HOW TO USE AND DISABUSE PRECEDENT

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Stare Decisis:

How to Use and Disabuse Precedent

A superior court appellate panel, analyzing a court of appeal decision, stated: "With due respect to the District Court of Appeals which decided the *Kruiss* case, it is the opinion of this [Superior] Court that the decision therein is erroneous." This occurred in 1962, and resulted in the oft-cited principle that: "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ("*Auto Equity*".)

Stare decisis means "The decisions of [the Supreme Court] are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Ibid.*)

VERTICAL AND HORIZONTAL PRECEDENT

Stare decisis has two basic forms -- vertical *stare decisis* and horizontal *stare decisis*. Under vertical *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. *(Auto Equity, supra,* 57 Cal.2d at p. 455.) Thus, a decision by the California Supreme Court is binding on all lower courts.

All state courts also are bound by United States Supreme Court decisions on issues of federal constitutional law. However, state courts are not bound by the decisions of lower federal courts, even on federal constitutional questions. (*People v. Crittenden* (1994) 9 Cal. 4th 83, 120, fn. 3; *In re Tyrell J.* (1994) 8 Cal. 4th 68, 79 The decisions of lower federal courts are persuasive but not binding. (*In re Tyrell J., supra,* at p. 79; see *People v. Bradley* (1969) 1 Cal. 3d 80, 86 [lower federal decisions addressing federal constitutional issues are "persuasive and entitled to great weight"].)

Also both the trial court and the Court of Appeal are bound under the doctrine of *stare decisis* by the California Supreme Court's interpretation of the Fourth Amendment (unless the United States Supreme Court has decided the question differently) notwithstanding the elimination of an accused's right to suppress evidence seized in violation of the California, but not the federal, Constitution by Proposition 8. (See, *People v. Greenwood* (1986) 182 Cal.App.3d 729, overruled by *California v. Greenwood* (1988) 486 U.S. 35.)

Under vertical *stare decisis,* every California superior court must follow any published decision from any district and any division of any court of appeal; for example, a trial court in San Diego is bound by a Fifth District Court of Appeal decision. (See, *Auto Equity, supra,* at p. 455.) *Stare decisis* requires a superior court to follow a published Court of Appeal decision even if the trial judge believes the appellate decision was wrongly decided. (*Cuccia v. Superior Court* (2007) 153 Cal. App. 4th 347, 353-354.) Where there are conflicting Court of Appeal decisions, the trial court is free to pick which of the decisions to follow. (*Auto Equity, supra,* at p. 456.)

Stare decisis also has a "horizontal" component, which deals with the question of whether courts of equal jurisdiction are bound to follow each other's decisions. In California, although an opinion of an appellate court in another district may be persuasive authority, it is not binding on another court of appeal. (*Auto Equity supra,* 57 Cal.2d at p. 455.) Indeed, different panels of the same Court of Appeal may disagree with one another. For

example, in *People v. Hofsheier* (2004) 117 Cal.App.4th 438 a Sixth District panel disagreed with the decision of another Sixth District panel in *People v. Jones* (2002) 101 Cal.App.4th 220. The court in *Hofsheier* said, "We disagree with the majority opinion in Jones." (*Hofsheier, supra,* at p. 439; see also *In re Andrew B.* (1995) 40 Cal.App.4th 825, overruled by *In re Sade C.* (1996) 13 Cal.4th 952, and *In re Kayla* G. (1995) 40 Cal.App.4th 878 [opposing decisions filed on same day by same division of same appellate district].)

As an aside, in federal court, circuits are free to disagree with other circuits. However, unlike California state courts, geography *does* matter in a number of federal circuits, including the Ninth Circuit where horizontal *stare decisis* operates to bind subsequent panels. Thus, the first panel of Ninth Circuit judges to publish an opinion on an issue binds not only district courts within the circuit but also subsequent Ninth Circuit panels. For the Ninth Circuit to overrule its own precedent, it must issue an en banc decision. *(Miranda B. v. Kitzhaber* (9th Cir. 2003) 328 F. 3d 1181, 1185 [panel must follow prior panel decisions unless a Supreme Court decision, an en banc decision, or subsequent legislation undermines its precedential value]; see also *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155.) Since the doctrine is one of policy, the court does depart from its own precedent in some unusual circumstances. (E.g. *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866-867; see also *Hertz v. Woodman* (1910) 218 U.S. 205, 212 [circuit Court of Appeals was not bound to follow its own prior decision].)

VERTICAL *STARE DECISIS*: USING PRECEDENT IN YOUR FAVOR

Relying on a published decision by the California Supreme Court which favors your position on an issue is relatively easy. Carefully describe how the facts and/or procedural posture in your case are identical, or nearly identical, to the case you are citing. The key is to keep track of Supreme Court decisions to determine whether the decision affects an issue in one of your pending cases. Also, consider whether it may impact cases you

completed. If the decision could apply retroactively, you should write to your former client and advise her/him how to proceed.

A recent example of success in using a recently decided Supreme Court case is *People v. Cornejo* (2016) 243 Cal. App. 4th 1453. Last August, the Supreme Court decided *People v. Prunty* (2015) 62 Cal.4th 59, which addressed the sufficiency of evidence to prove the "gang" element of the gang enhancement. The court held where the prosecution relies on crimes committed by specific gang subsets to prove the predicate crimes element of a gang enhancement, the evidence must show there is some associational or organizational connection between those subsets and the gang the defendant allegedly intended to benefit. *Prunty* involved the Norteño gang in Sacramento. While a gang expert talked about Nuestra Familia, the color red and the number 14 as common features of all Norteños, it relied on crimes committed by specific subsets to prove the predicate acts element of the gang enhancement. However, evidence was lacking to prove the various Sacramento Norteño subsets were all connected to the Norteños. The evidence, therefore, was insufficient to prove the gang enhancement.

