

# AMERICAN CRIMINAL LAW AND PROCEDURE

**KUL-LUBLIN-October 14-23, 2019**

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**Introduction: Prior to the first class, please read through the outline to note the Polish/English translation of relevant words and topics. This should assist in your understanding of the cases and legal concepts to be discussed in the class. Print and bring your outline to class, or have it available on your laptop in class. Please read in its entirety the search warrant affidavit that is also being provided to you, **and read it prior to attending the first class**. Read the Riley v. California case prior to the second class. Also included in your documents are an example of a complaint (the charging document) a change of plea form used in plea bargaining, and a Faretta waiver for those defendants asking to act as their own lawyer.**

**PP#1-Introduction /Santa Barbara, California**

- J. Maxeiner, “Learning From Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums” 32 Fordham Int’l L.J.32,39 (2008)

## **I. The Role of the District Attorney [Prokurator okregowy] in State Criminal Prosecutions**

- Pre-Arrest investigation (sledztwo w sprawie aresztu) — very close relationship between the police and District Attorney- much different than in the Federal Jurisdiction and other countries, including Poland: The exclusionary rule is the main reason! (See p.8-4<sup>th</sup> Amendment) The reasoning underlying the rule is to DETER the police illegal search/arrest/detentions!
- Some representative cases-PP#2
- Search [nakaz rewizji] and Arrest warrants [nakaz aresztowania] **The Search Warrant in your material should be read before the first class. See also p.9 re: Emergency Search Doctrine.**

- **Felony and Misdemeanor arrests without a warrant. See p.9 also**
- **Post arrest investigation (sledztwo w sprawie aresztowania) and preparation-first hours/days are important- See Jones murder case-PP 9+16**
- **Criminal Discovery [kryminalne odkrycie] and documentation of what has been provided.**
- **E-discovery (Electronic discovery)**
- **Lineups (sklady) –see below**
  
- **Filing of charges [skladanie oplat] -and discretion (Dyskrecja) vested with the District Attorney. **An example of a criminal complaint is included in your material.****
  - **Almost unlimited discretion - the very reason when abused it is so dangerous. This is probably the most important decision we make.**
  - **California “Realignment” Law of 2011 [Przeregulowanie]**
    - Effective October 1, 2011-Caused by prison overcrowding federal court lawsuits and 7/10 returned to prison within 3 years!
    - Major changes in the way California treats sentencing for a huge number of felony defendants.
    - Specified felons will serve their sentence in the local jail as opposed to the California State Prison system
    - what is a county jail? A state prison?
    - applicable to @ 500 felony offenses [including auto theft/burglary/grand [over\$950] theft, manslaughter while/intoxicated//assault/D/V/forgery/possession of drugs, etc.
    - sentence can exceed 1 year or any part of the 16-2-3 range
    - can also include supervised release (probation) half way house, drug program, home detention, electronic monitoring, mental health facility
    - allows 10 day flash incarceration
    - all on search and seizure conditions
    - non serious/violent/sex registrants or excessive taking white collar criminals are the exceptions.
    - defendant has no choice re electronic monitoring etc.....
    - 15 % increase in 10851’s after law passed=24,000 more car thefts in California....
    - S/L remains 3 years for these offenses, not 1[see S/L next section]
    - no parole [no S/S] if serve full term
    - many misdemeanor sentences will be just a few days!
    - \* Oct 1, 2011 to Oct 1, 2013, 26,000 less inmates in California State Prisons. 1,000 inmates a WEEK less

are going to prison. Prison population: 200,000 to 161,000 to 142,000 (June, 2013) 135,000 (July 2014) 134,500 (January, 2015) 132,000 (February 2015) 129,500 (May 2015) 127,405 (March 2016) 129,000 (August 2018) 125,000 (August 2019)[ 32 CSP-male=116,000+; 3 CSP-female=5,000+](In State) Now lawsuits pending in three counties re 4,000 inmates who cannot see doctor/disability/cancer treatment, etc.

California State Prison Population-February 2015: 29 % Black; 41% Hispanic; 23% White; 7% Other

Note- November 3, 2014 California by Proposition 47-possession of drugs a misdemeanor/all theft offenses and shoplift/burglary offenses are misdemeanors (\$950) Important also for “in the presence” arrest- see p. 9. Note-immediate effect: less people in custody-less early releases-drug court impact! Note Prison population drop above.

- The Statute of Limitations (Statut ograniczen) must be observed.
- Death/LWOP-no limitation
- 8+years in prison-6 years from commission of crime
- Less than 8 years-3 years from commission of crime
- Felony sex crimes-2014-If victim under age 18 S/L increased from victims 28<sup>th</sup> birthday to victims 40<sup>th</sup> birthday when the crime is committed on or after January 1, 2015, or for which the previous statute of limitations has not run as of January 1, 2015
- Almost all misdemeanors-1 year from commission. This is another reason Proposition 47 is important.
- Exceptions for theft of public money, many sex offenses and fraud offenses-4 years from discovery of crime.
- Commencing prosecution stops S/L-filing of complaint and issuing arrest warrant/indictment or information filed/and for misdemeanors: filing of complaint. **A copy of a criminal complaint and an arrest warrant is included in your material.**
- Important- as California DNA data bank (4<sup>th</sup> largest in the world) is getting 300 matches of forensic evidence a month!
- Note-Maryland v.King-2013-DNA taken at arrest ok.
- P v. Robinson- 47 Cal.4<sup>th</sup> 1104 (2010) DNA warrant upheld.

- Plea bargain waiver S/L: manslaughter/murder for example.
- Discriminatory prosecution (Dyskryminacyjne sciganie) will result in the case being dismissed. - Usual route is to ask California Attorney General to take case- or “wall off” the Deputy D.A.
- We decide whether to charge someone with a crime, what charge to be filed, the level of the charge {Felony or Misdemeanor? Three strikes? Two Strikes? Whether to make someone a witness or a defendant, and whether to arrest and incarcerate or send a letter for a voluntary appearance (Dobrowolny wyglad).
- Filing a “felony” as a misdemeanor very common- does not change the S/L though
- Some Common Crimes
  - Theft –Grand Theft [Schwerer Diebstahl][\\$950]-[important for making in the presence- arrests] **California Farm Produce=\$250**
  - Robbery [Rozboj]---Taking property by force and fear--
  - Burglary [Wlamanie]---entering a building or “locked” vehicle to commit theft (or a felony)

**Stare Decisis/Precedent/Statutory Construction-and the law of Burglary**

“Every person who enters any house, room, apartment,...shop,...store, ...barn, ...or other building, tent,...(etc.) any vehicle, when the doors are locked ...with intent to commit grand or petit larceny or any felony is guilty of burglary”

\*the slightest entry by any part of the person or an instrument is enough.

\*using a tool to create a hole in the wall; boring a hole in the wall; using an instrument to make the “entry”; entering a “closet” where original entry was with consent, then found out guns were in the closet-stolen=Burglary--- BUT not using a stolen ATM card, placing a forged check in the night deposit, or using a garage door opener stolen from a car outside to open the garage-no.

