Selected Criminal Terminology

"APPRENDI." This federal constitution requirement states that sentencing enhancements (other than prior convictions) must be decided by the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Apprendi v. New Jersey (2000) 530 U.S. 466, 490 (147 L.Ed.2d 435, 120 S.Ct. 2348. *

"**ARANDA**." People v. Aranda (1965) 63 Cal.2d 518. See Bruton v. United States (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620]. In a joint trial, co-defendant's statement must be excluded or edited if it incriminates another co-defendant. The rule thus presumes the statement is an admissible admission by the declarant and inadmissible hearsay against the codefendant. People v. Fletcher (1996) 13 Cal.4th 451, 455. *Aranda* held that the codefendant's confession may be introduced a the joint trial if it can be edited to eliminate references to the defendant without prejudice to the confessing codefendant. (63 Cal.2d at pp. 530-531). If not, and the prosecution insists on introducing the confession, the trial court must sever the trial. (*Ibid.*)*

"**ARBUCKLE**." People v. Arbuckle (1978) 22 Cal.3d 749. Right of a defendant to be sentenced by the same judge who accepted his guilty plea. In *Arbuckle*, our Supreme Court held as a general principle, "whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea. Thus, the sentence imposed by a judge other than the one who took the plea cannot be allowed to stand." In re Mark L. (1983) 34 Cal.3d 171, 177*

"BOYKIN/TAHL" Boykin v. Alabama (1969) 392 U.S. 238; In re Tahl (1969) 1 Cal.3d 122. The defendant must be advised of the constitutional rights to a jury trial, confrontation and against self incrimination and expressly waive those rights on the record when entering a guilty or no contest plea.*

"BRACAMONTE MOTION" People v. Bracamonte (1981) 119 Cal.App.3d 644. This is a motion to bifurcate the trial on the principal crimes from the trial on the defendant's prior convictions alleged for enhancement purposes. *

"**BRADY**." Brady v. Maryland (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194]. Motion for discovery/prosecution's obligation to provide exculpatory evidence. Apart from statutory discovery provisions, the Fourteenth Amendment Due Process Clause imposes on the prosecution an affirmative duty to disclose

to the defense, promptly and without request, any obviously exculpatory evidence possessed by the prosecutor and not readily accessible by the defense. See Brady, supra, and In re Ferguson (1971) 5 Cal.3d 525, 532.*

"CRUZ WAIVER." Penal Code section 1192.5 provides that a defendant who pleads guilty pursuant to a plea bargain which is subsequently disapproved by the trial court shall be permitted to withdraw the plea if he or she so desires. The issue before us is whether this provision applies when the trial court withdraws its approval because the defendant fails to appear for sentencing. *

"**DOYLE."** Doyle v. Ohio (1976) 426 U.S. 610 [49 L.Ed.2d 91, 96 S.Ct. 2240]. A Due Process violation for the use of a defendant's silence at the time of arrest and after receiving *Miranda* warnings to impeach an affirmative defense raised at trial. *Doyle* is not violated by impeachment with post-arrest silence if defendant testifies that he told police his exculpatory story. "*Doyle* prohibits the prosecution from impeaching a defendant's trial testimony with evidence of the defendant's silence after the defendant, having been advised of his constitutional rights under *Miranda v. Arizona* chooses to remain silent." *

"**EVANS**." "The broad discretion vested in a trial judge or magistrate includes the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. Such motion should normally be made as soon after arrest or arraignment as practicable. We note that motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most cases by reason of such delay." Evans v. Superior Court (1974) 11 Cal.3d 617, 626. *

"**FARETTA**." Faretta v. California (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]. Defendant has a right to proceed pro per if he knowingly and intelligently waives the right to counsel. *

"FOSSELMAN/POPE" People v. Fosselman (1983) 33 Cal.3d 572 involves a claim that counsel was ineffective not based upon a withdrawal of a defense. People v. Pope (1979) 23 Cal.3d 412 involves a claim of ineffective assistance of counsel based upon a loss of a potentially meritorious defense.