Cornejo provided the perfect scenario to obtain a reversal of the gang enhancement based on *Prunty* since the *Cornejo* case also involved the Norteño gang in Sacramento, and the same gang expert provided virtually identical testimony in both cases about the Norteño gang. The gang expert even used the same predicate crimes in both *Prunty* and *Cornejo.*

If you are relying on a Supreme Court decision, your appellate court is bound to follow it, unless it can distinguish the case. For example, in *People v. Ewing* (2016) 244 Cal. App. 4th 359 the court distinguished *Prunty* because in that case the prosecution did not rely on subsets. All predicate crimes were committed by the same Norteño regiment in Redding, and the gang expert supplied specific evidence of the organizational connections between that Norteño regiment and the Nuestra Familia prison gang.

HORIZONTAL *STARE DECISIS*: USING PRECEDENT IN YOUR FAVOR

If you are citing a favorable court of appeal decision, your court, even if it is in the same district and division, is not bound by it. After explaining why your case is similar to the case you are citing, bolster your argument with analysis why the opinion correctly decided the issue.

ADVERSE AUTHORITY

You may find the perfect case which supports your argument. More common is finding a case which seems to obliterate your argument. Here are some thoughts on what to do when you find adverse authority:

1. Do not ignore adverse authority. If you discover adverse authority, you have an ethical duty to cite it. (*In re Reno* (2012) 55 Cal.4th 428, 510 ["Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed"].) Aside from committing an ethical violation, ignoring adverse authority creates the impression you could find no way to challenge it, which makes it more likely you will lose.

2. Don't bury adverse authority in a footnote. Address it head on. If you can find no way to do so, you will almost certainly lose.

3. Read the opinion carefully, including all footnotes and any dissent. As you do so, look for ways to distinguish the case or challenge the logic of the opinion. A dissent can provide the basis to argue the opinion is wrong.

4. Usually an opinion will cite a prior case or multiple cases as authority for its conclusion. Read the cited cases carefully as well. You may find they do not support the conclusion reached, or give you an avenue to challenge the conclusion reached in your adverse case.

VERTICAL *STARE DECISIS:* DEALING WITH ADVERSE CALIFORNIA SUPREME COURT AUTHORITY

Every court of appeal is bound by decisions of the California Supreme Court. If you have a Supreme Court decision which is contrary to the argument you want to make, your ability to make a persuasive argument hinges on coming up with some basis to claim the Supreme Court decision does not apply.

A. If the Issue Involves Federal Constitutional Law, Look for Authority Enabling You to Argue United States Supreme Court Authority Trumps California Supreme Court Precedent.

This approach is more feasible with an older California Supreme court opinion, as United States Supreme Court jurisprudence may have developed since that opinion was published. For example, in *People v. Gardeley* (1996) 14 Cal.4th 605, 619 the court stated a gang expert can rely on reliable hearsay as the basis for his opinion. After 2004, criminal appellate practitioners began arguing *Crawford v. Washington* (2004) 541 U.S. 36 and subsequent Supreme Court cases interpreting the Confrontation Clause effectively trumped *Gardeley* and that therefore its reasoning on the scope of expert testimony was no longer valid. (See E.g. *Davis v. Washington* (2006) 547 U.S. 813; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Michigan v. Bryant* (2011) 562 U.S. 344; *Bullcoming v. New Mexico* (2011) __ U.S. __, __ [131 S.Ct. 2705, 2717]; *Williams v. Illinois* (2012) __ U.S. __ [132 S.Ct. 2221]; Ohio v. Clark (2015) __ U.S. __ [135 S.Ct. 2173].)

For years, appellate courts rejected this argument, holding *Gardeley* was binding. (See, e.g., *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747 [court of appeal reverses trial court's ruling limiting expert's testimony]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153.)

"Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*Ramirez, supra*, at p. 1427.)

Finally, in *People v. Hill* (2011) 191 Cal.App.4th 1104 the court concluded that some of the evidence relied on by the gang expert was admitted for its truth and qualified as "testimonial." The court said it disagreed with *Thomas,* but felt compelled to " follow relevant Supreme Court precedent; that precedent compels the result reached by the trial court. Thus we affirm its ruling." (*Id* at p. 1137.) Note that the court was wrong to conclude it was bound by *Gardeley*. If a United States Supreme Court decision requires a different result based on an interpretation of the federal constitution, a contrary California Supreme Court decision is not binding.

In *People v. Archuleta* (2011) 202 Cal.App.4th 493 the court agreed with the analysis in *Hill* but also decided it was bound by *Gardeley*. Finally, after appellate practitioners raised this issue for six years, the Supreme Court granted review in *Archuleta* to consider the following question: "Was defendant's Sixth Amendment right to confrontation violated by the gang expert's reliance on testimonial hearsay (*Crawford v. Washington* (2004) 541 U.S. 36)? And in *People v. Edwards* (2015) 241 Cal.App.4th 213 the Sixth District decided it was not bound by *Gardeley* and found a confrontation clause violation in a gang case. Review, of course, has been granted.

The moral of the story is: don't give up. When there is a basis to do so, keep arguing a California Supreme Court opinion has been superceded by United States Supreme Court authority. The Supreme Court may eventually take the issue up, as happened with the gang-expert-confrontation-clause issue.

B. Argue the Opinion Never Addressed the Issue You are Raising and therefore is not Authoritative

Remember, "the doctrine of stare decisis applies only to . . . the *ratio decidendi* or actual ground of decision of a case cited as authority." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902) A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *People v. Mendoza* (2000) 23 Cal.4th 896, 915.) "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citations Omitted.]" (*People v. Superior* Court (*Marks*) 1 Cal.4th (CT56 p., 65-66.) "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning." (*McGee v. Superior Court* (1985) 176 Cal. App. 3d 221, 226, citing *Hart v. Burnett, supra,* 15 Cal. 530, 598-599.)