People v. Garcia- 2016-California Supreme Court in a 459/211/261- (commercial store-bathroom 261)“although a close case-cannot charge TWO 459’s unless subsequent “room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure”

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- Possession, sales of drugs.

- Driving while intoxicated (Odurzona jazda) PP 16-Kling
- Assault/ Battery/ Deadly Weapon Use clause:
- (Atak/Bateria/Uzywanie smiercionosnej broni)
- Arson [Podpalenie], Rape (Rzepak), Kidnapping (Porwanie), Child Molesting [Molestowanie dzieci]. PP#4- Burdick Arson case;
- PP#5-Vasquez child abuse/neglect
- Domestic Violence (Przemoc domowa) /Restraining Order Violations (Ograniczanie naruszen zamowien)-includes fiancee, current or past dating relationship!
- Stalking--“He knows where I am all the time“-GPS/tracking/text/ DV shelters often disable the cell phone of the abused victim on arrival at the shelter. Very useful in search and rescue operations, and criminals get caught a lot because of it.
- Facebook and prison inmates-10,000 cell phones confiscated in 2010, 12,000 in 2013, BUT 3,000 in 2014 (now a misdemeanor) - and first 6 months of 2015=955 seized! (CSP has 49 K-9 dogs to search for drugs and phones!)S/O used smuggled phone to search victims My Space page!
- PP#6- Varela murder-See p.14-[Public Safety exception to Miranda]
- Gang Crimes and Gang Enhancements-PP #17
- Juvenile Crime-Adult Prosecutions-Juarez-PP #18-under 18 when convicted can petition for resentencing on LWOP case after 15 years. Note- No DP for juvenile offenders (Roper v. Simmons)/No LWOP for non-homicide juveniles (Graham)/No mandatory LWOP for homicide juvenile offenders (Miller)/No “functional equivalent” of LWOP for non-homicide juvenile offenders-E.g. 110-life; 84-life-No. Perez (2013) 30-life with parole eligibility at age 47 is ok.
- Vehicle Manslaughter (Nieumyslne spowodowanie smierci pojazdu)
- Conspiracy- an agreement by 2 or more persons to jointly commit a crime- Important because of evidence rule that allows statements of co-conspirators to be admissible against ALL defendants if made during the conspiracy. Also an exception to the Hearsay Rule-see p.21.
- Conspiracy to commit a misdemeanor is a felony! (important because of laws of arrest for only a misdemeanor) Prop 47?
- Murder (Morderstwo)/Manslaughter/Lying in Wait-DV victim kills sleeping husband/261 victim kills defendant/Germany the Murder Clause? Poland?
- What is Voluntary manslaughter and “Heat of Passion?”-You intend to kill or act with conscious disregard for human life-Can be reduced if sudden impulse or heat of passion-defendant provoked/provocation would cause a reasonable person to act rashly and without due deliberation-that is –from passion and not judgment. Also—“Imperfect self-defense”—a person who

kills because he/she unreasonably but actually believes that he/she is in imminent danger of death or GBI does not act with “malice” and therefore crime is voluntary manslaughter.

- **Examples-**
- **Not Heat of Passion-name calling/smirking or staring/insulting words and gestures/**
- **Note-PC 192-2015 amended-“For purpose of determining sudden quarrel or heat of passion...the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity,...sexual expression, orientation, including under circumstances in which the victim made and unwanted non forcible sexual advance towards the defendant...” (Wharton example)**

## **II. POST FILING-Arraignment [Postawienie w stan oskarzenia]**

- **The Arraignment - first court appearance**
- **Bail [Kaucja] and or Own Recognizance release on a promise to appear [Wypusc obietnice, ktora sie pojawi]**
- **2018-Bail system abolished in California- now risk assessment used- unknown results-being challenged in court currently (2019)**
- **Appointment of attorney (Mianowanie pelnomocnika) - Gideon v. Wainwright- 1963**
- **The Public Defender (Obronca z urzedu) - overworked but very competent attorneys.**
- **Conflict free attorneys are required.**
- **Argersinger v. Hamlin- 1972- free lawyer for any offense that involves jail (Wiezienie).**
- **Faretta v. California- 1975- a 6-3 decision. Dissent-If there is any truth to the old proverb that “one who is his own lawyer has a fool for a client”, the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.” [“Jesli w starym przyslowie jest jakas prawda, ze „ten, kto jest jego wlasnym adwokatem, ma glupca dla klienta“,to dzis Trybunal przy dzisiejszej opinii przyznaje konstytucyjne prawo do oszukania samego siebie“]**
- **Faretta motion (request) must be timely-(trial date,ready for trial ,number and availability of witnesses , likelihood of delay) **A copy of a Faretta waiver is included in your documents.****
- **People v. Espinosa-2014-Court cannot revoke pro-per status for jail behavior(violence in jail) (jail suspended his privileges including phone calls)Also- DA should not make**

**motion to revoke pro-per status- only the Court! If defendant engages in serious and obstructionist misconduct- inside or outside the courtroom- that threatens the integrity of the trial –Faretta status can be revoked.**

- **People v. Peyton-2014- D filed three years of motions, attacking the integrity of the judge, DA, police etc:“ When I reverse you on appeal, I will make sure to rub it in your face!”—The Court: The record can only be read as an attempt to abuse the dignity of the courtroom and impugn the integrity of just about everyone involved in the case. This should not be tolerated.**
- **Interpreters (Tlumacze ustni), Spanish, Vietnamese, Hmong, sign language, etc.**
- **Discovery - now a two-way street!**
- **Restraining orders in domestic violence cases**
  
- **Huge numbers of cases—in a small jurisdiction like Santa Barbara- 60-80 cases every day—from murder to speeding**
- **60% of lesser charges (Misdemeanors (Wykroczenia) settle at arraignment**
- **Plea and Sentence Bargaining (Zarzut i negocjowanie zdan) - extremely common (What did the defendant do? What is the strength of the case? What is the Defendant's record? How bad is the damage, the loss or the injury? Restitution? [Restytucja], Age of the defendant? Numerous other factors, probation status, D.A. can take a chance even where Judge would not!**
- **A plea bargain is a contract- specific performance unless judge/good cause intervenes. [A copy of a plea bargain form is included in your material.](#)**

### ***POST FILING - Preliminary Hearing - Grand Jury***

- **Huge change in California- Hearsay (Pogloska) Preliminary Hearings**
- **Grand Jury- - 19 members-- gather evidence, secrecy, immunity from prosecution, avoid a preliminary hearing, like the Michael Jackson case- a Santa Barbara case. The District Attorney alone determines if the case proceeds to a Grand Jury.**

### ***POST FILING - Pre-Trial Motions***

- **Note- while very, very few cases result in a Jury Trial, the existence of the Right to Jury trial impacts numerous pretrial motions!**
- **Discovery motions — reports, experts and their professional background [e.g., ekspert od pisma rycznego]**

