"IT'LL BE JUST LIKE STARTING OVER . . ."

Suggestions for New (and Old) Issues to Raise in the California (and occasionally U.S.) Supreme Court

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"IT'LL BE JUST LIKE STARTING OVER"[1]: Suggestions for New (and Old) Issues to Raise in the California (and sometimes U.S.) Supreme Court

by Bill Robinson, Assistant Director, SDAP

I. **Introduction**.

This article and presentation is a follow-up to a set of suggestions I stuck at the end of my rewritten "Rehearing/Review" Article for the 2016 SDAP seminar. It started out as a mini-article and think piece I did for the CADC Marin Chapter earlier this year. Here's where we're going.

The Concept: It's a new day at the California Supreme Court here in our suddenly Very Blue State of California. So, we need to stop thinking Defensively all the time – i.e., desperately trying to hang onto what scraps have been left of the rights of our clients from the Warren and Bird Court days – and start thinking Offensively or, better said, *Proactively* about how to increase the protections and rights of our clients and how to do away with decades of unfair, arbitrary, and just-plain-wrong appellate court holdings concerning our clients' rights and the framework of criminal law and procedure.

What follows are *three overall themes to work with*, followed by a series of suggestions, recommendations, or daydreams about areas or specific issues where I think there is something to be done.

A. **Raise Important and Controversial Issues Which Seem to Tap into the Changing Framework of the Criminal Justice System.** Look for new hooks and new paradigms (and/or a revival of old hooks and paradigms).

B. **Don't Be Afraid to Challenge Prior Bad (Especially Really Bad) Decisions of the George and Lucas Courts.** Don't let Stare Decisis stare you down; and remember the famous gesture from Justice Brennan, who, each year, would ask his new law clerks to name

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[1]With apologies to John and Yoko. For those of you who missed all that, check out "Starting Over" on the last Lennon-Ono album, "Double Fantasy".

the most important principle in constitutional law. After letting the clerks "stumble around," naming lots of famous cases, Justice Brennan would hold up one hand, with fingers spread, and tell them, "'*This* . . . is the most important rule in constitutional law.' Brennan knew that it took five votes to do anything, and, he may have thought, with five votes you can do anything."[2] In the California Supreme Court, that would be four fingers, so you don't need your thumb.

My point should be obvious: these precedents can be undone by a majority vote. Moreover, our Supreme Court seems to be overruling a fair number of its prior decisions in unanimous opinions. So, go for it!

C. **Consider Channeling Constitutional Arguments into Independent State Grounds under the California Constitution**. This was supposed to be a Main Theme of this presentation. However, at around the same time I started on this little project, SDAP's esteemed Executive Director, Dallas Sacher, advised me that it was his intention to do an article and presentation on this very topic, the Rise, Fall, and (we hope) Rebirth of Independent State Constitutional Grounds in California. So, I am going to leave this to Dallas's able mind and nimble (albeit chronically succinct) writing skills.

II. Challenging Bad Decisions of the Lucas and George Courts (and Going the Extra Mile Where We Have Already Prevailed as to an Issue).

A. Where this Has Worked Already, and Where to Go From There.

We'll start with the good news: a series of examples of bad decisions already reversed by the California Supreme Court, with discussion of each decision containing caveats for possible next steps.

1. ***People v. Chun*** **(2009) 45 Cal.4th 1172**. Holding: reinstating the second degree felony murder "merger" bar (*People v. Ireland* (1969) 70 Cal.2d 522) for all assaultive

[2] *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, Mark V. Tushnet (Norton & Company, 2005), p. 35.

felonious crimes, overruling *People v. Hansen* (1994) 9 Cal.4th 300 and other bad cases carving out hard-to-follow exceptions to the *Ireland* rule.

***Chun*, Ideas for Going Forward**: The bad news was that *Chun* did not get rid of that wicked stepchild of the criminal law, second degree felony murder, and even concluded it was not judge-made, but based on statute.

1a: **More and Better Attacks on Second Degree Felony Murder!** The best argument against it now is a constitutional one, akin to *Johnson v. United States* (2015) 135 S.Ct. 2551, that it's so hopelessly vague that it's impossible to know if it applies. Okay, that probably won't work. How about legislation or an initiative?

1b: **Expand the Holding of *Chun* to Cross-Over to Liability for Assaultive Crimes Under the Natural and Probable Consequences Doctrine, Using Equal Protection!** This is actually Dallas's idea, but I like it. How can you justify a bar on liability under the second degree felony murder rule for assaultive crimes but then turn around and permit such liability when the defendant is no longer the assaulter but is simply aiding and abetting an assaultive crime – even simple assault – with the prosecution allowed to argue that murder is the "natural and probable consequence" of that assaultive crime you intended to aid and abet? Doesn't this sound like an equal protection challenge in the making, under the state and/or federal constitution? Of course it does.

2. ***People v. Vargas* (2014) 59 Cal.4th 635**. Holding: Two convictions for "same act" serious felonies (robbery and carjacking) can only be a single Strike prior, carrying out the implication of a suggestive footnote by Chief Justice George in *People v. Benson* (1998) 18 Cal.4th 24.

Ideas for Going Forward: The problem is that *Vargas* still leaves intact the dubious and challengeable *holding* in *Benson*, that 654'd convictions which are *not* based on the "same act" *can* count as 2 strikes.

2a: **Let's overrule *Benson* entirely.** 654'ed counts from the same "indivisible transaction" can't count as two strikes without violating the spirit of section 654 and

California's double jeopardy protections. For example, where you commit an assault and a robbery of the same person, and the assault is incidental to the robbery, only one sentence is permissible under section 654. (See *People v. Miller* (1977) 18 Cal.3d 873, 885.) But under *Benson* and *Vargas*, these two crimes could be the basis for two strikes and a life sentence! This is absurd and unfair and should be challenged.

2b: **Ok, Let's Aim Even Higher!** To be included in the Next Criminal Justice Initiative, a provision that strikes, like Prop. 8 serious felony priors, must be "brought and tried separately," so that you can't end up with a life sentence based on a single prior incident or period of criminality that results in one prosecution.

3. ***People v. Chiu* (2014) 59 Cal.4th 55**. Holding: Homicide liability under the natural and probable consequence doctrine for an assaultive felony can't be greater than second degree murder.

Ideas for Going Forward. *Chiu* didn't touch the propriety of the natural and probable consequences doctrine, or limit it in some other obvious manners. Here are two suggested next steps.

3a: **Attack the Natural and Probable Consequences Doctrine Itself as Violative of Due Process**. I wrote a brilliant brief on this years ago in my *Valdez* case, which I am perfectly willing to share. (Okay, I borrowed most of it. . . .) While my case was still in state courts, the Ninth Circuit shot this argument down (see *Spivey v. Rocha* (9th Cir. 1999) 194 F.3d 971, 976-77), leaving me forced to win Mr. Valdez's freedom on an argument about intoxication and aiding and abetting. (See *People v. Mendoza* (1998) 18 Cal.4th 1114.)

But there's no reason we can't give this another try before the new-look Cal Supreme Court. I am happy to drag out my old briefing if anyone wants to take the plunge.