"FRANKS." Franks v. Delaware (1978) 438 U.S. 154 [57 L.Ed.2d 667, 98 S.Ct. 2674]. Also known as a motion to traverse warrant. "A defendant has a limited right to challenge the veracity of statements contained in an affidavit made in support of the issuance of a search warrant (under *Franks*)." People v. Lewis and Oliver (2006) 39 Cal.4th 970, 988-989. A motion to "quash" a search warrant is a related motion based on insufficient showing of probable cause in the affidavit. In order to prevail on a motion to traverse an affidavit, the defendant must demonstrate (1) that the affidavit included a false statement made knowingly and intentionally, or with reckless disregard for the truth, and (2)

that the allegedly false statement was necessary to the finding of probable cause. Franks at pp.155-156; People v. Hobbs (1994) 7 Cal.4th 948, 974. "If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to the warrant must be suppressed." People v. Bradford (1997) 15 Cal.4th 1229, 1297 citing *Franks* at pp. 155-156. "Moreover, there is a presumption of validity with respect to the affidavit." People v. Lewis and Oliver (2006) 39 Cal.4th 970, 989. *

"GRIFFIN." "Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. People v. Tafoya (2007) 42 Cal.4th 147, 184, citing *Griffin v. California (1965) 380 U.S. 609, 614 [14 L.Ed.2d 106, 85 S.Ct. 1229].* **

"HARVEY-MADDEN." People v. Harvey (1958) 156 Cal.App.2d 516, People v. Madden (1970) 2 Cal.3d 1017. See Whitely v. Warden (1971) 401 U.S. 560 [28 L.Ed.2d 306, 91 S.Ct. 1031]. Prosecution must establish the outside source of information relied on by field officers, after briefing or dispatch, for detention/arrest. As explained in Sanderson v. Superior Court (1980) 105 Cal.App.3d 264, 268, the Harvey-Whitely rule only applies where "information relied on to establish probable cause travels from an informant through a relaying officer to an arresting officer...." *

"HARVEY WAIVER." People v. Harvey (1979) 25 Cal.3d 754. Imposition of terms of probation based on dismissed counts based on defendant's agreement. "While implicit in ... a plea bargain ... is the understanding ... that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count, such adverse sentencing consequences may properly be imposed if there was agreement to the contrary. This 'contrary agreement' proviso is what has since been called a *Harvey* waiver." People v. Beck (1993) 17 Cal.App.4th 209, 215. *

"**HENRY**." The government violates a pre-trial detainee's right to counsel when it deliberately creates a situation in which a prisoner is questioned by an informant at the behest of law enforcement in the absence of his counsel. United States v. Henry (1980) 447 U.S. 264, 274 [65 L.Ed.2d 115, 100 S.Ct. 2183]. See also Massiah v. United States (1964) 377 U.S. 201, 206 [12 L.Ed.2d 246, 84 S.Ct. 1199] (after release on bail, defendant's statements to co-defendant who was cooperating with police and instructed to inquire about the pending charges violated the Sixth Amendment). Also referred to as ***Massiah*** error. *

"KELLETT." Kellett v. Superior Court (1966) 63 Cal.2d 822. If all charges from a course of criminal conduct should have been joined, acquittal or conviction of one (even lesser) charge is a Penal Code §654 bar to further prosecution. *

"PENAL CODE §654" provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 prohibits multiple punishment for an individual course of conduct event though it violates more than one statute. People v. Hicks (1993) 6 Cal.4th 784, 789. *

"**PENAL CODE § 1118"** Penal Code section 1118.1 permits a party to move for a judgment of acquittal at the close of evidence before the submission of the case to the jury on the ground that the evidence is insufficient to sustain a conviction on appeal. *

"PENAL CODE § 1538.5" Penal Code § 1538.5 authorizes a motion to suppress or a motion to return property in a criminal case. *

"PENAL CODE §995" A motion to set aside an indictment or information following a preliminary hearing. *

"**KELLY-FRYE**." People v. Kelly (1976) 17 Cal.3d 24; Frye v. United States (DC Cir. 1923) 293 F. 1013. Evidence based on a new scientific technique is inadmissible until reliability of the scientific method and expertise of the interpreting witness are established. (Federal courts apply a different test, see Daubert v. Merrill Dow Pharmaceuticals, Inc. (1993) 509 U.S. 579 [125 L.Ed.2d 469, 113 S.Ct. 2786] (under FRE 702, trial judge has a special obligation to ensure any and all scientific testimony is not only relevant but reliable).) *Kelly* "set forth certain general principles of admissibility of expert testimony based on new scientific techniques, include the following two step-process: (1) The reliability of the method must be established by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. Additionally, (3) the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." People v. Leahy (1994) 8 Cal.4th 587, 594. "The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." People v. Venegas (1998) 18 Cal.4th 47, 80. *Kelly* applies only to a limited class of expert testimony based on a technique, process or theory which is new to science. People v. Stoll (1989) 49 Cal.3d 1136, 1156. The distinction is between expert testimony and scientific evidence, the former is not subject to the special admissibility rule of *Kelly*, which applies to cases involving novel devices or processes. People v. McDonald (1984) 37 Cal.3d 351, 372-373. California's state rule is now referred to simply as the *Kelly* test or rule. People v. Soto (1999) 21 Cal.4th 512, 515, fn. 3. *

