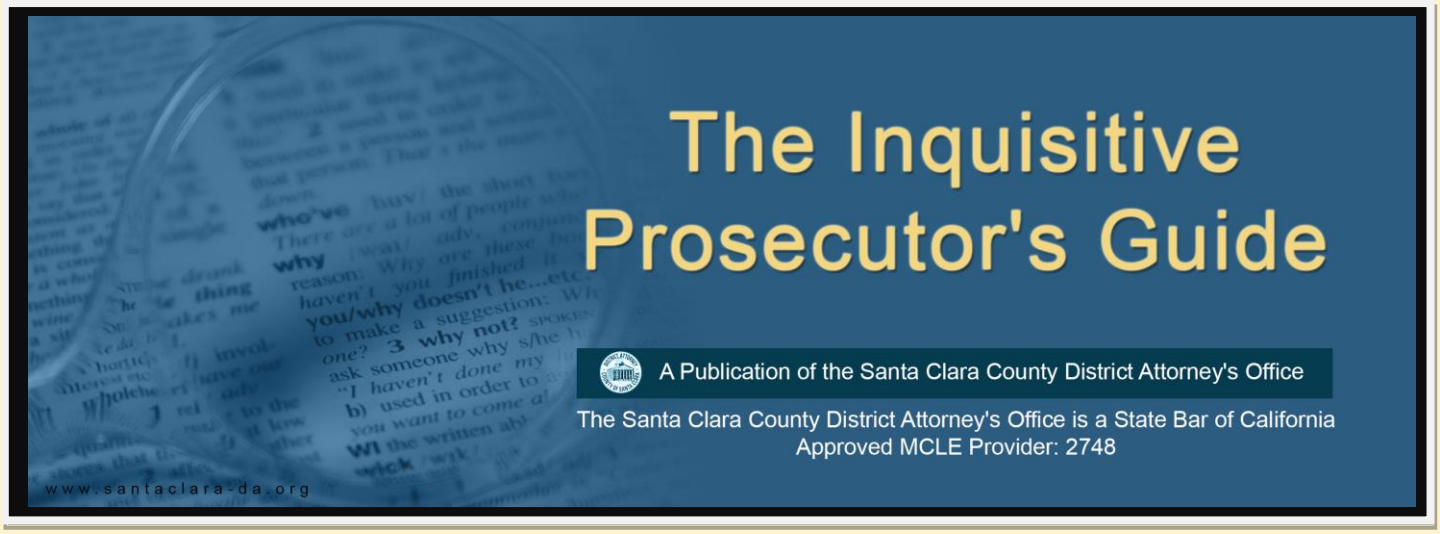

August 1, 2023 **2023-IPG-57 (RECENT CSC OPINIONS: *LEWIS* & *PRUDHOLME*)**

This edition of the Inquisitive Prosecutor's Guide discusses two recent California Supreme Court decisions.

In ***People* v. *Lewis*** (2023) 14 Cal.5th 876 [2023 WL 4112145], the California Supreme Court decided the issue of whether the element of "force or fear" is "relaxed" when the adult being kidnapped is too intoxicated to consent to the movement. Some other ancillary issues of import were also raised. To assist us in understanding what happened in *Lewis* and its significance, we are joined on the accompany podcast by the trial prosecutor in the case, Santa Clara County DDA Jonathan Beardsley.

In ***People* v. *Prudholme*** (2023) 14 Cal.5th 961 [2023 WL 4169428], the California Supreme Court decided the question of whether the legislative reduction in probationary periods enacted by AB 1950 (that went into effect in 2021) applied retroactively to defendants whose cases were not final – *even if the length of the probationary period had been negotiated as part of a plea bargain*. To help in explaining the rationale underlying *that* decision, we are joined on the accompanying podcast by a prosecutor who has had to argue a similar question in other cases, Santa Clara County DDA Pablo Wudka-Robles.

This podcast will provide **70 minutes of (self-study) MCLE general credit** and may be accessed at: **http://sccdaipg.podbean.com/**

A Defendant Acting with an Illegal Intent or Purpose May be Liable for Kidnapping a Person Who, Because of Intoxication or Other Mental Condition, is Unable to Consent to the Movement - *Even if* the Force Used Is No Greater than the Amount of Physical Force Required to Take and Carry the Victim Away a Substantial Distance

People* v. *Lewis (2023) 14 Cal.5th 876 [citations to 2023 WL 4112145]

Facts and Procedural Background

After having dinner and sharing a bottle of wine with a date, the victim and her date took a taxi to a local bar. At the bar, the victim has some more to drink – enough to make her feel tipsy. At some point, the victim realized she had lost her phone, separated from her date, and walked around the bar looking for it. The defendant approached the victim and asked what she was doing. The victim said she had lost her phone. The defendant then falsely claimed his friend had found a phone and made it appear as if he was calling his friend. The defendant suggested they have a drink while they waited for his friend to return. (***Id***. at p. *3.) The defendant ordered two drinks, as well as a shot for the victim. The victim drank the shot and sipped her other drink. The defendant ordered two more shots. The bartender initially refused to serve the drinks because she believed the victim was too drunk and could barely stand up. However, under pressure from the defendant, the bartender relented. The defendant and the victim each drank a shot. (***Ibid***.) Some flirtation may have occurred. The defendant then took the victim's hand, put his arm around her back, and began to usher her away from the bar. The victim stepped free of the defendant and walked ahead of him across the dance floor through the crowd. The defendant followed. (***Id***. at p. *5; ***People* v. *Lewis*** (2021) 72 Cal.App.5th 1, 8.)*

Editor's note:** ***People* v. *Lewis (2021) 72 Cal.App.5th 1 was the lower Court of Appeal opinion that was reversed in the instant case. IPG draws some of its factual description from that opinion. Based on that opinion and the factual summary in the California Supreme Court opinion, the victim's date attempted to follow the victim and defendant as they walked by and away from the victim's date, but the bar was so crowded he was unable to do so, and he went back to dancing. Before leaving the bar himself, the victim's date looked for the victim but did not locate her and eventually left the bar. The victim's date took a taxi back to the victim's house, but she was not there, so he slept in his car. (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145, *3]; ***People* v. *Lewis*** (2021) 72 Cal.App.5th 1, 8.) The victim and victim's date later got married and were wed before the trial took place. (***People* v. *Lewis*** (2021) (concurring and dissenting opinion) 72 Cal.App.5th 1, 23, fn. 1.)

The victim and the defendant left in the defendant's car. The victim had no memory of leaving with the defendant - likely because she was under the influence of a combination of alcohol and Xanax. (***Id***. at pp. *3-*4.)

> ***Editor's note:** As explained by the trial prosecutor in the podcast accompanying this IPG, it was reasonable to believe that the defendant slipped the Xanax into one of the victim's drinks. The victim had no memory of ever ingesting Xanax. And Xanax, in combination with alcohol, can cause blackouts and memory loss. (***Id***. at p. *2, fn. 2.) Moreover, as recounted in the lower Court of Appeal opinion, Xanax is often put in alcoholic drinks to mask its taste. (***People* v. *Lewis*** (2021) 72 Cal.App.5th 1, 10 [reversed and remanded].)

