

# DUI PROSECUTION



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# THE CHARGES

- 23152(a): driving under the influence of alcohol.
- 23152(b): driving with a blood alcohol level of 0.08% or higher.
- 23152(f): driving under the influence of drugs.
- 23152(g): driving under the influence of a combination of drugs and alcohol.

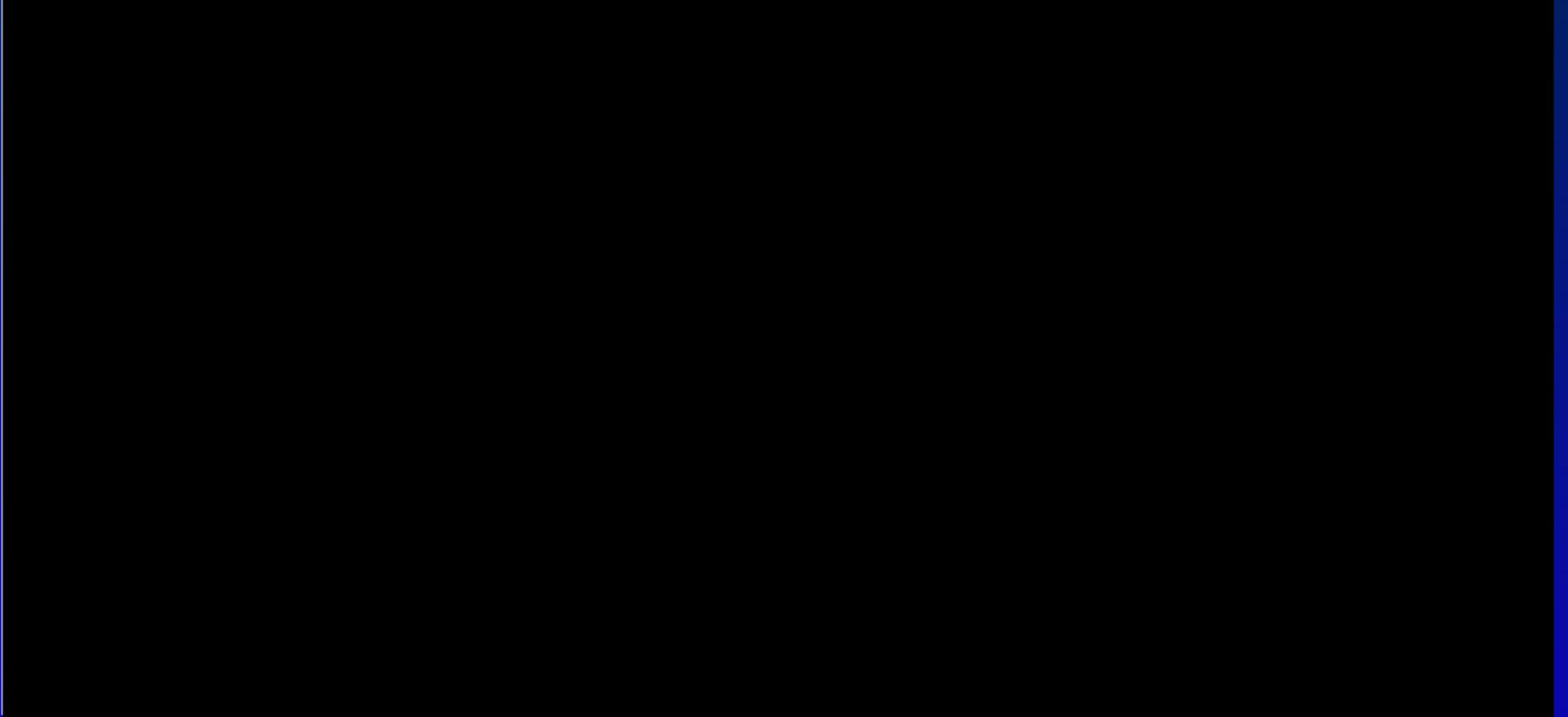
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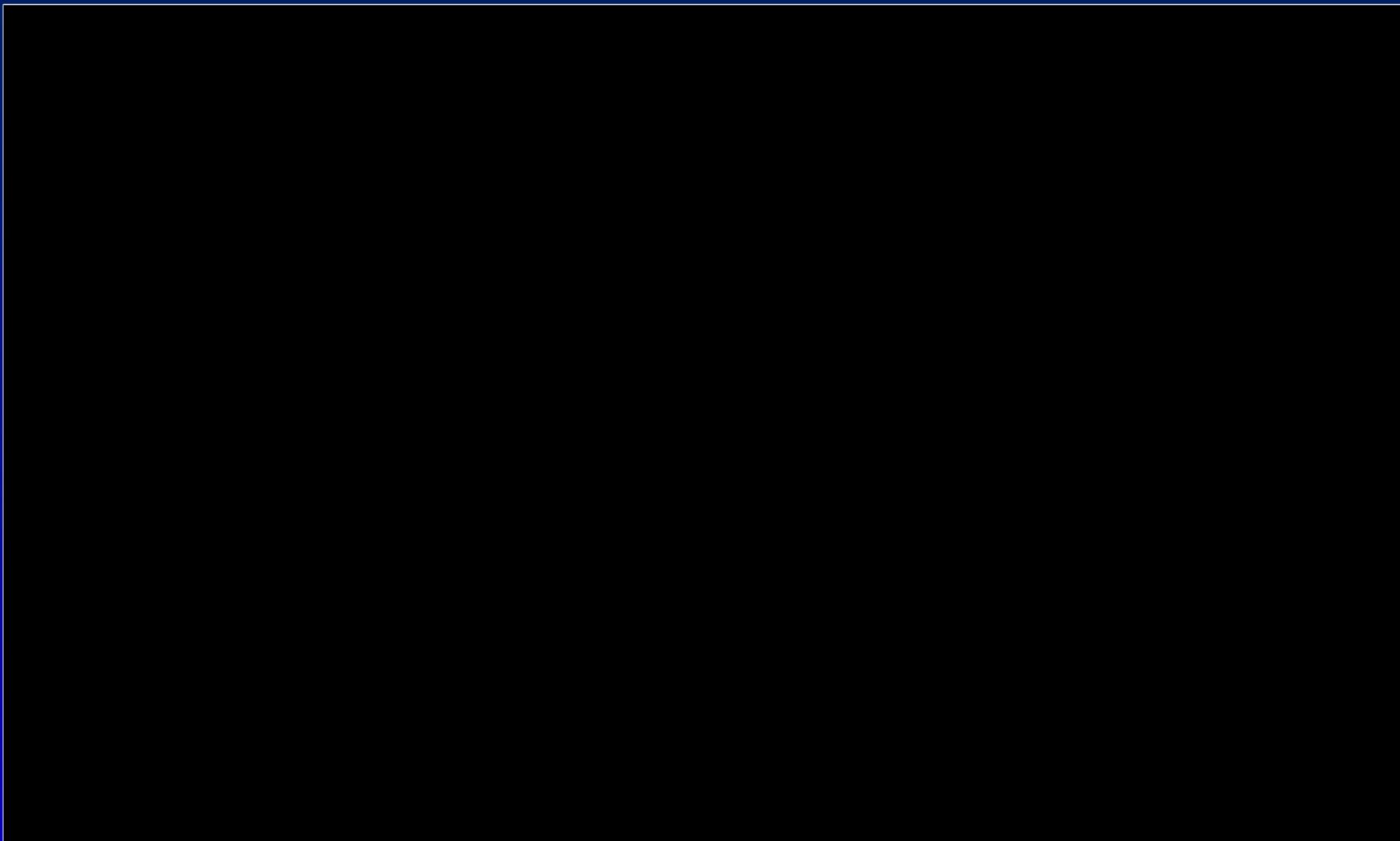
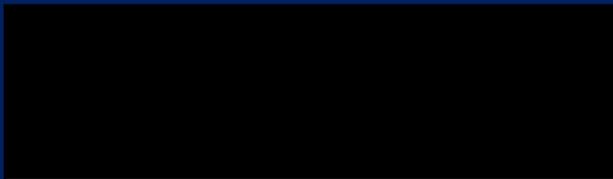
- 14601.1: driving on suspended license
- 14601.2: driving on suspended license because of a prior DUI conviction
- 23140: .05 BAC, driver under 21
- 23154: .01 BAC by a person on probation for a DUI
- 20002(a)

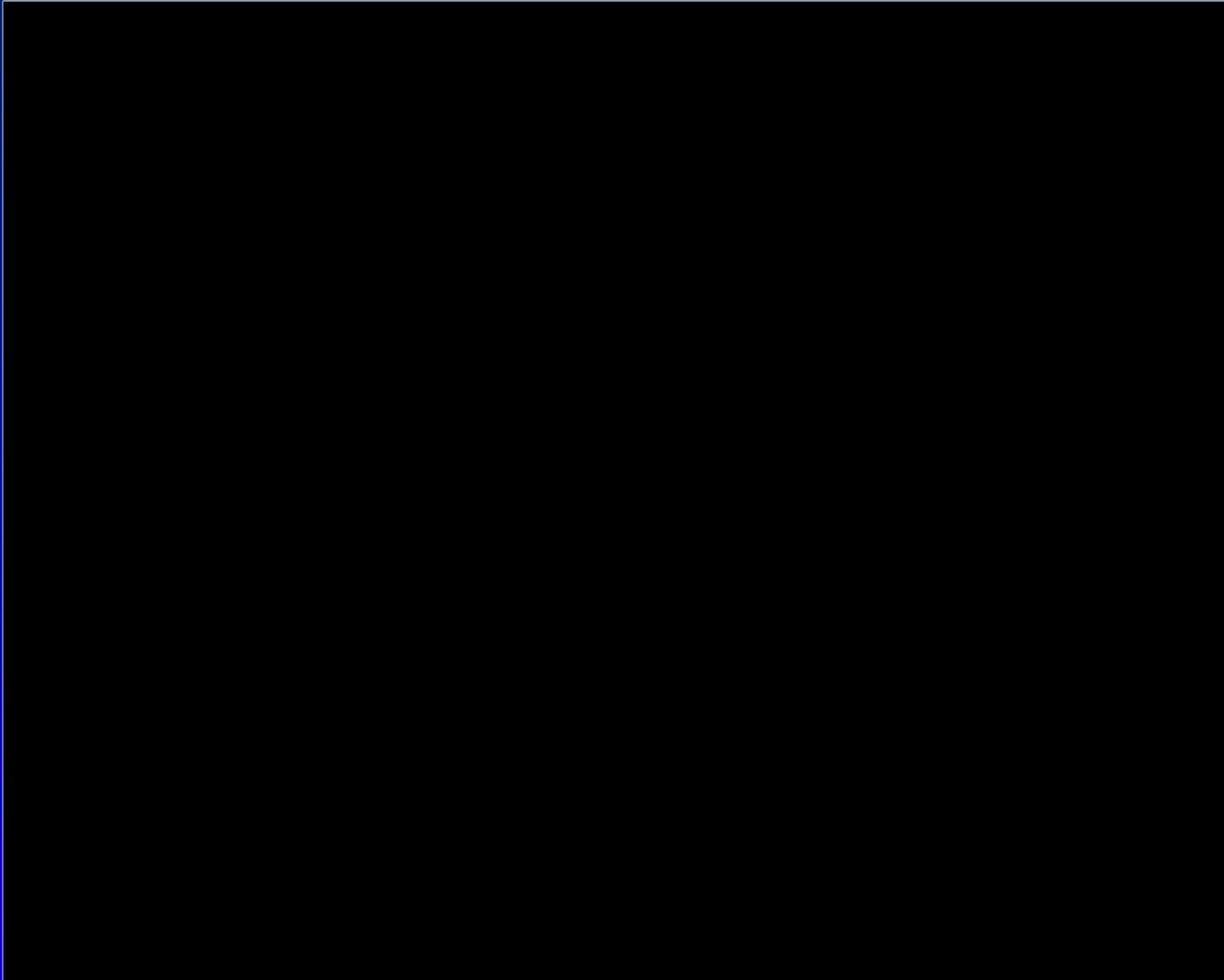
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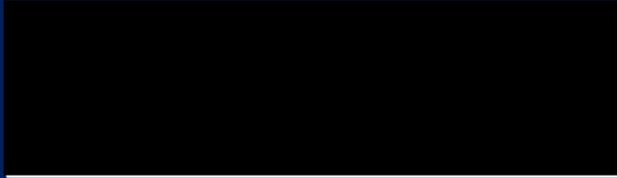
## Regarding 14601.2's:

- The fact that the suspension is based upon a prior conviction for driving under the influence is an element of the offense. This means no bifurcation. (*People v. Profitt* (2017) 8 Cal.App.5th 1255.)





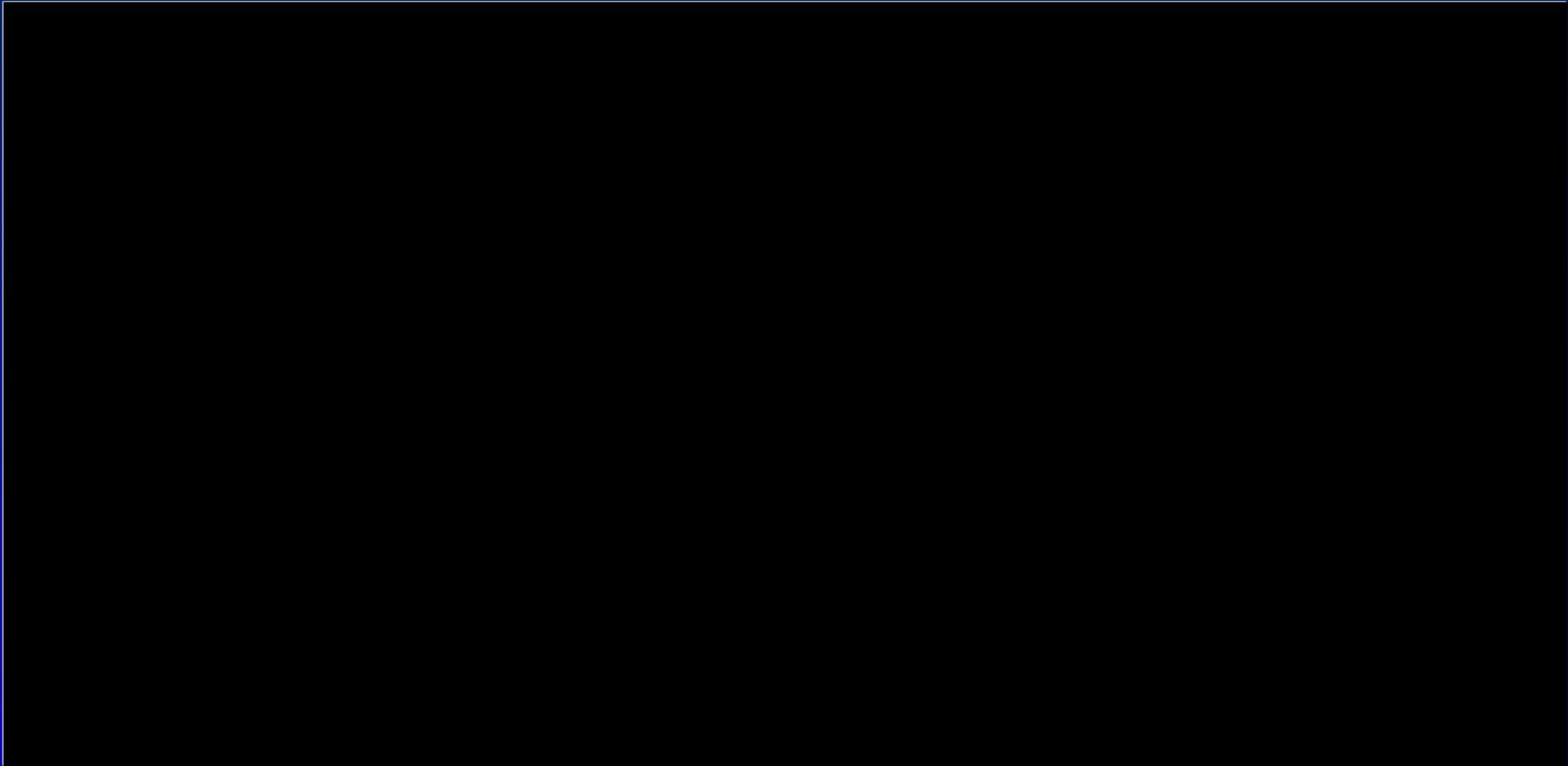
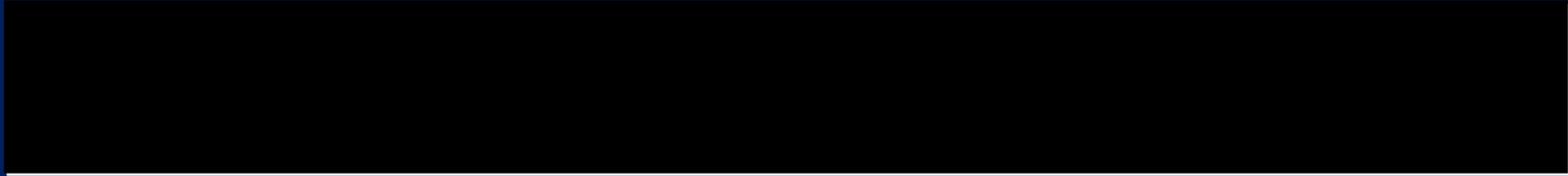


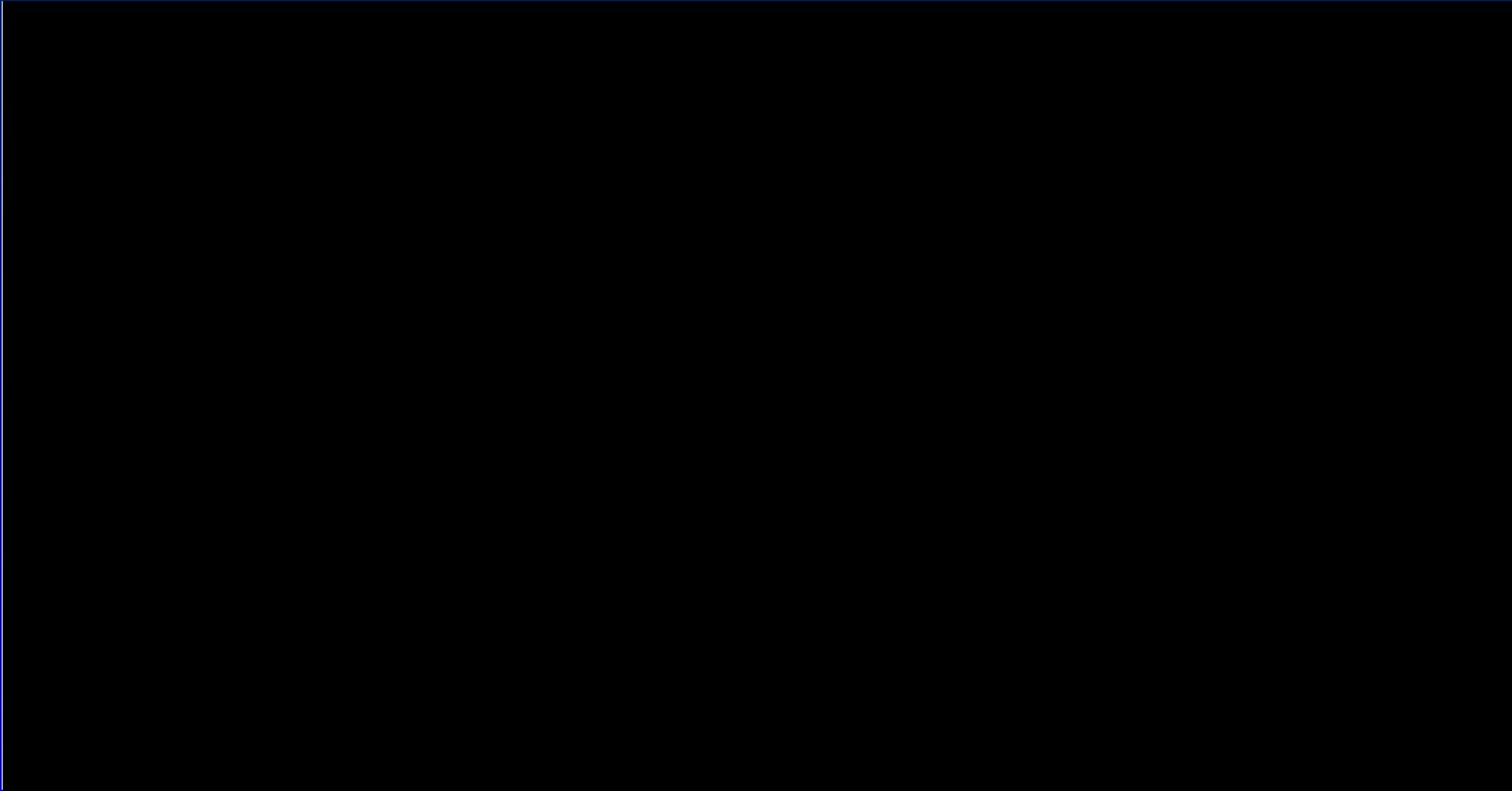
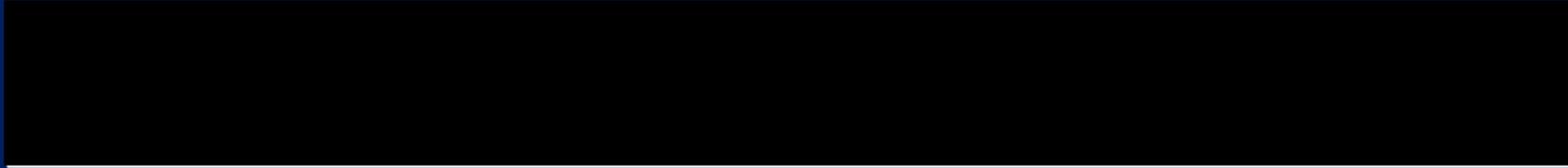


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- CALCRIM 2110: The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of \_\_\_\_\_. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

# UNDER THE INFLUENCE

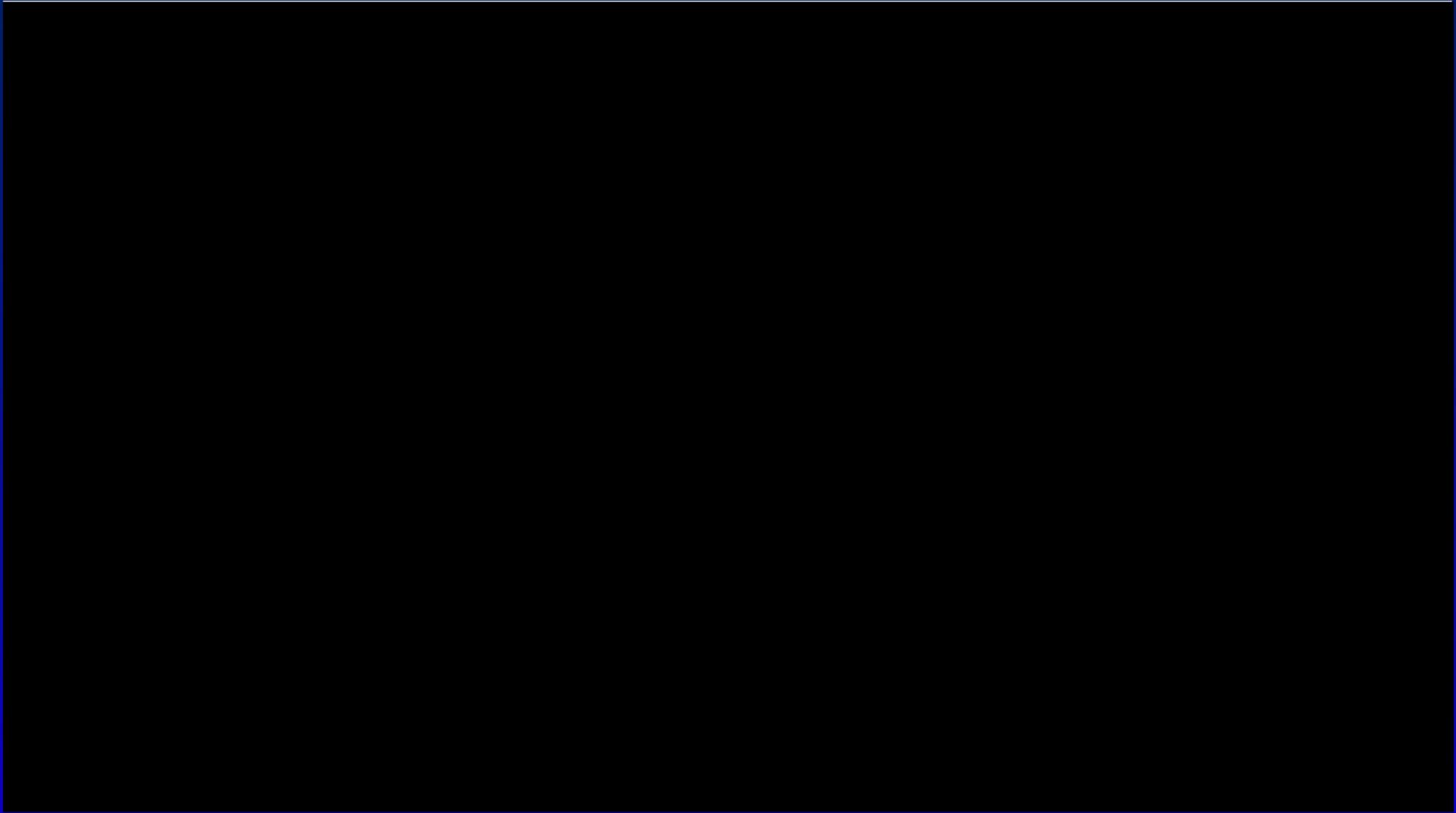
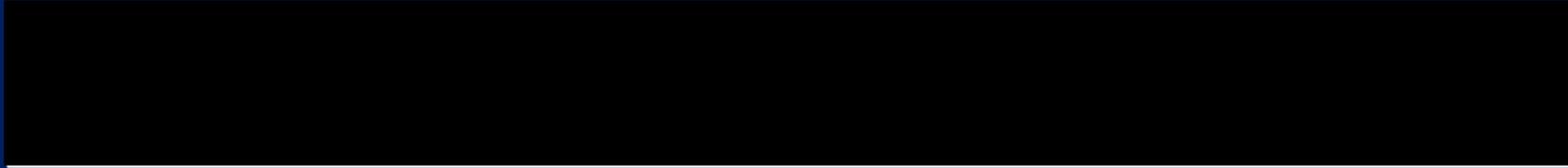
- Definition (CalCrim 2110, for example)
  - “A person is under the influence if, as a result of [drinking or taking drugs] his mental or physical abilities are so impaired that he is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.”

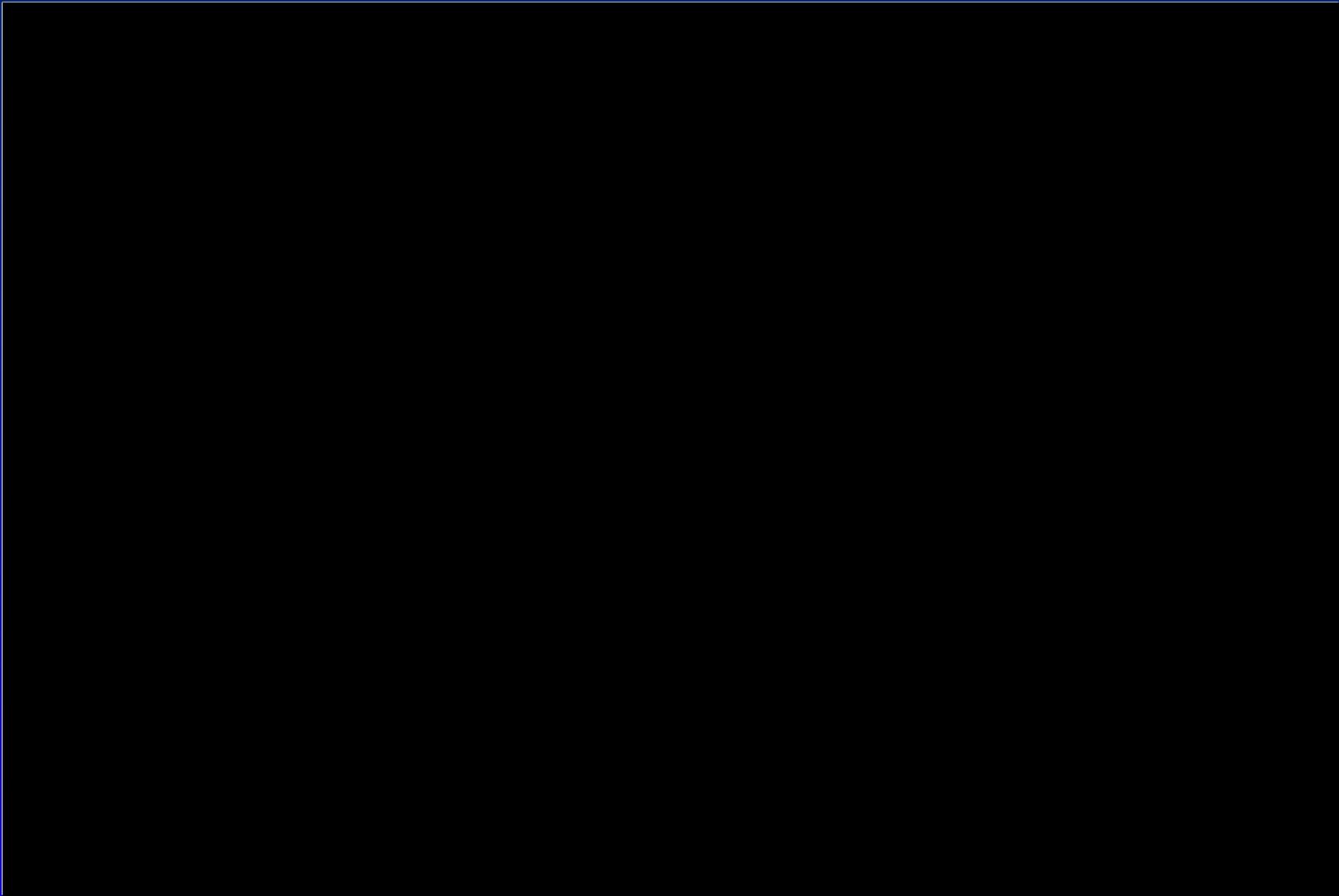
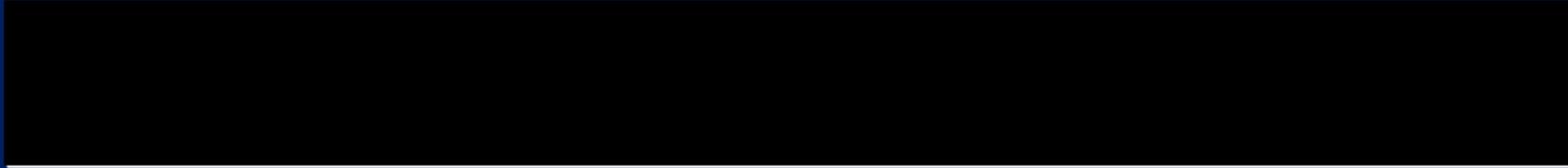


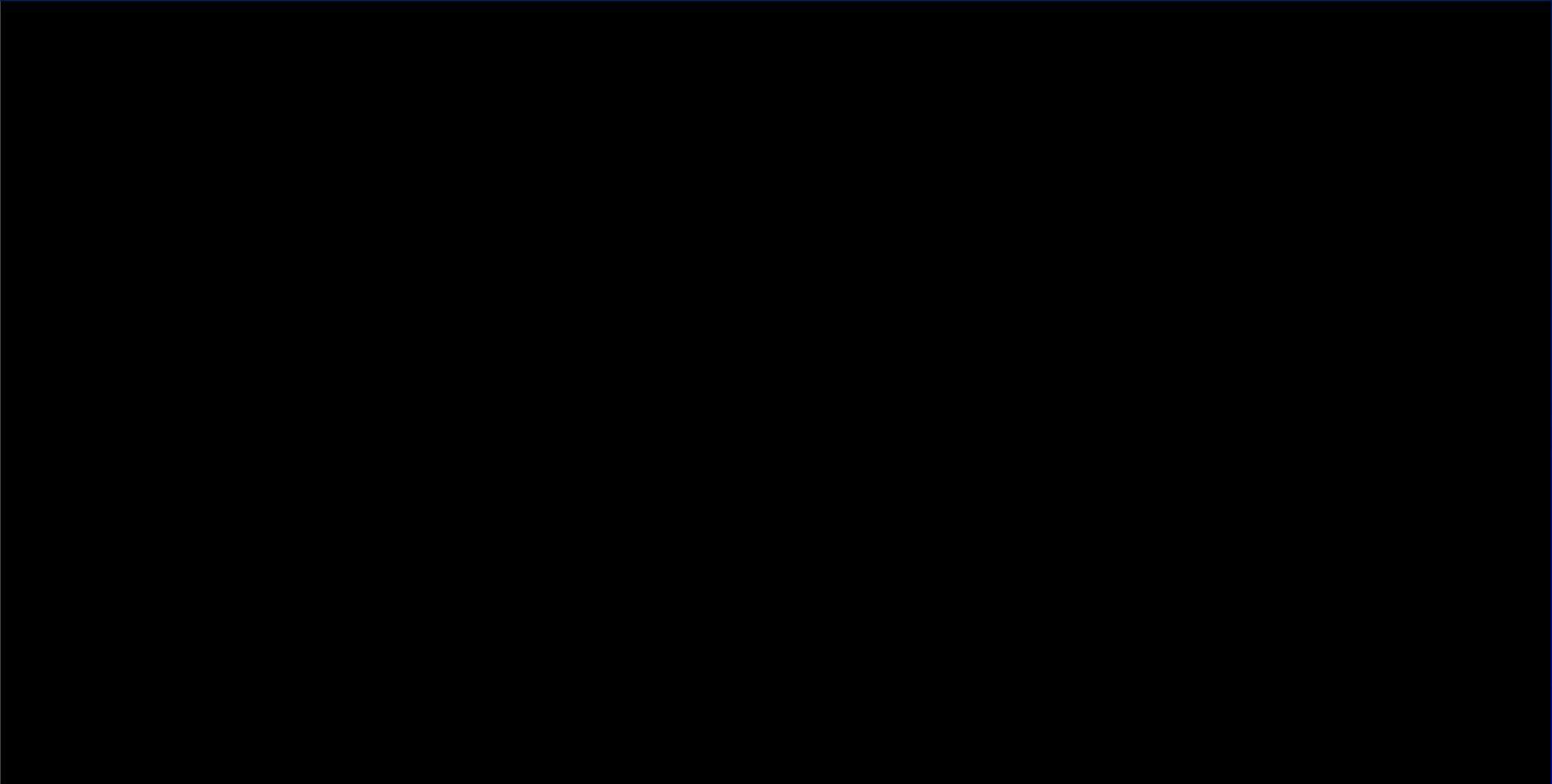


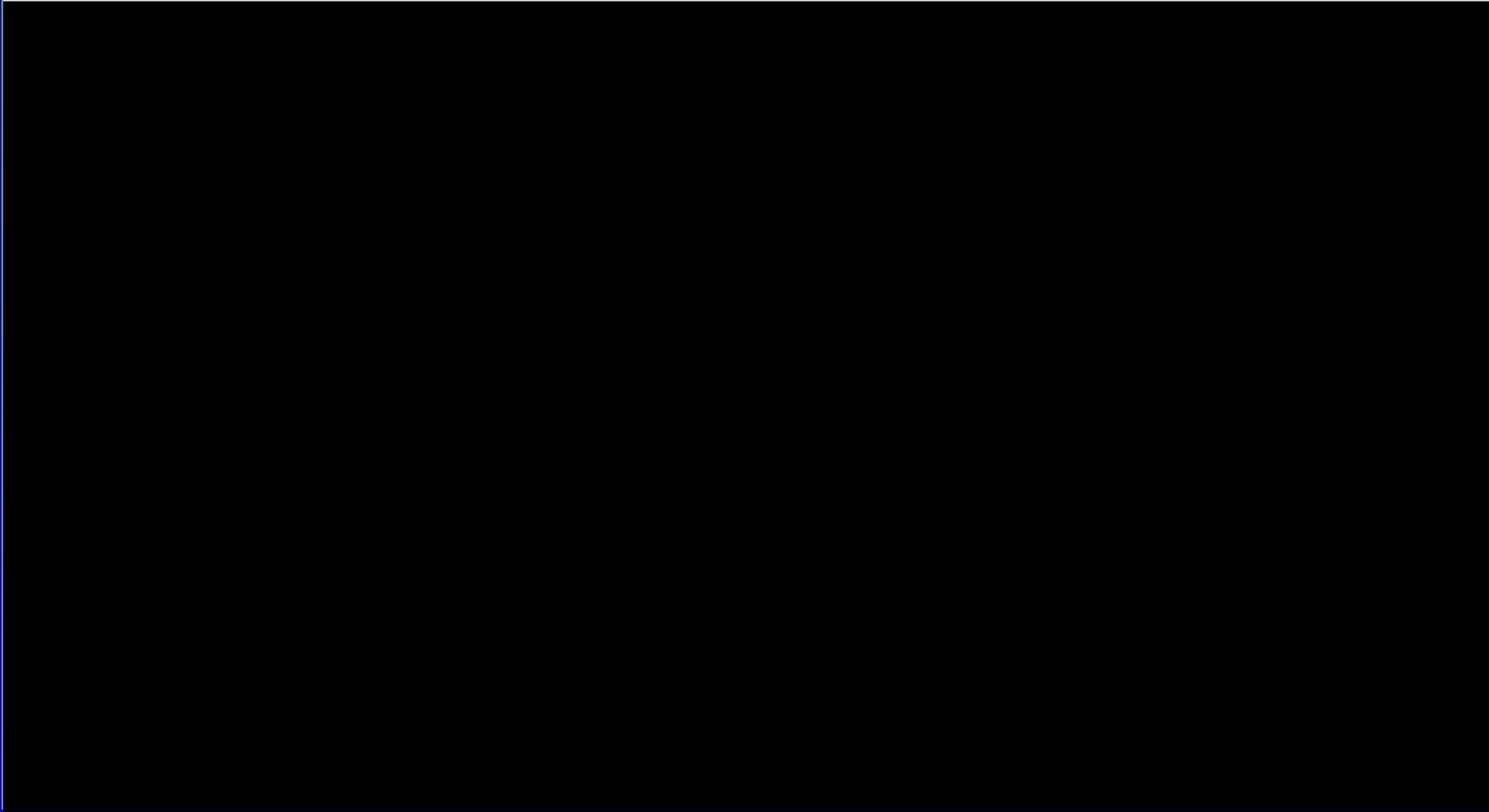
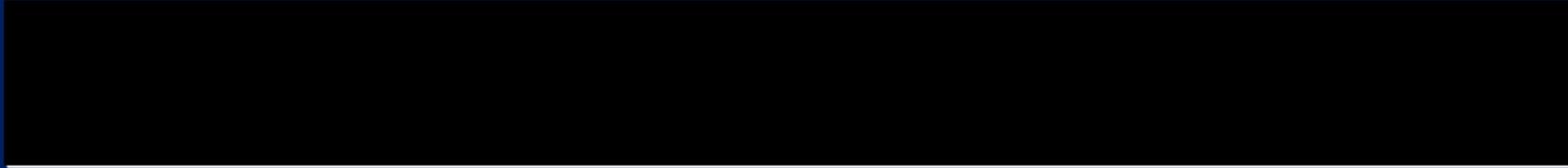
# PSYCHOPHYSICAL TESTS

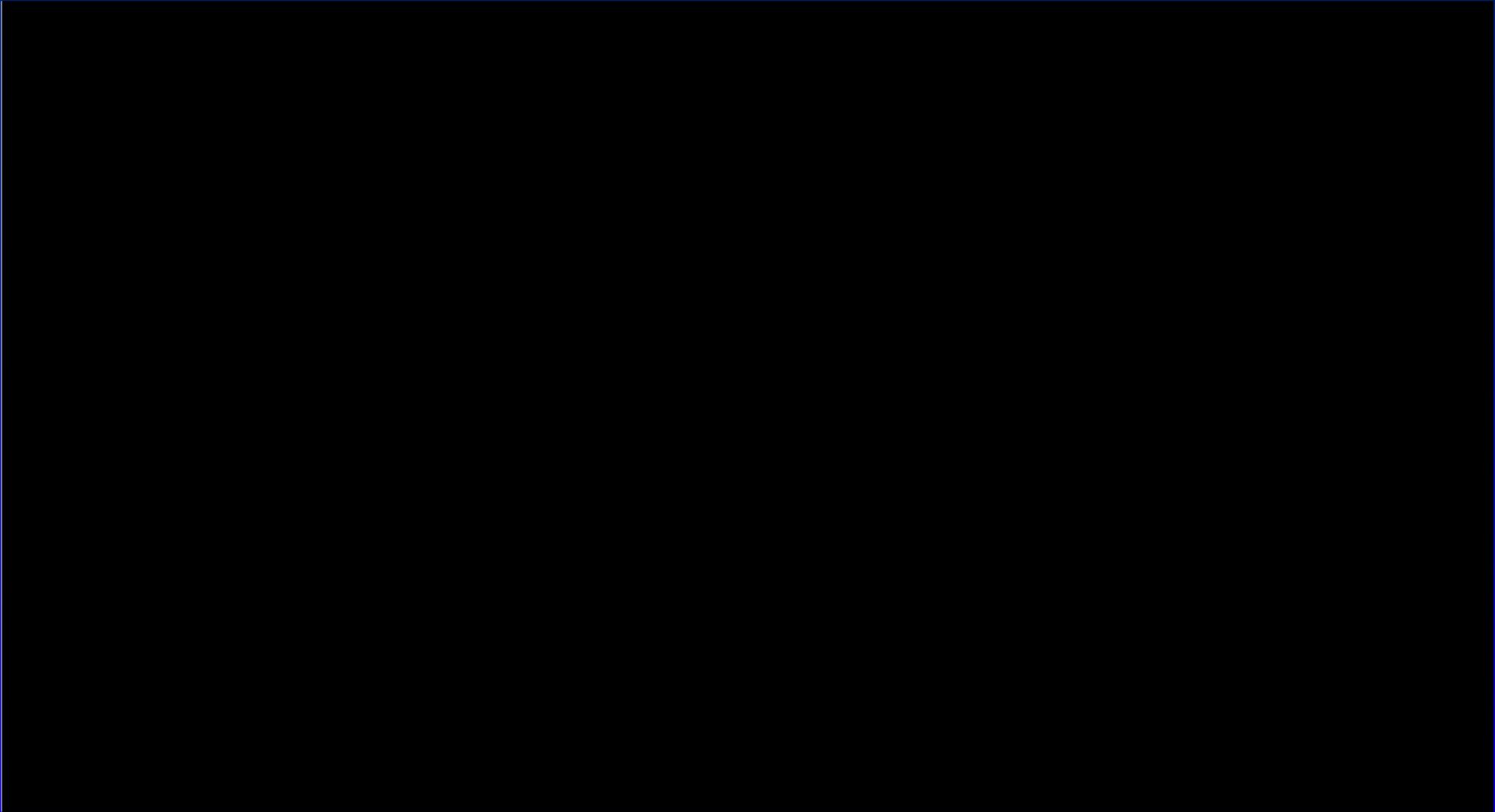
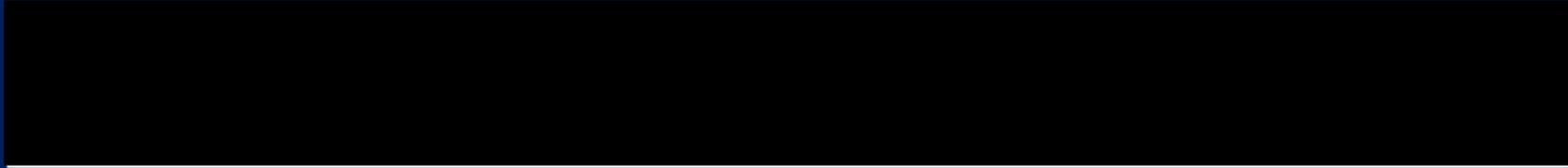
- Officer trained in HGN can use results of HGN test as basis for opinion on impairment without additional expert testimony. (*People v. Randolph* (2018) 28 Cal.App.5th 602.)

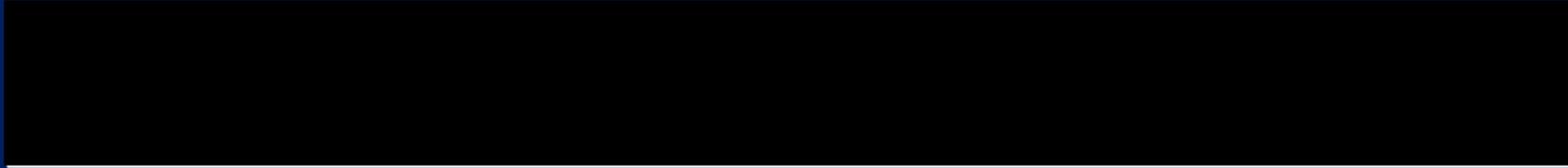




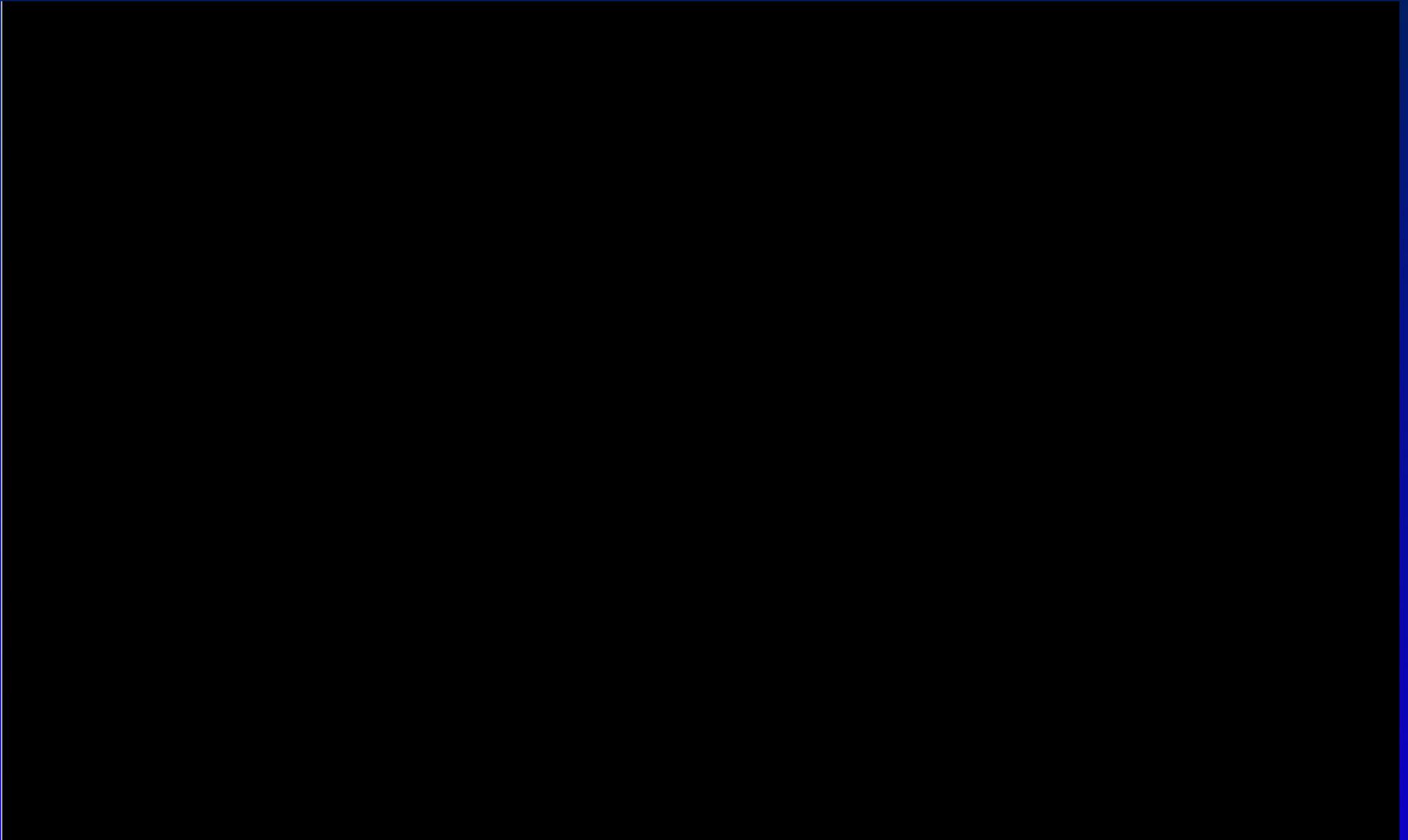


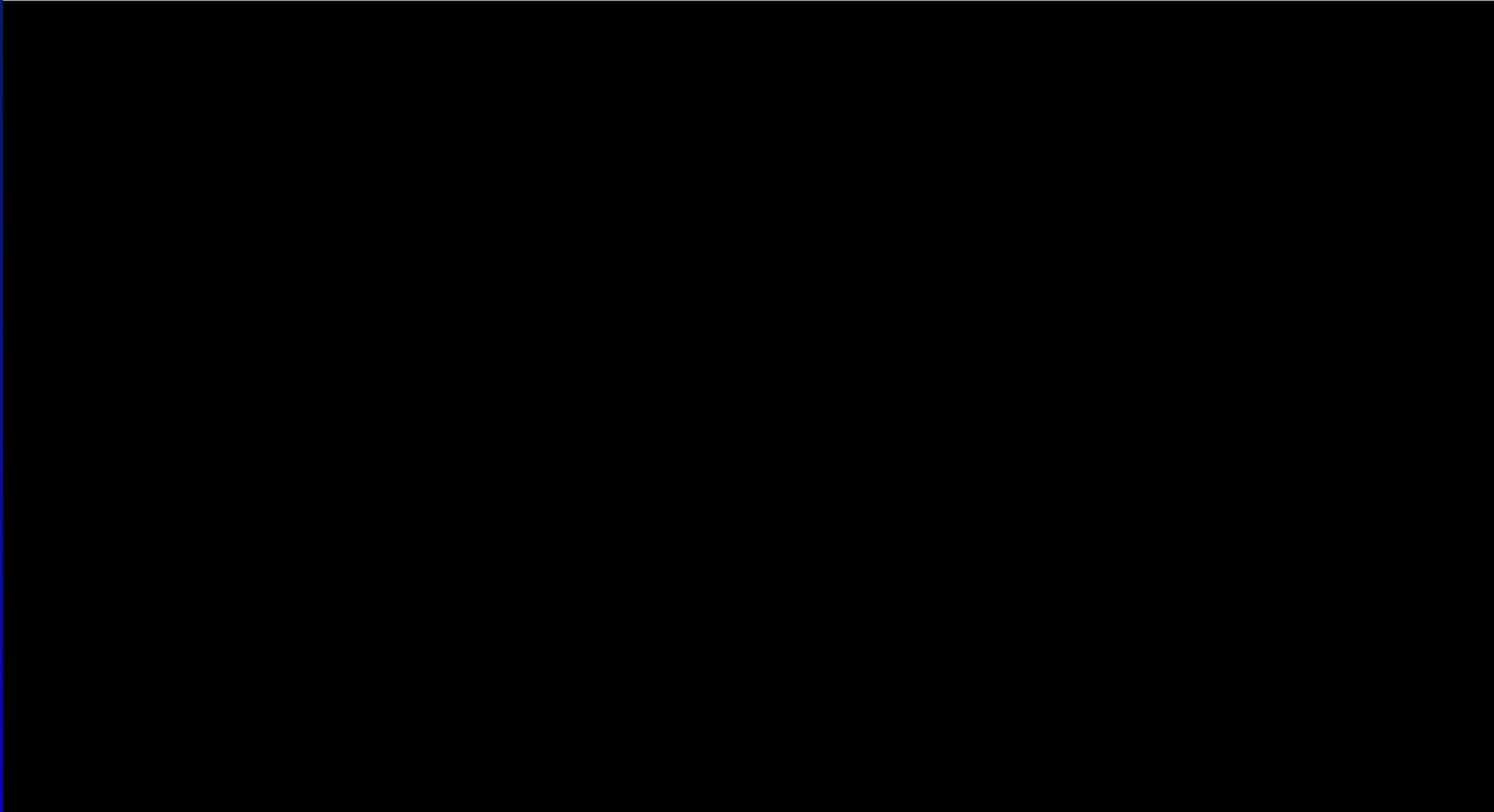


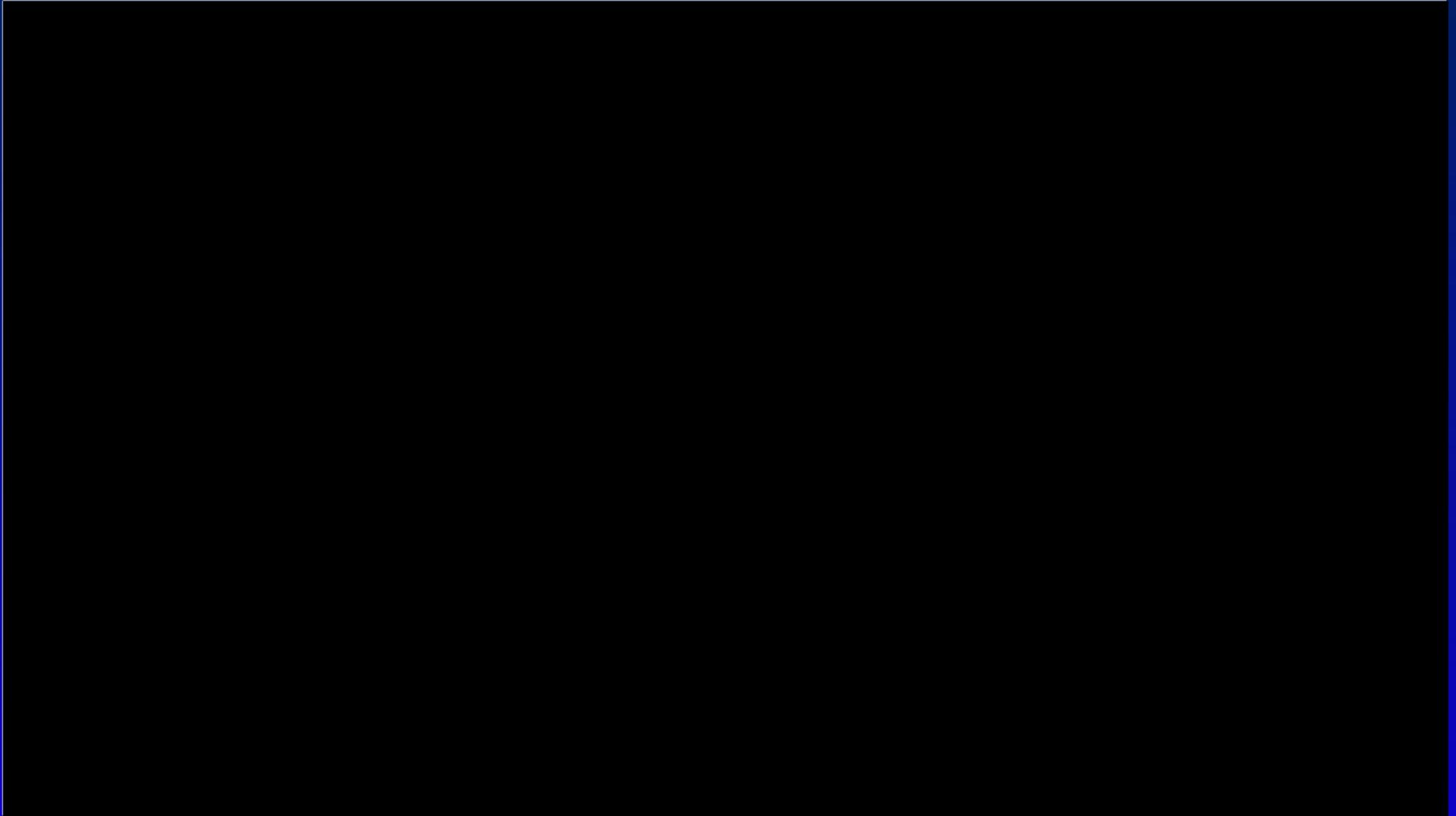
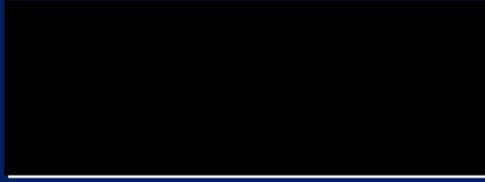


