CRIMINAL COURTS BAR ASSOCIATION

# NEWSLETTER

PUBLISHED BY THE CRIMINAL COURTS BAR ASSOCIATION MAY, 2014



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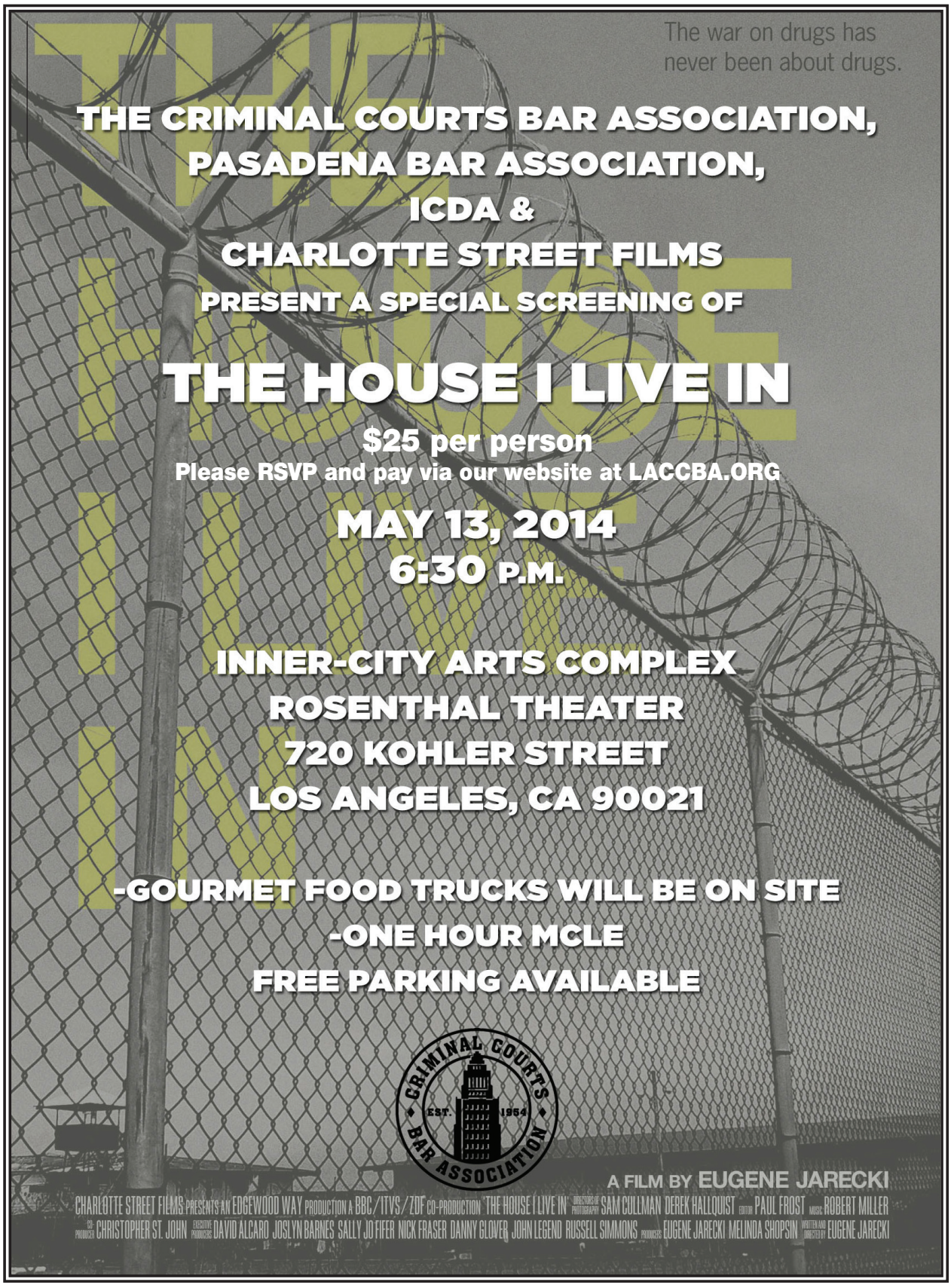