3b: **Challenge the Use of Misdemeanor Assaultive Target Crimes as the Basis for Murder Liability under the Natural and Probable Consequences Doctrine.** Take a look at the 4-3 unfavorable decision on this in *People v. Medina* (2009) 46 Cal.4th 913; Justice Moreno's dissent is a template as to how to challenge this conclusion, as is the excellent

depublished decision that preceded it in *People v. Martinez* (2008) 169 Cal.App.4th 199 (rev. gtd.).

Throw in Dallas's aforementioned equal protection challenge based on *Chun* and the *Ireland* merger rule, and you have yourself an issue!

4. ***People v. Sanchez* (2016) 63 Cal.4th 665,** overruling *People v. Gardeley* (1996) 14 Cal.4th 605 and holding that hearsay "basis" evidence, recited by a gang expert is an improper means, under both California hearsay law, and the Confrontation Clause, to prove up the requisite elements of a gang crime and/or enhancements.

(N.B.: *Gardeley* was on my original hit list of Lucas/George court cases to overrule, as was *McGee* (see below); and hey, it worked!)

Idea Going Forward: Attack the Rest of *Gardeley*!

4a. Let's go after the other irrational and harmful aspect of *Gardeley*, which held that the predicate crimes for creating a gang don't themselves have to be gang-related offenses, just crimes committed by gang members, overruling a number of prior Court of Appeal cases which quite reasonably required the predicate crimes to be gang-related. (See *People v. Gamez* (1991) 235 Cal.App.3d 957, 977-978.)

5. **Most recently: *People v. Gallardo* (2017) 4 Cal.5th 120**: Overrules *People v. McGee* (2006) 38 Cal.4th 682 (and, implicitly, *People v. Guerrero* (1988) 44 Cal.3d 343), holding that *Apprendi* and *Descamps* apply to proof of facts concerning prior convictions beyond the elements of the crime of conviction. There, that only took 17 years!

Ideas Going Forward, two parts.

5a. **Strict Applicability to Non-Divisible Offenses.** First, we need to get it clarified how *Descamps-Gallardo* applies to situations where there is not, as in *Gallardo*, which concerned former section 245(a)(1), two separate ways to commit a crime, with different elements, where one version, assault with a deadly weapon, is a strike, and the other, assault by force likely to inflict GBI, is not. In that unique situation, both *Gallardo* and *Descamps* make it clear that you *can* use the record of conviction to show it was really the "Strike"

version, assault with a deadly weapon, which is what the Supreme Court said could happen on remand in *Gallardo*.

This does not and should not mean that where, as is more commonly the case under California law, a "strike" requires proof of *facts beyond the elements of the crime* – e.g., uncharged personal use of a weapon or infliction of GBI, or that an older, pre-1982 second degree burglary was of a residence – a court is still permitted to make "findings" of these non-elemental facts from the record of conviction, be that a plea colloquy or a jury trial. Such factfinding was permitted by *Guerrero* and *McGee* but is squarely prohibited under *Descamps* and *Apprendi*.

Unfortunately, *Gallardo* does not directly deal with this common situation. But *Descamps* does, expressly concluding that judicial factfinding would violate the Sixth and Fourteenth Amendments. However, since *Gallardo* is largely silent on this important topic, we are probably going to have to fight this battle in post-*Gallardo* cases, and persuade the courts that the remedy in *Gallardo* – a remand for a new court trial – is unique to the 245(a)(1) "divisible crime" situation.

The good news is that there is language in *Gallardo* which strongly supports this position; and the better news, at least for the rest of you, is that I have now done a habeas, *In re Joseph Garcia*, where I make this argument in some detail.[3]

5b. **Make *Gallardo* and *Descamps* Retroactive**. This is the kicker. We need to undo all those three strikes convictions based on *Guerrero* fact finding which is now patently improper under *Descamps* and *Gallardo*. This will be easy if the cases are not yet final on appeal, but much trickier with respect to the many such convictions that were already final before *Descamps* and *Gallardo* were decided.[4] The retroactivity argument is complex, and something of an uphill fight. But a good argument can be made under California law that

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[3]I am happy to share this briefing on request.

[4] A slightly more complex question may be presented for cases which were not final when *Descamps* was decided but were final when *Gallardo* was decided. If you have such a case, please let me know and we can discuss.

Gallardo should be retroactive because the decision, while largely procedural in nature, affects the *integrity of the factfinding process*, because *Guerrero* allowed the prosecutor to prove that the crime was a serious felony when it really was not a serious felony once the Sixth and Fourteenth Amendment rights construed in *Descamps* and *Gallardo* were properly understood. (See, e.g., *People v. Kaanehe* (1977) 19 Cal.3d 1, 10: "Decisions have generally been made fully retroactive only where the right vindicated is one which is essential to the integrity of the fact-finding process.") This is a tough fight, but stay tuned![5]

B. **Some Categorized Suggestions for Fresh Incursions.**

See, we can go after these bad-old and bad-not-so-old decisions and get them reversed! Here's a laundry list of some suggested incursions. Some of these involve specific bad decisions, others concern shifts in doctrines, but all of them are about radical change in the law to advance our client's constitutional and statutory rights.

1. **Really Bad, Poorly Reasoned 3-Strikes Cases.** There have been so many. Quite a few fall into the category of "adding insult to injury," where the Supreme Court has engaged in questionable interpretation to make a very bad law even worse and more punitive and unfair. Here's a starting list of potential targets.

a. ***In re Cervera* (2001) 24 Cal.4th 1073**. The Holding: Third-Strikers get *Zero Conduct Credits* towards their parole eligibility date, and must serve out a full 25 years before being considered for parole. In my view, this was one of those decisions where the intended result dictated the sloppy reasoning, and should be overruled. However, I note that this one instance of unfairness may have lost its sting, since the new post-Prop 57 prison credits regulations effectively overrule *Cervera* by expressly permitting Third Strikers to earn conduct credits which shorten the period for parole eligibility.

b. ***People v. Lawrence* (2000) 24 Cal.4th 219**: After decent opinions in *Hendrix* and *Deloza* (*People v. Hendrix* (1997) 16 Cal. 4th 508 and *People v. Deloza* (1998) 18 Cal. 4th 585) as to what "same occasion" means for purposes of determining when consecutive

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[5] Again, I have briefed this in the Joseph Garcia habeas petition.

sentences are mandatory under the Three Strikes law, the Supreme Court held in *Lawrence* that temporally and transactionally related crimes committed in different locations do not "arise out of the same operative facts" and thus mandatory consecutive sentences are required. This should be challenged as contrary to the plain language of the Strikes law.

b-i: **A Step Further?** If we are talking about an initiative measure further reforming the Three Strikes law – something I would love to talk about – we should consider eliminating, at least for Third Strike sentences, the ridiculous overkill of mandatory consecutive sentences, under section 1170.12(a)(6) & (7), for separate occasions different operative fact cases, which turns multiple-count third strike cases into virtual LWOPs, giving prosecutors insane plea bargaining leverage in such cases. Judges should have the same discretion as in other felony sentencing cases to impose sentences for separate occasion crimes concurrently or consecutively, as the circumstances of the offender and offense dictate, in order to arrive at a just and fair sentence.

c. ***People v. Williams* (2004) 34 Cal.4th 397**: Third strikers with multiple 25-to-life sentences run consecutively – and thus, already a minimum of 50-years-to-life – get their section 667(a) Prop. 8 priors imposed over and over for *each and every count* on which a consecutive third-strike sentence is imposed! This holding, based on very poor reasoning, is a perfect example of the adage Justice Mosk used to quote in Eighth Amendment cases, i.e., "nothing succeeds like excess." (See *People v. Hicks* (1993) 6 Cal.4th 784, 797, Mosk, J., dissenting, citing his own article, "Nothing Succeeds Like Excess" (1993) 26 Loyola L.A. L.Rev. 981.)

