The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM

"*It's better to walk alone, than with a crowd going in the wrong direction.*" (Diane Grant)

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CASES:

***Brady and Pitchess Discovery*:**

People v. Superior Court (Johnson) **(July 6, 2015) 61 Cal.4th 696**

Rule: Upon notification that a police officer's confidential personnel file contains material evidence favorable to the defense or which is potentially exculpatory, the prosecution meets its *Brady v. Maryland* obligations by merely informing the defense of the existence of such information, allowing the defense to file a *Pitchess* (*v. Superior Court*) motion.

Facts (Taken partially from the First District Court of Appeal decision of Aug. 11, 2014, at 228 Cal.App.4th 1046; review granted)**:** On November 14, 2012, San Francisco Police Officers Paul Dominguez and Antonio Carrasco responded to a call concerning a felony domestic violence incident. At the scene, it was discovered that "Real Party in Interest" Johnson (i.e., "defendant") had hit a female minor, causing a two-inch lump on the back of her head. Johnson complained that she had "(m)aced (him) first." The victim also alleged that defendant had tried to prevent her from calling for help by grabbing her cellphone, and then a cordless phone, out of her hands.

Defendant was arrested for felony domestic violence (P.C. § 273.5(a)) and misdemeanor injuring a wireless communication device (P.C. § 591.5). Charged in state court with the above, the San Francisco Police Department (SFPD), pursuant to pre-established department procedures, notified the District Attorney's Office that the arresting officers had some "potential '*Brady* material'" (i.e., sustained allegations of reflective of dishonesty, bias, excessive use of force, or evidence of moral turpitude) in their confidential personnel files. As a result of receiving this information, the prosecution filed a motion with the trial court requesting the court to conduct an in-camera review of the officers' personnel files to determine whether any information in those files was discoverable pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, and then release any discoverable information to both the prosecution and the defense. The motion was supported by a declaration from an Assistant District Attorney to the effect that the officers were necessary witnesses for the prosecution and that the SFPD had informed the prosecution that each of the officers had "material in his . . . personnel file that may be subject to disclosure under" *Brady*. It was apparent that the prosecution had not yet viewed this information, it being in the officers' confidential personnel files and under the exclusive possession and control of the SFPD. Such information is confidential per statute (P.C. § 832.7(a)). After a discovery hearing, the trial court issued a ruling denying the prosecution's request, finding P.C. § 832.7 to be unconstitutional to the extent that it bars the prosecution from gaining access to, and inspecting the police department's officer personnel records on its own when *Brady* misconduct is alleged. The court ordered the SFPD to give the District Attorney access to the personnel files of the two officers involved so that the People could review the files for *Brady* material to be provided to the defense. The court further ordered that it would itself only do an in-camera review of the materials if the discoverability of what the prosecution found was a "close case." Two petitions for writ of mandate/prohibition were filed with the appellate court, challenging the trial court's orders. The First District Court of Appeal (Div. 5) granted in part and denied in part the petitions. (See 228 Cal.App.4th 1046; review granted.) The Court of Appeal held, basically, that it was the prosecutor's (as opposed to the trial court's) duty to review an officer's personnel file for any *Brady* material and upon finding any, file a motion with the trial court to release such information to the defense. The California Supreme Court granted review.

Held: The California Supreme Court unanimously reversed the Court of Appeal. Pursuant to the U.S. Supreme Court's decision in *Brady v. Maryland*, the prosecution is obligated to disclose to the defense material evidence favorable to the defendant. Separately, the California Legislature has enacted statutory procedures for seeking discovery of potentially exculpatory information located in a police officer's confidential personnel records (as those records are defined in P.C. § 832.8), as mandated by the California Supreme Court decision of *Pitchess v. Superior Court* (1974) 11 Cal.3rd 531. The major procedural difference between *Brady* and *Pitchess* is that under *Brady*, the prosecution must produce any "*material evidence favorable to the defense*" even though no request for such information has been made. Under *Pitchess*, the defense must affirmatively seek discovery of "*potentially exculpatory information*" in an officer's personnel records which a court will grant only after the defense makes a "threshold showing" of the existence of such information and its relevance, following the procedures as set out in Evidence Code §§ 1043 and 1045. The issue presented in this case is who—the prosecution or the trial court—has the responsibility for examining an officer's confidential personnel file for *Brady* material. The Court ruled here that the trial court was wrong when it found P.C. § 832.7(a) to be unconstitutional to the extent that it prevented the prosecution from examining a police department's confidential personnel files. To the contrary: "(T)he

prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases." If the prosecution wishes to obtain information from such files, "it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records." Whenever the prosecution is put on notice, as it was in this case, that there is information that is potentially favorable to the defendant in an officer's personnel file, it fulfills its *Brady* obligations *not* by rummaging through such files itself, nor by filing a motion with the trial court to review the files (as was done in this case), but rather by merely by informing the defense of what the police department informed it; i.e., that the specified records might contain exculpatory information. That way, a defendant may decide for himself whether to seek discovery, following the *Pitchess* (E.C. §§ 1043, 1045) procedures if he does. The information the police department has provided to the prosecution, as it is relayed to the defense, together with some explanation of how the officers' credibility might be relevant to the case, satisfies the threshold showing a defendant must make in order to trigger judicial review of the records under *Pitchess*. When such a showing is made, the trial court is then obligated to sit down with the law enforcement custodian of such records, reviewing them itself for any relevant, discoverable information, which it may then provide to the defense subject to any protective orders necessary to protect the officer's privacy interests to the extent possible. The case was remanded to the trial court for the purpose of using this procedure.

Note: Police officers, of course, hate *Brady*, and don't think much of *Pitchess* either. Screw up once and that mistake will come back to haunt you forever (although *Pitchess* includes a 5-year statute of limitations; E.C. § 1045(b)(1)). But both procedures, as annoying and perhaps unfair as they may be, are a fact of life, so we might as well get used to it. The secret, of course, is not to screw up, avoiding having your future cases compromised or by being embarrassed with the public-viewing of your dirty laundry in front of a jury. Being perfect, however, only occurs in a perfect world. Making mistakes is inevitable in the unique and difficult world of law enforcement. So the best I can advise is that when tempted to cut a corner, to use a little more force than necessary, to cover up a mistake, to embellish on the facts of any particular situation, or to do anything you know seems even *a little a little itty bitty* contrary to how you were trained or to your innate common sense, . . . *don't*. It's not worth the consequences. Prosecutors, by the way, don't think much of these discovery requirements either; particularly *Brady*. It puts them in a position where they are required to keep taps on law enforcement's screw-ups, something they know cops, with whom they have to work, hate. It also puts a prosecutor in a position of being held accountable for something about which they may not even have been aware, and which they wouldn't have hidden from the defense had they known about it, with reversal of a hard-fought-for conviction often being the sanction. At least this case simplifies a prosecutor's *Brady* obligation to some extent, needing only to tell the defense that there's stuff of possible interest to them in a police officer's files, and if they want it, to go get it themselves. The problem is, of course, when law enforcement fails to warn a prosecutor that there's potentially exculpatory information in an officer's confidential personnel file (or anything else, anywhere else, that might be classified as "*Brady* material"), the prosecutor is still going to be held accountable for knowing about it. If you wish to know more about the rules on both *Brady* and *Pitchess*, this case gives an excellent, even if abbreviated, synopsis of both legal theories which I pulled from the decision and put into a separate file. I'll send it to you upon request.

***Sixth Amendment Right to Confrontation*:**

Ohio v. Clark **(June 18, 2015) __ U.S. __ [135 S.Ct. 2173; 192 L.Ed.2nd 306]**

Rule: Hearsay statements of an unavailable witness are admissible in court against the defendant even though the defendant did not have the opportunity to cross-examine that witness, so long as the statements are "non-testimonial" and come within a recognized hearsay exception. A three-year-old's statements to non-law enforcement interrogators, collected for the purpose of thwarting an ongoing emergency, are commonly going to be held to be non-testimonial.

