

CRIMINAL COURTS BAR ASSOCIATION NEWSLETTER

PUBLISHED BY THE CRIMINAL COURTS BAR ASSOCIATION

FEBRUARY, 2005



OFFICERS

Stephen Sadowsky
President

Steve Escovar
President-Elect

Michael Artan
1st Vice-President

Andy Stein
2nd Vice-President

Allison 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

Allison 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

THE CRIMINAL COURTS BAR ASSOCIATION IS PLEASED TO WELCOME SEAN KENNEDY TO OUR FEBRUARY DINNER MEETING

The Criminal Courts Bar Association is pleased to welcome Sean Kennedy as our dinner speaker for the meeting on February 8, 2005 at Taix Restaurant. The title of Sean Kennedy's presentation is "Undoing the Sins of the Past."

Mr. Kennedy is the supervising attorney for the Habeas Unit of the Federal Public Defender's Office. In that position he supervises a total of 53 staff including 20 attorney/paralegals.

Mr. Kennedy has an impressive history of success. He recently argued before the

California Supreme Court in the matter entitled In Re Tauno Waidla, the case involving prosecutorial misconduct whereby prosecutors obtained guilty verdicts against two

different defendant's arising out of the same incident. In two separate trials the prosecution argued that the defendant before the jury was the person who was solely responsible for the crime charged.

Mr. Kennedy was also trial counsel for Buford Furrow and was habeas counsel in the matter of Thomas Goldstein, who was recently freed from prison after being wrongfully convicted for murder.

Mr. Kennedy is a professor in the Appellate Advocacy Program at Loyola Law School and is also the director of the Scott Moot Court program. He is married to the lovely Stephanie Kennedy and has two beautiful daughters.

FEBRUARY DINNER MEETING

Guest Speaker

"SEAN KENNEDY: Undoing the Sins of the Past"

Tuesday, February 8, 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.

THE TRUTH IS THAT THERE IS
 NOTHING NOBLE IN BEING SUPERIOR
 TO SOMEBODY ELSE. THE ONLY REAL
 NOBILITY IS IN BEING SUPERIOR
 TO YOUR FORMER SELF.

WHITNEY YOUNG (1913-1971)
Civil Rights Leader

WHILE WE HAVE THE GIFT OF LIFE,
 IT SEEMS TO ME THE ONLY TRAGEDY
 IS TO ALLOW PART OF US TO DIE -
 WHETHER IT IS OUR SPIRIT,
 OUR CREATIVITY, OR OUR
 GLORIOUS UNIQUENESS.

GILDA RADNER (1946-1989)
Comedian

YOU CANNOT LIVE A PERFECT DAY
 WITHOUT DOING SOMETHING
 FOR SOMEONE WHO WILL NEVER
 BE ABLE TO REPAY YOU.

JOHN WOODEN
College Basketball Coach

FOLLOW THE GRAIN
 IN YOUR OWN WOOD.

HOWARD THURMAN (1900-1981)
Clergyman

THERE IS NO GREATER JOY
 NOR GREATER REWARD
 THAN TO MAKE A FUNDAMENTAL
 DIFFERENCE IN SOMEONE'S LIFE.

SISTER MARY ROSE MCGEADY
Children's Advocate



DINNER MENU

Pot Roast of Beef and Fresh Boneless Trout Almondine.
 Entrees include a relish tray, soup du jour, fresh sourdough
 bread, garden salad with house vinaigrette dressing, fresh
 vegetable, rice or potato, sherbert, and coffee or tea.

We look forward to seeing you there.

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	Goldstein	James	Passanante	John
Bianco	James	Herman	Josh	Santwier	Rickard
Bird	George	Hutton	Richard	Schwartz	Robert
Blatt	James	Mathews	Charles	Trimarco	Jack
Brookman	Daniel	Mesereau	Thomas	Weitzman	Howard
Chaney	Christopher	Michaelson	Alvin	Wilson	Robert
Gerner	Michael	Nardoni	Daniel	Yanuck	Jeffrey
Golden	Jonathan	Norris	Michael		