After the defendant left with the victim, the defendant made three calls to his girlfriend as he drove to his home with the victim. (***Id***. at p. *4.) While the victim was incapable of resisting or consenting due to her intoxicated state, the defendant had sexual intercourse with the victim. The defendant then dumped the victim off near a parking lot, where she was later found early the next morning lying unconscious and wrapped in a blanket. (***Id***. at p. *2.)

She was eventually transported to a hospital. The victim slowly became more coherent and told a nurse she thought it was likely she had had sexual intercourse and said she had pain in her vagina. A sexual assault examination was conducted, and blood and urine tests performed.* The physical indicators were consistent with the victim's belief that she had vaginal intercourse, but not necessarily indicative of sexual assault. (***Ibid***.)

> ***Editor's note:** The blood test revealed a blood alcohol level of 0.18 percent, which, when retrogradely extrapolated, placed the victim's blood-alcohol level at 0.35 percent when she left the bar. The urine test disclosed the presence of Xanax, which the victim did not knowingly ingest. (***Id***. at pp. *2 and *3 at fn. 3.)

The defendant was later interviewed. At first, he claimed the victim asked him for a ride home and he obliged. He said she was "passing out" but she eventually awoke, started "freaking out," and demanded to leave the car. The defendant claimed he tried to convince the victim to stay in the car but eventually let her out in a driveway. The defendant initially denied having sex with the victim but admitted they had sex when confronted with the fact the police had a warrant to collect his DNA sample. (***Id***. at p. *4.)*

> ***Editor's note:** At trial, the defendant claimed he offered both the victim and her date a ride home, that the victim wanted a ride home alone, that they had consensual sex in his car, the victim was not too intoxicated to consent, and she asked to be let out of the car. He denied driving her to his place (although that was inconsistent with a subsequent tracking of his cell phone. (***Id***. at p. *4.)

The defendant was charged with raping the victim while she was intoxicated in violation of Penal Code section 261(a)(3) and kidnapping the victim to commit rape in violation of Penal Code section 209(b)). (***Id***. at p. *1.)

At trial, the prosecutor's theory of kidnapping for the purpose of rape was that the defendant kidnapped the victim *using both deception and force*, i.e., the defendant deceived the victim by claiming his friend had recovered her phone, and he used force against the victim by taking her forearm and guiding her out of the bar. (***Id***. at p. *5.)

***Editor's note:** Although not directly stated in the opinion, the prosecutor also argued there was sufficient force based on the mere act of driving the victim away in the car.

The jury was instructed that the defendant could be convicted of kidnapping to commit rape of an intoxicated person (i.e., a person who "is so intoxicated that he or she cannot give legal consent" to an act of sexual intercourse) based on causing the movement of a person through the use of force or through the use of deception. (***Id***. at p. *4.) The instruction was "a combination of CALCRIM No. 1201 (kidnapping a child or other person incapable of consent) and CALCRIM No. 1203 (kidnapping for the purpose of rape or other offenses)." (***Id***. at p. *5.) Specifically, the trial court identified the following elements:

(1) "the defendant intended to commit rape of a woman while intoxicated";

(2) "acting with that intent, the defendant used *physical force or deception* to take and carry away an unresisting person with a mental impairment";

(3) "acting with that intent, the defendant moved the person with a *mental impairment* a substantial distance";

(4) "the person with a *mental impairment* was moved or made to move a distance beyond that merely incidental to the commission of a rape of a woman while intoxicated";

(5) "when that movement began, the defendant already intended to commit rape of a woman while intoxicated";

(6) [the victim] "suffered from a *mental impairment* that made her incapable of giving legal consent to the movement"; and

(7) "the defendant knew or reasonably should have known that [the victim] was a person with a *mental impairment*." (***Id***. at p. *5.)

The jury was also given guidance as to what it meant to: (i) be a person with mental impairment; (ii) be incapable of giving legal consent; and (iii) engage in "deception." Specifically, the jury was told: "A person with a mental impairment may include [an] unconscious or intoxicated adult[ ] incapable of giving legal consent. A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences. [¶] Deception includes tricking the mentally impaired person into accompanying him or her a substantial distance for an illegal purpose." (***Ibid***.)

The parties largely agreed to this combination and the language as given, including the reference to movement of a person with a mental impairment." (***Ibid***.) However, the defendant objected to the inclusion of deception as an alternative theory of kidnapping. (***Ibid***.)

What Happened in the Court of Appeal?

After defendant was convicted of both charges, he challenged the conviction in the Court of Appeal on several grounds. One of those grounds was that the instruction allowed the jury to convict the defendant based on an erroneous theory that the asportation of element of kidnapping could be based on deceiving the victim into moving. Another issue raised, inter alia, was whether the case could be retried and that required the Court of Appeal to determine whether there was sufficient evidence that defendant used force or fear to compel the movement of the victim.

The Court of Appeal majority agreed that deception was not a lawful theory of kidnapping. It also found that the error was prejudicial because there was insufficient evidence to support a *lawful* theory of kidnapping (i.e., kidnapping by force or fear). It therefore reversed the defendant's conviction for kidnapping to commit rape and barred retrial based on insufficiency of the evidence." (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *5] citing to ***People* v. *Lewis*** (2021) 72 Cal.App.5th 1 at p. 23.) The Court of Appeal did not find it necessary to address claims there was insufficient evidence based on other grounds.

Editor's note:** The dissenting and concurring opinion of Justice Bedsworth in the Court of Appeal concluded that kidnapping *can* be accomplished without force or fear when the victim lacks "the capacity to legally consent to being moved, due to her inebriated condition," and thus the jury *could* lawfully have convicted the defendant of kidnapping based "upon proof that defendant took advantage of [the victim's] mental impairment by luring her out the bar under false pretenses for the purpose of raping her." (Id***. at p. 32.) Moreover, Justice Bedsworth believed that even if force or fear *were* required, the instructional error was harmless because "all [the prosecution] would have had to show is that [defendant], acting with unlawful intent, used enough force to take and carry [the victim] away a substantial distance while she was mentally incapacitated." (*Id*. at p. 33.) And driving the victim away from the bar "clearly and indisputably" established the use of enough force to move her a substantial distance while the kidnapping was in progress. (***Ibid***; see ***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *6.)

What Happened in the California Supreme Court?

In the California Supreme Court, the Attorney General agreed with the Court of Appeal that deception is an invalid theory of kidnapping even when the victim is an intoxicated adult. Accordingly, the California Supreme Court did not consider that issue, leaving it an open question.* (***Id***. at p. *6 ["We assume without deciding that it is not."].)

> ***Editor's note:** There was a fair amount of discussion of the issue of whether kidnapping by deception in the absence of force or fear is a valid theory in the concurring opinion. It is explored further in this IPG at pp. 12-13 and p. 17.)

However, the Attorney General *did* argue that the instructional error was harmless. And in order to make *that* determination, the California Supreme Court had to examine ***whether the force or fear element of kidnapping in the context of an intoxicated adult victim incorporated a relaxed standard of force akin to the standard used when an infant or small child is kidnapped.*** (***Id***. at p. *1.)