Alas, this was a unanimous decision, but one that to me was not at all obvious from the language of the statute. It fortunately was not carried over to second strike sentences, which the Supreme Court held in *People v. Sasser* (2015) 61 Cal.4th 1 were controlled by the language of section 1170.1, which limited status enhancements to one per sentence.

Why this wasn't included in the Prop. 36 reform of the Three Strikes law is beyond me. Nobody asked me what to include, cuz this would have been near the top of my list and would have been uncontroversial. So, let's attack this conclusion as contrary to the plain

language of the statute and to principles of California statutory and constitutional law precluding double punishment for the same conduct, including prior conduct.

c-i. **Stop Using Same Prior Conviction More Than Once to Increase Punishment!** Now that you mention it, why have we accepted the notion – considered heretical when the Three Strikes law first passed – that it's just fine to take the same prior and use it twice, first to double a sentence or impose a life term, and then to tack five years onto the sentence for it? This should have been eliminated under Prop. 36 as well, and we should think of ways of challenging this original heresy. (See *People v. Dotson* (1997) 16 Cal.4th 547, another unanimous Supreme Court decision.)

Caveat: It will be difficult to argue that *Dotson*, or the other decisions discussed above, were wrongly decided, even if they plainly were. Following these holdings interpreting the Strikes law, the electorate significantly modified the Three Strikes law by enacting Proposition 36 without changing the language at issue. There is a well-settled principle of statutory construction which holds that "when the Legislature amends a statute without changing those portions of the statute that have previously been construed by the courts, the Legislature is presumed to have known of and to have acquiesced in the previous judicial construction."(*People v. Atkins* (2001) 25 Cal.4th 76, 89-90.)

Nonetheless, we can still make these arguments, as this principle of statutory construction should not trump the plain language of the Strikes law, or the intent of the Electorate in enacting the Three Strikes law. (See, e.g., *City of Corona v. Liston Brick Co.* (2012) 208 Cal.App.4th 536, 545 [presumption can be rebutted by later statement of California Law Review Commission].) But the absurd bit of judicial overkill in *Dotson* and the other cases discussed above may have to be remedied by a further initiative.

2. **Gang Stuff.**

a. **"Gang-Relatedness" of Predicate Crimes.** As noted above, we won with *Sanchez* on testimonial hearsay and confrontation clause; but another piece of *Gardeley* should be challenged, i.e., the holding that the predicate crime doesn't have to be "gang-

related" as long as it was committed by gang members. That's dead wrong and still should be challenged.

a-i. **Beware of *Sanchez* as a Prosecutor's Weapon!** There is a very dangerous "ripple effect" from *Sanchez* about which we, and trial counsel, have to be very vigilant. Prosecutors are using *Sanchez* as a sword to attack defense use of experts, e.g., psychiatric experts, in cases where the client does not testify. They argue that the state law hearsay aspects of the holding in *Sanchez*, which are not premised on the Confrontation Clause, mean that experts can't base their opinion on hearsay statements made to them by a non-testifying defendant. We can argue that the Confrontation Clause aspects of *Sanchez* don't apply to the prosecution, but the hearsay rules are supposed to cut both ways. This may be a case where we have to argue that the due process right to present a defense overcomes the hearsay limitation, as it sometimes does in rulings under section 352. (See below.)

b. **This Space Left Blank**. [This needs to be filled in; my colleague Lori Quick, SDAP's gang expert (her gang moniker is "Quicksand"] was supposed to get back to me on this. . . . Tune in next time; or better yet, give me some suggestions!]

3. MY PET PEEVE: Due Process Right to Instruction on Lesser-Related Crimes Shown by the Evidence?

In *People v. Birks* (1998) 19 Cal.4th 108, the George Court held that there is no right to requested instruction on Lesser Related Offenses (LROs) shown by evidence, overruling a very wise and fair decision by the Bird Court in *People v. Geiger* (1984) 35 Cal.3d 510. The only good news from *Birks*, which was small consolation, is that you can get instructions on an LRO if the prosecutor agrees to it.

Here's a couple of common examples of this. Your client is charged with robbery. His defense is he clobbered the guy but he never took anything and had no intent to take anything when he clobbered him. It's well settled that assault, or aggravated assault, or battery, are not lesser-included offenses of robbery. But on these facts, they are lesser related. Under *Geiger*, your client would have gotten an instruction on assault, or aggravated

assault, on request. But after *Birks*, he cannot get such an instruction unless the DA consents to it. Another good example would be attempted murder and aggravated assault. If the DA doesn't charge it in the alternative, and there is not an attempted voluntary manslaughter defense, it ends up as an "all or nothing" choice between attempted murder and acquittal.

This one will be a challenge to overrule because *Birks* was a unanimous decision and was grounded on principles of separation of powers, based on the notion that the prosecutor has the authority to choose which charges to file, which the courts cannot subvert by allowing the jury to consider lesser crimes that are not necessarily included in the charged offenses. So, we need to be creative in our challenges to *Birks*. I have two suggestions.

a. **Frontal Attack.** Argue that the interests of justice and the state constitutional right to due process and a fair trial trump the prosecutor's discretion. If the facts of the offense give rise to an LRO that a jury could find while finding the defendant not guilty of the charged crime, due process requires it be given on request. This is akin to the notion that evidentiary rules requiring exclusion of certain evidence must sometimes give way to the defendant's due process right to present a defense. (See, e.g., *Washington v. Texas* (1967) 388 U.S. 14; see also *People v. Reeder* (1978) 82 Cal. App. 3d 543: "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.")

California courts have consistently held, with respect to the duty to instruct on LIOs, that there is a fundamental right under California law for juries to have a reasonable choice of a lesser crime rather than an all-or-nothing choice

> "Our courts are not gambling halls but forums for the discovery of truth." (*People v. St. Martin* (1970) 1 Cal. 3d 524, 533.) Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function.

(*People v. Barton* (1995) 12 Cal.4th 186, 196.) So, make a frontal attack: *Geiger* got it right in the first place, and *Birks* got it wrong.

But if that doesn't work – and it probably won't – here's another suggestion.

b. **Creative Alternative Approach.** Okay, maybe we have to concede that the portion of the holding in *Birks* premised on the notion that the DA gets to choose the charges is going to stick. This means that a defendant can't obtain a *conviction* on an LRO without the prosecutor's consent.

But: if, on the facts before the court, there is an LRO that is the logical alternative to the greater charge, and the prosecutor refuses to consent to allow a verdict on this LRO, *the defense should have the right, under the due process principles cited above, to have the jury instructed on the LRO and its elements, with an explanation that it is not before them because the prosecutor has chosen not to charge the lesser crime.* This way, the jury knows there is an alternative to an-all-or-nothing verdict, and won't feel so bad about acquitting the defendant. This would make for a fairer trial and will not undermine the DA's authority to choose the charges against a defendant. This should also lead, it is fair to say, to the DA agreeing more often to include the LRO as a conviction option for the jury.