CCBA 2005 PAID MEMBERSHIP

Atherton	Dale	Greenberg	Harold	Marrs	Hon. Bruce
Avery	Kevin	Henry	Karl	Mizrahi	Ed
Belger	Laurie	Hoffmayer	Monique	Nettles	Edward
Berke	Robert	Horowitz	Edward	Ogden	David
Braun	Harland	Hough	Steven	Otto	Douglas
Browne	Fred	Isaacson	Joel	Raab	Michael
Caballero	Richard	Kaplan	Richard	Ross	Alan
Carleton	David	Klink	Richard	Salerno	Victor
Chapman	Stuart	Kravis	Randy	Schwartz	Hon. Keith
Cohen	Seymour	Kristovich	Hon. Marlene	Sepe	Louis
Cormicle	Bruce	La Jeunesse	Anne	Shannon	Michael
Crain	Michael	Lafont	Robert	Solis	Anthony
Daley	John	Lawing	Hon. Robert	Soo Hoo	Mona
Egers	Mitchell	Lemberg	Andrea	Talcott	Hon. Robert M.
Ellison	Sherman	Leonard	Richard	Tedeschi	Pamela
Fischer	Dennis	Lindner	Charles	Tyre	John
Fujioka	Fred	Mandell	Steven	Wolk	Susan
Garcia	Anthony	Marino	Nina		

SUPER LAWYERS 2005

Los Angeles Magazine has published in their February
 2005 edition "Southern California Super Lawyers."

The Criminal Courts Bar Association is proud to announce
 that many of our current or past members are amongst this
 group of "Super Lawyers." Congratulations to MICHAEL
 ADELSON; MICHAEL ARTAN; MARK BECK; GEORGE
 BIRD, JR; JAMES BLATT; HARLAND BRAUN; BRADLEY
 BRUNON; STEVE COOLEY; STEVEN CRON; MITCHELL
 EGGERS; JAMES EPSTEIN; JANICE FUKAI; WILLIAM
 GENEGO; MARK GERAGOS; PAUL GERAGOS; RICHARD
 HIRSCH; RICHARD HUTTON; PHILIP ISRAELS; JAY JAFFE;
 MICHAEL JUDGE; MADELYNN KOPPLE; LEONARD
 LEVINE; JANET LEVINE; MICHAEL LIGHTFOOT;
 DONALD MARKS, WINSTON KEVIN MCKESSON;
 EDWARD MEDVENE; ALVIN MICHAELSON, MARCIA
 MORRISSEY; MICHAEL NASATIR, VICKY PODBERESKY;
 DONALD RANDOLPH; EDWARD RUCKER; DONALD RE;
 RICKARD SANTWIER; MICHAEL SHANNON; ROBERT
 SHAPIRO; ERIC SHEVIN; BARRY TARLOW; JOHN
 VANDEVELDE; MARK WERKSMAN; ROBERT WILSON;
 and GARRET ZELEN.

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:

- () Sustaining Member..... \$ 250.00
- () Attorneys admitted to practice over 5 years..... \$ 100.00
- () Attorneys admitted to practice 5 years or less..... \$ 50.00
- () Investigators..... \$ 50.00
- () Judges..... \$ 35.00
- () Law Student or not yet admitted..... \$ 25.00
- () 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

People v. Watson (2004) __ Cal.App.4th __, reported on December 22, 2004, in 04 Los Angeles Daily Journal D.A.R.15092, the Second Appellate District, Division 6, held that the defendant could be convicted of felony of battery by state prisoner on a non prisoner, within the meaning of section 4501.5, where the alleged offense occurred after the defendant was transferred from the state prison to the state hospital for treatment for his mental illness.

People v. Harless (2004) __ Cal.App.4th __, reported on December 22, 2004, in 04 Los Angeles Daily Journal D.A.R.15101, the Sixth Appellate District held that pursuant to *Crawford*, the victim's statements to (1) a doctor during course of a sexual abuse examination, (2) to a child abuse interview specialist and (3) to an investigator in the course of the district attorney's investigation of child abuse allegations against defendant, which were offered as part of the prosecution's case in chief, were "testimonial" hearsay, but were not rendered inadmissible by the Confrontation Clause where the victim was available to testify. Trial court did not err in instructing jury under CALJIC No. 10.42 that the definition of "duress," as used in section 288, subdivision (b)(1), includes "hardship." Evidence that defendant threatened the victim, his drug dependent minor daughter, that he would stop supplying her with drugs if she did not submit to his sexual advances, and that she would be taken away and placed in foster care if she disclosed their activities, was sufficient to establish the duress element of the forcible lewd act and aggravated sexual assault. Additionally, section 667.61 does not limit the number of mandatory consecutive sentences to the number of victims; as a result, where the defendant was convicted of five offenses to which the law was applicable, against two different victims, the court properly imposed five consecutive sentences. Finally, the court did not err under *Blakely* when it sentenced appellant to the upper term, finding that the defendant was convicted of other crimes for which consecutive sentences could have been imposed, but for which concurrent sentences were being imposed.