Facts: Defendant, who went by the name of "Dee," lived with his girlfriend, "T.T.," and her two young children; "L.P.," a 3-year old boy, and "A.T.," an 18-month-old girl, in Cleveland, Ohio. Defendant was also T.T.'s pimp. As such, he would regularly send her off on trips to Washington D.C. to work as a prostitute. (There's no truth to the rumor that Bill Clinton was scheduled to be a witness in this case.) In March, 2010, T.T. went on one such trip, leaving L.P. and A.T. in defendant's care. While she was gone, defendant brought L.P. to his preschool, dropping him off in the care of the employees there. One of the teachers noticed that L.P.'s left eye was bloodshot. When asked what had happened, L.P. said that he had fallen. But it was soon noted that L.P. also had "red marks, like whips of some sort" on his face. The head teacher was notified. She asked L.P.; "*Who did this*? *What happened to you*?" A "bewildered" L.P. responded; "*Dee*, *Dee*." L.P. responded to further questioning by telling the teachers that "*Dee is big*," eliminating some other child as the possible culprit. The teachers then lifted L.P.'s shirt and discovered more injuries. As "mandatory reporters," the teachers called a child abuse hotline to alert authorities. But defendant arrived at the school before anything could be done and, while denying any responsibility for the injuries, fled with L.P. A social worker, however, tracked down both children the following day at defendant's mother's house, taking them into protective custody. Examined by a physician, it was discovered that L.P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A.T. had two black eyes, a swollen hand, a large burn on her cheek, and both her pigtails had been ripped out at the roots. Defendant was indicted by an Ohio state grand jury on various assault, child endangering, and domestic violence charges. After an evidentiary hearing, L.P. was found incompetent to testify due to his age. The preschool teachers, however, were allowed to testify over defendant's objection as to L.P.'s hearsay statements identifying defendant as the person ("*Dee, Dee*") who had caused his injuries. Convicted of most of the charges, defendant appealed from his 28-year prison sentence. An Ohio state appellate court reversed on the ground that the introduction into evidence of L.P.'s out-of-court statements violated the Sixth Amendment's Confrontation Clause. In a split, 4-to-3 decision, the Supreme Court of Ohio affirmed. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court unanimously reversed the Ohio Supreme Court, thus upholding defendant's conviction. The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant's right to confront his "accusers" in court. (The term "accuser" is liberally applied to anyone who testifies against a defendant.) Hearsay statements (i.e., a witness testifying in court to what someone else said on some prior occasion) are generally inadmissible

in evidence, absent an exception to the rule. The preschool employees' testimony as to what L.P. told them is such a hearsay statement. Ohio, however, has an exception for the out-of-court statements made by child abuse victims. (Ohio Rule of Evidence 807; as does California; see Evid. Code § 1360.) Despite a statutory exception to the Hearsay Rule, however, such statements are not admissible in evidence if the Sixth Amendment's Confrontation Clause precludes such use. But there are exceptions to this constitutional rule as well. At one point, hearsay statements were admissible despite the Confrontation Clause so long as the statement bore "adequate indicia of reliability." Such indicia are present if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56.) More recently, however, the Supreme Court tightened the rules a bit, allowing the use of such hearsay testimony into evidence *only* if (1) the person who made the statement is unavailable to testify *and* (2) the defendant has had an opportunity to cross-examine that person. (*Crawford v. Washington* (2004) 541 U.S. 36.) On its face, the use of L.P.'s statements to his teachers against defendant in trial appear to violate the rule of *Crawford*. However, *Crawford* also has its exceptions. One major exception is that the *Crawford* rule only applies to "*testimonial statements*." The issue in this case was whether L.P.'s hearsay statements were "*testimonial.*" *Crawford* gave us little guidance as to what is, and what is not, "testimonial." Since then, however, the Supreme Court has developed its so-called "*primary purpose test*," to be used in attempting to decide this issue. Specifically: "Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that *the primary purpose* of the interrogation is to enable police assistance *to meet an ongoing emergency*. (On the other side of that coin), they are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency and that the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (Italics added; *Davis v. Washington* (2006) 547 U.S. 813.) A factor to consider in applying this "*primary purpose*" test is to whom the statement was made; i.e., the police or to someone not associated with law enforcement. In this case, we have a 3-year-old minor who made a statement to non-law enforcement witnesses. He did so *not* for the purpose of providing evidence for a future prosecution, but rather to allow the preschool employees to determine who might have hurt him so that they could end the abuse and protect the minor. It was, in effect, an "*ongoing emergency*" that L.P.'s interrogators were seeking to end. The statements were also obtained in the relatively informal atmosphere of the preschool, as opposed to a police station interrogation room. Another factor the courts consider is the fact that the Confrontation Clause would not have prohibited the use of such an out-of-court hearsay statement in a criminal case at the time of this nation's founding. Aside from all this, it was noted that merely because the witnesses in this case were "mandated reporters" did not convert them into agents of law enforcement, or otherwise convert L.P.'s statements to them into being testimonial. And also, the fact that this evidence supported the People's case does not change the rules. In reviewing all these circumstances, the Court ruled that L.P.'s hearsay statements were *not* testimonial, and thus properly admitted into evidence against defendant.