- Rough notes of lab experts, statements, photos, tapes, records, prior crimes/ of witness, psychiatric/psychological reports, counseling of sex offense /domestic violence victim. Beware of experts who want to help too much: BWS/RTS/DVAS/CAAS--etc.
- 2019-P. v. Wilson-Trial court abused its discretion by admitting the testimony of a prosecution expert on child abuse...” that studies show only a very small percentage of allegations of child sexual abuse are false” ...because “it tells the jury nothing about whether *this particular allegation* is false.”
- Note: MMPI in Poland: Volume 18, Polish Psychological Bulletin (1987)
- Forensic science is NOT personal opinion or advocacy: “if the law has made you a witness, remain a man of science. You have no victim to avenge, no guilty or innocent person to convict or save...” [Paul Broussard, Chair of Forensic medicine, Sorbonne, 1897]
- PP#7- NELSON-- Dependent Adult Sexual Abuse

### ***Lineups and Lineup Motions (Kolejnose ruchow)***

- Eyewitness (Naoczny swiadek) identification is important, common, and dangerous in that it is not reliable in many cases!
- Judge can order a lineup—and order defendant to be in it.
- cross racial identification is a common problem
- in the field showups are allowed-must be timely/not suggestive.
- 6 pack photo lineups are common—done on laptop now and preserved.
- Defendant has a right to a lawyer at a court ordered lineup-lawyers presence can help avoid problems.
- Jury told to consider: the time and opportunity of the witness to view the suspect; was the witness paying attention? Stress; accuracy of prior identifications; cross racial id? Expert testimony; how certain is the witness? Time between crime and the identification.
- Power Point #8-- The Vandenberg Federal Credit Union robbery-murder.

### ***Motion to Suppress evidence (Wniosek o stlumienie dowodow) - the Exclusionary Rule-Mapp v. Ohio***

**U.S. Constitution-4<sup>th</sup> Amendment: The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,**

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

- **Illegal search and arrests- evidence cannot be used.**
- **Emergency search/enter to arrest/hot pursuit (many of the cases in PP#2!)**
- **Emergency Aid Exception-Safety/Health risk is life threatening-someone needs immediate aid-entry necessary to prevent serious injury-ok without a warrant.**
- **P. v. Rubio- (2019)-11 gunshots at apt-victim/suspect inside? -found drugs-ok “failure to investigate would be a failure to discharge a duty of their office”**
- **2016-Fresno, California [population 500,000 and 1,200 911 calls per day], New York, Houston, Texas, Seattle, Washington=High Tec real-time crime centers- scour billions of data points, including arrest records, property records, commercial data bases, Web searches, Social Media postings, “Hoovering” cell phone data 200 police cameras,800 more from schools, traffic, and now- 400 more from police body cameras, license plate scans [2 billion],shot spotter to triangulate the location via microphones-etc....FBI now has Next Generation ID project=fingerprints, iris scans, facial recognition etc. Note-these things work- license plate scan broke Virginia case last year of TV news crew killing.**
- **Felony/Misdemeanor- “in the presence” requirement for almost all misdemeanors. No requirement like this for a felony- police can arrest on “probable cause.”**

### ***Arrest – Search and Seizure law (Prawo o aresztowaniu I prezeszukaniu I przejeciu)***

- **Mechanics of doing and getting a warrant.**
- **Warrants are preferred-every effort to uphold it if obtained!**
- **Probable Cause and the US Constitution’s 4<sup>th</sup> Amendment**
- **Facts---not conclusions! Let the Judge decide....**
- **2015-People v. Lazerus-DCA-20 year old murder and cold case investigation- staleness? “There is no bright line rule for determining when the information becomes “stale.” Courts have long recognized that firearms are likely to be retained by a suspect long after committing a crime. Further, because evidence on a computer is recoverable years after it has been downloaded, deleted, or viewed, the age of the information supporting a warrant is increasingly irrelevant when the object searched is stored on a computer.”**

- **Franks v. Delaware- 1978—ok to challenge warrant for deliberate false statements.**
- **Particularity—both for the location and the items to be seized. Now police use Google Maps! Split as of 2016 re items found “in plain view” during S/W execution—Special Master?**
- **Knock-notice (Powiadomienie Knock) is required.**
- **Sneak and Peek warrants? Used in 2018 Super bowl prostitution stings**
- **No Knock Warrants and Emergency Search Doctrine [Wharton/Childers cases]**
- **Katz v. United States-1967- reasonable expectation of privacy test (Rozsadne oczekiwanie prywatności)**
- **Nov 2012 9<sup>th</sup> Circuit {U.S. v. Wahchumwah}-no S/W required for undercover officer to video and audio record suspect during undercover buy in suspects home. Not a “search.”**
- **Facebook etc. Get Preservation order/friends/pictures/ wall postings**
- **Trash searches ok with no probable cause/warrant**
- **Confidential, reliable, unknown, paid informers and probable cause. In custody informers and accomplices require caution/corroboration!**
- **Residence arrests without a warrant are unlawful in most cases- Payton v. New York- 1980-emergency exception- hot pursuit [Goraca pogon] Police created exigencies: Kentucky v. King (2011): Police may rely on exigent circumstances so long as they have not violated or threatened to violate 4<sup>th</sup> Amendment.**
- **Dangerous! In 2014-50 killed by firearms (2 accidental) police officers killed while on duty. Deaths in line of duty (includes traffic, pursuits, assaults with car, heart attacks etc. @ 126 a year-;2016 135 officers killed on duty; 2017 129 officers; 2018 -144 officers killed, reversing a 1-year decline {52 by firearm, including their own weapon after suspect disarmed the officer} --9/11/2001 72 officers died in NYC attack.**
- **Note-California 2016 POST requirements for conflict resolution, de-escalation, crisis intervention, use of force, mental health, racial and cultural diversity training....**
- **California v. Acevedo-1991- vehicle- movable- search with probable cause and without warrant ok. A very important case!**