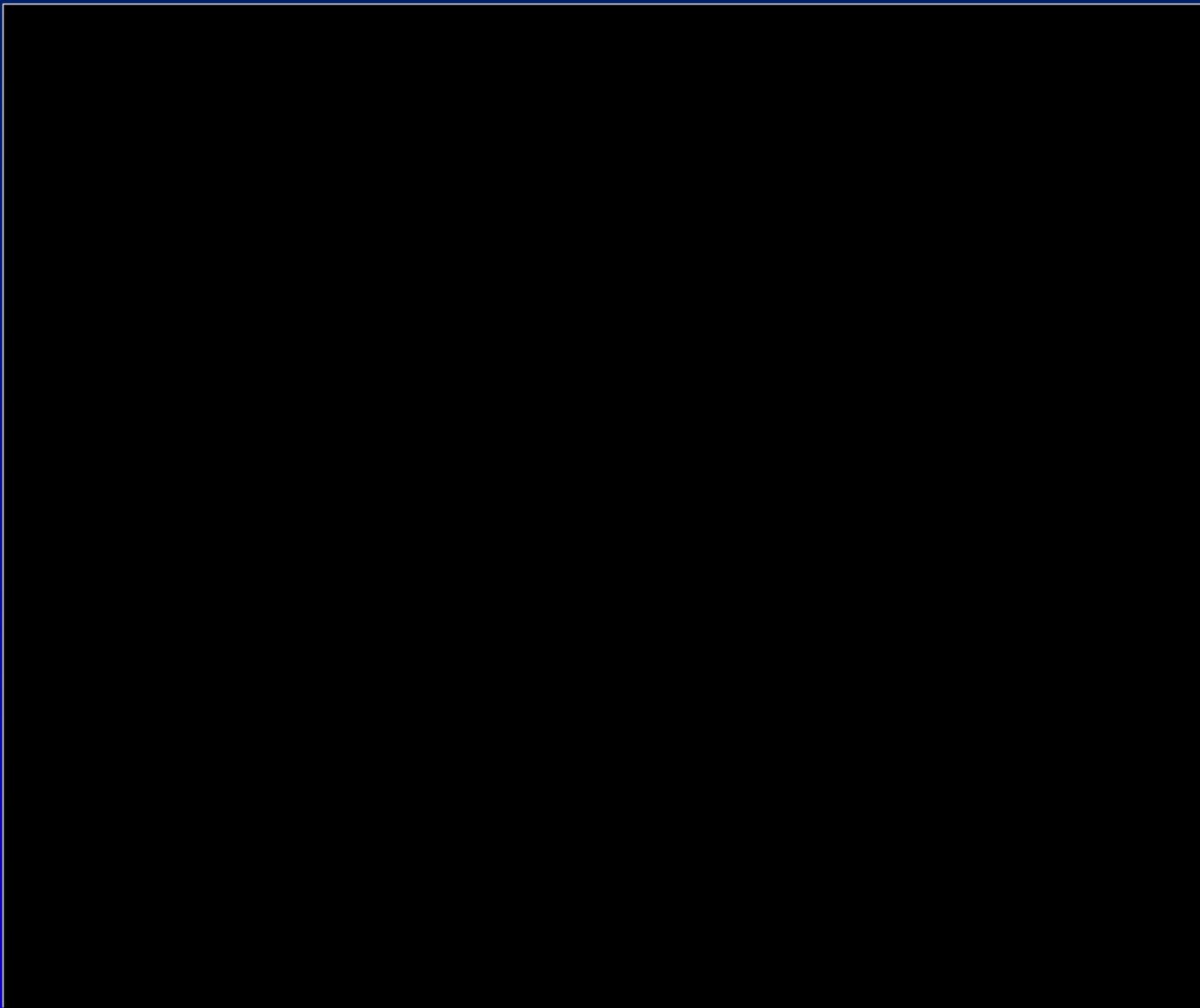
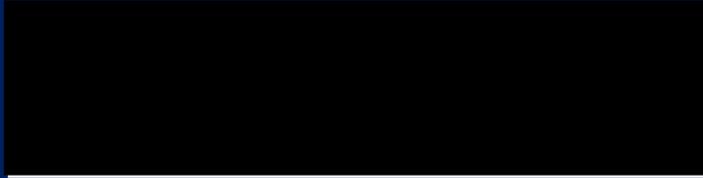


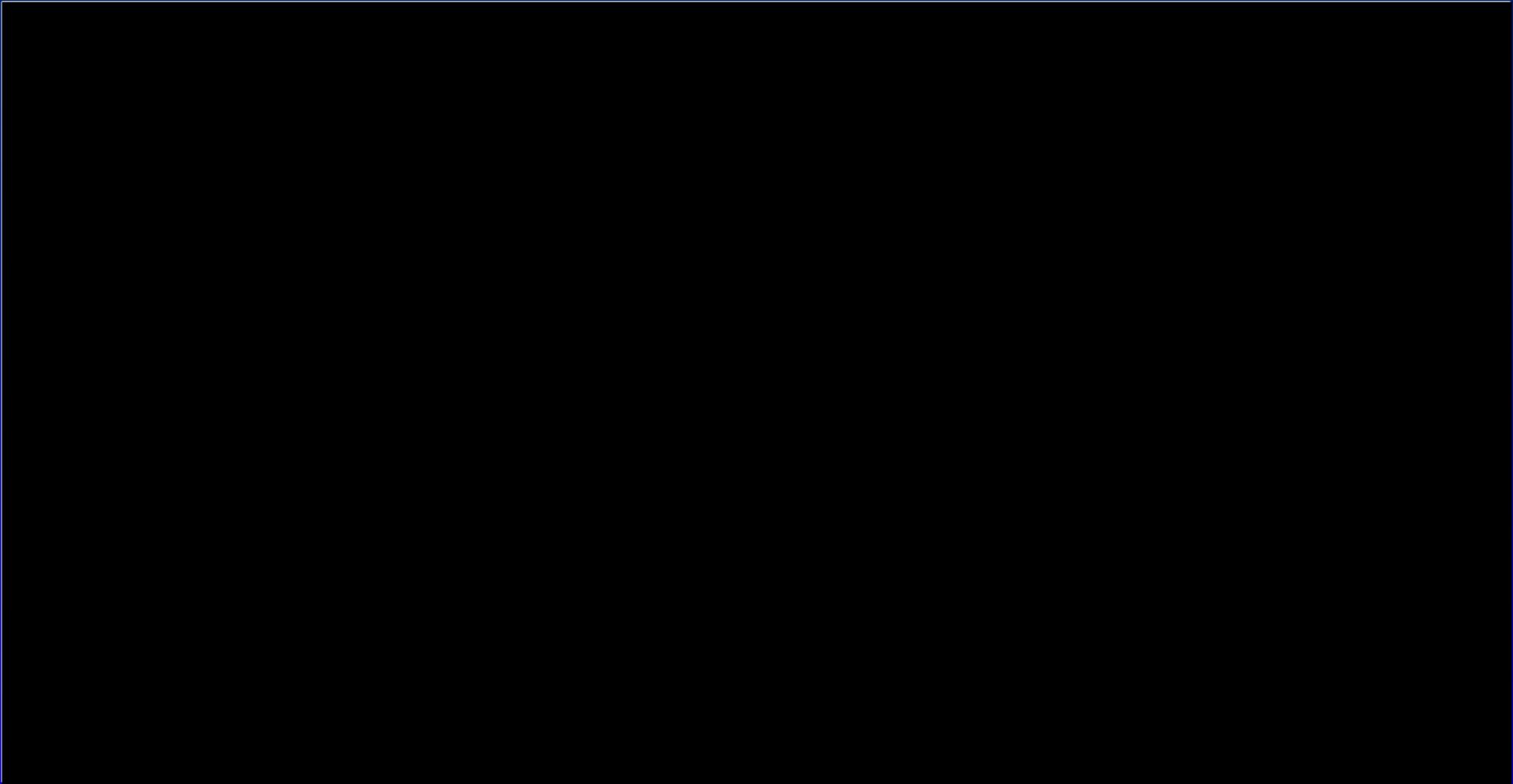
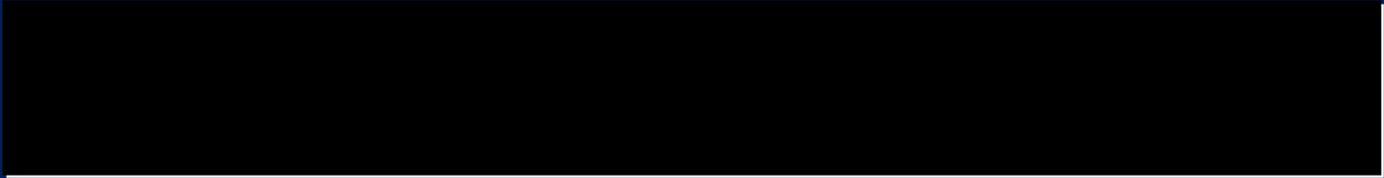


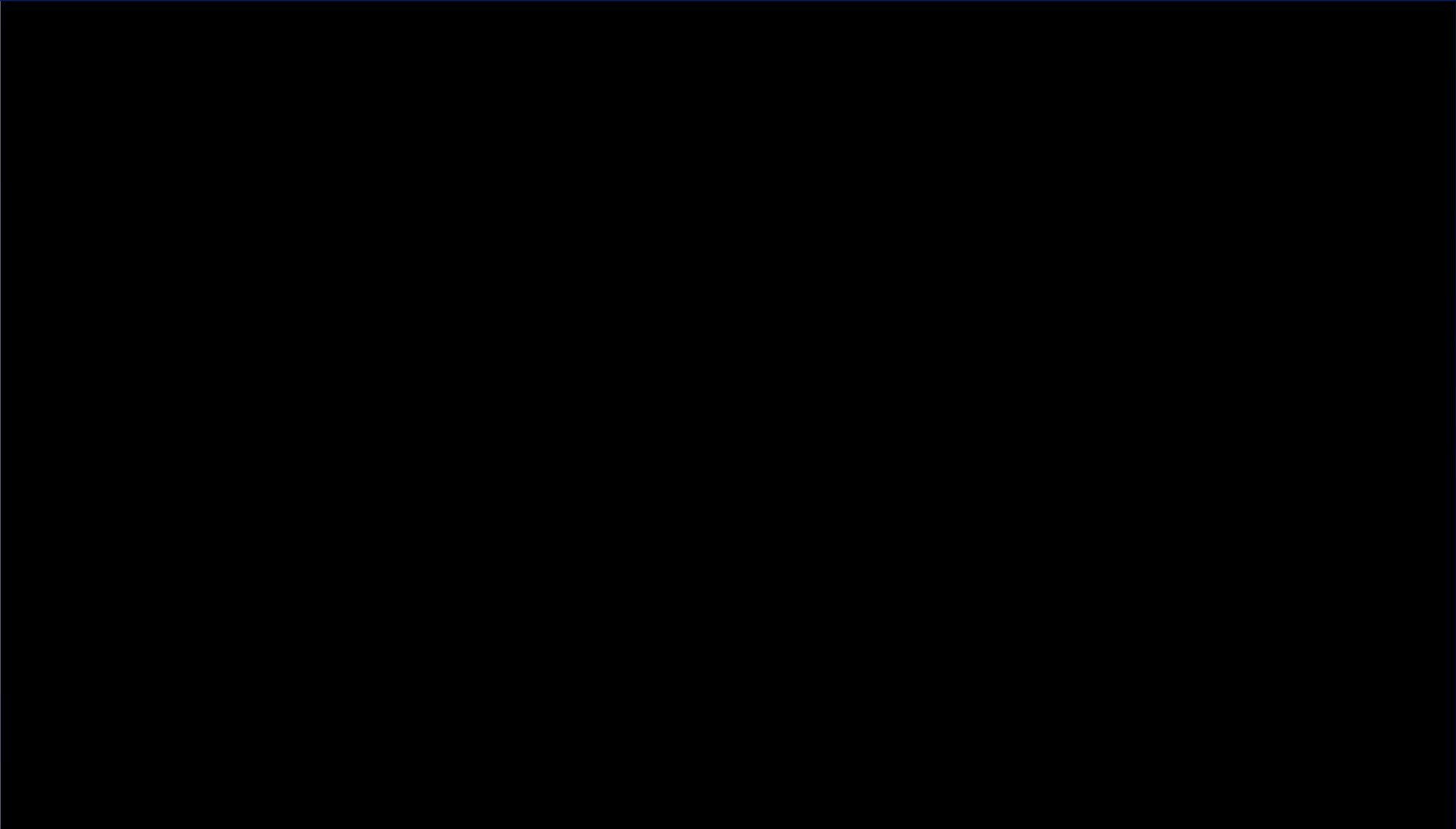
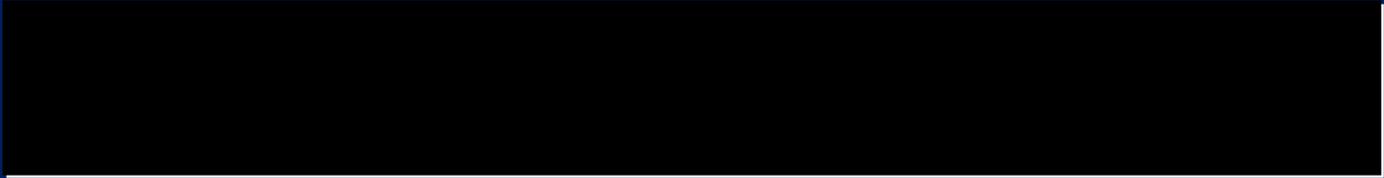












# COMMON DEFENSES

- *People v. Pena* (1983) 149 Cal.App.3d Supp. 14
  - 1) Act charged as criminal must have been to prevent a significant evil
  - 2) No adequate alternative to the commission of the act
  - 3) Harm caused by the act must not be disproportionate to the harm avoided
  - 4) Accused must enter entertain a good-faith belief that his act was necessary to prevent the greater harm
  - 5) Such belief is objectively reasonable under the circumstances; and
  - 6) The accused must not have substantially contributed to the creation of the emergency

# COMMON DEFENSES



- *People v. Patrick* (1981) 126 Cal.App.3d 952, 960:
  - “The commission of a crime cannot be countenanced where there exists the possibility of some alternate means to alleviate the threatened greater harm.”
- *People v. Slack* (1989) 210 Cal.App.3d 937
  - Dine and dash from Mexico, angry bouncers, US Customs stops him at border entry – no necessity
- *United States v. Bailey* (1980) 444 U.S. 394, 410
  - Whether identified as necessity or duress, “[under] any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law . . . the defenses will fail.”

# BLOOD DRAWS

- *People v. Cuevas* (2013) 218 Cal. App. 4th 1278
  - Officers can testify about blood draws and whether they were performed in a reasonable manner under the 4<sup>th</sup> Amendment.
    - Def was given implied consent admonishment
    - Def consented
    - Blood draw performed by someone the officer believed to be a phlebotomist or blood tech.
    - Def did not appear to be in pain/discomfort
    - Blood draw was routine based on officer's training and experience.
    - Site was cleaned in advance of blood draw
    - Clean needle was used.

# BLOOD DRAWS

- *People v. Fish* (2018) 29 Cal.App.5th 462
  - Valid arrest for DUI
  - Defendant refused to submit to testing, officer got a blood warrant
  - Draw performed at a hospital where officer observed (no testimony regarding manner)
  - Court relies on official duty presumption (Evid. Code 664) and presumption of validity
  - Burden of proving unconstitutional blood draw rested upon the defendant under these facts

# IGNITION INTERLOCKS

- Vehicle Code 23575.3
  - Offenses with dates of violation on or after 1/1/19
  - First offense (23152 per 23536):
    - Up to six months IID or
    - Restricted license for 1 year (to/from work, DUI program)
    - Restricted license for 6 months
  - Second offense (23152 per 23540):
    - 12 months IID
  - Third offense (23152 per 23546)
    - 24 months IID
  - Felony offense due to priors (23152 per 23550 or 23550.5)
    - 36 months IID

# IGNITION INTERLOCKS

- Injury Offenses:
  - First offense with injury (23153 per 23554)
    - 12 months IID
  - Offense causing injury with one prior (23153 per 23560)
    - 24 months IID
  - Offense causing injury with two priors (23153 per 23566)
    - 36 months IID
  - Offense causing injury with one felony prior (23153 with prior punishable under 23550.5)
    - 48 months IID

# CURRENT CASES IN DUI

- *Missouri v. McNeely* (2013) 133 S. Ct. 1552
- *Birchfield v. North Dakota* (2016) 136 S. Ct. 2160
  - Breath tests without a warrant → search incident to arrest.
  - Blood tests will need a warrant or a separate warrant exception aside from search incident to arrest

# CURRENT CASES IN DUI

- *People v. Vannesse* (2018) 23 Cal. App. 5th 440
- *People v. Gutierrez* (2018) 27 Cal. App. 5th 1155
- *Mitchell v. Wisconsin* (2019) 588 U.S. \_\_\_\_\_
- *People v. Cruz* (2019) 34 Cal.App.5th 764
- *People v. Cooper* (2019) 37 Cal.App.5th 642

# CURRENT CASES IN DUI

- *People v. Nzolameso* (2019) 39 Cal.App.5th 1181
- *People v. Lopez* (2020) 46 Cal.App.5th 317
- *People v. Nault* (2021) 72 Cal.App.5th 1144

# IMPLIED CONSENT

- Vehicle Code section 23612
- Differentiate between PAS and EPAS tests
  - PAS is a voluntary PRE-ARREST breath test
  - EPAS is the evidential POST-ARREST test

# IMPLIED CONSENT

- [REDACTED]
- “A person who drives . . . is deemed to have given his or her consent to chemical testing of his or her blood or breath . . . if lawfully arrested for [DUI.]” (VC 23612(a)(1)(A).)

□ [REDACTED]

■ [REDACTED]





A Crash Course:  
making a record  
and common  
motion issues



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- Notice of appeal is filed
  - Misdemeanor (30 days- Cal. Rules of Ct. 8.853.)
  - Felony (60 days- Cal. Rules of Ct. 8.304(b))

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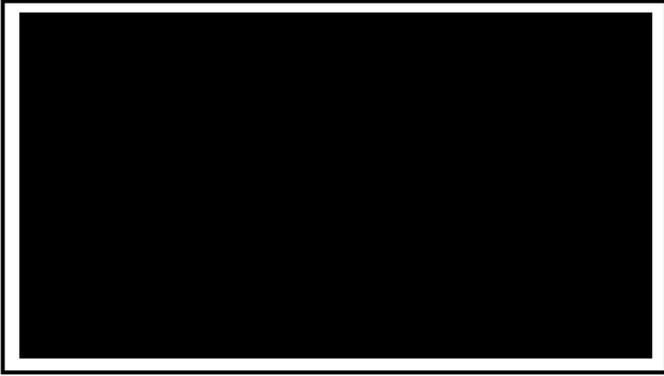
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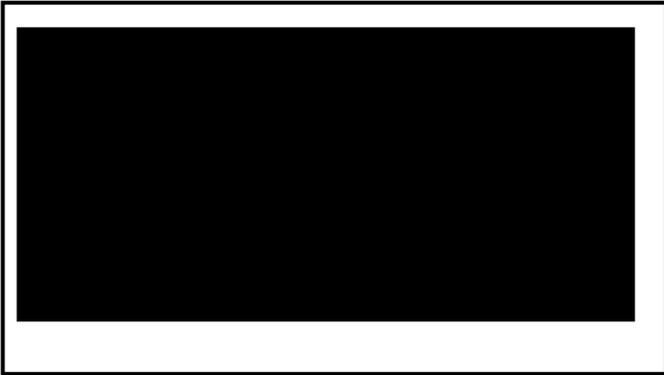
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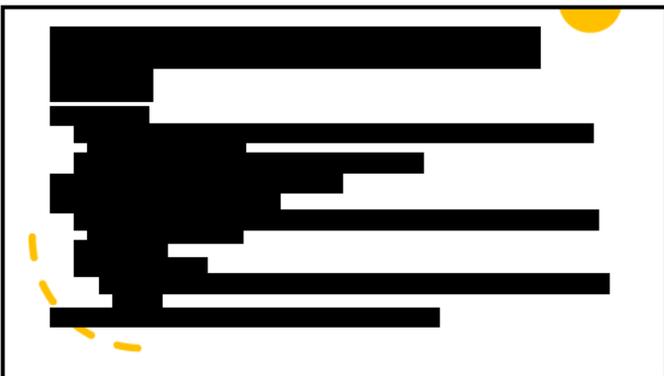
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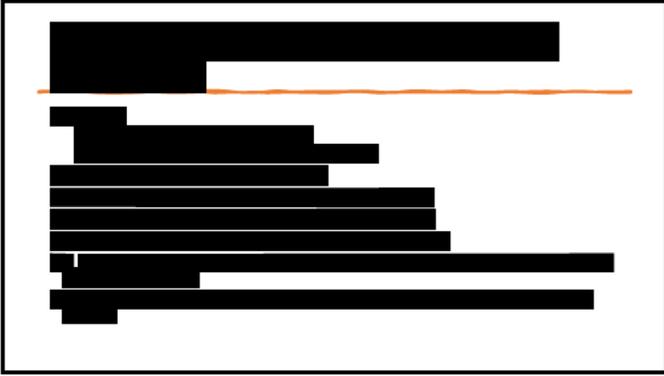
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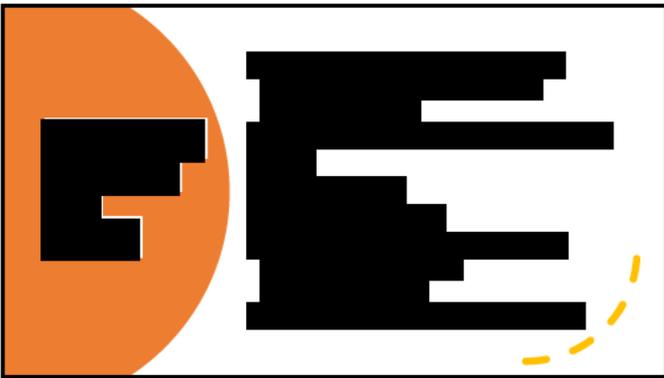
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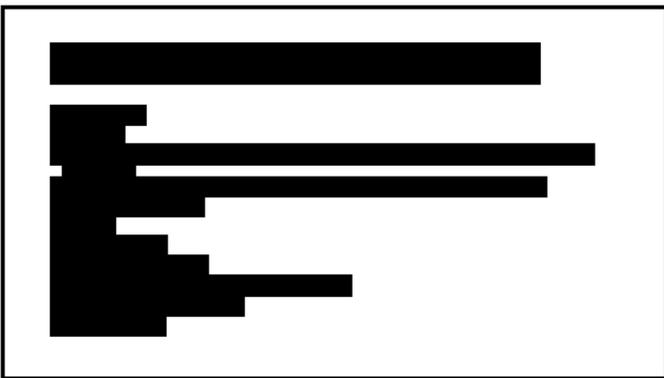
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- Under *In re Humphrey*, courts granting pre-trial detention **must explain their analytical process, and include it in the court's minutes, why alternatives to pre-trial detention are inadequate.** *In re Humphrey* (2011) 11 Cal.5th 135.

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### Motions to Suppress- Standard of Review

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- A review of a motion to suppress is a mixed question of fact and law. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182)
- Reviewing courts defer to the factual findings of the trial court when supported by substantial evidence (*People v. Alvarez, supra*, at p. 182), but independently determine the relevant legal principles and apply those principles in evaluating the reasonableness of the search or seizure. (*People v. Mays* (1998) 87 Cal.App.4th 969, 972.)
- "When a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746, see also, *People v. Eubanks* (1996) 14 Cal.4th 580, 595; *People v. Neely* (1999) 70 Cal.App.4th 767, 775-776; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016)

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**Reasonable Suspicion**

- A police officer may conduct a brief, investigatory stop when there are articulable facts supporting a reasonable suspicion that criminal activity is afoot. (*Terry v. Ohio* (1968) 392 U.S. 1, 30.)
- The standard for a "Terry-stop" is less demanding than probable cause and requires a showing considerably less than a preponderance of the evidence. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123.)
- Only a "minimal level of objective justification" is necessary. (*United States v. Sokolow* (1989) 490 U.S. 1, 7.)

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- "A traffic stop is justified at its inception if an officer has . . . a reasonable articulable suspicion that a particular motorist has violated any of the traffic or equipment regulations of the jurisdiction. Thus, the government need not show a violation actually occurred to justify an initial traffic stop. We look only at whether the stop was objectively justified; the officer's subjective motives are irrelevant."
- (*U.S. v. Mitchell* (10th Cir. 2011) 653 F.3d 1206, 1216, (emphasis added) internal quotations and citations omitted; see also *People v. Bell* (1996) 43 Cal.App.4th 754, 761.)

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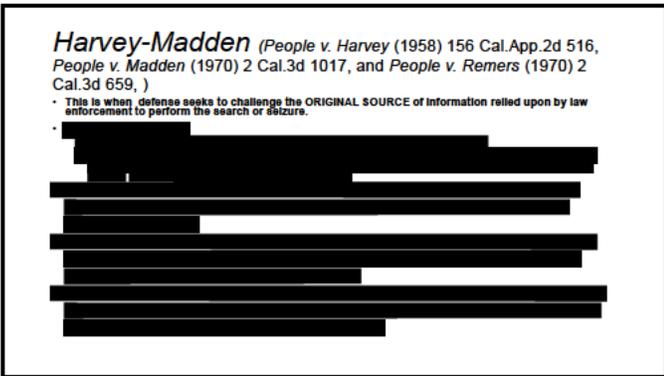
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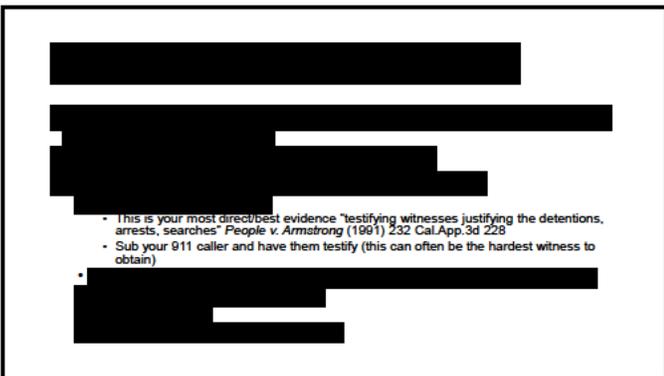
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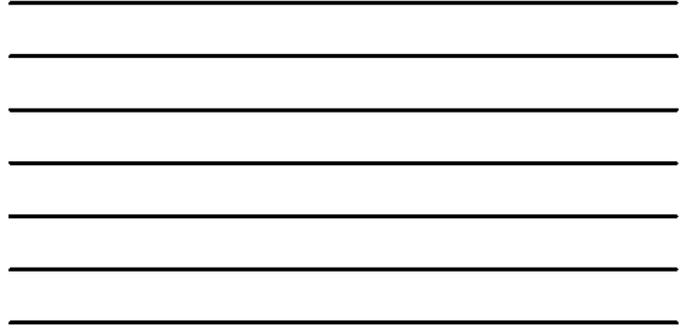


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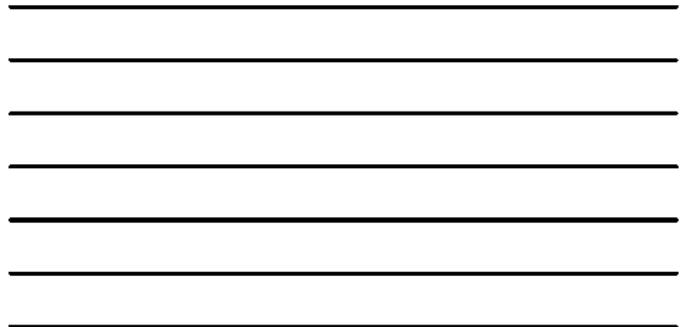
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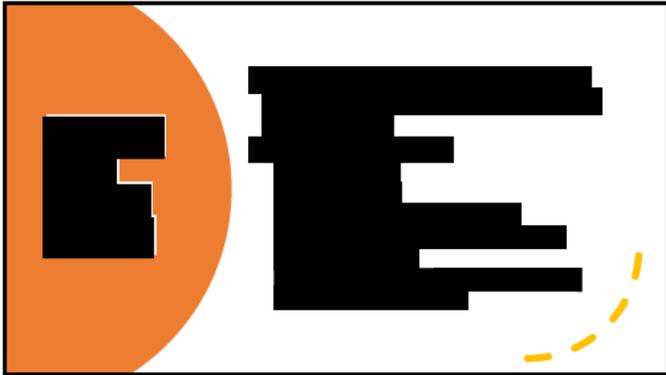


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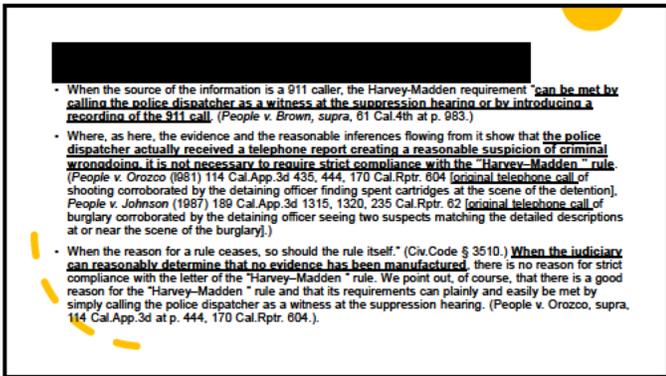
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- **Circumstantial evidence** verifying that probable cause had not been manufactured is also sufficient. (*People v. Armstrong*, supra, 232 Cal.App.4th at p. 245)
- Moreover, the *Harvey-Madden* rule is also satisfied **when the officers at the scene are able to sufficiently corroborate the information received by a non testifying dispatcher.** (*People v. Johnson* (1987) 189 Cal.App.3d 1315, 1319; *People v. Orozco* (1981) 114 Cal.App.3d 435, 444.)

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[REDACTED] were shooting out of a car. The People had the dispatcher but did not play the 911 call.

- "The [P]eople never proved that such a call was made but they did prove that there were cartridges within four to five feet of the passenger door to the car when the police looked for them.
- That these cartridges were found was testified to by officers who were subject to cross-examination.
- The Court found the presence of the cartridges certainly supports a very strong inference that the police did not make up the information from the informant.
- Thus, the veracity of the dispatcher's statement that he received a call was circumstantially proved." (*Johnson*, supra, 189 Cal.App.3d at pp. 1319-1320, quoting *Orozco*, supra, 114 Cal.App.3d at pp. 444-445.)
- In *Johnson*, the information transmitted by the police dispatcher was likewise "corroborated by what the officers observed at the scene, making it virtually impossible for the information to have been made up in the police department.
- The officers at the scene were thoroughly cross-examined and the court obviously believed that they, in fact, had received the dispatch as they said they did and found the evidence as they described." (*Johnson*, supra, at p. 1320.)

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- In *re Richard G.* (2009) 173 Cal.App.4th 1252, 1259
- Here there was no "manufacture" of information. The information received by the police dispatcher was radioed to multiple officers in multiple patrol cars and provided detailed descriptions of the two suspects.
  - Absent 1. the officer himself calling in the report to the dispatcher or, 2. claimvoyance on the part of the dispatcher, there is no way that the dispatcher could have manufactured these detailed descriptions at or near the place and time the officers saw appellant and his companion matching the detailed descriptions.
- Where, as here, the evidence and the reasonable inferences flowing from it show that the police dispatcher actually received a telephone report creating a reasonable suspicion of criminal wrongdoing, it is not necessary to require strict compliance with the "Harvey-Madden" rule. (*Ibid.*)

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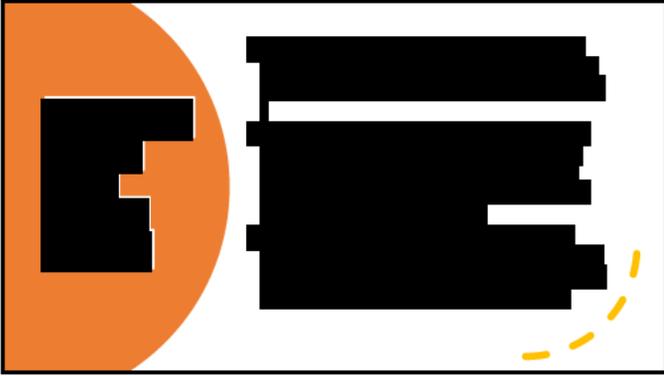
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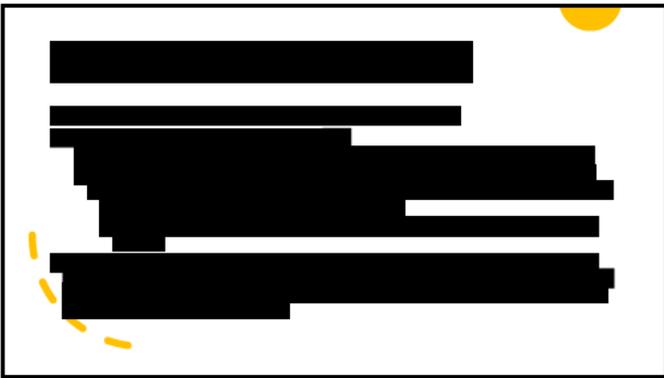
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- For *Harvey-Madden* you need to prove that the report was not made-up. This is especially important in why we need to proffer the actual 911 call.
- *People v. Brown* 61 Cal.4th 968: found an anonymous 911 call sufficiently reliable to support the traffic stop of a car
- The caller in *Brown* reported he was witnessing a fight in the alley outside of his home. He said at least four people, who lived two doors away from him, were involved. He heard one person claim to have a loaded gun.
- Indeed, the dispatcher confirmed she could hear people screaming in the background of the call, further corroborating the caller's account. The caller also told the dispatcher that he could hear the siren and see the lights of the responding patrol car.

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- "Another indicator of veracity is the caller's use of the 911 emergency system," which "has some features that allow for identifying and tracing callers, and thus provide[s] some safeguards against making false reports with immunity." (*Navarette*, 40 Cal.4th at p. 467.) This 911 call was recorded, and the caller confirmed his address with the dispatcher. (*Navarette*) Get this information out! The automatically updated info as part of the computer system
- Finally, as this court has observed, private citizens who report criminal activity generally have no bias or motive other than good citizenship, and therefore tend to be reliable. (*People v. Ramey* (1976) 16 Cal.3d 263, 268–269)

[REDACTED]

[REDACTED]

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• *People v. Wells* (2006) 38 Cal.4th 1078. In *Wells*, the officers received an anonymous phone call reporting a driver weaving across the road and possibly drunk. (id. at p. 1080.) The caller identified the vehicle as "an '80's model blue van traveling northbound on Highway 99 at Airport Drive." (ibid.) The police spotted the van a few miles north of that location on the highway and pulled it over, without having observed any signs of impaired driving. (ibid.)

• *Wells* concluded that the anonymous tip corroborated by the observation of the matching vehicle was sufficient to constitute reasonable suspicion under the circumstances. *Wells* noted, "California cases indicate that a citizen's tip may itself create a reasonable suspicion sufficient to justify a temporary vehicle stop or detention, especially if the circumstances are deemed exigent by reason of possible reckless driving or similar threats to public safety. (*Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926[phoned-in tip of erratic driving]; *People v. Rios* (1983) 140 Cal.App.3d 616 [car illegally parked and traffic hazard]; *People v. Superior Court (Meyer)* (1981) 118 Cal.App.3d 579 [reckless driving, driver pointing gun].)" (*People v. Wells*, supra, 38 Cal.4th at p. 1083.)

- Exigent circumstances and a threat to public safety are further factors to consider for reliability and finding RS

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• *Wells* also pointed to *United States v. Wheat* (8th Cir.2001) 278 F.3d 722, 729-730, noting, "As *Wheat* explained ... cases allowing the search stress the accuracy of the tipster's description and location of the vehicle, the relatively greater urgency presented by drunken or erratic highway drivers, and the minimal intrusion involved in a simple vehicle stop." (*People v. Wells*, supra, 38 Cal.4th at p. 1085)

- With your location get out how far from original call, heavy or light traffic, residential area? Want to show odds of another car matching that description in same area is VERY LOW, probability this was the car 911 caller saw VERY HIGH

• *Wells* explained, *Wheat* believed that in the context of reckless and possibly intoxicated driving, the tip's lack of "predictive information" [citation] was not critical to **determining its reliability**. Such an analysis is more appropriate in cases involving tips of concealed criminal behavior such as possession offenses. (*Wheat*, supra, 278 F.3d at p. 730.) We agree. An informant's accurate description of a vehicle and its location provides the tip with greater reliability than in the situation of a concealed firearm, because the informant was presumably an eyewitness to illegal activity and his tip can be sufficiently corroborated by the officer spotting the described vehicle in the expected time and place.

- Time and place, how much time has passed?

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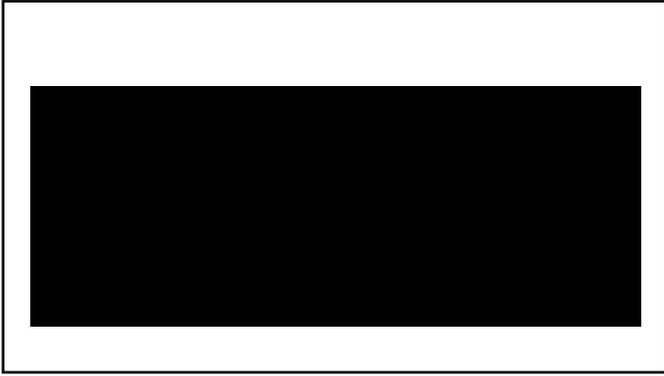
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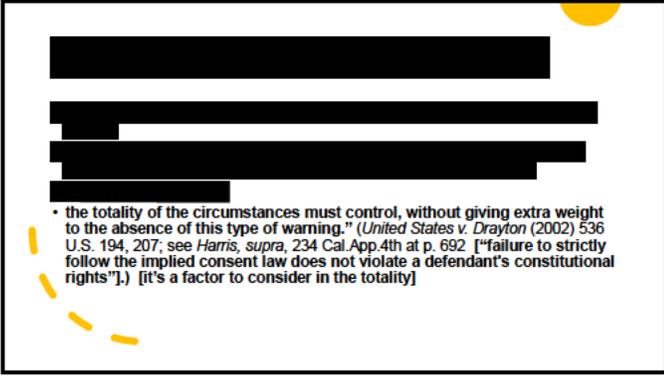
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- the totality of the circumstances must control, without giving extra weight to the absence of this type of warning.” (*United States v. Drayton* (2002) 536 U.S. 194, 207; see *Harris, supra*, 234 Cal.App.4th at p. 692 [“failure to strictly follow the implied consent law does not violate a defendant’s constitutional rights”].) [it’s a factor to consider in the totality]

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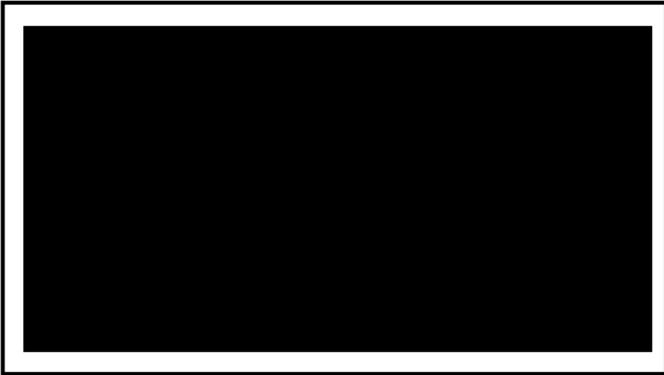
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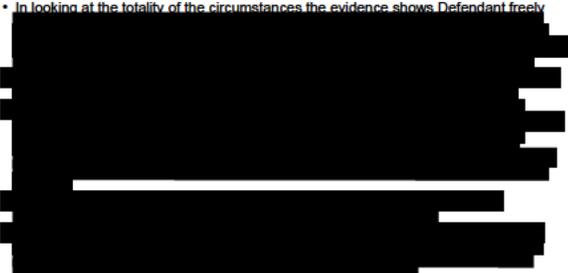
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██████████ *People v. Balov* (2018) 23  
Cal.App.5th 696

- In looking at the totality of the circumstances the evidence shows Defendant freely



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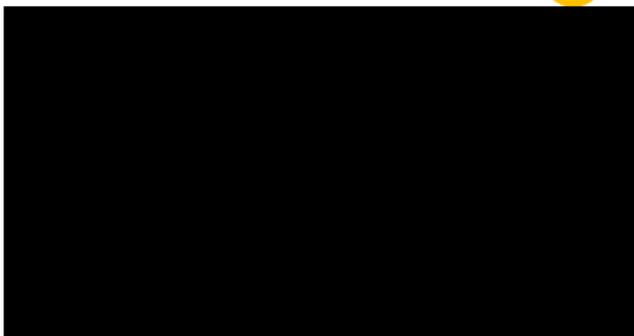
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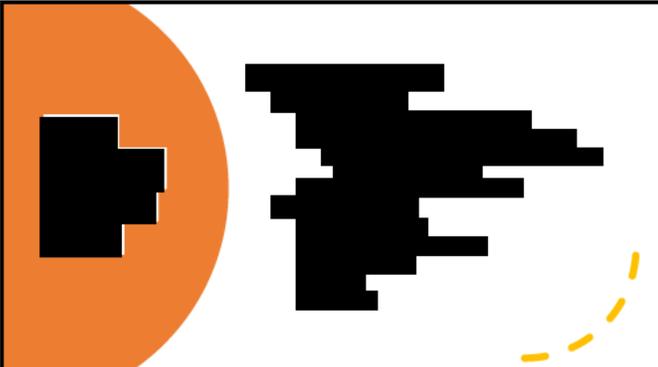
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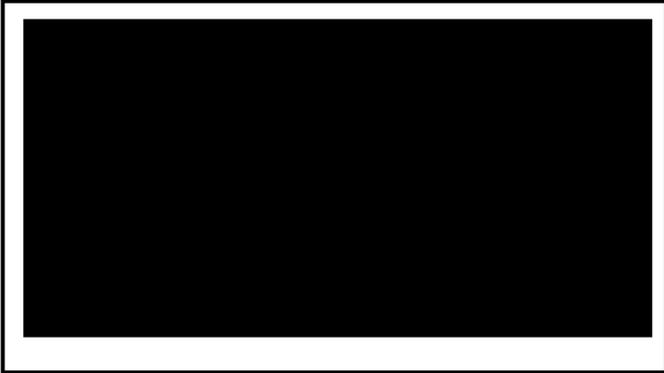
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- A showing of actual prejudice requires proof that the defendant's ability to defend against the charges has been impaired as a result of delay. The defendant must present evidence of actual prejudice. Bare conclusory statements, such as a claim of lack of recall, are not sufficient to establish actual prejudice. (*Sema v. Superior Court* (1985) 40 Cal.3d 239, 250.)
-  are insufficient to establish actual prejudice. (*Blake v. Superior Court* (1980) 108 Cal.App.3d 244, 250-251; *People v. Sahagun* (1979) 89 Cal.App.3d 1, 23-24.)
- Clearly a defendant cannot make a showing of actual prejudice by vague claims of lost or faded memories. (*Sema v. Superior Court, supra*, 40 Cal.3d at pp. 250-251 [Four year delay]; *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937 [27 month delay].)

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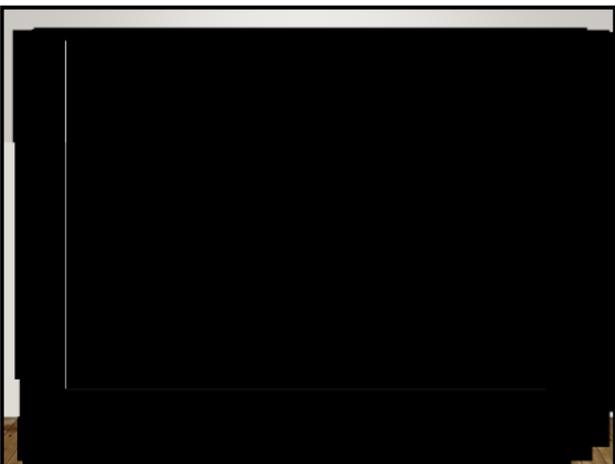
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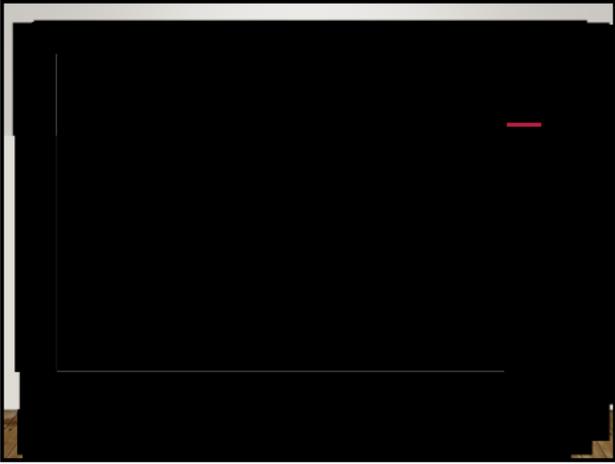
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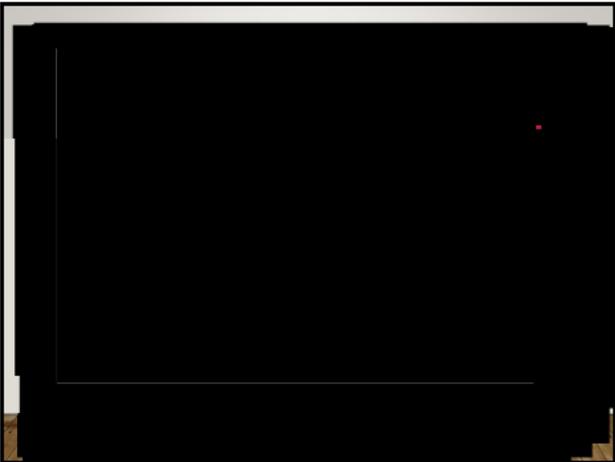
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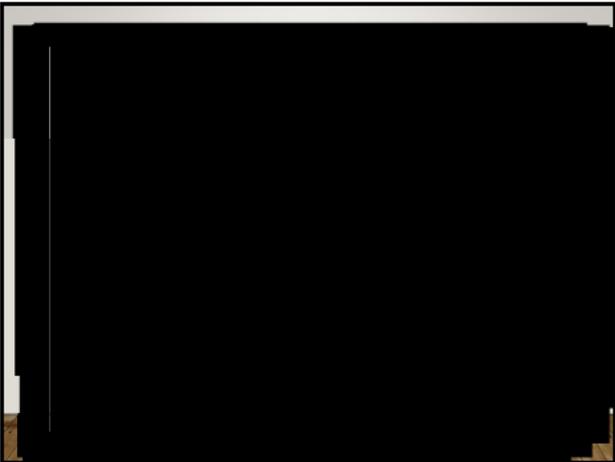
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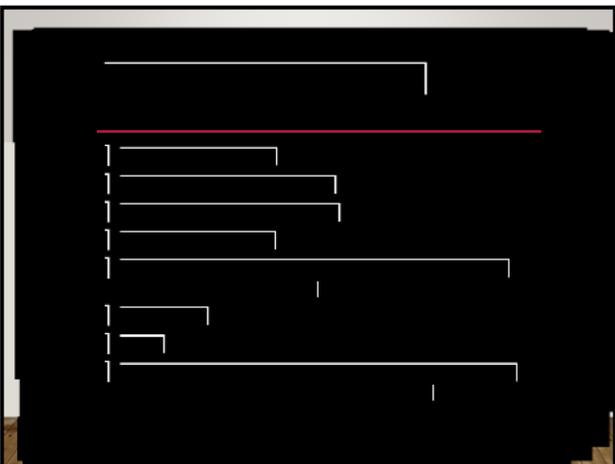
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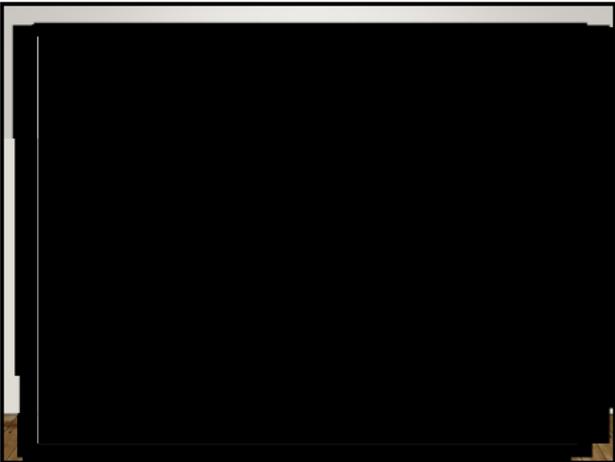
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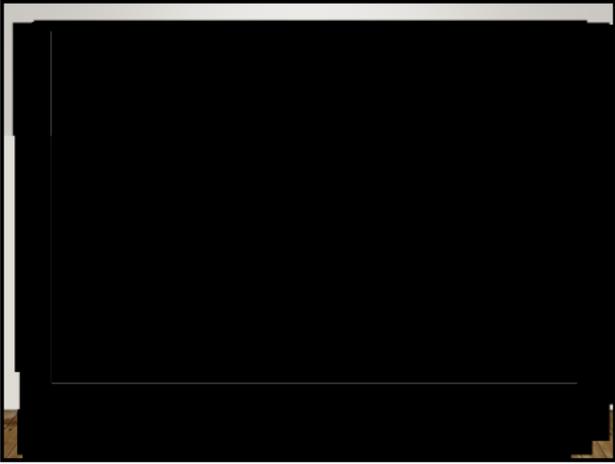
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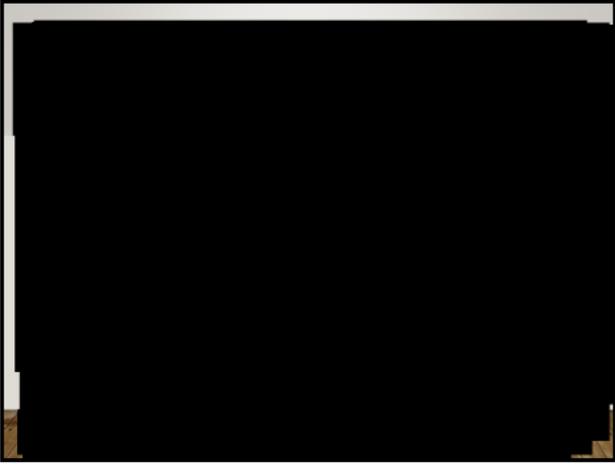
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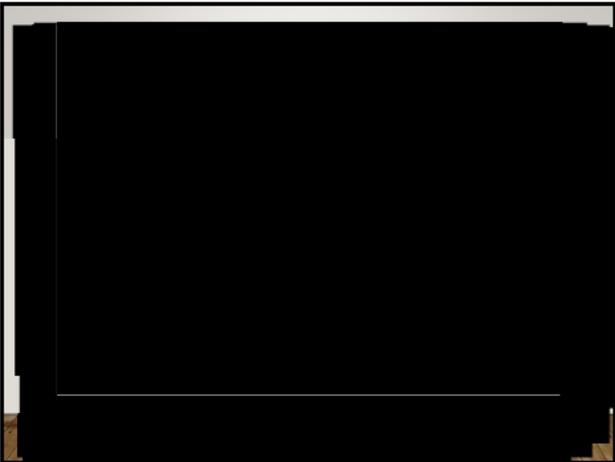
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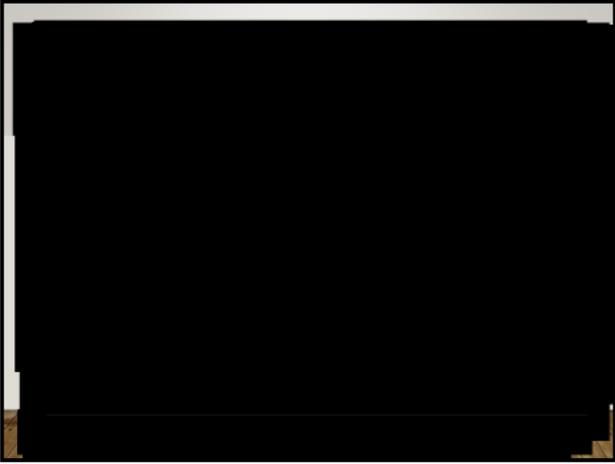
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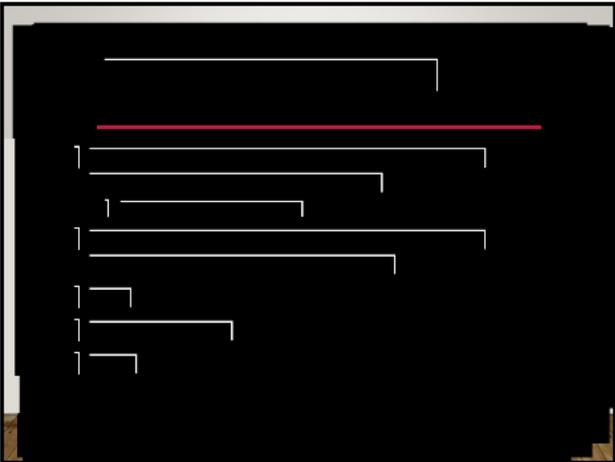
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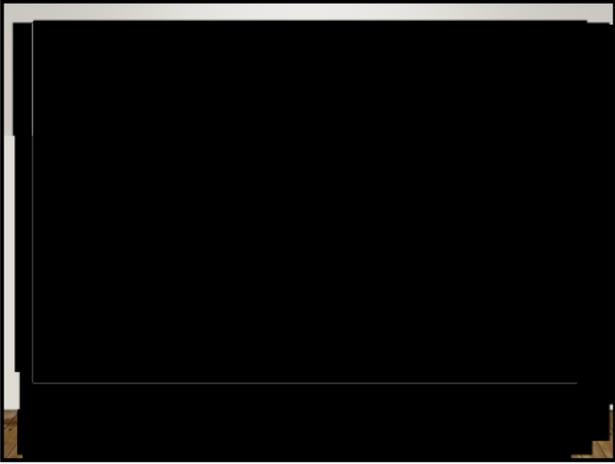
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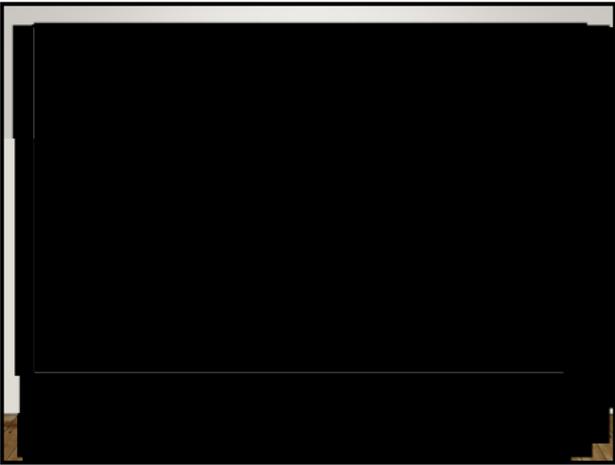
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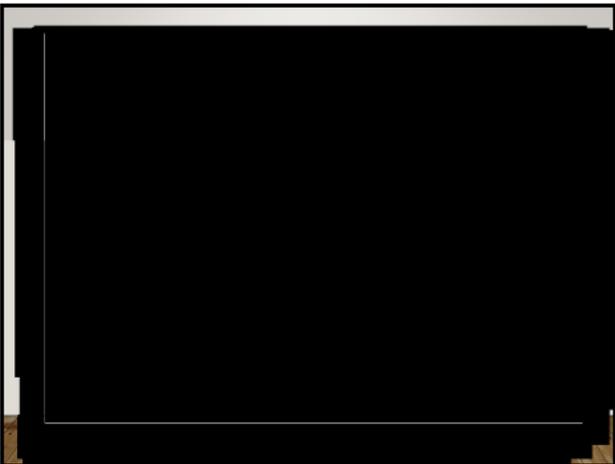
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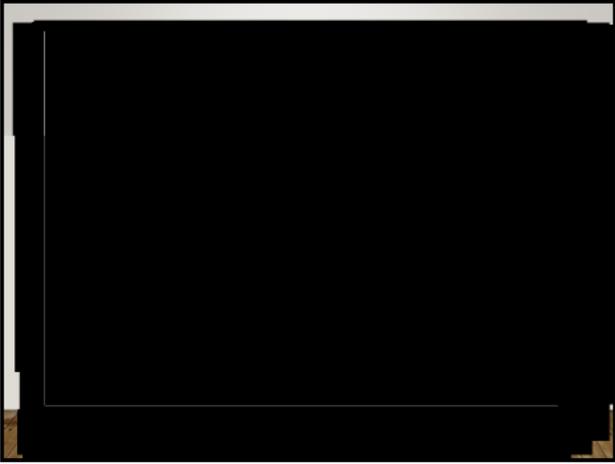
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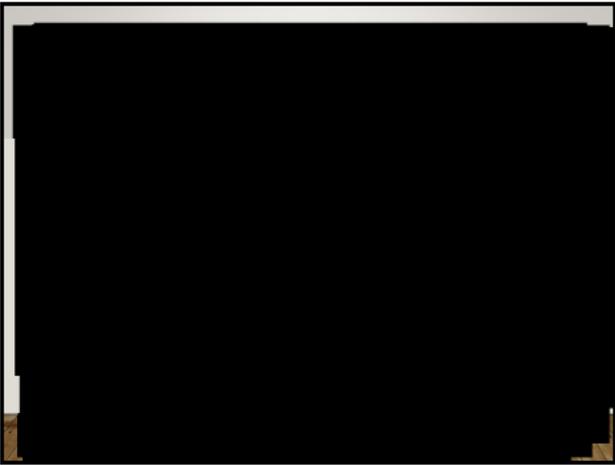
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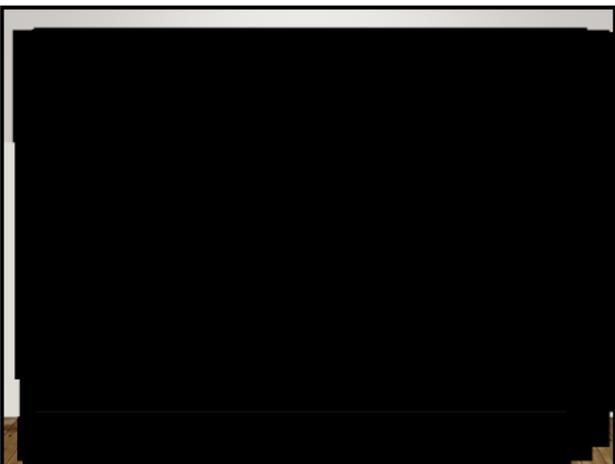
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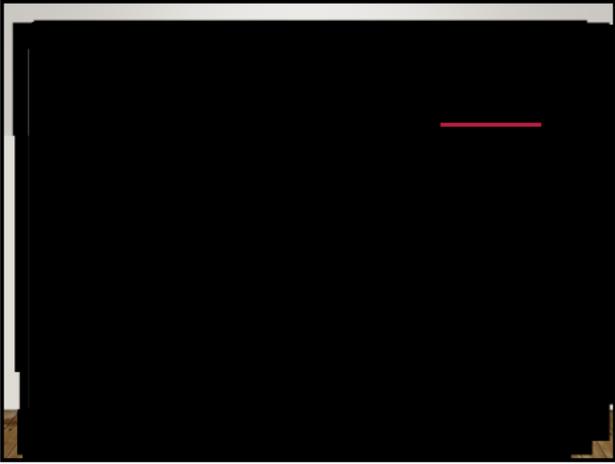
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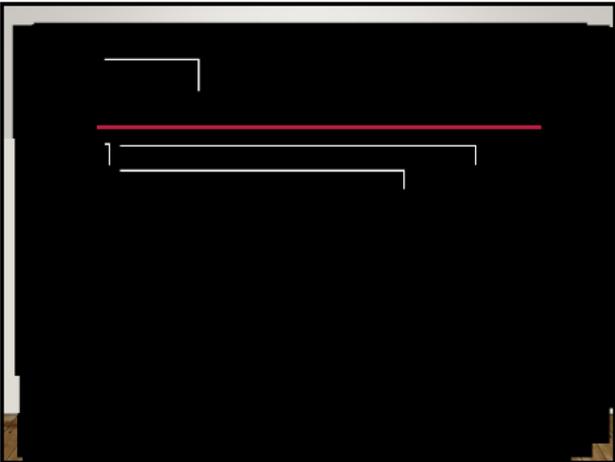
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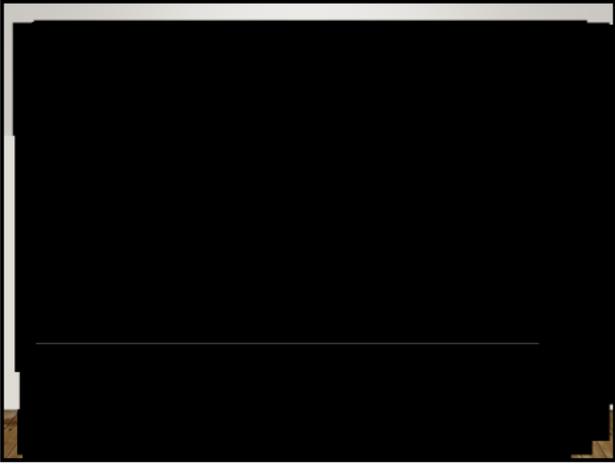
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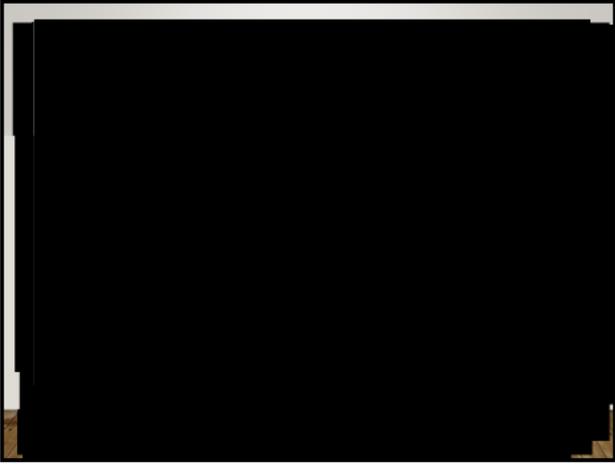
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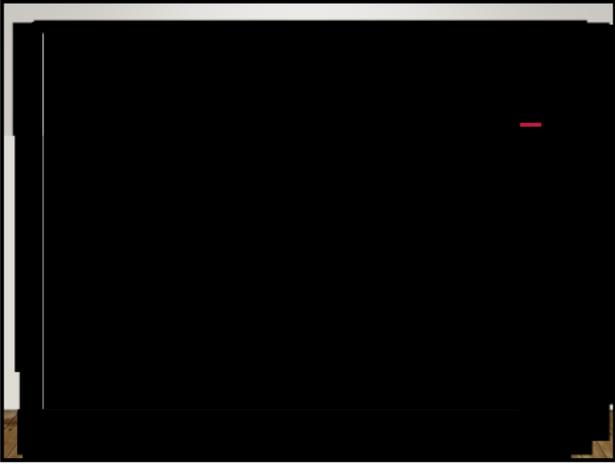
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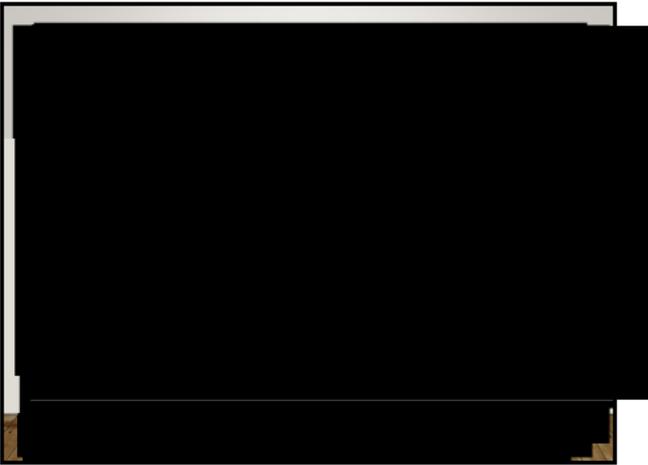
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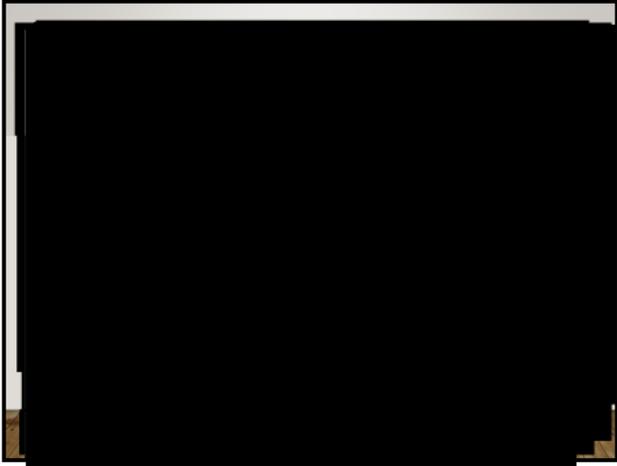
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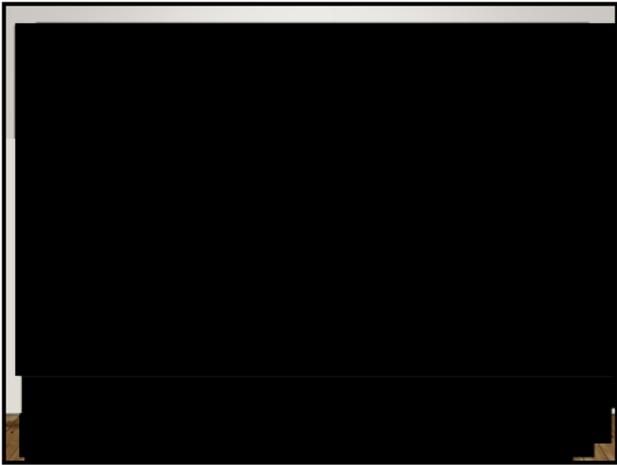
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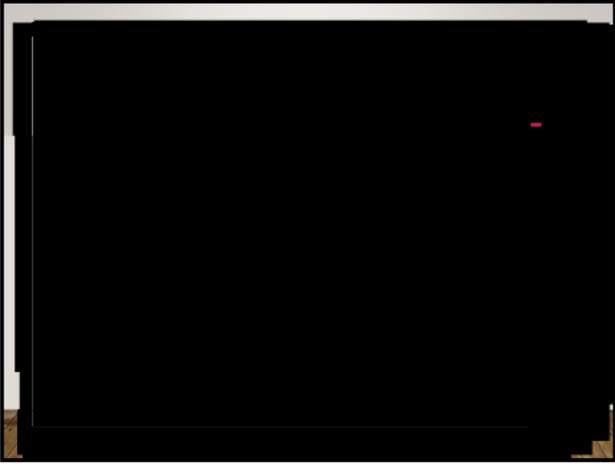
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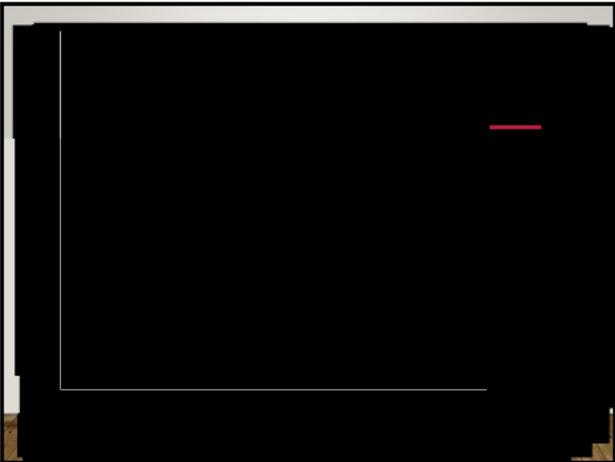
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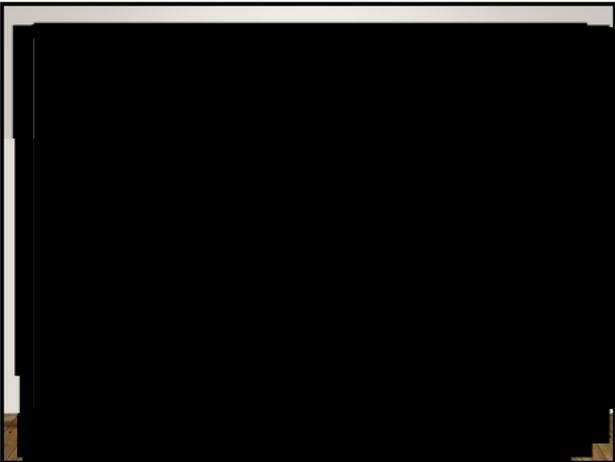
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## Misdemeanor Domestic Violence Training