"**LENT."** People v. Lent (1975) 15 Cal.3d 481. Under Penal Code §1203.1, the court may impose and require "reasonable conditions" of probation "specifically for the reformation and rehabilitation of the probationer." *

"A condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality...." *Lent* at p. 486. The test is clearly in the conjunctive, and thus all three factors must all be found to be present in order to invalidate a condition of probation. People v. Balestra (1999) 76 Cal.App.4th 57, 65, fn. 3. But there is no nexus requirement for a probation search condition. It may be imposed even if it has no "relationship to the crime of which the offenders was convicted" (*Lent* at p. 486*),* even if the underlying offense is not theft-related. People v. Brewer (2001) 87 Cal.App.4th 1298, 1311. In addition to *Lent's* three part test, constitutional safeguards circumscribe the court's discretion in imposing probation conditions. People v. Hodgkin (1987) 194 Cal.App.3d 795, 802; People v. Pointer (1984) 151 Cal.App.3d 1128, 1137.

"**MARSDEN**." People v. Marsden (1970) 2 Cal.3d 118. See People v. Stephens (19848) 156 Cal.App.3d 1119. Defendant's request to discharge/substitute counsel for incompetent defense requires in-camera hearing (prosecutor excluded). "A defendant is entitled to substitute another appointed attorney if the record clearly shows that the first appointed attorney is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." People v Valdez (2004) 32 Cal.4th 73, 95, citing People v. Welch (1999) 20 Cal.4th 701, 728. *

"**MURGIA**." Murgia v. Municipal Court (1975) 15 Cal.3d 286. See People v. Superior Court (Hartway) (1977) 19 Cal.3d 338. Motion to dismiss for lack of equal protection, alleging the defendant was singled out for prosecution only because of invidious discrimination. "Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution." *

"PITCHESS." Pitchess v. Superior Court (1974) 11 Cal.3d 531. See PC §§ 832.5, 832.7, 832.8; Evidence Code §§1043-1047. Defense motion to discover records of complaints in police personnel files to support a self-defense claim, usually in §§148/243 cases or in allegations of a coerced confession. Peace officer personnel records are confidential and shall not be disclosed except by discovery pursuit to EC §§1043 and 1045. *

"**SERNA**." Serna v. Superior Court (1985) 40 Cal.3d 239. Motion to dismiss for lack of speedy trial where delay between accusation and arrest exceeded statute of limitations period for a misdemeanor. *

"TROMBETTA." California v. Trombetta (1984) 467 U.S. 479 (81 L.Ed.2d 413, 104 S.Ct. 2528). If the state deliberately destroys material defense evidence, the prosecution may be limited in offering the people's version of the evidence (test results, etc.). "Law enforcement agencies have a duty under the due process clause of the Fourteenth Amendment, to preserve evidence that might be expected to play a significant role in the suspect's defense. To fall within the scope of this duty, the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means. The state's responsibility is further limited when the defendant's challenge is to the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. In such case, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." People v. Catlin (2001) 26 Cal.4th 81, 159-160 (citations to *Trombetta, Youngblood, Roybal and Beeler*); see also People v. Carter (II) (2005) 36 Cal.4th 1215, 1246. California initially had a stricter rule for such destruction (People v. Hitch (1974) 12 Cal.3d 641), which it has since abandoned. People v. Cooper (1991) 53 Cal.3d 771, 810; People v. Johnson (1989) 47 Cal.3d 1194, 1233-1234. *

"**WHEELER**." People v. Wheeler (1978) 22 Cal.3d 258. Motion to quash a jury venire and repeat jury selection, alleging a discriminatory exercise of peremptory challenges to exclude members of a cognizable group on a biased basis. "Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. Such a use of peremptories by the prosecution 'violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under [both the state and federal Constitutions].'" *

"MOTION TO REDUCE CHARGES (Penal Code §17(b)). Commonly known as a "17(b)" motion. This provision invests the trial court with discretion to treat a felony punishable … by imprisonment in the state prison or by fine or imprisonment in the county jail as a misdemeanor. These offenses, which can be sentenced either in state prison or county jail (commonly as a term of probation), are known as "wobblers." Offenses which state only imprisonment as the punishment are referred to as "straight felonies." (See People v. Mendez (1991) 234 Cal.App.3d 1773, 1779 fn. 5.) *