- **Chimel v. California- 1969- arm's length/weapons-evidence**
- **Search of car's SDM ( sensing and diagnostic module) without pc is not allowed:P.v.Gomez-2011-with pc ok P v. Diaz (2013)(speed and when brakes applied)**
- **Incident search of arrested PERSON is OK. But- (incident search of text messages on defendant's cell phone-Not without warrant or emergency (2014 –Riley v. California). Is it ok to compel P/W, F/P? Only P/W is testimonial. Note-Apple vs DOJ re San Bernardino terrorist attack: court order directing Apple to create special software to crack the phones PIN code. (Google, What's App, FB and Twitter support Apple) But-March 28<sup>th</sup>- FBI withdraws request- phone opened!**
- **Carpenter v. U.S. (2018) (5-4 decision) S/W required to obtain cell phone location data from wireless carrier. 4<sup>th</sup> A. must evolve to accommodate seismic shifts in digital technology.**
- **Maryland v. King (2013) (5-4 decision) taking DNA on arrest ok for "identification"-like fingerprints/photo [In 2003 a man concealing his face broke in to a woman's home with a gun and raped her. In 2009 King arrested on unrelated case and DNA taken and matched. Note-CODIS [Combined DNA Index System] began in 1994-now all 50 States include DNA testing on conviction, 28 like Maryland include for arrestees. Testing is faster and faster now- a few days in California vs months...soon...minutes!**
- **DNA and Genetic Genealogy-3<sup>rd</sup> cousin is close enough!**
- **Consent to search (Zgoda na wyszukiwanie) - third party consent/reasonable belief of authority to consent. Fernandez v. California-(2014)-Police can consensually search a jointly occupied dwelling when an objecting occupant is no longer present.**
- **Probation/parole search and seizure waivers-OK [People v. Schmitz (2010)187CA4th722-parolee in passenger seat] [search in back seat of car ok-glove box?]**
- **Administrative searches (Wyszukiwania administracyjne)ok-customs, airport/weapons/drugs/border searches. Also-Administrative searches by school officials ok- all that is needed is "reasonable suspicion"-In re Rafael C-March 28, 2016- search of students cell phone-Not affected by Riley!**

- Terry v. Ohio- 1968- Temporary detention (Tymczasowe zatrzymanie) for investigation and questioning is ok—e.g., Suspected Drunk Driver—not a crime to weave in the roadway. Lawrence Rosenthal in LADJ-May 2013: Stop and frisk policing builds on a critical insight of the great liberal Chief Justice Earl Warren...he ruled that the constitutional prohibition on unreasonable search and seizure does not require that the police wait until a crime has been committed before they can stop and frisk a suspect. Police can use stop and frisk to prevent crime, as long as they act on objectively reasonable suspicion. Enduring drop in crime rates followed, including a 2/3 reduction in NYC murder rate. Criminologists can find no non police related explanation for NYC's success. Also-Criminals are the worst racial profilers: after Terry, crime drop in minority areas was disproportional- most lives saved were minorities! Note- 2016-City of Chicago has @ 500 187's per year- arrests in @ ¼ of the cases. January, 2016- 50 murders in one month! March 28=131 187's and 605 shootings, an 85% increase. 2017 Chicago had 625 shot and killed and total of 682 murders, plus 2,936 shot but survived! August 2018 63 shot between August 3 and August 5<sup>th</sup>! [Chicago has pop. Of 2.7 million] [The "Ferguson" effect?] {200,000 stop and frisks!} {Poland has population of 38 million- and @ 300-400 187's a year} Rate in Poland dropped by ½ since year 2000 (from 2 per 100,000 to 0.08 per 100,000)**
- Heien v. North Carolina- USSCT-2014-a temporary detention- a traffic stop-for suspected law violation need only be justified by a reasonable suspicion-not probable cause-this is based on the officers understanding of the facts and the law.-and he/she may be reasonably mistaken on either ground (one brake light out-out of state plate expiration-rearview mirror obstruction-mistake as to curfew)-Reasonable suspicion the test!**
- People v. Brown-2015 California Supreme Court- a person might be detained when he submits to authority by remaining in a parked car after police lit up the car in response to a dispatch call involving a fight and possible firearm and police saw D drive away- OK ( Defendant drunk=23152a)**
- Drug detecting dog-not a "search" =PC- ok to search a moveable! But-2015-USSCT-cannot extend traffic stop to wait for drug dog.**
- Florida v. Jardines-2013-Drug dog sniff at front door is a search-requires PC-subsequent S/W ruled illegal and evidence suppressed ( 5-4 decision)**

- **U.S. v Jones-USSC-(2012):** Installation of GPS on vehicle + a “search” and requires S/W: you can get time, date and location on laptop, plus door openings and closings! GPS in cell phones, pre-installed GPS in vehicles, even satellite images will be issues now! -But 2019 Court of Appeal-ok w/o S/W if a parolee on S and S.
- **People v. Maikhio-2011-Game Wardens** (full police powers) do not need reasonable suspicion to stop hunter/fisherman and demand to inspect catch-same for boarding a boat etc.: special needs/only effective way to enforce the laws/less expectation of privacy because of the activity engaged in-close in time and distance from actual “taking”. E.g.- Ecology Law Quarterly articles. [3/day/24/year-no selling] [“Millions of years ago when dinosaurs inhabited this planet, extinction occurred at an average rate of...one form every 1,000 years. From the time of Christ to about 1800AD., one form of mammal was exterminated every 55 years...In the Us alone, no less than 40 birds and mammals have become extinct since 1820, 18 of them in the 20<sup>th</sup> century alone”]
- **Consent encounters - airport stops etc.** Is it a consensual encounter or a detention?
- **No driver’s license stops for no reason/ sobriety checkpoints** (Punkty kontroli trzezwosci)/border patrol stops/truck weigh stations
- **1990 USSCT upheld sobriety checkpoints:** set rules for stopping cars made by a supervisor; safety and identification that it is a police checkpoint (lights, police cars, signs, uniformed police), an effective location to deter others, duration short.—2,500 a year in California-California traffic deaths at lowest level since record keeping began in 1946 (3,434 in 2008/3,081 in 2009 and 2,715 in 2010) dropping at a rate of @11% a year! Note-2,816 in 2011, 2,857 in 2012, 3,104 in 2013, 3,387 in 2015, 3,623 in 2016! [cell phones, texting, non-citizens with CDL- bicycle and pedestrian deaths up]
- **2019-Google asked to drop checkpoint locations from WAZE!**
- **No searches that “shock the conscience”** (Wstrzasnij swiademyn)- Rochin v. California- 1952-
- **Schmerber v. California- 1966-drunk driver and forced draws** –that is- taking the blood sample by force- was legal.
- **Missouri v. McNealey (2013) - S/W required.** (In Schmerber defendant in accident and hospitalized-McNealey was arrested w/o accident and judge was available....) California implied consent law –ok without a warrant if no force used.

- **Mitchell v. Wisconsin (2019)** unconscious/uninjured=emergency (5-3 decision)-also says S/W in 5-15 minutes
- **Force may be used with S/W -People v. Rossetti-2014-4** officers-may use no more force than necessary to safely draw blood.
- **People v. Jones-2014-S/S** condition permits warrantless blood draw of suspected drunk driver. Cf: force?
- **People v. Youn-2014-Court** should not suppress evidence when the police act in reasonable reliance on binding precedent. (look to the reason for the Exclusionary Rule)
- **People v. Macabeo-2014-same** for cell phone search that predated Riley.
  - **Not applicable to civil cases, immigration matters, lawyer disbarment, probation violation hearings, and others. Emslie v. State Bar case.**
  - **The Fruit of the Poisonous Tree-** all that follows will be excluded unless the chain of illegality is broken. (can result in witness, or confession, being lost)
  - **United States v. Leon-** good faith exception if S/W used – No exclusionary rule! Not obviously defective warrant reviewed by officer’s superior, DDA and neutral judge=immunity also (Messerschmidt.v Millendeer- 2012- USSCT)
  - **Attenuation-intervening event-something happens that is removed sufficiently from the first illegal arrest. Not a ‘but for’ test.**
  - **Inevitable Discovery (Nieuchronne odkrycie) —like what happened in the “Christian Burial Case” (Nix v. Williams- 1984-** (search would not have been stopped and would have found the victim anyway)
  - **Harris v. New York- 1971-** illegally seized evidence can be used for impeachment.
  - **“Standing”—only the person whose rights were violated can suppress the evidence!**
  - **Examples—robbery getaway car-** no standing for two passengers; transponder in plane not owned/possessed by defendant-no standing; rented car by a third person- defendant not authorized driver- no standing; abandoned property-put down suitcase; airport search and denial of ownership- no

standing; ( no legitimate expectation of privacy in abandoned or unclaimed property)