Holding and Analysis

1. The crime of kidnapping in violation of Penal Code section 207 is committed when a defendant "forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county". (***Id***. at p. *6.) Aggravated kidnapping in violation of Penal Code section 209, subdivision (b) requires the kidnapping be done for the purposes of robbery or specified sexual offenses.

2. Generally, to prove defendant guilty of simple kidnapping, it must be shown: "1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; ¶ 2. *Using that force or fear*, the defendant moved the other person [or made the other person move] a substantial distance; [AND] ¶ 3. The other person did not consent to the movement." (CALCRIM 1215, emphasis added by IPG.)

   To prove defendant guilty of aggravated kidnapping for purposes of rape, it must additionally be shown: 1. The defendant intended to commit [rape]; 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a [rape]; and ¶ 5. When that movement began, the defendant already intended to commit [rape]." (See CALCRIM 1203.)

3. "[O]rdinarily the force element in section 207 requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *8.], citing to ***In re Michele D.*** (2002) 29 Cal.4th 600, 606.) And "[n]ormally, "'[i]f a person's free will was not overborne by the use of force or the threat of force, there was no kidnapping.'" (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *10].)

4. However, the California Supreme Court has previously held that when the victim is an infant or small child too young to consent to the movement, the kidnapping statute incorporates a "relaxed standard of force." (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *1], citing to ***In re Michele D.*** (2002) 29 Cal.4th 600, 610.) Under this relaxed standard, "the amount of force required to kidnap an unresisting infant or child is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." (***Ibid***.)

> ***Editor's note:** Although the California Supreme Court used the term "relaxed standard of force" throughout its opinion, it did not weigh in on the exact parameters of that standard and declined to express an "opinion about whether the phrase 'relaxed force' fully captures the relevant showing, or whether a broader term would be more appropriate." (***Id***. at p. *14, fn. 9.) However, the court did note that "[t]he relaxed force requirement does not demand that the kidnapper touch his or her victim directly." (***Id***. at p. *14.)

The rationale is that because "infants and children are too young to give their consent to being moved," they are "in a different position vis-à-vis the force requirement for kidnapping than those who can apprehend the force being used against them and resist it." (***Ibid***.)

> ***Editor's note:** The Legislature later codified the standard described in ***In re Michele D***. (§ 207, subd. (e), added by Stats. 2003, ch. 23, § 1.). (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *8.].) The Legislature explained, however, was simply a codification of the holding in ***Michele D.*** and did "not constitute a change in existing law." (***Ibid***.) Specifically, subdivision (e) of section 207 now states: "For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." (Pen. Code, § 207(e).)

5. When the kidnapping victim is an adult "unresisting intoxicated person who is unable to legally consent," the "relaxed standard" of force or fear is equally applicable. (***Ibid***.) "The law protects the victim, who may go willingly with the defendant because he or she is unable to appreciate the defendant's illegal intent." (***Id***. at p. *10.)

6. It is not necessary for the relaxed standard to apply that such a person be intoxicated to the point of "total incapacitation or unconsciousness." (***Id***. at p. *9.) It is sufficient if "[t]he person is incapable of giving legal consent" and that just means the person "is unable to understand the act, its nature, and possible consequences." (***Ibid***.)

7. "In sum, a defendant acting with an illegal intent or purpose may be liable for kidnapping under section 207 if he or she uses physical force to take and carry away a person who, because of intoxication or other mental condition, is unable to consent to the movement. The quantum of force required is no greater than the amount of physical force required to take and carry the victim away a substantial distance". (***Id***. at p. *12 [and noting there is no constitutional prohibition on applying that standard in the instant case].)

8. The California Supreme Court observed that even though it must be shown that a kidnapper acted with an illegal intent or for an illegal purpose when the person kidnapped is unable to give legal consent (such as when the person kidnapped is an *unresisting* intoxicated victim), this "does not necessarily mean that a defendant who kidnaps a *resisting* intoxicated victim must act with such a specific intent." (***Id***. at p. *10, fn. 6, emphasis added by IPG, and noting that such a "situation is materially different" and need not be considered in the instant case]; **see also *People* v. *Hartland*** (2020) 54 Cal.App.5th 71, 78–79 [holding there is no requirement that the defendant be shown to have an illegal intent or purpose when an intoxicated victim is actively resisting the movement and "[t]he resistance means the victim does not actually consent to being transported, and that is sufficient to prove the element of lack of consent. It is no defense to claim that the victim was so intoxicated that the withholding of consent was legally invalid and that the perpetrator acted with innocent intent."].)

9. The California Supreme Court in ***Lewis*** declined to "consider the ***precise*** nature of the additional required mental state — illegal intent or illegal purpose — that is required in the relaxed force context." (***Id***. at p. *11, fn. 7.)* However, it noted that whatever the precise nature, "[t]he intent to rape certainly suffices." (***Ibid***.)

> ***Editor's note:** Nevertheless, the California Supreme Court directed readers of its opinion to take a look at the case of ***People* v. *Singh*** (2019) 42 Cal.App.5th 175, 181–183, a case which rejected an argument that the phrase "illegal intent or for an illegal purpose" in CALCRIM No. 1201, which sets out the elements for kidnapping a child or person incapable of consent, was unconstitutionally vague and broad, and that the failure to define the possible scope of a defendant's alleged illegal intent or purpose based on the evidence provided inadequate guidance to the jury." (***Id***. at p. 181.)

10. The California Supreme Court also observed that when a defendant is charged with kidnapping a victim who lacks the ability to consent, it must be shown that the defendant "knew or should have known of the victim's impaired state. A defendant is not liable for kidnapping a mentally impaired adult if the defendant actually and reasonably believed the victim was not a mentally impaired person. This requirement applies to the aggravated kidnapping of a mentally impaired adult alleged here (§ 209, subd. (b)), as well as the simple kidnapping of a mentally impaired adult (§ 207, subd. (a))." (***Id***. at p. *11.) This requirement "reflects the general principle that an alleged kidnapper must harbor at least 'criminal negligence as to consent.'" (***Ibid***, citing to ***People* v. *Fontenot*** (2019) 8 Cal.5th 57, 68.)

The California Supreme Court cautioned that, while the instructions given in trial court in the instant case met this requirement, "[j]ury instructions like CALCRIM No. 1201 [which sets out the elements for kidnapping a child or person incapable of consent] that do not explicitly recite this requirement, but rely on the relaxed force concept for kidnapping a mentally impaired adult, risk materially misstating the law." (***Id***. at p. *11, fn. 7.)

11. After assuming (without deciding) that the trial court erred by including deception as an alternate theory of kidnapping, the California Supreme Court held that any error in the instructions was harmless beyond a reasonable doubt.

> ***Editor's note:** The Attorney General contended that the instructions "*as a whole* were not erroneous because they adequately conveyed the relaxed force requirement, *notwithstanding* the inclusion of deception as an alternative" theory of kidnapping. (***Id***. at p. *13, emphasis added.) And given the standard of review, which considers whether there is a reasonable likelihood that the instructions caused the jury to apply the law in an impermissible manner, the Attorney General argued there was no basis to reverse the conviction. (***Ibid***.) The California Supreme declined to "definitively resolve whether a jury would have viewed the instructions as the Attorney General suggests" because "[e]ven assuming the instructions did *not* adequately convey the force requirement to the jury, any error was harmless beyond a reasonable doubt." (***Ibid***.)