But what's the authority for this? Two separate sources. First, there is the notion, discussed above, that "our courts are not gambling halls," which was the basis for the original holding in *Geiger*. But we need to pull a bigger fish out of the water, namely, recognition by the California Courts, based on state and federal constitutional grounds, of a *right to instruction on the defense theory of the case.* There is excellent case law on this from the 9th Circuit – see, e.g., *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739, and *Mathews v. United States* (1988) 485 U.S. 58, 63-64. It's time for the California Supreme Court to recognize this same principle under the California Constitution, and the right to instruction on an LRO shown by the evidence would be a good vehicle for asserting this right.

4. **While We're on the Subject, How about this Crazy Idea: Recognition That the *Chapman* Standard Applies When There Are Trial Errors Which Violate Fundamental Constitutional Rights under the California Constitution.**

What a great idea, Robinson! But there's a problem, you say. The familiar *Watson* test, which requires a "reasonable probability of a more favorable outcome," purports to be based on Article VI, section 13 of the California Constitution. (See *People v. Watson* (1956) 46 Cal.2d 818, 836, and, e.g., *People v. Blackburn* (2015) 61 Cal.4th 1113, 1132.) If the standard is mandated by the Constitution, you would have to amend the constitution to change it.

However, what the Constitution actually says is the following:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal Const, Art. VI § 13, emphasis added.)

I think this passage gives us some wiggle room to argue that the miscarriage of justice standard, *Watson*, applies to *nonconstitutional* error, but not errors which violate fundamental constitutional rights under our state charter. Using the same reasoning as the federal courts in applying the heightened *Chapman* standard to constitutional error, we can argue that, similarly, a heightened standard should apply to errors which violate our independent state constitution. Mind you, this has not been a successful argument. (See, e.g., *People v. Cahill* (1993) 5 Cal.4th 478 [dividing errors under California law into per se reversible errors, akin to "structural errors" under U.S. Supreme Court analysis, e.g., deprival of the jury trial right, and trial errors, to which the *Watson* test applies].)

Still, we should make a pitch, echoing U.S. Supreme Court precedent, that there is an in-between kind of trial error involving fundamental constitutional rights, which should be subject to the enhanced *Chapman* test of harmlessness beyond a reasonable doubt. The federal constitutional harmless error test is explicated by the Supreme Court in *Chapman*.

> An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

(*Chapman v. California* (1967) 386 U.S. 18, 23-24.)

In fact, there is some vintage Court of Appeal case law that we used to cite frequently which recognizes a more stringent form of harmless error review than that specified by *Watson* when there is an "extremely close case." (See *People v. Hickman* (1981) 127 Cal.App.3d 365, 373.)

> It is appropriate to apply a divergence from the *Watson* standard in this case. As stated in Justice Friedman's concurring opinion in *People v. Reeder* (1976) 65 Cal.App.3d 235, 244: "Where the evidence, though sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense . . . must be considered as prejudicial.'"

(*People v. Hickman*, *supra*, at p. 373; see also *People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; *People v. Briggs* (1962) 58 Cal.2d 385, 407; *People v. Stein* (1979) 94 Cal.App.3d 235, 240.)

Okay, that's not *Chapman*, but it looks a lot like it. (See *Neder v. United States* (1999) 527 U.S. 1, 19: "If . . . the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.")

So, let's revive the *Reeder* codicil to *Watson* and try to drum up an argument that the *Chapman* standard should apply when an error violates "substantial rights" of a defendant under the California Constitution in a close case.

5. **Homicide Issues.**

Okay, *now* you got me started as I move into my favorite area to incite change to help our clients. I have a nice laundry list on this, in addition to the suggestions I've already made above that flow from *Chun* and *Chiu*. I could go on *ad nauseam* on these issues, but will try to keep it relatively brief here.[6]

a. **First Degree Felony Murder and "Merger" Rule?** How about this wacky idea. There is heretofore no *formal* recognition, as to first degree felony murder, of something like a "merger" rule as to the target felony crime. For example – and this is based on a real case – if somebody lights the clothes of the victim on fire while the victim is wearing those clothes, this should not be an arson felony murder because the act underlying the target felony of arson – lighting the clothes – is *assaultive* in nature for the purpose of harming the victim. Thus, this assaultive act should merge, like any assaultive crime does under *Ireland* and *Chun* with respect to second degree felony murder, and thus should not be the basis for first degree felony murder culpability based on arson.

This principle is recognized for the felony murder special circumstance, which requires that the felony be "predominately independent" of the homicide. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 61-62.) But hitherto, there is no recognized direct connection between this and first degree felony murder. This challenge was recently raised in a Sixth District case involving a homicide prosecuted as a first degree murder under both a felony murder/arson theory and based on premeditation. But the case went nowhere on direct appeal, with the court concluding (in an unpublished opinion) that the instruction on arson felony murder was proper, and that the independent purpose rule did not apply; review was denied.

This is patently unjust because it gives rise to a shortcut to first degree murder based on the assaultive act of lighting clothes on fire without any finding of premeditation and

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[6]If this piques your interest, please look at my two articles, "Turning Murder Into Manslaughter" and "Murder and Madness," and the 2016 update I did of these articles, which are on SDAP's website in some form and available from me in their current and updated versions.

deliberation. Obviously, this would be a different matter if the defendant set fire to a pile of clothes in order to make a room catch on fire, and the ensuing fire killed someone in the house. That would be a classic example of arson felony murder. But assaulting someone by lighting up the clothes they are wearing is an assault upon the person, using fire as the instrumentality of the assault, and is thus akin to assaulting them with blows or a weapon; thus, it should only be a first degree murder if it's premeditated and deliberate. So, we need to push for the recognition of the merger doctrine, or a "predominantly independent purpose" rule, for first degree felony murder.[7]

b. **Two Theories of Manslaughter: Related Errors.**

i. **Failure to Include the "Phantom Element" which the DA must Prove**. It is well settled that it's the DA's burden to prove, where the facts support a manslaughter defense, that the killing was not committed in the heat of passion based on provocation; and/or that the killing was not committed based on an actual but unreasonable belief in the need to defend onself (or another) against imminent peril. (See *People v. Rios* (2000) 23 Cal.4th 454, 462.) And while CALCRIM instructions so reflect, this nowhere appears in the definition of the crime of murder, but is instead stuck in at the very last sentence of the instructions on manslaughter as a lesser included offense.

My contention, argued in elaborate detail in my "Turning Murder into Manslaughter" article, is that these "Phantom Elements" have to be included in the definition of the crime of murder to emphasize that this is part of the prosecutor's burden of proof to obtain a murder conviction.

Why is this vital? The jury is presumed to follow all instructions, taken as a whole. However, as I point out in my article, a great deal of mischief can arise in jury deliberations because of CALCRIM No. 640, the instruction that makes a mockery out of *People v. Kurtzman* (1988) 46 Cal.3d 322, 329, telling the jury they can consider the lesser and greater offenses "in whatever order you wish," but then telling them that the court can't accept a

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[7]If this issue comes up, briefing by former SDAP panel attorney and current ADI Staff Attorney Siri Shetty is available from this odd arson-murder case.

verdict on the lesser charge until the jury unanimously agrees that the defendant is not guilty of the greater charge. Taken together, this means the jury can pretty much *ignore* the manslaughter instructions – including the last sentence that puts the burden on the prosecutor to prove the absence of provocation and of passion, and/or the absence of imperfect self-defense – if they conclude that the defendant is guilty of murder, i.e., that he killed a human being with malice aforethought.