Note: *Confused*? Let me break this all down into its finest points: For a non-testifying person's out-of-court hearsay statements to be allowed into evidence, typically through the testimony of some third person who heard the statement, there has to be an applicable statutory "firmly rooted" hearsay exception that bears "particularized guarantees of trustworthiness." But for the exception to apply, the "declarant" (e.g., L.P. in this case) has to be both unavailable by the time

of trial *and* the defendant has to have had the opportunity to cross-examine him at some point, such as at the preliminary hearing. If defendant has not yet had the opportunity to cross-examine the declarant, then the statements are inadmissible unless the statements are found to be "*non-testimonial*." To determine whether a declarant's statements are or are not testimonial, you have to weigh all the factors discussed in this case, as well as others not relevant here, particularly the declarant's "primary purpose" in making those statements in the first place. So why should you, as the law enforcement officer investigating a case, care? While it's the prosecutor's task to decipher all the finer points of a *Crawford* issue, it's the cop's duty to clearly describe in his or her reports all the circumstances surrounding the collection of a victim or witness's statements so that the prosecutor knows how to apply it all in the courtroom setting. We need the detail, and you need to have it all recorded in preparation for your later courtroom testimony. If you're really interested in all the rules surrounding *Crawford*, this case but touching the tip of the iceberg, I keep a running training outline dealing with one's Sixth Amendment right to counsel and right to confrontation. I can send it to you at no extra cost.

***Assault with a Deadly Weapon, per P.C. § 245(a)(1)*:**

In re D.T. **(June 10, 2015) 237 Cal.App. 4th 693**

Rule: Evidence of an attempted battery through the use of an instrument that has the potential for causing death or great bodily injury, irrespective of the defendant's lack of an intent to cause death or great bodily injury, supports an assault with a deadly weapon conviction.

Facts: The 13-year-old defendant and 14-year old female victim were friends up until defendant teasingly poked the victim with a pocket knife while at school. On this occasion, defendant pulled on the hood of the victim's sweater as she tried to pull away from him, telling him to leave her alone. Taking this as a challenge, defendant, still holding onto the victim's sweater, produced a pocket knife and opened it so she could see the blade. He then told the victim; "*You won't be scared of this.*" The victim, afraid she might get hurt, responded; "*If my mom was here, you wouldn't have said that.*" While still holding onto her, defendant poked her multiple times in the upper back with the exposed blade. She could feel the "sharp" and "pointy" knife, feeling some pain. Although she didn't really think defendant would hurt her, or that he was trying to cut or kill her, she was still scared that she "might" get hurt. Defendant seemed to be mad and appeared to be "trying to bother" her. At this point, a teacher approached. Defendant ceased his action, put the knife away, and went into class. A "visibly upset" victim reported the incident to the teacher. The police were called. The victim told the responding officer that she was scared that defendant might hurt her. The officer found a visible red mark on her back but no broken skin. Defendant was contacted in the assistant principal's office where he produced the knife for the officer. The knife was found to be sharp on one side of the blade which was over 2½ inches in length, with a sharp point. The officer testified that in her eight years of experience, she'd seen knives of the same shape and sharpness cause both "wounds that [bled] profusely" and "wounds that cause people to die." Defendant claimed to have "accidently" left his father's knife in his backpack which he brought to school. While at first denying the victim's allegations, he eventually admitted to "accidently" poking her a number of times, but that he was "just playing" and did not intend to hurt her. Charged in Juvenile Court with coming within the provisions of W&I § 602 for having assaulted the victim with a deadly weapon (P.C. § 245(a)(1)), defendant