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[Redacted]

- [Redacted]

- Penal Code 273.5(a)

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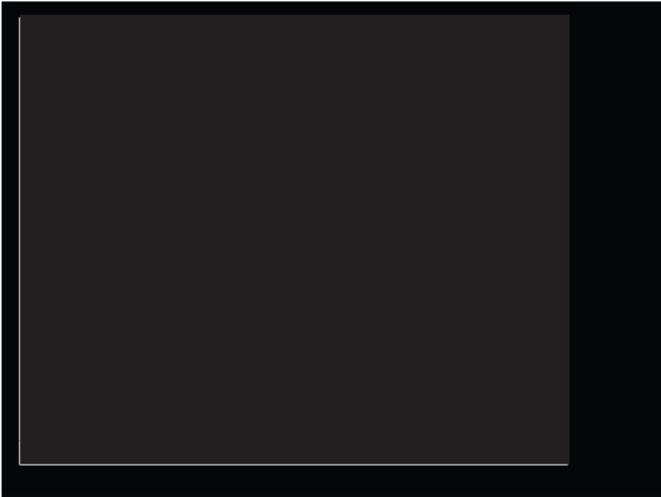
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- Penal Code 243(e)(1)
- Corroboration

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- Restraining Order Violations
  - Penal Code 166(c)(1) or 273.6?

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### Penal Code 166(c)(1)

- An order pursuant to PC 136.2
  - A Criminal Protective Order
- An order as a condition of probation per PC 1203.097
  - A Criminal Protective Order
- An order issued pursuant to Family Code 6320
  - An Emergency Protective Order
- An order excluding on party from the family dwelling or from the dwelling of another.
- An order enjoining a party from specified behavior that the court determined was necessary to effectuate the order.

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### Penal Code 273.6

- An order issued pursuant to Code of Civil Procedure 527.6, 527.8 or 527.85.
  - Civil Restraining Orders
- An order issued pursuant to Family Code 6320
  - An Emergency Protective Order
- An order excluding on party from the family dwelling or from the dwelling of another.
- An order enjoining a party from specified behavior that the court determined was necessary to effectuate the order.

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## Issuing Criminal Protective Orders

- PC 136.2(a)(1)(G)(ii)(I) ORDERS PENDING TRIAL
  - If the Court has a good cause belief that harm to, intimidation or dissuasion of a victim or witness has occurred or is reasonably likely to occur.

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# Issuing Criminal Protective Orders

- PC 136.2(h)(2)(i)(1) ORDER AFTER CONVICTION
  - Up to 10 year CPO on any DV related case, whether Defendant is sentenced to jail, prison, or probation

- [REDACTED]  
[REDACTED]  
[REDACTED]

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## Consequences of the Plea

PC 1203.097: "If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, there terms of probation SHALL include..."

- Minimum 36 months of probation
- Criminal Protective Order
- Minimum of book and release
- Minimum \$500 fine
- Successful completion of BTP
- Defendant to complete a specified amount of community service (20 hours standard for misdemeanor)

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## Consequences of the Plea

PC 273.5(a)

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- 10 year California gun ban per PC 29805
- Prior for PC 273.5(f)(1) for 7 years
  - 2-4-5 CDC, additional \$25,000 bail
- *Castro* Prior crime of moral turpitude

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## Consequences of the Plea

PC 243(e)(1)

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- 10 year California gun ban per PC 29805
- Prior for PC 273.5(f)(2) for 7 years
  - 2-3-4 CDC, additional \$25,000 bail
- *Castro* Prior crime of moral turpitude... maybe

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## Consequences of the Plea

PC 245(a)(4)

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- 10 year California gun ban per PC 29805
- Prior for PC 273.5(f)(1) for 7 years
  - 2-4-5 CDC, additional \$25,000 bail
- *Castro* Prior crime of moral turpitude

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## Consequences of the Plea

PC 242

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- 10 year California gun ban per PC 29805

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## Consequences of the Plea

PC 240

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- 10 year California gun ban per PC 29805

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## Consequences of the Plea

PC 415

- Up to 10 year CPO
- Probation pursuant to PC 1203.097

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## Consequences of the Plea

PC 166(c)(1)

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- Prior for PC 166(c)(4) for 7 years when new case involves an act of violence or a "credible threat"
  - 16-2-3 CDC
- *Castro* Prior crime of moral turpitude... maybe

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## Consequences of the Plea

PC 273.6(a)

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- 10 year California gun ban per PC 29805
- Prior for PC 273.6(d) for 7 years when new case involves an act of violence or a "credible threat"
  - 16-2-3 1170(h)
- *Castro* Prior crime of moral turpitude... maybe

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## Consequences of the Plea

PC 166(a)(4)

- Up to 10 year CPO
- Probation pursuant to PC 1203.097
- *Castro* Prior crime of moral turpitude... maybe

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## Consequences of the Plea

- Charge a 166(c)(1) or a 273.6?
  - Domestic Violence Unit = PC 166(c)(1)
  - Misdemeanor Unit = 273.6 (w/ exceptions)

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- Code of Civil Procedure Section 1219
  - (a) Except as provided in subdivisions (b) and (c), if the contempt consists of the commission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment.
  - (b) Notwithstanding any other law, a court shall not imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime. Before finding a victim of a domestic violence crime in contempt as described in this section, the court may refer the victim for consultation with a domestic violence counselor...

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[REDACTED]

- ... in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of defendant's commission of other domestic violence is not inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.
- Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

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[REDACTED]

- [Thus the 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes... that the evidence was 'more probative than prejudicial.'"]
- *People v. Johnson* (2010) 185 Cal.App.4th 520.
  - Prior was 18 years old.

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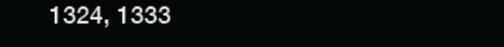
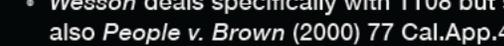
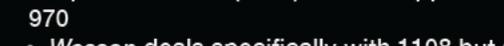
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- *People v. Wesson* (2006) 138 Cal.App.4th 959, 970
- *Wesson* deals specifically with 1108 but see also *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333

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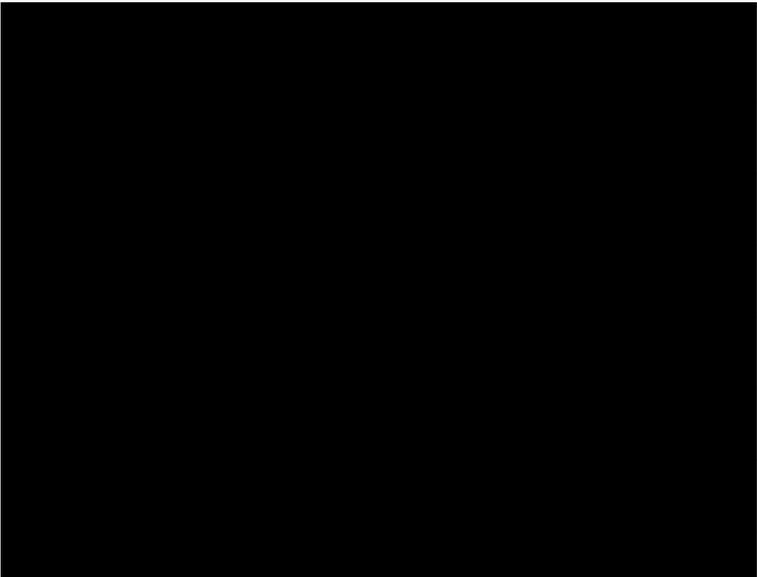
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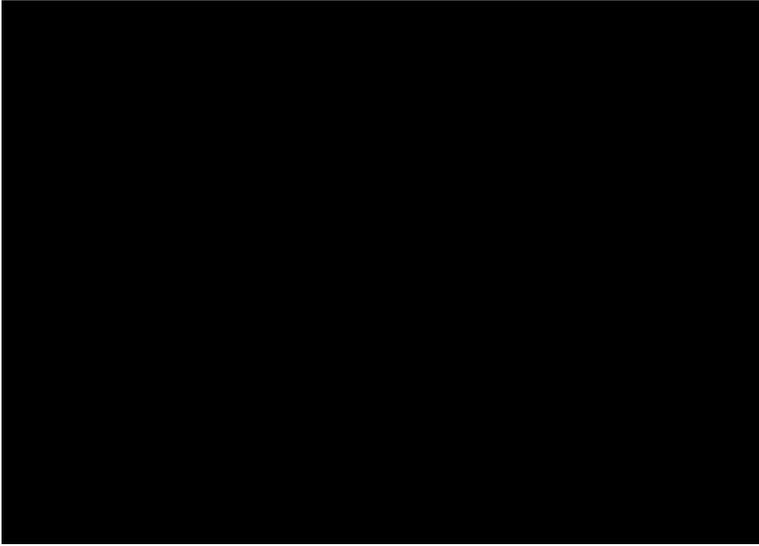
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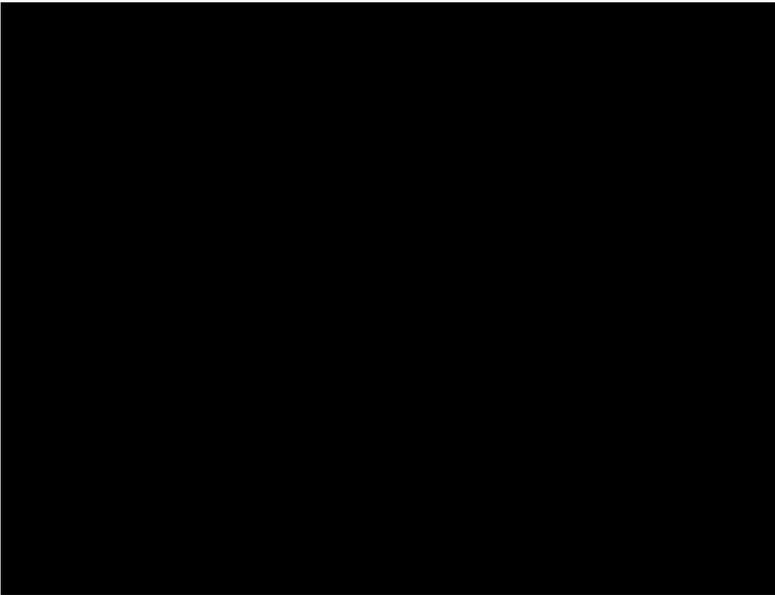
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# Discovery Requests



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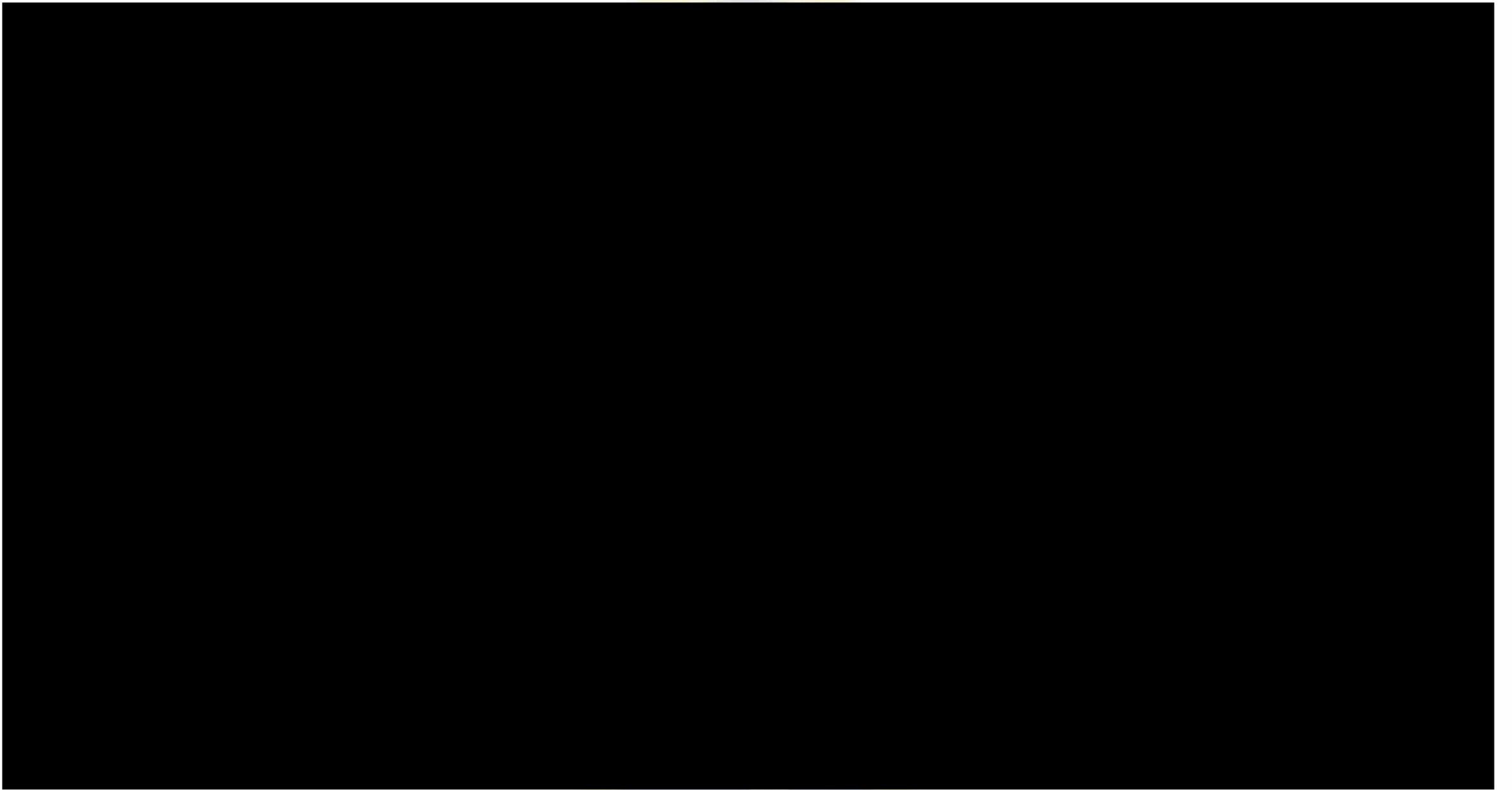
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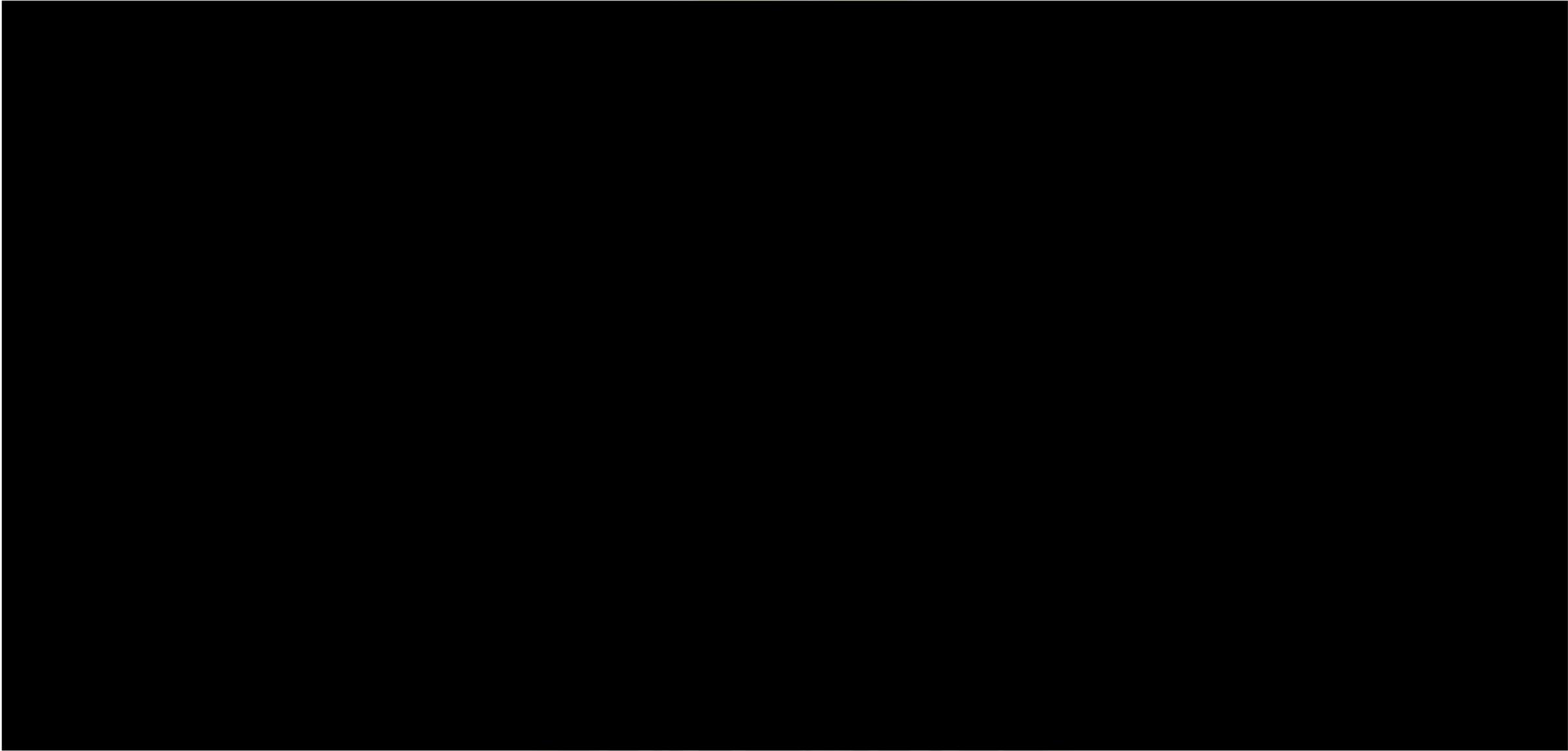
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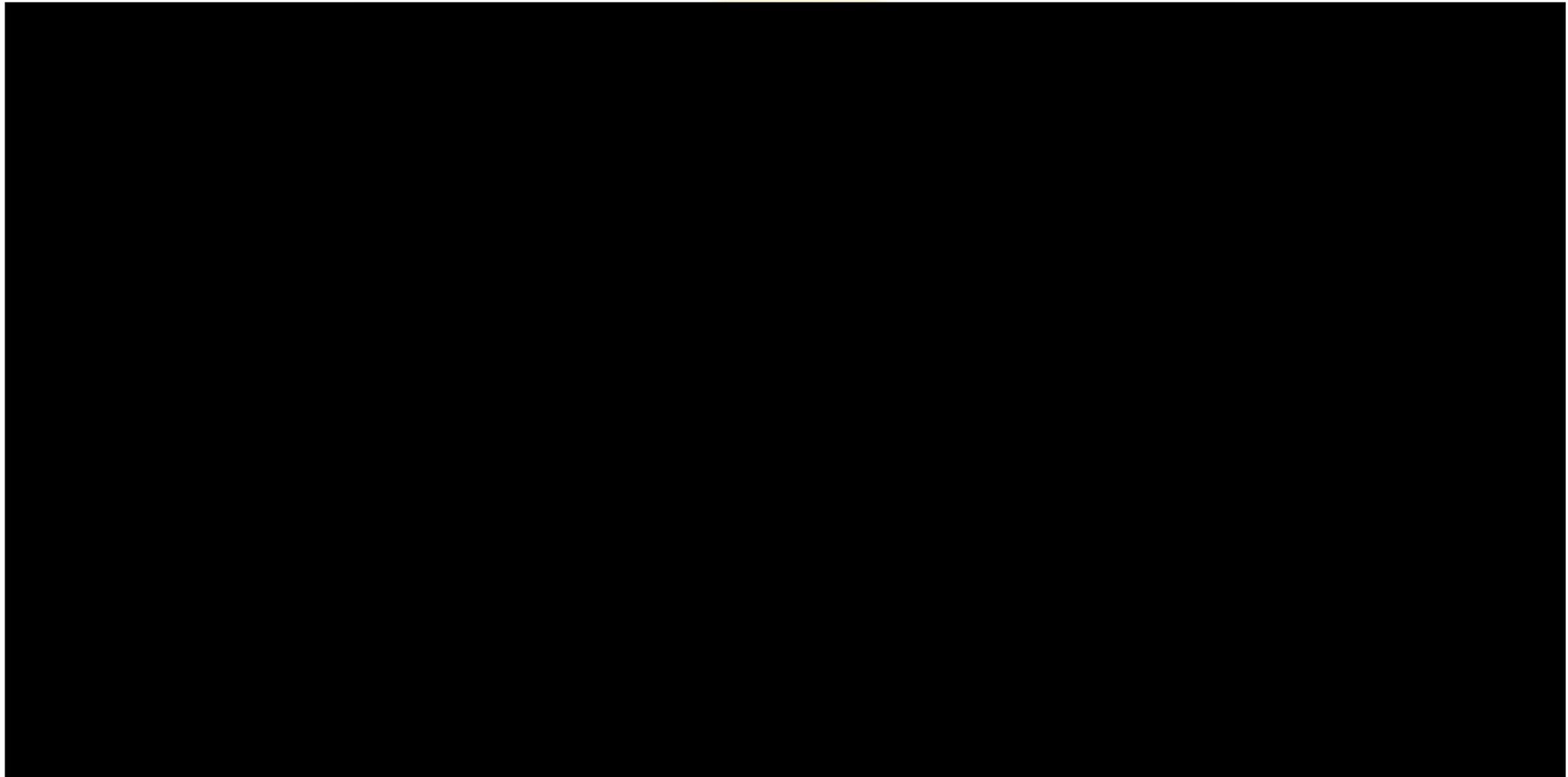


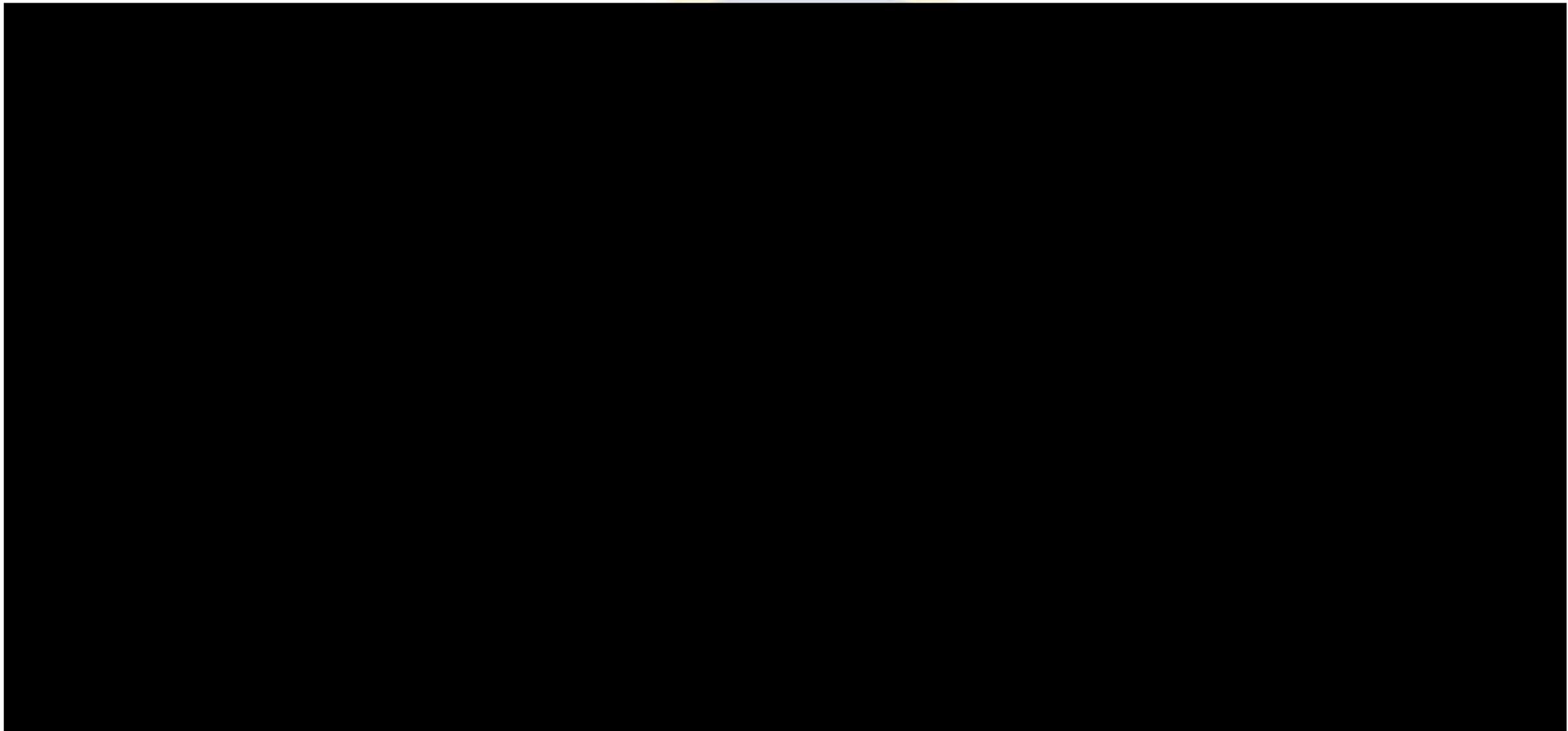














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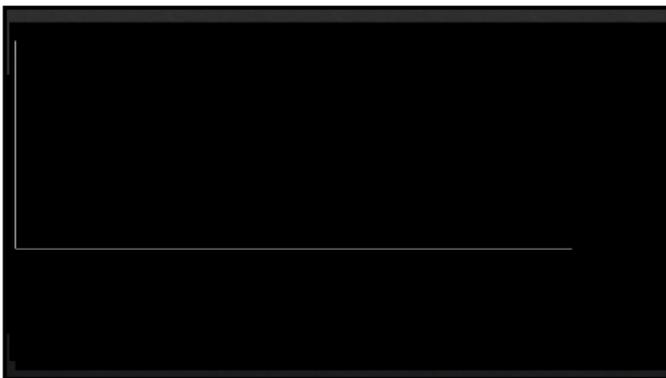
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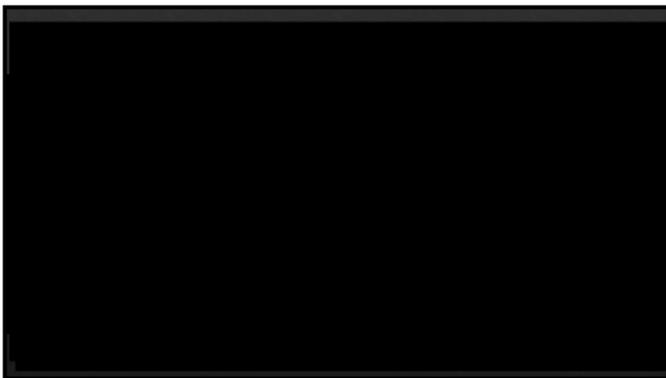
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**American Bar Association Canon 1908:  
Newspaper Discussion of Pending Litigation**

- ⊗ Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice.
- ⊗ Generally they are to be condemned.

**CA Rules of Professional Responsibility  
Rule 3.6 – Trial Publicity**

- ⊗ A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will:
  - ⊗ Be disseminated by means of public communication, and
  - ⊗ Have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

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**Rules Limiting Disclosure**

These rules all specify what type of information should not be divulged directly to the media during the pendency of a criminal matter.

CA Rules of Professional Conduct rule 3.6

- ⊗ ABA Model Code of Professional Conduct rules 3.6 and 3.8
- ⊗ National Prosecution Standards rules 2-14.2 to 2-14.8
- ⊗ Common sense

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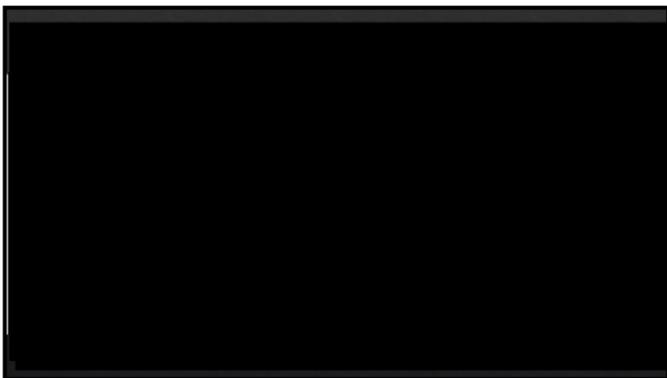
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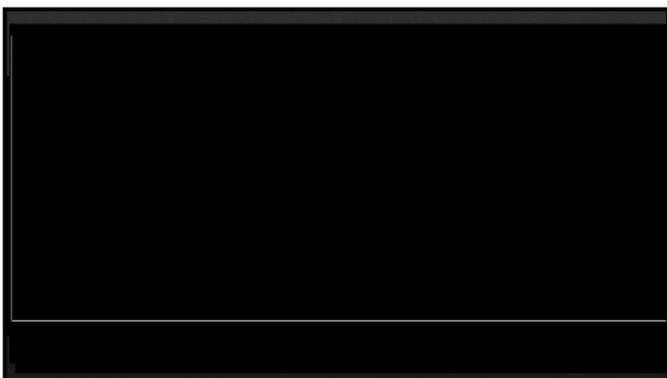
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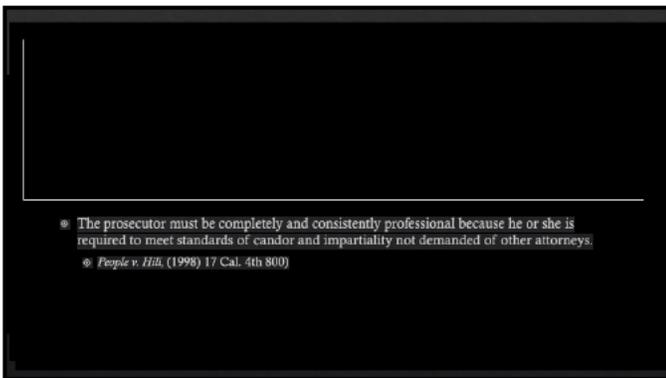
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⦿ The prosecutor must be completely and consistently professional because he or she is required to meet standards of candor and impartiality not demanded of other attorneys.  
⦿ *People v. Hill*, (1998) 17 Cal. 4th 800

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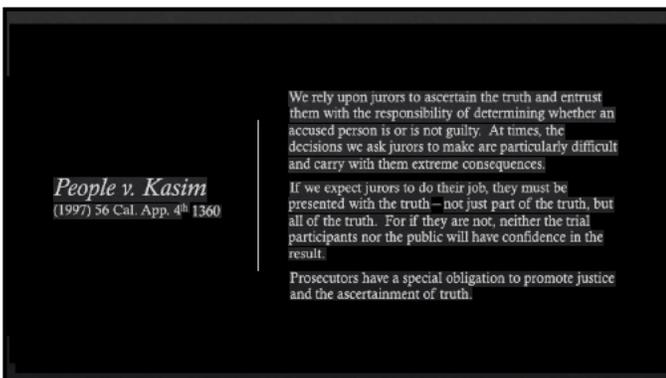
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*People v. Kasim*  
(1997) 56 Cal. App. 4th 1360

We rely upon jurors to ascertain the truth and entrust them with the responsibility of determining whether an accused person is or is not guilty. At times, the decisions we ask jurors to make are particularly difficult and carry with them extreme consequences.

If we expect jurors to do their job, they must be presented with the truth – not just part of the truth, but all of the truth. For if they are not, neither the trial participants nor the public will have confidence in the result.

Prosecutors have a special obligation to promote justice and the ascertainment of truth.

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***Berger v. United States***  
(1935) 295 U.S. 78, 88

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he [or she] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He [or she] may prosecute with earnestness and vigor – indeed, [the prosecutor] should do so."

- "But, while [the prosecutor] may strike hard blows, he [or she] is not at liberty to strike foul ones."
- "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

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**Rule 3.8 – Special Responsibilities of a Prosecutor**  
The prosecutor in a criminal case shall:

<p>Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;</p> <p>Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;</p> <ul style="list-style-type: none"> <li>• Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;</li> </ul>	<p>Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>
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### Rule 3.8 Continued

Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6

- ⦿ The rules apply to all employees, not just attorneys. You can be held responsible for someone else's actions.

When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

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### Rule 3.8(f)

- ⦿ When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - ⦿ Promptly disclose that evidence to an appropriate court or authority, and
  - ⦿ If the conviction was obtained in the prosecutor's jurisdiction,
    - ⦿ Promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - ⦿ Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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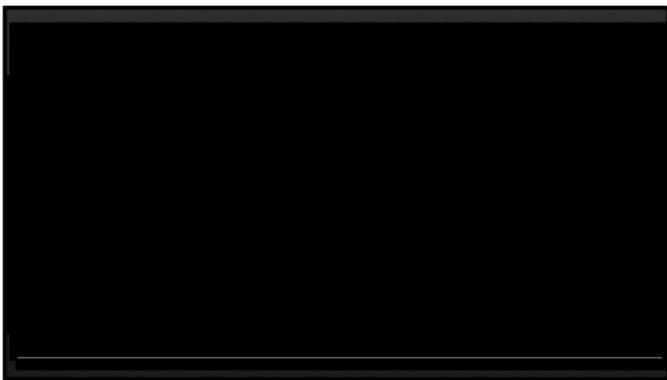
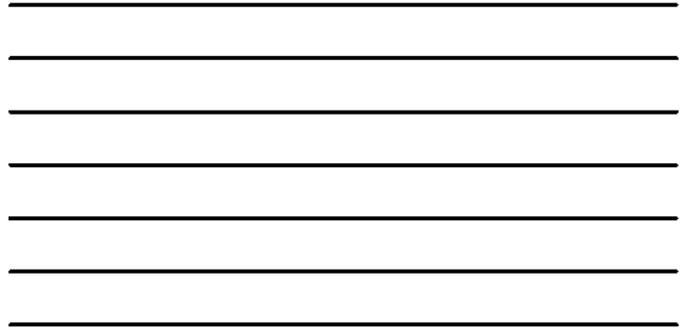
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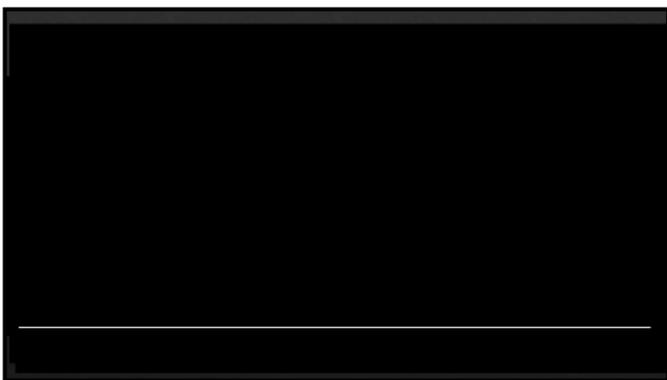
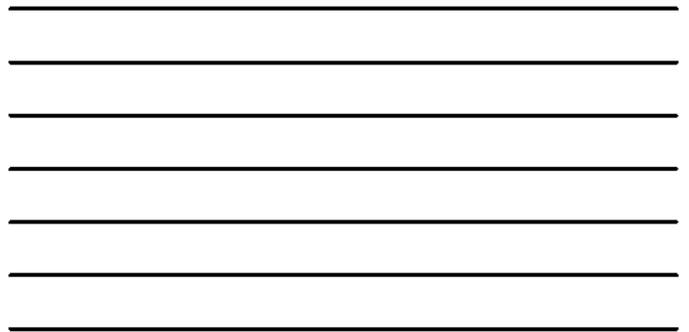
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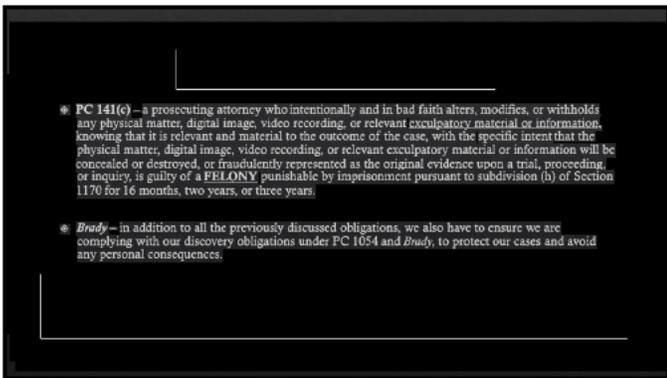
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"Prosecutors have a constitutional mandate to disclose material, favorable evidence possessed by any member of the prosecution team to defendants in a criminal case."  
© *Brady v. Maryland* (1963) 373 U.S. 83, 87

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Only favorable evidence must be disclosed. *United States v. Bagley* (1985) 473 U.S. 667, 676

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### We Have An Affirmative Duty To Disclose

The prosecution has an affirmative duty to disclose voluntarily and without request substantial material evidence favorable to the accused.

⊗ *In re Ferguson* (1971) 5 Cal. 3d 525

⊗ *Brady* does not have a good faith or inadvertence defense.

⊗ *Giglio v. United States* (1972) 405 U.S. 150

⊗ "Duty on the part of the prosecution; even in the absence of a request therefore, to disclose all subsequent material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness."

⊗ *People v. Rutherford* (1975) 14 Cal. 3d 399

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⊗ However, the prosecutor's duty to "disclose" exculpatory evidence to the defendant does not include a duty to "explain" to the defendant why the evidence has been disclosed, even when the evidence disclosed by the prosecution consists of voluminous reports and other written materials.

⊗ *United States v. Jordan* (2003) 316 F. 3d 1215, 1253-54

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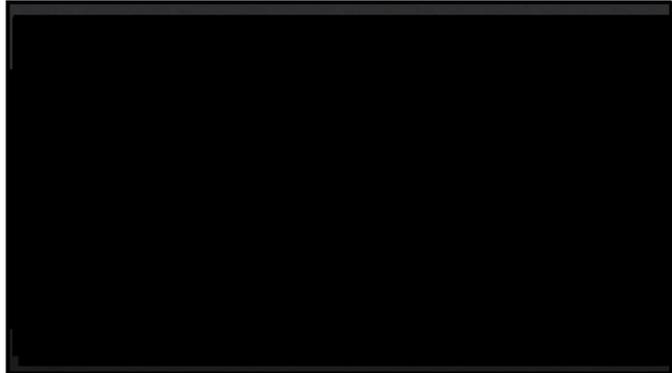
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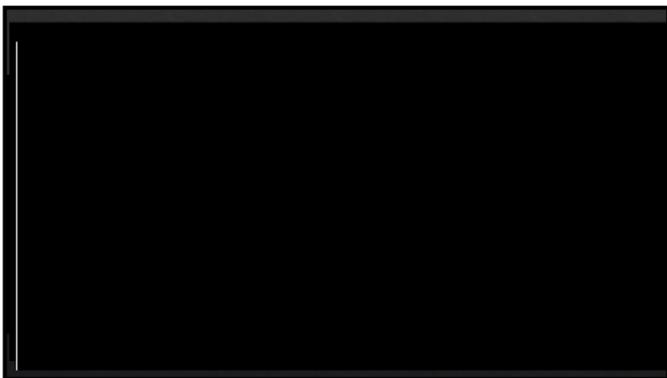
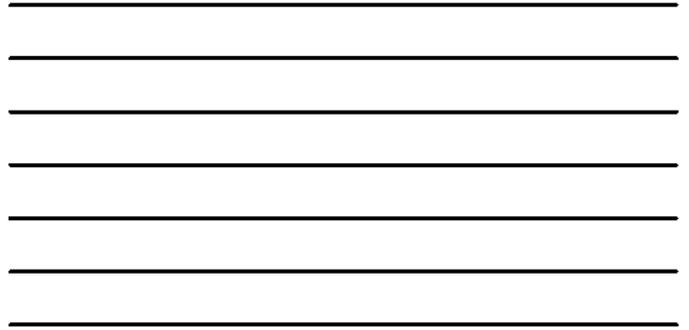
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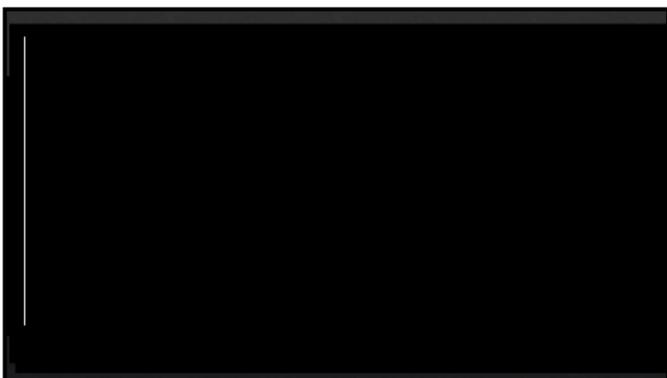
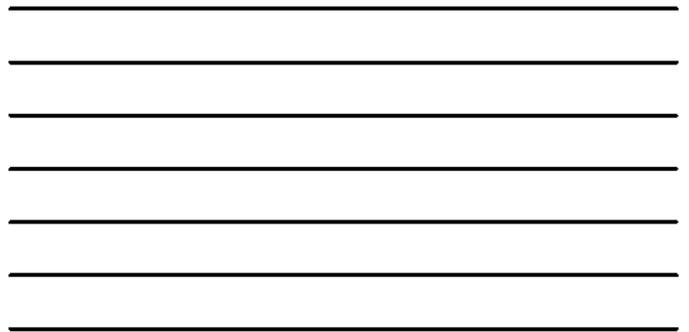
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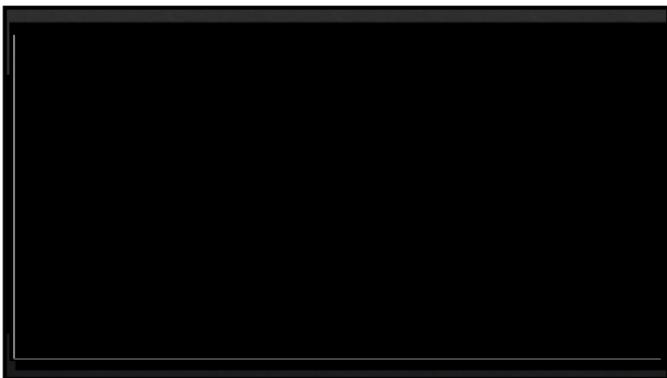
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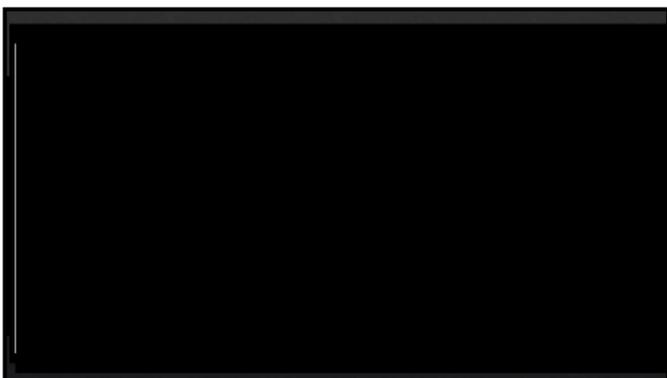
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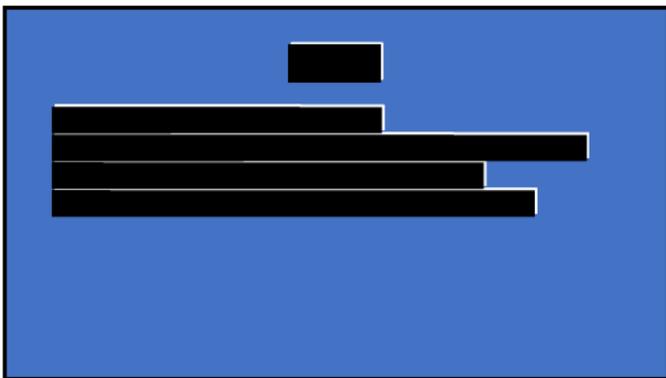
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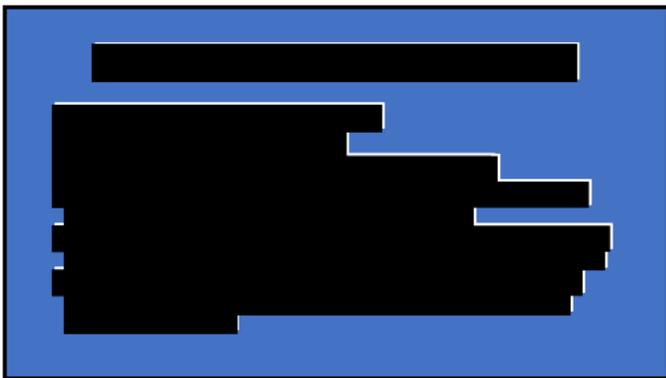
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- Hardship: (CCP 204)
  - (b) An eligible person may be excused from jury service only for *undue hardship*, upon themselves or upon the public...

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- Challenges for cause: CCP 225(b)
  - Implied Bias (CCP 229): Related to a party, V, or witness, financial interest in an outcome, unqualified opinion or belief as to merits of the case based on knowledge of facts, state of mind evincing enmity against, or bias towards either party.
  - Actual Bias (CCP 225(b)(1)(c)): Existence of a state of mind whereby a juror cannot act with entire impartiality and without prejudice to both parties.
    - Nature of the case/charges, settled opinions of the case, cannot assure Court that s/he would follow the law, opinion on guilt/innocence.

