

CRIMINAL COURTS BAR ASSOCIATION NEWSLETTER

PUBLISHED BY THE CRIMINAL COURTS BAR ASSOCIATION

APRIL, 2005



OFFICERS

Stephen Sadowsky
President

Steve Escovar
President-Elect

Michael Artan
1st Vice-President

Andy Stein
2nd Vice-President

Alison Triessl
Treasurer

Jeffrey Yanuck
Secretary

BOARD OF DIRECTORS

Janice Fukai
Gigi Gordon
Karl Henry
Michael Judge
Winston McKesson
Sharon Morris
Felipe Plascencia
Mark Rafferty
Bruce Richland
Jon Takasugi
Alison Triessl
John Tyre
Michael Yamamoto
Jeffrey Yanuck

Editor
Chris Chaney
(626) 577-5005
cchaney@pacbell.net

Associate Editor
Patrick Lake
WALTERLAKE@aol.com

Photographer
Mike Shannon

Associate Photographer
Jeff Yanuck

SPOTLIGHT ON WILLIAM GENEGO

William Genego was a recipient of one of the President's Award at the Criminal Courts Bar Association Dinner Dance held on March 12, 2005.

Since April 2000 he has been a partner with Michael Nasatir, Richard Hirsch, and Vicky Podberesky. Before that, among other career achievements, he taught at the University of Southern California for eight years where in addition to running the clinical program he taught criminal procedure, evidence, and trial advocacy.

Mr. Genego was the recipient of the President's Award in part because of his work in a case involving Harold Hall. His remarks when accepting the President's Award were so moving that they deserve to be heard again.

In Mr. Genego's own words:

I first spoke to Harold Hall in 1992 when he called me from the County Jail. He had just been tried on two counts of capital murder and sentenced to LWOP. He was calling for free legal advice, not to retain me.

Even though I had just entered private practice, I took the time to speak with him. Or maybe it was because I had just entered private practice and had the time to speak with him that I took the call.

When his appeals were over, Harold continued to fight his case, representing himself. Harold continued to call and ask me legal questions, and I continued to speak with him. I actually didn't know much about the facts of his case, only enough to be able to answer his questions about the law and procedure.

For ten years Harold Hall was a voice on the other end of a telephone to me. I didn't meet him in person until 2002, after his federal peti-

tion had been denied by the district court and I agreed to represent him in his appeal to the 9th Circuit.

In thinking back about what it was that made me first speak with Harold, and continue to speak with him over the years, even before I had any idea he had been wrongfully convicted, I realize it was Harold himself. He had a quiet determination in his voice, and despite his circumstances, never expressed anger or frustration or felt sorry for himself, and spoke respectfully about everyone, including the DA and police. It was that extraordinary determination that enabled Harold to keep his case alive for more than six years as he navigated the complicated maze that habeas corpus litigation has become.

There is one other person who should be recognized tonight who is not here. That is the judge who presided over Harold's nine-month trial, Superior Court Judge Alexander Williams III. Five years after the trial, when it was learned that handwritten notes critical to the prosecution's case contained evidence of erasures that the jury was never told about, Judge Williams ruled that Harold was entitled to a new trial.

The system's resistance to post-conviction relief then took over, resulting in Judge Williams' 1995 ruling being overturned by the state court of appeal. It was not until nine years later that Judge Williams' ruling was reinstated by the Ninth Circuit in a 2-1 decision. If it had been up to the Ninth Circuit judge who dissented in Harold's case, Harold would not be here tonight. Not because Harold's claim didn't have merit, but because to the dissenting judge, that was not the question.

(cont. pg. 2)

APRIL DINNER MEETING

Guest Speaker

ANDRÉS BUSTAMANTE "Immigration Consequences of Criminal Convictions"

Tuesday, April 12, 2005

Board of Directors Meeting
(Everyone welcome to attend)
5:30 p.m.

Cocktails/Reception
6:30 p.m.

Dinner Meeting begins
promptly at 7:00 p.m.
\$30.00 per person

Les Freres Taix Restaurant
1911 Sunset Blvd., Los Angeles, CA
(Near Alvarado)

1.0 MCLE Credit Approved

Reservations advised. Call Chris Chaney at (626) 577-5005. CCBA certifies that this activity conforms to the standards for approved education activities prescribed by rules and regulations of the State Bar of California governing minimum legal education.