EXAMPLE:

In 1998, the Supreme Court held the failure to instruct on the lesser included offense of voluntary manslaughter in a murder prosecution is only an error of state law." (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) The error, therefore is subject to the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) rather than the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) standard. Under the *Watson* standard, reversal is not required "unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*Breverman, supra,* at p. 165.) Even when the court of appeal agrees error occurred, you usually lose when the *Watson* standard is applied.

Breverman addressed the failure to instruct on the lesser included offense of manslaughter, where heat of passion negates malice, an essential element of murder. In

Breverman Justice Kennard wrote a cogent dissent reasoning the error implicated the constitutional requirement the prosecution prove every element of the crime beyond a reasonable doubt, namely the element of malice. Most LIOs are based on the *absence* of an element of the greater crime, such as the absence of force, an essential element of a robbery or a forcible child molestation. Manslaughter is different. Rather than being based on the absence of malice, manslaughter involves an additional element, heat of passion or the unreasonable belief in the need for self-defense, which negates malice. The defendant who commits manslaughter still acts with "malice," that is, with the intent to kill or by committing an act with reckless disregard for the deadly consequences. However, the crime is deemed a lesser crime because a person acting under the specified circumstances is less culpable.

Based on this distinction, there is a basis to argue the LIO of manslaughter is different than other LIOs, and implicates the federal constitution. In *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 the Supreme Court stated, "When a factual circumstance negates an element of the crime, as heat of passion negates malice, the federal Constitution's due process guarantee under the Fifth and Fourteenth Amendments requires the prosecution to bear the burden of proving the absence of that circumstance beyond a reasonable doubt." Therefore, it would seem the failure to instruct on manslaughter and require the prosecutor to prove the absence of provocation or an unreasonable belief in the need for self-defense would impact a defendant's federal constitutional rights and require application of the *Chapman* standard instead of the *Watson* standard.

In a footnote, the court in *Breverman* recognized there might be a federal issue. In footnote 19 the majority acknowledged Justice Kennard's dissent on this very point, and did not disagree with her analysis. Instead, the court said this issue was not properly before it because the defendant never raised it. "The issues presented by such a claim must properly await a case in which they have been clearly raised and fully briefed." (*Id., supra,* at p. 170, fn. 19; see also, *People v. Moye* (2009) 47 Cal.4th 537, 558, fn. 5 [noting

that in *Breverman* the defendant never raised the claim "that the lesser-included offense instructions given below were defective under federal law"].)

It would seem, therefore, in any case where the appellate court agrees the trial court erred in failing to instruct on manslaughter, the court of appeal would consider the issue the Supreme Court expressly said it did not address: does the error implicate the federal constitution and therefore require application of the *Chapman* harmless error standard. After all, the Supreme Court said that issue was undecided. Depressingly, despite the Supreme Court's acknowledgment it had not ruled on that question, for 15 years court of appeal panels routinely rejected any argument the failure to instruct on voluntary manslaughter implicated the federal constitution, citing the holding in *Breverman* the failure to instruct on an LIO was only state law error. Not until *People v. Thomas* (2013) 218 Cal.App.4th 630 did a court finally agree the "[f]ailure to instruct the jury on heat of passion to negate malice is federal constitutional error requiring analysis for prejudice under *Chapman* [*v. California* (1967) 386 U.S. 18, 24]". (*Id.* at p. 644.) In *Thomas*, the court only addressed the federal claim because the Supreme Court ordered it to do so. In the first appeal, the court had found the error was only one of state law, citing *Breverman.* The court agreed there was error, but found it harmless under the *Watson* standard. The Supreme Court granted review and ordered the court of appeal to consider the federal claim in the light of *Mullaney v. Wilbur, supra.* The court did so, decided the failure to instruct on manslaughter did violate the defendant's federal constitutional right, and reversed after applying the *Chapman* standard.

The moral of the story is don't give up. If you have a basis to argue Supreme Court precedent should not apply, keep making that argument.

C. Argue the Opinion Is not Authoritative Because on Close Analysis the Issue Addressed by the Supreme Court is Different than the Issue you are Arguing.

EXAMPLE: Under Prop. 47, a commercial burglary is a misdemeanor if it qualifies as "shoplifting." Penal Code section 459.5, subdivision (a) provides, "shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours." We usually think of shoplifting as leaving a store with something you failed to pay for. What about purchasing goods with a stolen credit card or a forged check? That is not "shoplifting," as commonly understood, but does it qualify as entering a commercial establishment with the intent to commit larceny?

In *People v. Williams* (2013) 57 Cal.4th 776 the Supreme Court held "theft" for purposes of robbery could only be based on theft by larceny, not theft by false pretenses. Using a forged check or a stolen credit card to obtain property from a store is theft by false pretenses, not theft by larceny. Based on *Williams*, the Attorney General has been arguing using a forged check or stolen credit card to purchase something from a commercial establishment is not "larceny," but rather theft by false pretenses, and therefore cannot constitute "shoplifting" under section 459.5 since it requires entry with the intent to commit larceny. One court accepted this argument, and held trying to cash a forged check at a bank did not constitute entering a commercial establishment with the intent to commit larceny because the underlying conduct was theft by false pretenses. (*People v. Gonzales* (2015) 242 Cal.App.4th 35 [rev. granted Feb. 17, 2016, S231171].)

In the context of Proposition 47, *Williams* can be distinguished because the Supreme Court was talking about the elements of robbery, not the elements of commercial burglary and the meaning of the term "larceny" in that context. In *Williams*, after using re-encoded payment cards to purchase gift cards at a department store, Williams shoved a guard who tried to stop him. He was convicted of robbery. (*Williams, supra,* 57 Cal.4th at p. 779.)