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- Challenges for cause: CCP 225(b)
  - *People v. Henderson* (C088883)

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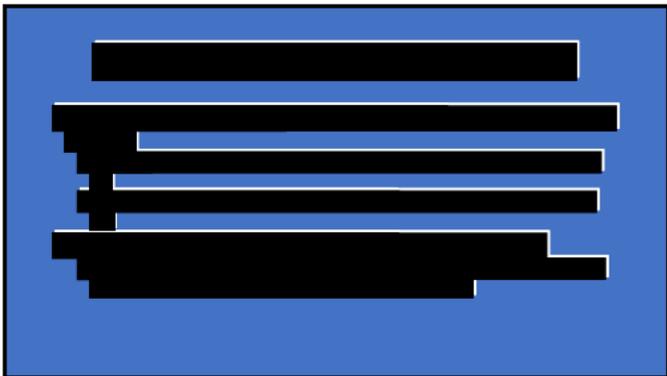
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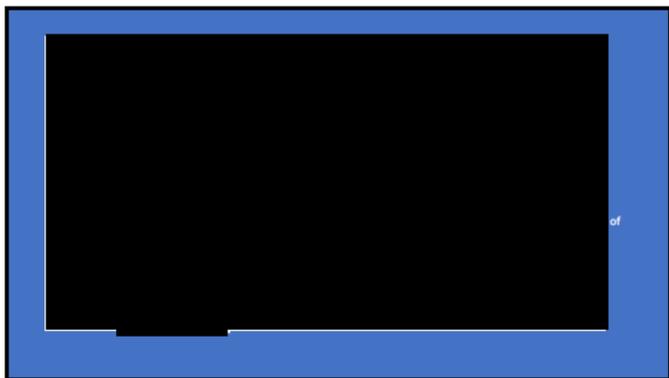
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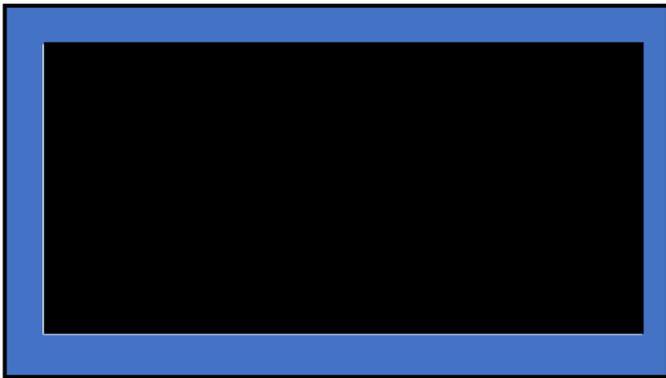
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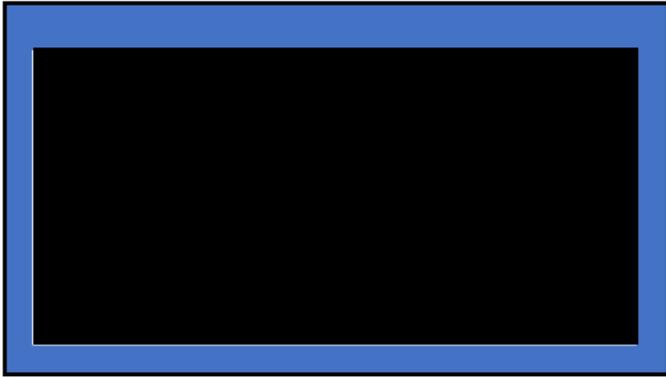
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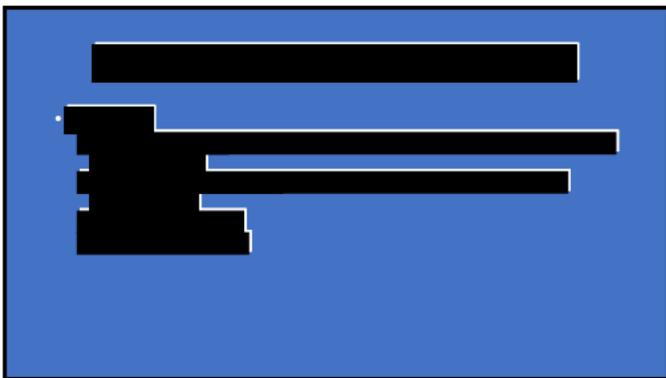
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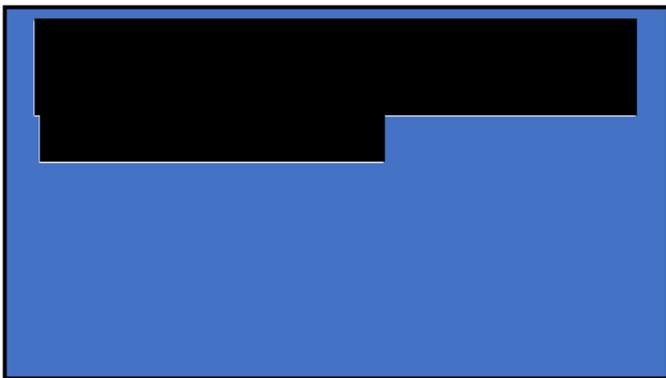
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# Gang Prosecution 101



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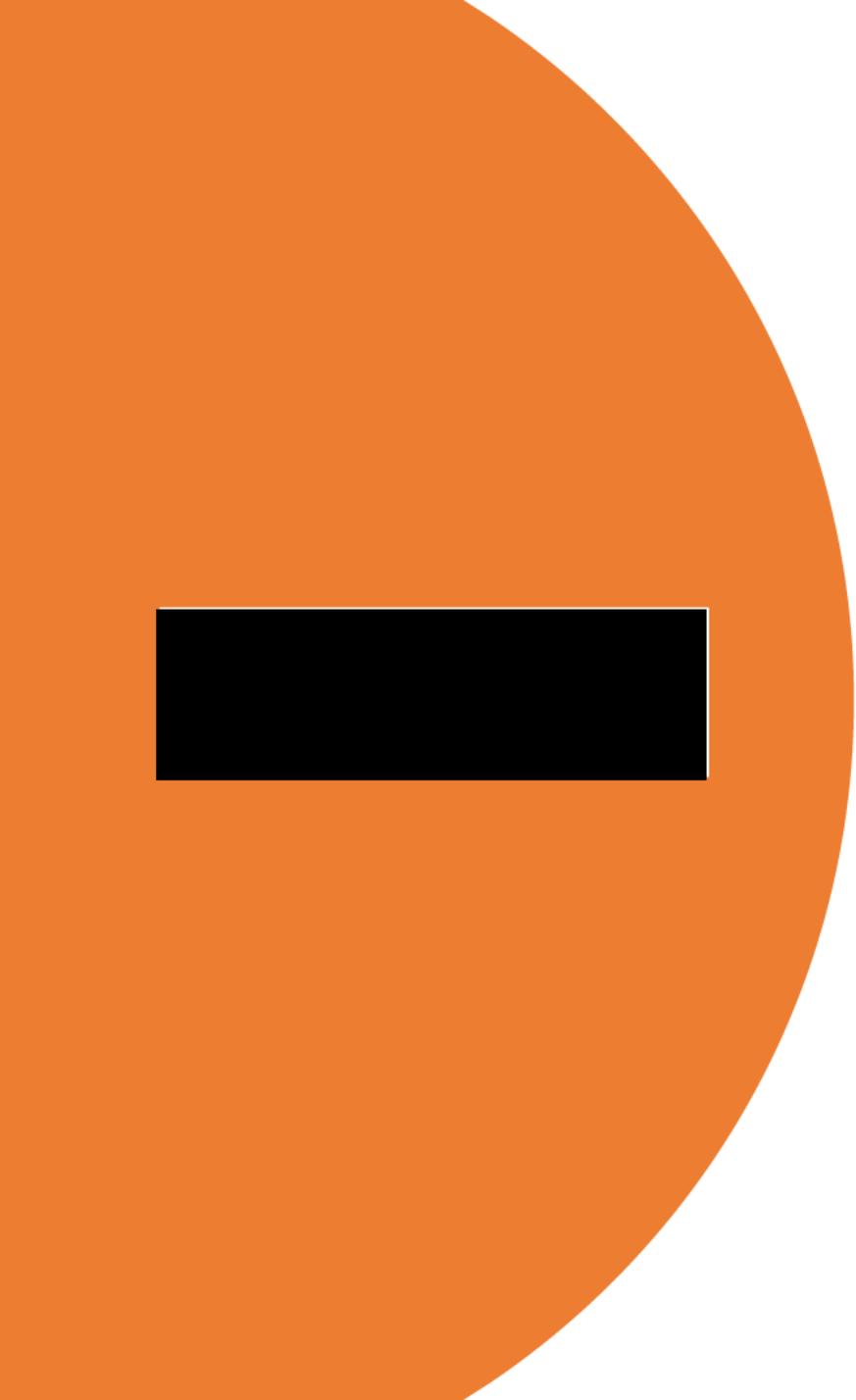
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- "... the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986."
  - It is the intent of the Legislature in enacting this chapter to **seek the eradication of criminal activity by street gangs** by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.
  - Penal Code Section 186.21
- 



[Redacted text block]

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# AB 333

- [REDACTED]
- [REDACTED]
- [*Delgado & Clark*] – Cal Supr. Granted review.
- [REDACTED]



Gang Expert /  
Gang Packets /  
Supporting  
Info

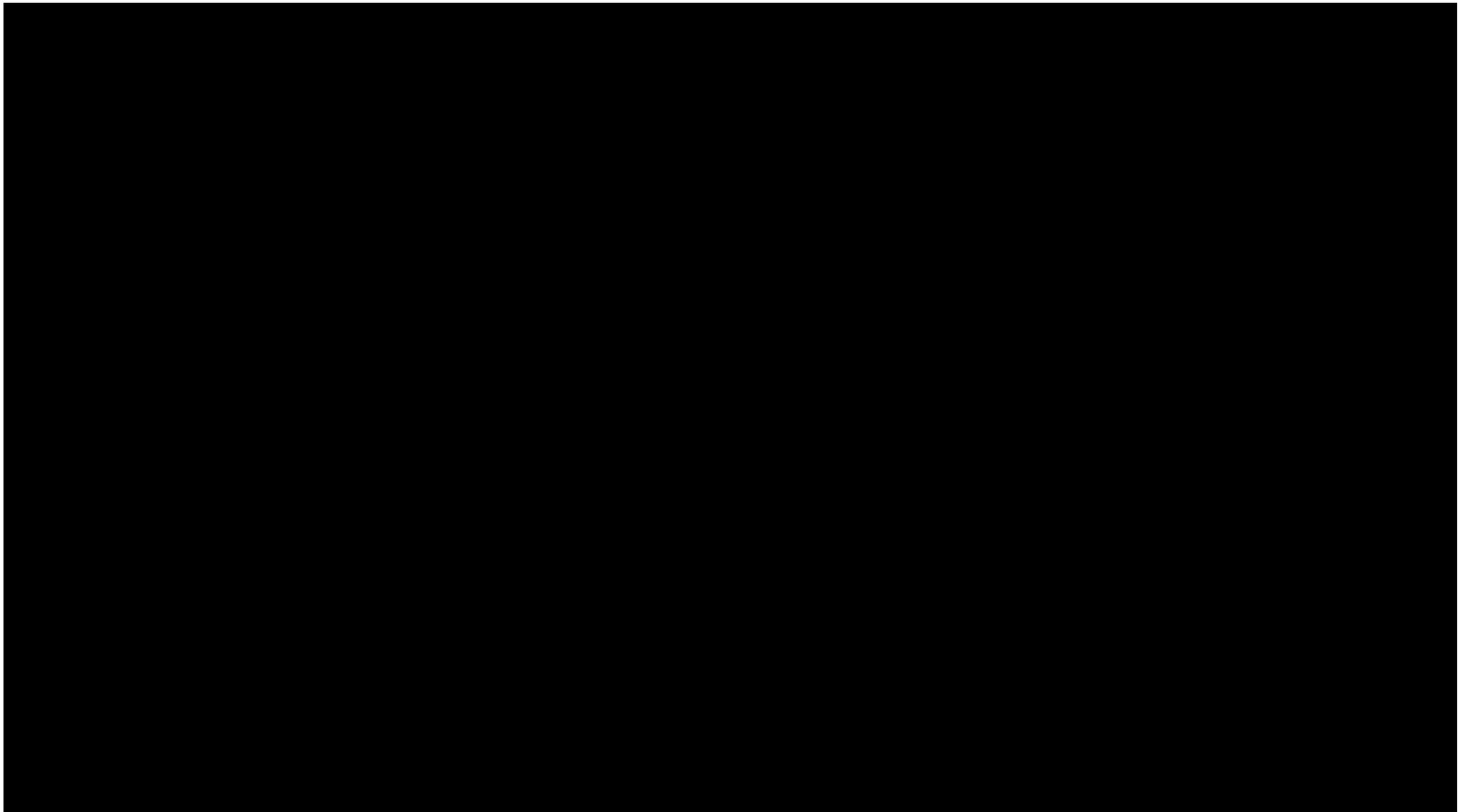
Special knowledge, skill,  
experience, training or  
education – EC 720

- [REDACTED]

[REDACTED]

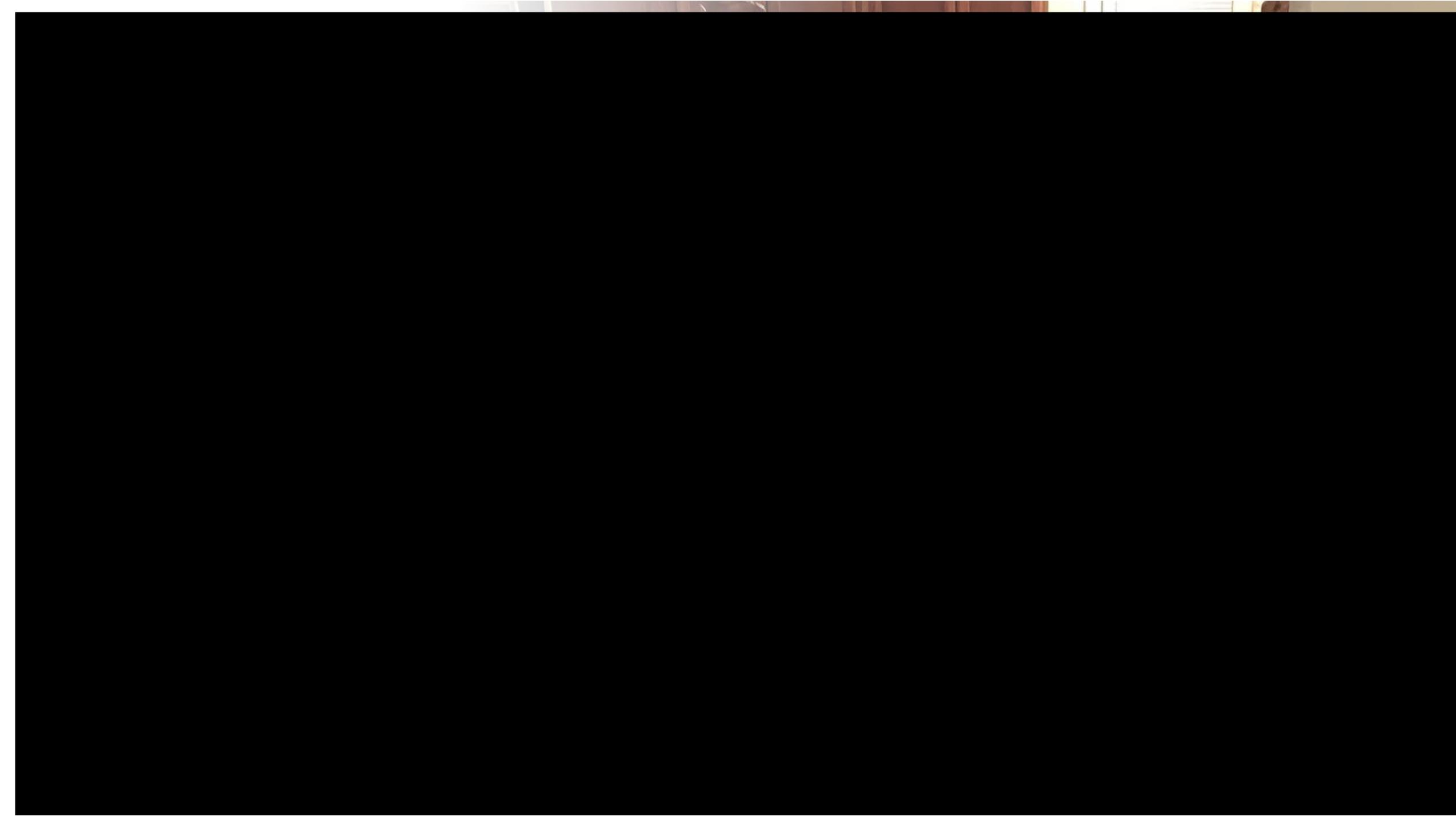




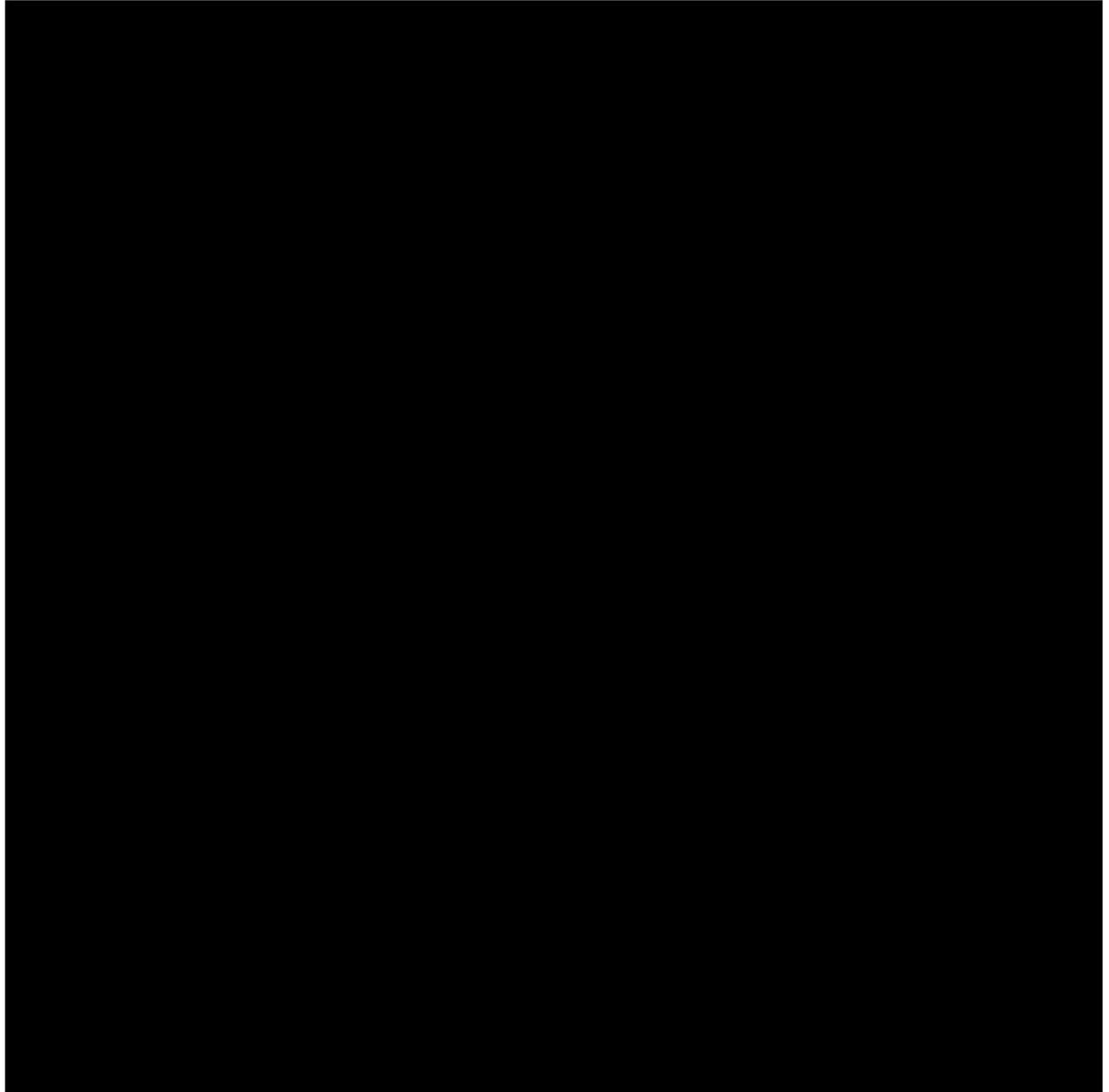
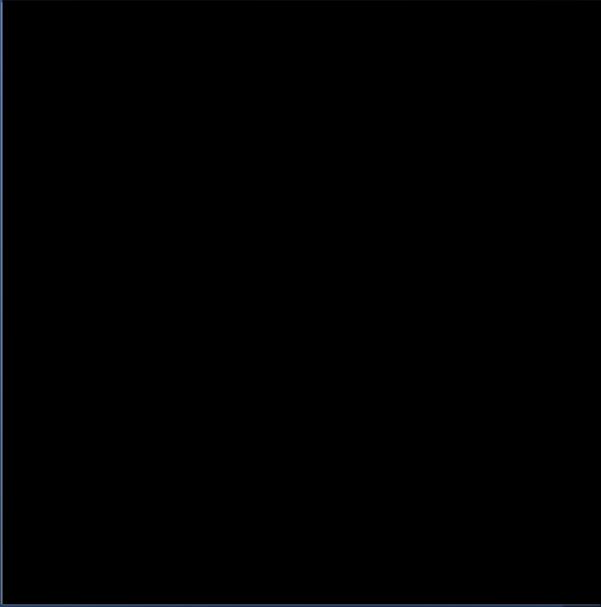


## PC 186.22(f) / CalCrim 1400

- Ongoing, organized association or group of 3 or more
- Formal/Informal
- Common name or common identifying symbol
- That has, as one or more of its primary activities the commission of [ A-Z of pc 186.22(e)(1) ]
- Whose members collectively engage in or have engaged in a pattern of criminal activity.









The crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group. [CalCrim 1400]



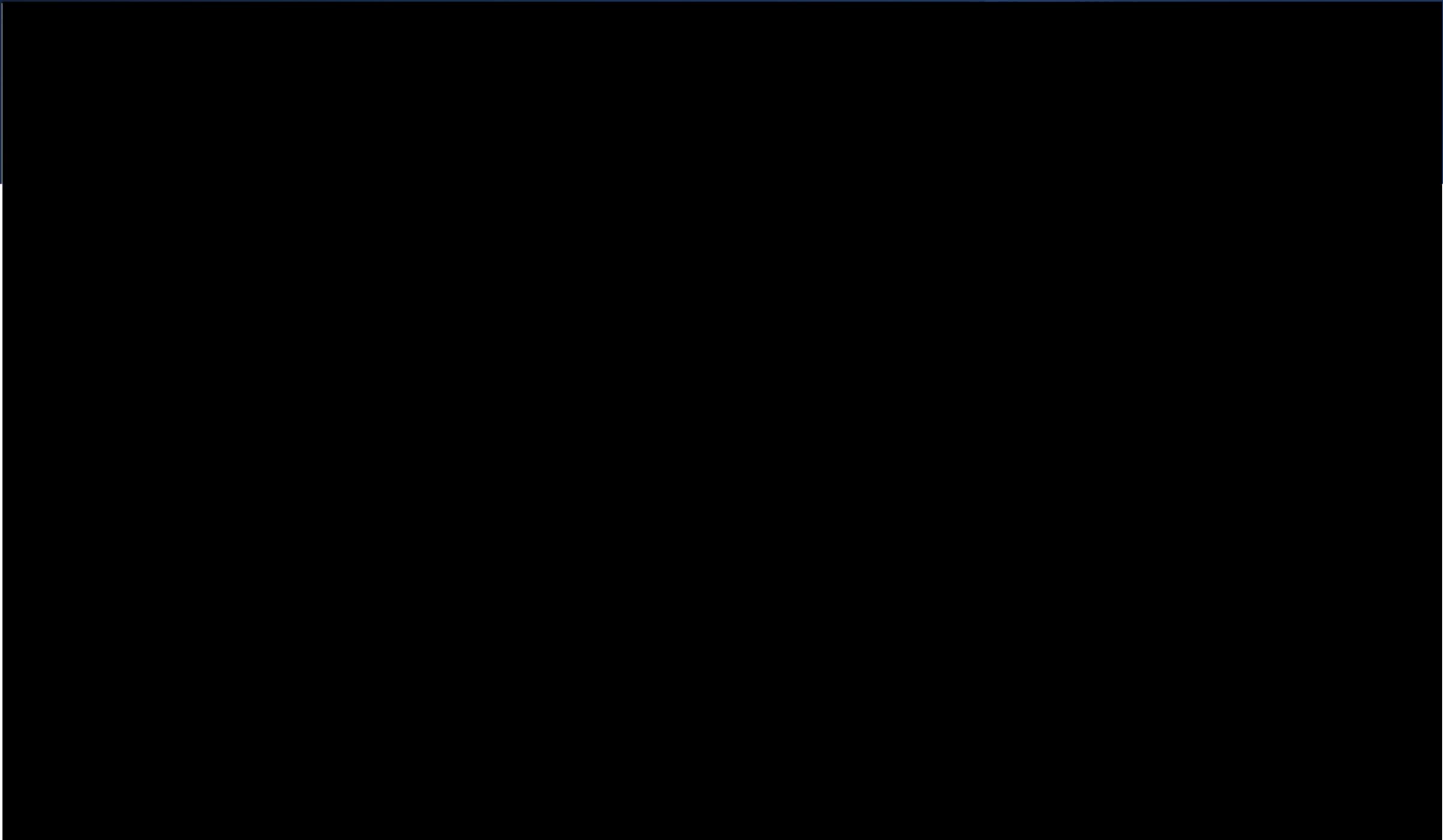
## Timing – AB 333

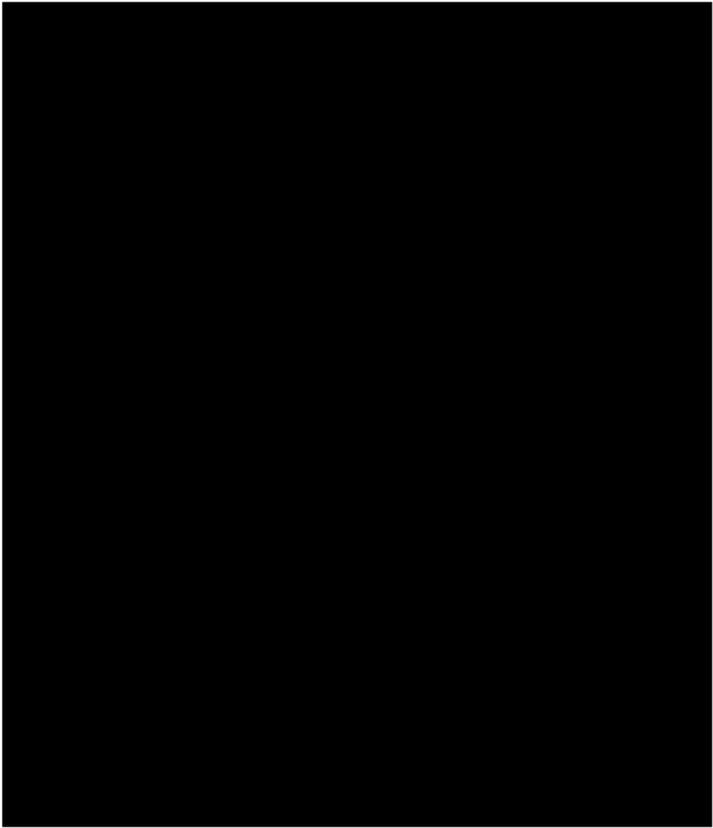
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[REDACTED]

[REDACTED] – *Delgado and  
Clarke*

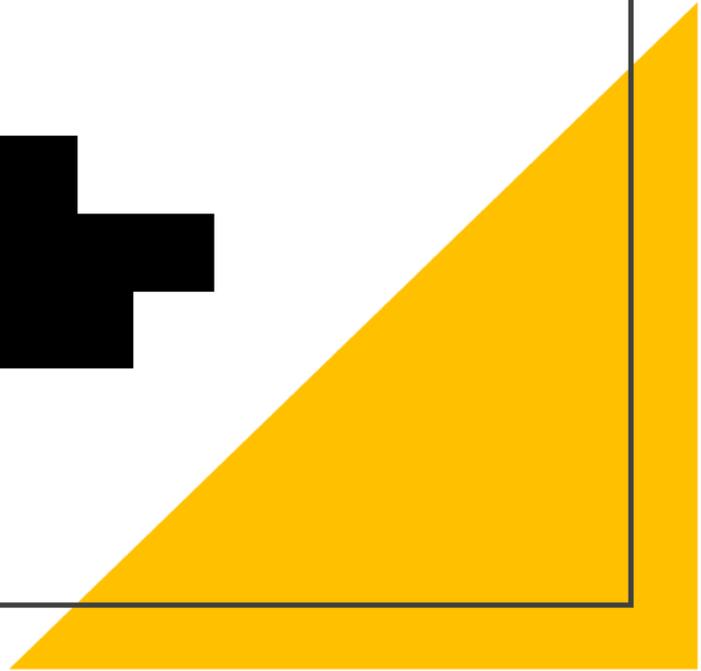
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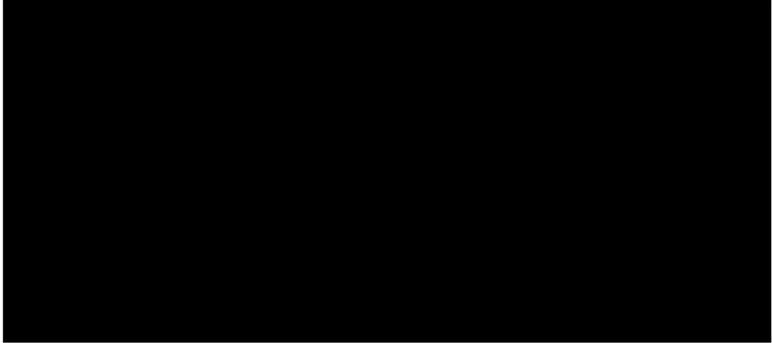
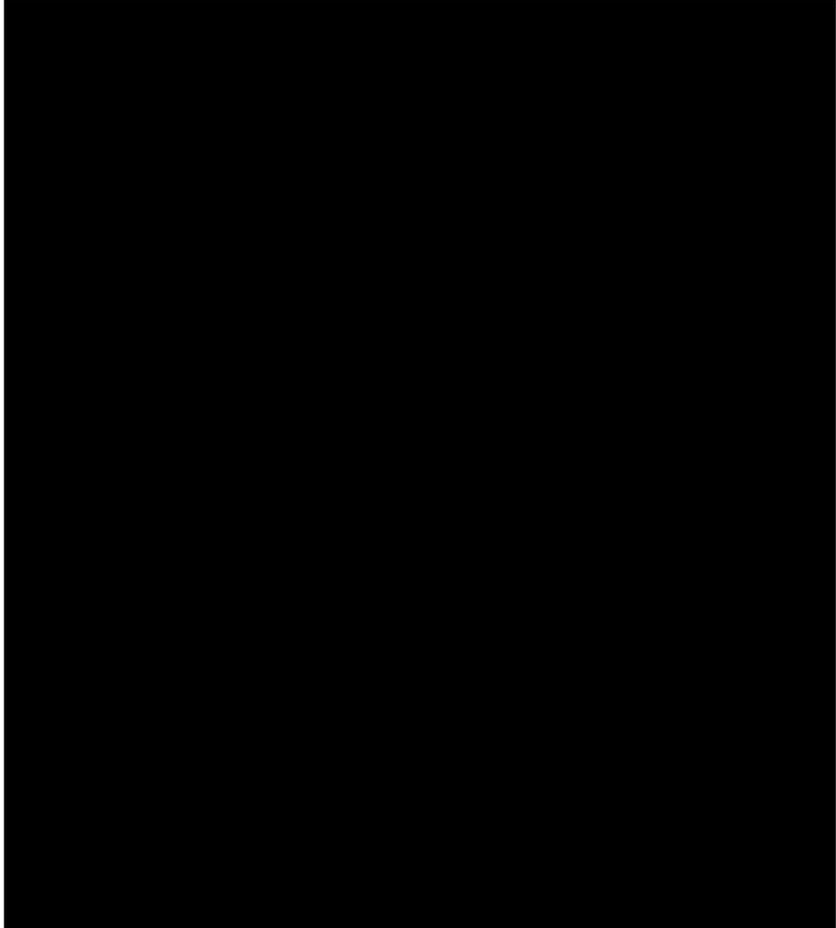




- (e)(1)... “pattern of criminal gang activity” **means the commission of, attempted commission of,** conspiracy to commit, or solicitation of, sustained juvenile petition for, or **conviction of,** two or more of the following offenses:

- 

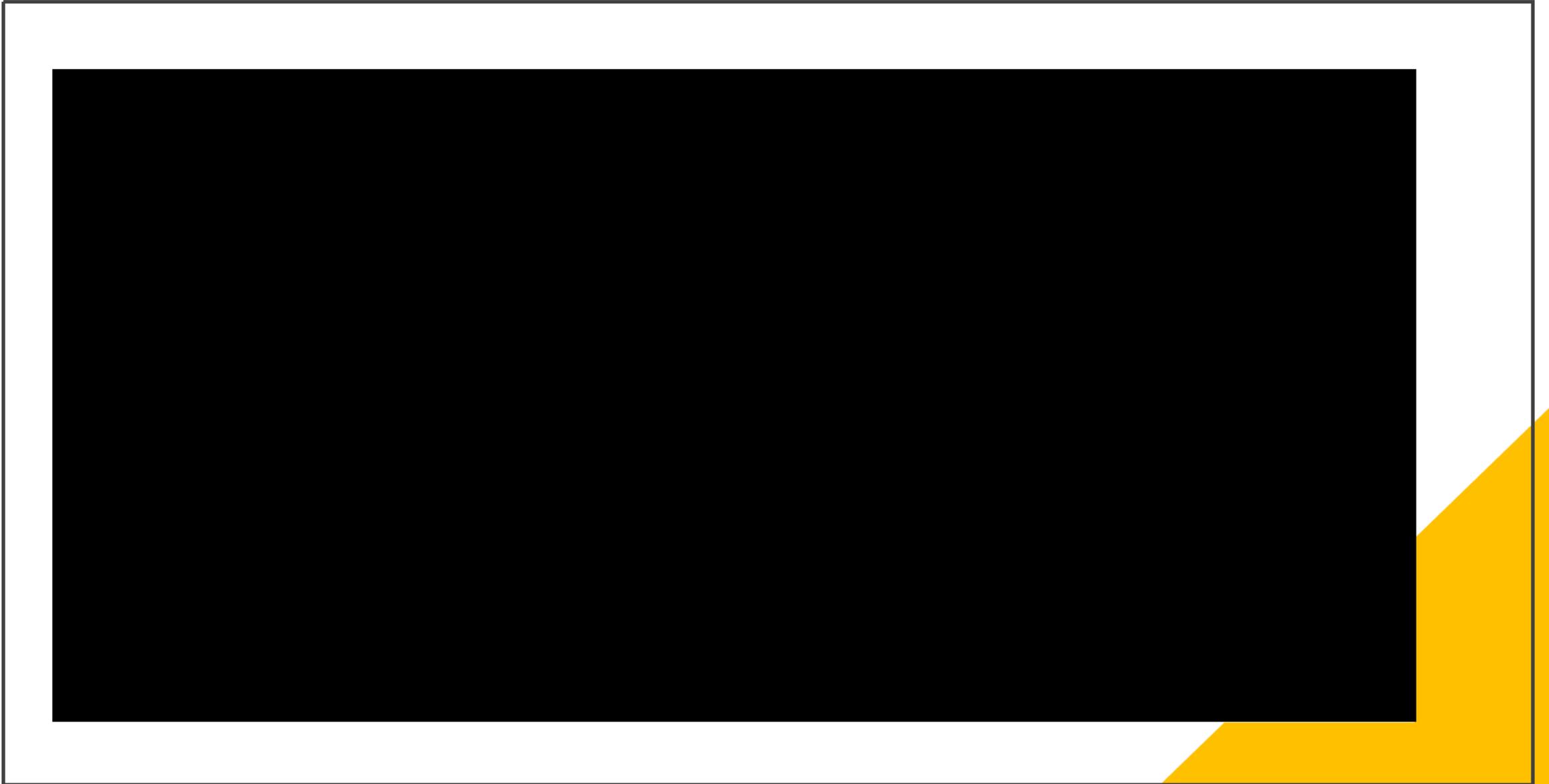




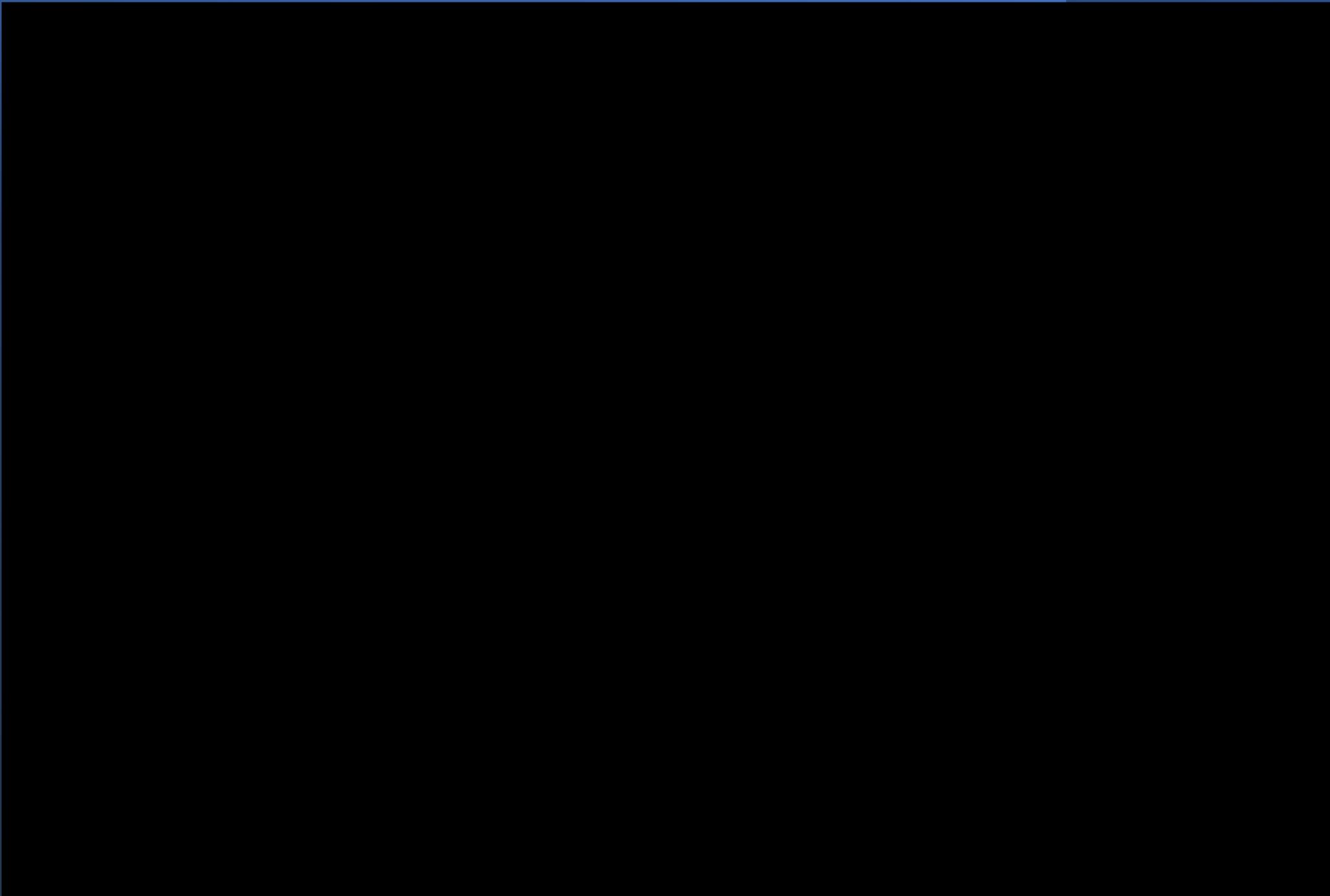
- *Valencia* – 11 Cal.5th 818

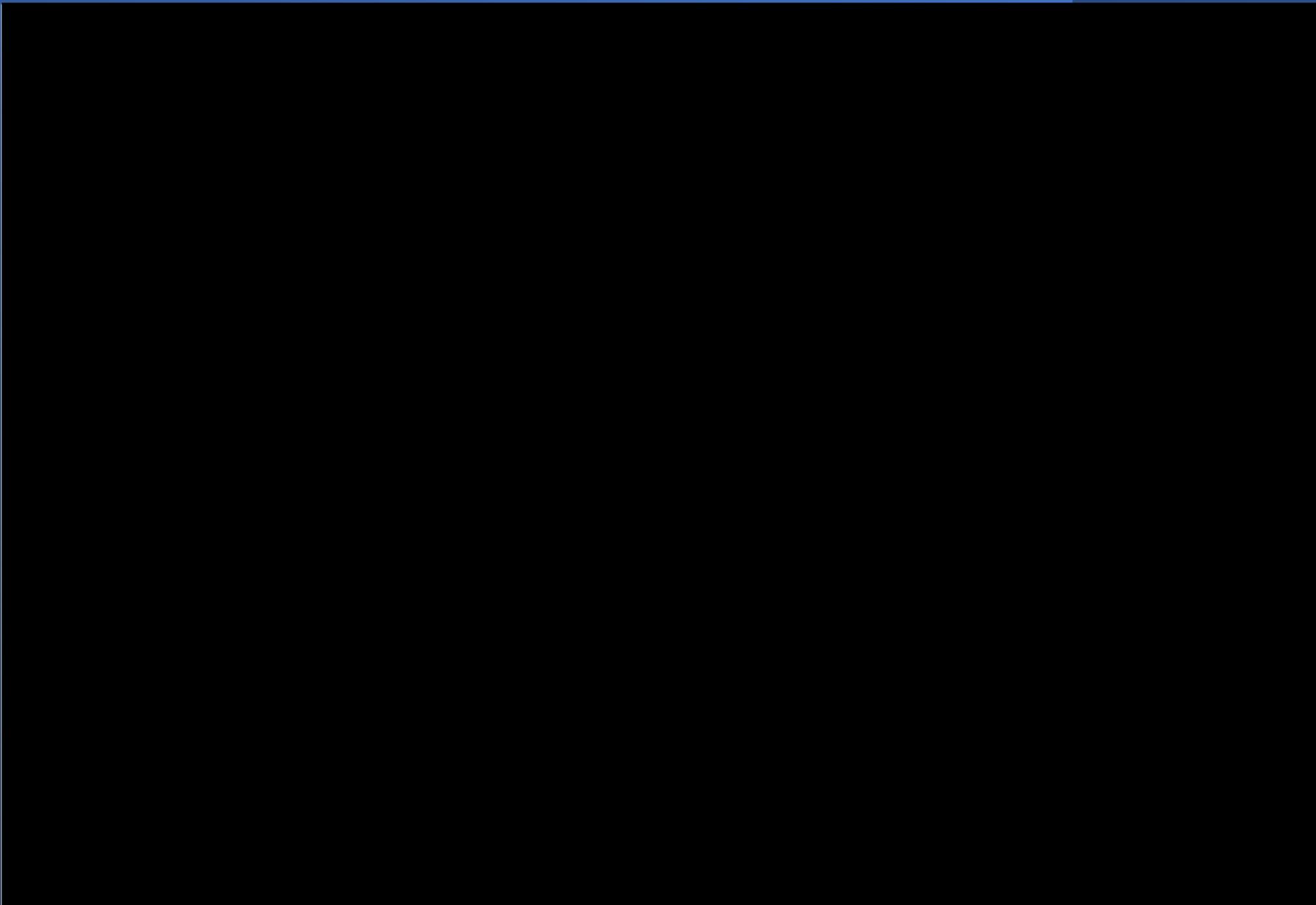
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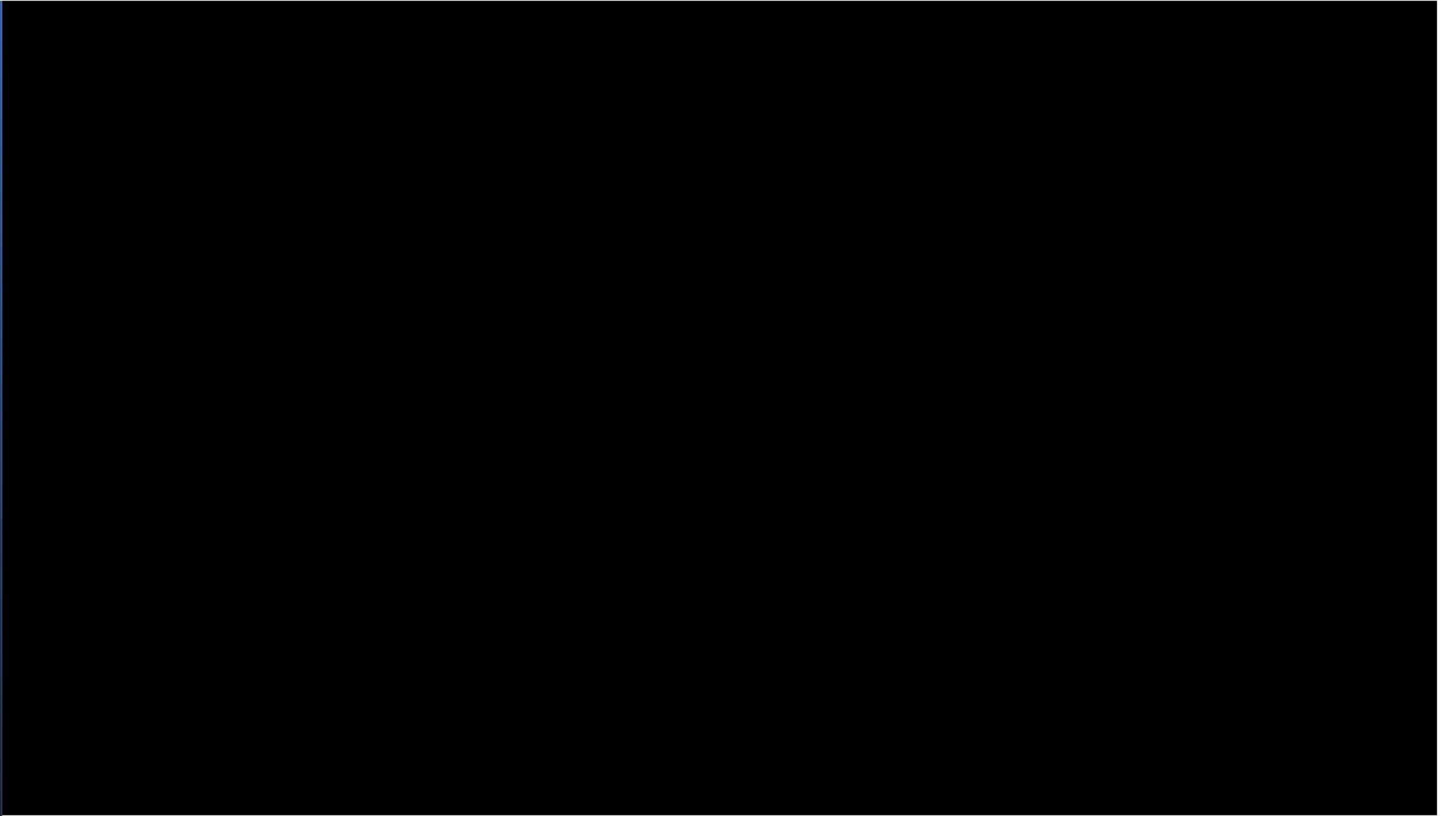












“...the offenses were committed on separate occasions or by two or more **members**, the offenses **commonly benefited** a criminal street gang, and the common benefit from the offenses is **more than reputational.**”

SPLIT: Cal Supremes granted review (*Clark*)

*People v. Delgado (2022) 74 Cal.App.5th 1067*

*People v. Clark (2022) 81 Cal.App.5th 133*

# Other Requirements

*People v. Delgado (2022) 74 Cal.App.5th 1067* "Collectively"

proving two gang members individually committed the predicate offenses on two separate occasions or two gang members collectively committed two predicate offenses on the same date [\*\*remember *Zermeno* (1999) 24 Cal.4th 927]

*People v. Clark (2022) 81 Cal.App.5th 133*

that a pattern of criminal gang activity may be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion.

*Cal Supremes S275746 – 6.6.23 fully briefed.*

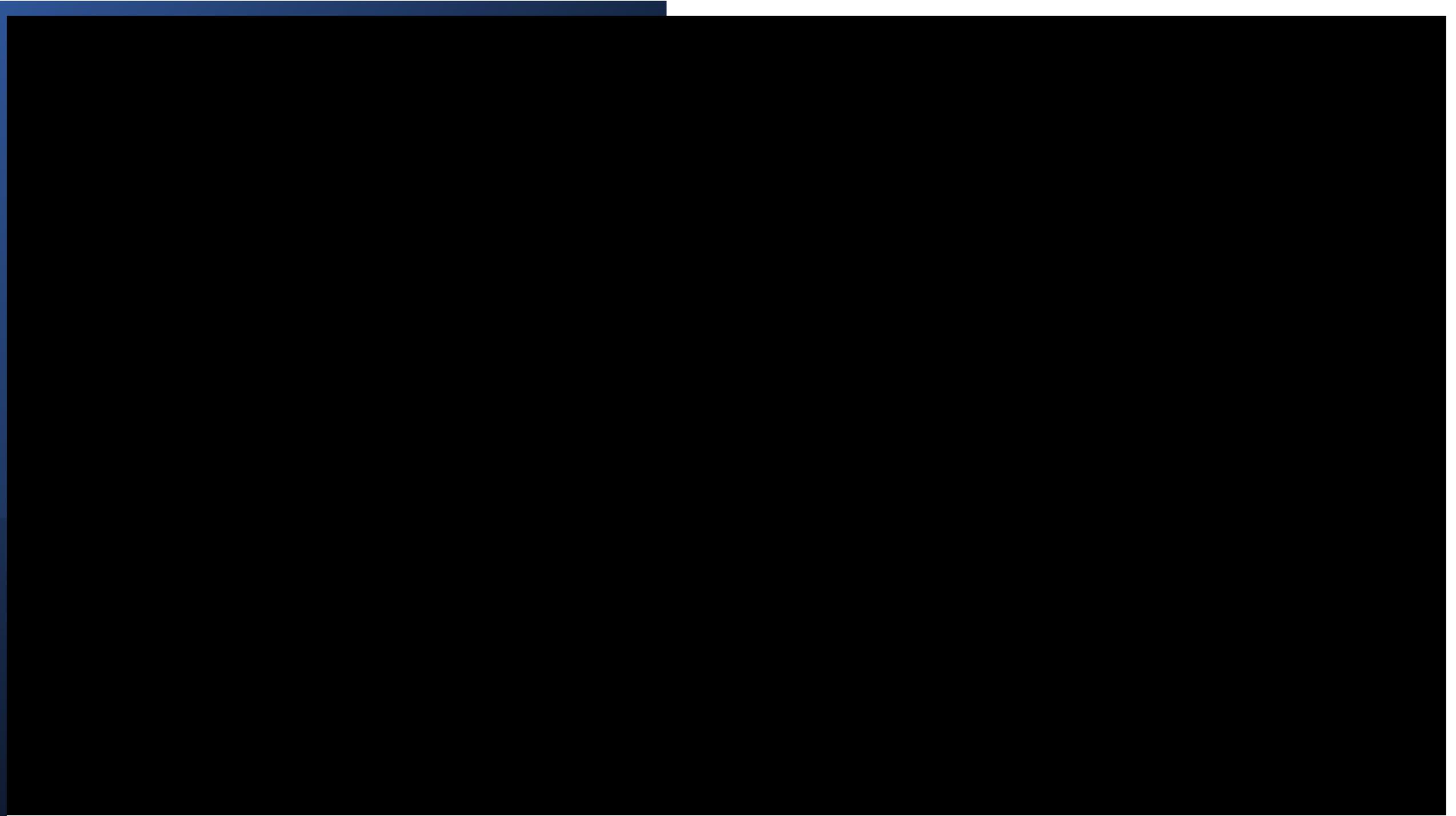
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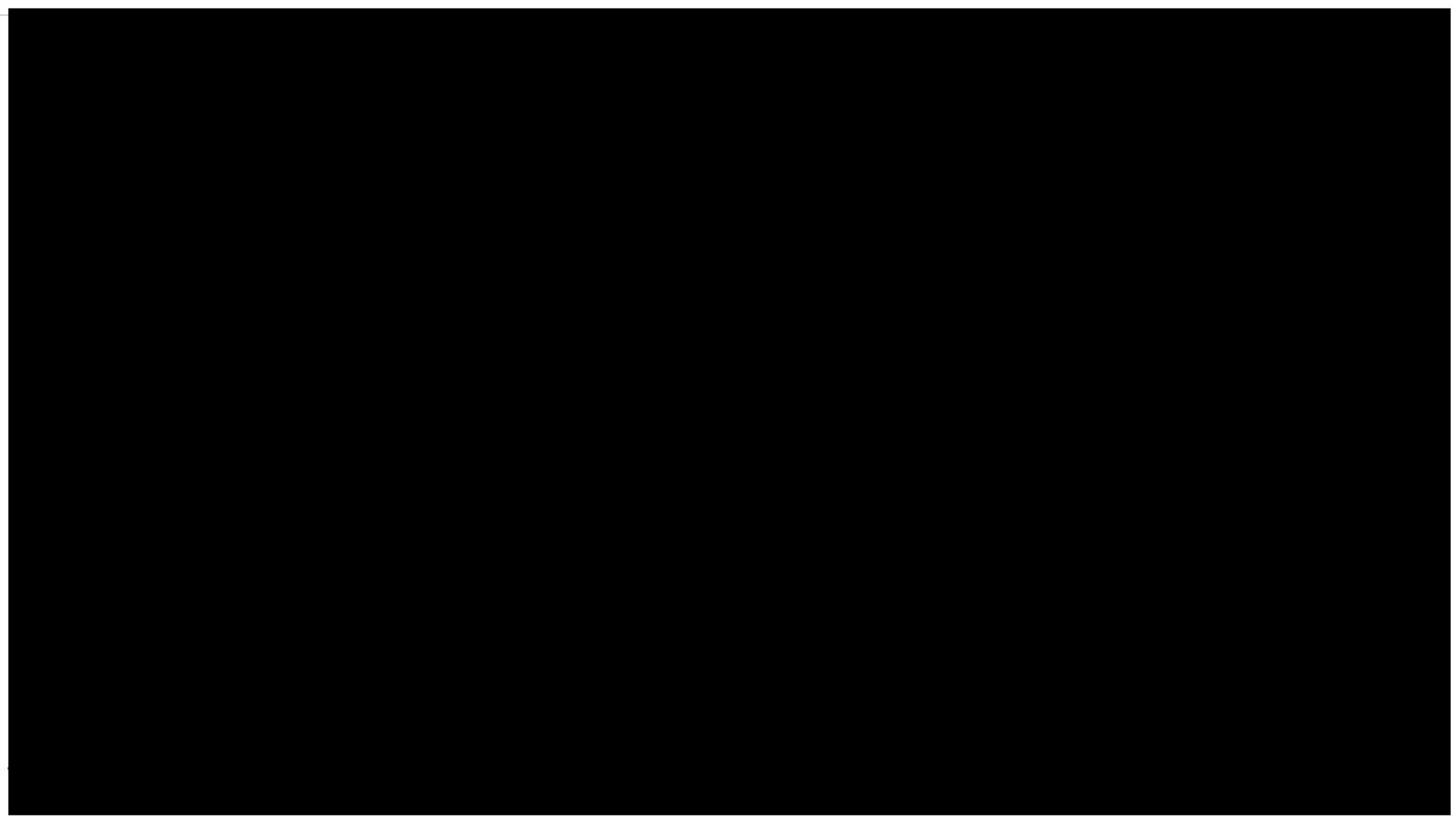
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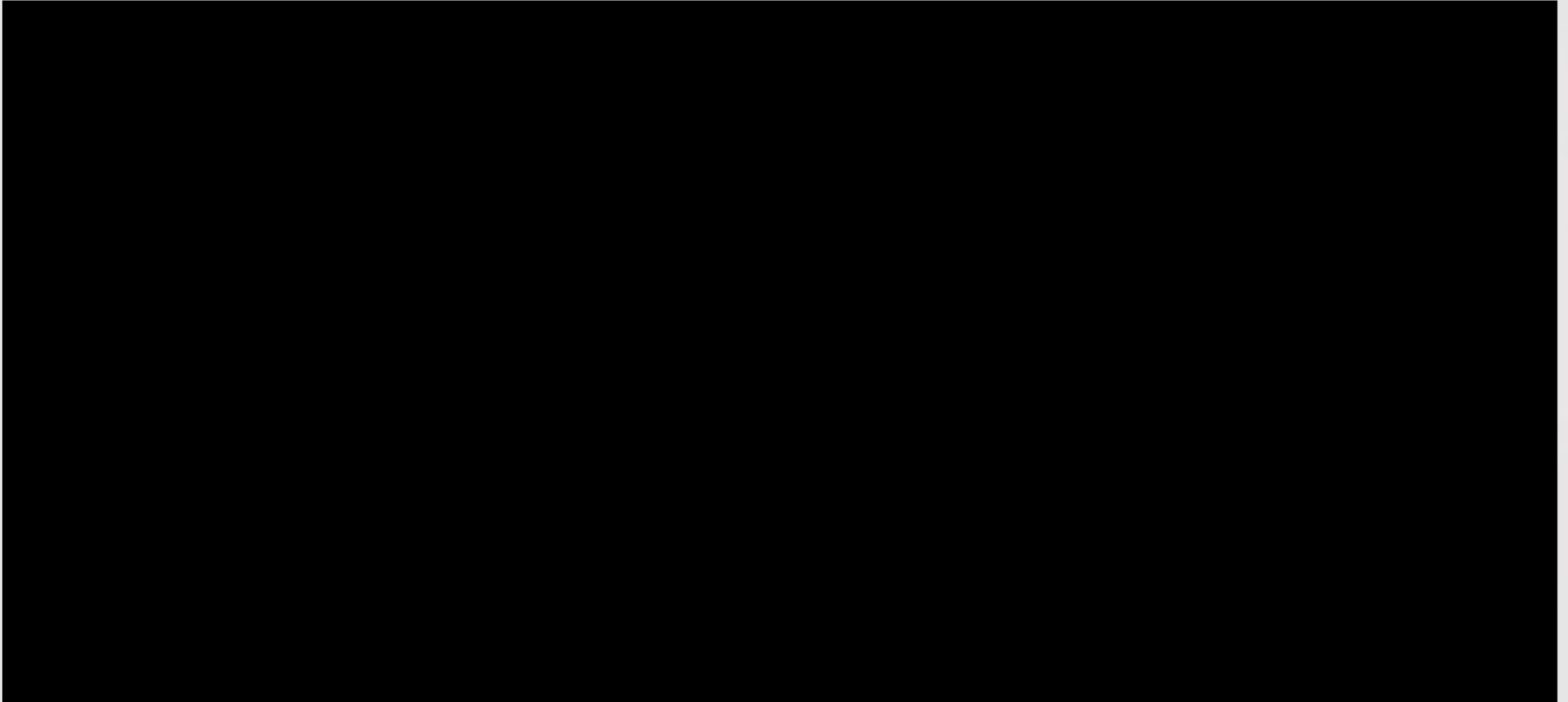


# People v. Prunty (2015) 62 Cal.4th 59

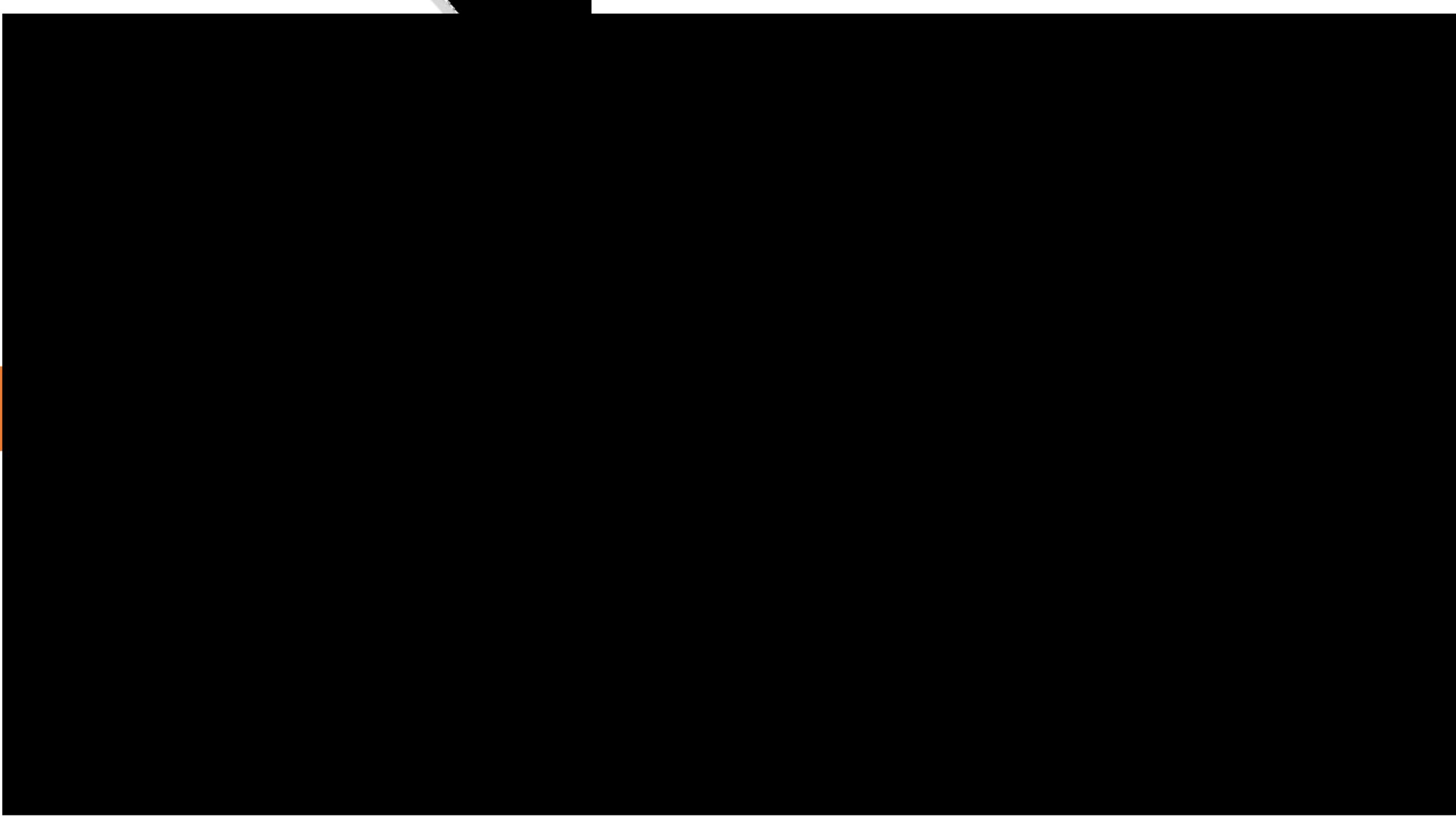
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# **People v. Prunty (2015) 62 Cal.4th 59**

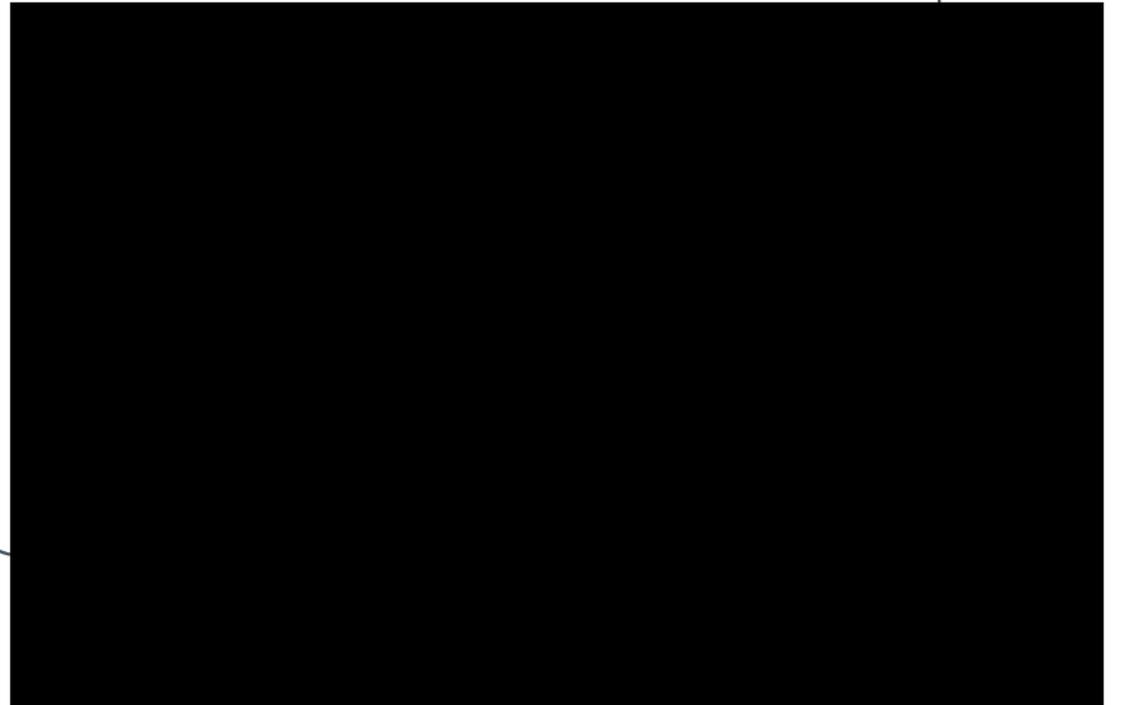


# **People v. Prunty (2015) 62 Cal.4th 59**



# PC 186.22(g) – Common Benefit

...to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the **common benefit is more than reputational.**



# PC 186.22(g)

[REDACTED]

**“Cognizable benefit”** – (*Renteria*  
(2022) 13 Cal.5th 951, 966)



- [REDACTED]
- *People v. Renteria* (2022) 13 Cal.5th 951

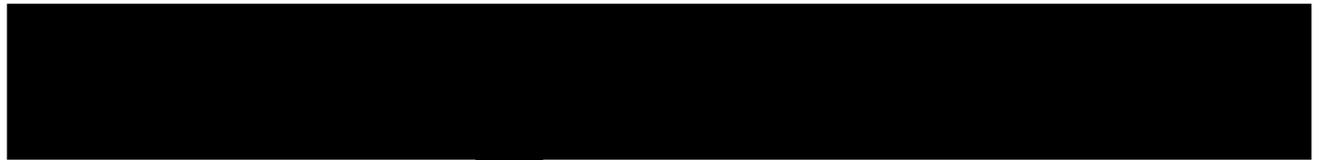
- Where three members of the same gang “actively assisted each other” and, because of their common gang membership, “could rely on each other’s cooperation in committing these crimes”, there was sufficient evidence of both association and benefit—in particular, that the gang members would “would benefit from committing [the crimes] together ... [e]xpert opinion that particular criminal benefited a gang by enhancing its reputation for viciousness could be sufficient to raise the inference that the conduct was ‘committed for the benefit of ... a[] criminal street gang’ within the meaning of section 186.22(b)(1).