(cont. from pg 1)

Harold Hall's case is unusual in that it is both an example of what habeas litigation should not be about, and what it should be. Habeas litigation should not be about procedural barriers erected in the interest of finality and comity that deflect claims regardless of whether they have merit; the focus of habeas litigation should be the commitment to a fair trial exemplified by Judge Williams' ruling, that decides claims on their merits and enables innocent people who are wrongfully convicted to get the relief to which they are entitled, even if it takes 19 years.

CCBA WELCOMES ANDRÉS BUSTAMANTE TO THE APRIL DINNER MEETING

The Criminal Courts Bar Association is pleased to welcome Andrés Bustamante as our dinner speaker for the April 12, 2005, dinner meeting at Taix Restaurant.

Mr. Bustamante will address our membership in a talk entitled "Immigration Consequences of Criminal Convictions."

Mr. Bustamante has just been awarded the prestigious Clay Award which is given by California Lawyer Magazine to those attorneys whose work "has had a profound, far reaching impact in 2004 or whose achievements in 2004 are expected to have such an impact in the coming years."

Mr. Bustamante is a sole practitioner with an emphasis in immigration and post conviction work. He is a graduate of UC Riverside and the Peoples College of Law and has been practicing for 15 years. Mr. Bustamante has done work for our good friends Anthony Brooklier, Donald Marks, Victor Sherman, David Elden and Michael Artan.

Mr. Bustamante will specifically address the responsibilities of the criminal defense lawyer when handling cases that involve immigration consequences. He will focus on cases involving drugs, firearms, domestic violence, and property theft.

The Board of Directors welcomes you to the meeting and looks forward to seeing you.

ADVERSITY

ADVERSITY HAS THE EFFECT OF ELICITING TALENTS WHICH IN PROSPEROUS CIRCUMSTANCES WOULD HAVE LAIN DORMANT. -HOMER

IN TIMES LIKE THESE, IT HELPS TO RECALL THAT THERE HAVE ALWAYS BEEN TIMES LIKE THESE. -PAUL HARVEY

I KNOW GOD WILL NOT GIVE ME ANYTHING I CAN'T HANDLE. I JUST WISH THAT HE DIDN'T TRUST ME SO MUCH. -MOTHER TERESA

"WHEN FATE THROWS A DAGGER AT YOU, THERE ARE ONLY TWO WAYS TO CATCH IT; EITHER BY THE BLADE OR BY THE HANDLE. -UNKNOWN

CCBA 2005 SUSTAINING MEMBERS

The Criminal Courts Bar Association thanks each of its Sustaining Members. Your contributions have helped support our programs for the 2005 year.

Acosta	Oscar	Golden	Jonathan	Passarante	John
Arfa	Fay	Goldstein	James	Richland	Bruce
Artan	Michael	Herman	Josh	Santwier	Rickard
Bad Boys	Bail Bonds	Hutton	Richard	Schwartz	Robert
Bennett	Terrence	Kavinoky	Darren	Shapiro	Mark
Bianco	James	Lake	Patrick	Stein	Andrew
Bird	George	Levine	Leonard	Trimarco	Jack
Blatt	James	Mathews	Charles	Wager	Donald
Brookman	Daniel	Mesereau	Thomas	Weitzman	Howard
Caruso	Carey	Michaelson	Alvin	Wilson	Robert
Chaney	Christopher	Nardoni	Daniel	Yanuck	Jeffrey
Germer	Michael	Norris	Michael		