- Overnight guest in home- standing.
- Visitor for a few hours- no standing

### ***Motion to exclude Defendants Statement - The Miranda Decision***

- Prior to Miranda- terrible cases of police violence to obtain confessions- including beatings, threats and delays in bringing before the court for arraignment.
- **Miranda v. Arizona- 1966- A most famous case. The 4 rights and waiver requirements. The purpose of Miranda is to negate the coercive effects of an interrogation conducted by law enforcement.**
- **Berghuis v. Thompkins-June 2010-USSCT-If a Miranda warning is given and understood, and an uncoerced statement is obtained=valid (though implied) waiver.**
- **Multiple attempts and means to avoid Miranda: Must be in custody -- station house questioning; telephonic; undercover officers; not applicable to traffic stop;**
- **No promises of leniency allowed getting statements: 2012 case-defendant invokes, parole agent says to him: “I don’t want to recommend maximum custody because you are not cooperating”- Miranda violation [P.v.Gonzalez 10/12/12] 46 years after Miranda! P.v.Westmoreland (2013) police told D you won’t get a life sentence if you admit and unpremeditated killing during a robbery- not true-suppressed.[Felony murder rule]**
- **Not in custody; free to leave etc.-telephone conversation- no Miranda required/not applicable to FBI job interview/ not applicable to traffic stop. Note-2015-People v. Morales-Defendant may be “in custody” despite being told free to leave: after being told he failed the polygraph and based on the aggressive, confrontational and accusatory questioning a reasonable person in the defendants position would not believe he was free to leave the station-Note mid-point Miranda still not enough-post Miranda confession was the result of police coercion!**
- **BUT- “not in custody” but complaint filed-People v. Engert (1987) Must Mirandize!**
- **J.D.B. v. N. Carolina (2011)-minors AGE is to be considered in determining whether or not he would have believed he was in custody and not free to leave=Miranda.**

- **P. Nelson-2012-Juvenile who waived Miranda must make clear and unambiguous invocation of right to remain silent- Asking to speak to mom not enough**
- **2014 in California-custodial interrogation at a fixed place of detention must be recorded in its entirety—but two full pages of exceptions-still admissible/jury instruction, etc.**
- **People v. Thomas (2011)187-janitor at school where 187 occurred- placed in back seat of police car for 20 minutes/doors shut and locked: “custody” undone when released and questioned outside of police car.**
- **Maryland v. Shatzer-2010—Edwards overruled-rule terminates 14 days after release from custody.**
- **Rhode Island v. Innis- 1980-Robbery- gun tossed- “too bad if a little girl found the gun and killed herself”-offhand remark not an interrogation- not enough reason to expect a response.**
- **Brewer v. Williams- 1977- the Christian Burial Speech-police designed to get a statement without questioning at all. [the statement inadmissible but the body ok]**
- **Snitch (Kapus-informator) in jail cell- no questioning – OK- but if 5<sup>th</sup> or 6<sup>th</sup> Amendment issues-very technical and tricky- need a DA. [P. v. Gonzalez- CSct-2011]**
- **Public Safety- where is the gun?**
- **Since 1984 times have changed-Public Safety Exception expansion to take into account terrorism? Treat captured terrorists as enemy combatants and try them in military courts [one of the six WWII German saboteurs captured in the US and executed was a US citizen]Question to get information not just about “ticking time bombs” but about future bombs/plots etc.??**
- **Example-Faisal Shahzads arrest 53 hours after car bomb left at Times Square –advice would be not to give Miranda at all.**
- **Test: whether there was an “objectively reasonable need to protect the police or the public from any immediate danger.” Terrorists seldom act alone, and simultaneous acts are common. Exception governs even if no advisement, or advisement and a refusal!**
- **Routine booking (Jail) questions are ok. But-Jail classification questions resulting in “gang” admission is not admissible (People v. Elizalde-Calif Sup Ct 2015 (basic biographical questions ok=- gang is likely to be incriminating); drug dealer arrested, phone rings,” It’s probably the guy looking for his money” “What guy?” “The guy that gave me the drugs to sell” admissible.**
- **Salinas v. Texas (2013) D went to station-non custody-no Miranda given-asked if his gun would match shells found at murder scene- remained silent and looked at floor. The 5<sup>th</sup> Amendment privilege guarantees that no one may be...**

compelled to be a witness against himself. But in order to invoke..., D must expressly claim it at the time- “Silence admissible to prove guilt.

- Impeachment of the defendant with statement taken in violation of Miranda.

***Motion to Dismiss for Procedural reasons, or for “outrageous” police (Law Enforcement- including District Attorney Misconduct), or insufficient evidence at The Preliminary Hearing or for legal errors by the judge at the preliminary Hearing or the Grand Jury proceeding.***

- e.g., Zepeda murder case; Attias tape recording of attorney phone call.
- People v. Alvarez-2014-Bad faith destruction of evidence- video surveillance existed of 2 committing a strong-arm robbery- DA and police told that videos would not be destroyed-robbery case dismissed-bad faith. What...”is so disturbing about un-retained or destroyed evidence is that we can never truly know what was lost.”
- Conflict of interest/Attorney General/motion to recuse DA. (allegation that children of DA would be called as witnesses)

### **III. JURY TRIALS (Proby Jury)**

- US Supreme Court: right only if penalty is more than 6 months in custody- California and most states: ANY jail time = Jury Trial.
- 6-person jury and 10-12 for conviction is constitutional
- Speedy Trial rights - usually 60 days but common for a felony case to go to trial about a year after the crime.
- Picking the Jury - voir dire examination {12 volunteers}
- Questioning by judge and the attorneys, juror questionnaires, and alternates.
- Tweeting/Texting/Google/searches/new problems every day! Judge must do more to prevent problems. Effective 2012-trial judge required in civil and criminal cases to explain that the prohibition re research, dissemination of information and conversation applies to all forms of electronic and wireless communication!
- “Facebook is every jury profiler’s greatest friend”—Wi-Fi in courtrooms-law firm associates in the rear of the courtroom with a laptop running online searches of jurors! [As of 2012 FB has 800 million users posting 25 billion pieces

of content a month!] 2014-890 million daily users! In 2015 1.5 BILLION users who log in at least once a month!!Plus-70 different language translators!