argued that the knife was not used as a deadly weapon because he didn't intend to cause death or great bodily injury. (Defendant was also charged with possessing a knife on school grounds, per P.C. 626.10(a)(1), which he conceded was true.) The trial court sustained the wardship petition, deemed the offenses to be misdemeanors, and placed defendant on probation.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. On appeal, defendant advanced three arguments: *(1)* He first argued that the knife, under the circumstances, was not likely to cause death or great bodily injury because he only used it to poke the victim in the back. P.C. § 245(a)(1) makes it illegal to assault another "with a deadly weapon or instrument, other than a firearm, or by any means of force likely to produce great bodily injury." A "deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." There are two categories of deadly weapons; (a) those that are deadly as a matter of law (e.g., dirks or blackjacks) because the ordinary use for which they are designed establish their character as such, and (b) those, while not deadly per se, may be used under circumstances or in a manner likely to produce death or great bodily injury (e.g., a bottle or a pencil). A knife, because it has other legitimate uses, falls into this second category. In determining whether any particular instrument is likely to produce death or great bodily injury we may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. Prior cases have established that "an instrument can be a deadly weapon even if it is not actually used with deadly force." It has also been held that a charge of 245(a)(1) is established when the instrument is "some hard, sharp, pointy thing," even if only used to threaten and not actually used to stab. The issue here was whether "the simple act of poking a classmate with a knife in a playful manner is sufficiently likely to cause great bodily injury or death. The Court held that even if it was to be assumed that defendant's version of the facts were true (i.e., that he was simply teasing the victim), the undisputed facts of this case still support a finding that the knife was used as a deadly weapon. The test is whether the knife was "used in such a manner as to be *capable of producing* and *likely to produce*, death or great bodily injury." The knife in this case had a sharp blade that was more than 2½ inches long, sufficient to cause severe and even fatal wounds. While defendant may not have pushed the knife into the victim with enough force to break the skin, he still poked it against her back in an area of her body she could not even see let alone control. Defendant also repeatedly poked the victim while preventing her escape by holding onto her hood. A simple slip and the knife could have caused serious injury to the helpless victim. Based upon this evidence, the trial court's finding that the knife, as used here, was both "*capable of producing* and *likely to produce*, death or great bodily injury," was upheld. *(2)* Defendant also argued that he did not intend to use the knife as a deadly weapon because he and the victim were only playing. However, although one's intent is relevant, the prosecution was not required to prove, as an element of P.C. § 245(a)(1), that defendant intended to use the knife as a deadly weapon. The only intent necessary to prove is the intent to attempt to commit a battery, a battery being "any willful and unlawful use of force or violence upon the person of another." Defendant here did not deny his intent to commit a battery upon the victim. *(3)* Finally, defendant asserted that the limited nature of the victim's injury demonstrated that the knife was not likely to cause death or great bodily injury. However, because section 245(a)(1) focuses only on "*potentiality*," the People need not prove an actual injury. Although the extent of a victim's injuries may assist the trier of fact in deciding whether an item is likely to cause death or serious bodily injury (i.e., whether it qualifies as a deadly

weapon), the extent of injuries, or even where there are no injuries, is not dispositive of this issue.

Note: I've always found the problem of what it takes to prove an assault with a deadly weapon charge (i.e., an "ADW") to be somewhat confusing. This case does as good a job as any I've seen in explaining it. The bottom line seems to be that if you've got the facts to prove an attempted battery through the use of an instrument of some sort that has the potential, under the circumstances, to cause death or great bodily injury, then that's an ADW. Absent that intent, the offense is a misdemeanor P.C. § 417(a)(1); exhibiting a weapon in a rude and threatening manner. Note that it need not be proved that the suspect actually intended to cause death or great bodily injury, although such evidence would certainly strengthen the case.