CCBA 2005 PAID MEMBERSHIP

Adelson	Michael	Garcia	Anthony	Melnik	Todd
Atherton	Dale	Greenberg	Harold	Mizrahi	Ed
Avery	Kevin	Hauser	Steven	Nettles	Edward
Beck	Marki	Henry	Karl	Ogden	David
Belger	Laurie	Herriford	David	Otto	Douglas
Berke	Robert	Hoff	Hon. Michael	Peck	Joel
Braun	Harland	Hoffmayer	Monique	Raab	Michael
Brodey	Jeffrey	Horowitz	Edward	Randolph	Donald
Brooks	C Robert	Hough	Steven	Ross	Alan
Browne	Fred	Isaacson	Joel	Salerno	Victor
Burkenroad	David	Jacobson	William	Schwartz	Hon. Keith
Caballero	Richard	Judge	Michael	Sepe	Louis
Carleton	David	Kaplan	Richard	Shannon	Michael
Chapman	Stuart	Klink	Richard	Solis	Anthony
Clark	Robert	Kravis	Randy	Soo Hoo	Mona
Cohen	Seymour	Kristovich	Hon. Marlene	Suzuki	Michael
Cooley	Steve	La Jeunesse	Anne	Szocs	Steven
Cormicle	Bruce	Lafont	Robert	Takasugi	Jon
Crain	Michael	LaPan	Richard	Talcott	Hon. Robert M.
Daley	John	Lawing	Hon. Robert	Tedeschi	Pamela
David	Maynard	Lemberg	Andrea	Tyre	John
Egers	Mitchell	Leonard	Richard	Vaughn	Roy
Ellison	Sherman	Lindner	Charles	Veganes	Theodore
Evans	David	Mandell	Steven	Wolk	Susan
Fischer	Dennis	Marcus	Hon. Stephen	Zimbert	Michael
Fujioka	Fred	Marino	Nina	Zlotnik	Arna
Fukai	Janice	Marrs	Hon. Bruce		

2005 DINNER DANCE ANOTHER GREAT SUCCESS

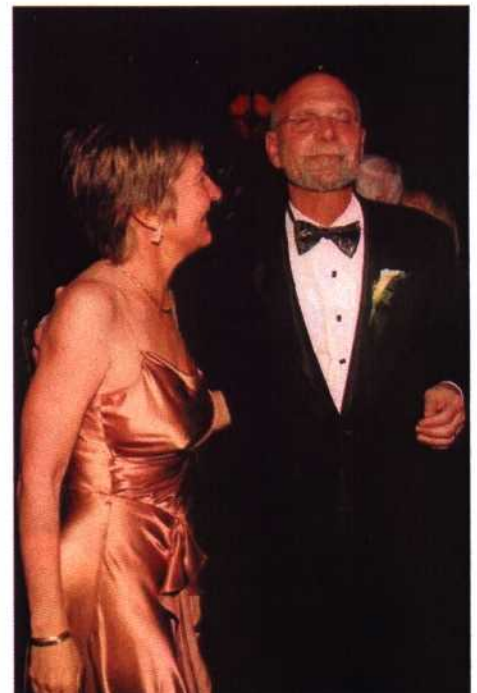
The 2005 Criminal Courts Bar Association Dinner Dance was once again a highlight of the social season. Just about all the important people in the criminal justice system of Los Angeles were out on the town-drinking, eating, dancing and generally enjoying each other's company.

A hearty congratulations to President Stephen Sadowsky for the tremendous amount of work and care in bringing this event together. A perfect gentlemen and gracious host.

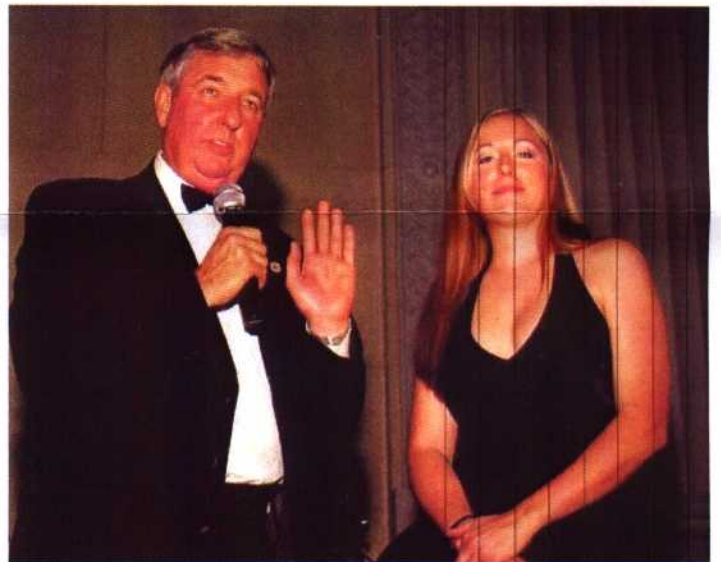
One last round of applause for our award winners: Honorable Norman P. Tarle, Stan Chambers, Johnnie L. Cochran, Jr., James Blatt, Thomas A. Mesereau, Jr., Sean Kennedy, and William Genego.

Thanks to everyone who attended this great event. See you next year!