It also opens the door to improper argument by the prosecutor – which we see all the time – that the jury *doesn't even have to consider the manslaughter instructions until they have unanimously concluded that the defendant is not guilty of murder*. This is dead wrong under *Kurtzman* but is also especially dangerous where, in the unique situation of manslaughter, they can't really properly reach a murder verdict until they have resolved the issue posed only in the manslaughter instructions, and conclude that the DA has proved the absence of provocation and of passion and/or the absence of imperfect self-defense beyond a reasonable doubt.

That's why these elements have to be included in the definition of murder when these defenses are presented by the evidence. So, keep pushing the argument that the instruction on these manslaughter elements belongs in the definition of murder when these defenses are presented.

i-(a). **Fix the Awful *Kurtzman* Instruction.** Alternatively, if we don't succeed in getting the manslaughter Phantom Elements included as part of the murder instruction, let's get that awful CALCRIM 640 instruction amended so it makes it clear to the jury, in a homicide case, that while they can *consider* the lesser and greater offenses in any order they wish, the court cannot accept a guilty verdict *for the murder charge* unless the jury agrees that the prosecutor has proven, beyond a reasonable doubt, the absence of provocation and of passion and/or the absence of imperfect self-defense.

ii. **Intoxication and Mental Impairment Instructions (CALCRIM Nos. 625 & 3428), Apply to Proof of These Manslaughter Elements.** The instructions on these two defenses in murder cases tend to be stated as limiting their relevance to proof of malice

aforethought and premeditation and deliberation, with the jury told they can consider such evidence only as to these elements, and nothing else. But both are relevant to the "missing elements" described above, especially imperfect self-defense. (See *People v. Ocegueda* (2016) 247 Cal.App.4th 1393 [mental disorder evidence relevant to imperfect self-defense where beliefs not matter of pure delusion]; see also *People v. Soto* (2016) 248 Cal.App.4th 884, rev. gtd, case argued and submitted [intoxication evidence relevant to imperfect self-defense].)

ii-(a). **Mental Deficiency Evidence and Heat of Passion Defense.** A further related point, a bit more controversial, is my contention that mental deficiency evidence is relevant to the *subjective* aspects of the objective heat of passion defense, in the same way it was in *People v. Humphrey* (1996) 13 Cal. 4th 1073 as to perfect self-defense. This is not, as the Supreme Court in *Humphrey* took pains to explain, a "reasonable battered woman" standard, but rather involves the objective test applied to a reasonable person *in the defendant's situation*, which includes his/her lived experiences and mental conditions such as PTSD/BWS, which come out of that experience. (*Id*., at p. 1086.)

My contention is that this applies, by parity of reasoning, to the other "reasonable person" homicide defense, heat of passion manslaughter. Thus mental impairments akin to BWS, e.g., PTSD, can and should be considered as part of the jury's determination whether a reasonable person *in the situation of this defendant* would have been provoked to act rashly out of passion and not reason.

This conclusion will be resisted. But in my considered opinion, it follows from *Humphrey*, makes sense, and is well worth urging in the not uncommon situation of a case involving a heat of passion defense and a client with a significant history of PTSD.[8]

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[8]This is likely to be a major issue in my own Benoit murder appeal; so stay tuned, as I will have briefing on this some time this year.

iii. **Express Recognition from the California Supreme Court that *Chapman* Harmless Error Applies to Instructional Errors on Manslaughter Defenses, Including Failure to Instruct on These Two Theories and Misinstruction on Elements or Aspects of These Defenses.** Justice Kennard's dissent in *Breverman* makes this point perfectly, and it has been fully adopted by one Court of Appeal in *People v. Thomas* (2013) 218 Cal.App.4th 630. But other courts have waffled on this after *Thomas*, and it's past time for the California Supreme Court to correct its erroneous holding in *Breverman* that the *Watson* test applies, and squarely hold that the *Chapman* test applies because of the prosecutor's burden to prove the manslaughter elements beyond a reasonable doubt.

c. **Diminished Actuality Involuntary Manslaughter**. I covered this in some detail in my two Homicide articles and the update. The starting point of this analysis is the type of involuntary manslaughter recognized by Justice Kennard in her concurrence in *Bryant* (*People v. Bryant* (2013) 56 Cal.4th 959), and by the Court of Appeal majority in *Brothers* (*People v. Brothers* (2015) 236 Cal.App.4th 24). Under those cases, where there is a killing committed in the course of a merged assaultive felony, with evidence from which the jury could have reasonable doubt that malice was proven, instruction on the lesser included offense of involuntary manslaughter is required.

Mix this theme up with recent and older cases recognizing the "diminished actuality" defense, based on evidence of mental disease or defect from which the jury has reasonable doubt as to express and implied malice, a la *Cortes* (*People v. Cortes* (2010) 192 Cal.App.4th 873) and *Herrera* (*People v. Herrera* (2016) 247 Cal.App.4th 467), and what do you get? *Involuntary manslaughter as an LIO of murder based on a diminished actuality defense.*

Mind you, this has yet to be accepted by any case, or even put forward as a thesis in any published opinion. But to me, it's as solid as a rock. What does this mean? It means, I think, that there is a sua sponte duty (as *Brothers* holds), for a court to instruct on the LIO of involuntary manslaughter for an assaultive homicide when there is a basis for giving the diminished actuality instruction. So, go out there and make some good law on this![9]

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[9]This issue, too, is likely to arise in my Benoit murder appeal.

d. **Imperfect Heat of Passion as Negating Premeditation and Deliberation for First Degree Murder.** Here's another gem from my Murder-Manslaughter article, this one co-dreamed up by SDAP Panel Attorney Candace Hale, which is proof, once again, that great minds think alike!

Basically, the premise here is that the CALCRIM and CALJIC instructions which advise the jury that they can *consider* provocation as to the degree or murder, i.e., as bearing on premeditation and deliberation, are inadequate. Rather, the jury should be instructed that if they believe that the killing was committed in the heat of passion based on provocation, but conclude beyond a reasonable doubt that the provocation was such that a reasonable person would not have been provoked to act rashly – meaning they believe that your unreasonable, hot-tempered client was actually provoked – the crime must be second degree murder. I call this "imperfect heat of passion" since it's akin to imperfect self-defense. In Candace's case, it was called "subjective heat of passion" – but it's the same concept, really.

There is already some good briefing on this in some of our panel cases. Moreover, Candace got the Fifth District to agree with her that this was a valid theory of defense in a first degree murder case with provocation facts, and that counsel was ineffective for not asking for such instructions! (See *People v. Flores*, 2009 Cal. App. Unpub. LEXIS 6705.) Here's the key holdings from this unpublished opinion, as passed along to me by Candace, with her editorial pith included in CAPS.[10]

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[10]Of course, we can't rely on unpublished opinions as authority, but we can mine them for their wisdom and brilliance. This also gives me a chance to explain the conundrum we sometimes face when we get an unpublished win with an opinion that, by any measurement, should be published. We normally don't ask for publication in this situation because our loyalty to our clients and their interests is paramount and because of the generally accepted principle that a published decision is far more likely to lead to a grant of review than an unpublished one. There are exceptions, e.g., where the "win" means little or nothing to your client as a practical matter; but generally, opinions like the one in *Flores* typically end up as unpublished gems that we can share with our colleagues and mine for useful argumentation but cannot cite as authority.

