court had to notify the court and dependency attorney in Imperial County within five days after it received recommendations from Kern County probation and child welfare services.
In re Ray M. (2017) 6 Cal.App.5th 1038

Welfare and Institutions Code section 786 mandates sealing all juvenile records, which requires that all records be sealed, including any acknowledgment that the minor knew that driving under the influence of drugs or alcohol was dangerous to human life, as provided for by Vehicle Code section 23593.
In re Dean W. (2017) __ Cal.App.5th __; G053807; 11/3/17

SHACKLING DEFENDANTS

"Before a presumptively innocent defendant may be shackled, the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom." This "applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without." This cannot be delegated to custodial officers. And judges cannot "institute routine shackling policies reflecting a presumption that shackles are necessary in every case."

U.S. v. Sanchez-Gomez (9th cir., 2017) 859 F.3d 649

PRELIMINARY HEARINGS AND THE 60-DAY RULE

Penal Code section 859b provides that the defendant is entitled to dismissal if a preliminary hearing is continued, without the defendant's personal consent, more than 60 days from "the date of the arraignment, plea, or reinstatement of criminal proceedings." The 60-day clock runs from whichever of these events occurs later. The reinstatement of criminal proceedings after the defendant was restored to competency had no impact on the 60-day rule, which was triggered when he entered a plea of not guilty. Since the defendant did not waive his right to a preliminary hearing within 60 days at that point, when his preliminary hearing was continued past 60 days without his personal consent, he was entitled to dismissal. The defendant had waived the 60-day limit at an earlier time, but that waiver had no impact.

People v. Figueroa (2017) 11 Cal.App.5th 665

NEW CHARGES FILED WHEN A DEFENDANT IS INCOMPETENT

A defendant who is incompetent under Penal Code section 1368 on a felony cannot be kept in custody beyond the maximum available custody time for the underlying offense or three years, whichever is shorter. The defendant here was in custody for three years. The judge ordered the defendant released. The prosecutor then filed a new Information, alleging the same crime. The prosecutor can refile; refiling is only limited by the two dismissal rule. But a new three-year period of confinement does not start again. If the defendant is again found incompetent, he cannot be kept in custody beyond three years in total, including the prior confinement period.

Jackson v. Superior Court (2017) __ Cal.5th __; S235549; 12/11/17

REMOVING JURORS

In order to remove a juror with an alternate, the court is required to conduct a reasonable inquiry to determine whether the juror is able to perform the duties of a juror. No such inquiry was conducted here. Moreover, the court's actions were done without the defendant or counsel being present. The juror substitution was a critical stage in the proceedings entitling him to the assistance of counsel, something he did not get here. Reversed.

People v. Young (2017) __ Cal.App.5th __; C077483; 11/17/17

FAILURE TO EXCUSE A JUROR WHO WAS A FORMER TEACHER OF THE VICTIM

In the middle of trial, a sitting juror informed the judge that the victim had been a high school student of the juror three years earlier. The juror remembered the victim positively. The judge got the juror to say that he thought he could still be fair, and the juror remained. The failure to excuse the juror was an abuse of discretion in a case where the credibility of the victim's identification of the defendant was crucial evidence.

People v. Romero (2017) 14 Cal.App.5th 774

PROP. 64

Health and Safety Code section 11361.8, enacted by Prop. 64, provides that an inmate serving a sentence for an offense that is now a misdemeanor can petition for a reduction to a misdemeanor, which must be granted unless the prosecutor shows that the inmate is dangerous. The express provision requiring that folks serving a sentence petition for relief controls here.

People v. Rascon (2017) 10 Cal.App.5th 388

MULTIPLE ACTS, ONE CHARGE: UNANIMITY AND NOTICE

When the prosecution presents evidence of multiple crimes but only one charge, does the prosecution have to elect the basis for the charge, at the commencement of trial or as soon as practically possible?

No. Hoffman v. Superior Court (2017) __ Cal.App.5th __; G054414; 11/7/17

Yes. People v. Salvato (1991) 234 Cal.App.3d 872

JUDGE SITS AS A THIRTEENTH JUROR WHEN RULING ON NEW TRIAL MOTION

On a motion for new trial on insufficiency of the evidence, the judge is required to reweigh the evidence. The judge must independently evaluate the evidence, including credibility, to determine whether the evidence is sufficient to uphold the verdict.