- *People v. Renteria* (2022) 13 Cal.5th 951 [although sole actor case], citing *Albillar*.



# PC 186.22(a) Substantive Charge

1. ...**actively participated** in a CSG (more than passive)
2. ... he/she **knew** that members of the gang engage in or have engaged in a pattern of criminal gang activity
3. The defendant willfully assisted, furthered, or promoted felonious conduct by members of the gang either by:
  - a) directly and actively committing a felony offense
  - b) aiding and abetting a felony offense



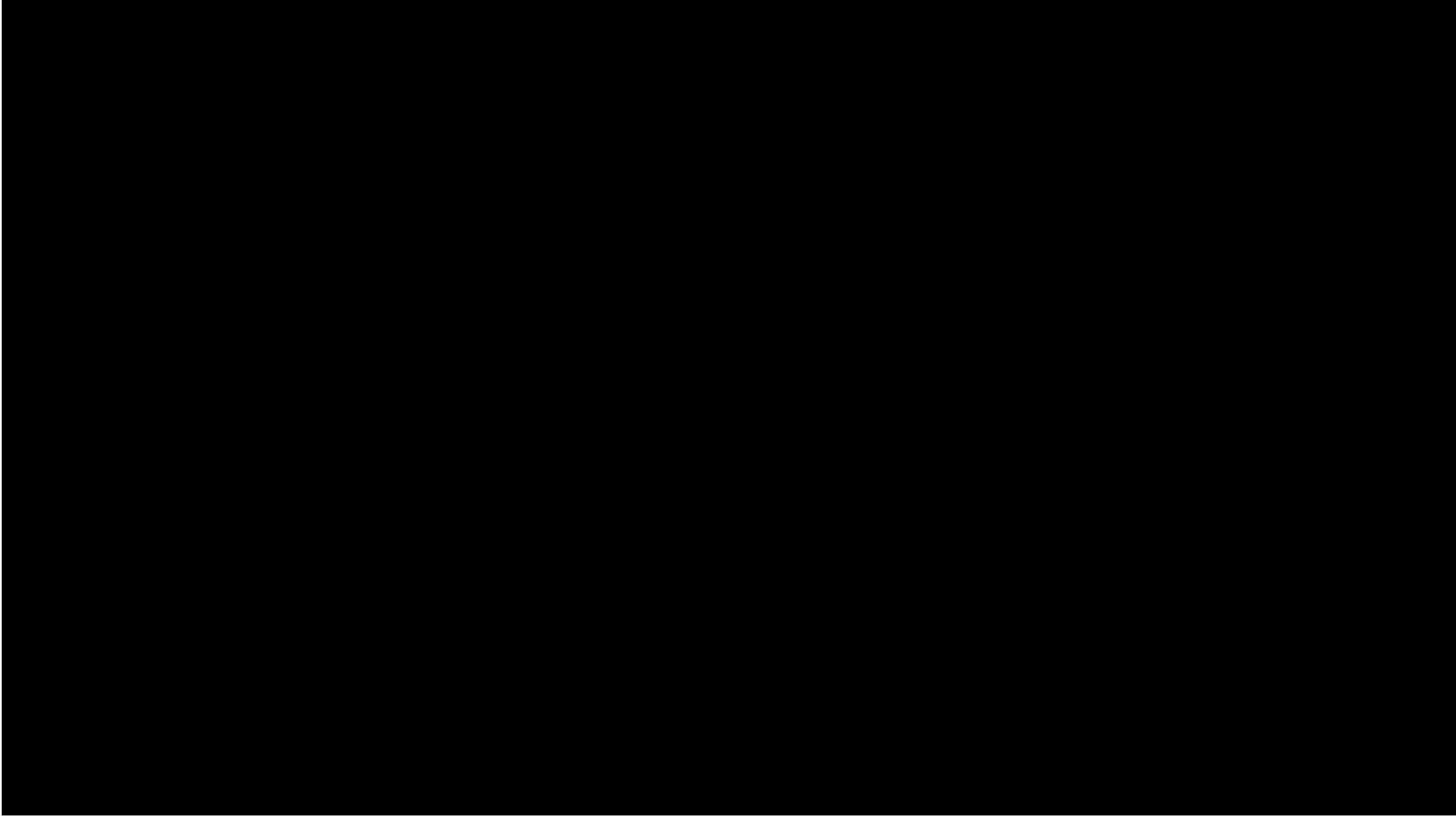
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*People v. Garcia* (2007) 153  
Cal.App.4th 1499; *People v. Tran* (2011) 51 Cal.4th 1040



# EC 352.2

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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- Membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, and is not more prejudicial than probative and is not cumulative. (*People v. Avitia* (2007) 127 Cal.App.4th 185, 192.)
  - Gang evidence may be relevant to establish motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

# Limited Purpose Gang Evidence

- [REDACTED]
- *People v. Ramos* (2022) 77 Cal.App.5th 1116, 1132 ..  
“nothing in Assembly Bill 333 limits the introduction of gang evidence in a bifurcated proceeding where the gang evidence is relevant to the underlying charges.”

# PC 1109 – Bifurcation

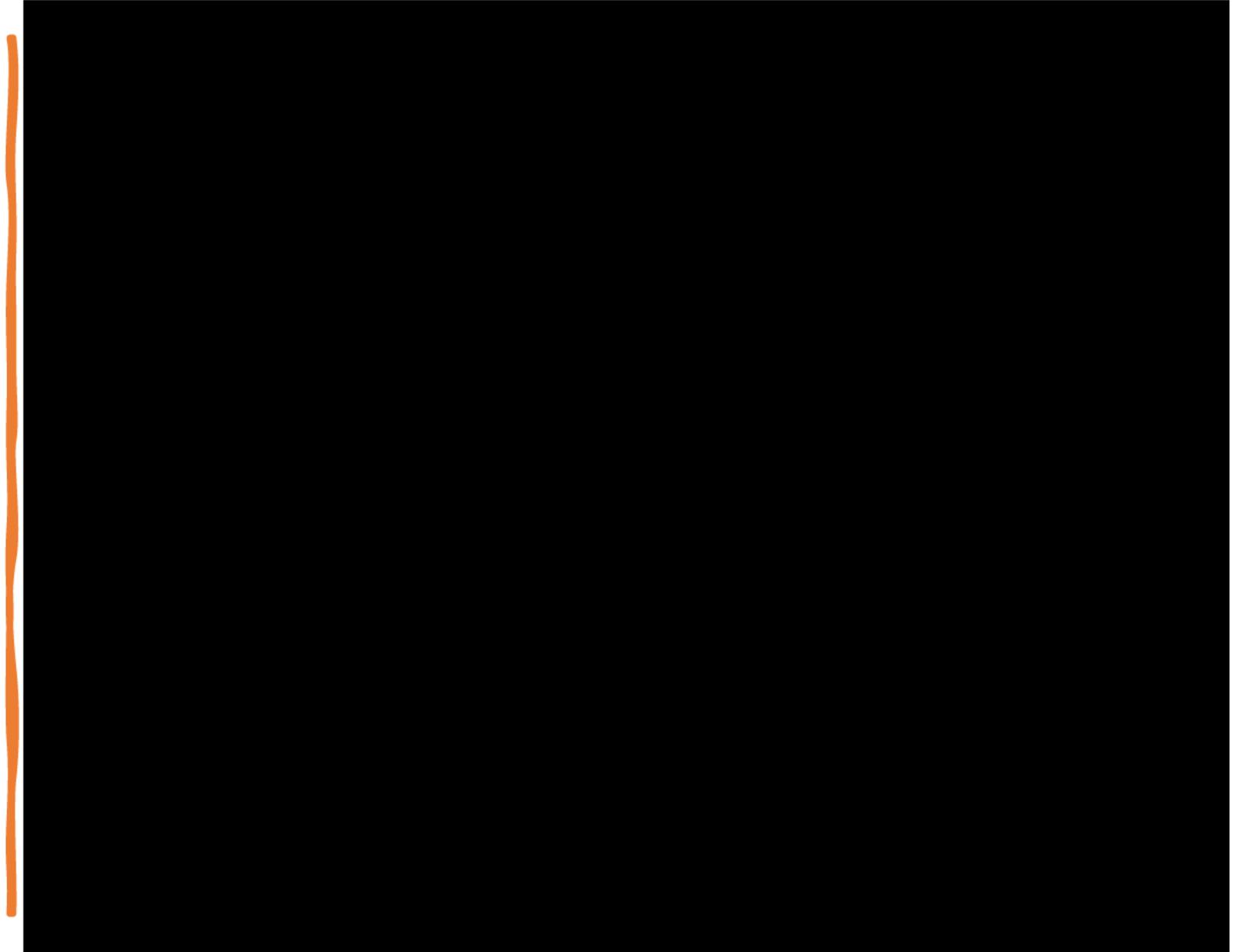
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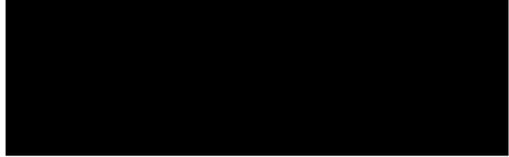
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# PC 12022.53



(e)(1): The enhancements provided in this section shall apply to **any person** who is a principal in the commission of an offense if both of the following are pled and proved:

(A) The person violated subdivision (b) of Section 186.22.

(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).

(2) An enhancement for participation in a criminal street gang ... shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, **unless** the person personally used or personally discharged a firearm in the commission of the offense.

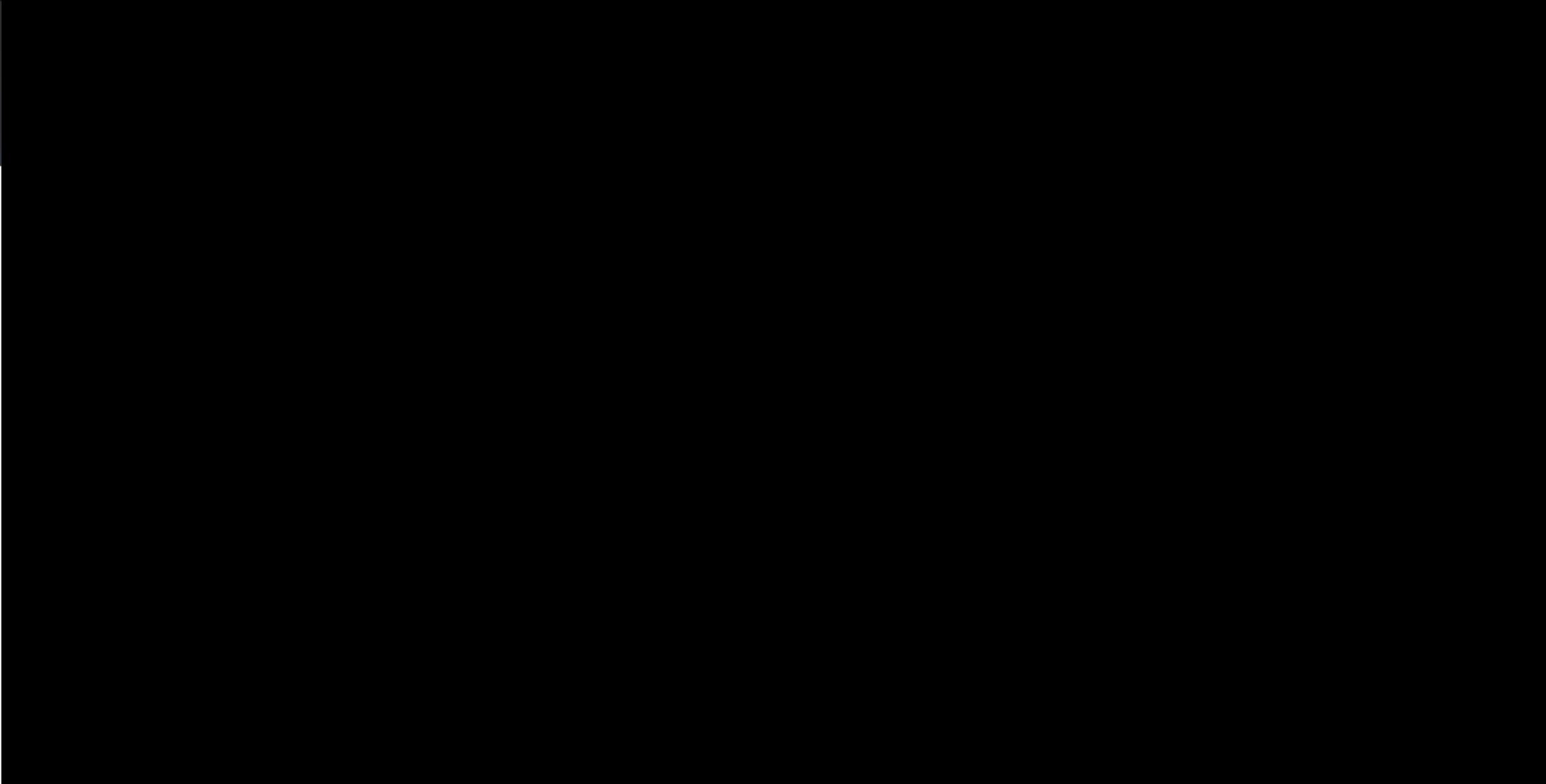
# PC 12022.53 and CSGs

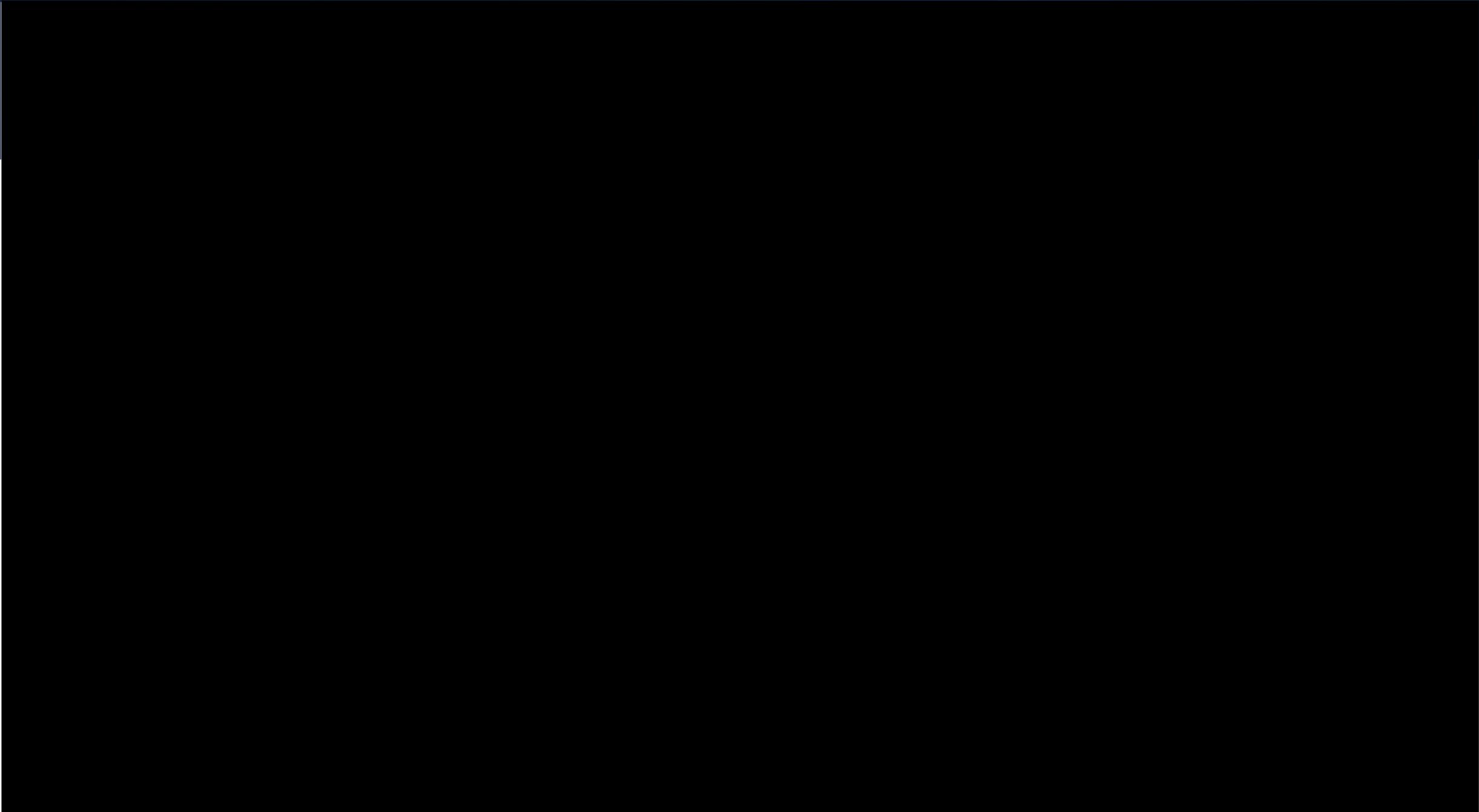
## CalCrim 1402

If the defendant was found guilty of underlying crime, and the crime was committed for the B, D, or A, with specific intent to P, F, or A, then...

- 1) someone who was a principal in the crime personally (used/discharged) a firearm during the commission of the offense
- 2) That person intended to discharge the firearm
- 3) That person's act caused (GBI/death) to another person who was not the accomplice.







# Gang Prosecution 101



The Newest Deadly  
Weapon: FENTANYL



Lisa A. Smittcamp, District Attorney

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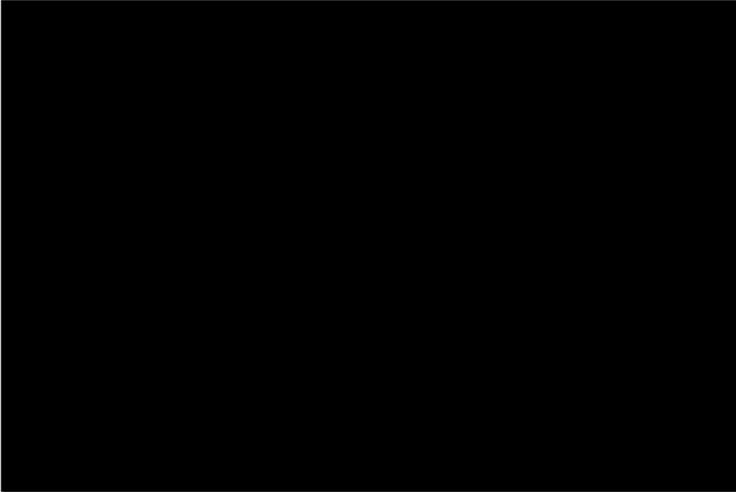
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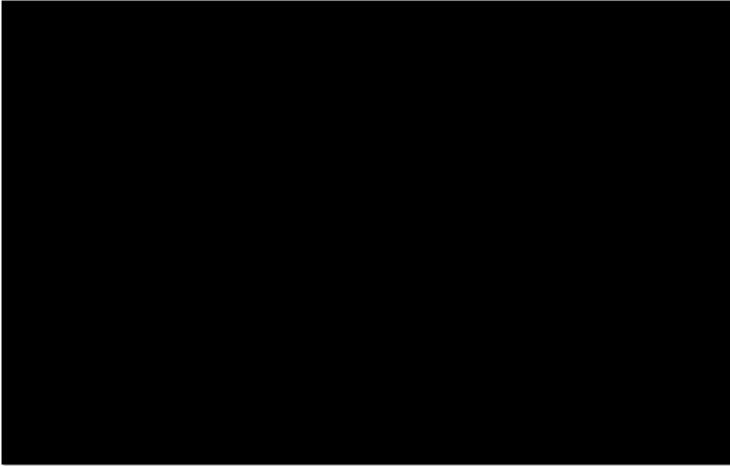
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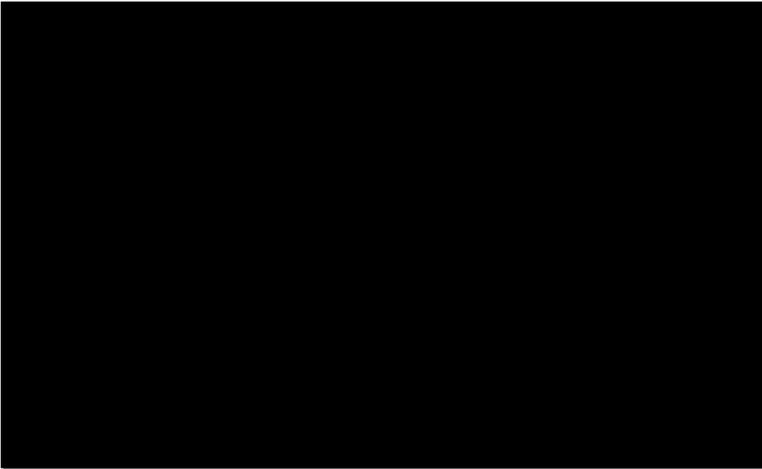
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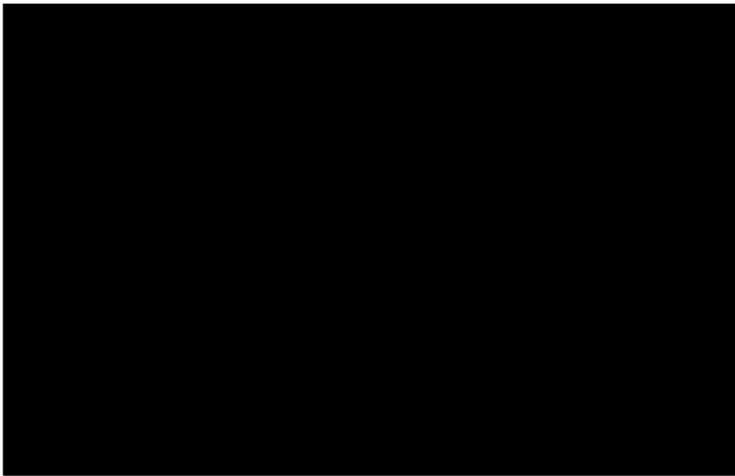
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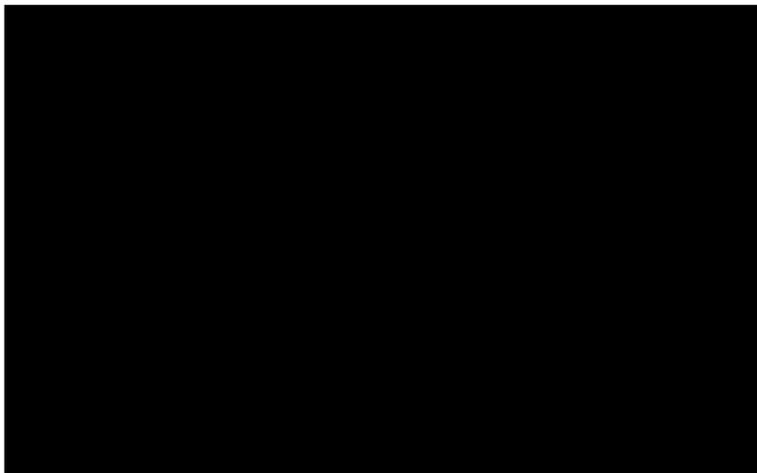
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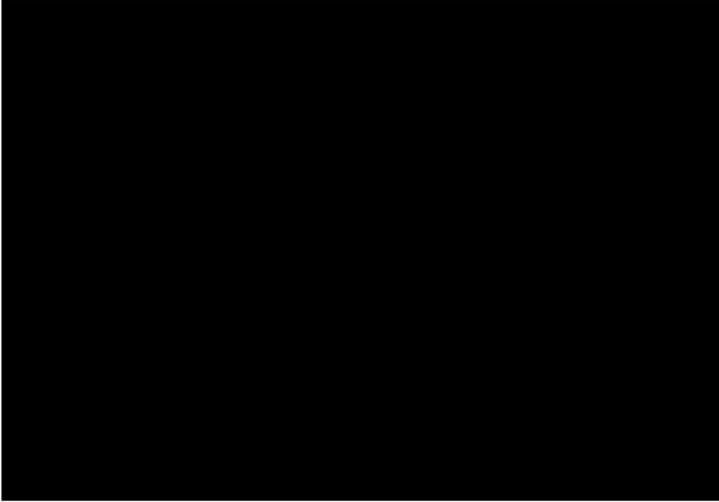
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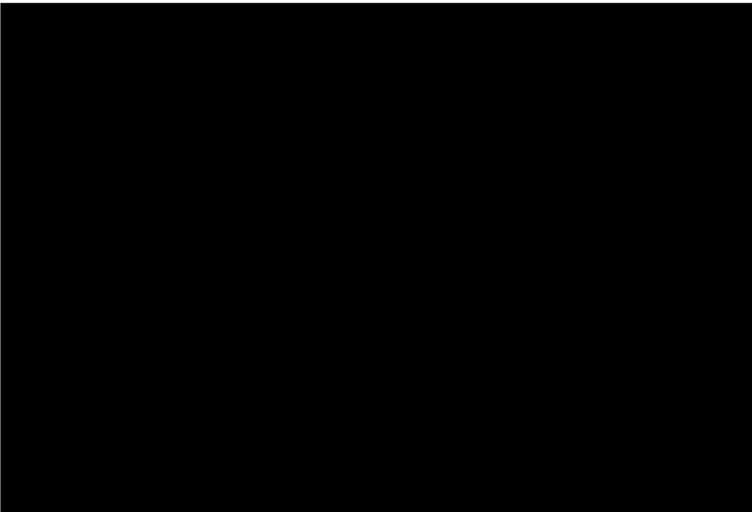
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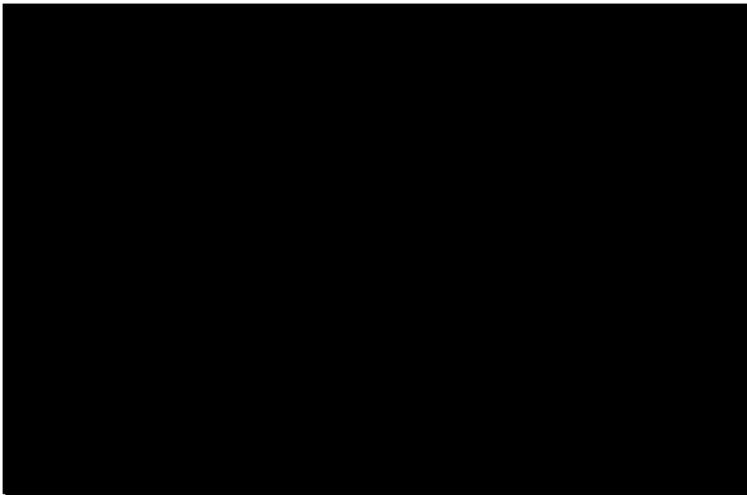
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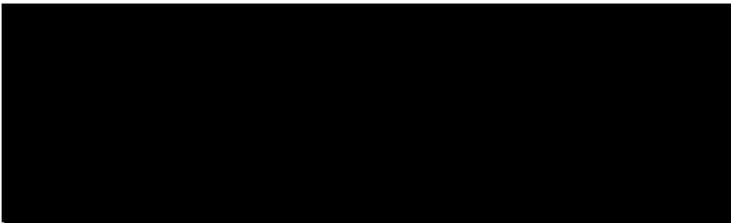
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People v. Jennings (2010) 50 Cal.4th 616  
People v. Diaz (1992) 3 Cal.4th 495

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People v.  
Brown

(2023) 14 Cal.5th 453

We now clarify that to prove first degree murder by means of poison, the prosecution must show the defendant deliberately gave the victim poison with the intent to kill the victim or inflict injury likely to cause death.

The use of poison, standing alone, does not fulfil this requirement unless it is carried out with a state of mind more culpable than the malice requirement for a second degree murder conviction.

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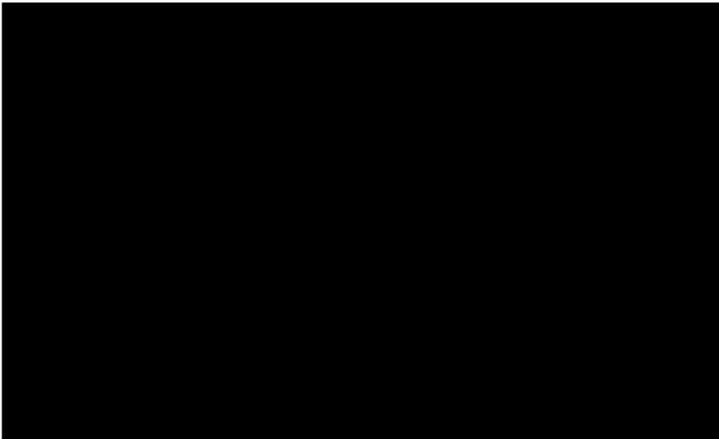
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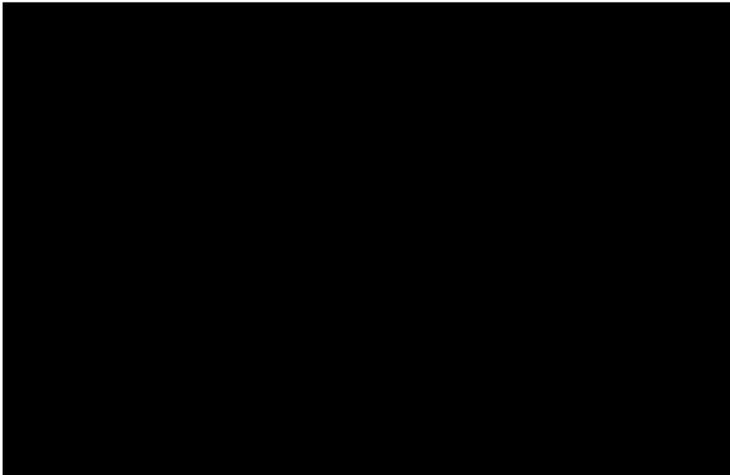
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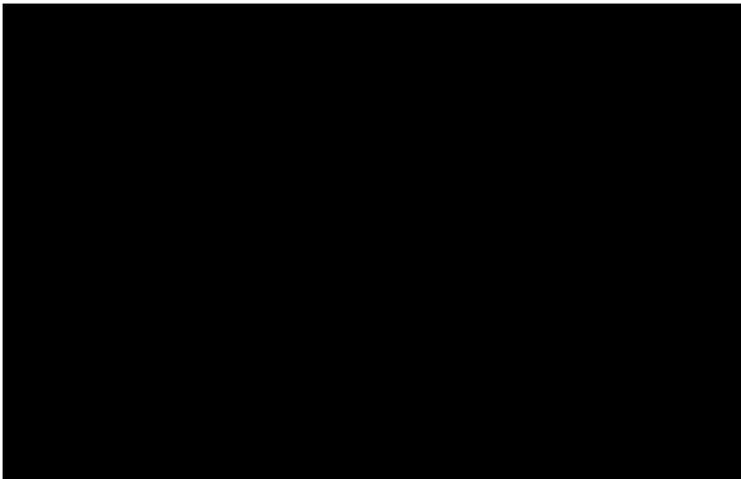
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**Issues**

- Contributory Negligence – not a defense  
*People v. Schmirer* (1996) 44 Cal.App.4<sup>th</sup> 38
- Proximate Cause / Intervening Cause –  
**COMBINED DRUG TOXICITY**  
*People v. Tseng* (2018) 30 Cal.App.5th 117

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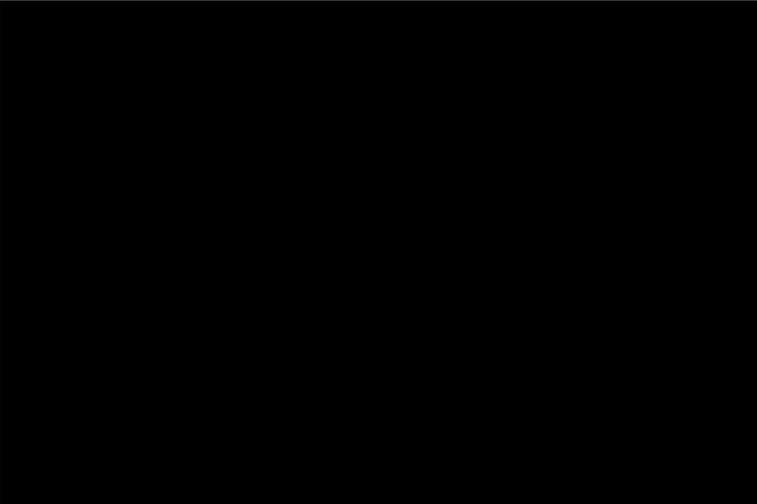
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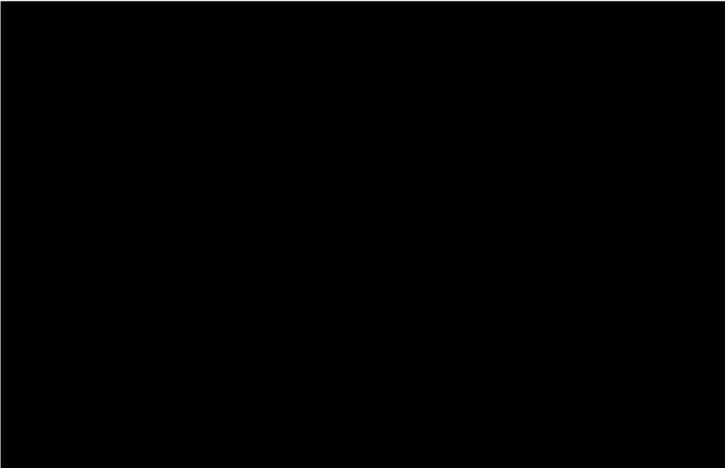
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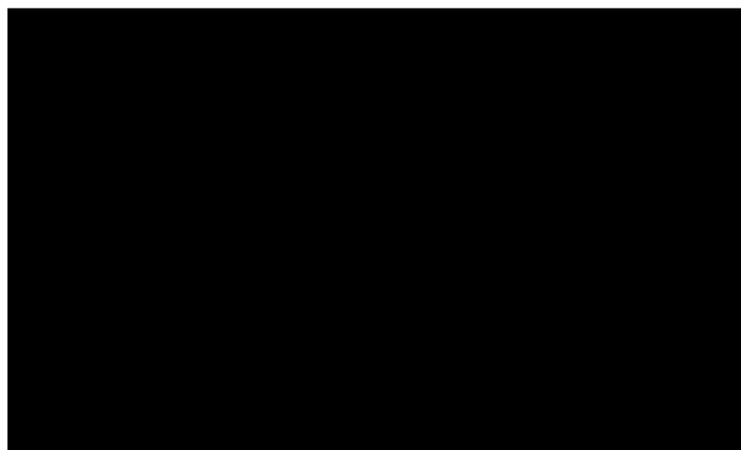
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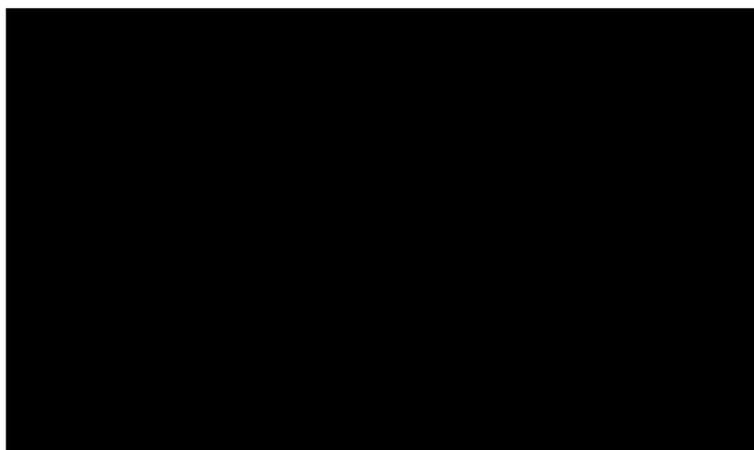
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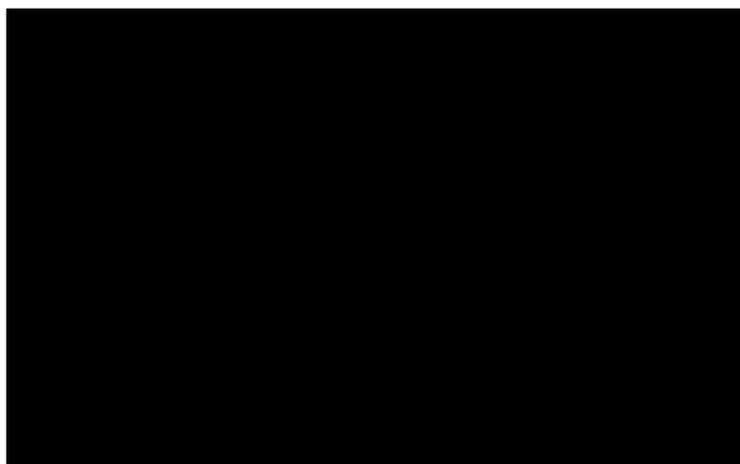
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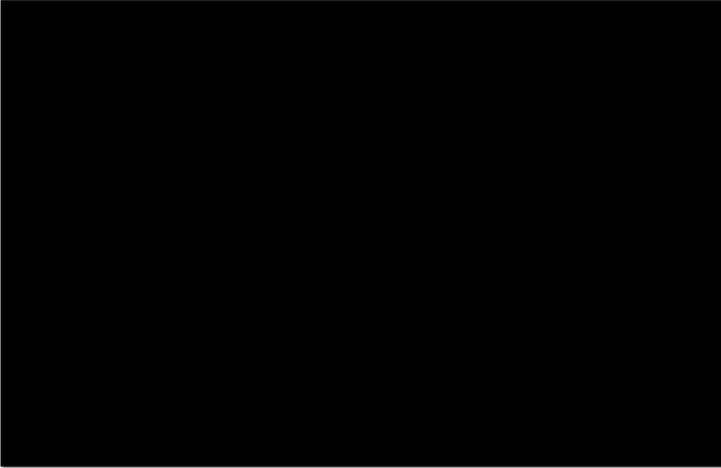
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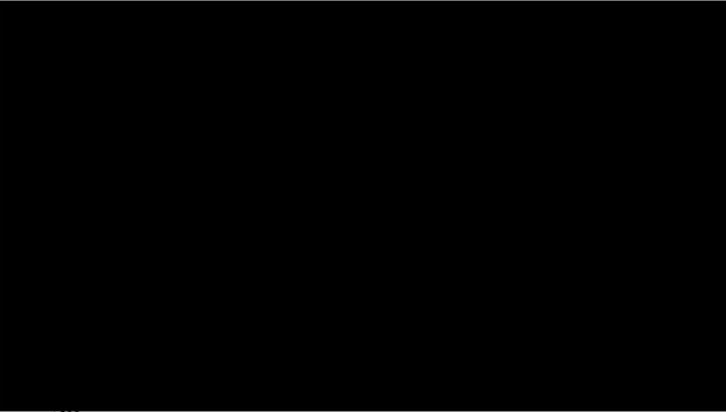
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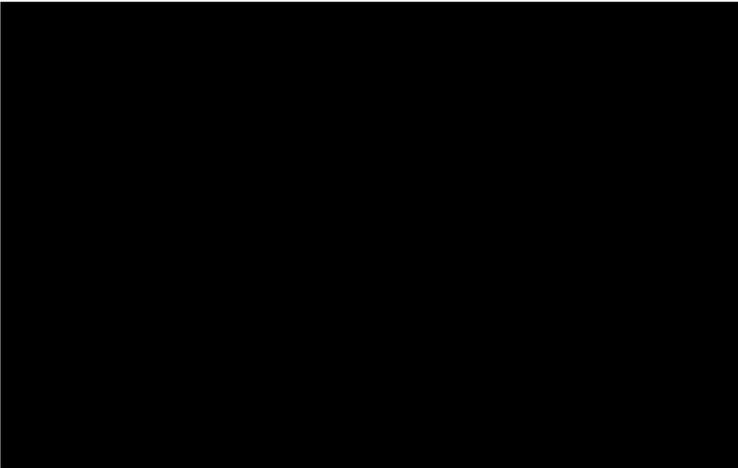
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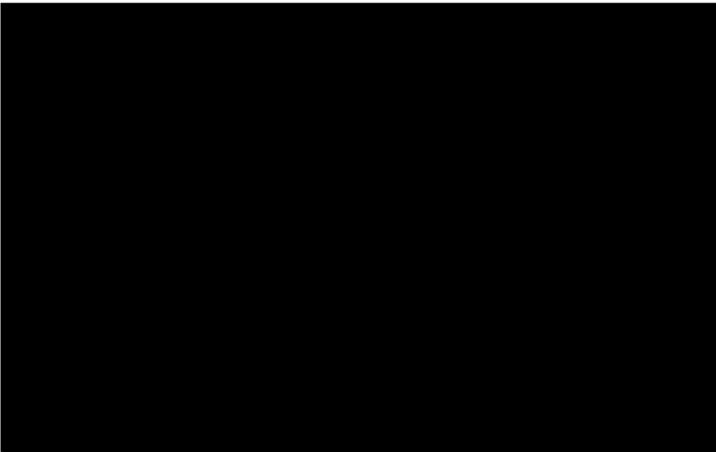
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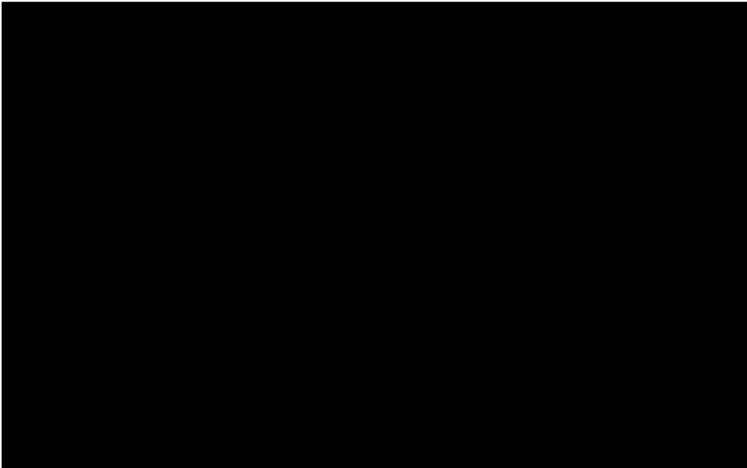
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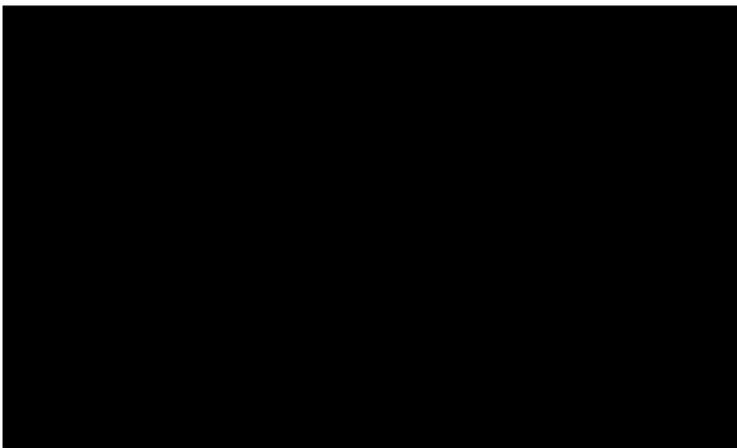
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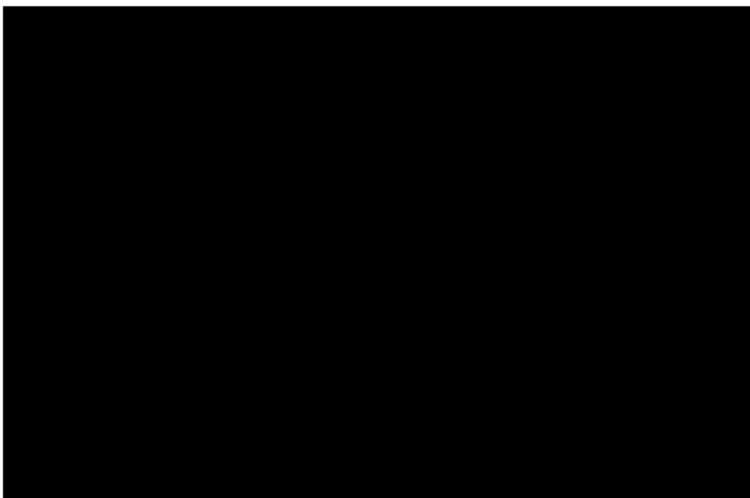
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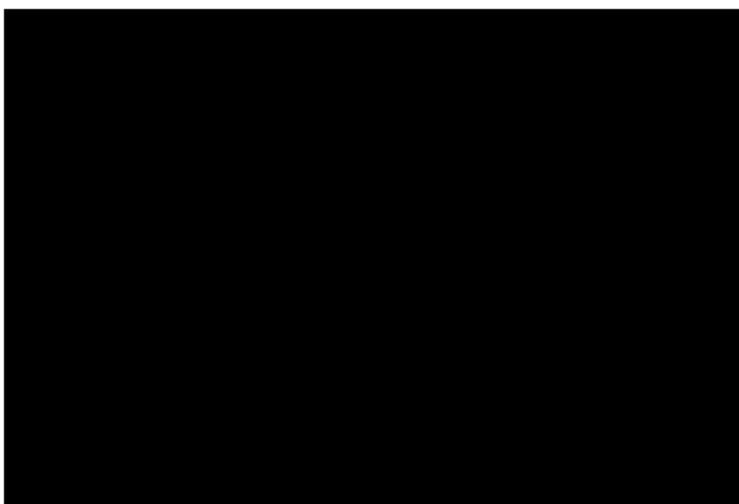
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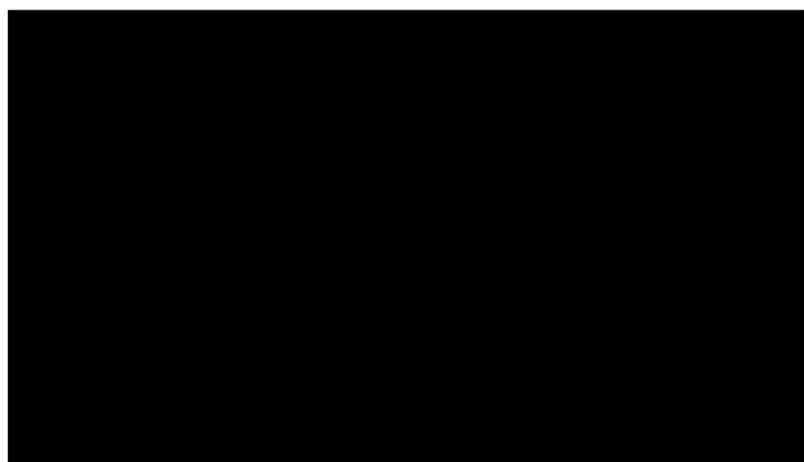
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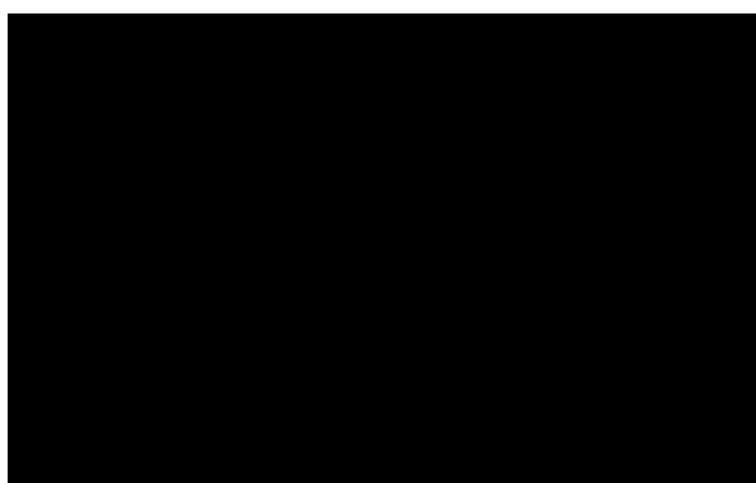
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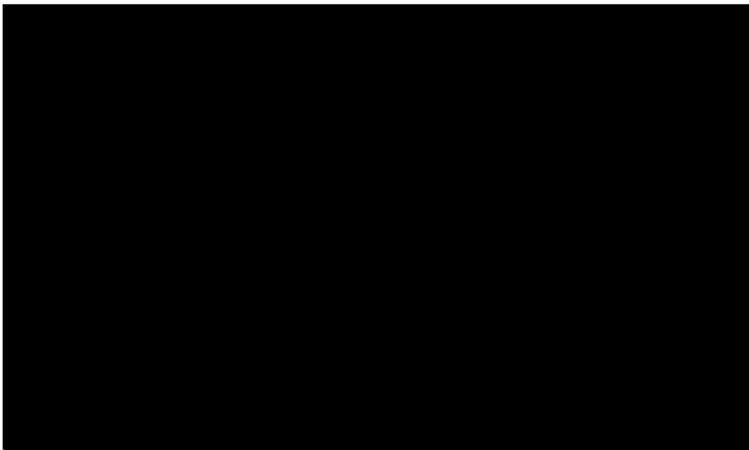
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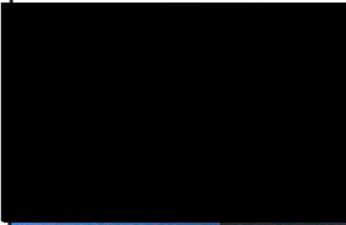
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The Newest Deadly  
Weapon: FENTANYL



Lisa A. Smittcamp, District Attorney



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# The Life of a Misdemeanor File