***Sexual Exploitation of a Mentally Disabled Victim*:**

People v. Vukodinovich **(June 29, 2015) 238 Cal.App.4th 166**

Rule: The developmental disabilities of a person may prevent her from having the positive cooperation in act or attitude pursuant to an exercise of free will necessary for a legal consent in submitting to sex acts.

Facts: Defendant was a 73-year-old bus driver for Yolo Employment Services; a nonprofit agency providing work activity programs, job training, and job retention services for individuals with disabilities. Defendant's duties involved driving clients to and from work. "L." was a 49-year-old female client of Yolo Employment Services, who had a mental age of three or four and an IQ of 37. She was also partially blind and could not read or write. Between 2009 and 2012, defendant drove L. to and from her work at a Walgreens warehouse where she worked at affixing labels to products. During this time period, defendant coaxed L. into engaging in various acts of sexual intercourse, oral copulation, and digital penetration, with most acts occurring in the bus on the way home. L. commonly went along with this activity, although she often told him that she didn't' want to engage in the sex acts. When she resisted, defendant persisted anyway. According to L., defendant would direct her to move up to the front seat, having her lie down on the floor, and then remove her clothes. He would put "[p]inky, two hand" in her "gina." L. testified that "it felt "[n]ot good." Or he would kiss her breasts and "gina." L. testified that he would tell defendant; "No more, Tom, no more, no more, stop." But defendant would push her to the floor and do things like make her lick his "peanut" and put it in her mouth. When she told defendant, "no more," defendant "[a]gain," "pushed [her] head down." On one occasion, defendant told L. to sit on his lap while he was in the driver's seat, and he put "[h]is peanut" in her "gina." Defendant told L. not to tell others about what they were doing or he might get fired. At trial, however, L's testimony showed that she was not totally resistant to the idea of participating in the alleged acts of sex. When asked if she wanted to have sex with defendant, she responded; "A little bit, not a lot." When asked why she wanted to have sex with defendant, she responded; "It's good." When asked whether she wanted defendant to put his finger in her vagina, L. responded; "Yeah, one, not two." L.'s sister eventually discovered what was going on and called the police. When interviewed by the police, defendant claimed that L. was the aggressor; that she "enjoys sex and wants it from wherever she can get it." L., on the other hand, said that she "not want it." When asked what sex meant to her, she said, "The baby. Don't wanna a baby." Defendant was charged in state court with various counts of sexual intercourse,

attempted sexual intercourse, oral copulation, and penetration with a foreign object, all with a person who "is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent." (P.C. §§ 261(a)(1), 288(g), & 289(b)) Convicted of eleven counts of the above (hanging on 46 other counts, all of which were later dismissed), defendant was sentenced to 14 years in prison. He appealed.