- Challenges (Wyzwania) for cause and for no reason at all.
- Challenges of jurors for improper reasons---Race or any cognizable class—P v. Cisneros-2015- “...failure to articulate anything about the excused jurors did nothing to dispel the reasonable inference the prosecutor preferred women to men and was exercising peremptory challenges to effect that preference.”
- Batson/Wheeler-social worker, gang friends, knew defendants family, relative incarcerated unfairly, prejudice against police, ambiguous answers, young-single-not registered to vote=no responsibility, occupation (probation officer- nurse) , prior hung jury
- Keeping notes and having real reasons- especially in death penalty jury selection.
- Change of venue- too much prejudicial pre-trial publicity. [Michael Jackson case]
  
- The Jury Trial- most common on American TV but in fact very few cases are tried at all. Of those that are, 8—8.5 out of 10 will be found guilty.
  
- The Opening Statement. (See PP #8-p.4) (Oswiadczenie otwierajace)
  
- Direct Examination - no leading questions --A leading question is one that suggests the answer or has the answer in the question.  
Some examples: “Was the get-a-way car a red Volvo?”  
“Did you arrive home at 10:37 PM?”  
“Did you give the defendant your money because you were afraid for your life?”
- Cross Examination- almost anything goes. —Bias, inconsistent statements, prior crimes or bad acts, reputation and character witnesses, ...as a District Attorney – do not make the mistake of attacking every witness- e.g., the defendant’s mother etc.
- Leading questions are permitted on cross examination- “Is it not true that every word you said is nothing but a big fat lie, and that you and your witness are just making things up as you go along?”
- “Sarah, you’re a witness. And it’s the defense’s job to show the jury that you’re a rotten witness because you’ve got a rotten character.” [Kelly McGillis (playing the DA) to Jodie Foster in “The Accused” ( 1988)

- **Direct and Cross of experts---DNA, Medical issues, alcohol impairment, and psychiatric defenses. (Note- California and most states eliminated “Diminished Capacity”) As in ANY case- criminal or civil- the attorney has to understand the technical material and make sure the JURY understands it too!)**
- **District Attorney should NEVER be afraid to ask a question in fear of the truth.**
- **Closing Arguments (Zamkniecie argumentu) by District Attorney and Defense Attorney, PP#6- Varela murder; Jones video/PP#16-PP#9**
- **Instructions to the Jury**
- **COMMON DEFENSES (Wspolna obrona)**
  - **The most common approach by the defense in a jury trial is to attempt to raise a reasonable doubt as to the defendants’ guilt, and to argue that the defendant is presumed to be innocent unless guilt is proved beyond a reasonable doubt. PP#9-Noriega murder case. [See in Death Penalty section]**
- **In California- ALL 12 jurors must agree to any verdict.**
- **Entrapment -Is what the Government did likely to get a law-abiding person to commit the crime?**
  - **“Reverse stings” are legal**
  - **Internet child molest stings are legal**
- **Insanity- Power Point- Attias video (10) and PP#11**
- **Did the defendant know the difference between “right” and “wrong” and did the defendant understand what he/she was doing?**
- **Double Jeopardy (Podwojne zagrozenie)**
  - **multiple jury trials are permitted-2016-P.Verducci-Calif 187 ok after 4 trials!**
  - **State and Federal prosecutions for the same acts are permitted.**
  - **Multi-Country prosecutions generally prohibited. PP#12-Hively Israel/Canada Murder for hire.**
  - **Israel issues: search and seizure ( lawful in Israel /illegal in California); wiretaps/no subpoena power/jurisdiction in Tel Aviv and Jerusalem/**

- letters rogatory (a request from one court to another for judicial assistance) /non-cooperation/cooperation/witness problems/costs\$/delays//case was prior to e-mail and attachments/ sdt's/custodian of records/plea bargaining//first Gulf war/translations/ Canada/extradition and copies of documents/ wiretaps and the best evidence rule/transfer of Nackan to California/ housing/security/witnesses now in Africa/rental and airline records- seized via SW early- otherwise gone forever!/court proceedings in Petah Tiqva- relatives/significance of two different stories different in USA vs Israel/the agreement and Mr. Lapid/Canada extradition/LeGros preliminary hearing/the plea bargain/Wendy LeGros.....and where are they now????? [31 years later]
- civil case for money can follow unsuccessful criminal case (O.J. Simpson- police assault cases)

#### **IV. SENTENCING (Skazanie) Note: Germany has @65,000 inmates-90/per 100,000. Austria has 99/per 100,000-Poland has 194/per 100,00--USA Has 8 X rate of 707/per 100,000!**

- Plea bargaining- almost all cases –many believe coercive and should not be used/others plead because threatened by harsher sentencing, avoid jail, or get out of jail ( like 2/3 strike defendants)
  - Plea bargaining “is not some [part] of the criminal justice system; It IS the criminal justice system” [Justice Kennedy/ 94 % of all state convictions via plea bargain!
  - 2012-USSCT- Lafler-Frye decisions- “Incompetent defense atty gave bad advice and or did not tell defendant of plea offer- subsequent convictions reversed! Now what/ open court inquiry? Closed? Amin v. Superior Court- 2015-DA cannot rescind plea bargain based on a mistake (misdemeanor videotape case had two felony child molest cases in the reports-plea agreement said it would resolve all incidents in the reports)
  - 
  - Probation Report PP#13-Hulsey Sentencing
  - Felony cases and determinate sentencing
  - The Three Strikes Law- Changed in 2012 by electorate in California. Now law requires ALL to be “serious or violent” felonies with few exceptions. [any felony plus a weapon= 3 strikes] {eg-10851 and knife}[Any felony and intent to cause GBI] 2012 change cut sentence to 2,700 inmates.