12. When a jury is instructed on two theories of guilt (one valid and one invalid), the error is a form of "federal constitutional error under ***Chapman* v. *California*** (1967) 386 U.S. 18, 24" and thus "[t]he reviewing court must reverse the conviction *unless*, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *13, emphasis added by IPG.) In that circumstance, the fundamental question is whether "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (***Ibid***.)

"In determining … whether the error was harmless, the reviewing court is not limited to a review of the verdict itself." (***Ibid***.) A court may examine "the *entire* cause, including the evidence." (***Ibid***, emphasis added.) Thus, if, based on the findings the jury necessarily made to reach the verdict they did, is it clear beyond a reasonable doubt that the jury would *still* have convicted the defendant had the alternative theory *not* been presented. (***Ibid*** and fn. 8.)

> ***Editor's note:** The last sentence of the above paragraph is IPG's attempt at a simplified synopsis of what the ***Lewis*** court said rather than a verbatim recitation of the actual language used by the Court.

The California Supreme Court recognized that the assumed error in the case before it was "a form of alternative-theory error because it is premised on the idea that the jury may have found [the defendant] guilty based on an invalid theory of deception rather than a valid theory of [relaxed] force" while confirming that "no higher standard of review applies to alternative-theory error than applies to other misdescriptions of the elements. The same beyond a reasonable doubt standard applies to all such misdescriptions, including alternative-theory error." (***Ibid***.)

13. Applying that standard, the California Supreme Court found the error was harmless because, "[b]y its verdict, the jury [necessarily] found that [the defendant] moved or made [the victim] move a substantial distance, beyond that merely incidental to the commission of rape, and it was undisputed at trial that [the defendant] used some quantum of physical force — he admitted driving [the victim] in his car — to accomplish that movement." (***Id***. at p. *1 [bracketed information added or substituted by IPG].) "[A]nd the act of driving necessarily involved the application of physical force to [the victim] under the relaxed force standard in ***Michele***." (***Id***. at p. *14.)

> ***Editor's note:** The California Supreme Court recognized that an argument could be made that escorting the victim from the bar *could also potentially* have been relied upon to meet the relaxed force requirement and that if this were the only evidence of force, then it might or might not be clear beyond a reasonable doubt that the jury would still have convicted the defendant had the alternative theory of deception not been presented. (***Id***. at p. *14, fn. 9.) However, because the court concluded that defendant *indisputably* used physical force to move the victim in his vehicle, it was irrelevant whether the jury could view the movement from inside the bar to outside the bar as a form of deception. (***Id***. at p. *14 and fn. 9.) For that same reason, the court declined to express any opinion on whether simply "physically escorting" a victim to a different location could qualify as sufficient force under the "relaxed force" standard. (***Ibid***.)

Moreover, "[t]he jury also [necessarily] found the *remaining* elements of the offense, including that [the defendant] had the requisite illegal intent." (***Id***. at p. *1, emphasis and bracketed information added by IPG.)

"Any rational juror who made these findings would, based on the evidence at trial, have likewise found [the defendant] guilty of kidnapping under the relaxed force standard beyond a reasonable doubt." (***Ibid*** [citing to ***In re Lopez*** (2023) 14 Cal.5th 562, 589].) In other words, "it would be impossible, based on the evidence, for a jury to make the findings reflected in its verdict without also making the findings that would support a *valid* theory of liability." (***Id***. at p. *1.)

14. The California Supreme Court rejected the argument that since "the prosecution relied heavily" on the theory of deception during its opening and closing arguments, the error could not be harmless. (***Id***. at p. 14, fn. 10 [and noting a "prosecutor's mere reliance on an invalid theory will not overcome a showing of harmlessness"].)

15. The California Supreme Court rejected the argument that since there was insufficient evidence that the victim was "incapacitated," it could not be clear beyond a reasonable doubt that the jury would still have convicted the defendant of kidnapping under the relaxed standard of force had the alternative theory of deception not been presented. (***Id***. at p. *14.)

The court rejected the argument for two reasons. First, because the victim need not be "incapacitated" in order for the relaxed standard of force theory of kidnapping to apply. Rather, it just must be shown that the victim did not have the ability to give legal consent due to mental condition or impairment. (***Id***. at p. *14.) Second, even assuming "the jury instructions allowed the jury to rely on deception rather than force, the instructions did not eliminate the requirement of mental impairment." (***Ibid***.) Rather, the instructions required the jury to find "beyond a reasonable doubt that [the victim] was *mentally impaired* [due to intoxication] at the relevant time, regardless of whether it thought [the defendant] used force or deception to move her." (***Ibid***, italics and bracketed information added by IPG].)

16. Although the California Supreme Court reversed the Court of Appeal, it observed that the Court of Appeal did not address all of the defense claims that there was insufficient evidence to support the verdict (i.e., because the Court of Appeal found it unnecessary in light of its finding of prejudicial instructional error). Thus, it remanded the case back to the Court of Appeal to address those outstanding claims. (***Id***. at p. *15.)

***Editor's note: Although not entirely clear, per** DDA Jonathon Beardsley, the remaining contentions to be addressed are likely to be (i) whether there was sufficient evidence that defendant intended to have sexual intercourse with the victim knowing she would be too intoxicated to consent when the kidnapping began, and (ii) whether there was sufficient evidence that the victim could not legally consent to the movement.

Concurring Opinion of Justice Kruger (Joined by Justice Groban)

Justice Kruger wrote "separately to make two points about what the majority opinion says — and, importantly, what it does not say — about the substantive law governing the kidnapping of young children and intoxicated or otherwise impaired adults." (***Id***. at p. *15.)

1. First, Justice Kruger emphasized that while the validity of a "kidnapping-by-deception theory" was not addressed by the majority, it "remains an open and significant question" whether "the kidnapping of young or impaired victims can be accomplished by deception — or, for that matter, by any other means not involving technical uses of physical force —". (***Ibid***.)

   Justice Kruger reiterated that while the "crime of kidnapping typically cannot be accomplished by deception alone" (***ibid*; see e.g.**, ***People* v. *Stephenson*** (1974) 10 Cal.3d 652, 657 [no kidnapping where the defendant tricked the victims into accepting a ride home from the airport in his car, drove to a secluded location, and then robbed them of their belongings]), "when victims lack the ability to understand what is happening to them, whether because of their young age or mental condition, the law does not insist on the same force-or-fear showing as would be required in kidnapping cases involving victims who are legally capable of consenting to movement." (***Id***. at p. *15.)

   Justice Kruger believed that in the former circumstance, there are "reasons to doubt whether the law draws a firm line between" the use of actual physical force, if only in a technical sense, and "other ways of moving a victim." (***Id***. at p. *16.) She observed that it would "seem odd to interpret the statute in a way that fails to reach the defendant who lures a young child away with false promises of ice cream or puppies, without ever exerting the physical force necessary to hold a hand or push a stroller." (***Ibid***.) And noted that a defendant who moves a small child or someone suffering from a mental impairment for an unlawful purpose "would seem equally blameworthy, regardless of whether the movement was accomplished through the use of force in a technical sense, deception, or some other means." (***Ibid***.)