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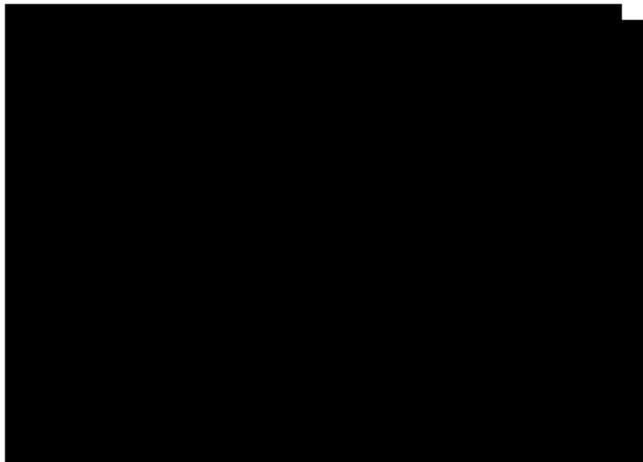
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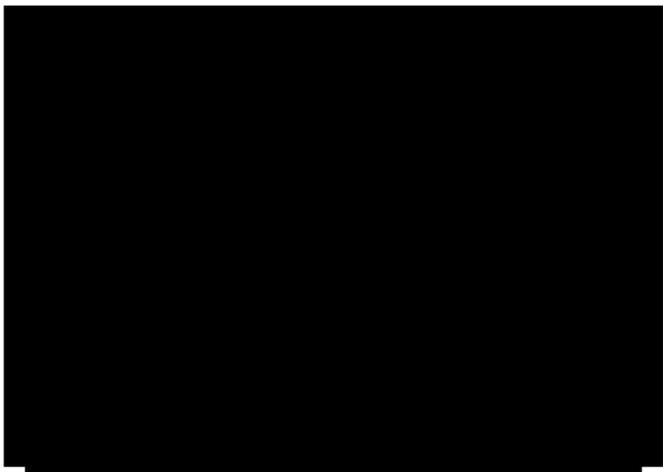
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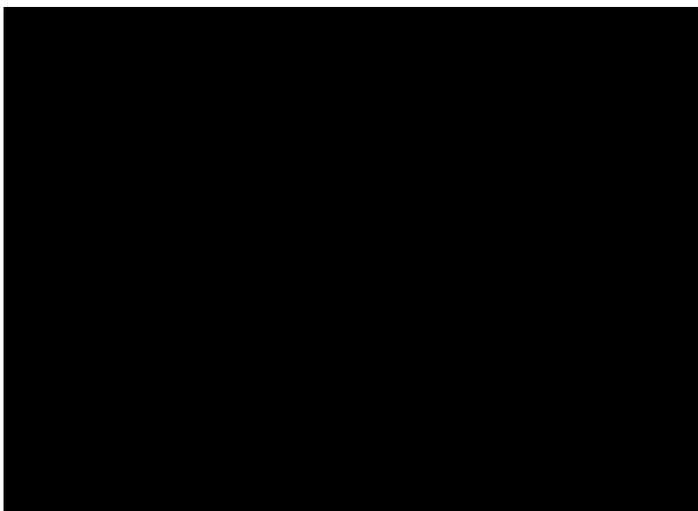
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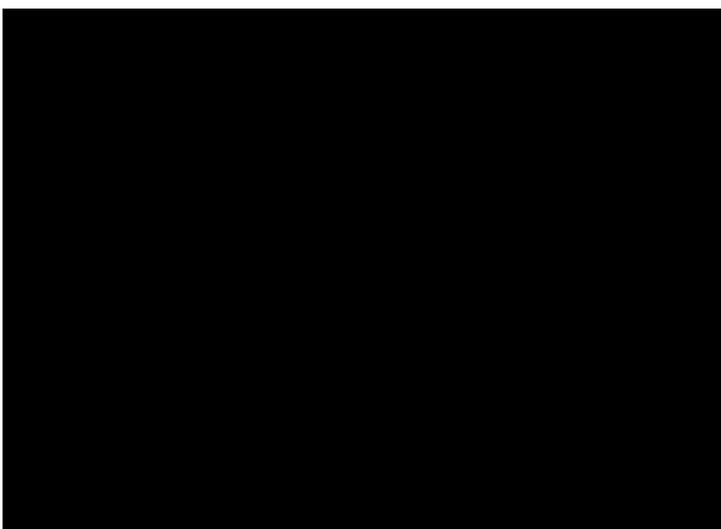
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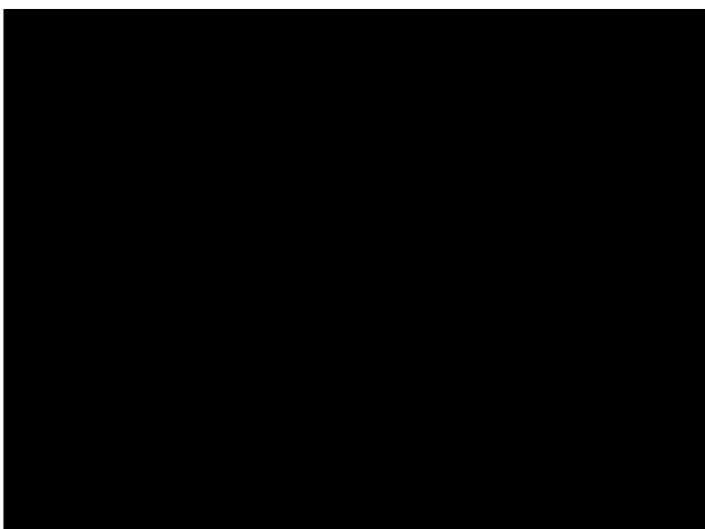
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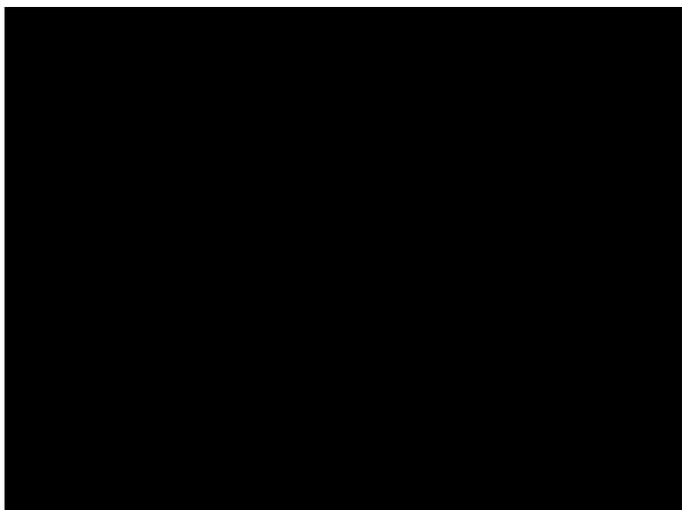
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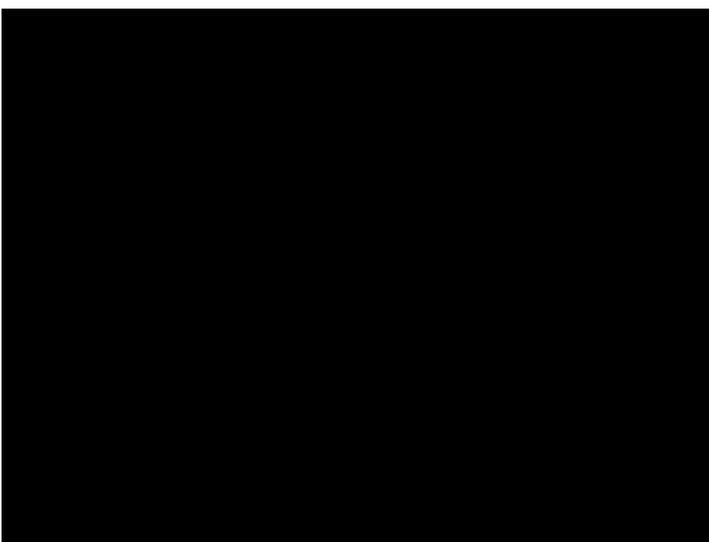
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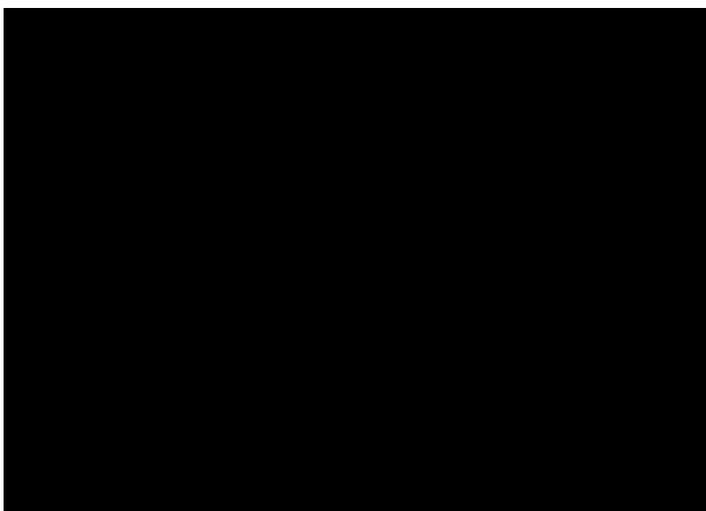
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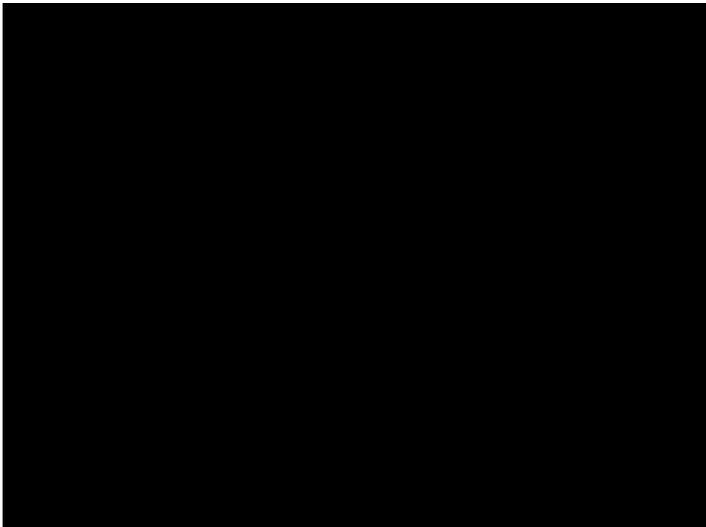
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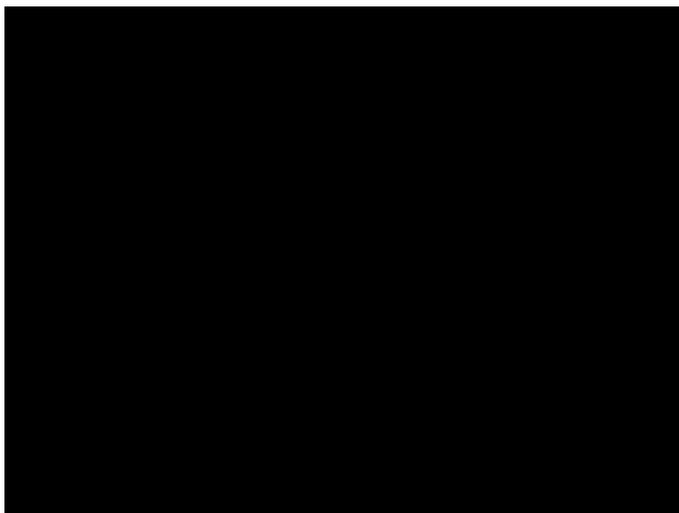
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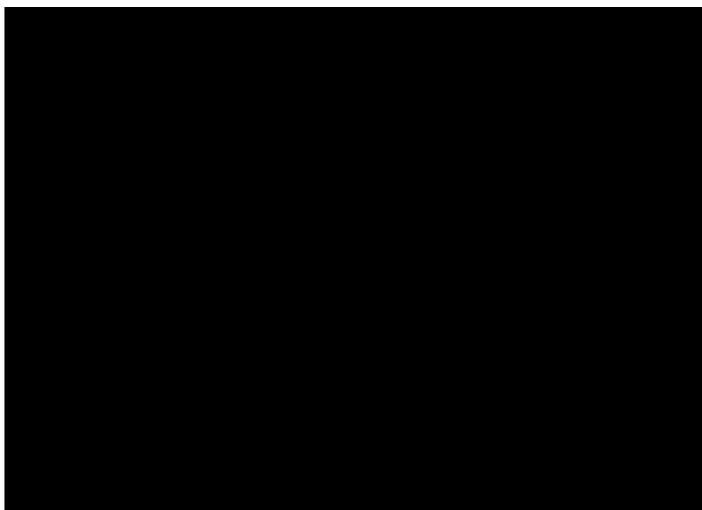
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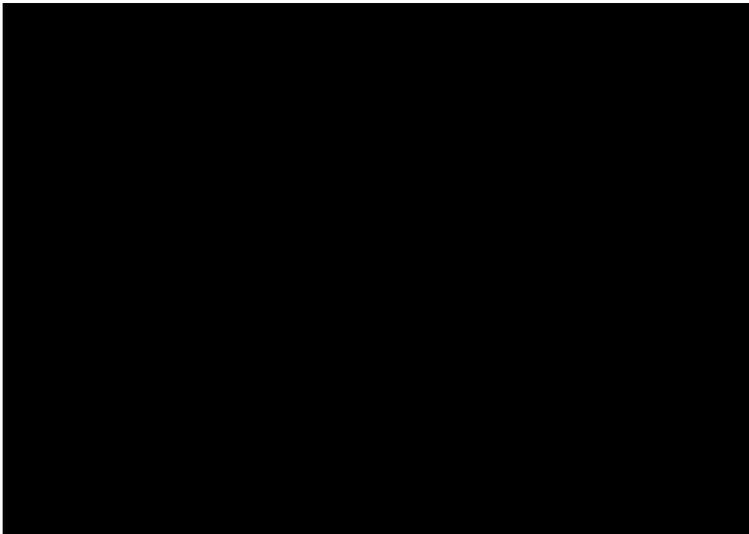
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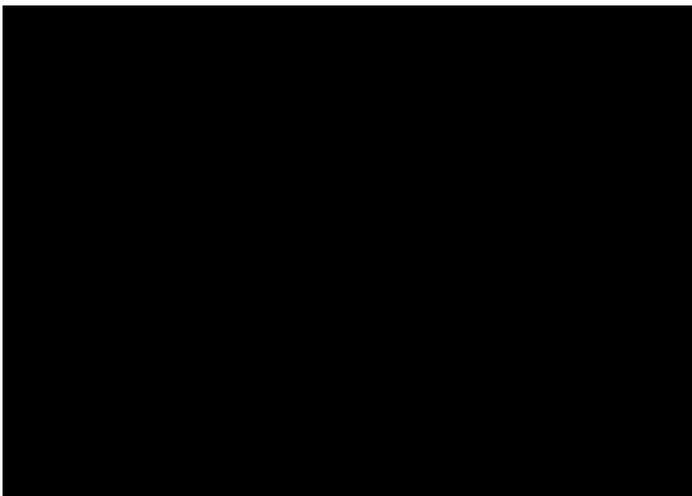
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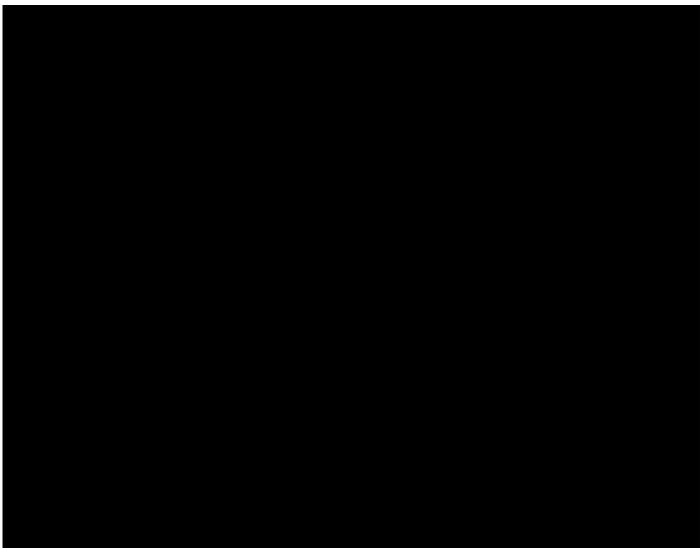
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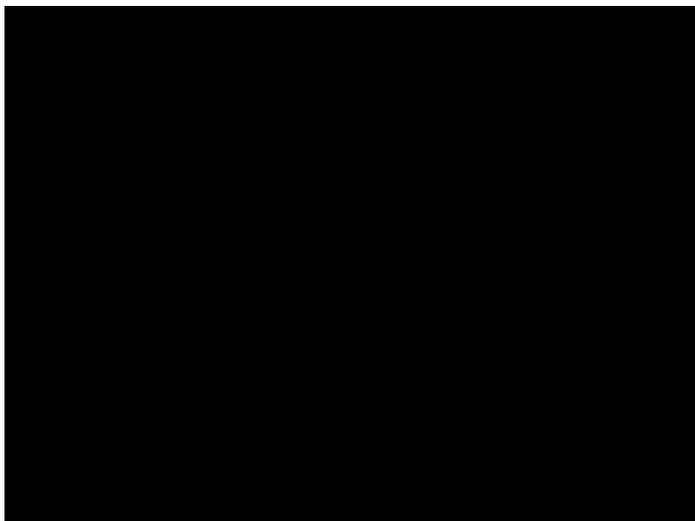
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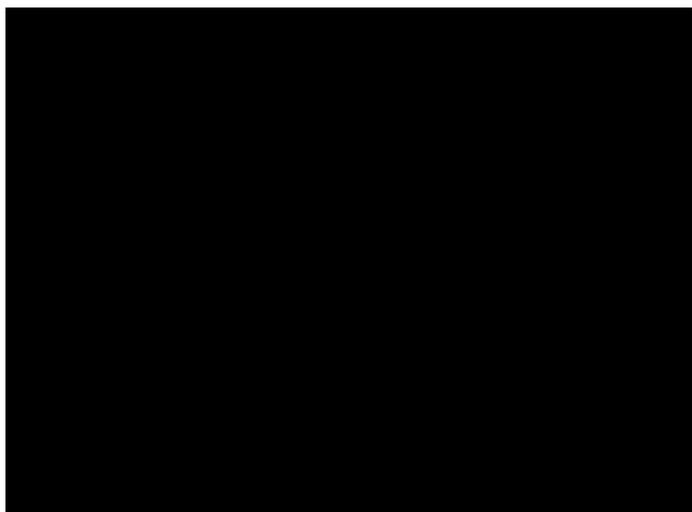
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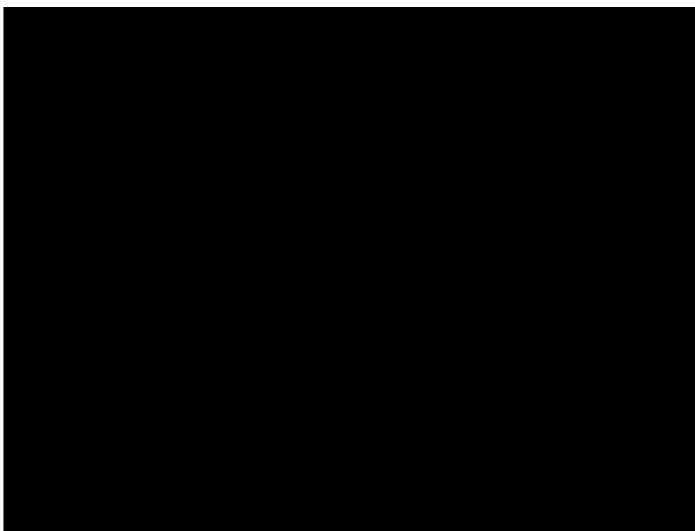
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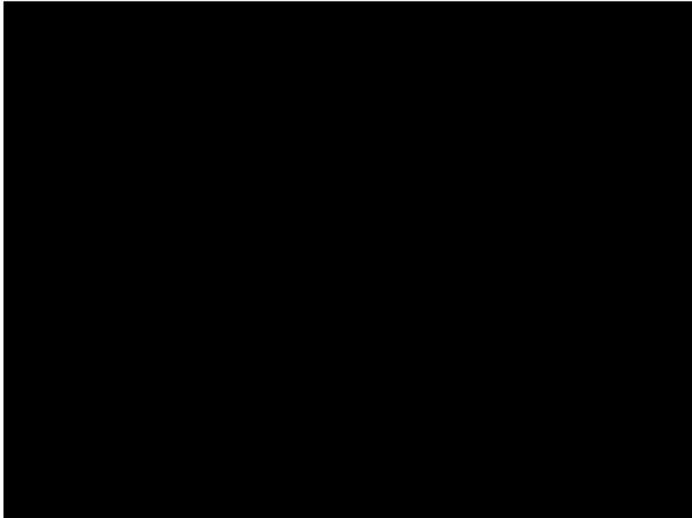
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WEAPONS RELATED CHARGES			
Weapon	Statute	UCC Description	UCC Sentencing Range
Assault Rifle			
Baseball Bat			
Ball gun	PC 626.10(a)	MISD. WEAPONS ON SCHOOL GROUNDS	1 Yr.
Ball			
Ball Club			
Blunt Object	PC 417(a)(1)	USE OF DEADLY WEAPON IN FIGHT	6 Mo.
Wooden Board	PC 417(a)(1)	EXHIBITING A DEADLY WEAPON	6 Mo.
Bottle	PC 29815(a)	MISD. OF FIREARM WITH A PROBATION RESTRICTION	1 Yr.
Brass Knuckles			
Chain			
Club	PC 245(a)(1)	MISD. ASSAULT WITH A DEADLY WEAPON	1Yr.
Crowbar			
Firearm			
Flac	PC 23920	POSSESSION OF FIREARM WITH ID NUMBERS REMOVED	6 Mo.
Handgun			
Knife			
Ligature	PC 626.10(b)	MISDEMEANOR WEAPONS ON COLLEGE OR UNIVERSITY GROUNDS	1 Yr.
Machete			
Object			
Pellet Gun			
Pipe			
Primer			
Razor Blade			
Revolver			
Rifle			
Screwdriver			
Semi-automatic Firearm			
Sharp Object			
Shovel			
Sword			
Tire Iron			
Vehicle			
Wrench			

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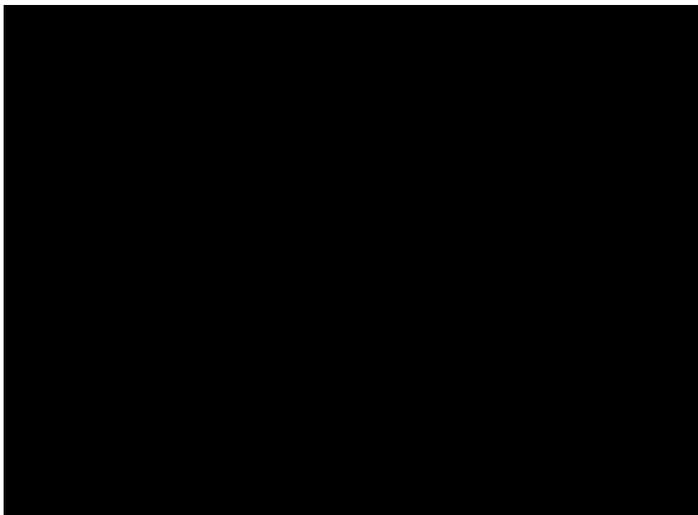
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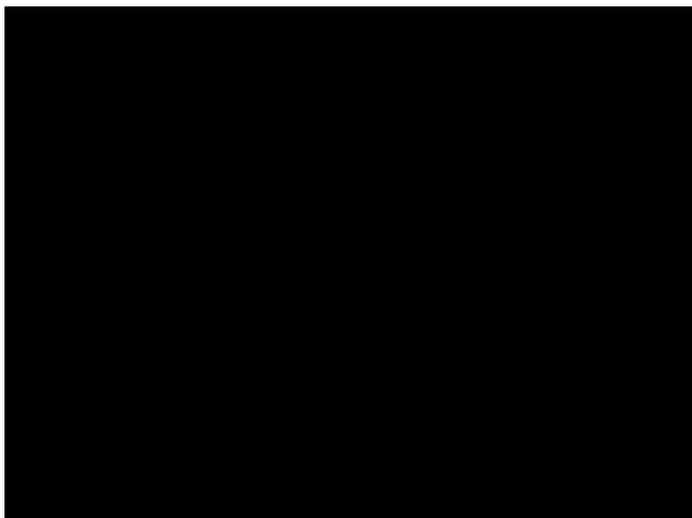
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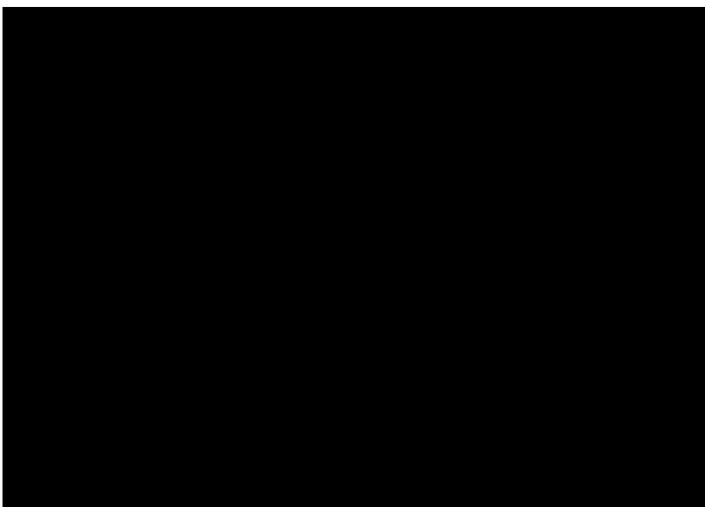
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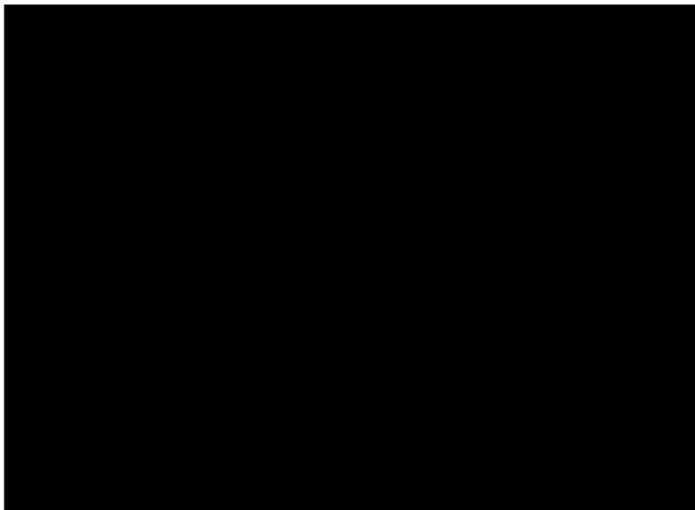
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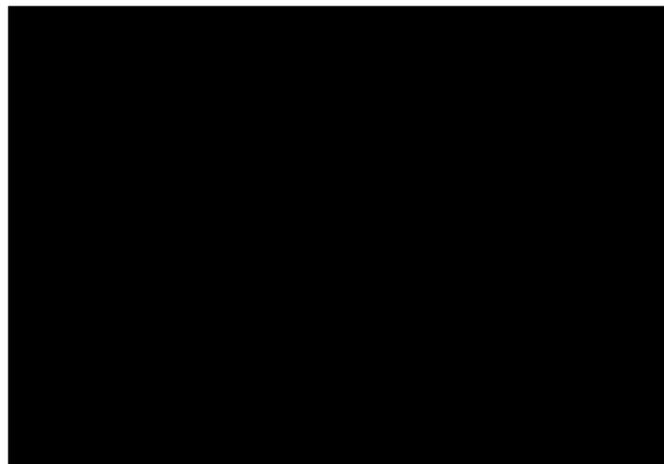
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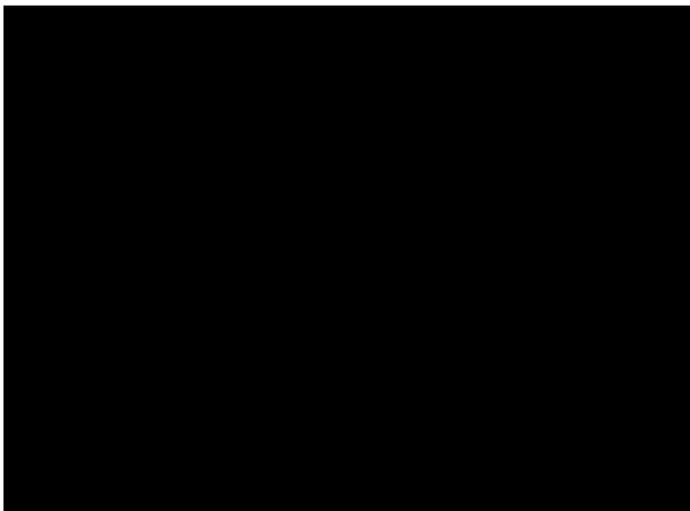
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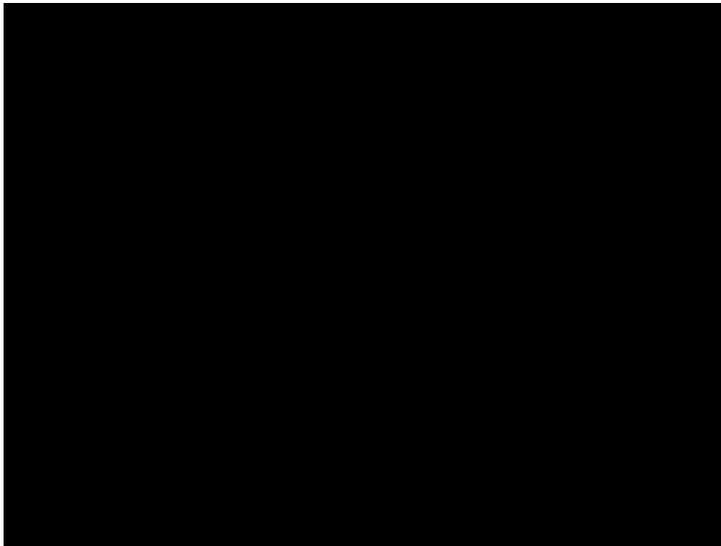
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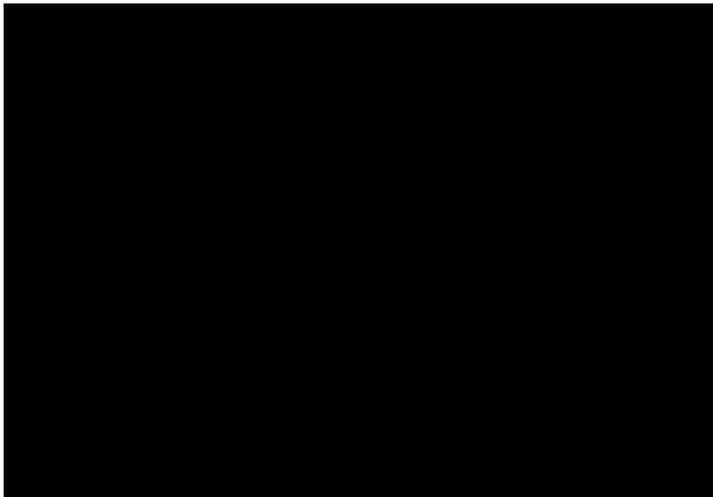
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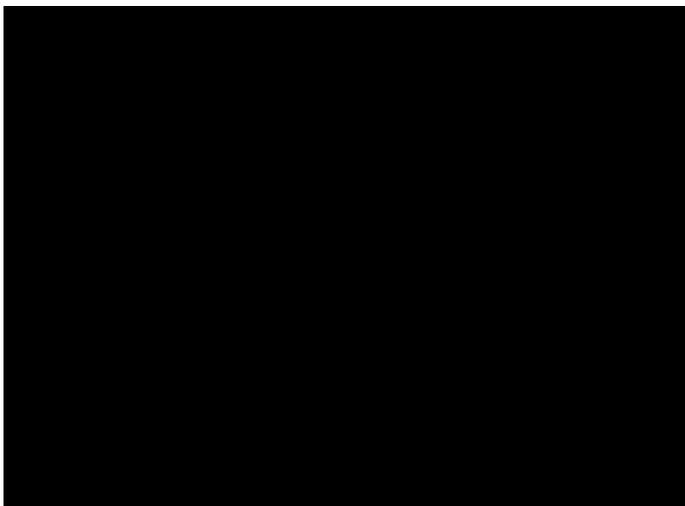
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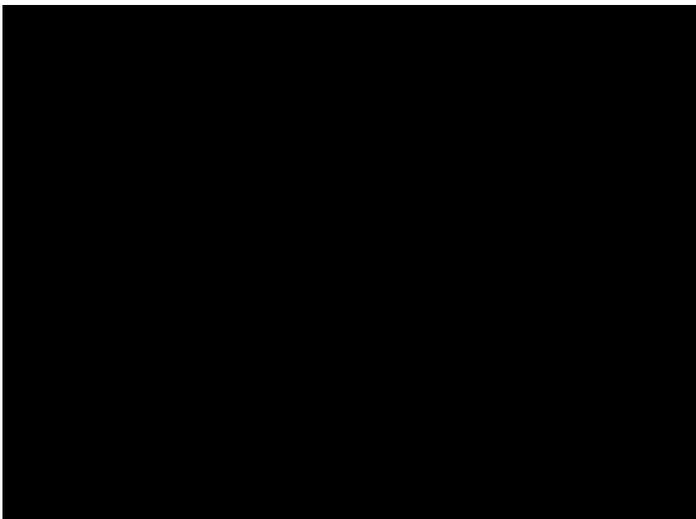
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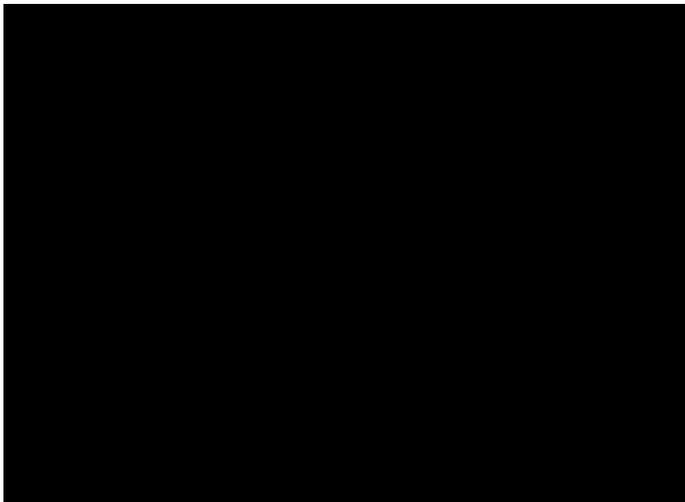
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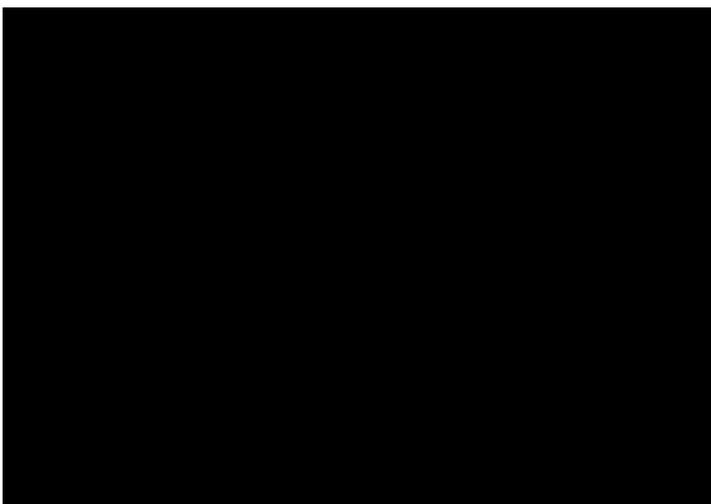
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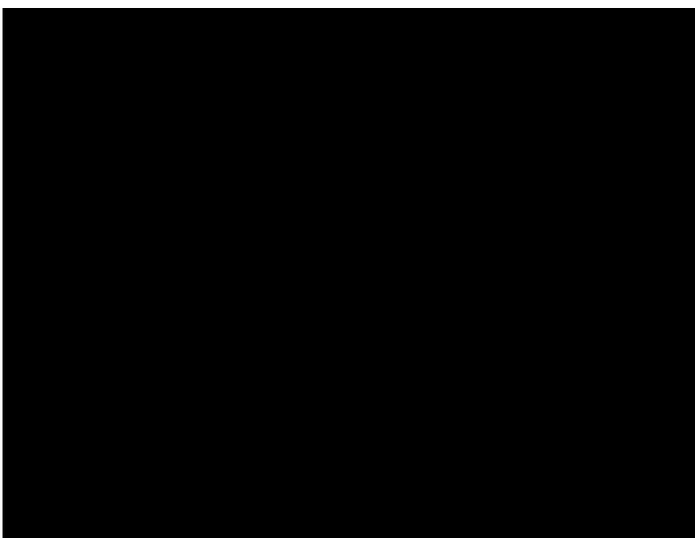
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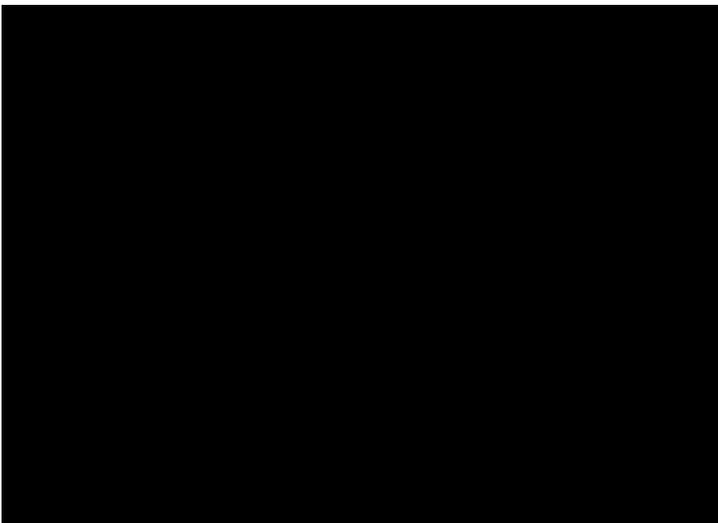
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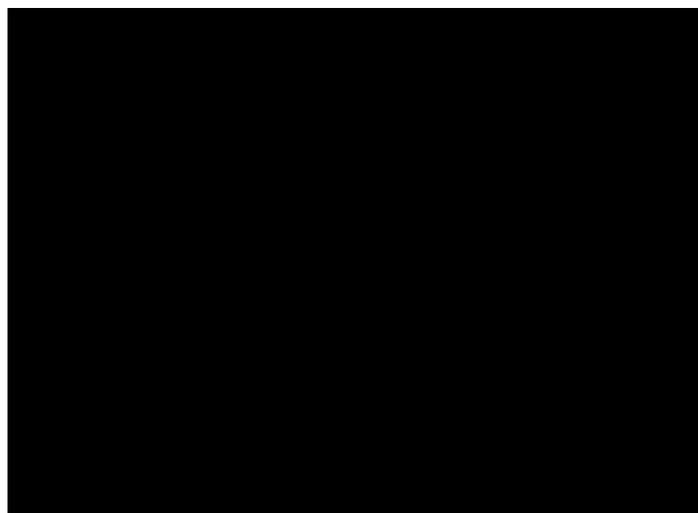
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**Standard Alcohol DUI**

- VC 23152(b) – Driving with a BAC of .08% or higher
- VC 23152(a) – Driving Under the Influence of alcohol

**DUI with injury**

- VC 23153(a) and VC 23153(b)
- Injury has to be inflicted on any individual, not the defendant

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**FILING DUIs**

**DUI with drugs (DUID)**

- VC 23152(f) – Driving under the influence of drugs
- VC 23152(g) – Driving under the influence of alcohol/drug

**DUI with "passenger for hire"**

- VC 23152(e)/VC 23153(e) – Driving with a BAC of .04% or higher with a "passenger for hire"
- Effective July 1, 2018
- Uber/Lyft

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**FILING DUIs**

**Allegations and Enhancements**

- VC 23578 – Blood Alcohol Content (BAC) .15% or higher
  - Only alleged as an enhancement
  - Only alleged on the (b) count
- VC 23578 - Refusal

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## FILING DUIs

### Allegations and Enhancements

- Speeding and Reckless Driving While DUI
- VC 23582(a)
  - 30+ mph on freeway or 20 mph on streets plus reckless driving
  - Mandatory minimum 60 days in county jail



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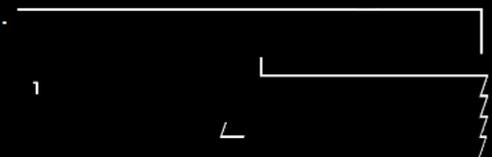
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## FILING DUIs

### Allegations and Enhancements

- Minor Under 14 Years of Age in Car
- VC 23572



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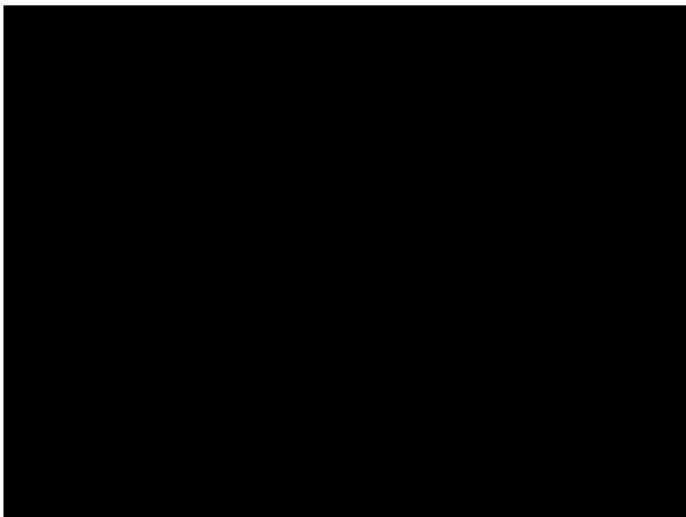
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## FILING DUIs

### PRIORS

- Following misdemeanor convictions can be alleged as priors if the date(s) of violation are within 10 years:
  - VC 23152(a)/(b)/(f)/(g) – DUI
  - VC 23153(a)/(b)/(f)/(g) – DUI w/injury (\*as misd.)
  - VC 23103(a)/VC 23103.5 – "wet reckless"
  - Out of state convictions that meet the elements of a CA DUI

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## FILING DUIs

### PRIORS

- Following convictions can be alleged as priors to make the new offense a felony DUI:
  - Three prior DUI's/wet reckless in the last 10 years
  - Any prior felony DUI in the last 10 years (VC 23153(a)/(b), VC 23550, VC 23550.5, PC 192(c)(1)
- LIFETIME PRIOR
  - PC 191.5(a), Felony 191.5(b) or PC 192.5(a)
  - PC 191.5(a) or PC 192(c)(2) (\*prior to 2007)

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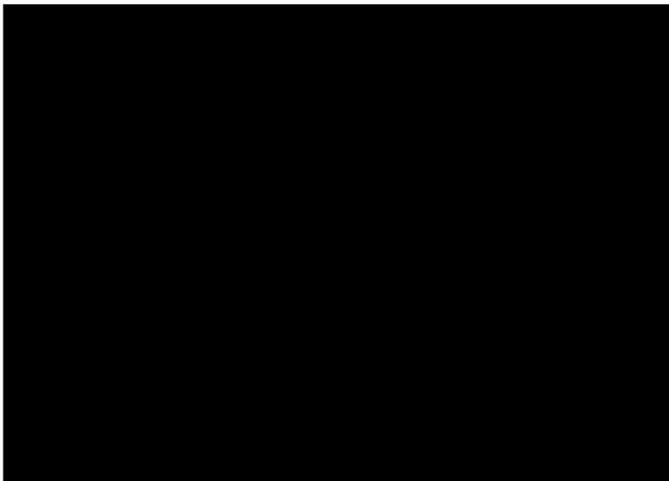
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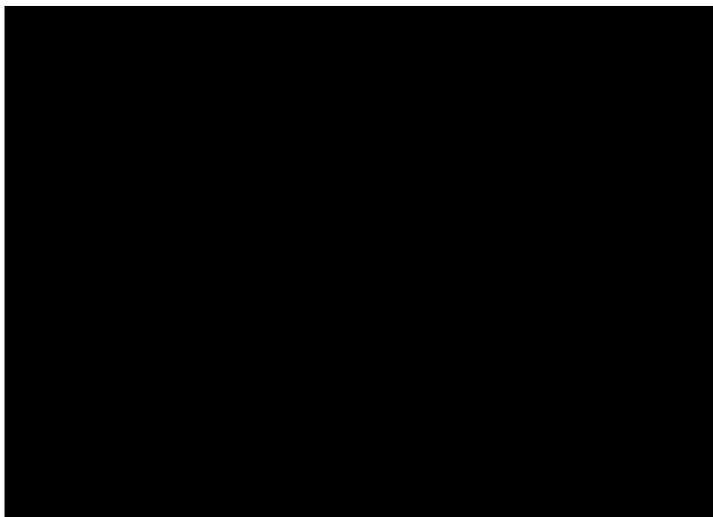
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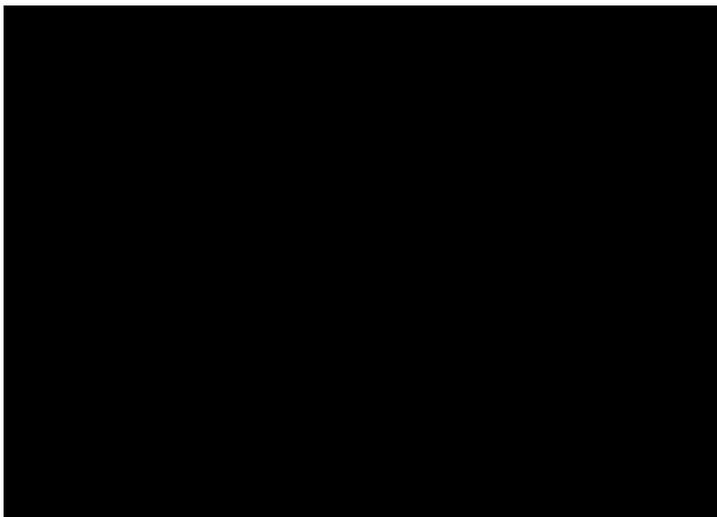
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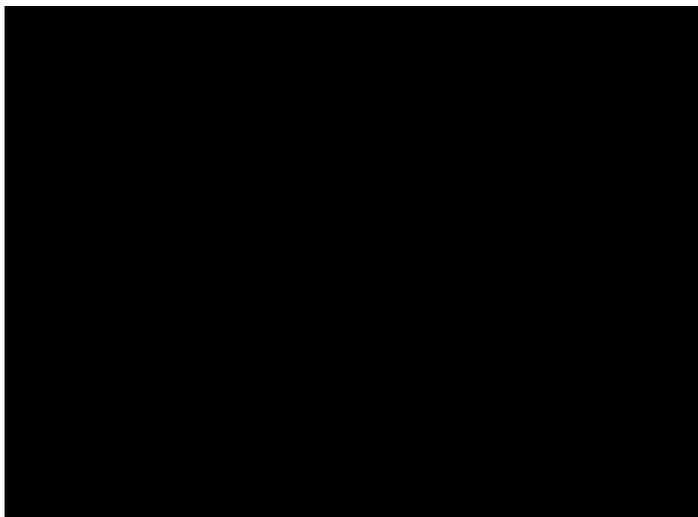
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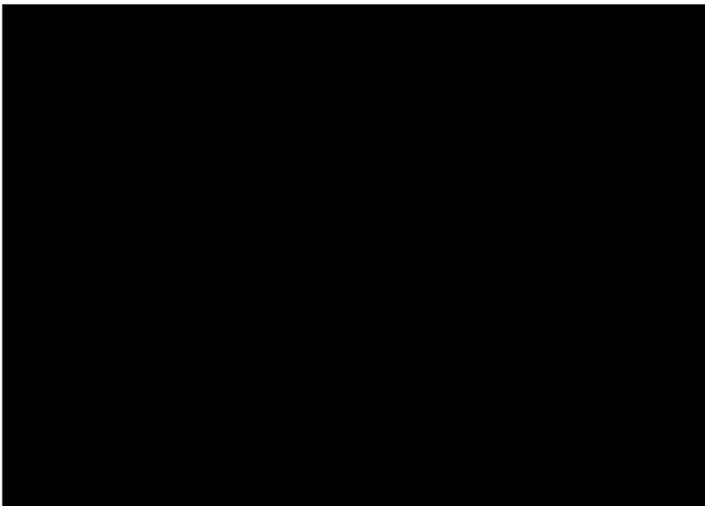
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**FILING VC 14601s....**

- VC 14601.1 – most common

- VC 14601.5

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**FILING VC 14601s....**

- VC 14601.2 –

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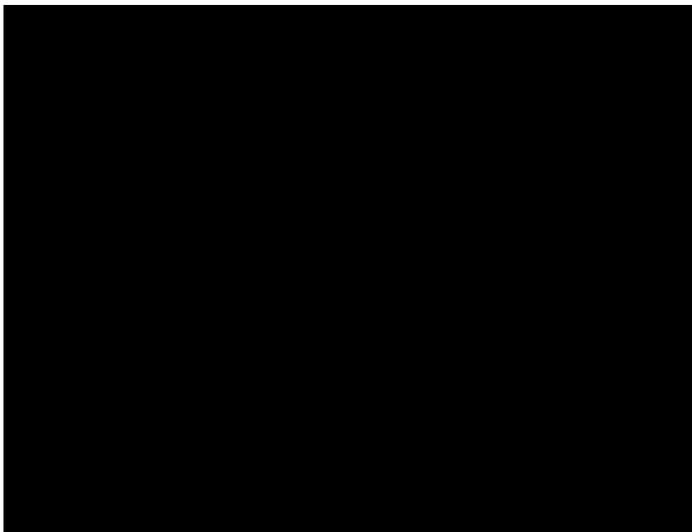
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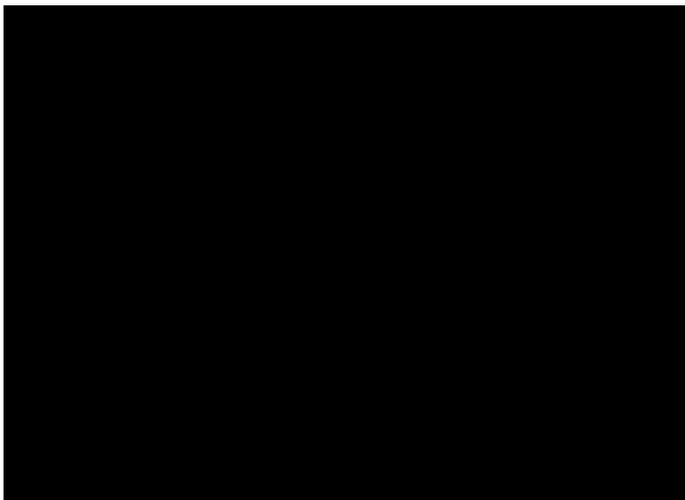
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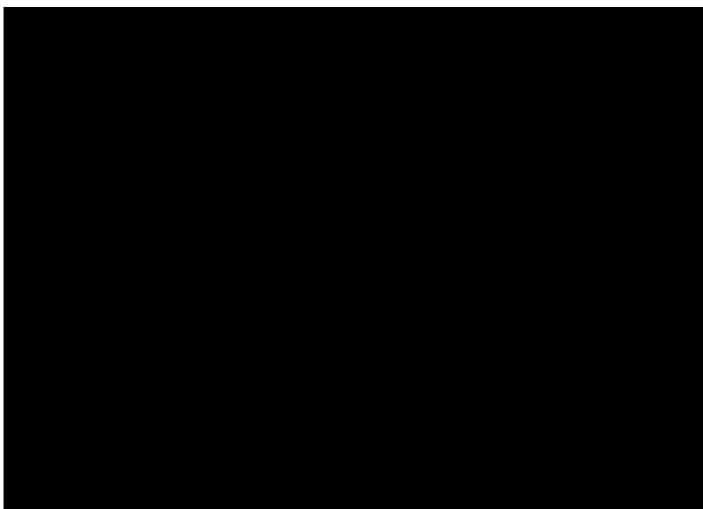
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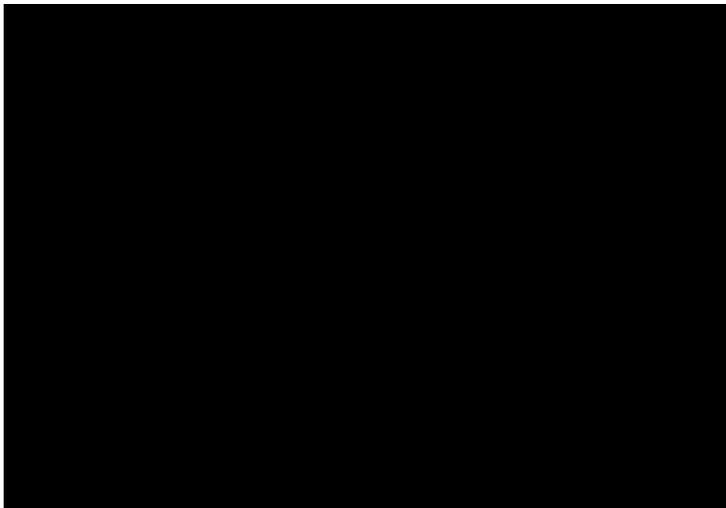
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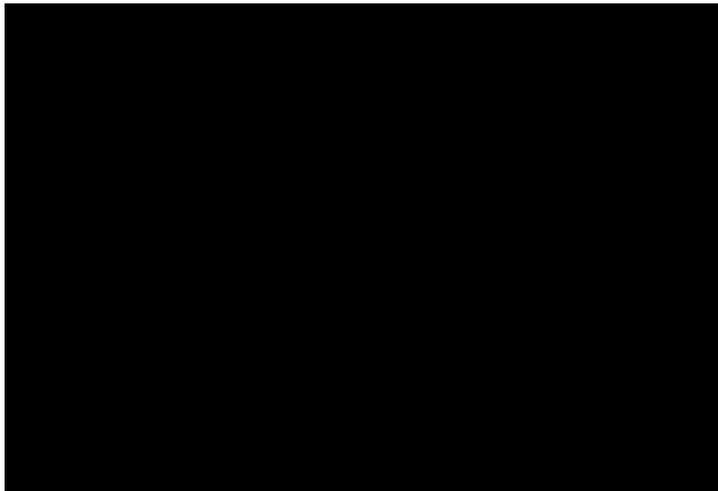
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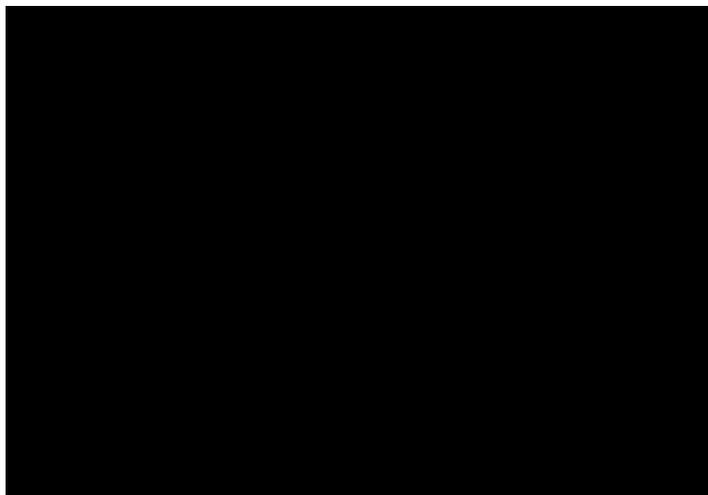
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### FILING DV CHARGES

#### DV CHARGES

- PC 273.5 – Domestic Violence w/INJURY
  - Spouse, former spouse, dating, previously dated or engaged, cohabitant, fellow parent
  - Requires "traumatic injury" – physical injury, internal or external, serious or minor




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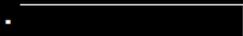
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### FILING DV CHARGES

#### DV CHARGES

- PC 243(e)(1) – Domestic Violence Battery
  - Spouse, former spouse, dating, previously dated or engaged, cohabitant, fellow parent




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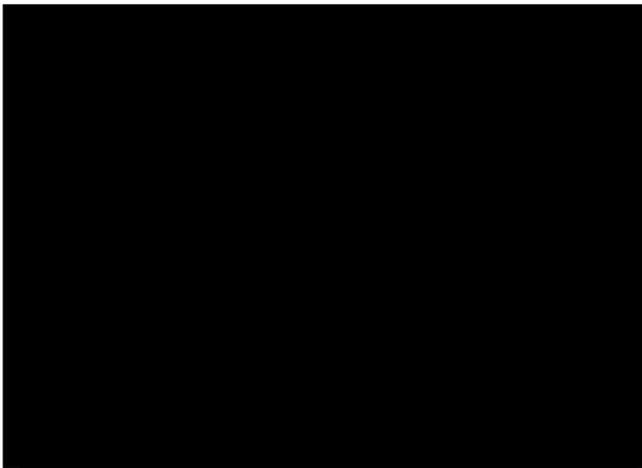
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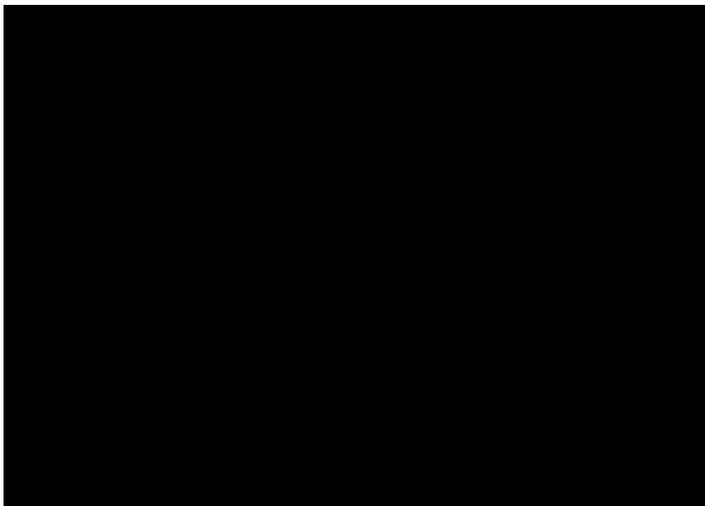
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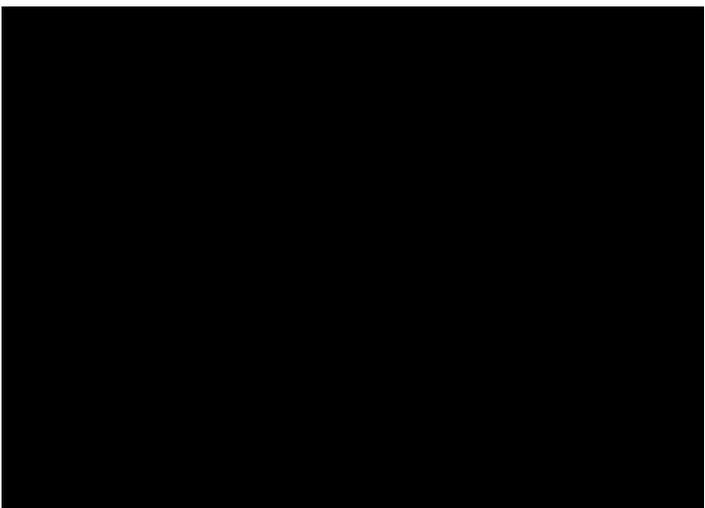
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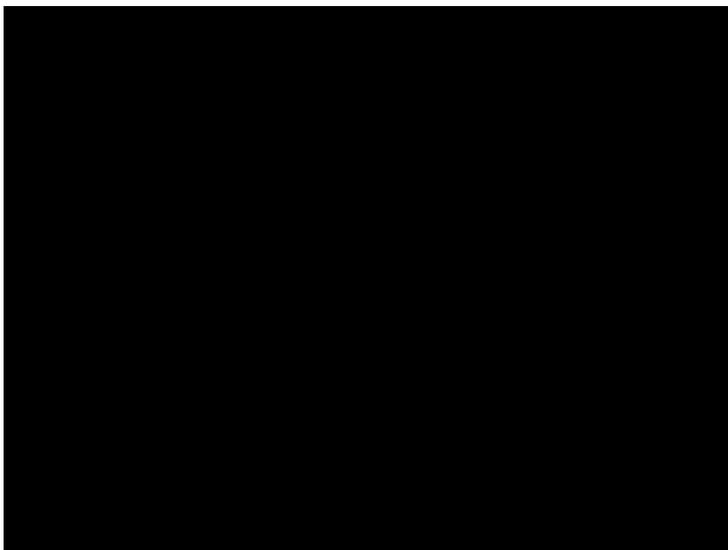
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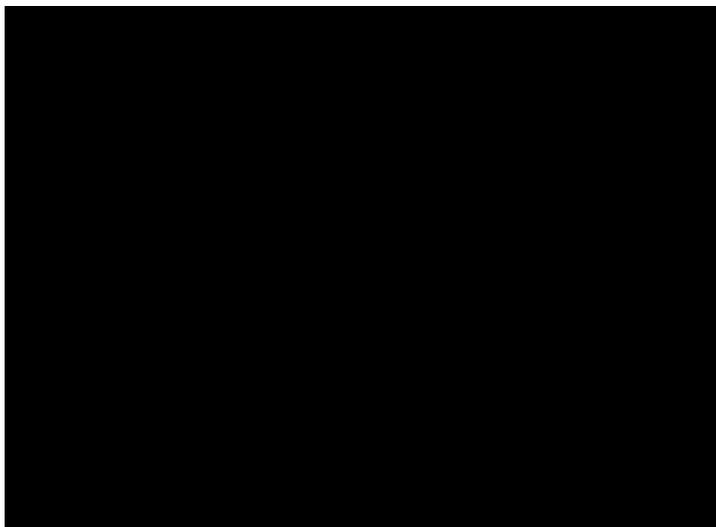
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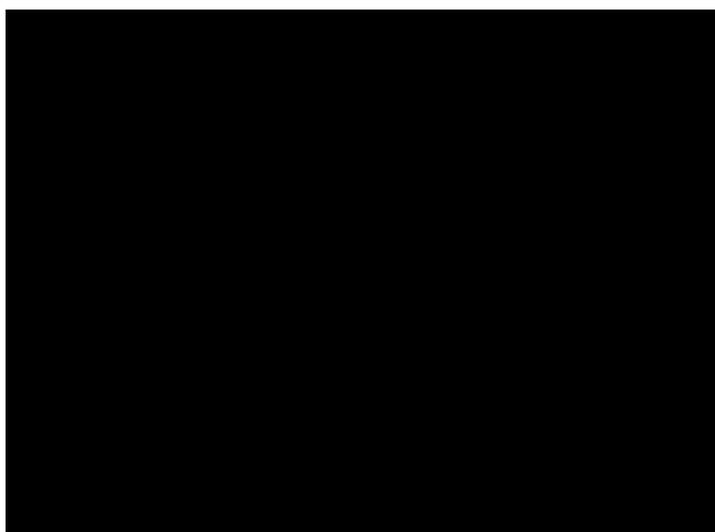
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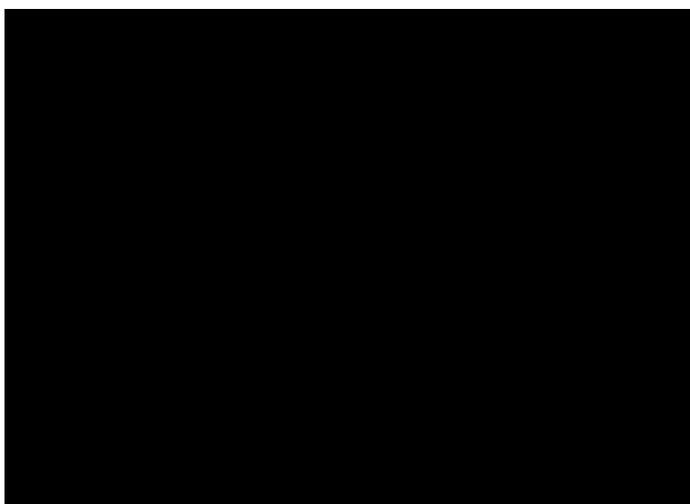
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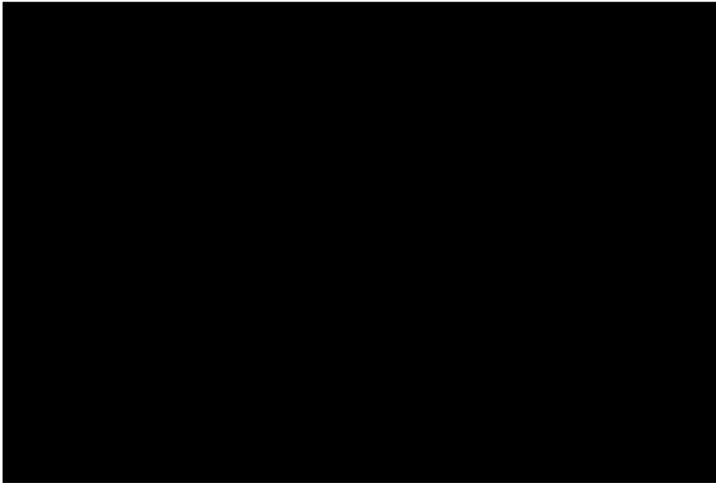
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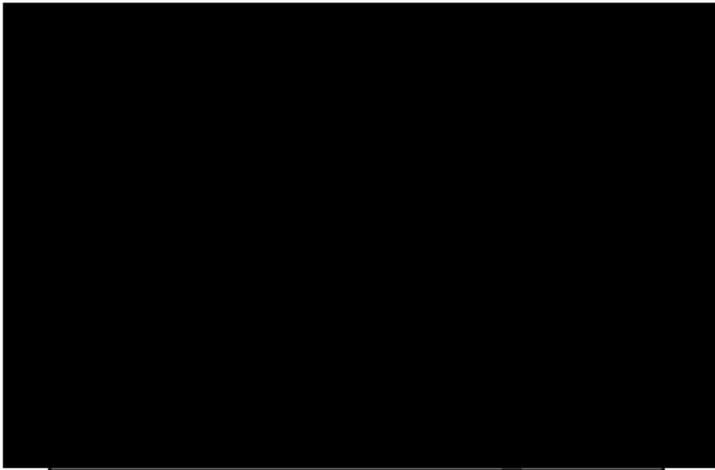
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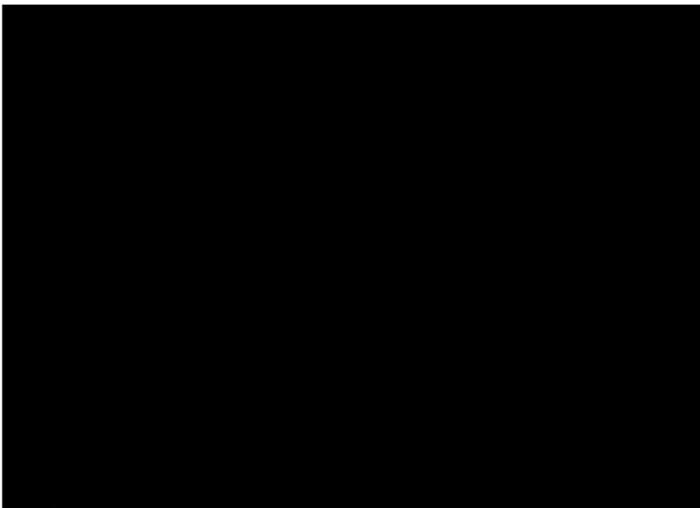
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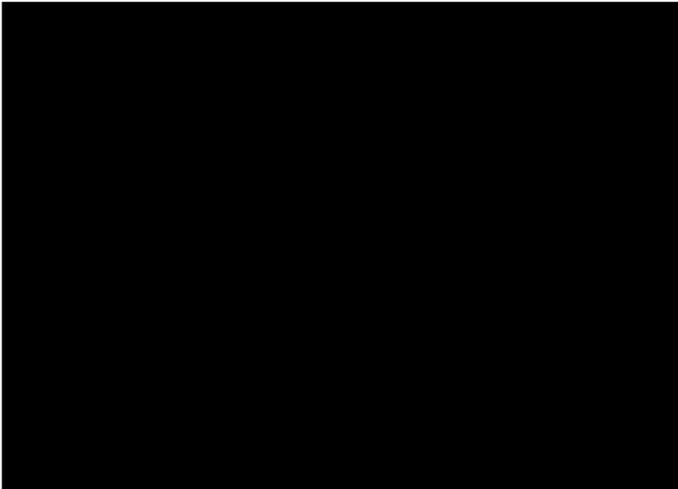
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**Prop 47**