CRIMINAL COURTS BAR ASSOCIATION
2005 DINNER DANCE



CRIMINAL COURTS BAR ASSOCIATION 2005 DINNER DANCE



CRIMINAL COURTS BAR ASSOCIATION
Attn: Christopher C. Chaney
1055 E. Colorado Blvd, Suite 310
Pasadena, CA 91106
Telephone: (626) 577-5005

NEW APPLICATION / RENEWAL 2005

Please remit Member Renewal Application the Amount of:

- | | | |
|--------------------------|-----------------------------------------------------|-----------|
| <input type="checkbox"/> | Sustaining Member..... | \$ 250.00 |
| <input type="checkbox"/> | Attorneys admitted to practice over 5 years..... | \$ 100.00 |
| <input type="checkbox"/> | Attorneys admitted to practice 5 years or less..... | \$ 50.00 |
| <input type="checkbox"/> | Investigators..... | \$ 50.00 |
| <input type="checkbox"/> | Judges..... | \$ 35.00 |
| <input type="checkbox"/> | Law Student or not yet admitted..... | \$ 25.00 |
| <input type="checkbox"/> | First year member, discounted dues..... | \$ 35.00 |

NAME: _____

ADDRESS: _____

PHONE NUMBER: _____

FAX NUMBER: _____

E-MAIL: _____

(Please provide us with your e-mail address.)

Please enclose this form with your application.

Make your check payable to "CCBA" and mail to:
Attn: Christopher C. Chaney
Criminal Courts Bar Association
1055 E. Colorado Blvd, Suite 310
Pasadena, CA 91106

CCBA NEWSLETTER CASE DIGEST

By Gary Mandinach

Bockting v. Bayer (9th Cir. 2005) __ F.3d __, reported on February 23, 2005, in 05 Los Angeles Daily Journal 2038, the Ninth Circuit Court of Appeal held that where the sole witness, a minor, to the defendant's allegedly criminal conduct, did not testify at trial, but the interview with the witness was admitted at trial, violated the dictates of the Sixth Amendment and *Crawford*, even though her statements at the interview contradicted her testimony at a preliminary hearing where she claimed not to remember what happened. This court found that *Crawford* applies retroactively, even if it creates a "new rule," because it is both a "watershed rule" and one "without which the likelihood of an accurate conviction is seriously diminished." (See *Schriro v. Summerlin* (2004) __ U.S. __ [124 S.Ct. 2519].)

United States v. Osife (9th Cir. 2005) __ F.3d __, reported on February 23, 2005, in 05 Los Angeles Daily Journal 2058, the Ninth Circuit Court of Appeal held that the ruling in *New York v. Belton* (1981) 453 U.S. 454, which permitted the search of an automobile and any container, pursuant to a lawful arrest of its occupant, or recent occupant, is not limited to situations wherein it is reasonable to believe that the automobile contains evidence related to the crime for which the defendant was arrested. (See also *Thornton v. United States* (2004) __ U.S. __ [124 S.Ct. 2127].)

People v. Davis (2005) __ Cal.App.4th __, reported on February 23, 2005, in 05 Los Angeles Daily Journal 2038, the Fourth Appellate District, Division 2, held that the Elder Abuse Act (Welf. & Inst. Code, §15600 et. sec.) mandates reporting of any circumstance giving rise to an objective basis for suspecting that abuse occurred and does not require that the reporter subjectively recognize the occurrence of the abuse. The prosecution for failure to make the mandatory report does not require negligence or criminal intent as the standard is one of strict liability. Evidence that the defendant, a licensed nursing home administrator, failed to report an incident in which an employee of the nursing home used a chokehold on a dependent adult who did not threaten the employee was sufficient to establish a violation of the act's mandatory reporting requirements, regardless of whether the victim suffered physical or psychological injury.

People v. Lowe (2005) __ Cal.App.4th __, reported on February 23, 2005, in 05 Los Angeles Daily Journal 2035, the Sixth Appellate District held that the unexplained five month delay between filing of the felony complaint and arraignment, was prejudicial and violated the defendant's constitutional right to a speedy trial where the defendant was deprived of a chance for a concurrent sentence. (See *Barker v. Municipal Court* (1966) 64 Cal.2d 806 [the possible loss of a concurrent sentence is protected by the right to a speedy trial; see also *Salvador Martinez* (1995) 37 Cal.App.4th 1589, 1594 1595; *Smith v. Hooey* (1969) 393 U.S. 374, 378].)