People v. Bowen (2004) __ Cal.App.4th __, reported on December 22, 2004, in 04 Los Angeles Daily Journal D.A.R.15110, the Third Appellate District held that In determining the number of drug offender's past probation violations for purpose of ascertaining his continuing eligibility for treatment under Proposition 36, the court properly counted pre Proposition 36 violations, including cases where probation was revoked and jail time imposed. A defendant who signs an agreement to waive "all custody credits" while in a residential drug treatment program, as a condition of probation, knowingly and intelligently waived his right to receive such credits following his subsequent revocation of probation and sentencing to state prison. (See *People v. Arnold* (2004) 33 Cal.4th 294, 298; accord *People v. Jeffrey* (2004) 33 Cal.4th 312,315 317.)

Sons v. Superior Court (2004) __ Cal.App.4th __, reported on December 22, 2004, in 04 Los Angeles Daily Journal D.A.R.15113, the Fifth Appellate District, after an analysis of *People v. Batts* (2003) 30 Cal.4th 660, wherein the California Supreme Court had held that under certain circumstances, wherein the prosecution committed intentional misconduct, in order to trigger a mistrial, they were barred by the double jeopardy clause of the state and federal constitutions, held that the facts did not warrant such a remedy in this case. Here, the prosecutor's failure to disclose material, exculpatory evidence in first trial, even if knowing and willful, does not bar retrial following a successful habeas corpus petition under double jeopardy clauses of the federal and state constitutions and constitutional requirements of due process of law.

People v. Shabazz (2004) __ Cal.App.4th __, reported on December 23, 2004, in 04 Los Angeles Daily Journal D.A.R.15141, the Second Appellate District, Division 8, held, after the matter was transferred back to the ca to be reconsidered in light of *People v. Chiu* (2003) 113 Cal.App.4th 1260, wherein this court disagrees with *Chiu*, and maintains that the 25 to life enhancement under section 12022.53, subdivision (d) does not apply to defendant sentenced to life imprisonment without the possibility of parole, pursuant to section 12022.53, subdivision (j). The Court of Appeal specifically noted that it does not appear that the Legislature intended that a court impose an enhancement that can never be served.

People v. Looney (2004) __ Cal.App.4th __, reported on December 27, 2004, in 04 Los Angeles Daily Journal D.A.R.15209, the Second Appellate District, Division 4 held that, wherein the defendant procured the signature of an individual whose mental competency was questionable, but to whom no misrepresentations are made about the true nature of the documents signed, does not constitute falsification within the meaning of the forgery (B 470, subd. (c)).

United States v. Blanco (9th Cir. 2004) __ F.3d __, reported on December 28, 2004, in 04 Los Angeles Daily Journal D.A.R.15274, the Ninth Circuit Court of Appeal held that where the government disclosed to defendant's counsel that it had used a confidential informant with ties to the Drug Enforcement Administration, and disclosed all payments made to the informant, but did not disclose that the informant had a close relationship with the Immigration and Naturalization Service which allowed him to receive a "special parole visa" permitting him to remain in the United States, the government breached its constitutional duty under *Brady v. Maryland*, to disclose exculpatory evidence, including promises and consideration given to witnesses and informants.

People v. Lamont (2004) __ Cal.App.4th __, reported on December 29, 2004, in 04 Los Angeles Daily Journal D.A.R.15293, the Fourth Appellate District, Division 3, held that a passenger in a vehicle has the legitimate expectation of privacy in the vehicle driven by another, and as a result, he standing to bring a motion to suppress. (See also *People v. Bell* (1996) 43 Cal.App.4th 754, 765; *People v. Hunt* (1990) 225 Cal.App.3d 498, 505; *United States v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; contra *People v. Cartwright* (1999) 72 Cal.App.4th 1362.)

People v. Beagle (2004) __ Cal.App.4th __, reported on December 30, 2004, in 04 Los Angeles Daily Journal D.A.R.15361, the Fifth Appellate District held that the rule expressed in *People v. Harvey* (1979) 25 Cal.3d 754, which prohibits the negative consideration at sentencing of dismissed charges, also applies to probation conditions. Here, the court erroneously added drug conditions of probation after a drug charge had been dismissed as part of a plea negotiation.

IN THE TRENCHES

Congratulations to new board member Winston Kevin McKesson on his recent success in a gang related drive-by shooting case before the Honorable Gary Daigh in Department O of the Compton Superior Court.