   Justice Kruger effectively laid out the argument for why deception *could* suffice as a theory of kidnapping in certain situations where the victim is lawfully unable to consent and the defendant "causes" the victim to move through deception.

   "Given the rationale underlying ***Michele D.,*** it could be argued that the operative standard under our precedent is best described not as a 'relaxed' or 'reduced' force standard, but as a constructive force standard — a standard that is satisfied so long as the defendant can be said to have *caused*

the movement of a victim who, because of the victim's young age, state of intoxication, or other mental impairment, can neither effectively resist nor consent to the movement." (***Id***. at p. *17, emphasis added by IPG.)

"One can easily conceive of ways that a person could accomplish the movement of an intoxicated or impaired person without any use of force at all. Imagine, for example, that instead of tricking an intoxicated victim into entering his car, the defendant persuaded her to walk with him to a nearby apartment. Or imagine that instead of taking the defendant's own car, the defendant hailed a cab or escorted her onto a city bus. In those scenarios, the defendant might not have deployed physical force to move his victim, but he would have caused her to move all the same. In all of these scenarios, the defendant has taken advantage of his victim's impairment to move her — by whatever means — to a location that "'substantially increase[d] the risk of harm [to her] over and above that necessarily present in the crime'" of rape itself." (***Id***. at p. *17.)

2. Justice Kruger emphasized that kidnapping in general requires "not just the intentional commission of physical acts, but also — at least — criminal negligence as to consent." (***Id***. at p. *18.) And that "[t]his principle holds in cases involving the kidnapping of young children or mentally impaired adults." (***Ibid***.)

Justice Kruger believed such a requirement is especially necessary in a relaxed force case involving an adult who is said to be unable to consent due to intoxication as it "may sometimes be difficult to determine whether another adult has reached a level of impairment that would preclude giving legal consent to being moved. Without the requirement that the defendant act with at least criminal negligence as to the victim's capacity to consent, there is a danger the defendant could be liable for simple kidnapping merely for transporting an adult the defendant reasonably believed was coming along voluntarily, with any illegal intent or unlawful purpose." (***Id***. at p. *19.)

Questions an Inquisitive Prosecutor Might Have After Reading *People* v. *Lewis* (2023) 14 Cal.5th 876 [2023 WL 4112145]

1. Does the relaxed standard for force or fear apply in *other circumstances* than when the kidnapping victim is infant or small child or too intoxicated to provide consent?

The relaxed standard of force or fear should apply *whenever* the person kidnapped is unable to consent. In ***People* v. *Lewis*** (2023) 14 Cal.5th 876 [2023 WL 4112145], the California Supreme Court viewed all persons who are "unable to consent to being moved," including adults "who by reason of extreme intoxication, delirium or unconsciousness from injury or illness [are] unable to give [their] consent" as "similarly vulnerable to kidnapping" and accordingly, as subject to the relaxed standard of force or fear applicable to infants and children. (***Id***. at p. *9; **see also** concurring opinion of Justice Kruger at p. *15.)

> ***Editor's note:** Some other specialized varieties of kidnapping do not necessarily require force or fear at all. (**See *People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145, at p. *6, fn. 5 citing to Pen. Code, § 207, subds. (c), (d)].)

2. Does physically "escorting" a victim from one place to another suffice to meet the force or fear element under the relaxed standard of force or fear applicable when the victim is legally unable to consent to being moved?

In the ***Lewis*** case, prior to driving the victim, the defendant also "escorted" the victim from inside to outside the bar. Specifically, the defendant took the victim's hand, put his arm around her back, and began to usher her away from the bar. The victim stepped free of the defendant and walked ahead of him across the dance floor through the crowd. The defendant followed. (***Id***. at p. *5; ***People* v. *Lewis*** (2021) 72 Cal.App.5th 1, 8.)

The question arose (but was not decided by the California Supreme Court) in ***Lewis*** whether physically escorting a victim legally unable to consent from one place to another for an illegal purpose or intent could suffice to meet the relaxed force requirement. (***Id***. at p. *14, fn. 9.) Although the majority opinion did not address the question, the concurring opinion of Justice Kruger strongly suggested that it could.

The concurring opinion discussed the case of ***People* v. *Oliver*** (1961) 55 Cal.2d 761, a case involving a defendant who led a two-year-old boy away by the hand, taking him from an alley at the back of his home behind a fence somewhere nearby. (***Lewis*** at p. *16.) Justice Kruger characterized ***Oliver*** as concluding, "at least implicitly, that leading the willing child away by the hand satisfied the statute's requirement of a forcible taking." (***Ibid***.) Moreover, in the case of ***People* v. *Dalerio*** (2006) 144 Cal.App.4th 775, 782, a case mentioned by both the majority and concurring opinion in ***Lewis***, the appellate court held that evidence of kidnapping sufficed to satisfy the corpus delicti rule where the defendant "deceived a nine-year-old child into voluntarily accompanying him" by telling her that her friends were nearby "looking at a deer" and then "*physically escorted*" her to a remote location. (***Lewis*** at pp. *14, fn. 9 and *16.)

It remains an open question whether merely escorting a victim from one location to another suffices to meet the quantum of force necessary when applying the relaxed standard of force of fear. Similarly, it remains an open question whether the force must be directly applied by the defendant or can be indirectly applied. However, given the analysis in the concurring opinion and the gist of the majority opinion, it is likely (but not certain) that whatever force is necessary to move the victim (including physically escorting the victim) should suffice to meet the element – and regardless of whether that force is directly or indirectly applied. (***Lewis*** at p. 14; this IPG at p. 7.)

3. Should the current jury instructions relating to a charge of violating Penal Code section 209(b) be modified when the kidnapping victim is legally unable to consent to being moved due to his/her intoxication?

Both the majority and concurring opinion in ***Lewis*** largely approved of the instructions (sans reference to kidnapping by deception as a valid theory) given by the trial court regarding what needed to be proved in order to establish the defendant kidnapped the victim with the intent to commit a rape in violation of Penal Code section 209(b). (***Id***. at pp. *11, fn. 7; *12, *14, *18.) Thus, if that is the charge in a future case, the jury instruction should include the following elements:

(1) the defendant intended to commit rape of a woman while intoxicated;

(2) acting with that intent, the defendant used physical force to take and carry away an unresisting person with a mental impairment;

3) acting with that intent, the defendant moved the person with a mental impairment a substantial distance;

(4) the person with a mental impairment was moved or made to move a distance beyond that merely incidental to the commission of a rape of a woman while intoxicated;

(5) when that movement began, the defendant already intended to commit rape of a woman while intoxicated;

(6) [the victim] suffered from a mental impairment that made her incapable of giving legal consent to the movement; and

(7) the defendant knew or reasonably should have known that [the victim] was a person with a mental impairment that made him/her incapable of giving legal consent (***Id***. at p. *5.)

A. Suggested model jury instruction in a simple kidnapping case (Pen. Code, § 207) where the adult victim is a person legally unable to consent to the movement.

