

CRIMINAL COURTS BAR ASSOCIATION NEWSLETTER

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*The Criminal Courts Bar Association
cordially invites you to attend the*

63rd Annual Awards Dinner



Installation of Incoming President

Louis Sepe

*Criminal Defense Attorney Gilbert Rodriguez and his 10-piece
Westside Crew Band will take the stage directly after the program*

—Limited seating is available for this event—

SATURDAY, APRIL 23, 2016

Millennium Biltmore Hotel

506 South Grand Avenue • Los Angeles, CA 90071

Cocktails - Tiffany Room at 7:30 p.m.

Dinner - Crystal Ballroom

\$180 per person • \$1800 per table • Black Tie Optional

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CCBA NEWSLETTER CASE DIGEST

By Gary Mandinach

2016 CRIMINAL COURTS BAR ASSOCIATION AWARD WINNERS

The Criminal Courts Bar Association is pleased to announce that the 63rd Annual Awards Dinner will be held on Saturday, April 23, 2016 at the Millennium Biltmore Hotel, Los Angeles. Cocktails at 6pm, Dinner at 7:30pm. Criminal Defense Attorney Gilbert Rodriguez and his 10-piece Westside Crew band will take the stage directly after the program. Limited seating is available for this event.

The Criminal Courts Bar Association is pleased to announce the award winners for 2016:

**JERRY GIESLER MEMORIAL AWARD
STEFFENY HOLTZ**

**JOSEPH M. ROSEN JUSTICE AWARD
MICHAEL ADELSON**

**ROBERT M. TAKASUGI
JUDICIAL EXCELLENCE AWARD**

THE HONORABLE GREGORY DOHI

**MORT HERBERT SERVICE AWARD
CAREY CARUSO**

**JOHNNIE COCHRAN AWARD
MARILYN BEDNARSKI
RON KAYE
KEVIN LAHUE**

**PRESIDENT'S AWARD
GOVERNOR JERRY BROWN**



People v. Perry (2016__Cal.App.4th__, reported on February 22, 2016, in 2016 Los Angeles Daily Journal 1665, the Second Appellate District, Division 1 held that the defendant who pleaded no contest to a grand theft person, and a robbery was dismissed, as part of a plea agreement was able to gain the benefit of the passage of Proposition 47, which retroactively reduced the offense to a misdemeanor, and was not subject to reinstatement of the dismissed charges. This court relied in part on *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, which indicated that the provisions of Proposition 47 apply to negotiated pleas; that the will of the voters would be frustrated if the prosecution was allowed to force the defendant to withdraw his plea. The court disagreed with *Harris v. Superior Court* (2015) 242 Cal.App.4th 244.

People v. Navarro (2016__Cal.App.4th__, reported on February 22, 2016, in 2016 Los Angeles Daily Journal 1677, the Fourth Appellate District, Division 3 held that a parole condition restricting use of the defendant's use of the internet was impermissibly vague. (In re Sheena K. (2007) 40 Cal.4th 875, 887-889.) The parole condition was susceptible to varying interpretations, including one that would completely preclude the defendant from using e-mail, which would unnecessarily infringe on his right to communicate with family/friends or to find or keep employment.

People v. Hudson (2016__Cal.App.4th__, reported on February 22, 2016, in 2016 Los Angeles Daily Journal 1691, the Third Appellate District held that pursuant to Proposition 36, section 1210.1, which provides treatment conditions for nonviolent drug offenders who are placed on probation, found that the trial court did not err when it found the defendant not eligible for the program. The jury acquitting the defendant of possession of various controlled substances for sale, but found him guilty of simple possession of the same drugs; but the verdict did not implicitly find that such possession was solely for personal use. The expert testimony at trial constituted substantial evidence that the defendant possessed drugs for other than personal use, which supported the trial judge's ruling, by a preponderance of the evidence, that he was not eligible for Proposition 36 sentencing.

In re Kocontes (2016__Cal.App.4th__, reported on February 22, 2016, in 2016 Los Angeles Daily Journal 1668, the Fourth Appellate District, Division 3, the majority held that the order dismissing felony cause of action for "lack of territorial jurisdiction" did not preclude the prosecution from refileing the cause, because the "two-dismissal" rule for felonies applied. Collateral estoppel does not bar a new complaint from being filed after the dismissal of the prior complaint alleging the same offense. The dissent found that a dismissal for lack of territorial jurisdiction is not a dismissal in the furtherance of justice within the meaning of section 1385, and it is not subject to the "two-dismissal" rule. Since this type of defect cannot be cured by amendment, an action in excess of territorial jurisdiction must be dismissed pursuant to section 1008 after the demurrer is sustained, which is what the trial court did in this matter.

People v. Quiroz (2016__Cal.App.4th__, reported on February 24, 2016, in 2016 Los Angeles Daily Journal 1767, the Third Appellate District held that the trial court lacks jurisdiction to convene a competency hearing after a state hospital certifies that a defendant, who has been involuntarily confined for three years due to incompetence to stand trial, is not likely to regain competency.



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CCBA NEWSLETTER CASE DIGEST

By Gary Mandinach

People v. Andres (2016) __Cal.App.4th__, reported on February 24, 2016, in 2016 Los Angeles Daily Journal 1793, the Fourth Appellate District, Division 1 held that the trial court did not err in granting the defendant's habeas corpus petition where the inmate timely filed an appeal and was not required to use any specific mail procedure in filing his administrative appeal to redress his grievances against action taken against him in the Donovan state prison. The use of institutional mail is an acceptable method of mailing. The appeal pamphlet given to inmates to assist them in preparing administrative appeals does not state an inmate was required to use the secure collection boxes when submitting an administrative appeal. When the defendant did not get a response to his first appeal, he filed another with the warden using legal mail. The Court of Appeal focused on the first filed appeal, and concluded that the record supports the finding that the defendant, whom the trial court found credible in the hearing on the matter, submitted that appeal on or about January 25, 2013, as he testified and as reflected on the 602 appeal form itself; and that as such, his appeal was timely pursuant to section 3084.8, subsection (b) (1), inasmuch as the incident that was the subject of the appeal occurred on January 20, 2013.