Mr. McKesson's client was charged with two counts of Attempted Premeditated Murder, GBI enhancement, use enhancement, and a gang enhancement. After one and a half weeks of trial Mr. McKesson was able to resolve the matter by way of his client pleading to a violation Penal Code Section 32. Father Greg Boyle was involved in the sentencing portion of the case, preparing a written report as to why Mr. McKesson's client was not a gang member.

Congratulation also to new CCBA Treasurer Alison Triessl on her recent success at the Fontana Superior Court. In People vs. Shirley, after following the defendant's car a short distance, Fontana Police found a distraught Mr. Shirley with a box cutter in his hand. He had cut his wrist to the bone in a suicide attempt and was bleeding profusely.

Earlier that evening and throughout that night, members of the Shirley family called several law enforcement agencies in an attempt to get help for Mr. Shirley, in fear he would do harm to himself. A request to take Mr. Shirley into custody on a Welfare and Institutions Code Section 5150 hold was denied. Other pleas were also ignored.

Police advanced on Mr. Shirley telling him to drop the box cutter. Due to blood loss, shock, and mental cloudiness, Mr. Shirley did not immediately drop the cutter but instead slowly came towards the officers, most likely in a silent request for assistance.

The Fontana Police Department used tasers on Mr. Shirley several times and then shot him even though at that point the box cutter had been dropped and landed under a nearby car. Mr. Shirley was charged with evading, brandishing, and resisting arrest.

After three years of fighting Ms. Triessl achieved an outright dismissal for Mr. Shirley.

Congratulations to Jeff Yanuck for his recent success before the Honorable Martin Herscovitz in Division 116 of the Van Nuys Superior Court. In this case the defendant was accused of setting the family home on fire and stealing an identical car as his own and switching the vin numbers. The defendant was charged with arson, operating a chop shop, receiving stolen property, and grand theft auto.

In a trial that lasted nine full days the jury returned a verdict of not guilty on all counts in less than two hours. Mr. Yanuck lauds the work of his arson expert Jim Colvin, and his private investigator, Marshall Maydeck. The prosecutions experts were arson investigator John Little and from the CHP chop shop expert Sung Chir.

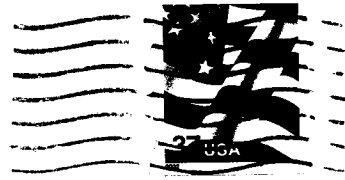
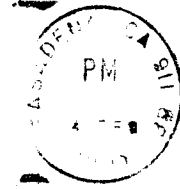
Congratulations also to past President Bob Schwartz who won a DMV license suspension hearing on lack of probable cause grounds uncovering authority that should be helpful to other defense counsel. At issue was the application of Penal Code Section 836 (prohibiting peace officers from making an arrest for a misdemeanor not committed in their presence) to the arrest for driving under the influence of his client who had stopped her vehicle on the shoulder of the 1-5 freeway after running out of gas. According to the evidence, her stranded vehicle did not obstruct or interfere with any vehicle traffic. Nonetheless, the DMV hearing officer was prepared to rule against the driver citing Vehicle Code Section 40300.5, which enumerates exceptions to Penal Code Section 836, in particular Penal Code Section 40300.5(b) which allows for an arrest by a peace officer for driving under the influence of a suspect who "is observed in or about a vehicle that is obstructing a roadway."

The issue confronting Mr. Schwartz was whether Penal Code Section 40300.5 applies to drivers who potentially obstructed a roadway or only those drivers who actually obstructed a roadway. The hearing officer granted Mr. Schwartz' request for a continuance to provide additional legal authority. He then retained the services of the Legislative Intent Service (LIS) to research the legislative intent behind the enactment of Penal Code Section 40300.5, especially subdivision (b). From the materials collected by LIS, it was evident that Penal Code Section 40300.5(b) was intended to apply only to those situations where the driver's vehicle actually is obstructing traffic. As stated in the Senate Committee analysis, "This bill is directed primarily at situations where an officer comes across a vehicle obstructing traffic with the driver passed out behind the wheel....." The original Assembly version of Penal Code Section 40300.5 was worded, "if the officer observes the person in or about a vehicle obstructing a roadway or unlawfully parked. (Emphasis added.) The Senate amendment in the next amended version of the bill deleted the phrase "or is unlawfully parked." Accordingly, counsel should argue that the legislature considered expanding the scope of subdivision (b) beyond just those situations where the driver had actually obstructed traffic but rejected this expansion.



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!

*Criminal Courts Bar Association
Awards Dinner Dance will be held at
the Park Plaza Hotel on March 12, 2005.
Mark your calendars, save the date,
and hire your babysitter.*

INVITATIONS WILL BE MAILED SOON!