FROM THE OPINION:

"Defendant Saul Herrera Flores stabbed Jose Santoyo with a machete after they got into an argument regarding the parking location of Santoyo's truck. Santoyo died, and defendant was convicted of first degree murder with the use of a deadly weapon. (Defendant was also convicted of being a felon in possession of a firearm and resisting an officer, but these convictions are not at issue here.) We have consolidated his direct appeal with his petition for writ of habeas corpus. In his direct appeal, he claims the jury was not properly instructed regarding provocation and its application to second degree murder and the court did not adequately reply to [*2] the jury's question about the meaning of "deliberately" as it applied to first degree murder. In addition, he asserts in his direct appeal and in his petition for writ of habeas corpus that his counsel was ineffective concerning these issues. We will grant defendant's petition and vacate the judgment, subject to further proceedings on remand as we will direct in our disposition."

HERE'S MY FAVORITE PART:

"The People argue that an instruction on subjective heat of passion does not even exist; thus counsel would not have found it by looking through the CALCRIM instructions. The People question whether the defense of unreasonable heat of passion for second degree murder is even recognized by California [*23] law.

"The People's arguments clearly fail. As previously set forth, the voluntary manslaughter heat-of-passion instruction repeatedly uses the term "provocation," and provocation is the main focus of the instruction. The terms are interchangeable. Thus, any reasonably competent attorney would recognize that provocation is the critical element of heat of passion. As catalogued in the published CALCRIM instructions, CALCRIM No. 522, the provocation instruction, directly follows CALCRIM No. 521, the instruction on the degrees of murder. CALCRIM No. 522 is titled "Provocation: Effect on Degree of Murder." In addition, provocation/subjective heat of passion is a well-established theory to reduce a first degree murder to second degree murder, dating back to the Valentine case (*People v. Valentine, supra*, 28 Cal.2d 121) and continuing to gain attention in published case law throughout the years. Defense counsel's explanation that he simply did not see any instruction on subjective heat of passion is not a satisfactory justification for not requesting the instruction. Counsel's inaction fell below the normal range of competency."

HA HA HA!!!!!

OH, AND THIS:

"Disposition

"The petition for writ of habeas corpus is granted; the conviction of first degree murder is vacated. The matter is remanded to the trial court with directions that the People may file a written election to try defendant on a charge of first degree murder within 60 days after the filing of the remittitur in the trial court and proceed to trial in accordance with Penal Code section 1382, subdivision (a)(2). If the prosecutor does not file the proper election in the specified time period, the trial court shall enter a judgment of conviction of second degree murder and sentence defendant accordingly."

6. ***Apprendi* Cases:**

a. ***Gallardo*:** Okay, I already covered this.

b. **Overrule *Nguyen*:** In *People v. Nguyen* (2009) 46 Cal.4th 1007 the California Supreme Court rejected an *Apprendi*-based challenge to the use of juvenile priors as strikes, based on the notion that because there was no jury trial right as to these priors, there is not the requisite guarantee of their reliability.

A variant of this argument, not well presented in the *Nguyen* case itself, focuses on *due process* considerations, emphasizing that the whole point of the juvenile court system is an understanding that it is not a criminal proceeding in nature and that treating adjudications under this system the same as prior strike criminal convictions is contrary to due process. Notably, the Louisiana Supreme Court has adopted this reasoning in *State v. Brown* (La. 2004) 879 So.2d 1276, 1289.

Dallas and I both took Cert petitions up on this, and have some very nice briefing on it. We both got answer requests from the U.S. Supreme Court, but no Cert grant. Unfortunately, in each of our cases, we had a preliminary *Apprendi* problem, in that our clients were Second-Strikers, and the AG could and did argue, somewhat disingenuously but correctly, that the juvenile strike prior didn't really increase his maximum punishment since he could have gotten a longer sentence under California law even without the strike.

What we need is a third strike case where the juvenile prior was the lynchpin that gave rise to a life sentence. Thus, if you have such a case, I suggest pitching this argument first at the new-look CSC as an effort to overrule *Nguyen,* but also to the US Supreme Court.[11]

7. **Eighth Amendment, Cruel and/or Unusual Punishment Challenges.** What follows are some suggestions for new directions for cutting edge claims under the state and federal constitutional provisions. The caveat is that in most cases, with no existing rule from either the U.S. Supreme Court or California Supreme Court as to these permutations of current case law, these challenges are going to be most effectively presented in trial courts in the guise of "as-applied" violations of the state and or federal constitutional protections, rather than as categorical challenges.

a. **LWOPs and Youthful Offenders.** As you all know, in the last two decades, a series of landmark U.S. Supreme Court Eighth Amendment cases culminated in rulings prohibiting LWOP sentences for juveniles who commit non-homicide crimes (*Graham v. Florida* (2010) 560 U.S. 48) and requiring consideration of the "hallmarks of youth" factors before the rare "irreparably corrupt" juvenile murderer can be given an LWOP sentence (*Miller v. Alabama* (2012) 567 U.S. 460).

The good news, in California at least, is that we've nearly come full circle on this issue. Under the most recent amendments to Penal Code section 3051, anyone with a life term, or a long determinate term, is parole eligible after serving between 15 or 25 years if their crime was committed when they were 25 or younger – unless they are sentenced as a Third Striker or under the One-Strike law for certain sex crimes. For a straight LWOP sentence, you get a hearing after 25 years if your crime was committed when you were under 18, but no benefit at all if you were over 18.

The focus of our new challenges should be those offenders who have been left out of this recent wave of constitutional and statutory change. Here's a few suggestions.

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[11]One has to wonder, though, whether there is still a 5-vote *Apprendi* majority, with one of the original *Apprendi* stalwarts, Justice Scalia, replaced by the Trump appointee, Neil Gorsuch.

i. **18-25-Year-Olds with LWOP Sentences.** The amendments to section 3051 added juvenile offenders with LWOP sentences, but purposely left out 18-25-year-old offenders, otherwise covered by 3051, if they have an LWOP sentence. There is no rational justification for this distinction, other than the archetypal line-drawing at 18, which is contrary to the "under-25-years-old brain science" that is a major underpinning of the Supreme Court's recognition in *Graham* and *Miller* of the significance of the "hallmarks of youth" factors. California has recognized this in section 3051 with respect to 18-25-year-old non-LWOP lifers, and should extend it to LWOP sentenced young offenders over 18.