Castillo v. McFadden (9th Cir. 2005) __ F.3d __, reported on February 25, 2005, the Ninth Circuit Court of Appeal held that a claim that petitioner was denied federal due process by the admission at his trial of videotape of his questioning by the police was not specifically characterized as a federal claim in the state court where the state court briefing cited the admission as "fundamental error" but contained only a single reference to federal due process requirements in the brief's concluding paragraph and did not argue applicability of federal law to that claim or cite to federal or state cases involving the legal standard for a federal constitutional violation. The petitioner must have cited to either a federal or state case involving the legal standard for a federal constitutional violation in order to exhaust his state remedies for federal review. Pursuant to *Peterson v. Lampert* (9th Cir. 2003) 319 F.3d 1153, 1158, the petitioner must have either referenced specific provisions of the federal constitution or cited to federal or state cases involving the legal standard for a federal constitutional violation.

People v. Butler (2005) __ Cal.App.4th __, reported on February 28, 2005, in 05 Los Angeles Daily Journal 2262, the Second Appellate District, Division 4, held that testimony that declarants had made statements to co worker, which implicated the defendant, which declarants denied, was not inadmissible as "testimonial" hearsay within the meaning of *Crawford* even though the statements were included in police reports, as they were not in response to police questioning. (See *People v. Corella* (2004) 122 Cal.App.4th 461467 [even prior to *Crawford*, the statements were not considered testimonial, and would come in as a spontaneous statement].)

In re Wagner (2005) __ Cal.App.4th __, reported on February 28, 2005, in 05 Los Angeles Daily Journal 2296, the Fourth Appellate District, Division 3 held that the lower court's authority to revoke probation on its own motion did not authorize the court to place the defendant in jail following his request to modify conditions, denying him bail and scheduling a hearing a month hence, without notice to the defendant or his counsel that the court was considering such action as an apparent sanction for the defendant's failure to cooperate with judge's assistant in scheduling payment of court ordered charitable contribution. (See *People v. Vickers* (1972) 8 Cal.3d 451, 457.) Additionally the court, in implementing statutory requirement that the defendant convicted of domestic violence make a financial contribution to a shelter for victims of such violence (§ 1203.097), exceeded its authority by designating a specific shelter to which the defendant was required to contribute. This personal involvement violated the Canons of Judicial Ethics. The court's "precipitous" order remanding defendant to custody without affording him an opportunity to respond to charges made by judicial assistant created appearance that judge was motivated by anger. Such personal embroilment requires that case be assigned to a different judge on remand.

IN THE TRENCHES

Congratulations to Louis Sepe who recently tried a case before the Honorable C.H. Rehm, Jr.

The defendant, while under the influence of drugs and alcohol, walked into an auto body shop requesting a cup of coffee. He put his money down on the counter. The complaining witness indicated that he does not sell coffee at his establishment. The defendant is accused of slapping the complaining witness and said "I'm going to come back here and burn the place down."

On those facts the defendant was charged with a violation of penal code section 422 with five prior 211s.

In discussing the essence of the trial Mr. Sepe relates the following: The crime of Penal Code Section commonly known as criminal threat requires that the complaining witness be in sustained fear. In other words fear from the defendant's threat must not be fleeting. The prosecutor was allowed over defense objection to introduce the following evidence: The complaining witness knew the defendant to be a Marivel gang member, knew the defendant to beat up and rob people on the street, including old ladies.

The defendant had been in and out of jail several times and the complaining witness knew the defendant to be a violent person. The judge allowed the evidence in even though there was no prior history between defendant and complaining witness. Counsel should be aware that the sustained fear element may let in reputation evidence. Mr. Sepe offered to stipulate to that element of the crime, as well as offering to concede the element of the crime in order to keep out the prejudicial evidence pursuant to Penal Code Section 352.

However, the judge indicated that he would allow the prosecutor to introduce the evidence in any event.

The trial lasted six days and after jury deliberations of four hours a not guilty verdict was returned.

Mr. Sepe lauds the work of Robert Freeman, private investigator, and was complimentary of the District Attorney, Ms. Hanlon.