- - HS 11377, HS 11350, HS 11357(a)
  - PC 666
  - PC 459.5 under \$950
  - Under \$950
    - PC 487(c) – Person
    - PC 487(d) (auto/firearm)
    - PC 470, 475, 476, 476a (forged checks, money orders, etc)

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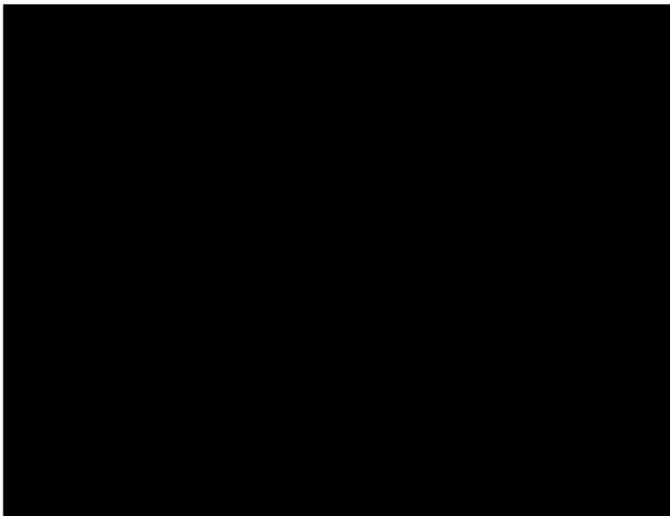
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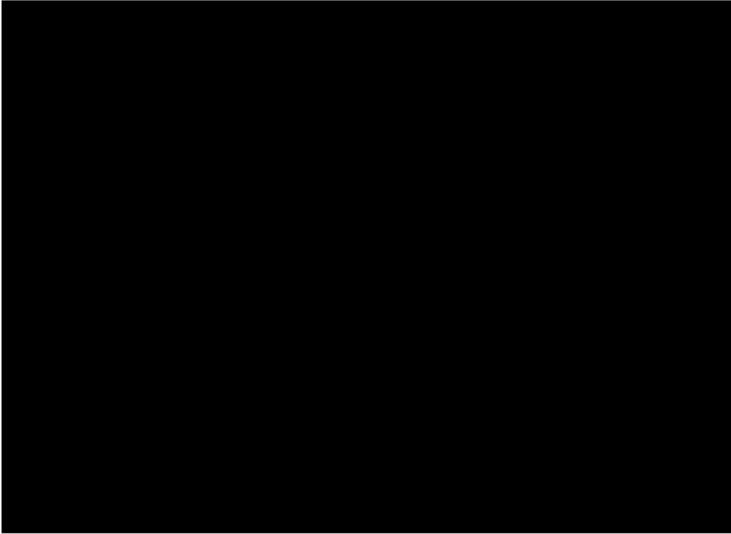
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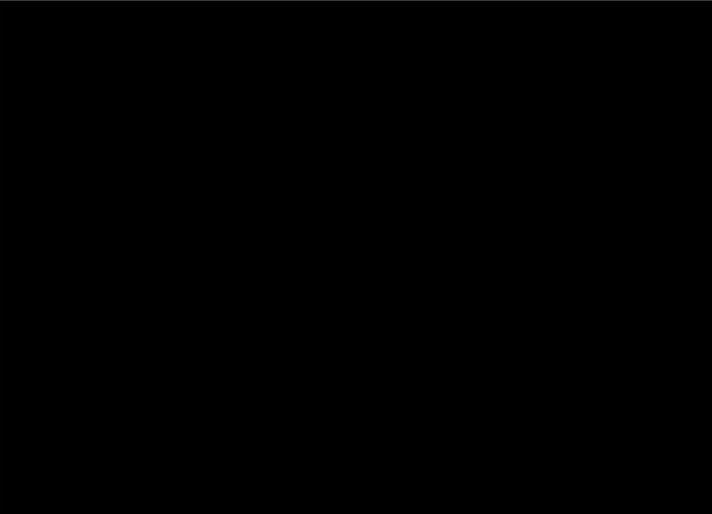
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## DV Sentencing

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> **Family Code section 6211:** "Domestic abuse" is abuse perpetrated against:

- Spouse / former spouse
- Cohabitant / former cohabitant
- Dating and/or engaged
- Parent of child

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- PC 273.5, abuse w/corporal injury
- PC 243(e)(1), domestic battery
- PC 591/591.5, damaging phone lines
- PC 236, false imprisonment
- PC 646.9, stalking
- PC 166(c)(1), CPO viol. / PC 273.6 (EPO/RO viol.)
- PC 422 criminal threats
- PC 415, disturbing the peace
- PC 594, vandalism
- PC 242, simple battery

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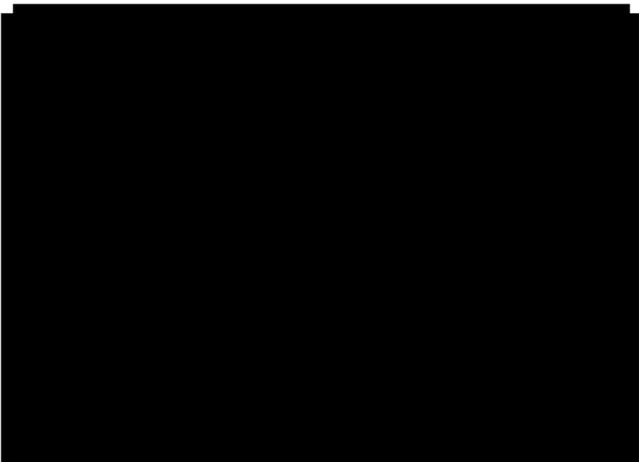
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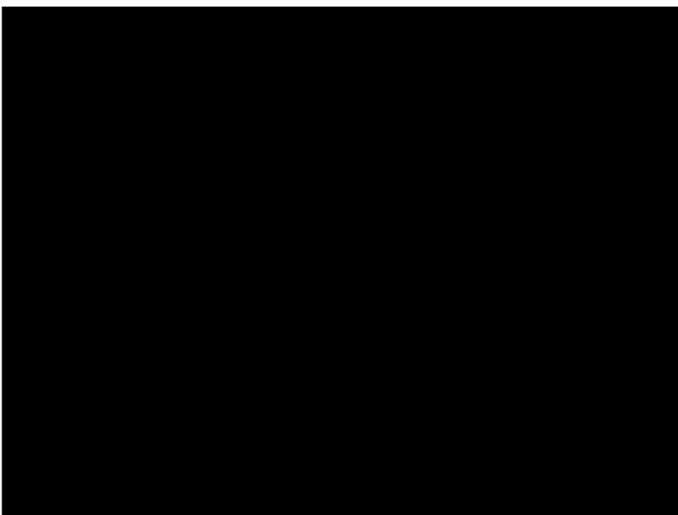
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## Sentencing – PC 290

- PC 314.1 indecent exposure
- PC 647.6 annoying/molesting child
- PC 243.4, sexual battery

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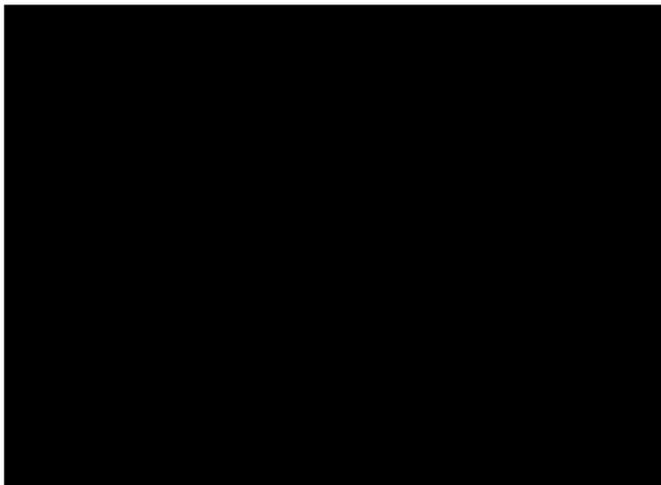
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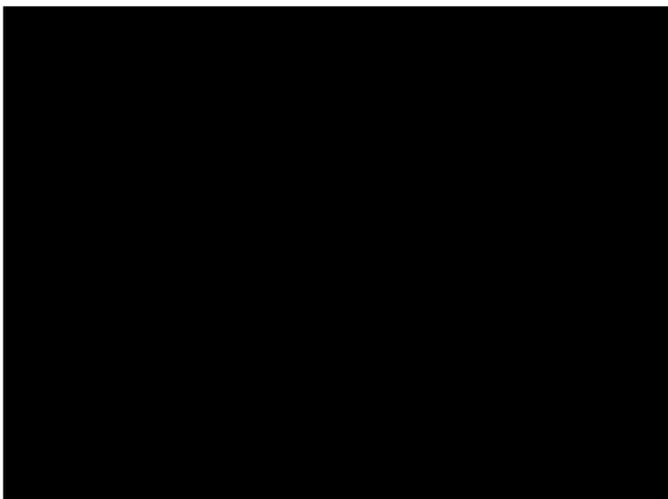
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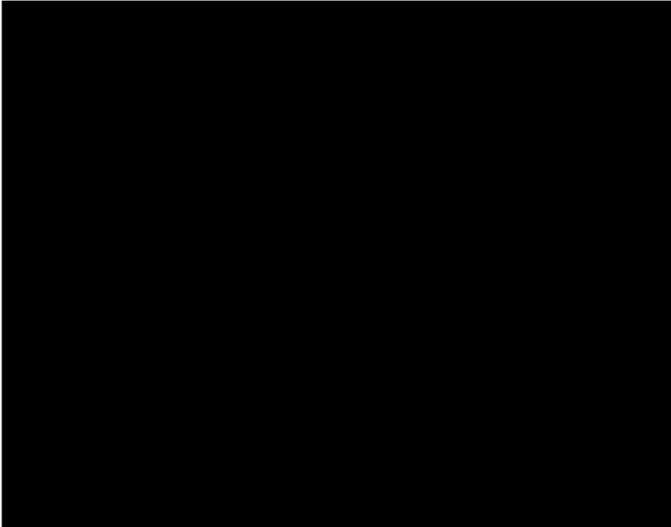
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**AB 1950**

- Misdemeanor Cases
  - Codified in PC 1203a
  - Limited to 1 year of probation
  - Unless otherwise specified within existing statutes
    - I.E. DUI's and DV are 3 years, 273's are 4 years

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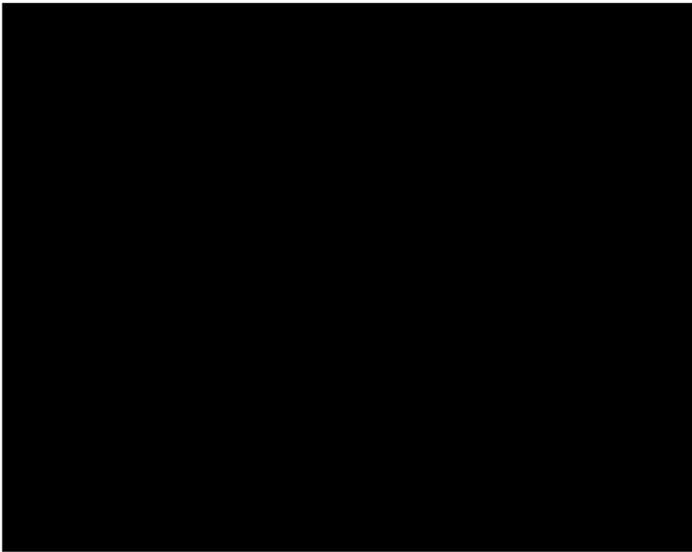
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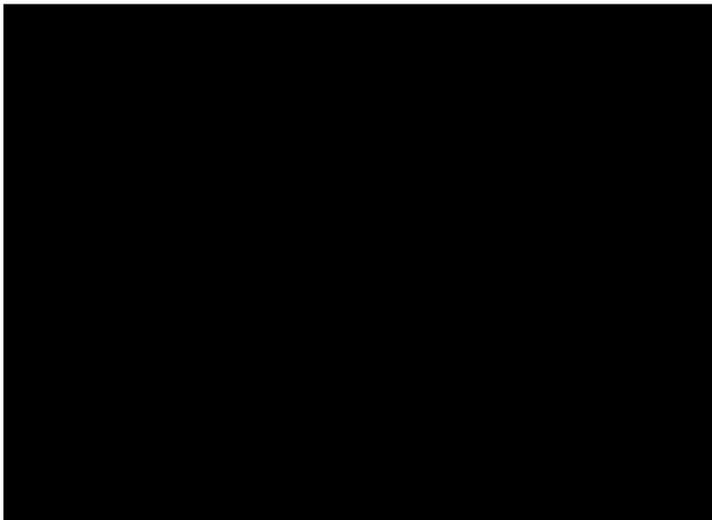
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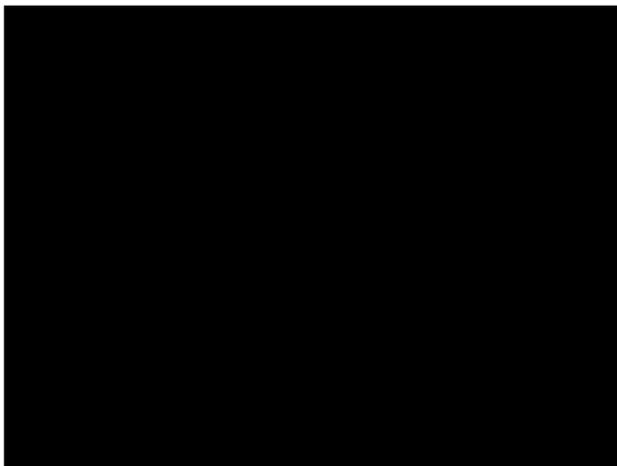
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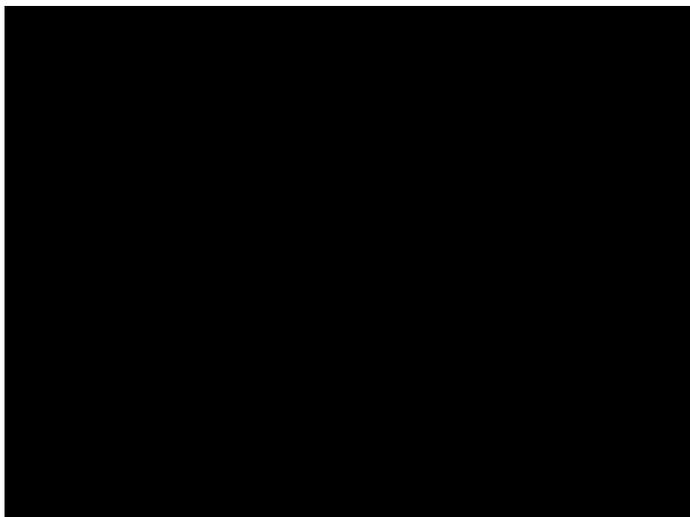
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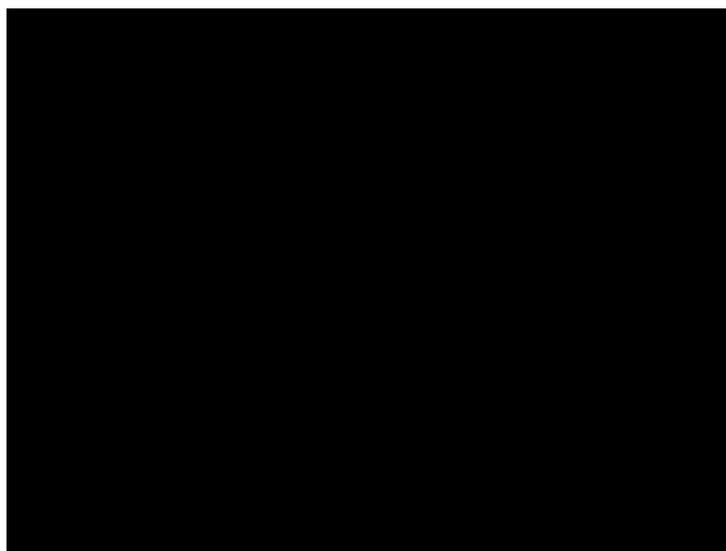
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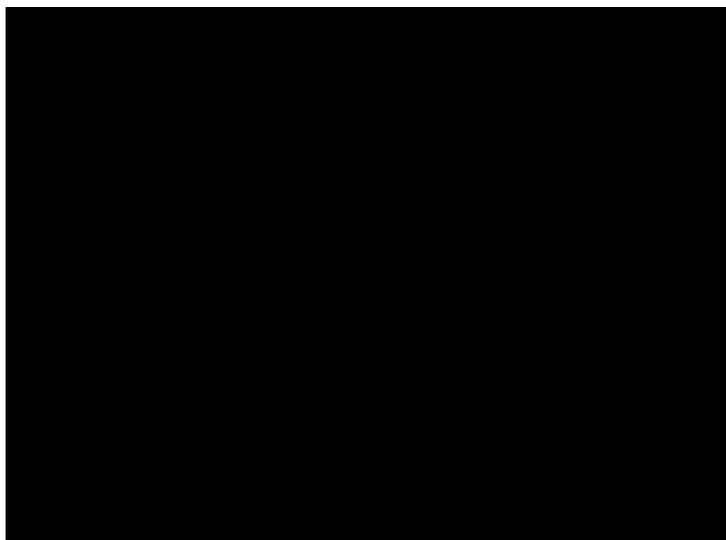
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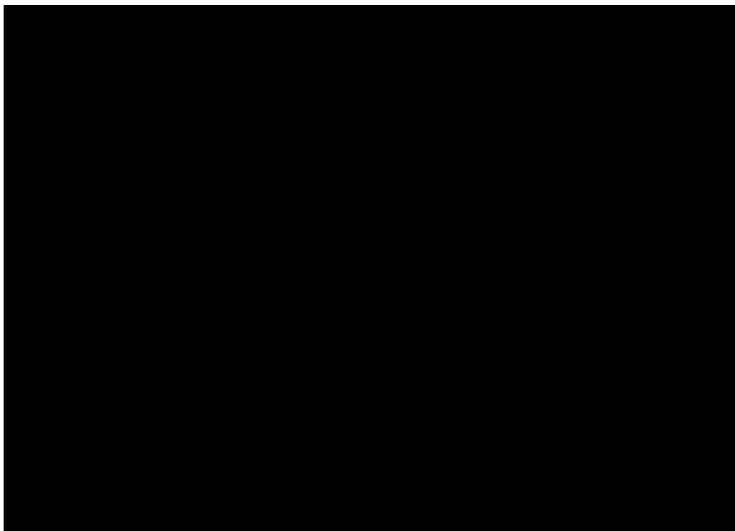
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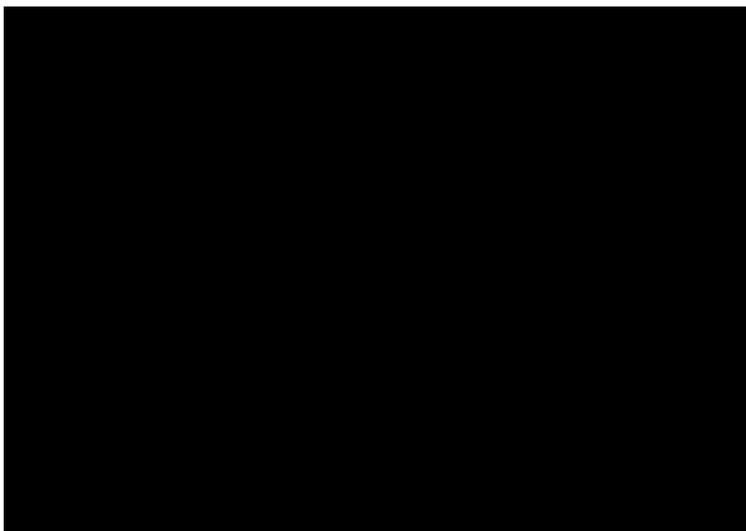
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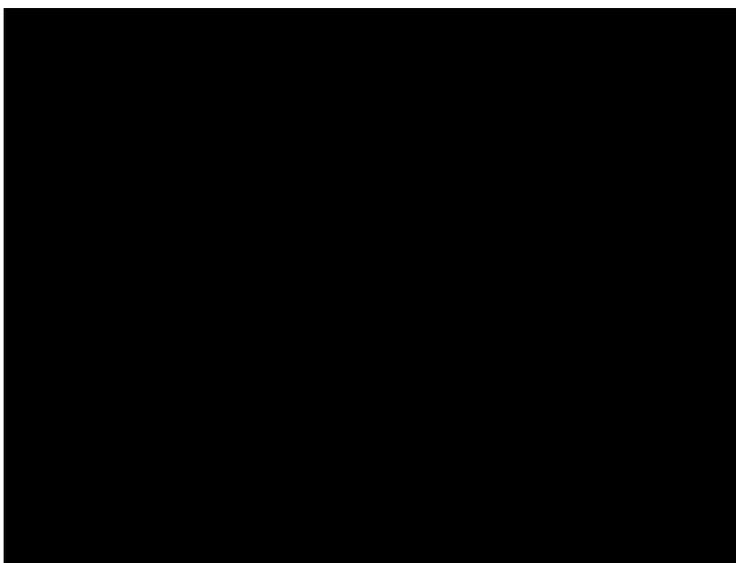
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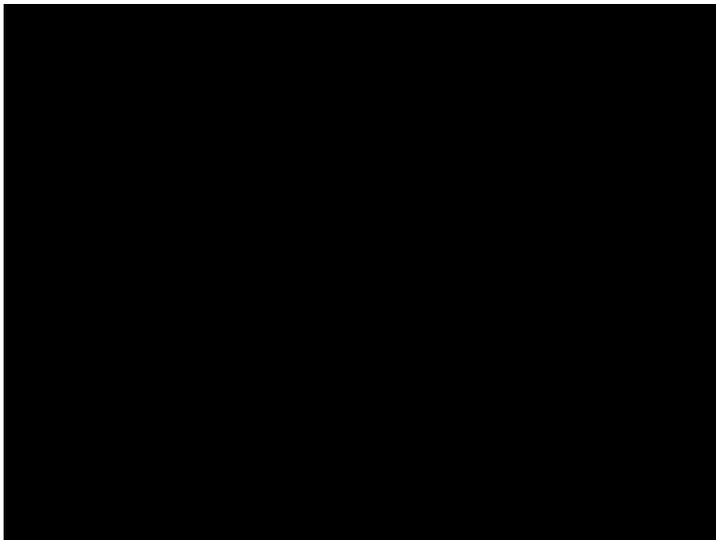
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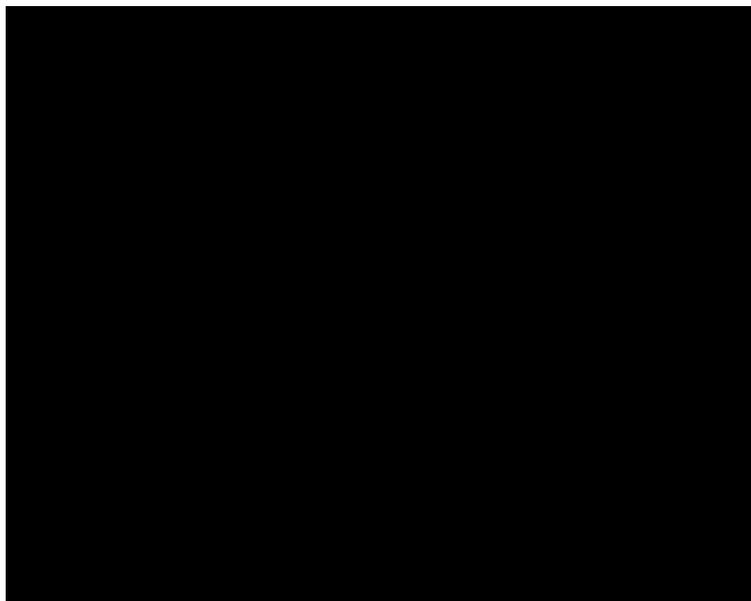
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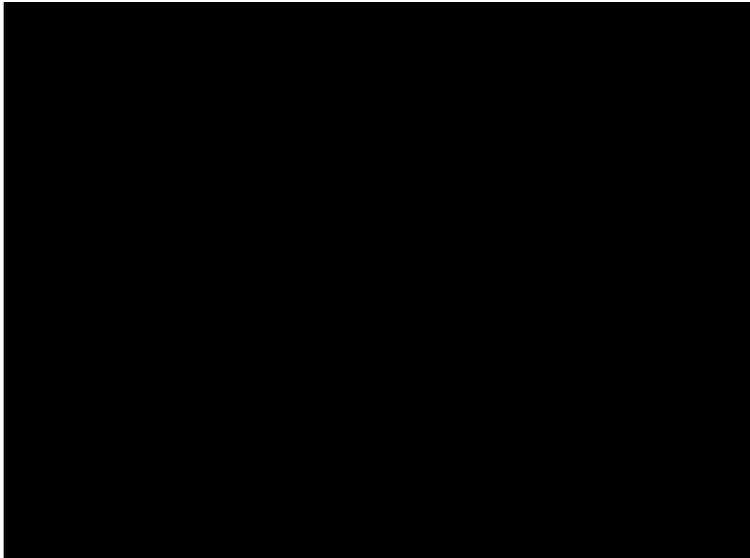
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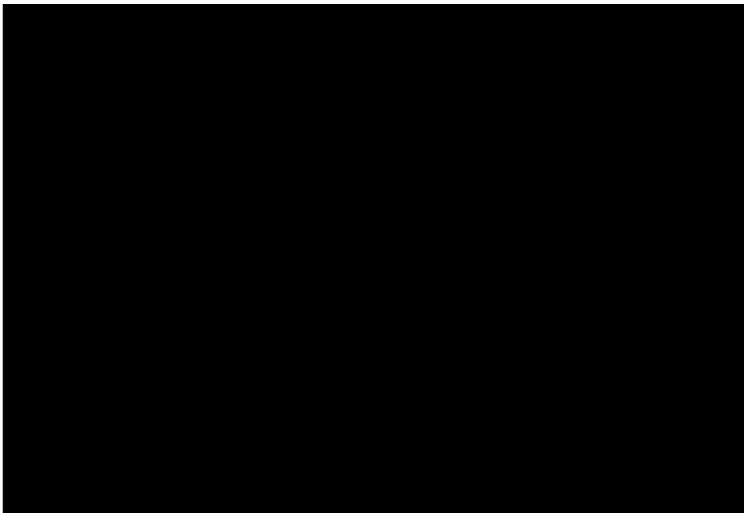
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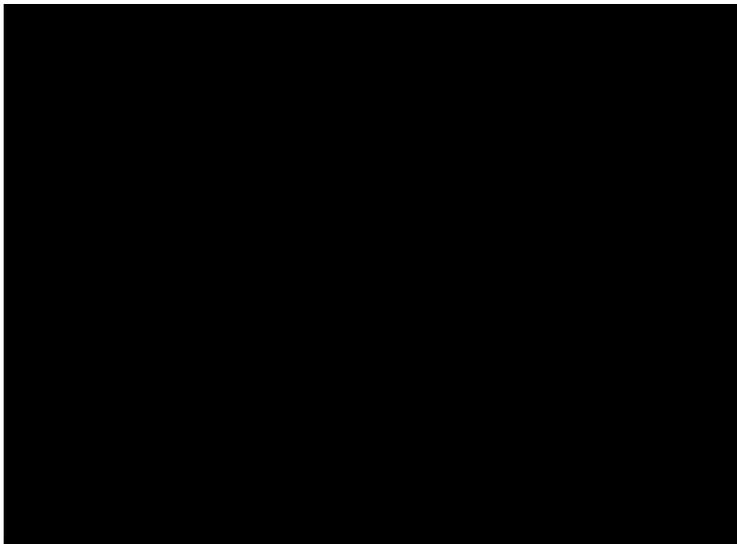
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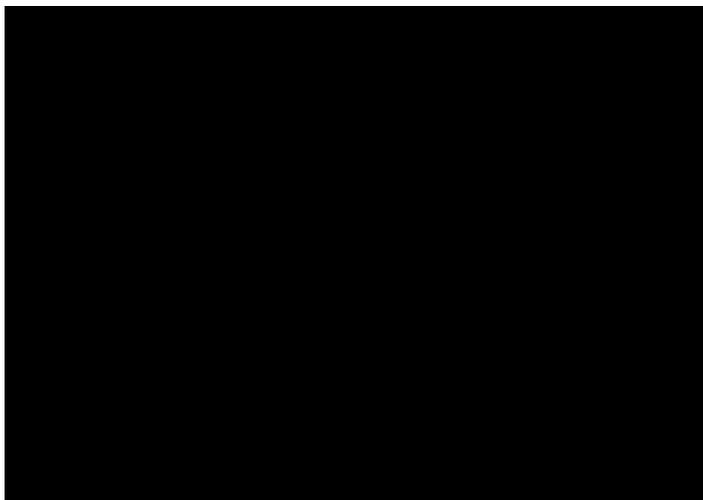
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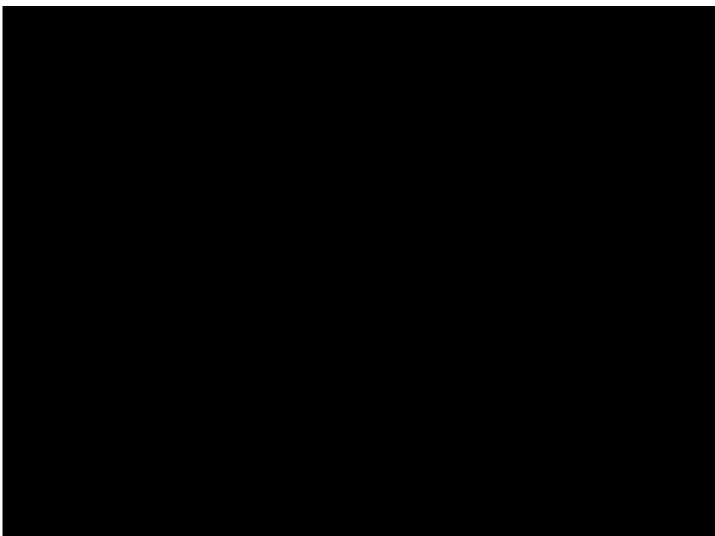
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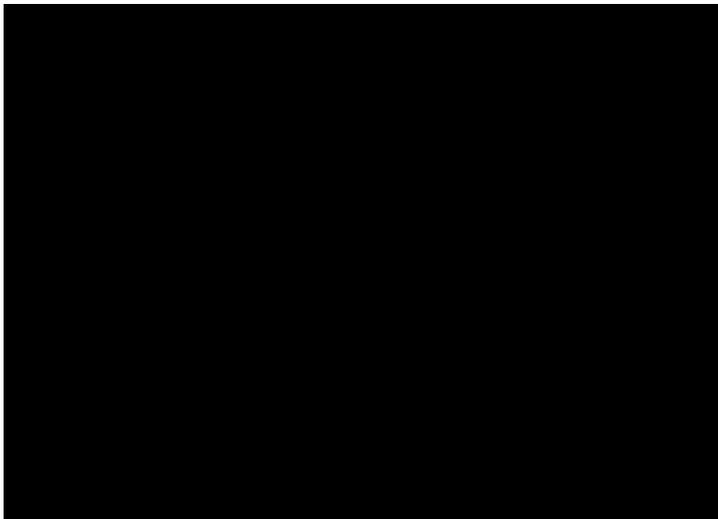
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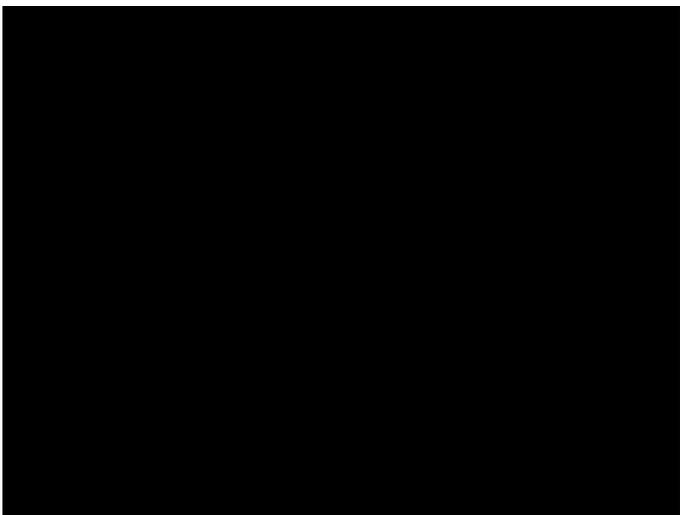
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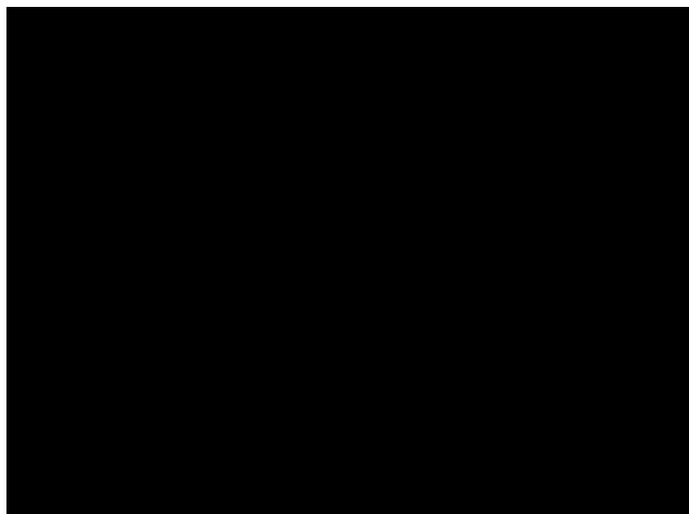
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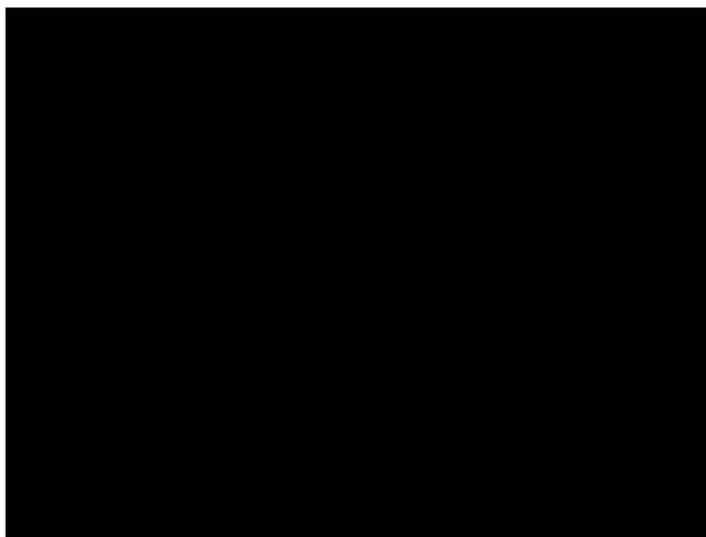
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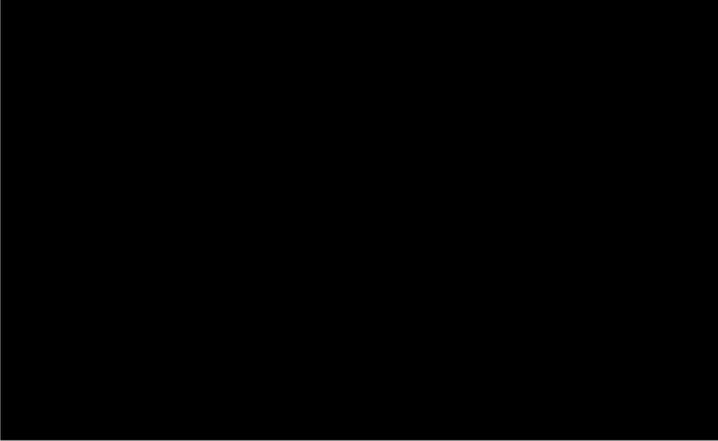
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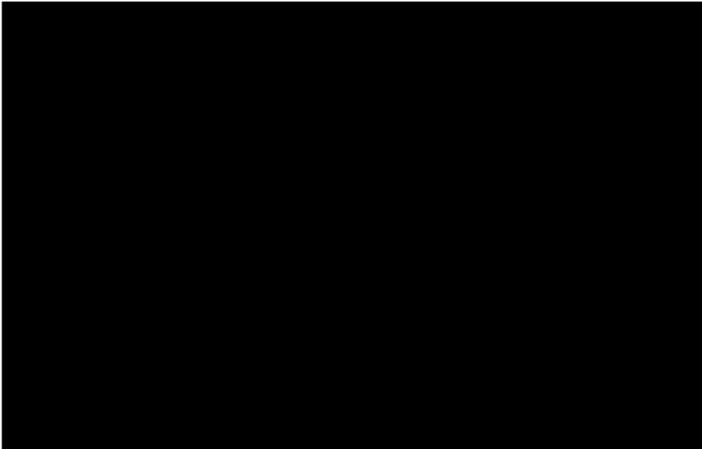
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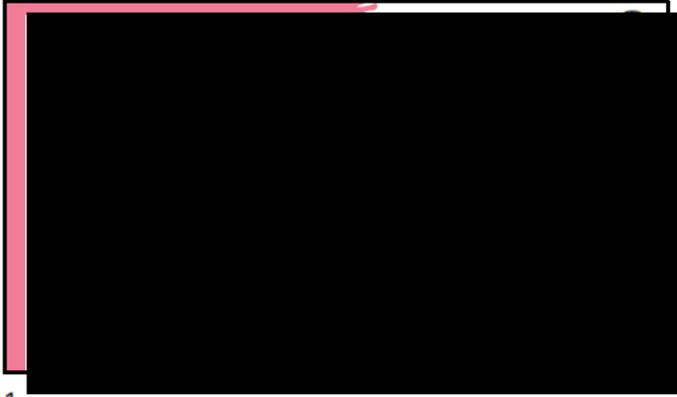
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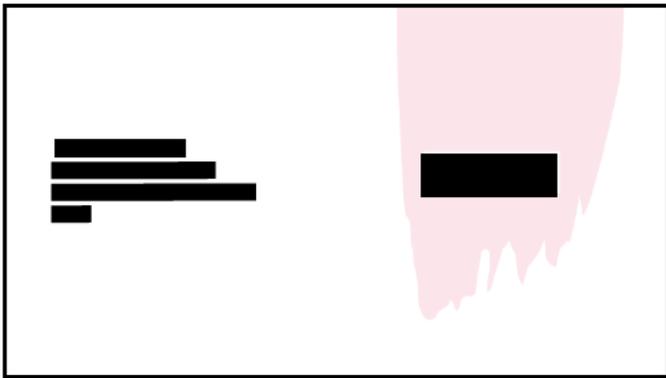
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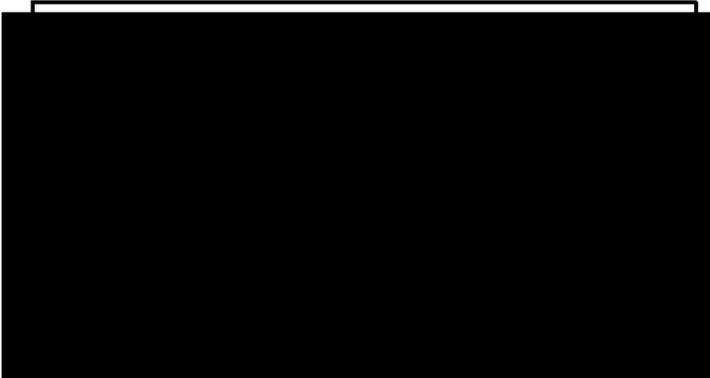
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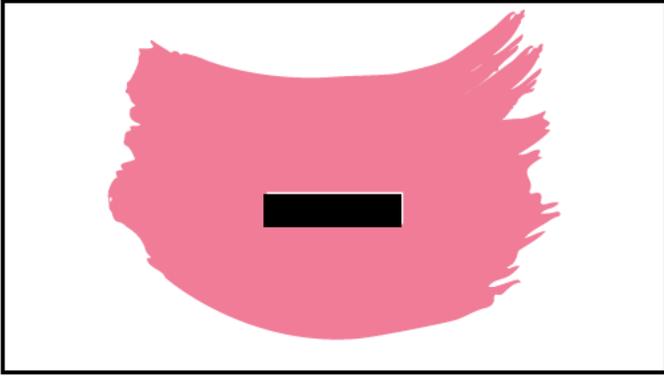
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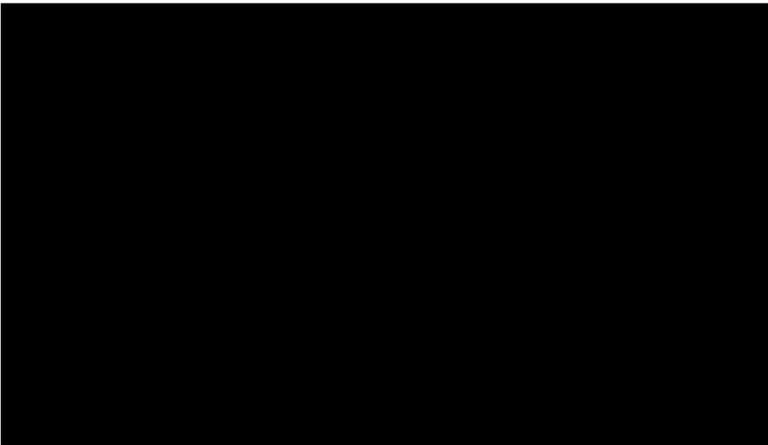
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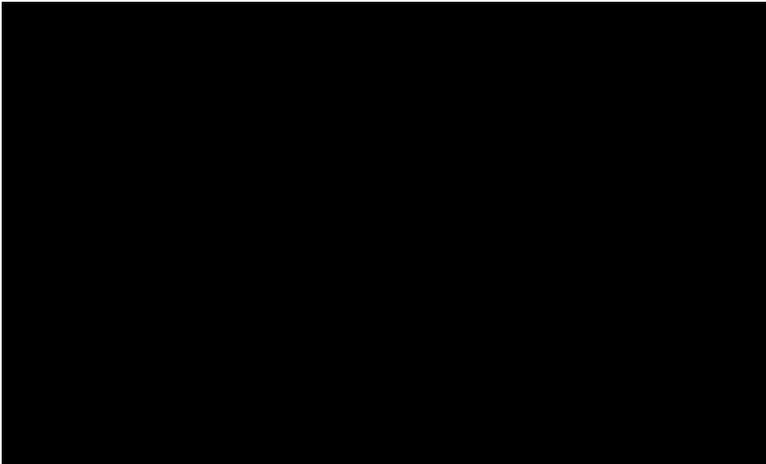
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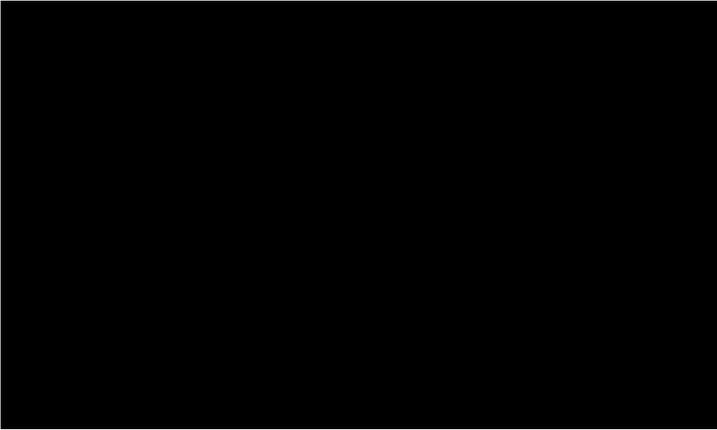
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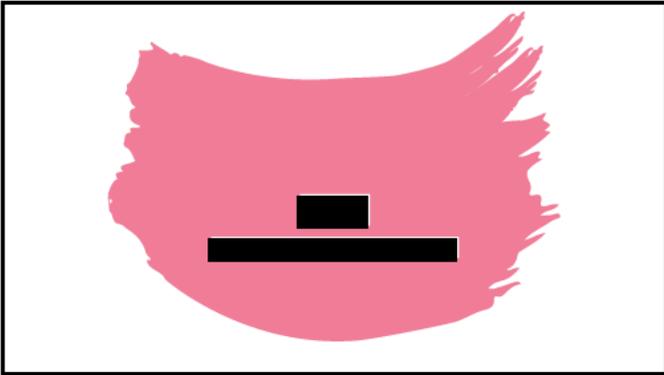
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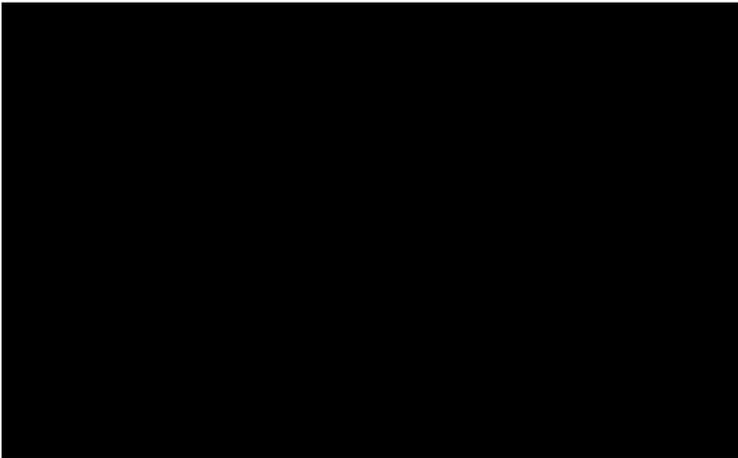
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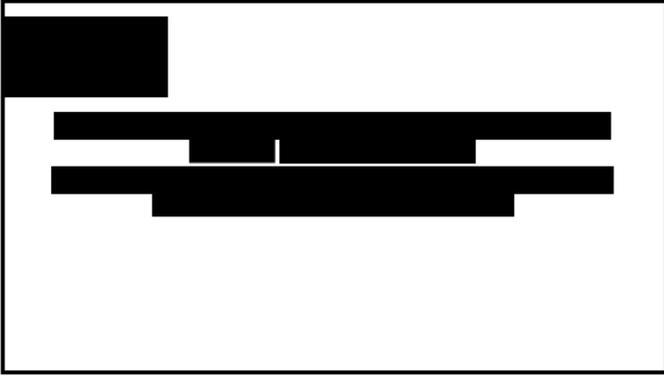
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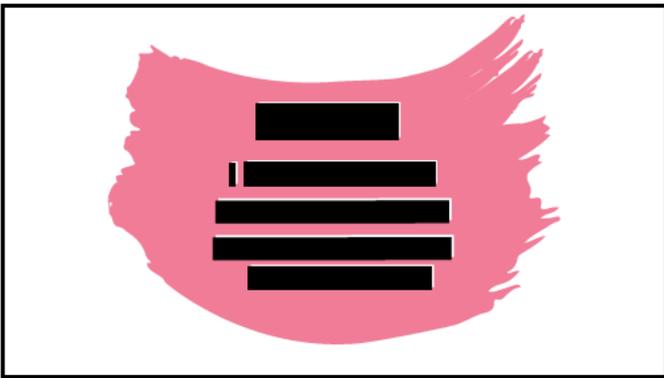
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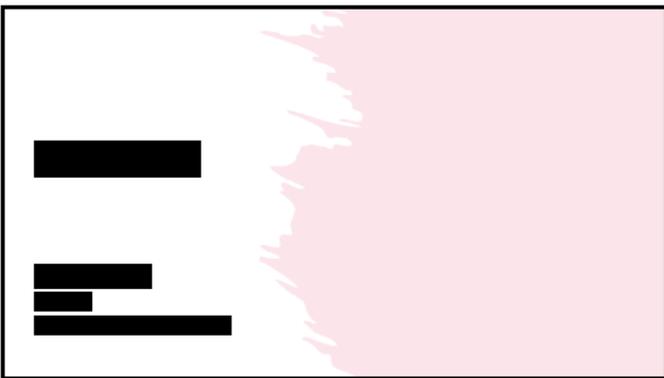
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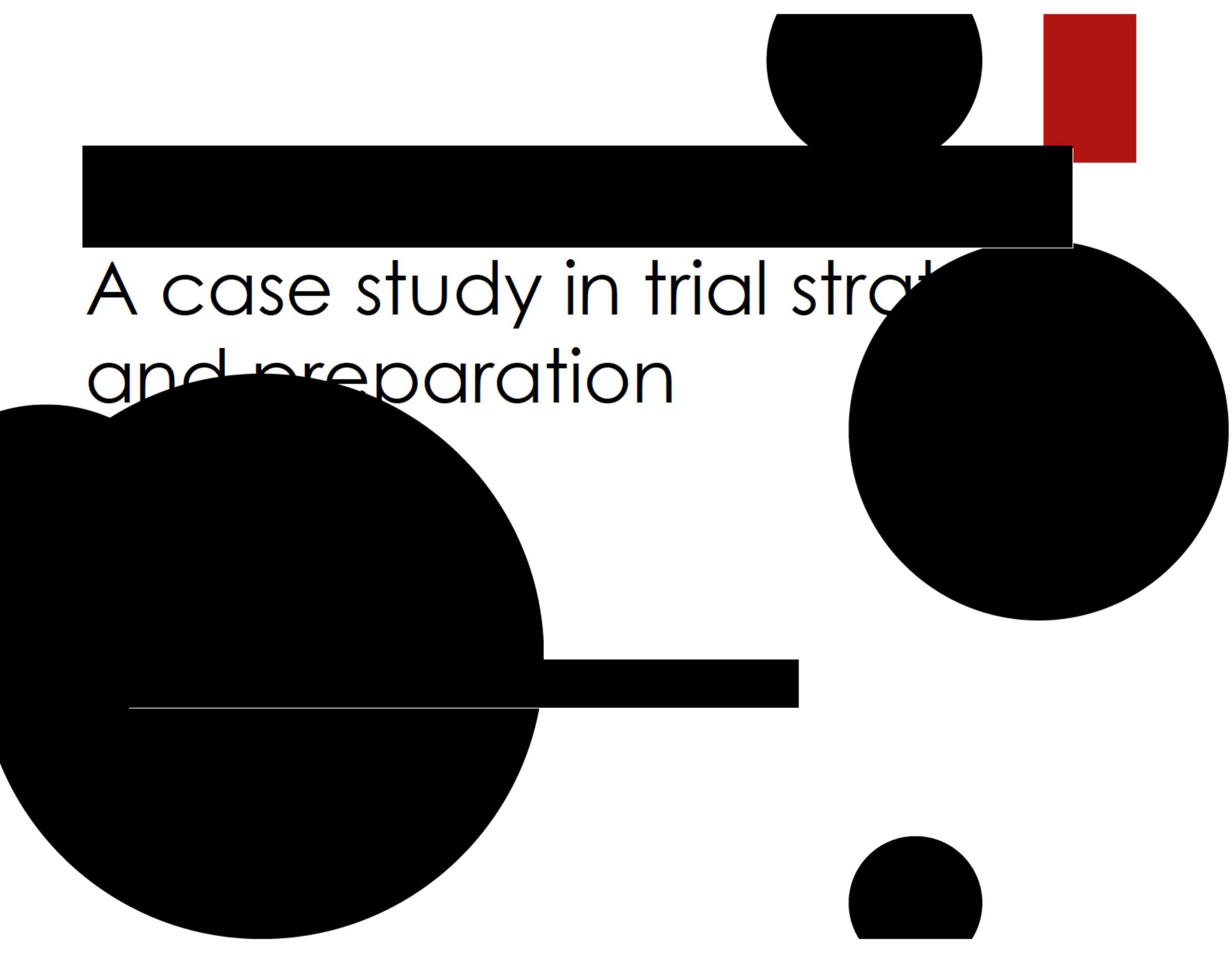
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A case study in trial strategy  
and preparation