The Supreme Court reversed that conviction. It reasoned robbery required "'the felonious taking of personal property in the possession of another'" by force or fear. (*Id.* at p. 786.) The court then reasoned the California Legislature likely intended the phrase "felonious taking" in the robbery statute to share the same common law meaning as larceny. (*Id.* at p. 786-787.) Theft by false pretenses did not qualify as a "felonious taking" since it involved "a consensual transfer of possession and title of the property." (*Id.* at p. 787.) The crime is completed once title to the property is acquired. Therefore, theft by false pretenses cannot be the basis for a robbery conviction. "The crime of theft by false pretenses ends at the moment title to the property is acquired, and thus cannot become robbery by the defendant's later use of force or fear." (*Ibid.*)

In the context of Proposition 47, *Williams* can be distinguished because the issue involves the definition of larceny for purposes of burglary, not robbery "*Williams* did not analyze the relationship between theft by false pretenses and burglary." (*People v. Vargas* (2016) 243 Cal.App.4th 1416, 1426.) In fact, in *People v. Parson* (2008) 44 Cal.4th 332 the Supreme Court held "[a]n intent to commit theft by a false pretense . . . will support a burglary conviction." (*Id.* at p. 354.) In *Parson*, the Supreme cited *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30-31. (*Ibid.*) In *Nguyen* appellant entered people's homes and obtained an item for sale by paying with a check from a closed bank account. (*Nguyen, supra*, at p. 30.) Like the defendant in *Williams*, Nguyen argued he could not be convicted of burglary because he did not commit "larceny," but rather committed theft by false pretenses. (*Ibid.*) The appellate court rejected this argument because Penal Code section 490a states, "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." "Thus, the Legislature has indicated a clear intent that the term "larceny" as used in the burglary statute should be read to include all thefts, including 'petit' theft by false pretenses." (*Nguyen, supra*, at p. 31.)

Based on the holdings in *Parson* and *Nguyen* and the language in Penal Code section 490a, you have a strong argument "intent to commit larceny" as used in section 459.5 includes using a forged check or a stolen credit card in a fraudulent attempt to obtain property. In fact, three opinions published in February and March 2016 agreed with that argument. (*People v. Vargas* (2016) 243 Cal.App.4th 1416 and *People v. Triplett* (February 8, 2016, C078492) ___ Cal.App.4th ___ [2016 Cal.App.Lexis 92]; *People v. Root* (March 1, 2016, D068235) ___ Cal.App.4th ___ [2016 Cal.App.Lexis 160].)

D. When Older and Newer Supreme Court Cases Reach Seemingly Conflicting Results Take the Time to Analyze why the Favorable Case Applies to Your Situation.

Where an older California Supreme Court case that is on-point but has not been overruled seems to conflict with a more recent California Supreme Court case, the Court of Appeal may be compelled to follow the older California Supreme Court case. (See, e.g. *Civil Service Commission v. Superior Court* (1976) 63 Cal.App.3d 627, 631 ["There is no exception in *Auto Equity Sales* for Supreme Court cases of ancient vintage. If [an older California Supreme Court case] does not comport with the standards of review required by [a more recent California Supreme Court case]...that proposition is not ours to announce"].) The U.S. Supreme Court has similarly held, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (*Rodriguez de Quijas v. Shearson / American Express, Inc.* (1989) 490 U.S. 477, 484.)

If faced with seemingly conflicting Supreme Court decisions, examine the circumstances carefully and argue the favorable decision, whether new or old, should apply in your case.

AN EXAMPLE of analyzing conflicting Supreme Court opinions is found in recent Proposition 47 jurisprudence. Penal Code section 1170.18 states qualified felony

convictions must be reduced to misdemeanors whether the conviction is obtained by jury trial or plea. The Attorney General has argued if a felony conviction reduced to a misdemeanor was the product of a plea bargain, the prosecutor must be permitted to reinstate dismissed charges because reducing the conviction deprives the prosecutor of the benefit of the bargain. For example, a defendant charged with robbery based on taking $200 from a victim may be allowed to plead to a felony grand theft/person, thereby avoiding a strike prior. The grand theft conviction is eligible for resentencing under Prop. 47. Must be prosecutor be allowed to reinstate the robbery charge?

There are Supreme Court opinions which arguably support both sides. In *Doe v. Harris* (2013) 57 Cal.4th 64,6 (*Doe*) the Supreme Court held subsequent unanticipated changes in the law do not permit a defendant to withdraw from a plea bargain. In *Doe,* defendant plead guilty in 1991 to one count of child molestation. He had to register as a sex offender. At the time the sex offender database was only accessible to law enforcement. In 2004 a provision of Megan's Law required the sex offender database be available to the public, including sex offenders convicted before its passage. Doe filed suit arguing he would be deprived of the benefit of his bargain because he had agreed to provide the required registration information with the proviso it would not be made public. The California Supreme Court held:

> [T]he general rule in California is that a plea agreement is "'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy....'" ([*People v.] Gipson* [(2004) 117 Cal.App.4th 1065,] 1070.) It follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement. (*Doe, supra,* at pp 73-74.)

An earlier opinion in *People v. Collins* (1978) 21 Cal.3d 208 seems to support the opposite conclusion. In *Collins,* the defendant pled to one count of non-forcible oral copulation in exchange for the dismissal of fourteen other charges. Before he was sentenced, the Legislature repealed the crime to which he had pleaded guilty. (*Collins,*

supra, 21 Cal.3d at p. 211.) Collins objected to any sentence on the consensual oral copulation charge because it no longer was a crime—at all. The court sentenced him anyway and Collins appealed. (*Id.* at pp. 208-212.)