- **“Serious” =22 crimes by name [Murder, Rape, Robbery, Kidnapping, Residential Burglary etc. Plus, ANY felony with GBI/Firearm and others....**
- **“Violent” =45 crimes by name plus attempts and conspiracy to commit the crime...**
- **Three Strikes sentence = 25-Life- must do 80% of it**
- **In re Edwards- 2018-53 years to life + parole eligibility after 3 years- Proposition 57!**
- **DA/Court can strike 1 or 2 strikes.... factors to consider...**
- **Examples- Power Point on Vandenberg robbery**
- **Felony Probation**
- **Conditions of Probation (Warunki sprawdzania) - any reasonable condition is OK: no alcohol, no checks, residence in drug rehab program, attends domestic violence classes; waive 4<sup>th</sup> Amendment protections allowing search and seizure for no reason at all. Now – many cases and challenges to probation conditions re phone, P/W, social media etc.-Various cases now pending in CSCT re ok to order probationer to provide electronic P/W's etc.**
- **Restitution-can include 187 victims' estate/ hospital**
- **2019-fines, fees and assessments must be supported by defendant's ability to pay! P. v. Castellano (2019)- P. v. Johnson (2019) rape conviction and 8 years/cell phone/prison wages**
- **P. v. Smith (2011) \$750,000 restitution for age 8-18 child molest upheld.**
- **Drug Courts-Mental Health Courts-Homeless/Restorative Justice Courts-Veteran's Courts (21 suicides a day-exceeds those killed in Iraq/Afghanistan )-DUI Courts-Re-Entry Courts: immediate consequences-problem solving teamwork-positive-make it better- job referrals-no early kicks, 3 days in jail = 3 days-2,500 Drug Courts in USA now. (See allrise.org)-Impacted now by Proposition 47!**
- **Less and less defendants in ‘Drug Courts’**
- **Diversion programs**
- **Dual diagnosis programs for defendants with mental illness and drug/alcohol problems.**
- **Domestic Violence Courts**
- **State Prison Sentences—Determinate Sentencing- 2-3-4: 3-4-5: 3-5-9, etc.**
- **Enhancements- Prior Prison/ excessive taking/ on bail enhancement/10-20-life for weapons use. [Sizzler robbery-PP#14]]**
- **Gang Enhancement- “...with the specific intent to promote, further, or assist in any criminal conduct by gang members.” 2016-Uptick in bank fraud, id theft, credit card embossers/skimmers ‘re-coded credit cards is the new drug!’**

- Consecutive sentences- Multiple sex offenses
- Chelsea's Law [2010]-longer sentences for SO's, under the age of 14 victims and prior or GBI =25-life-longer parole/lifetime GPS tracking for SO's [7,000 in 2010!] – [Note-2015 USSCT-Grady v. NC- GPS is a search and must be “reasonable”]and exams by psychiatrists before release on parole;666 amended and grand theft increased from \$400 to \$950( allegedly to make room for criminals with longer sentences)
- Filing of SO's complicated [see p 2] includes: (1) when did it occur? [S/L issues and legislative changes] (2) Is it a ‘no-probation’ case- the complaint must include this allegation (3) does the defendant have strike priors? (4) How many separate acts can be charged? (5) What jurisdiction can file the case in the event of (a) multiple victims in different counties or (b) crimes beginning in one county and ending in another (6) does the defendant have “violent” prior convictions? (7) Did the defendant have or use a weapon? (8) What kind of weapon-gun, knife- personal use? (9) Was injury or GBI inflicted on the victim? (10) Did it occur during a residential burglary? (11) What is the age of the victim? Under 14? Under 10? [Mandatory 25-life for 261 etc.] (12) Is there a 7-year age difference between the defendant and the victim? (13) were there 2 defendants acting in concert? (14) What is the age of the victim?  
Examples
- Forcible rape has a 3-6-8 range of sentences. With one strike prior 8 can be doubled to 16, plus 5 for the prior=21 years; 2 strikes =25-life plus 10=35-life; use a firearm +10, discharge it +20, discharge and GBI=25-life.
- If multiple victims/multiple acts=full term consecs-8+8=16, and if a strike prior 16+16=32 +5=37 (15%credits, not 50%)

## THE HEARSAY RULE

**Note-the Hearsay Rule is a rule of evidence, not having anything at all to do with the legality of the arrest/search -it is a rule concerning the admissibility of evidence (usually witness testimony) at the trial or hearing. The leading legal text on the Hearsay Rule and its exceptions in California is 400 pages in length!**

**California Evidence Code Section 1200. (a) “Hearsay Evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.**

**(b) Except as provided by law, hearsay evidence is inadmissible {Considered unreliable because not under oath, no opportunity to cross examine witness, jury cannot see demeanor of the witness, no chance to confront and cross examine the witness (a Constitutional right)}**

**Example- Police officer in drunken driving trial is asked; “When the defendant was arrested did his wife say to you; “I told him not to drive because he was too drunk!”**

**Exceptions are so many that it is more common than the exclusion of evidence because it is “Hearsay.”**

**\*Confessions or admissions of the defendant. Note- Self-serving statements are not admissible; “I did not do it- I am innocent” Not a confession or admission.**

**\*Declarations against interest**

**\*Spontaneous Statements-made at or near exciting event under stress- no time to fabricate: “Who shot you?”**

**\*Prior Consistent or Inconsistent Statements-Special rules before admissible**

**\*Dying Declarations- no one will die with a lie on their lips-But circumstances must show person knows they are dying and the cause of the injury.**

**\*Some statements of young victims/DV victim (Confrontation issues and problems)**

**2015-Ohio v. Clark-USSC-a 3-year-old abused child’s statement to a teacher re black eye, belt marks and bruises not testimonial and admissible-Note child incompetent to testify!**

**\*Business Records-made in the normal course of business**

**-person with knowledge testifies in court about how collected**

**-entries in records made at or near the time of the event**

**-custodian attempts to keep records accurate**

**\*Former Testimony under oath**

**\*Statements of identification**

**\*allowed in search/arrest warrants and probable cause hearings**

**\*using a translator- considered a language conduit**

**\*all statements made by all conspirators during the conspiracy**

**In most of the above- but not all- the witness must be “unavailable” and due diligence must be shown before testimony is admissible.**

**Note- only Hearsay if offered to prove the truth of the matter stated.... Not Hearsay-tape recording of drunken driver where jury can hear voice/slurring/”fear” statements.**

**People v Goldsmith (2014)-Red light camera – not hearsay- a statement is either oral or written expression-of a person!**

### **The Death Penalty or Life without parole.**

**California’s Death Penalty Law [1977-78] adopted to comply with USSCT decisions by (1) limiting the kinds of murders that are subject to the death penalty**

(2) allowing defense evidence in mitigation and (3) providing guidelines for the jury to make the choice and to leave discretion with the jury, avoiding mandatory death penalty .

First- only if one of 17 Special circumstances are present- not all first-degree murders are eligible for the death penalty. (To minimize the risk of arbitrariness)

Special Circumstances—felony murder, multiple murder, murder with a prior murder, murder of a judge, police/fire officer, witness/ Murder for race religion sexual orientation/ murder for hire or for financial gain/ lying in wait murder, etc--17 of them.

\*People v. Banks-CSC-2015-First degree felony murder rule liability extends to all aiders and abettors-but **only** “major participants” in the underlying crime who act with reckless indifference are death penalty eligible under the Special Circumstances felony murder rule---not the get-away driver in this case.

2019-Felony Murder rule severely limited no to the actual killer or active participants in the killing, not just the crime!

Plus, in 2019 Governor of California stopped all death sentence executions for all inmates on death row.

Second: Aggravating and mitigating circumstances are listed and the jury told what they can consider, and what they cannot consider. Hurst v. Florida (2016)- ONLY the jury can find each fact necessary to impose a death sentence.

- Power Point#9- above- the Noriega case.
- Alpha Dog- the Hollywood case-PP# 19
- Adams-triple murder-PP# 20
- Adams penalty phase-LADA

Many challenges: Can the jury be told that the Governor can commute?