Courts should use a combination of CALCRIM 1215 [in light of its bench notes on a court's instructional duties and related instructions] and CALCRIM 1201 when the kidnapping is someone legally incapable of providing consent. It would read like this:

1. The defendant used sufficient physical force to take and carry away an unresisting adult person with a mental impairment;
2. The defendant moved the person with a mental impairment a substantial distance;
3. The person who was moved suffered from a mental impairment that made (him/her) incapable of giving legal consent to the movement;
4. The defendant moved the person with a mental impairment with an illegal intent or for an illegal purpose;
5. The defendant knew or reasonably should have known that the person moved suffered from a mental impairment [such as unconsciousness from injury or illness, intoxication, or delirium] that rendered the person incapable of giving legal consent.

The jury should also be instructed that: "A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences."

The jury should also be instructed that "[t]he physical force to take and carry away an unresisting person with a mental impairment need only be the force necessary to accomplish such a taking and carrying away."

4. Should a prosecutor *ever* proceed on a theory of kidnapping by deception when the victim is legally unable to consent to being moved?

IPG respectfully recommends that prosecutors **should be extremely wary of relying on a theory of kidnapping based on** deception for several reasons. First, the California Supreme Court in ***People* v. *Lewis*** (2023) 14 Cal.5th 876, --- [2023 WL 4112145 at p. *6] did not decide the question of whether kidnapping a person legally unable to consent when the person is moved via deception is a viable theory of kidnapping. Second, there is some case law holding it is **not** valid theory in general - even in "relaxed force" circumstances. (**See *People* v. *Nieto*** (2021) 62 Cal.App.5th 188, 197 [holding that deception is not an alternative to force under the general kidnapping statute even in a case involving a six-year-old victim].)

Deception as a theory of kidnapping, if relied upon at all, should only be relied upon when no other recognized theory of kidnapping is applicable and when something akin to the circumstances discussed in the concurring opinion in ***Lewis*** at pp. *16 and *17 and this IPG at pp. 12-13 are present. That is, when the victim is legally unable to consent and the deception *causes* the victim to be moved.

The Law Reducing the Length of Probation to Two Years for Most Felonies Should be Applied to *Nonfinal* Cases Even Though the Length of the Period of Probation Was Reached After a Plea Bargained Agreement.
People* v. *Prudholme (2023) 14 Cal.5th 961 [citations to 2023 WL 4169428]

Facts and Procedural Background

In 2018, the defendant committed a second degree robbery, which carried a maximum penalty of five years in state prison. Pursuant to a negotiated plea bargain, the charge of robbery was dismissed, and defendant pled to second degree burglary, a wobbler punishable by a prison term of 16, 24, or 36 months, or up to one year in the county jail. The maximum available probationary term was five years, but the parties agreed to three years of probation. The conditions of probation required defendant to serve a year in the county jail. (***Id***. at p. *1.)

The defendant filed an appeal (albeit the basis of the appeal is not specified). While that appeal was pending, the Legislature enacted Assembly Bill 1950, which amended Penal Code section 1203.1 to reduce the amount of time a person convicted of most* felonies could receive to two years. (***Id***. at pp. *2-*3.) The amended version went into effect on January 1, 2022.

> ***Editor's note**: "The new two-year probation limit of Assembly Bill 1950 does not apply to violent felonies defined in section 667.5, subdivision (c), offenses which include 'specific probation lengths within its provisions,' or to certain theft or financial crimes exceeding a loss of $25,000. (§ 1203.1, subd. (l)(1) & (2).)" (***Ibid***.)

Before the passage of AB 1950, section 1203.1 allowed a court to impose felony probation for a period "not exceeding the maximum possible term of the sentence," except "where the maximum possible term of the sentence [was] five years or less," in which case probation could not continue for over five years. (***Ibid***.)

The defendant argued that he was entitled to a reduction of his probation term to two years since AB 1950 is a statute that reduces punishment (i.e., is an ameliorative statute) that went into effect while his case was pending on appeal (i.e., his case was not final) and such statutes apply retroactively to all cases not yet final. (***Id***. at p. *3.) Moreover, defendant argued that not only should the probation term be reduced to two years, but that the remainder of the plea agreement should remain in place. (***Id***. at p. *1.)

The Court of Appeal agreed that AB 1950 applied to defendant retroactively but that the decision in ***People* v. *Stamps*** (2020) 9 Cal.5th 685 [discussed in this IPG at p. 21] required the case be remanded to the trial court to "permit the People and trial court an opportunity to withdraw from the plea agreement." (***Ibid***.)

The California Supreme Court took the case up for review to determine whether AB 1950 was retroactive to all nonfinal cases and, if so, whether the People should be given the opportunity to withdraw from the plea bargain if the term of probation was reduced as a result of that retroactive application. (***Id***. at p. *1.)

Holding and Analysis

1. "[A] new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." And Penal Code section 3 provides that that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared.'" (***Id***. at p. *3.)

2. Nevertheless, "both the Legislature and the electorate (sometimes hereafter 'enactors') have the power, subject to constitutional limitations, to declare that an amendment is to apply retroactively." (***Ibid***.)

3. When it is not clear whether the legislation was intended to apply retroactively, courts resort to the principle of statutory interpretation adopted in the case of ***In re Estrada*** (1965) 63 Cal.2d 740. Under the rule adopted in ***Estrada***, "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage *provided the judgment convicting the defendant of the act is not final*." (***Id***. at p. *3, emphasis added by IPG.)

4. The legislature did not express an intent with regard to retroactivity when enacting AB 1950. (***Ibid***.) Thus, the question before the California Supreme Court was whether the principles underlying the ***Estrada*** rule would apply to legislation that did not technically reduce "punishment" but merely reduced the amount of time a person could serve on probation. (***Id***. at p. *4.)

5. Although recognizing that "a grant of probation is generally not considered punishment but an act of leniency aimed at reforming the defendant, reducing recidivism, and securing restitution to the victim," the California Supreme Court nevertheless decided to apply the ***Estrada*** rule. (***Ibid***.)

The court reasoned that "while placing a defendant on probation itself is deemed an act of clemency, the court may impose various conditions on the probationary grant. These include the imposition of a jail term, the suspension of a further jail or prison sentence, and the payment of a fine or victim restitution. In addition, the court may require the probationer to submit to a search of his home, car, person, electronic devices and social media accounts. Probation conditions may restrict where the defendant can go, with whom he can associate, where he lives and whether he can move or leave the county. He may be required to wear a device that continuously monitors his whereabouts. While probation conditions can serve rehabilitative ends, they can also be invasive and restrictive. Their violation can lead to a return to jail or prison, without the right to a jury trial on the question of the violation or the commission of a new offense." (***Id***. at p. *4.) These restrictions on personal liberty justified treating a reduction in probation as akin to a reduction in punishment subject to the rationale of ***Estrada.*** (***Ibid***.)

Accordingly, the California Supreme Court agreed with both parties that AB 1950 applied retroactively to all cases not yet final, including defendant's case, which was still pending on appeal when Assembly Bill 1950's amendment went into effect. (***Id***. at p. *5.)