The Supreme Court agreed Collins could not be sentenced for a crime which no longer existed. (*Id.* at p. 212.) However, the court also decided the prosecutor must be allowed to reinstate dismissed charges, with the proviso the sentence could not be increased because otherwise Collins would be penalized for exercising his appellate rights. "When a defendant gains total relief from his vulnerability to sentence, the state is substantially deprived of the benefits for which it agreed to enter the bargain." (*Id.* at p. 215,) Thus, while the court "permitt[ed] the state to revive one or more of the dismissed counts, [it] limit[ed] defendant's potential sentence to not more than three years in state prison, the term of punishment set by the [new] determinate sentencing act." (*Id.* at p. 216.)

In the Proposition 47 context, both sides have found a way to argue these cases can be reconciled to favor permitting or prohibiting reinstatement of dismissed charges. The Attorney General argues *Collins* controls. In their view, *Doe* involved a change in future collateral consequences, which provides no grounds for withdrawing from the plea bargain. *Collins* controls when a future change in the law affects the nature of the conviction. Since Prop. 47 changes the conviction from a felony to a misdemeanor, the prosecutor must be allowed to reinstate some dismissed charges.

On the other side, Prop. 47 petitioners argue *Collins* was "impliedly overruled" by *Doe* (*Harris v. Superior Court* (2015) 242 Cal.App.4th 244, 262 (dis. opn. of Mosk, J.) or argue *Collins* is distinguishable because in that case the change in the law meant the defendant gained "*total relief from his vulnerability to sentence.*" (*Collins, supra,* 21 Cal.3d at p. 215, italics added.) Proposition 47 does not render a conviction invalid; it merely requires a lesser sentence.

To date, only one appellate court has found that *Collins* controls in the Proposition 47 context, and review has been granted in that case. (*Harris v. Superior Court, supra*, 242 Cal.App.4th 244 [review granted 2/24/16, S231489.) On the other hand, as of March 15 three courts had decided the reduction of a felony to a misdemeanor does not invalidate the plea bargain and the prosecutor cannot reinstate dismissed charges. (*People v. Gonzalez* (2016) 244 Cal.App.4th 1058; *People v. Brown* (2016) 133 Cal.App.4th 1170; *People v. Perry* (2016) 244 Cal.App.4th 1251.)

E. If all else Fails, Raise the Issue and Seek Review or Cert. With a Persuasive Argument Why the Higher Court Should Overrule Its Precedent.

Even if you can find no basis to distinguish Supreme Court precedent or argue United States Supreme Court jurisprudence controls, if you strongly feel the decision is wrong argue the issue, present a strong analysis challenging the conclusion reached by the Supreme Court, and when you lose seek review in the Supreme Court. If your argument is based on a federal constitutional right, you should also then file a cert. petition with the United States Supreme Court.

HORIZONTAL STARE DECISIS: CHALLENGING OR DISTINGUISHING CONTRARY COURT OF APPEAL AUTHORITY

An unfavorable court of appeal opinion is not binding on your court, even if the opinion is from the same district and division. (*Auto Equity, supra*, 57 Cal.2d at p. 455.) The issue is whether it is persuasive and should be followed. When faced with court of appeal authority contrary to your argument, you must argue the opinion is wrong.

Read the opinion carefully, and study any authority cited for the conclusion reached on the issue you are raising. Since this is an appellate court, it will cite another opinion as the basis for its legal conclusion. You may find the authority cited does not support the

conclusion reached. Alternatively, you may be able to argue your case is distinguishable, and therefore the contrary opinion does not apply. Finally, you can argue the conclusion reached is not logical.

A. The Authority Cited in an Opinion Does Not Support the Holding

EXAMPLE: Is the error in giving a kill-zone instruction in attempted murder cases subject to the *Chapman* standard for reversal? In *People v. McCloud* (2012) 211 Cal.App.4th 788 the court held the *Watson* standard applied in deciding whether an error in giving this instruction required reversal. However, the case it cites to support this conclusion is inapposite.

The kill-zone instruction can be erroneously used as a substitute for transferred intent to kill, which does not apply to attempted murder cases. In a murder prosecution, you have the principle of transferred intent. John intends to kill Joan, but the bullet he aims at Joan kills Francine instead. Even though he did not intend to kill Francine, he is guilty of murder because intent is transferred. He is no less culpable just because he missed his intended target and killed someone else. But what if the bullet hits Francine, only injuring her? John can be convicted of attempting to murder Joan, since he intended to kill her and committed a direct but ineffective step toward that end. However, his intent to kill Joan does not support an attempted murder charge as to Francine. In *People v. Bland* (2002) 28 Cal.4th 313 the Supreme Court held that transferred intent is not applicable to "inchoate" crimes such as attempted murder.

Even though it was not necessary to its holding, The Supreme Court then explained John could still be guilty of attempting to murder every individual who was near Joan if there is a "concurrent" intent to kill everyone in a group in order to ensure Joan's death. The Supreme Court said this could be considered the creation of a "kill zone." The court gave the example of throwing an explosive device into a group of people to ensure the death of

one intended victim. Another example was shooting repeatedly at a house with high-powered wall piercing weapons to ensure the death of one person who was in the house. (See *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565.)

Even though the Supreme Court said the kill zone theory "is not a legal doctrine requiring special jury instructions" (*People v. Bland, supra,* 28 Cal.4th at p. 331, fn. 6), CALJIC and CALCRIM have a special instruction on the kill zone, and courts frequently give it even in cases where a defendant uses a handgun to shoot at someone who is part of a group.

For years criminal appellate practitioners challenged the kill zone instruction without success. Finally, in 2012 the court in *People v. McCloud, supra,* 211 Cal.App.4th 788, agreed it was error to give this instruction when a defendant fired 10 shots from a semiautomatic handgun at a party over 400 people attended. "Three bullets struck three victims, killing two and injuring the third. The seven remaining bullets hit no one." (*Id.* at p. 564.) Based on the kill-zone theory, McCloud was convicted of 46 counts of attempted murder. The court of appeal found the instruction should not have been given. The instruction is only proper when "the defendant reasons that he cannot miss his intended target if he kills everyone in the area in which the target is located." (*Id.* at p. 798.)