Must agg/mit be found true beyond a reasonable doubt?

Felony murder and intent to kill required? [Carlos] {58/61 cases reversed – resulted in 3 Justices on Supreme Court being voted out!} USSCT said not required but need to show mental state of reckless indifference.

Can post crime mitigation be considered? (Religion/etc.?)

California lists certain mitigating factors and also has “K” (avoiding the problem with Texas’s 3 question law....)

No death penalty for juveniles. (2005)

No death penalty for defendants who are mentally retarded.

Lethal injection-no unnecessary suffering.

No LWOP for juvenile who did not commit homicide [Graham v. Florida-USSCT 2012]; LWOP is ok for 17 year old who followed three victims to secluded location, shot and killed 2 and shot third who played dead but survived(P.v.Murray-2011). Split on 110-year type sentences that exceed juvenile’s life expectancy.... i.e., death cases, not attempts or cases where the juvenile is not the actual killer.

California as of 2012: 726 inmates on death row since 1976 when punishment was reinstated. In 2014 total is 746. In 2015 total is 749. In 2016 total is 746 again,

2018 total was 744, 2019 total is 734-15 have been executed. (2 in other states)-23 have committed suicide. 69 have died in prison. Cost [?] \$184 million a year in California. Race 33% Caucasian, 36% Black, 24% Hispanic, and Other 6%. All but 21 are males.

November 2012 on California ballot for repeal/replace by LWOP-Defeated 53 %-47%. [31 States have the Death Penalty-in 4 of them it is “suspended.”]

2019- California Governor “suspends” imposition of DP/ Court challenges to whether DA can continue to seek it!

## V. Appeal (Apel) and Habeas Corpus

- Appeals are free and common
- No appeal from a plea of guilty unless approved
- Death Penalty appeals go directly to the California Supreme Court
- Federal Habeas Corpus can follow California- not unusual to take more than 20- 25 years!
- Habeas Corpus is always available to prevent injustice
- Brady v. Maryland-1963- Again...never have to fear the truth coming out. Note- Brady is 50 years old—and yet:
- Connick v. Thompson (2011) Brady violation pattern required to sue DA(reversing a \$14 million judgment for failure to train)[lab report with different DNA-hidden by DA]
- Smith v. Cain (2012) “I can’t ID anyone” statement hidden by DA-only witness against defendant.
- 2014-Santa Clara DA removed from case for having an affair with the DNA crime lab technician who isolated the DNA on a cold case hit-then delayed in disclosing other reports (10,000 pages regarding the discovery of the affair and other information) to defense- motion to dismiss pending-or jury instruction to let jury know of the affair, and to consider it in appraising reasonable doubt!
- Note: wrongful convictions almost always (1) eyewitness id (2) faulty science (3) jailhouse informers and often 2 of the three:2015/DOJ/standards-DNA/Chemistry/Fire Debris/Explosives/GSR/Trace material/Anthropology/Dogs/Dental/facial Identification/Speech Recognition/Bloodstain Pattern Analysis/Footwear/tires/Questioned Documents etc.
- 2016 California refers Brady (and “incompetent” defense attorneys) to State Bar now!

## **VI. Victims and Witness Assistance Programs (Pomoc dla ofiar i swiadkow)**

- **Crime leaves a terrible wake in many cases- Vandenberg video, Attias case.**
- **Victim Compensation Programs- money collected from every criminal.**
- **Claims filed on behalf of victims and surviving relatives- medical expenses, burial costs, counseling, lost wages, witness protection matters.**
- **Huge and dramatic increase and impact on the victim assistance aspects in the day to day processing of cases.**
- **Victim assistance regarding going to court, status of the case, preparation for sentencing statements, being physically present in the courtroom, telephone /e-mail availability; bi-lingual assistance; child witnesses.**
- **2012-misd crime to post on internet address, telephone, id info for D/V, S/O and stalking victims; abortion clinic employees**
- **Civil lawsuits by crime victims against other persons deemed “responsible.”—Tarasoff- decided in 1976- Cf: Regents v. S. Ct. (Rosen) California Supreme Court 2018: Universities have a legal DUTY, under certain circumstances, to protect or warn their students from foreseeable violence in the classroom or during curricular activities! [Thompson- a student- hearing voices, complaining in person and in e mails to professors and Dean 2 other students harassing/talking/ unwanted sexual advances, sounds of gun clicking- followed by psychiatric evaluation but not hospitalized, not taking meds, moved from dorm-then stabbed Rosen – with a butcher knife during Chemistry lab!] {Related cases- common carrier, hotels, employer, -rape in parking structure—But not 261 after fraternity drinking party-must be engaged in educational activity etc.}**
- **Where are we now and where are we going?**
- **In 1860 Kleindeutschland- 120,000 Germans in NYC- only exceeded by Berlin and Vienna-1904 “Ship Ablaze”**

**Huge growth in national and local victim services: 1965 first Crime Victim Compensation program in USA - California;1972-1<sup>st</sup>VictimAssistancePrograms established—thereafter- Rape Crisis Centers, Battered Women’s Shelters/Programs;(1976); Mandatory Arrest laws in DV , Victim Restitution a Constitutional Right, Drinking age raised to 21(1984)/ Elder Financial and Physical Abuse laws/investigative assistance/immunity for banks/Expert testimony in BWS and SO cases [Note dangers here]/ Hate Crime legislation-race religion national origin and sexual**

orientation/ Notoriety for Profit laws/ International Parental Child Kidnapping Act ( Hague convention)/Megan's law-notify community of residence of SO and photo!/ Identity theft and deterrence laws/ after 9-11-01 special statute for people connected to the 2,974 people killed in Twin Towers attack [Air Transportation Safety and Systems Stabilization Act- loss of wages/ enjoyment of life/waive civil actions(**Note Kenneth Feinberg, post**)Human Trafficking/ Amber Alert ( 2002) it really works! / DNA funding and labs-[reminder- see p.2-California alone getting 300 hits a month!] and mandatory samples of convicted persons/ Military Sexual Assault Programs/ 2009= Pres. Obama named new WH position re advisor re violence against women; 2010-Chelsea's law (see above); 2012-no cost for SO exam to victim whether or not there is co-operation in criminal proceedings [different for VCC]; I Phone alerts!

**Kenneth Feinberg:** the minute you go down the road of deciding that certain victims are entitled to **PUBLIC** money but not others, you get into a very serious political and philosophic question. Every victim of a death, whether it be a stockbroker, a policeman or a soldier, should get the same amount? [9/11, Virginia Tech, BP, GM, Agent Orange, Boston Marathon-it WAS done] Katrina? /Fort Hood? / Erfurt/Paris/Brussels/Norway's Ander's Breivik killed 8 with a bomb and shot and killed 69 more, mostly children/Columbine H.S., First WTC attack? Oklahoma City Bombing? USS Cole? San Bernardino? Paris attacks? Christchurch attacks in 2019? 2019 Dayton and El Paso mass shootings? etc.

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