6. The California Supreme Court then addressed the next question raised: what is the appropriate remedy when a term of probation is reduced but the probationary term was bargained for in a plea agreement? (***Id***. at p. *5.)

7. The California Supreme Court recognized that the legislature has the "*power to amend relevant statutes in a manner that permits modification of previous plea agreements*" (***id***. at p. *7) and the fact "[t]hat the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them" (***id***. at p. *8). (**See also** Pen. Code, § 1016.8, subds. (a)(1), (b) [stating that any provision of a bargain "that requires a defendant to generally waive future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may retroactively apply after the date of the plea is void as against public policy"].)

However, when retroactive legislation is potentially applicable to a plea bargained sentence, a defendant must establish both that the bill applies retroactively *and* that in enacting the bill, the

Legislature intended to overturn long-standing law that a court cannot unilaterally modify an agreed-upon term of a negotiated sentence. (***Prudholme*** at p. *7 citing to ***People* v. *Stamps*** (2020) 9 Cal.5th 685*; **see also** Pen. Code, § 1192.5 [prohibiting a court from proceeding "as to the plea other than as specified in the plea" but allowing a court to "withdraw its approval in the light of further consideration of the matter" which, in turn, allows a defendant to withdraw his plea]; **cf**., ***Harris* v. *Superior Court*** (2016) 1 Cal.5th 984, 991-992 [finding unambiguous language in Proposition 47 showed voters intended to allow reduction of certain felony convictions to misdemeanors regardless of whether those convictions resulted from plea agreements].)

> ***Editor's note:** In ***Stamps***, a defendant facing a potential "third strike" sentence of 25 years to life, agreed to a plea bargain imposing a nine-year sentence, which included a mandatory five-year enhancement for a prior conviction of a serious felony. At the time the plea was negotiated, "a fundamental assumption underlying the plea bargain" [citation omitted] was that the sentencing court could not strike such an enhancement. While that case was on appeal, the Legislature enacted a bill which "removed provisions that prohibited a trial court from striking a serious felony enhancement in furtherance of justice under section 1385." (***Prudhome*** at p. *6 citing to ***Stamps*** at p. 700.) The defendant then asked the Court of Appeal (and later the California Supreme Court) to remand the case to the trial court for the trial court to exercise its discretion under the new law (which the defendant argued applied retroactively to his nonfinal sentence.) (***Stamps*** at pp. 692-693.) The ***Stamps*** court agreed that the new law applied retroactively but held that the legislature did not signal that the new law was intended to overturn the "long-standing law limit[ing] the court's unilateral authority to strike an enhancement yet maintain other provisions of the plea bargain." (***Stamps*** at p. 701.) Under that long-standing law, a court is prohibited "from unilaterally modifying the terms of the bargain without affording … an opportunity to the aggrieved party to rescind the plea agreement and resume proceedings where they left off." (***Ibid***.) Accordingly, the California Supreme Court in ***Stamps*** ordered a remand to allow the defendant the opportunity to seek the court's exercise of its Penal section 1385 discretion to strike the enhancement. However, the California Supreme Court also held that if the trial court were inclined to exercise its discretion to strike the enhancement, the prosecution would have a right to withdraw its assent to the plea bargain. (***Id***. at pp. 707-708.) Moreover, the California Supreme Court held the trial court, on its own initiative, would have the option could withdraw its prior approval of the plea agreement. (***Id***. at p. 708.)

8. The legislature made no mention of the legislative intent regarding the application of the new probationary period enacted by AB 1950 to pleas. (***Id***. at p. *7.) Nevertheless, taking into the legislative history and the goals behind the bill's enactment, the California Supreme Court determined "that, by enacting Assembly Bill 1950, the Legislature intended that its new limitations on the maximum term of probation in amended section 1203.1 should be applied to existing, nonfinal plea agreements while otherwise maintaining the remainder of the bargain." (***Id***. at p. *11 [and disapproving ***People* v. *Scarano*** (2022) 74 Cal.App.5th 993, 1011 to the extent it held otherwise, at p. *11, fn. 13].)

Among the factors considered by the California Supreme Court in coming to this conclusion:

(i) the goals of AB 1950 of reducing "the length of probation across the board in order to increase probationary effectiveness and reduc[ing] the likelihood of incarceration for minor probation violations" "would seem to apply to all probationary terms regardless of whether they are imposed following conviction at trial, an open plea, or a plea agreement" (***id***. at p. *9)

(ii) the across-the-board approach adopted by the legislature, notwithstanding arguments for a more case-specific consideration in deciding the length of probation, signaled the legislature's "view that, for an eligible defendant, a shorter period of probation generally serves the public's interests, regardless of how a conviction was secured (***id***. at p. *10)

(iii) if the plea were withdrawn and "the bargained-for statutory probation term considered insufficient, the Peoples only recourse would be to require a plea to a more serious offense, making Assembly Bill 1950's two-year probation limit inapplicable, or to seek a prison term" and "[i]t seems doubtful the Legislature intended that its ameliorative action would transform plea bargains for probationary terms into dispositions calling for admission of a more serious offense or a state prison sentence, given the legislative history" (***ibid***)

(iv) applying the two-year period would not *substantially* deprive the State of the benefits for which it agreed to enter the bargain since the defendant would still have to serve a county jail sentence (which the People originally believed was a sufficient penalty), the defendant would remain subject to a probationary term (albeit one of shorter duration), and every other condition of probation would remain in place. (***Id***. at pp. *10-*11.)

9. The California Supreme Court **<u>begged</u>** the legislature (and initiative authors) to "consider the retroactive application of new laws and to regularly express their intent regarding if and how they should be applied retroactively." (***Id***. at p. *12 [and noting that determining legislative intent when the intent is not clear "can be a difficult, divisive, and time-consuming one for courts" – a problem that could be avoided if the "Legislature expressly states whether the sentencing reforms it enacts are to be given retroactive application on appeal or not, and if so, whether retroactive application applies to negotiated sentences or not"].)

Questions an Inquisitive Prosecutor Might Have After Reading *People* v. *Prudholme* (2023) 14 Cal.5th 961 [2023 WL 4169428]

1. Given that the legislature can easily upset the terms of a plea bargain by passing laws invalidating one or more aspects of the bargain, is there some way to include a term in the plea bargain providing that any future changes in the law would not invalidate the terms of the plea bargain?

To ensure that the People are not deprived of the benefit of their bargain and that defendants who avoided certain conviction on multiple or more serious charges as a result of a plea bargain do not obtain unjust and undue reduction in consequences, it would make sense to allow prosecutors to include terms that insulate the bargain against future changes in the law. However, notwithstanding these concerns or possible infringement on a core function of the executive branch, in 2019 the Legislature passed a bill that precludes such negotiated agreements.

Penal Code section 1016.8, effective January 1, 2020, states:

(a) The Legislature finds and declares all of the following:

(1) The California Supreme Court held in Doe v. Harris (2013) 57 Cal.4th 64 that, as a general rule, plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. That the parties enter into a plea agreement does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.

(2) In Boykin v. Alabama (1969) 395 U.S. 238, the United States Supreme Court held that because of the significant constitutional rights at stake in entering a guilty plea, due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary.