The court then stated, "State law instructional error is reviewed for harmlessness under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836-837." (*Id.* at p. 803.) In *McCloud* this conclusion did not matter since convicting someone of 46 counts of attempted murder under those circumstances was preposterous. The court had no difficulty finding prejudice under the *Watson* standard. But you may have a case which is not that preposterous, and you would be better off with the *Chapman* standard.

First, the court is correct that state law instructional error is reviewed for harmlessness under the *Watson* standard. But the court never explained why the error in giving a kill-

zone instruction was only an error of state law. The case cited in *McCloud*, *People v. Whisenhunt* (2008) 44 Cal.4th 174, does not support the conclusion the erroneous giving of a "kill zone" instruction is merely an error of state law. In *Whisenhunt*, the court gave required accomplice instructions but failed to advise the jury it had to determine whether a witness was an accomplice or that the witness was an accomplice as a matter of law. (*Id.* at p. 214.) Since this error was based on section 1111, "the asserted error is one of state law, subject to the reasonable probability standard of harmless error under *People v. Watson*." (*Ibid.*)

In *McCloud,* the error does not involve an instruction which is contrary to a California statue. The error, as described by that court""a legally erroneous conception of the kill zone theory." (*McCloud, supra*, 211 Cal.App.4th at p. 801.) The legally erroneous conception of the kill-zone theory provided a "legally erroneous" shortcut to find an essential element of the crime -- intent to kill. Instructing the jury on an invalid legal theory of guilt implicates the constitutional guarantee of due process and a fair trial. (*Griffin v. United States* (1991) 502 U.S. 46, 59; *People v. Guiton* (1993) 4 Cal.4th 1116, 1125-1126, 1128; *Neder v. United States* (1999) 527 U.S. 1, 12 [instructional error regarding an element of the charged offense implicates the Sixth Amendment right to a jury trial].) The error does not involve state law, but rather the constitutional requirement the jury find every essential element of a crime beyond a reasonable doubt.

Reading the authority cited by the *McCloud* court and explaining why it does not apply allows one to argue the error is not one of state law, but implicates the federal constitution. As seen above in the *Thomas* case, this can be the difference between an affirmance and a reversal.

B. The Reasoning Behind an Appellate Court's Conclusion is Unreasonable

EXAMPLE: As noted above, in *People v. Thomas*, *supra*, 218 Cal.App.4th 630, the court held the failure to instruct on the LIO of heat-of-passion voluntary manslaughter was federal constitutional error. Other appellate courts, however, have been loath to jump on board. In *People v. Millbrook* (2014) 222 Cal.App.4th 1122, the court reasoned, "The full import of *Thomas* is []unclear." (*Id.* at p. 1146.) In *Thomas*, the defendant had requested a voluntary manslaughter instruction. In *Millbrook*, the defendant had not made that request. *Millbrook* reasoned it was not clear whether the Supreme Court had remanded the case to decide the issue it had not considered in *Breverman*, or whether the Supreme Court had wanted the appellate court to decide whether the refusal to give a requested instruction on the defense theory of the case violated the constitutional right to present a defense. The attorney general will argue *Thomas* does not apply when the issue is the court's sua sponte duty to instruct, as opposed to the refusal to instruct. (See also *People v. Peau* (2015) 236 Cal.App.4th 823, 830 ["*Thomas* does not necessarily resolve whether an error in failing to give such an instruction sua sponte is also one of federal constitutional dimension"].)

This reasoning is illogical. The holding in *Thomas* is based on *Mullaney v. Wilbur, supra,* 421 U.S. 684, 704, where the Supreme Court stated, "When a factual circumstance negates an element of the crime, as heat of passion negates malice, the federal Constitution's due process guarantee under the Fifth and Fourteenth Amendments requires the prosecution to bear the burden of proving the absence of that circumstance beyond a reasonable doubt." Since the error is rooted in the due process requirement the prosecution prove the absence of heat of passion beyond a reasonable doubt, it should make no difference whether defense counsel requested the LIO instruction. Under *Mullaney,* the error implicates the federal due process right either way.

C. In Many Instances, You Will Have to Argue Multiple Grounds Why Appellate Decision is not Authoritative

EXAMPLE: You have an arguable issue the court erred in its *sua sponte* duty to instruct on heat of passion manslaughter in a murder case where your client was convicted of first degree murder. In *People v. Peau, supra,* 236 Cal.App.4th 823 the court held a conviction for first degree murder shows the error in failing to instruct on heat-of-passion manslaughter was harmless. It reasoned any error was harmless since the jury was instructed with CALCRIM No. 522, which states, "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter." The court reasoned since the jury convicted appellant of first degree premeditated murder, it necessarily found appellant did not act in response to provocation.

If you are faced with a similar scenario, you will have to argue the court's reasoning in *Peau* is flawed. You should argue an older Supreme Court case, *People v. Berry* (1976) 18 Cal.3d 509, held a first degree murder verdict did not render harmless the failure to instruct on heat-of-passion manslaughter. In *Berry* the Supreme Court concluded the "passing reference" to provocation as a basis for distinguishing between first and second degree murder did not clearly advise the jury it should consider whether the defendant was provoked and committed the killing in the heat of passion. (*People v. Berry, supra,* at pp. 512, 518.)