Held The Third District Court of Appeal affirmed. Defendant's primary contention on appeal was that the statutes criminalizing sexual conduct with people incapable of consent due to a developmental disability are unconstitutional because they violate his (and L.'s) federal and state rights to privacy. Citing the U.S. Supreme Court case of *Lawrence v. Texas* (2003) 539 U.S. 558, where it was held that attempts to criminalize sex acts (specifically, sodomy) between consenting adults, occurring in the privacy of their home, constitutes a Fourteenth Amendment due process violation, defendant argued that the same theory applied to what he and L. were doing. The Supreme Court, in *Lawrence*, however, made it clear that due process in such a context protects only "the private sexual conduct of two *consenting* adults." It does not extend to the situation where a person has sex with another who is so mentally incapacitated as to be legally (even if not factually) incapable of consenting. To the contrary, the state has a duty to protect individuals with disabilities. "Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people." Defendant also argued that there was insufficient evidence that L. lacked the legal capacity to consent to his sexual advances. In rejecting this argument, the Court first noted that "legal consent" is defined as the "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (P.C. § 261.6) The Court then compared the facts in this case with three prior decisions, all of which found a lack of consent due to the victim's "weakened intelligence." First, in *People v. Boggs* (1930) 107 Cal.App. 492, a defendant's conviction of rape was upheld where the victim had the mental capacity of a 10 or 12 year old and lacked "sufficient mentality to protect herself from the ordinary vicissitudes of life." The victim testified in *Boggs* to relenting to the defendant's advances because she had things to do and he wouldn't go away until she did. Second, in *People v. Mobley* (1999) 72 Cal.App.4th 761, the defendant's convictions of unlawful sodomy of two men in their early 20's were upheld where both victims had low IQs (80 and 75), the cognitive functioning of adolescents (14 and 11 year old), and some basic sex education. Both victims in *Mobley* testified that they consented to the sex acts. But the evidence showed that they did so only after being talked into them by a defendant who befriended them and pressured them into believing "that friends kiss, go to bed together and engage in sex." Finally, in *People v. Thompson* (2006) 142 Cal.App.4th 1426, where the victim conversed at the level of a nine or ten year old and read at the level of a seven or eight year old, and who could not cook, use a bus, or do simple arithmetic, it was found that she did not have the mental capacity to legally consent to a sex act. Compared to the victims in these cases, the Court held here that "substantial evidence" supported the jury's determination that L. also was legally incapable of giving her consent to the sex acts committed by defendant. L. had a mental age of three or four and an IQ of 37, putting her in the "moderately disabled" category. She could not read or write. Although she could bathe herself and change herself, she did not consistently select clothes appropriate for the weather. She could not cook. As far as sex was concerned, she understood only enough to know that she didn't "wanna a baby." The Court found that based upon this (and other details of the victim's lack of a true understanding of the nature of what

having sex really meant), it was not shown that she had the capacity to give legal consent. Defendant, therefore, was properly convicted.

Note: I don't often brief "sufficiency of the evidence" cases in that they are commonly so fact-specific that they don't really aid us in evaluating the next such case to come along. But there seems to be such a spurt of sex cases in the news lately involving the issue of consent that I felt it was worth talking about. More specifically, we need to have some understanding about how the issue of consent relates to persons with mental or developmental disabilities. The Court noted that one percent of the United States population has one form or another of a developmental disability. And with a current trend towards attempting to integrate such persons into society, as opposed to sticking them away in some institution, these people are perhaps more available to predators for sexual exploitation. This particular case, for instance, tells us that just because the victim has seemingly agreed to participate in one sex act or another doesn't mean that they are legally capable of giving such a consent. This case will help you get comfortable with what the standards are and hopefully sensitize you to the issue, if you aren't already.

***Burglary and Consensual Entries*:**

People v. Sigur **(July 9, 2015) 238 Cal.App. 4th 656**

Rule: Entry into a residence with the intent to commit felony sex acts with a 13-year-old minor is a residential burglary. Consent to enter for that purpose, given by the minor/victim, is not a defense.

Facts: Defendant, a 35-year-old male, met A.B., a 13-year-old female, in an Internet chat room. A.B. lived with her divorced mother part time (with her father getting custody every other week). A.B. had access to a cell phone and a computer during the periods she stayed with her mother. In August, 2010, A.B. created a profile listing herself as 14 years old on several "singles" and "20's" chat rooms. Defendant responded to one of A.B.'s inquiries for someone who lived in her telephone area code, identifying himself as being in his 20's. The two of them began "chatting" regularly, eventually moving to an exchange of cell phone texts. When A.B. finally admitted to being 13, defendant revealed his true age to be 35. At A.B.'s request, defendant came to A.B.'s mother's home. They took walks together, one such walk to a secluded area resulting in A.B. orally copulating defendant. They became even more intimate with defendant, at A.B.'s invitation, sneaking into her bedroom at night through a window. A.B. eventually relented to defendant's urgings and, between September and mid-October, submitted to a number of acts of sexual intercourse and other related sex acts, all occurring in A.B.'s bedroom at her mother's house. A.B.'s father eventually found the text messages on her cell phone. When confronted, A.B. claimed that defendant was a 14-year-old boy who skateboarded in the neighborhood. But A.B.'s father called defendant's number and, noting that he sounded like an adult, told him that A.B. was only 13 and that if he didn't back off, the sheriff would be called. Finally, on October 14th, A.B. told defendant that she wanted to come live with him. Defendant came to A.B.'s mother's house and, again entering through the bedroom window, helped A.B. pack. The two of them then fled to defendant's double-wide trailer where they engaged in sexual intercourse a couple more times. The next morning, A.B.'s mother found her daughter missing and the Sheriff was called. Defendant was tracked down by pinging his cell phone. Responding deputies located A.B. at defendant's trailer, and took her into custody. Defendant, upon being arrested,