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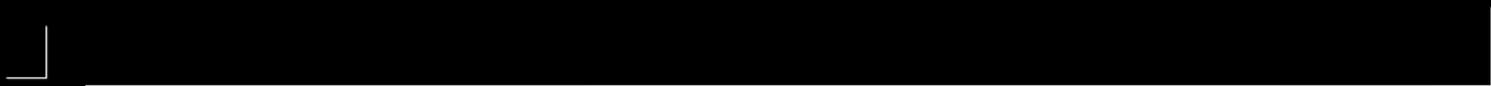
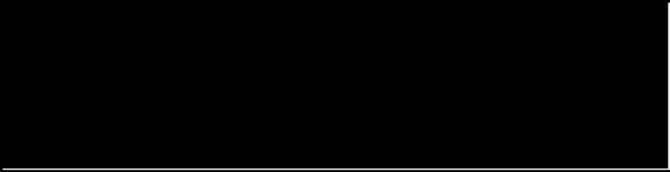
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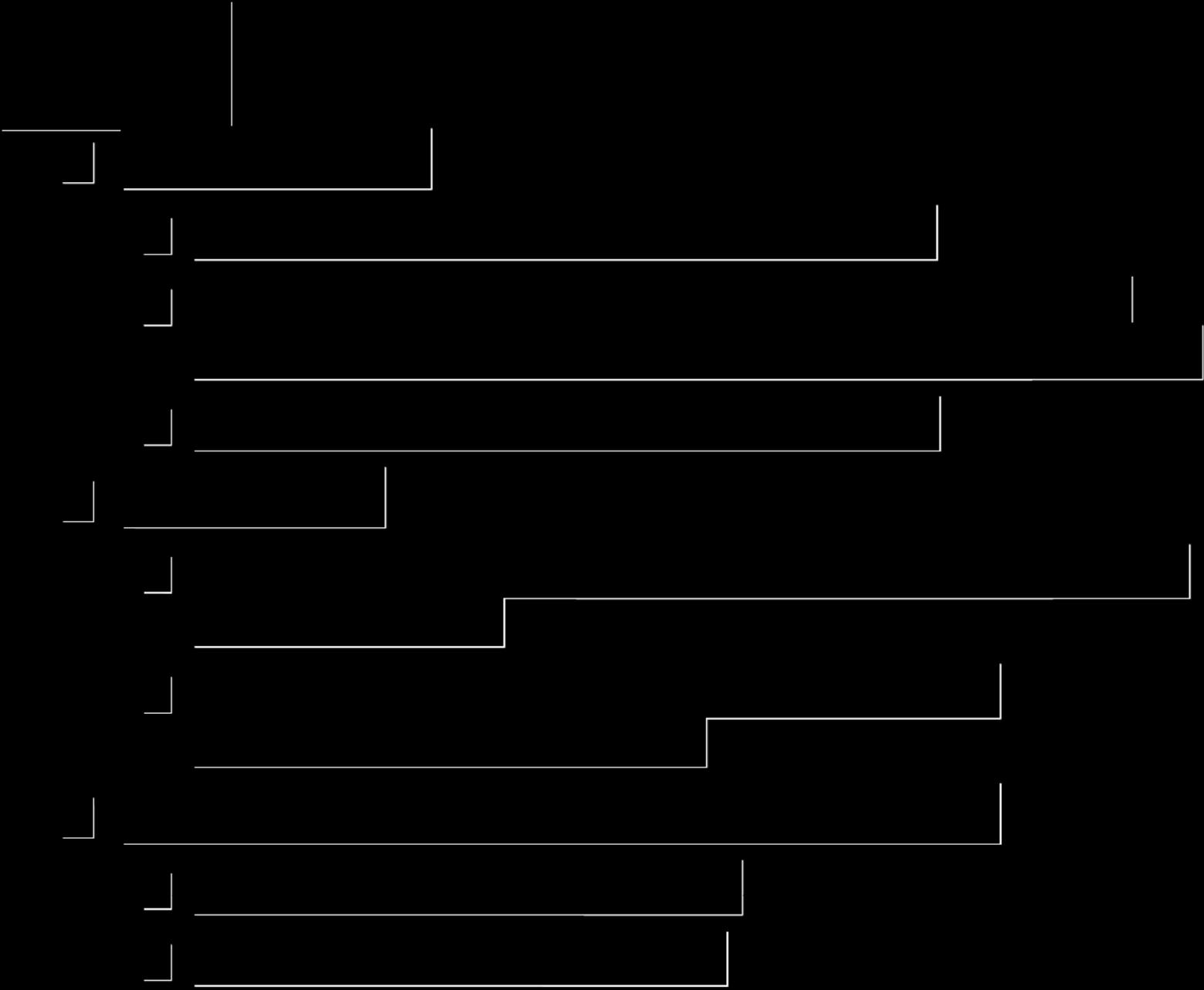
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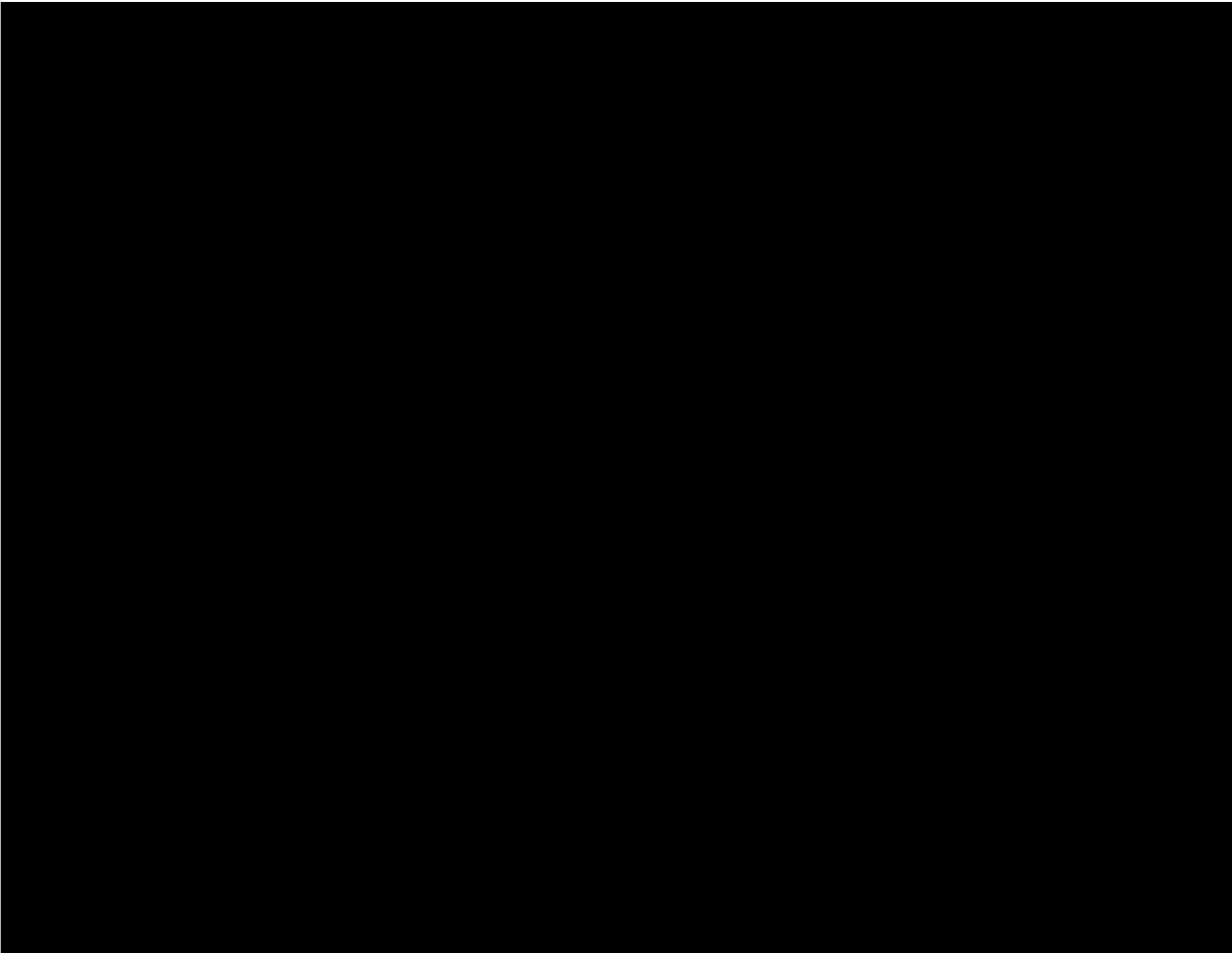














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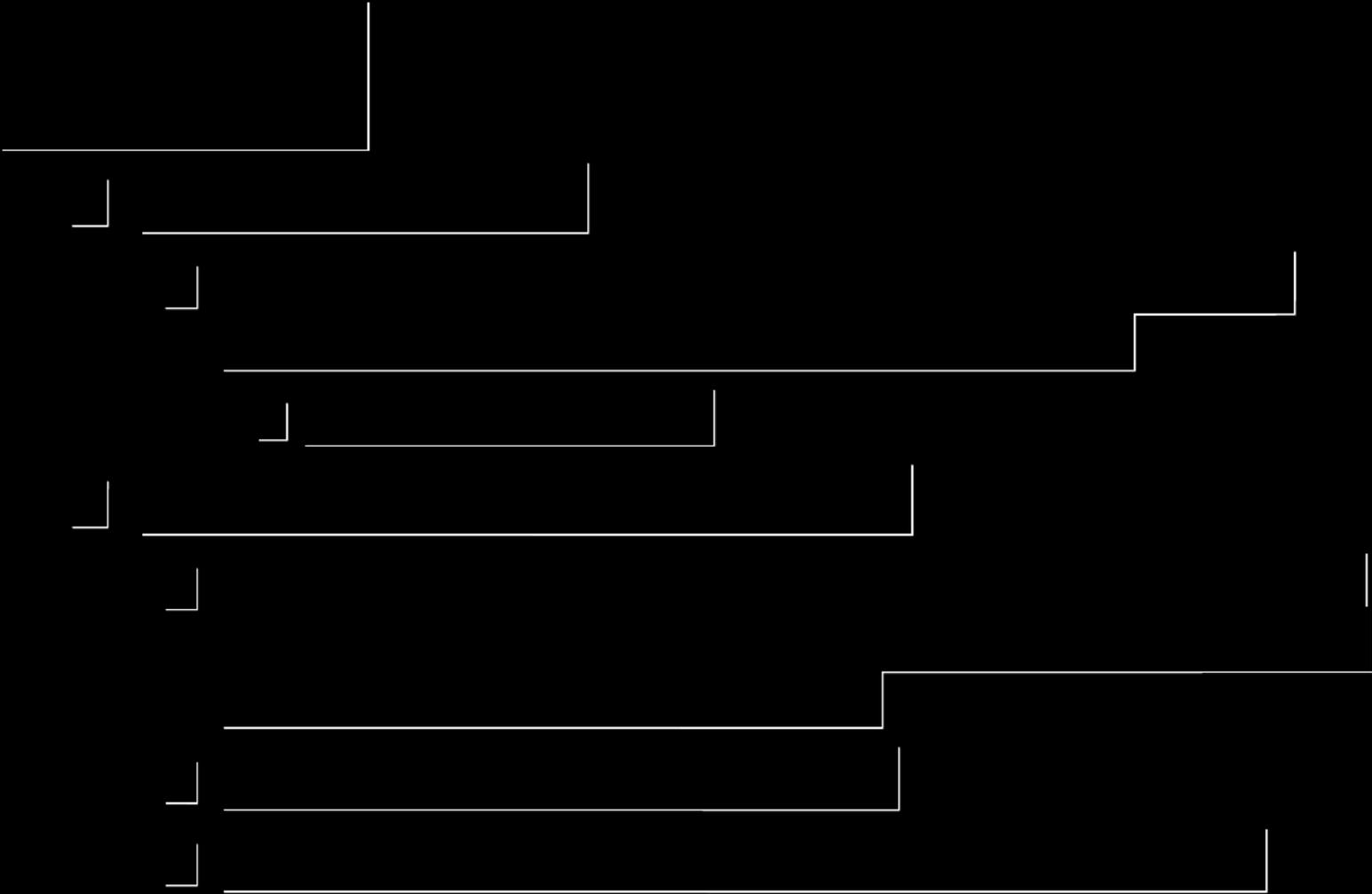
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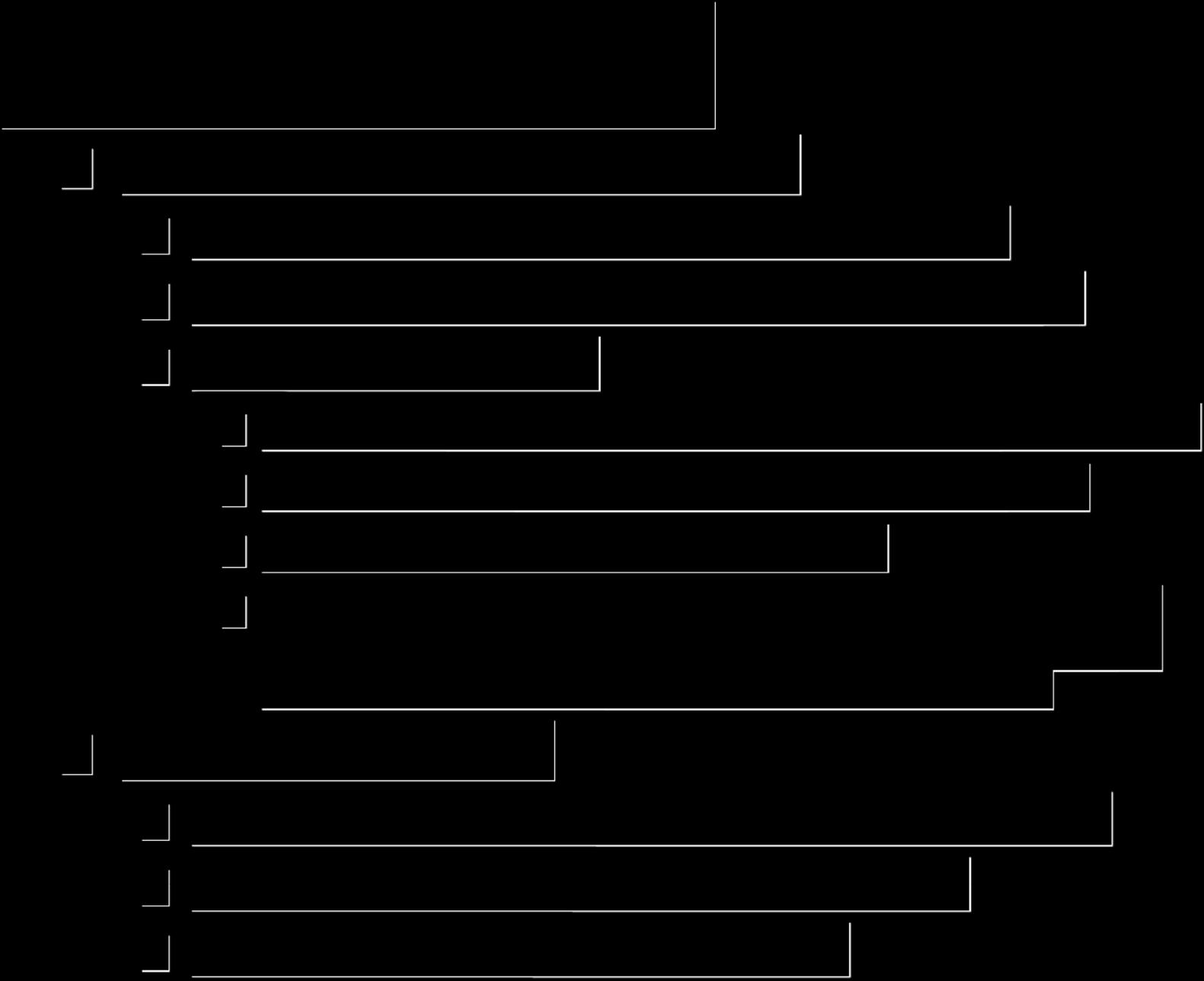
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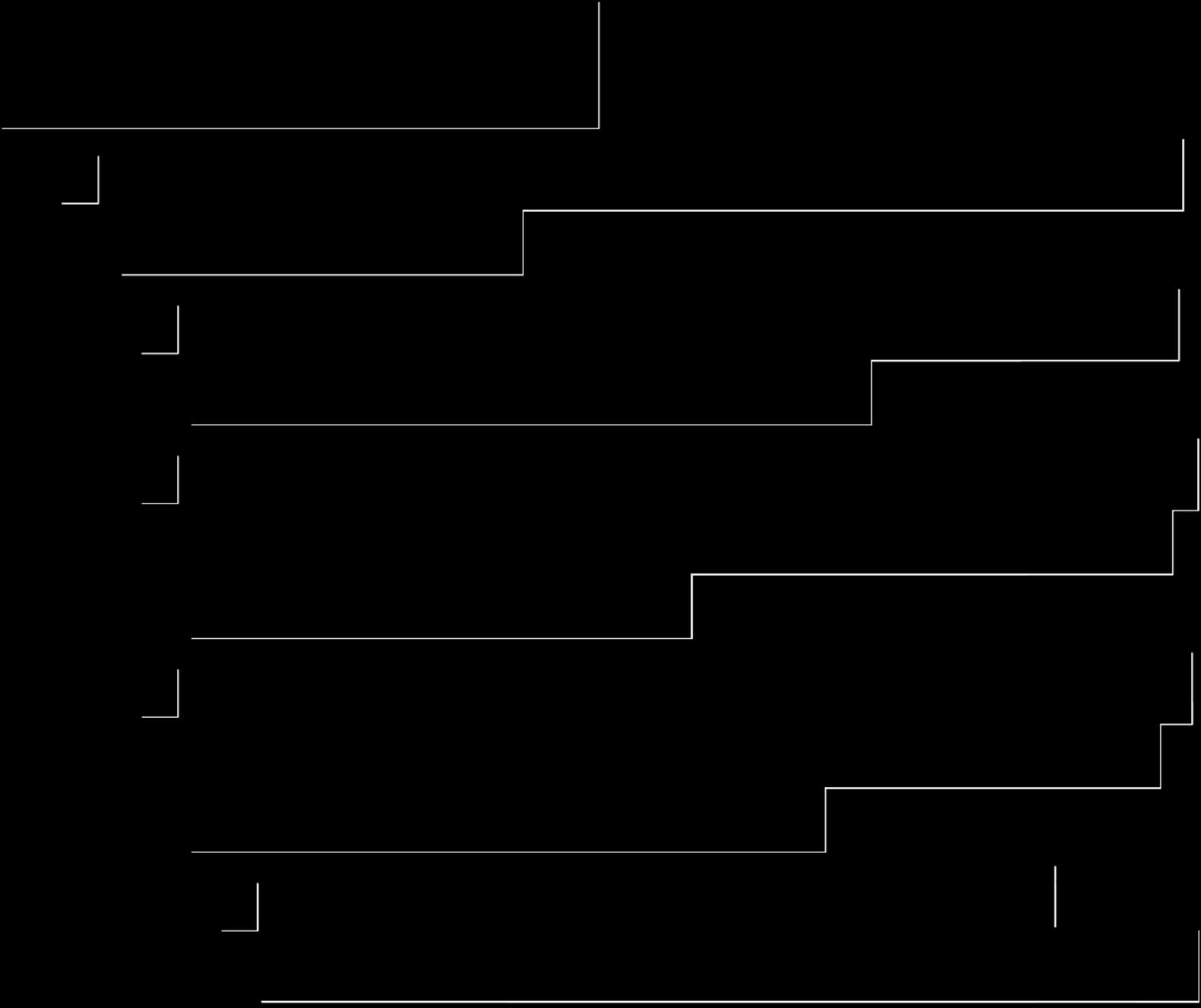




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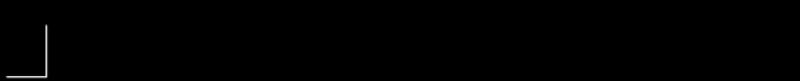
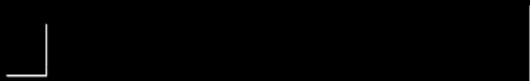
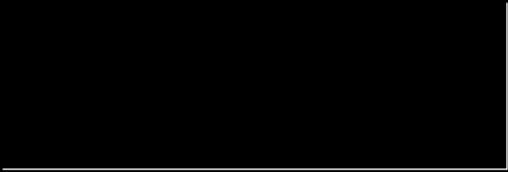




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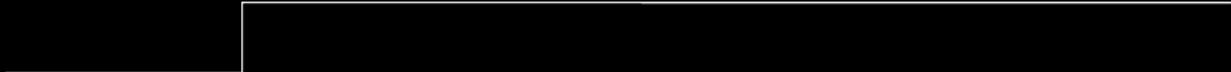
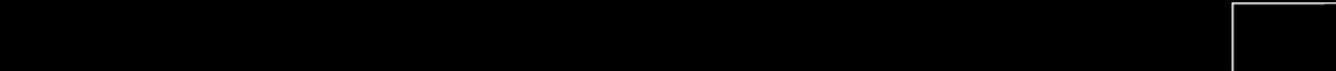
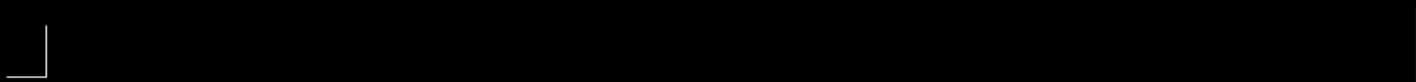
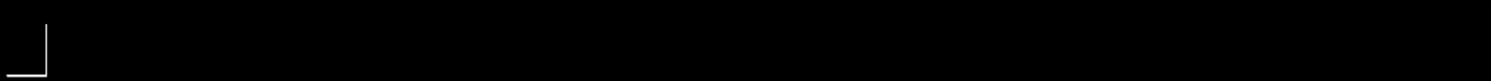
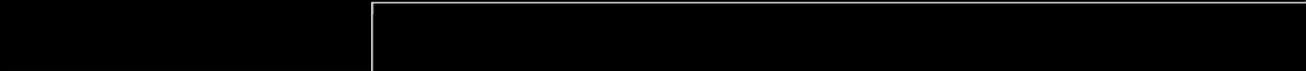
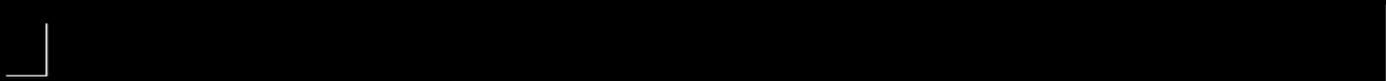
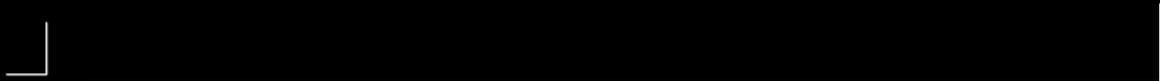
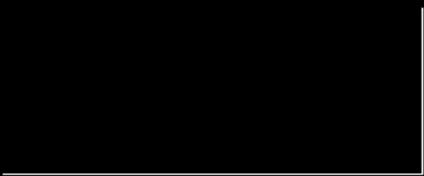


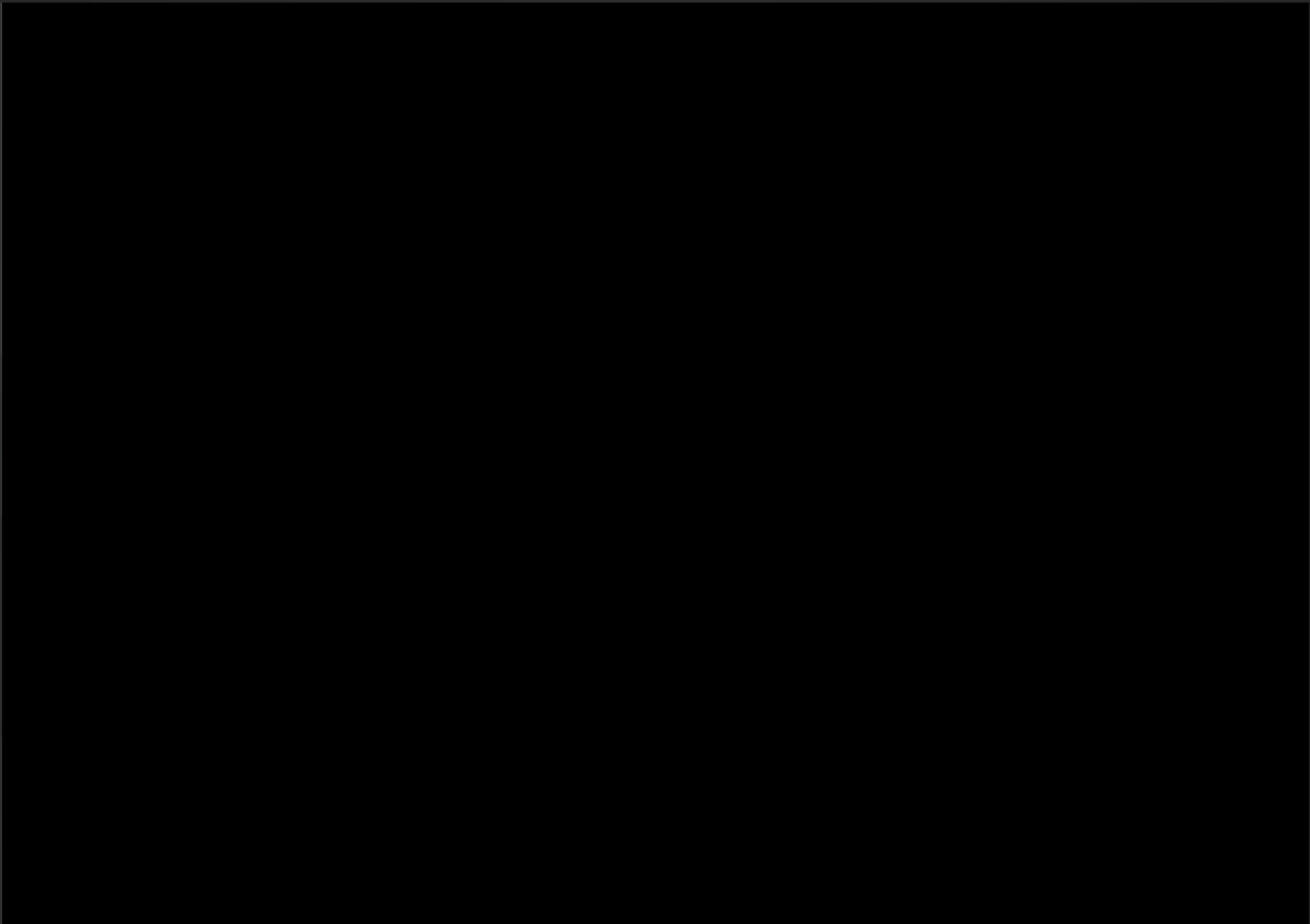






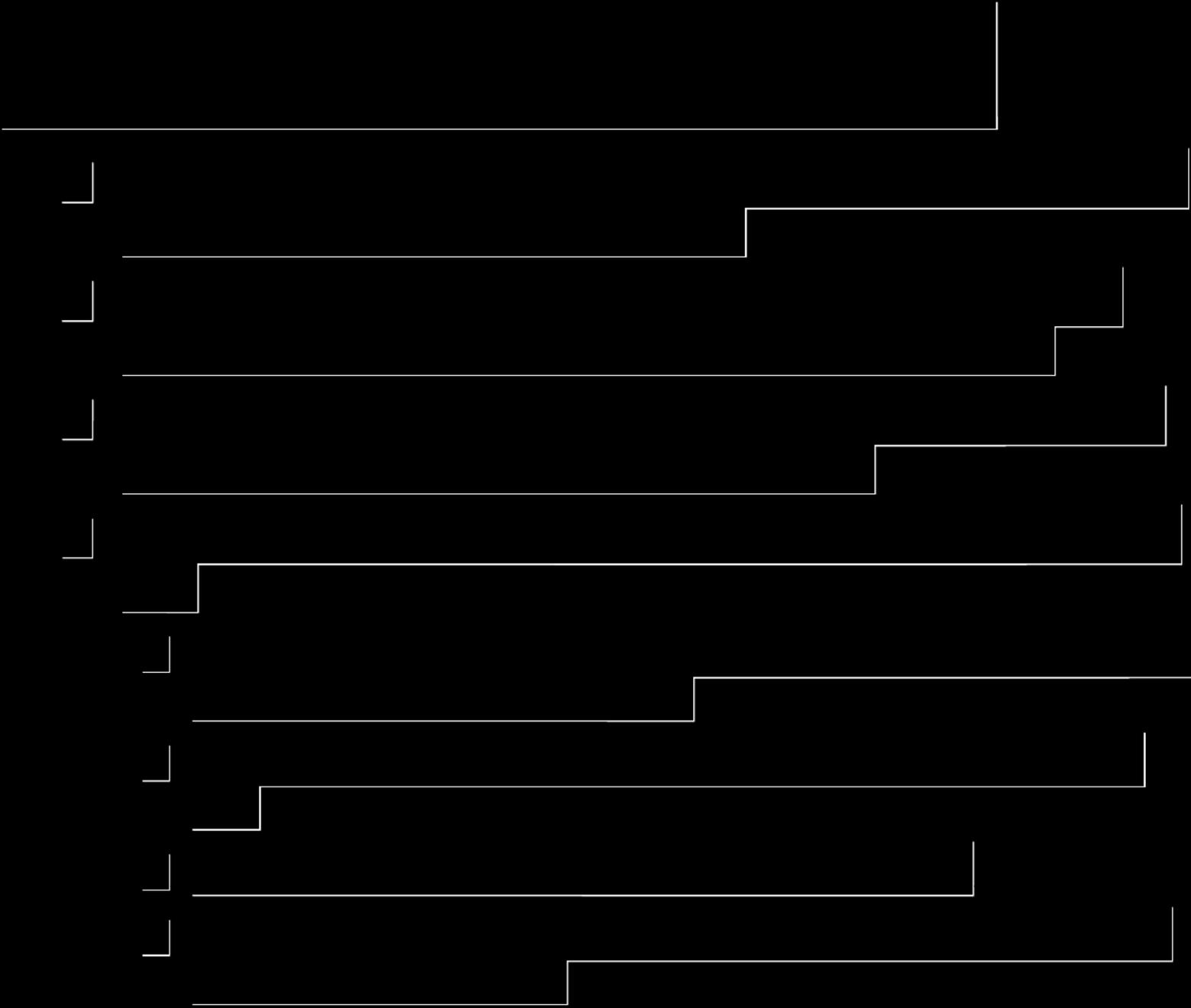




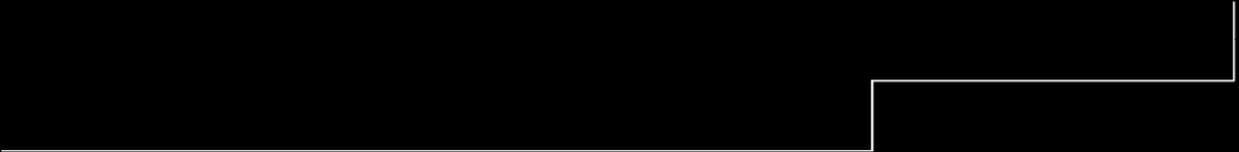
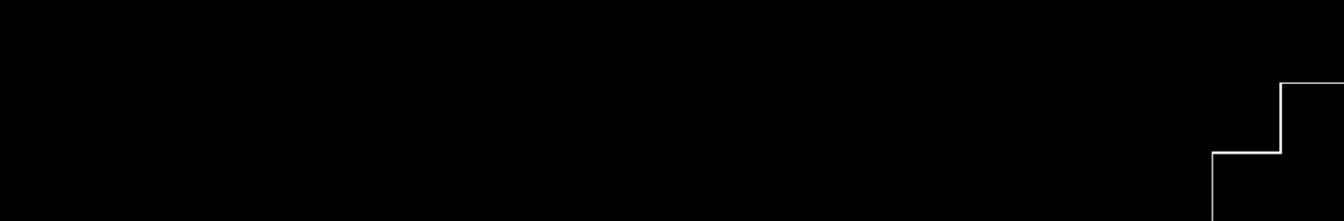
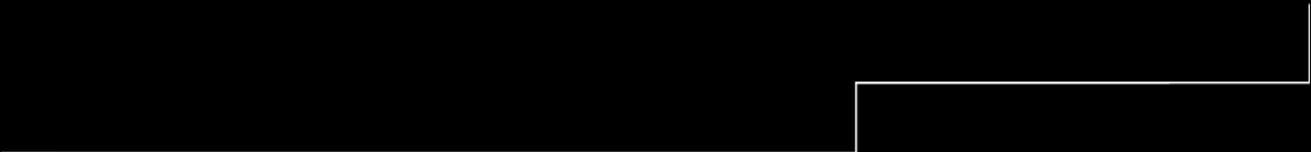
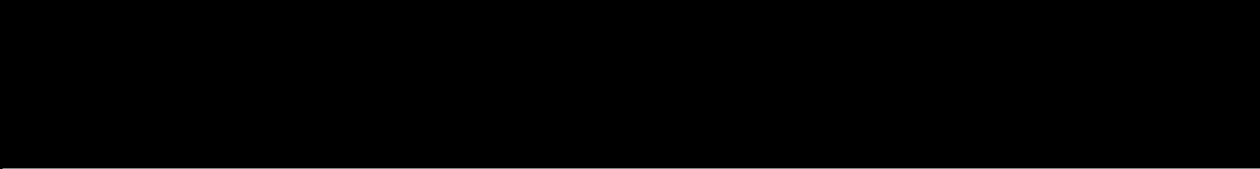




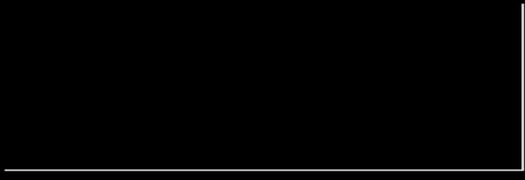
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## Opening, Objections, Direct, Cross, Impeachment, and Closing

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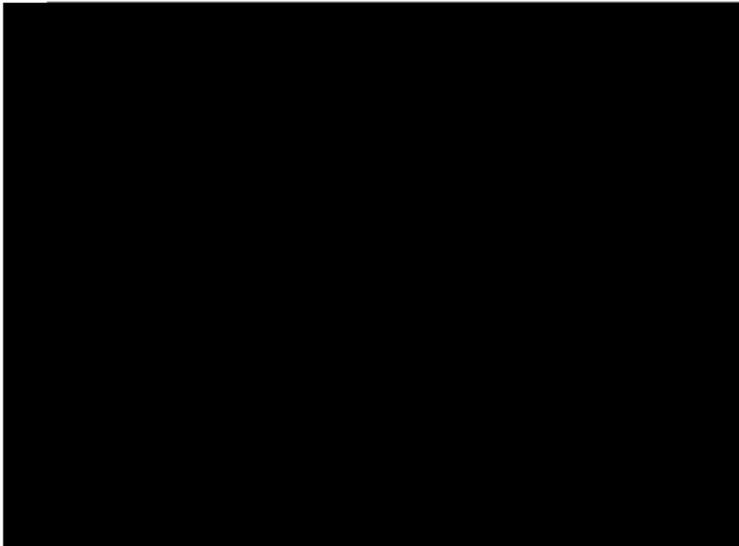
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- [Redacted]
- It is proper to use any demonstrative evidence in opening statement that will be introduced into evidence. *People v. Green* (1956) 47 Cal.2d 209, 215.
  - [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

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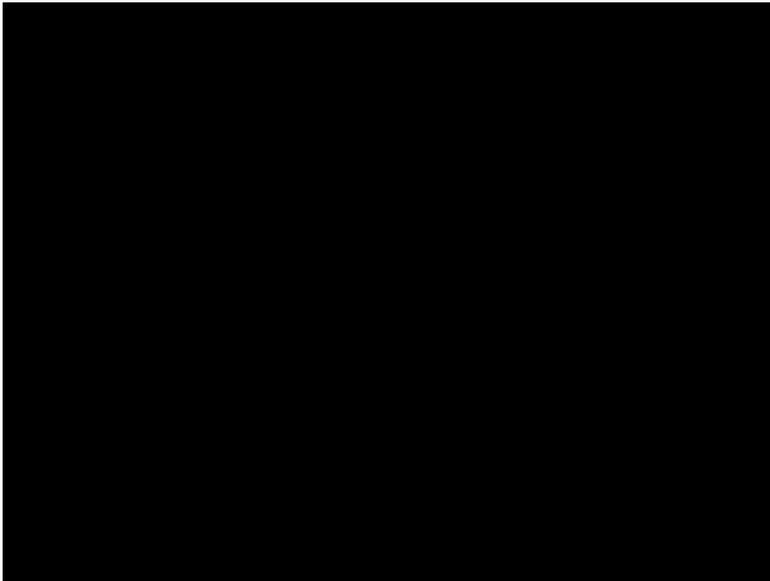
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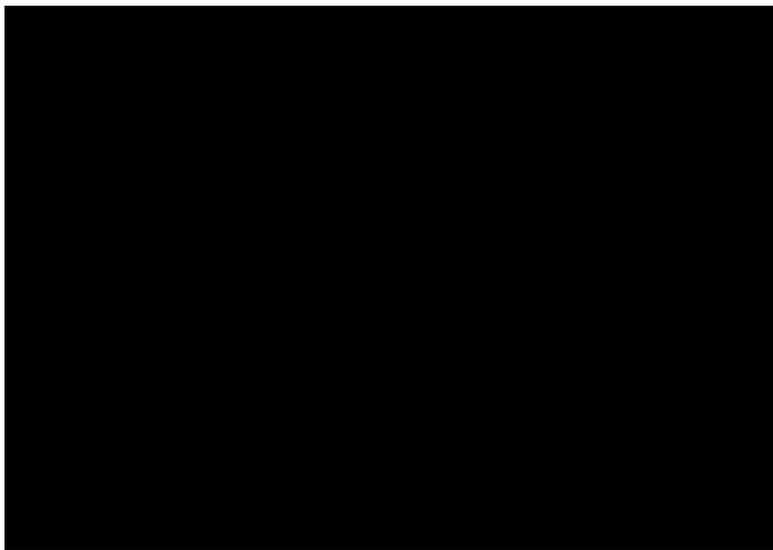
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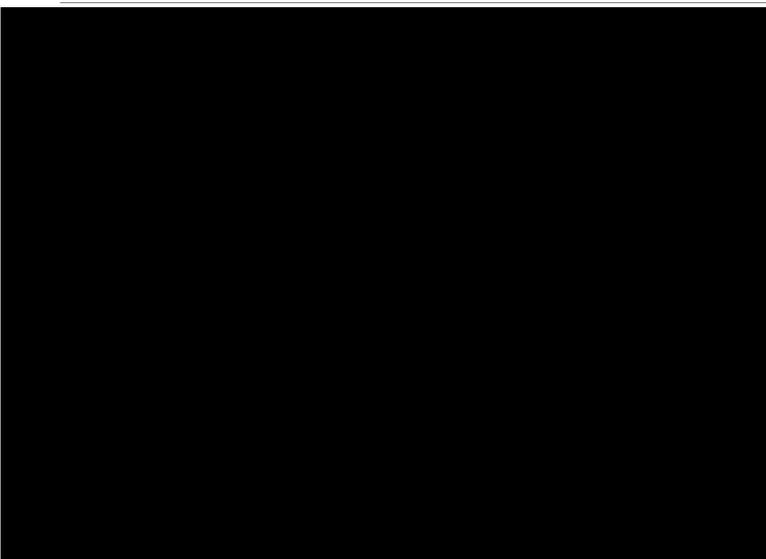
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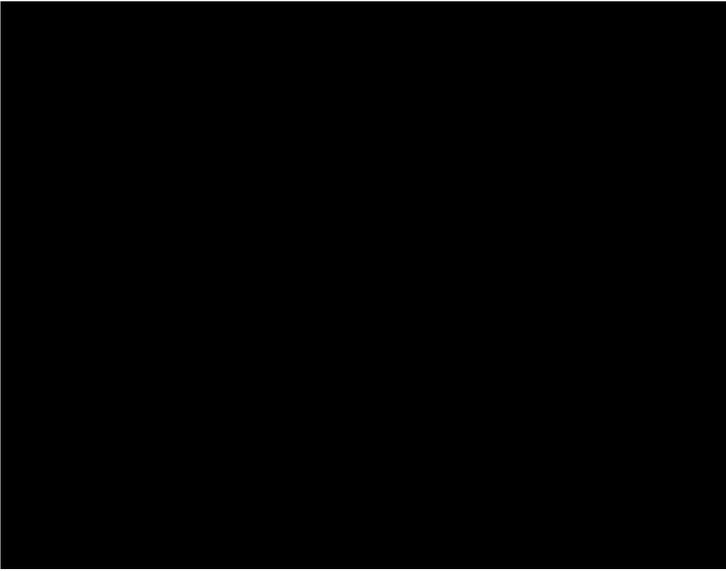
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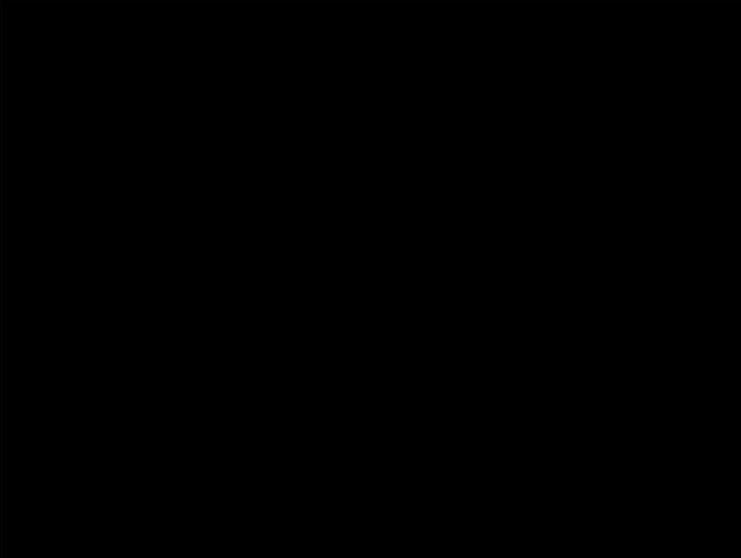
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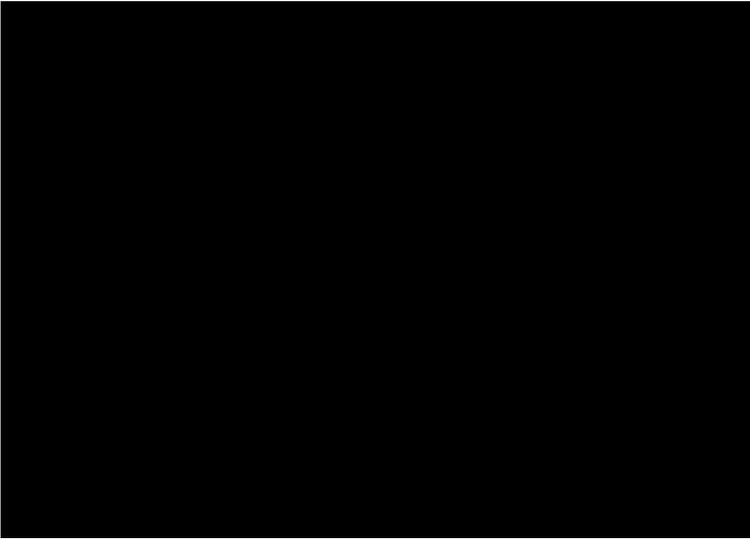
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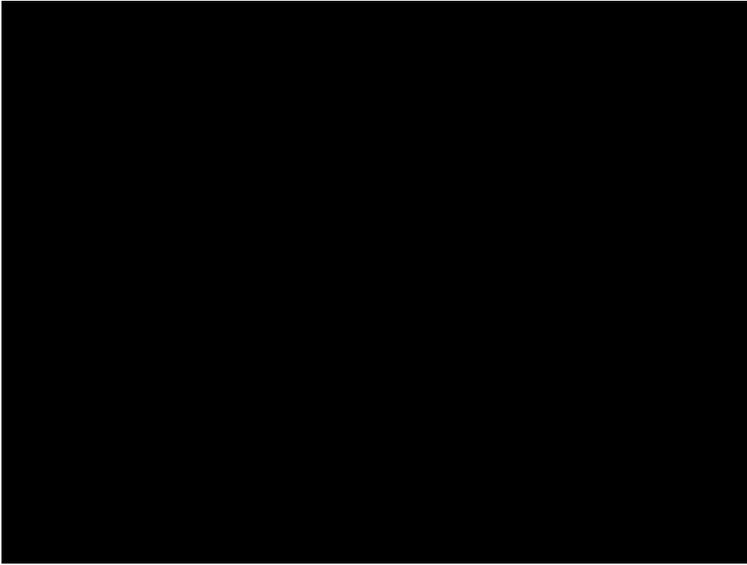
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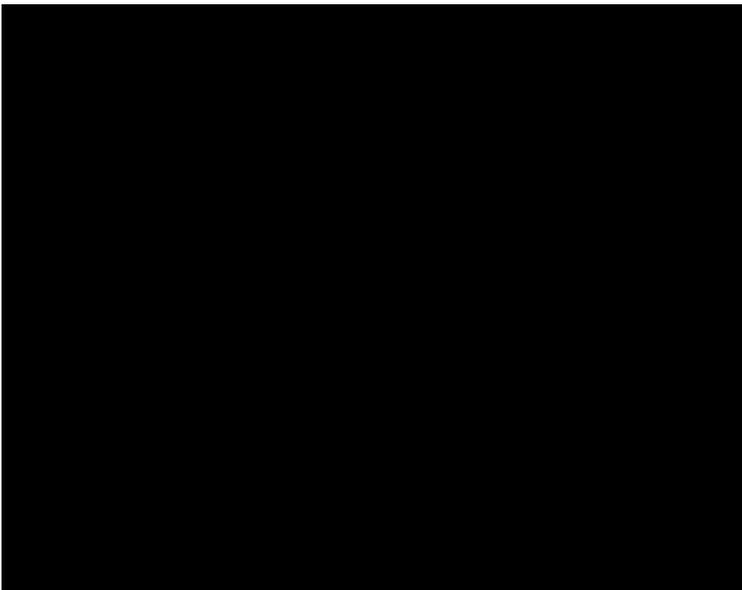
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- [redacted]
- Evidence Code Section 700
  - "... every person, irrespective of age, is qualified to be a witness..."
- Evidence Code Section 701
  - Unless "... incapable of understanding the duty of a witness to tell the truth."

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## Direct Examination

- [redacted] ... Evidence Code Section 767(b)
  - "The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under PC 273a... PC 273d... PC368

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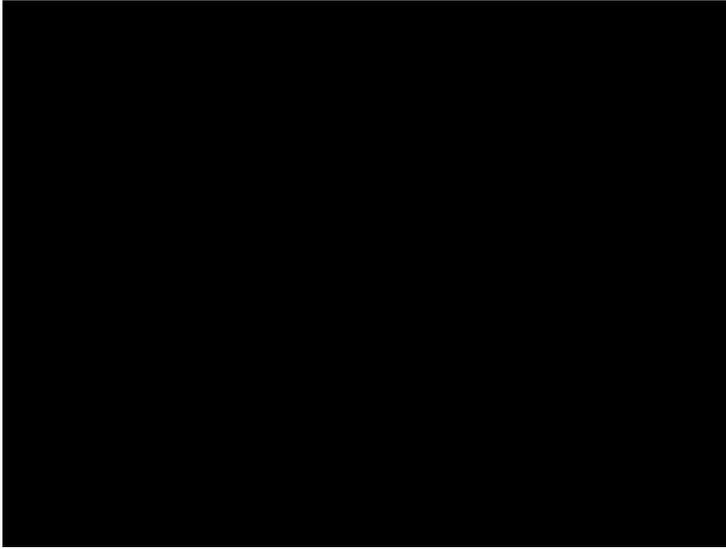
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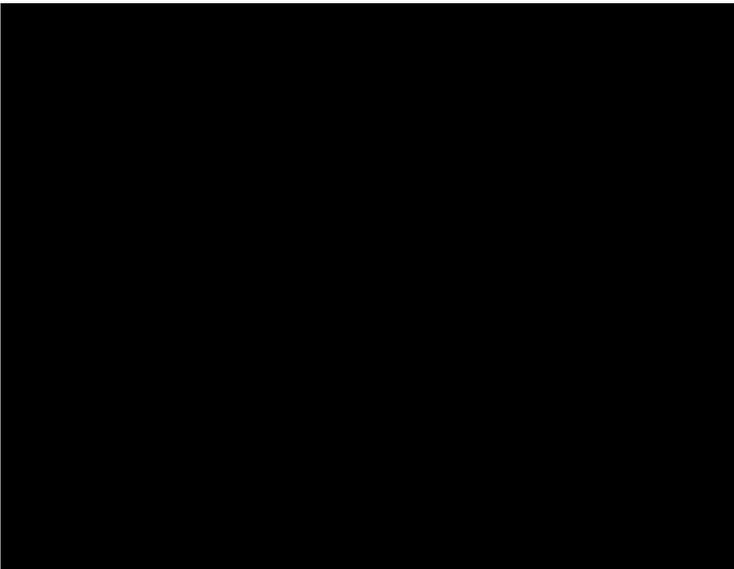
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- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- "A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party." Evidence Code Section 766

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## Impeachment

- [REDACTED]
- Evidence Code Section 767 states "except under special circumstances where the interest of justice otherwise require; a leading question may not be asked of a witness on direct or redirect examination."
  - See *People v. Spain* (1984) 154 Cal.App.3d 845 at 853
    - "The rule is thus long established that permitting the use of leading questions on direct examination when the prosecution is faced with a hostile witness is a special circumstance" within the meaning of Evidence Code Section 767.

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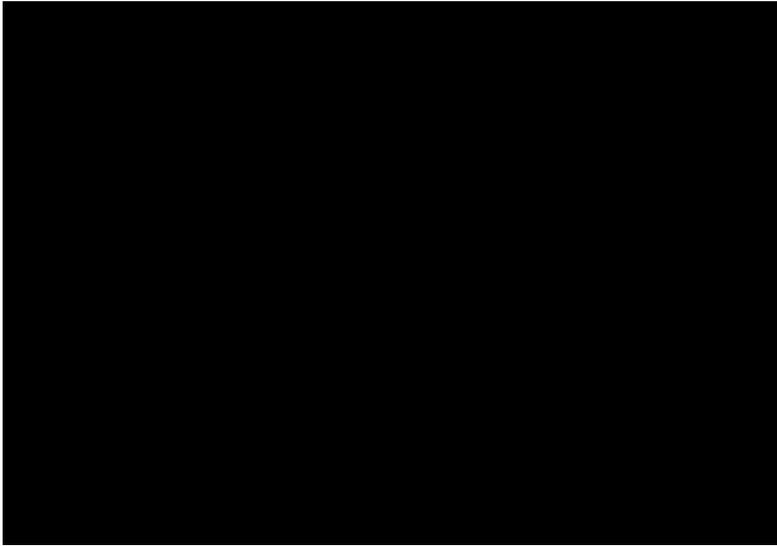
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# Impeachment

- "Greening" from *California v. Green* 399 U.S. 149 and *People v. Green* (1971) 3 Cal.3d 981... it is synonymous with "Impeachment"
  - Dealing with a failure of memory being deliberately evasive
  - A witness who recalls only details favorable to the defendant and denies remembering any unfavorable statements, may be impeached with prior inconsistent statements, see *People v. Montiel* (1993) 5 Cal.4th 877.
- Genuine lack of memory or momentary uncertainties do not amount to inconsistent statements, see *People v. Johnson* (1991) 3 Cal.4th 1183.
  - Refresh recollection under Evidence Code Section 771,
    - *People v. Seaton* (2001) 26 Cal.4th 598.
      - "There was no need to authenticate the tape recording and transcript because they were not introduced into evidence, but were used only to refresh (the officer's) recollection."

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# Impeachment

- Evidence Code Section 770
  - "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless;
    - The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
    - The witness has not been excused from giving further testimony in the action"

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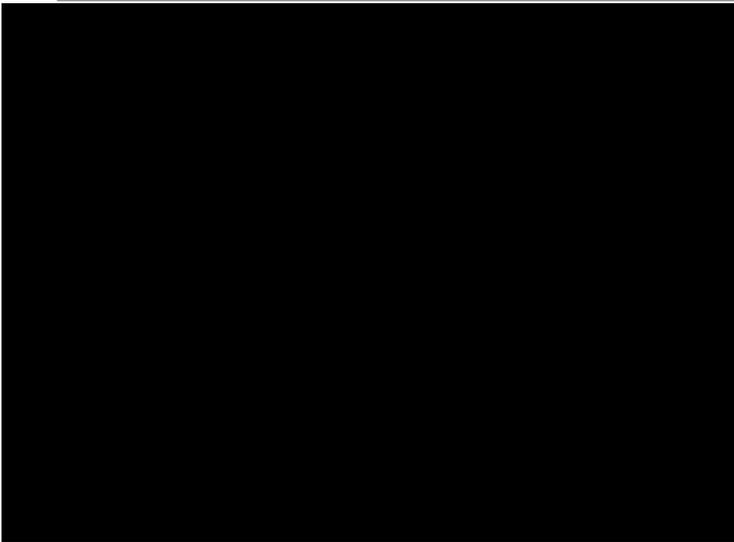
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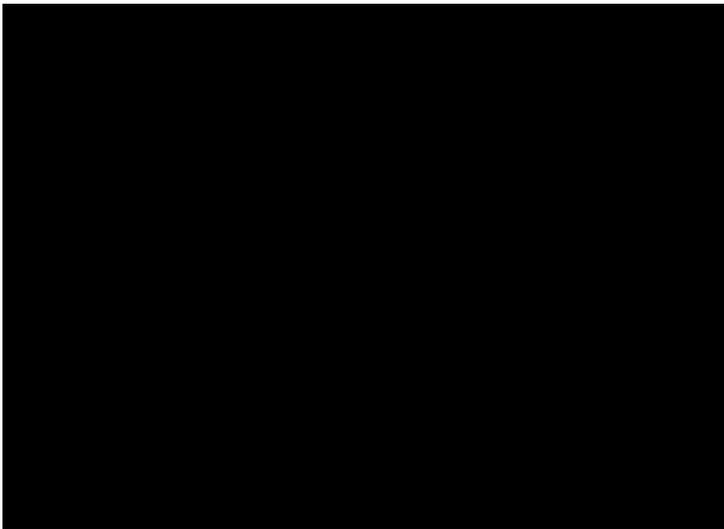
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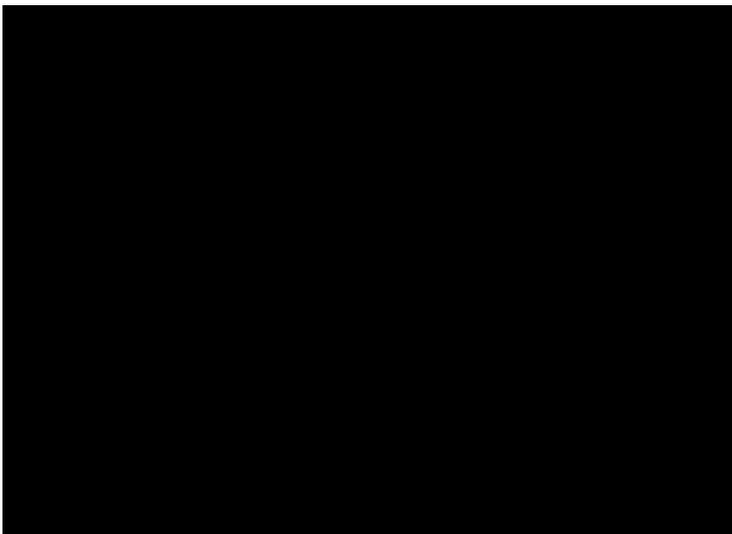
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## Closing Argument

- [REDACTED]
- No "quantitative measures" like puzzles when discussing reasonable doubt. *People v. Katzenberger* (2009) 178 Cal.App.4th 1260
- [REDACTED]
- Do not put prestige of being a prosecutor or state what steps were taken to assure a witness' truthfulness. *People v. Frye* (1998) 18 Cal.4th 894.
- [REDACTED]
- [REDACTED]
- [REDACTED]
- Do not call witnesses, defendants, or defense counsel names. *People v. Lo Cigno* (1961) 193 Cal.App.2d 360
- [REDACTED]

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## Closing Argument

- [REDACTED]
- Do not comment on a defendant's failure to testify (*Griffin* error). *Griffin v. California* (1965) 380 U.S. 609
- Do not comment on a defendant's failure to give a statement to the police (*Doyle* error). *Doyle v. Ohio* (1976) 426 U.S. 610
- Do not comment on a defendant's incarceration pending trial (*Torch* error).
- [REDACTED]
- [REDACTED]
- [REDACTED]

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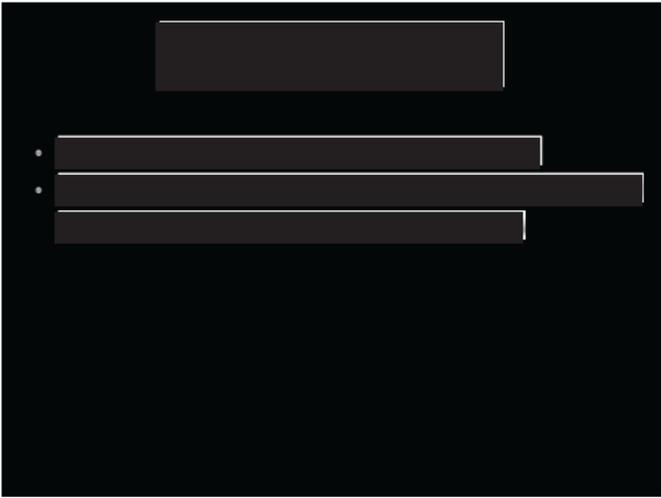
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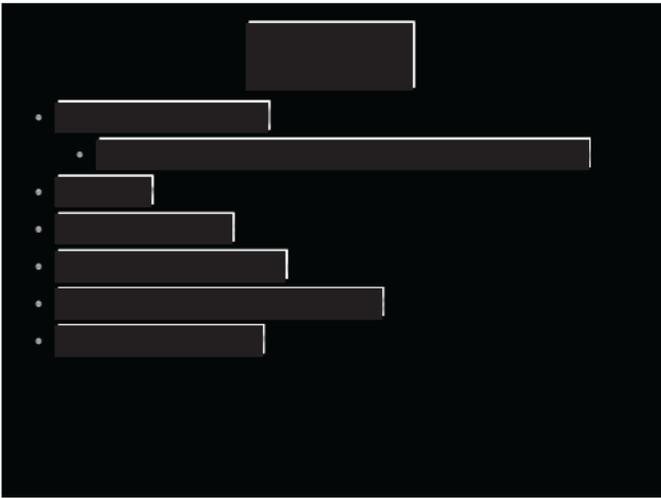
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