# 2014 Awards Dinner A Huge Success

*Congratulations to president Michael Goldstein on the huge success of the 2014 Criminal Courts Bar Association Awards Dinner. Held at the Hollywood Roosevelt Hotel on Saturday, April 26th the event was completely sold out. Over 350 guests jammed into the Blossom Ballroom for an evening of dinner, drinks, speeches and the celebration of our award winners.*

*Congratulations to the newly installed Officers of our association:*

***Christa Hohmann***
*President-Elect*

***Louis Sepe***
*1st Vice-President*

***Michael Suzuki***
*2nd Vice-President*

***Evan Freed***
*Treasurer*

*Congratulations also to our newly installed Board of Directors:*

| | |
|---|---|
| *David Ayvazian* | *Kevin Greber* |
| *Eric Barter* | *Mark Khalaf* |
| *Ronald Brown* | *Patrick McLaughlin* |
| *Theresa Jo Coady* | *Ezekiel Perlo* |
| *Richard Chacon* | *Victor Salerno* |
| *Janice Fukai* | *Mia Yamamoto* |

*We salute once again our 2014 award winners and thank them for their gracious remarks:*

**JERRY GIESLER MEMORIAL AWARD**
***CHRISTOPHER CHANEY***

**JOSEPH M. ROSEN JUSTICE AWARD**
***JAY JAFFE***

**JOURNALISM EXCELLENCE AWARD**
***CHARLOTTE STREET FILMS***
***"THE HOUSE I LIVE IN"***
***By Director Eugene Jarecki***

**ROBERT M. TAKASUGI**
**JUDICIAL EXCELLENCE AWARD**
***HONORABLE LANCE ITO***

**MORT HERBERT SERVICE AWARD**
***JOHN YZURDIAGA & PAUL HORGAN***

**JOHNNIE COCHRAN AWARD**
***VERNA WEFALD***

**PRESIDENT'S AWARD**
***DR. MIMI SILBERT, Founder, CEO & President***
***DELANCEY STREET FOUNDATION***

# CCBA Newsletter Case Digest

*By Gary Mandinach*

*In re K.J.* (2014) _ Cal.App.4th _, reported on March 24 , 2014, in 2014 Los Angeles Daily Journal 3579, the First Appellate District, Division 3 held that the amendment to Welfare and Institutions Code section 731 that permitted juvenile sex offenders to be committed to Division of Juvenile Facilities (DJF), was intended by the legislature to apply to youths whose offenses occurred prior to the enactment. The amendment is not considered ex post facto since the purpose of a commitment is not punitive, (see *In re Robert M.* (2013) 215 Cal.App.4th 1178, 1186; see also *In re Carl N.* (2008) 160 Cal.App.4th 423, 435-436), and are not considered criminal convictions. (Welf. and Inst. Code § 203; *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 618.)

*People v. Garcia* (2014) _ Cal.App.4th _, reported on March 25, 2014, in 2014 Los Angeles Daily Journal 3664, the Fourth Appellate District, Division 1 held that the defendant can 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 within the store, a bathroom, with the requisite felonious intent to commit a sexual assault. (See *In re M.A.* (2012) 209 Cal.App.4th 317; *People v. Sparks* (2002) 28 Cal.4th 71, [a burglary can be committed when the defendant enters the residence without the intent, but then forms the requisite intent, to commit a crime, before entering the single room in the residence where the crime took place;] see also *People v. Elsey* (2000) 81 Cal.App.4th 948.)

*People v. Garcia* (2014) _ Cal.App.4th _, reported on March 25, 2014, in 2014 Los Angeles Daily Journal 3653, the Sixth Appellate District held that the conditions of probation that a sex offender waive the "privilege against self-incrimination and participate in polygraph examinations," and waive the psychotherapist-patient privilege "to enable communication between the sex offender management professional and supervising probation officer," under section 1203.067, are not constitutionally overbroad or unreasonable. A probation condition may limit a constitutional right so long as the condition is closely tailored to its purpose.