The court in *Peau*, however, found the more recent decision in *People v. Wharton* (1991) 53 Cal.3d 522 supported the contrary conclusion. (*People v. Peau, supra,* 236 Cal.App.4th at pp. 831-832.) You can argue *Wharton* is distinguishable because the Supreme Court was not deciding the question whether the failure to give a heat-of-passion voluntary manslaughter instruction is rendered harmless where the jury convicts the defendant of first degree murder. The issue in *Wharton* did not involve the failure to instruct on heat-of-passion manslaughter, but merely the failure to give a requested

pinpoint instruction when the jury was otherwise thoroughly instructed on every aspect of heat-of-passion manslaughter. In *Wharton,* the Supreme Court agreed the trial court should have given a requested pinpoint instruction that provocation may be based on a series of events occurring over a considerable amount of time. (*People v. Wharton, supra,* 53 Cal.3d at p. 571.) The court decided, however, the error was harmless. First, it concluded the standard of prejudice for the failure to give a pinpoint instruction was the *Watson* (*People v. Watson, supra,* 46 Cal.2d 818, 836) standard. (*People v. Wharton, supra*, at p. 571.) The court then found it significant that "the jury was otherwise given comprehensive instructions on provocation and heat of passion and nothing in those instructions precluded the jury from finding adequate provocation resulting from conduct occurring over a considerable period of time." (*Id.* at p. 572.) Defense counsel made that very point in closing argument. (*Ibid.*) The Court then noted the jury had found the murder was premeditated, and that the instructions had advised the jury that to make a first degree murder finding it had to determine the murder was "'the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not upon sudden heat of passion.' (See CALJIC No. 8.20.)" (*People v. Wharton, supra,* at p. 572.)

The analysis in *Wharton* has no relevance to the issue in the *Peau* situation, and the court in *Peau* erred in relying on *Wharton* to find the error harmless. First, the error in *Wharton* involved the mere failure to give a pinpoint instruction, not the failure to instruct on a lesser included offense supported by substantial evidence. The issues are totally different, and the prejudice analysis is not transferable. Second, the failure to give a pinpoint instruction is analyzed for prejudice under the *Watson* standard, whereas the error in failing to instruct on voluntary manslaughter is subject to the *Chapman* standard for prejudice. (See *People v. Thomas, supra,* 218 Cal.App.4th 630.) As the opinion in *Thomas* demonstrates, the more stringent C*hapman* standard can result in reversal even if an error is harmless under the *Watson* standard. Third, the jury in *Wharton* was given the full panoply of instructions on heat-of-passion voluntary manslaughter. The only thing missing was a pinpoint instruction advising the jury provocation could occur over a long

period of time. As the court noted in *Wharton*, the instructions did not preclude the jury from considering whether provocation occurred over a long period of time, and defense counsel made that point clear in closing argument. In contrast, in *Peau* the jury heard only a passing reference to provocation as a basis of reducing first to second degree murder, and, in contrast with *Wharton*, the instructions never defined either provocation or heat of passion for the jury.

You can also argue *Wharton* is distinguishable because it involved CALJIC instructions rather than CALCRIM instructions. In *People v. Wharton* the jury was instructed with CALJIC No. 8.20. (*People v. Wharton, supra,* 53 Cal.3d at p. 572.) CALJIC No. 8.20 states that "sudden heat of passion or other condition precluding the idea of deliberation can reduce the charge from first degree murder to second."[1] The jury in *Wharton* was also given complete instructions on heat-of-passion manslaughter which thoroughly defined that legal term for the jury.

In a case tried now, a jury will not be instructed with CALJIC No. 8.20. Rather, it will be instructed with CALCRIM No. 522. That instruction advises the jury:

> Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter. (CT 145.)

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[1] "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection *and not under a sudden heat of passion* or other condition precluding the idea of deliberation, it is murder of the first degree." (CALJIC 8.20, emphasis added.)

CALCRIM No. 522 nowhere defines "provocation." It does not mention heat of passion. If, in contrast with *Wharton,* the jury is given no instructions defining heat of passion in the context of voluntary manslaughter, the jury will have no basis to determine what "provocation" means. On this further basis *Peau* can be distinguished.

You can cite to the principle "'It is axiomatic that cases are not authority for propositions not considered.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 684, citation omitted.) *Wharton* did not consider whether a first degree murder verdict could render harmless the failure to instruct on the lesser included offense of heat-of-passion manslaughter. The issue was different, the prejudice standard was different and the instructions given to the jury were different. Contrary to the holding in *People v. Peau, supra,* 236 Cal. App. 4th at pp. 831-832, *Wharton* provides no basis to find the error in this case was harmless beyond a reasonable doubt.

FINAL THOUGHTS: DICTA, PLURALITY OPINIONS, AND THE HIGH COURT'S RIGHT TO CHANGE ITS VIEW

A. Dicta

Analysis that is unnecessary to a decision's holding is dictum and lacks precedential force. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1085, fn. 17.) While California Supreme Court dictum is not binding on lower courts, it is "highly persuasive." (*People v. Garcia* (2015) 237 Cal. App.4th 666, 687; *Evans v. City of Bakersfield* (1994) 22 Cal. App.4th 321, 328.) "When the Supreme Court has conducted a thorough analysis of the issues or reflects compelling logic, its dictum should be followed." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.)

Although an issue may have become moot before an opinion was issued, if the appellate court decides the issue anyway because the issue is a "recurring question of public importance," the court's discussion cannot simply be dismissed as "dicta." (*People v.*

Masterson (1994) 8 Cal.4th 965, 970, fn 2.)

B. Plurality Opinions

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ... .' " (*Marks v. United States* (1977) 430 U.S. 188, 193 [51 L. Ed. 2d 260, 97 S. Ct. 990].) This rule does not work particularly well, if at all, unless "one opinion can be meaningfully regarded as 'narrower' than another," that is, unless "one opinion is a logical subset of other, broader opinions." (*King v. Palmer* (D.C.Cir. 1991) 292 U.S. App.D.C. 362 [950 F.2d 771, 781] (en banc).) When it isn't possible to discover a single standard that constitutes the narrowest ground for a decision on an issue, the only binding aspect of a splintered decision is its specific result. (See, *People v. Lopez* (2012) 55 Cal.4th 569, 591, Liu, J. dissenting.)