(3) Waiver is the voluntary, intelligent, and intentional relinquishment of a known right or privilege (Estelle v. Smith (1981) 451 U.S. 454, 471, fn. 16, quoting Johnson v. Zerbst (1938) 304 U.S. 458, 464). Waiver requires knowledge that the right exists (Taylor v. U.S. (1973) 414 U.S. 17, 19).

(4) A plea bargain that requires a defendant to generally waive unknown future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may occur after the date of the plea is not knowing and intelligent.

(b) ***A provision of a plea bargain that requires a defendant to generally waive future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may retroactively apply after the date of the plea is void as against public policy***.

(c) For purposes of this section, "plea bargain" has the same meaning as defined in subdivision (b) of Section 1192.7. (Emphasis added by IPG.)

2. Can a prosecutor and defense counsel agree to plea bargain that allows for a greater period of probation than authorized by Penal Code section 1203.1?

Although this question did not directly arise in ***People* v. *Prudholme*** (2023) 14 Cal.5th 961, the ***Prudholme*** court reiterated the general rule that "a court may not accept an unauthorized plea." (***Id***. at p. *8) """Where a trial court is asked to approve an illegal plea bargain — illegal because it violates a policy condition established by the Legislature or the people through the initiative process — the proper course of action for the court is clear. It should decline to act in excess of its authority and should refuse to approve an arrangement under which it is called upon to do so.""" (***Ibid***.) "Faced with ... an unlawful plea bargain, a trial court should withhold approval of the bargain." (***Ibid***.) "Thus, if a court has approved a plea bargain containing an illegal term, ordinarily, the recourse for a court would not be to reform the bargain to make it legal; it would be to withdraw its prior approval of the agreement." (***Ibid***.)

It is almost certain that an agreement to an unauthorized term of probation (i.e., lengthier than the two-year term described in Penal Code section 1203.1(a)), would be viewed as an illegal term. Instead, parties seeking an agreement that imposes a longer term of probation than two years in a felony case should consider having the defendant plead to a crime falling into one of the exceptions to the two year limitation. (See Pen. Code, 1203.1(l).)

Penal Code section 1203.1(l) states:
(l) The two-year probation limit in subdivision (a) ***shall not apply to***:
(1) An offense listed in subdivision (c) of Section 667.5 and an offense that includes specific probation lengths within its provisions. For these offenses, the court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding the maximum possible term of the sentence and under conditions as it shall determine. All other provisions of subdivision (a) shall apply.

(2) A felony conviction for paragraph (3) of subdivision (b) of Section 487, Section 503, and Section 532a, if the total value of the property taken exceeds twenty-five thousand dollars ($25,000). For these offenses, the court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding three years, and upon those terms and conditions as it shall determine. All other provisions of subdivision (a) shall apply." (Emphasis added by IPG.)

Keep in mind as well that a negotiated plea is not illegal or unauthorized just because the crime to which the defendant is pleading is not charged or is not a lesser included offense of the crime charged. Rather a "court, in accepting a knowing and voluntary plea of guilty or nolo contendere, is not limited in its jurisdiction to the offenses charged or necessarily included in those charged." (***People* v. *West*** (1970) 3 Cal.3d 595, 613.) However, "it is desirable that in a plea bargain the lesser offense to which a defendant pleads be one '***reasonably related to defendant's conduct***.' (ABA Standards, standard 3.1(b) (ii).) 'In this way, the defendant's record * * *, while not a completely accurate portrayal of his criminal history, will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion.' (ABA Standards, p. 68.) In common practice and under the ABA standard a reasonable relationship between the charged offense and the plea obtains when (1) the defendant pleads to the same type of offense as that charged (the ABA Standards refer to this as a 'categoric similarity'), or (2) when he pleads to an offense which he may have committed during the course of conduct which led to the charge." (***Ibid***, emphasis added by IPG.)

3. If the legislature passes a law ameliorating the penal consequences of the plea, will that new law *always* apply to nonfinal convictions arrived at by way of a plea bargain?

Although, in light of the decision in ***Prudholme***, the reduction in the length of probation is almost certain to apply to every plea-bargained conviction subject not yet final, this does not necessarily mean that a new law that does not specify whether it applies retroactively to plea-bargained convictions will *always* be retroactively applied to such convictions without allowing the prosecution to withdraw from the plea.

The California Supreme Court in ***Prudholme*** recognized but distinguished its earlier decision in ***People* v. *Collins*** (1978) 21 Cal.3d 208, which involved a defendant who, pursuant to a plea bargain, pleaded guilty to one count of oral copulation in exchange for dismissal of 14 other counts, but whose conviction was not yet final when the Legislature decriminalized oral copulation.

The ***Collins*** court held that the plea was invalidated by the elimination of the crime of oral copulation but also held the prosecution was deprived of the benefits of its bargain and that the dismissed counts (which remained crimes) could be revived. The ***Collins*** court stated: "When a defendant gains total relief from his vulnerability to sentence, the state is ***substantially deprived*** of the benefits for which it agreed to enter the bargain." (***Id***. at p. 215.) "The intervening act of the Legislature in decriminalizing the conduct for which he was convicted justifies a reversal of defendant's conviction and a direction that his conduct may not support further criminal proceedings on that subject; but it also destroys a fundamental assumption underlying the plea bargain that defendant would be vulnerable to a term of imprisonment. The state may therefore seek to reestablish defendant's vulnerability by reviving the counts dismissed." (***Id***. at p. 216.)

However, the ***Collins*** court also acknowledged that the defendant was not seeking to repudiate the bargain by attacking his guilty plea but "only the judgment, and [he] does so on the basis of external events - the repeal and reenactment of section 288a - that have rendered the judgment insupportable." (***Ibid***.) Accordingly, the California Supreme Court sought "a remedy that restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled." (***Ibid***.) That remedy was to permit "the state to revive one or more of the dismissed counts, but limit[] defendant's potential sentence to not more than three years in state prison, the term of punishment set by the Community Release Board pursuant to the determinate sentencing act." (***Ibid***.)

If application of a new law, that does not unambiguously state it applies retroactively to potentially reduce punishment or other penal consequences, to a plea bargained conviction "fundamentally alter[ ] the character of the bargain" in a way that "substantially deprive[s]" the State of the benefits for which it agreed to enter the bargain" (***Prudholme*** at p.*10), the decision in ***Prudholme*** should not prevent the trial court from permitting the People to withdraw from the plea bargain and thus restoring the parties to their pre-plea status.

NEXT EDITION: ISSUES INVOLVING PROVING AGGRAVATING CIRCUMSTANCES IN LIGHT OF THE RECENT CHANGES TO PENAL CODE SECTIONS 1170 AND 1170.1 *OR* THE IMPACT OF THE INTRODUCTION OF INADMISSIBLE EVIDENCE (INADVERTENTLY OR NOT) AND HOW TO MITIGATE THE DAMAGE *OR* HOW TO RESPOND WHEN THE DEFENSE COUNSEL ASKS YOU TO PROVIDE THE COMPLETE RAP SHEET OF A WITNESS (INCLUDING A DISCUSSION OF THE LATEST ATTORNEY GENERAL OPINIONS ON THE QUESTION).

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.