*People v. Petrovic* (2014) _ Cal.App.4th _, reported on March 27, 2014, in 2014 Los Angeles Daily Journal 3812, the Second Appellate District, Division 6 held the evidence was sufficient to show that appellant knowingly possessed child pornography on his computer, even if he did not realize that the images were stored in the computer's temporary Internet files, is a violation of section 311.11. The Court of Appeal did not adopt the dicta from *Tecklenburg v. Appellate Division of the Superior Court* (2009) 169 Cal.App.4th 1402, which relied on *United States v. Kuchinski* (9th Cir. 2006) 469 F.3d 853, to reach an opposite conclusion.

*People v. Dubose* (2014) _ Cal.App.4th _, reported on March 27, 2014, in 2014 Los Angeles Daily Journal 3797, the Fourth Appellate District, Division 2 held that the trial court erred in failing to follow section 654, for carjacking and kidnaping for purposes of robbery, both crimes being part of an indivisible course of conduct in connection with a felony murder and sharing a single common objective. It is for the trial court to determine what the underlying felony is for the double jeopardy analysis and therefore, the trial court must resentence and determine the underlying felony for the felony murder. Additionally, since *Miller v. Alabama* (2012) _ U.S. _ [132 S.Ct. 2455] was not decided at the time of appellant's sentencing, the trial court must, using the factors set forth in *MIller*, such as mitigating factors, age-related characteristics and the nature of the crimes, to determine whether appellant's sentence should be LWOP or 25 to life.

*People v. Morales* (2014) _ Cal.App.4th _, reported on March 28, 2014, in 2014 Los Angeles Daily Journal 3894, the Six Appellate District held that the Court of Appeal has jurisdiction to hear the appeal and not the appellate department of the superior court, when the defendant was initially charged with a felony, even thought the plea bargain was for a misdemeanor. Code section 691, subdivision (f) reads that a felony case is one in which a felony is charged. The Court of Appeal has jurisdiction to hear a case when the defendant is charged with a felony and a misdemeanor, but is convicted only of the misdemeanor. (See *People v. Brown* (1970) 10 Cal.App.3d 169; see also *People v. Spreckels* (1954) 125 Cal.App.2d 507.) This court distinguished *People v. Scott* (2013)221 Cal.App.4th 525, finding that it was a misdemeanor case based on the procedural aspects of that matter.

*In re S.F.* (2014) _ Cal.App.4th _, reported on March 28 2014, in 2014 Los Angeles Daily Journal 3889, the Fourth Appellate District, Division 3 held that where officers had probable cause to detain appellant for jaywalking, and then determined that he had a streaker, an oil-based marker, the officers did not have probable cause to arrest him for violating section 594.2, subdivision (a) (possession of various objects with the intent to commit vandalism). The subsequent search of appellant's bedroom and the finding of the marijuana had to be suppressed as fruit of the poisonous tree. (*Wong Sun v. United States* (1963) 371 U.S. 471, 487-488.)

*People v. Black* (2014) _ Cal.4th _, reported on March 28, 2014, in 2014 Los Angeles Daily Journal 3915, the California Supreme Court held that appellant was not prejudiced by the fact that the trial court denied two defense challenges for cause, which in turn caused appellant to use two peremptory challenges to remove those jurors. Ultimately, appellant wanted to remove two other jurors using peremptory challenges, but he had exhausted his challenges. This court found that appellant cured any error for the failure of the court to remove the two jurors which had been challenged for cause, by the use of the peremptory challenges, and the trial court was under no statutory obligation to grant appellant extra peremptory challenges to remove otherwise competent jurors. Because not incompetent juror who should have been dismissed sat on the jury as a result of exhausting his peremptory challenges he is not entitled to a reversal. (See *People v. Yeoman* (2003) 31 Cal.4th 93.)

*People v. Marinelli* (2014) _ Cal.App.4th _, reported on March 28, 2014, in 2014 Los Angeles Daily Journal 3929, the Sixth Appellate District held that where appellant successfully completed probation for an attempted section 288, subdivision (a) offense, he can move to expunge his plea pursuant to section 1203.4, subdivision (a). (See *People v. Lewis* (2007) 146 Cal.App.4th 294, 298.)