Hopefully, there will be more sentence reform in which the Legislature cures this omission by making over-18 youth LWOPs entitled to a Youthful Offender Parole hearing after 25 years, and/or making them eligible for resentencing under 1170(d)(2). But while we are waiting, let's push the envelope and argue, under the reasoning of *Miller* and its progeny, that it's cruel and/or unusual punishment under the state and/or federal constitutions, to lock these young offenders up forever with no chance of parole.

b. **Death Penalty and Youthful Offenders.** In *Roper v. Simmons* (2005) 543 U.S. 51, the Supreme Court held that the Eighth Amendment prohibited execution of a defendant who was a juvenile when his crime was committed. I don't do capital cases and pretend no expertise in this area of law. But it strikes me that, under the reasoning of *Roper*, *Graham*, and *Miller*, the death penalty for 18-25 year old offenders should be either prohibited by the Legislature or struck down by the courts for the same reasons California is recognizing that 18-25 year old offenders have the same "hallmarks of youth" features to their crimes as under-18 offenders in terms of entitlement to Youthful Offender parole hearings for very serious crimes. It follows from this that the Eighth Amendment – and/or California's preclusion against cruel or unusual punishment under the State Constitution – should preclude execution of youthful offenders 25 and under who commit special circumstance homicides.

c. **Mentally ill offenders, death penalty and LWOP.** It violates the Eighth Amendment to execute a mentally retarded offender (*Atkins v. Virginia* (2002) 536 U.S.

304), but there is no comparable ban for LWOP sentences imposed on retarded offenders, and no similar ban of the death penalty or LWOP sentences for severely mentally ill persons who are not classifiable as mentally retarded. This is where we need to push the envelope. Here are a few suggestions.

i. **Ban LWOP Sentences for Mentally Retarded Offenders.** I have only just started looking into this. At least one state does this already by statute. (See Ind. Code § 35-50-2-9, subd. (a) [state may not charge special circumstances for death penalty or LWOP where defendant "is an individual with an intellectual disability"]; See *McCarty v. State* (Ind.Ct.App. 2004) 802 N.E.2d 959, 967-968.) The only thing I found concerning this issue under California law is an unpublished opinion rejecting this contention because it's not supported by *Atkins* and based on rather circular reasoning that there was a gang special circumstance alleged and found true. (*People v. Jones* (2003) 2003 Cal.App. Unpub.LEXIS 7364.) But what does a gang special circumstance mean in the context of a person who is certifiably mentally retarded? How much can such a person understand about the significance of being in a gang and the societal costs? There is room for creative legal work here.

ii. **Challenge to the Death Penalty and LWOP for severely mentally ill persons.** Can we really impose a death sentence for someone who was schizophrenic or psychotic at the time he or she committed the crime? Presumably, such a person did not succeed with an insanity defense, and I confess I know very little about capital case law. But it strikes me that the reasoning behind *Atkins* ought to apply to this situation.

d. **Youthful Sexual Offenders.** A letter I recently got from a repeat client caused me to think about this subject. Mr. G seems to have done virtually everything to challenge his 30-to-life plus change sentence for sexual offenses under the One Strike law, including hopeless habeas claims, and petitions under Proposition. 36 and 47, for which he was ineligible. In his most recent letter (following a loss on a Prop. 47 issue relating to a drug possession offense, on the ridiculous basis that his child molest convictions from the same

proceeding as the drug case are prior super-strikes because they were "prior to the filing of the petition" (see *People v. Montgomery* (2016) 247 Cal.App.4th 1385 and *People v. Zamarripa* (2016) 247 Cal.App.4th 1179)), he told me something about himself about which I was hitherto unaware – that he was 20-years-old when these crimes were committed.

This led me to nose around a bit to see if he was eligible for Youthful Offender Parole under section 3051. The answer to this question was "No"; but, surprisingly, it wasn't because of the nature of his crimes. There is no exclusion for sexual offenses per se in section 3051, as there is for sexual offense "super strikes" under both Propositions 36 and 47. Rather, there is a blanket exclusion from the benefits of section 3051 for anyone sentenced under the Three Strikes law or the One Strike law. So, Mr. G is ineligible.

This got me thinking. Doesn't this seem a bit arbitrary? I mean, an offender could have multiple life sentences for aggravated sexual assault (§ 269) or sexual intercourse with a minor under 10 (§ 288.7) and be eligible under section 3051; but if he's got two counts of 288(a) with multiple 13-year-old victims, giving him an identical sentence for what appears to be considerably less culpable conduct, he is ineligible if the multiple victims were pled and proven (or admitted), resulting in a One Strike Sentence.

This gave me one idea for a constitutional challenge. And then, of course, I went a step farther. Here are my ideas.

i. **Equal Protection Challenge to the Exclusion of Persons Sentenced Under the One Strike law From the Youthful Offender Parole Provisions of Section 3051.** Mr. G can be my test case. The "similarly situated persons" I would compare him to are the hypothetical more serious sexual offenders described above who are eligible for a Youthful Parole hearing. This would be one of those cases which we would pitch under both the state and federal equal protection clauses, and hope for the state courts, i.e., the state Supreme Court, to take up the challenge.

What makes this challenge palatable to the courts is that it's not about getting people like Mr. G *released*; it's about giving them *half a chance to get released* through a Youthful Offender parole hearing, as is the case with murderers.

ii. **Cruel and/or Unusual Punishment.** In such a claim for habeas relief, I would also toss in a cruel and/or unusual punishment claim under the state and federal constitutions, making the rather obvious argument that the same "hallmarks of youth" factors that both Supreme Courts and the California Legislature have mandated be considered when setting confinement periods for youthful offenders in homicide cases should be applied to sexual offenses.

Surely these same hallmarks of youth factors – lack of full brain development, immaturity, impulsiveness, lack of appreciation of consequences, etc., as well as the possibility of change and rehabilitation (see, e.g., *Montgomery v. Louisiana* (2016) 136 S.Ct. 758) – apply with equal force to youthful sexual offenders as to young homicide offenders. We need to show, with available social science statistics, that the notion that sexual offenders are destined to commit such crimes again and again has been shown to be as much a myth as the parallel notion that Third Strike offenders need to be locked up forever because they will necessarily reoffend and harm people.

Obviously, this is a big challenge, but one worth taking on, with the understanding that we are blazing new ground which, some time in the not-too-distant future, may result in giving sex offenders with virtual LWOPs the same chance to get a parole release date that murderers have.

8. **Roundup of More Random Bad Rulings Needing Fixing**. This list could get really long, but here's just a couple more I came up with by walking down memory lane to a pair of old cases of mine with good issues and bad results.

a. ***People v. Low* (2010) 49 Cal. 4th 372:** When you are arrested and you have drugs on you when they drag you into jail, you are guilty of not just simple possession of drugs – now a misdemeanor – but also the felony charge of violating section 4573, bringing drugs into jail.

This is plainly wrong. This statute was designed to punish persons who willfully bring contraband like narcotics into the jail to use, sell, or barter. The legal error in *Low* (and in the unpublished *Alphonso Chavez* case I had a couple years before *Low* on virtually the

same facts) is that there is no actus reus of willfully bringing drugs into jail when you are dragged into jail involuntarily by the police. The contrary reasoning in *Low* is that the authorities have to notify you about bringing contraband into the jail, and you are supposed to give it up before they search you and find it. But this assumes that you have some duty to tell the cops you have drugs, which is contrary to your 5th amendment privilege! If, as Mr. Low and Mr. Chavez did, you exercise this privilege and don't disclose, you get a more serious felony charge when they find the drugs on you.

The good news is that both Yours Truly and Matthew Siroka, who represented Mr. Low, have thoroughly briefed this issue, which deserves reconsideration.

b. ***People v. Cooper* (1991) 53 Cal.3d 1158: Escape Rule (Modified Form) Applies to Robbery.** I'm going to end with this little gem, and give you an example, from an old case of mine, of how to raise a challenge to a poorly reasoned existing precedent.