In re Kirchner (2016) __Cal.App.4th__, reported on February 24, 2016, in 2016 Los Angeles Daily Journal 1770, the Fourth Appellate District, Division 1 held that *Miller v. Alabama* (2012) 132 S.Ct. 2455 and *People v. Gutierrez* (2014) 58 Cal.4th 1354 apply retroactively in state collateral proceedings and require that inmates serving life terms for crimes committed while they were juveniles must, except in the most extraordinary circumstances, be given an opportunity to seek parole. (*Montgomery v. Louisiana* (2016) 567 U.S. [135 S.Ct. 1546, 191 L.Ed. 635]. However, state legislation, section 1170, subdivision (d)(2), providing such inmates an opportunity to obtain a parole hearing has remedied any constitutional defect in the inmate's sentence. The Court of Appeal found that this is an adequate remedy at law, and is required before the defendant can file a habeas petition. The Court of Appeal also found that this ruling does not conflict with the holding in *Gutierrez*. The defendant has a right to bring a petition under section 1170, subdivision (d)(2).

People v. Garcia (2016) __Cal.App.4th__, reported on February 24, 2016, in 2016 Los Angeles Daily Journal 1785, the Fourth Appellate District, Division 1 held that the trial court did not abuse its discretion in failing to bifurcate the gang allegation under section 186.22, subdivision (b)(1). (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 [if the gang evidence is admissible at the guilt phase, any inference of prejudice would be dispelled, and bifurcation is not necessary].) Even though the evidence showed that a defendant was a documented member of a different gang than his co-defendants, did not preclude the jury from finding that he committed the robberies in association with and for the benefit of the codefendants' gang. (See *People v. Albillar* (2010) 51 Cal.4th 47, 67-68 [§ 186.22, subd. (b)(1) does not require a defendant be a member of a street gang, only that he commits a felony to benefit a gang, or in association with a gang and that he has a specific intent to aid gang members in the commission of a felony].) The jury was permitted to infer a relationship from the evidence that members of the codefendants' gang trusted him and treated him as if he was one of them, and from expert testimony regarding close ties among certain gangs. Appellant also challenged both the curbside one person show-up, and the photo 6-pack as being unduly suggestive. Even though one person show-ups may pose

a danger of suggestiveness, the are not inherently unfair. The facts of each case must be considered, and for there to be a due process violation, it must be an unduly suggestive procedure (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) As it pertains to the photo 6-pack, there is no requirement that a defendant be surrounded by people nearly identical in appearance. (*People v. Wimberly* (1992) 5 Cal.4th 773, 790.) Here, the defendant had argued that only one person in the 6-pack had long hair.

People v. Garcia (2016) __Cal.4th__, reported on February 26, 2016, in 2016 Los Angeles Daily Journal 1895, the California Supreme Court held that the defendant cannot be found guilty of multiple burglaries when he gains entrance into the front of the store to commit a robbery, and then subsequently entered a separate room. The burglar may be charged with multiple burglaries only if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure. Such a separate expectation of privacy and safety may exist where there is proof that the internal space is owned, leased, occupied, or otherwise possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to the stand-alone structures enumerated in section 459.

People v. Brown (2016) __Cal.App.4th__, reported on February 29, 2016, in 2016 Los Angeles Daily Journal 1952, the First Appellate District, Division 4 held that the trial court erred in failing to instruct, sua sponte, with a lesser included offense of section 240 (simple assault) for the charged offense of section 69, resisting an executive officer. The defendant had a physical altercation with police officers who restrained him following an arrest. The trial court also erred in admitting expert testimony regarding the police standards for use of force when the testimony invaded the province of the jury by inviting jurors to conclude that the use of force was reasonable solely because it was consistent with the officers' training.

People v. Bias (2016) __Cal.App.4th__, reported on March 1, 2016, in 2016 Los Angeles Daily Journal 2027, the Fourth Appellate District, Division 2 held that the trial court erred in granting the defendant's petition to reduce a second degree burglary, to the new offense of petty theft (§ 459.5), since he entered a bank with intent to commit identity theft (see *People v. Barba* (2012) 211 Cal.App.4th 214, 220), by using another person's personal identifying information in order to cash a forged check, written for less than \$600, because such crime does not constitute shoplifting within the meaning of Proposition 47, section 1170.18, subdivision (a).

People v. Chen (2016) Cal.App.4th , reported on March 2, 2016, in 2016 Los Angeles Daily Journal 2082, the Second Appellate District, Division 8 held that the trial court erred in granting the defendant's petition under Proposition 47, section 1170.18, subdivision (a) for the violation of second degree commercial burglary (§ 459), based on having entered the Department of Motor Vehicles building with intent to commit perjury by falsely swearing that he did not receive a previous driver's license in another state and/or under another name. Essentially, the court found that he did not commit the burglary to commit a theft, and therefore, it did not qualify for a reduction to a misdemeanor since it did not fall into the category of a violation of section 459.5, and his crime could not be redefined as "shoplifting" under Proposition 47.



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SAVE THE DATE

- *April: No Dinner Meeting*
- *May: Dinner meeting will be held on Tuesday, May 10, 2016, at Taix French Restaurant. The guest speaker will be criminal defense attorney M. Gerald Schwartzbach and author of new book, "Leaning on the Arc: A Personal History of Criminal Defense."*