eventually admitted to the sex acts, but claimed that he thought A.B. was 18. He also denied ever entering A.B.'s bedroom; an assertion that was later disproved by his DNA being recovered from her bed. Defendant was charged in state court with a pile of lewd and lascivious-related acts with a minor. Among the charges relevant to this brief were nine counts of first degree residential burglary for having entered A.B.'s mother's home with the intent to commit a felony. He was also charged with the kidnapping of a minor and failing to register as a transient sex offender, plus assorted enhancement allegations. Convicted of the whole ball of wax, defendant was sentenced to a determinate term in prison of a mere 103 years, *plus* an indeterminate term of another 550 years to life.

Held: The Third District Court of Appeal affirmed (with a minor alteration of the sentence). In the published portion of the Court's opinion, the validity of the burglary convictions (or, at least five of them) was discussed. Burglary, per P.C. § 459, is committed when a person enters a building with the intent to commit a theft or a felony. The prosecution's theory in this case was that defendant entered A.B.'s mother's house at least eight times for the purpose of committing felonies related to the sex acts with A.B., and once with the intent to kidnap her. However, it is a rule of law that it is not a burglary when the owner-possessor of the building (a residence, in this case) actively invites the accused to enter, knowing of the accused's felonious intent. Per the Court: "[T]he owner-possessor must know the felonious intention of the invitee. There must be evidence 'of informed consent to enter coupled with the "visitor's" knowledge the occupant is aware of the felonious purpose and does not challenge it.'" On appeal, defendant argued that A.B. was fully aware of his felonious intent, having invited him in on the various occasions to commit such acts. However, the Court here ruled that the issue was not whether A.B. consented to defendant's various entries, but rather whether A.B.'s mother did. Prior case law indicates that generally, minor children do not have co-equal dominion over the family home. Although parents may choose to grant their minor children joint access and mutual use of the home, parents normally retain control of the home as well as the power to rescind the authority they have given. While this rule is not absolute, a minor as young as 13 typically does not have the authority to allow strangers into her parents' home. In those instances where a defendant himself does not have an unconditional possessory right to enter as an occupant of the premises (e.g., he doesn't live there), a defense of consent to enter the premises for the purposes of engaging in felonious sexual conduct with a minor requires at least one of the following: (1) The minor has a possessory interest in the premises co-equal to the parent or other adult owner/occupant *and* expressly and clearly invited the defendant to enter so the defendant could engage in felonious sexual conduct with the minor; (2) a parent or other adult who has a possessory interest in the premises expressly and clearly gave the defendant permission to enter for the purpose of engaging in felonious sexual conduct with the minor; *or* (3)(a) the minor expressly and clearly gave the defendant permission to enter for the purpose of engaging in felonious sexual conduct with that minor, (b) the minor had been given permission by the parent or other person with a possessory interest to allow entry into the premises for such purpose, *and* (c) defendant knew that the minor had been given such permission. The evidence here did not establish any of these alternatives. Defendant, therefore, was properly convicted of all nine counts of burglary.

Note: Generally, a consensual entry is not a defense to a burglary charge. But it can be under the right circumstances (e.g., when he lives there or has the occupant's knowing consent to enter for the purpose of committing a theft or a felony). This case provides a good review of those

cases. But its real value is putting a limit on the consensual entry defense to a burglary charge. Good case to put into your burglary file for when you come across similar circumstances.