Cooper held that aiding a robber after the crime of robbery has, in any meaningful sense, already been completed, makes you guilty of robbery on an aiding and abetting theory if the stolen loot is still being carried away to a place of temporary safety. Because of this poorly reasoned opinion, anyone who aids and abets a robbery up to an and including this mythical moment in time, even if they are not present when the robbery is committed, or even have no knowledge of the robbery while the crime is being committed or in the immediate flight from the robbery, is guilty of the principal crime and not merely being an accessory after the fact.

Justice Kennard's dissent in *Cooper* shows how this is wrong. Here's how I summarized it nearly twenty years ago in a brief arguing that *Cooper* should be overturned Hopefully, the briefing excerpted below – which laid an egg in the William Little case around the turn of the century [the 20th to the 21st – hey, I'm not *that* old], will provide you with a sample of how to challenge a badly reasoned precedent in need of reconsideration. And the entire thesis of my article and presentation is my considered opinion that the chances of getting such an opinion reconsidered and overruled are a lot better now than when I wrote this brief.

Cooper Erroneously Extended the Scope of the Crime of Robbery to Include a Person Who Aids an Escaping Robber after the Robbery Has Been Completed, and Should Be Reconsidered and Overruled by this Court.

Although principles of stare decisis should properly make this court "reluctant" to overturn its prior opinions, the doctrine is "flexible, and 'permits this court to reconsider, and ultimately to depart from" its own precedents when appropriate. (*People v. King* (1993) 5 Cal.4th 59, 78, quoting *Mordi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) "Court made error should not be shielded from correction." (*Ibid*.)

In this vein, appellant urges this court to reconsider and overrule the unprecedented "court made" expansion of the law of robbery in *Cooper*, where a bare majority of this Court concluded that getaway drivers are guilty of robbery under an aiding and abetting theory if they "form the intent to facilitate or encourage commission of the robbery prior to or during the carrying away of the loot to a place of temporary safety." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 1165.) Justice Kennard's carefully reasoned dissenting opinion in *Cooper* succinctly described the reasons the majority's "temporary safety" test is erroneous under California law.

> For more than 100 years our law has recognized that a person who assists in the commission of an offense has a higher degree of moral culpability than a person who helps the perpetrator after the offense has been committed. This distinction has been acknowledged by the Legislature. (§§ 31, 32, 33.) Nevertheless, choosing to ignore statutory law and established precedent, the majority now holds that a person who aids an escaping robber after the robbery has been completed may be held criminally liable as a principal to the robbery if the robber, at the time of the assistance, still has possession of the stolen property and the assistance is given before the robber has reached a place of "temporary safety." [¶] The majority's "temporary safety" test finds no support in our previous decisions, draws a line that is inappropriate to the defendant's level of culpability, and is inconsistent with the general rule that one who aids a

> fleeing felon is not a principal in the commission of the felony. Whether a robber is carrying stolen property or has reached a place of "temporary safety" has no bearing on the type of offense committed by a person who aids in the robber's escape: a person who is not involved in a robbery until the property has already been forcibly taken and who then assists the robber's escape is, under established principles of law, only an accessory after the fact.

Cooper, *supra*, 53 Cal.3d at pp. 1171-1172, dis. opn. of Kennard, J.)

As Justice Kennard points out, the majority's "temporary safety" holding has the effect of *adopting* the felony murder "escape rule" while only nominally rejecting it. The rule has no other source in the criminal law, and is contradictory to prior interpretation of the law of robbery, which finds that the crime is completed after only "slight asportation" of the property. (*Id*., at pp. 1173-1176, and cases cited therein.) The application of the rule, as Justice Kennard pointed out, will lead to absurd distinctions between persons who assist fleeing robbers in possession of stolen property versus those who help robbers who are not in possession of the loot, without any real relation to the culpability of the accomplice. (*Id*., at pp. 1176-1177.)

> In summary, the novel rule set forth by the majority finds no support either in the statutory language or in the previous decisions of this court. It is inconsistent with the rule that a person who aids an escaping felon is an accessory after the fact. And . . . it will lead to absurd results because criminal liability will bear little or no relationship to the culpability of the offender. In ignoring the requisite relationship between criminal liability and moral culpability, the majority has undermined a foundational principle of criminal justice.

(*Id*., at p. 1178.) Based on the sound reasoning of Justice Kennard's dissent, which was joined by two other members of this Court, appellant submits that the "temporary safety" holding in *Cooper* must be reconsidered and overruled.

If *Cooper* is overruled, this Court can only conclude that *both* the instructions given in the present case on the duration of robbery, pursuant to former CALJIC No. 9.44 (5th ed.) and CALJIC 9.40.1, were erroneous

> instructions on the elements of this crime, and were thus federal constitutional error. On the facts of the present case, this error cannot be found harmless. As explained in Part I-B above, the jury acquitted appellant of the charge of personally using a firearm in the commission of the charged crimes, meaning his conviction was likely predicated upon aiding and abetting culpability. On the facts of the present case, there was a reasonable possibility on the evidence presented above that the jury could have concluded that William Little did not act knowingly with the intent to assist the robbers until the point in time in which they reentered his car to make their escape. As such, improper instructions which extended the crime of robbery up to and beyond this time cannot be found harmless beyond a reasonable doubt.

Thus, I end this discussion with the last of several calls to battle using a dissenting opinion by Justice Kennard as our rallying cry. Which brings up another important point to remember when going after those poorly reasoned and unfair opinions by the Lucas and George courts:

Look for Those Dissenting Opinions, Especially by Justice Kennard and, More Recently, Justice Liu.

They can be an excellent starting point for your argument that a prior case was wrongly decided and needs to be reconsidered.

III. **Conclusion: The Bywords for Our New Issue Challenges.**

A. **Be Creative!** Don't be afraid to mix and match legal arguments to get to the new understanding that you are after.

B. **Don't Be Daunted by Bad Precedent.** All of the successful arguments in Part A began as challenges against existing case law and succeeded. Don't be afraid to take on new dragons to slay, or to boldly continue something that was sometimes haltingly started in a recent favorable case.

B-1. **Don't Be Daunted by Losses in the Court of Appeal, or Even Review Denials**. We have to start somewhere. Your case might not be the "right one," or the right

time. Keep plugging. And as we continue to raise these challenges, the briefing keeps getting better.

C. **The Shoe is on the Other Foot!** Just as the Burger/Rehnquist Courts and the Lucas/George courts ripped apart Warren and Traynor/Wright/Bird court precedents, *now it's our turn* to take aim at poorly reasoned, mean-spirited decisions from the Lucas and George Courts.

D. **Expand your Review-Worthy Horizons!!** We generally think of the best issues for the California Supreme Court as novel issues, based on new laws or initiatives, or decisions on issues where there is a split of authority, or where your case falls between two lines of authority, one favorable, one unfavorable. We need to add into this mix challenges to existing precedents that you think are worthy of reconsideration by the Supreme Court, and frame them as such, pointing out all the flaws in the challenged case and the reasons why it should be reconsidered.

E. **Practice Including Independent State Grounds in All Constitutional Arguments (Unless Subject to the "Truth in Evidence" Provisions of Proposition 8)**. I defer to Dallas's argument and presentation on this subject, but would be remiss in not including this.