C. Despite *Stare Decisis*, a High Court Can Overrule its Own Precedent

The concept of binding precedent "is a principle of policy and not a mechanical formula of adherence to the latest decision." (*Helvering v. Hallock*, *supra,* 309 U.S. at p. 119.) If *stare decisis* was an inflexible principle, racial segregation in schools would be legitimatized (see *Brown v. Board of Education* (1954) 347 U.S. 483, overruling *Plessy v. Ferguson* (1896) 163 U.S. 537), sexual acts between consenting adults of the same sex could be criminalized (see, *Lawrence v. Texas* (2003) 539 U.S. 558, overruling *Bowers v. Hardwick* (1986) 478 U.S. 186), and state minimum wage laws could not be enforced (see *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, overruling *Adkins v. Children's Hospital* (1923) 261 U.S. 525).

There are strong policy reasons for deferring to precedent. "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (*Payne v. Tennessee* (1991) 501 U.S. 808, 827.) "Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts." (*People v. King* (1993) 5 Cal.4th 59, 82, (Mosk, J. dissenting.)

But the U.S. Supreme Court and the California Supreme Court have the power to overrule a prior decision. Relevant considerations "include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." (*Montejo v. Louisiana* (2009) 556 U.S. 778, 792–793, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (overruling *Michigan v. Jackson* (1986) 475 U.S. 625.) The Court has also examined whether "experience has pointed up the precedent's shortcomings." (*Pearson v. Callahan* (2009) 555 U.S. 223, 233, overruling *Saucier v. Katz* (2001) 533 U.S. 194.) In *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, Justice Mosk noted the need for flexibility in applying *stare decisis*, stating, "This is especially so when, as here, the error [in the prior opinion] is related to a 'matter of continuing concern' to the community at large. (*United States v. Reliable Transfer Co.* (1975) 421 U.S. 397, 409, fn. 15.)" (*Anderson, supra*, 43 Cal.3d at p. 1147.)

St*are decisis* has less weight in constitutional cases than those involving statutory interpretation. This is because the Legislature can amend a statute, whereas in constitutional cases, "correction through legislative action is practically impossible." (*Burnet v. Coronado Oil & Gas, supra,* at p. 407 (Brandeis, J., dissenting); see also *Kimble v. Marvel Entm't, LLC, supra,* [in statutory interpretation cases, "critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees"].)

Similarly, a high court is more willing to change a prior ruling which in retrospect is deemed wrong when it is based on court-created law rather than a statute. (See, e.g. *People v. Cuevas* (1995) 12 Cal.4th 252 [holding that an out-of-court identification is subject to the substantial evidence rule], overruling *People v. Gould* (1960) 54 Cal.2d 621 [an out-of-court identification insufficient to support a conviction absent corroborating evidence].

Decisions involving statutory interpretation may nevertheless be overruled. (See, e.g. *People v. King* (1993) 5 Cal.4th 59, 78-79 [firearm-use enhancements may be imposed for each separate offense for which it is found true], overruling *In re Culbreth* (1976) 17 Cal.3d 330 [sentence enhancement for use of a firearm in the commission of a felony prescribed by Penal Code section 12022.5 may be imposed only once in the context of multiple counts if all the charged offenses are incident to one objective and effectively comprise an indivisible transaction].)

Although the U.S. Supreme Court is generally reluctant to overturn its decisions construing statutes, it has "done so to achieve a uniform interpretation of similar statutory language, *Commissioner v. Estate of Church,* 335 U.S. 632, 649-650 (1949), and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation (see, *e. g., Boys Markets, Inc. v. Retail Clerks,* 398 U.S. 235 240-241 (1970) (overruling *Sinclair Refining Co. v. Atkinson* 370 U.S. 195 (1962))." (*Rodriguez de Quijas v. Shearson / American Express, Inc., supra,* 490 U.S. at p. 484.)

Many factors influence a court's decision to overrule a prior holding. The fact that a prior decision is now perceived as wrongly decided or "unworkable" may justify overturning it. For example, in *Johnson v. United States* (2015) __U.S. ___ [135 S.Ct. 2551; 192 L.Ed. 2d 569], the Supreme Court recently addressed enhanced sentences under the Armed Career Criminal Act, which imposes an increased prison term upon a defendant with three

prior convictions for a "violent felony." The act defined "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The Court had previously rejected suggestions (by J. Scalia) that this definition was void for vagueness in both *James v. United States* (2007) 550 U.S. 192 and *Sykes v. United States* (2011) 564 U.S. 1. In *Johnson*, the Court – in an opinion authored by J. Scalia – rejected its previous interpretations in both *James* and *Sykes* and found the phrase unconstitutional, stating that "the doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable." (*Johnson v. United States, supra,* ___ U.S. at p. ___ [135 S.Ct. at p. 2562].)

Some courts look for a "special justification" to overturn precedent. (See, e.g. *Kimble v. Marvel Entm't, LLC, supra*; *Dickerson v. United States* (2000) 530 U.S. 428, 443; *United States v. International Business Machines Corp.* (1996) 517 U.S. 843, 856; *Golden Gateway Center v. Golden Gateways Tenants Assn.* (2001) 26 Cal.4th 1013.) For example, Justice Alito, dissenting in *Arizona v. Gant* (2009) 556 U.S. 332, described the majority as overruling *New York v. Belton* (1981) 453 U.S. 454 and *Thornton v. United States* (2004) 541 U.S. 615, and identified the following factors that may be relevant in determining whether there is a "special justification" for abandoning precedent: whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned. (*Id.* at p. 358.)