*People v. Brewer* (2014) _ Cal.App.4th _, reported on March 31, 2014, in 2014 Los Angeles Daily Journal 3988, the First Appellate District, Division 5 held that a sentence enhancement imposed pursuant to section 667.5, subdivision (a) based a violent felony prior enhancement, and a current offense which is classified as violent, the 3-year enhancement is imposed for those prison terms that have not "washed out", and the same enhancements which qualify under section 667.5, subdivision (b), must be stayed and not stricken. (Cf. *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122-1123, 1129.)

*People v. Durst* (2014) _ Cal.App.4th _, reported on March 31, 2014, in 2014 Los Angeles Daily Journal 4000, the Third Appellate District held that the defendant's contention on appeal that his confession was involuntary based on the officer's failing to give Miranda warnings in his first interview, and then giving them before his second interview, the "two-step interrogation technique", which was condemned in *Missouri v. Seibert* (2004) 542 U.S. 600 [159 L.Ed.2d 643], is forfeited where his opening brief disregards the trial court's crucial findings concerning the facts and relies on a transcript of his statements that the trial court expressly found to be unreliable. Additionally, the Court of Appeal also found that appellant forfeited his contentions pertaining to the imposition of booking fees under Government Code section 29550.2, and assessing attorney fees under section 987.8, and even if not forfeited, they are without merit as they are materially different than criminal fines which are subject to the right to a jury trial, and the determination, by the jury that he has the ability to pay. (See *Southern Union v. United States* (2012) 567 U.S. _ [183 L.Ed.2d 318] [pertaining to fines and not fees].) Fees imposed pursuant to Government Code section 29550.2 and section 987.8 are not penalties inflicted for the commission of crimes and do not depend on a determination concerning the extent of the crimes; administrative fees do not have to be determined by a jury. (See *People v. Rivera* (1998) 65 Cal.App.4th 705, 707-708.)

*People v. Ngo* (2014) _ Cal.App.4th _, reported on April 1, 2014, in 2014 Los Angeles Daily Journal 4032, the Sixth Appellate District held that the trial court prejudicially erred by giving a unanimity instruction that misstated "2009" as "2010," thereby allowing jury to convict defendant of an offense, alleged to have occurred in 2009, based on separate conduct that occurred in 2010. Even though there was no objection, the error is not forfeited since the instruction affected the substantial right of the defendant. (§ 1259; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn.34.) The failure to instruct on the lesser included offense of attempted sexual penetration with respect to a charge of sexual penetration of a child was error, where there was evidence consistent with the possibility that the defendant attempted to penetrate the victim, but that the child's mother interrupted the attempt when she walked into the room. The error was prejudicial since the evidence of actual penetration was weak. An attempt is a lesser included offense of any completed crime. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609.) The trial court also erroneously instructed the jury on count 1, sexual penetration of a child under 10, which is a specific intent crime, with the instruction on general intent, was harmless under any standard where there was no evidence to support a theory that defendant penetrated the victim without intent to achieve sexual gratification. Given the fact that the court is reversing on different theories of instructional error, there is no possibility of a more favorable outcome based on a cumulative error analysis. (See *People v. Rogers* (2006) 39 Cal.4th 826, 890 [no cumulative effect from independent errors].)

*People v. Steele* (2014) _ Cal.App.4th _, reported on April 3, 2014, in 2014 Los Angeles Daily Journal 4245, the Third Appellate District held that there was sufficient evidence to uphold appellant's conviction for kidnap for prostitution within the meaning of section 267. The evidence established that one of the victims, a teenager, D.L., and her mother were in regular contact and had a substantive parent-child relationship in which the mother endeavored to protect the daughter's safety, even though the daughter often left home for days at a time and stayed with a boyfriend. The Court of Appeal found that this conduct was sufficient to establish that appellant who prostituted the daughter and did so while she was in the legal custody of the parent, an element of kidnaping for prostitution under section 267. (See *People v. Flores* (1911) 160 Cal. 766, 770.)

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# Save The Date

- *CCBA Dinner Meeting will be held on Tuesday, May 13, 2014. Award winning documentary by Charlotte Street Films, "The House I Live In" at Inner-City Arts Complex Rosenthal Theater.*
- *CCBA Dinner Meeting will be held on June 10, 2014 at Taix Restaurant. Dinner speaker to be announced.*