Congratulations to Michael Zimbert, Jack Stone, Ida Campbell-Thomas and Jim Sussman, who after approximately three and a half weeks of jury trial in San Fernando, a case in which their clients were charged with five counts of attempted first degree murder and numerous gang allegations, were able to convincingly argue that the victims (non-gang members) initiated the shooting, thereby allowing the jury to consider both self defense and imperfect self defense arguments. The jury returned not guilty verdicts on all 5 counts of first degree attempt murder and found all gang allegations not true. The jury found that the lesser charges of attempted voluntary manslaughter with armed and use allegations to be the appropriate verdict.

Congratulations also go out to Michael Zimbert and Steve Mandel who did an excellent job at a preliminary hearing involving a murder with a 190.2(a)(22) (defendant was an active participant in a criminal street gang) special circumstance allegation. Mr. Zimbert and Mr. Mandell were able to establish thru cross-examination of the People's expert that there was not competent evidence sufficient to establish that their respective clients were "active gang members" thus the Judge dismissed the special circumstance allegation at the conclusion of the preliminary hearing.

CCBA NEWSLETTER CASE DIGEST

In re Lennies H. (2005) __ Cal.App.4th __, reported on February 22, 2005, in 05 Los Angeles Daily Journal 1955, the First Appellate District, Division 4 held that were the officer had reasonable cause to "stop and frisk" appellant, felt keys in his pocket, and at that moment had reasonable cause to believe that suspect was involved in a carjacking, the search of pocket and seizure of the keys was reasonable within the meaning of *Minnesota v. Dickerson* (1993) 508 U.S. 366, 368 379; *People v. Dickey* (1994) 21 Cal.App.4th 952.

People v. Boulden (2005) __ Cal.App.4th __, reported on February 22, 2005, in 05 Los Angeles Daily Journal 1958, the Second Appellate District, Division 4, held that the trial court's directive to counsel not to violate Wheeler/Batson, and implied that certain sanctions would fall on counsel if they did, did not impose an impermissible conflict between defense counsel's duties to appellant and as an officer of the court. (See *People v. Willis* (2002) 27 Cal.4th 811, 815 821; *People v. Muhammad* (2003) 103 Cal.App.4th 313325 326.)

People v. Overman (2005) __ Cal.App.4th __, reported on February 22, 2005, in 05 Los Angeles Daily Journal 1981, the Fourth Appellate District, Division 2 held that shooting at an occupied building, in violation of section 246, is not limited to shooting directly at an inhabited or occupied dwelling, but may be committed by shooting either directly at or in close proximity to an inhabited or occupied dwelling under circumstances showing a conscious disregard for the probability that one or more bullets will strike the dwelling or persons in or around it. (See *People v. Atkins* (2001) 25 Cal.4th 76, 85; see also *People v. Cruz* (1995) 38 Cal.App.4th 427, 431 433 [the statute does not require a specific intent to achieve a specific result].) Negligently shooting at an occupied building, as defined in section 246.3, is a lesser included offense of that described in section 246, and the trial court prejudicially erred by failing to so instructing where the defendant was willing to waive any statute of limitations defense to the lesser charge. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 375, which overruled *People v. Ognibene* (1993) 12 ca4 1286, and *People v. Bice* (1988) 206 Cal.App.3d 111, which had been relied on by the trial court to rule that the lesser would not be given].)

Smith v. Massachusetts (2005) __ U.S. __, reported on February 23, 2004, in 05 Los Angeles Daily Journal 2052, the United States Supreme Court held that where the court granted defendant's motion for acquittal after the prosecution rested (similar to §1118), on one count, based on the insufficiency of the evidence, but then reconsidered and altered its ruling prior to the submission of the case to the jury, reinstating that count, said ruling violated the Double Jeopardy Clause. (See *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573.) Where, after an unqualified mid trial acquittal on one count, wherein the trial has proceeded to the defendant's introduction of evidence on the remaining counts, the acquittal must be treated as final unless the availability of reconsideration has been plainly established by a pre existing state rule, or case authority, expressly applicable to mid trial rulings on the sufficiency of the evidence.



CRIMINAL COURTS BAR ASSOCIATION

c/o Law Offices of Hutton & Wilson
1055 E. Colorado Blvd.
Suite 310
Pasadena, CA 91106



Jon R. Takasugi
320 W. Temple Street, Rm. 35
Los Angeles, CA 90012

SAVE THE DATE!

*The May Dinner Meeting
will be held on May 10th, 2005.*

We are currently scouting westside locations.

Stay tuned for further announcements.