People v. Watts (2017) __ Cal.App.5th __; B270324; 11/14/17

MULTIPLE POSSIBLE FACTUAL SCENARIOS AND PROSECUTORIAL ELECTION

Where several different acts can form the basis of a conviction, the prosecutor may elect one and avoid the need for a unanimity instruction. Once the prosecutor elects, however, the court is bound by that election.

People v. Brown (2017) 11 Cal.App.5th 332

APPELLATE DIVISION NEED NOT APPOINT COUNSEL ON A PEOPLE'S APPEAL

The appellate division is only required to appoint counsel on appeal from a conviction; where the defendant won in the trial court and the prosecution appeals, the appellate division is not required to appoint counsel.

Morris v. Superior Court (2017) 17 Cal.App.5th 636

RIGHT TO A COMPLETE TRANSCRIPT OF THE FIRST TRIAL

"An indigent defendant facing retrial is presumptively entitled to a 'full' and 'complete' trial transcript – and this entitlement extends to counsel's statements."

People v. Reese (2017) 2 Cal.5th 660

JUROR DISCUSSION OF THE DEFENDANT NOT TESTIFYING NOT MISCONDUCT

No jury instruction was given telling the jury not to consider or discuss the fact that the defendant did not testify. The jury discussed the defendant's failure to testify. The trial judge denied a motion for new trial. This is not jury misconduct, because no one told the jurors they could not discuss the defendant not testifying. This could violate due process, but no due process violation claim was raised.

People v. Alaniz (2017) __ Cal.App.5th __; B266209

The jurors in this case discussed the failure of the defendant to testify at trial, although they had been specifically instructed not to do so; one juror said the defendant did not testify because "he knew he did it." This is jury misconduct. The strength of the prosecutor's case is ntot relevant to the determination of prejudice. Once there is a presumption of prejudice such as that shown here, the prosecution has to rebut that presumption with evidence that no prejudice actually resulted. There are three factors possible to rebut prejudice. First, whether jurors drew adverse inferences of guilt from the defendant's failure to testify. Second, the length of discussion of the topic; a transitory comment is not enough. Third, whether jurors were reminded not to consider the defendant's failure to testify.

People v. Solorio (2017) 17 Cal.App.5th 398

FRIVOLOUS APPEAL? SANCTIONS!

The Court of Appeal initially threatened to impose sanctions for a frivolous criminal appeal. The court deleted the footnote so stating.

People v. Sperling (2017) 12 Cal.App.5th 676

KICKING HOLDOUT JURORS OFF

IMPEACHING DEFENSE EXPERTS

During the sanity trial, the defense called mental health experts. The prosecutor was permitted to impeach the defense experts with statements the defendant made during a police interrogation. Those statements were made after the defendant invoked his right to counsel. Allowing impeachment would promote seeking the truth, so it was proper.

People v. Edwards (2017) 11 Cal.App.5th 759

Contra, James v. Illinois (1990) 493 U.S. 307

ARBUCKLE

"[I]n every plea in both adult and juvenile court, an implied term is that the judge who accepts the plea will be the judge who pronounces sentence."

K.R. v. Superior Court (2017) 3 Cal.5th 295

RIGHT TO INDEPENDENT DEFENSE EXPERTS

In Ake (470 US 68), the court held that "when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" The threshold criteria are the following: the defendant has to be indigent, he has to have a mental condition which is relevant to potential punishment, and that mental condition has to have been seriously in question.

McWilliams v. Dunn (2017) __ U.S. __; 137 S.Ct. 1790

JURY EXPERIMENTS AND JURY MISCONDUCT

The jury heard a pretext phone call between the victim and the defendant, during which the defendant did not admit anything. But the jury focused on the call during deliberations. One (Asian) juror was adamant that an innocent defendant would have reacted differently than this defendant. She then conducted an experiment, falsely accusing a male Hispanic juror of slapping her behind, saying, "he wanted to put his Mexican burrito in my chicken fried rice." This was jury misconduct.

People v. Wismer (2017) 10 Cal.App.5th 1328