

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 30, 2010**

**SELECTED CASES PENDING IN THE
CALIFORNIA SUPREME COURT**

Jeremy Price

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Privilege Against Self-Incrimination

People v. Lessie, no. S163453 (rev. gr. July 23, 2008)

Question Presented: “Is a minor’s request during police interrogation to speak to a parent an invocation of the privilege against self-incrimination that renders statements made after the request inadmissible?”

Status: Argued and submitted on November 3, 2009

Opinion Below: 161 Cal.App.4th 1085 (no. D050019, filed April 8, 2008). The Sixth District Court of Appeal rejected appellant’s contention that whenever a juvenile asks to speak to his or her parent, interrogation must cease. Instead, the Court of Appeal held that, following the adoption of Proposition 8, the federal totality of the circumstances standard is to be applied to a minor defendant’s claim that his or her statements were elicited in violation of *Miranda*.

Note: *Lessie* will require the Supreme Court to revisit *People v. Burton* (1971) 6 Cal.3d 375, 383-384, which held that “when, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege.”

Pretrial Lineups and Forfeiture

People v. Mena, no. S173973 (rev. gr. August 26, 2009)

Question Presented: “Did defendant forfeit his right to appeal the denial of his request for a physical identification lineup prior to the preliminary hearing (see *Evans v. Superior Court* (1974) 11 Cal.3d 617) because he failed to seek immediate review of the ruling by filing a petition for writ of mandate?”

Status: Appellant’s reply brief due

Opinion Below: 173 Cal.App.4th 1446 (no. D052091, filed May 19, 2009). Division One of the Fourth District Court of Appeal held: “First, we conclude a defendant’s right to relief is waived if he does not challenge an adverse ruling by a timely pretrial petition for a peremptory writ.” The Court of Appeal further held:

“Even assuming the claim of error is preserved and the trial court abused its discretion when it denied the motion, we conclude any alleged error was harmless beyond a reasonable doubt.”

Note: In *Evans*, the United States Supreme Court concluded “due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.” The California Supreme Court in this case will be called on to decide whether the failure to seek pretrial writ relief on this issue amounts to non-compliance with the “timely request” requirement announced in *Evans*.

DNA, Arrest Warrants, and Statutes of Limitations

People v. Robinson, no. S158528 (rev. gr. February 13, 2008)

Question Presented: (1) “Does the issuance of a ‘John Doe’ complaint and arrest warrant timely commence a criminal action and thereby satisfy the statute of limitations?”

(2) “Does an unknown suspect’s DNA profile satisfy the ‘particularity’ requirement for an arrest warrant?”

(3) “What remedy is there, if any, for the unlawful collection of genetic material under the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (Pen. Code, section 295 et seq.)?”

(4) What is “the effect, if any, of the holding in *Herring v. United States* (2009) ___ U.S. ___. 129 S.Ct. 695, on the issue of whether the exclusionary rule applies to blood samples mistakenly collected from defendant Robinson by law enforcement for inclusion in our state DNA data base?”

Status: Argued and submitted - *Decision due on January 25, 2010*

Opinion Below: 156 Cal.App.4th 508 (C044703, filed October 26, 2007). The Third District Court of Appeal held: “the statute of limitations for a sexual offense is satisfied when the prosecution is commenced within the period of limitations by the filing of an arrest warrant predicated upon the identification of the perpetrator

by a DNA profile. (See Pen.Code, § 804, subd. (d).)” According to the Court of Appeal: “the DNA profile of the perpetrator of a sexual offense incorporated in an arrest warrant provides the particularity of identification of an offender required by [Penal Code] section 804.”

Note: In *Herring v. United States* (2009) __ U.S. __. 129 S.Ct. 695, the United States Supreme Court considered the scope of the good faith exception to the Fourth Amendment exclusionary rule and held: “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”

Birotte v. Superior Court, no. S176965 (rev. gr. November 10, 2009)

Question Presented: “When is the identity of a suspect ‘conclusively established by DNA testing’ for purposes of the one-year statute of limitations under Penal Code section 803, subdivision (g)(1)?”

Status: Respondent’s answer brief due

Opinion Below: 177 Cal.App.4th 559 (B213606, filed September 8, 2009). Division Seven of the Second District Court of Appeal held: “the additional one-year limitations period does not begin at least until qualified laboratory personnel fully evaluate and verify the data generated by the initial, automated computer match between the DNA profile developed from a suspect’s biological sample and the DNA profile developed from evidentiary sources, including biological materials left by perpetrators at crime scenes or obtained from victim examinations. Indeed, although as a practical matter it may eliminate any limitations period for crimes to which [Penal Code] section 803(g)(1) applies, a reasonable interpretation of the statutory language, viewed in context, suggests the additional one-year limitations period does not commence until a biological sample has been obtained with a sufficient chain of custody for the DNA profile developed from it to be admissible in evidence, that DNA profile has been matched to a DNA profile developed from crime scene evidence and statistical analyses have been completed that establish with sufficient certainty the suspect is the source of the evidentiary profile. Because the criminal complaint was filed in this matter within one year of even the earliest of those possible trigger dates, the trial court properly denied Birotte’s motion to dismiss the charges as barred by the

statute of limitations.”

Note: Penal Code section 803(g)(1) provides: “Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing, if both of the following conditions are met: [¶] (A) The crime is one that is described in subdivision (c) of Section 290. [¶] (B) The offense was committed prior to January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004, or the offense was committed on or after January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense.”

Search Incident to Arrest

People v. Diaz, no. S166600 (rev. gr. October 28, 2008)

Questions Presented: (1) “Was defendant’s cell phone an item ‘immediately associated with the person of the arrestee’ within the meaning of *United States v. Edwards* (1974) 415 U.S. 800, and thus subject to search incident to his arrest?”

(2) “Was the warrantless search of the cell phone an hour and a half after the arrest, while defendant was being interrogated, invalid under *United States v. Chadwick* (1977) 433 U.S. 1?”

(3) In light of the decision of the United States Supreme Court in *Arizona v. Gant* (Apr. 21, 2009, No. 07-542) __ U.S. __ [129 S.Ct., 1710, 173 L.Ed.2d 485, 2009 WL 1045962], the California Supreme Court ordered supplemental briefing on the following question: “May police, while interrogating a suspect about 90 minutes after arresting him and transporting him to the station, conduct a warrantless search of information contained in a cell phone that was on the suspect’s person at the time of his arrest?”

Status: Fully briefed

Opinion Below: 165 Cal.App.4th 732 (B203034, filed July 30 2008). Division Six of the Second District Court of Appeal held: “the cell phone was immediately associated with Diaz’s person at the time of his arrest, and was therefore properly subjected to a delayed warrantless search.”

Note: The Court of Appeal issued its decision in this case before the United States Supreme Court decided *Gant*, which held that *New York v. Belton* (1981) 453 U.S. 454 “does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.” *Gant* further held: “circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.”

Compulsory Process

People v. Jacinto, no. S164011 (rev. gr. July 30, 2008)

Question Presented: “Was defendant denied his constitutional rights to compulsory process and due process when the sheriff’s department released a subpoenaed defense witness to federal immigration authorities for deportation prior to defendant’s trial?”

Status: Fully briefed

Opinion Below: 162 Cal.App.4th 373 (no. A117076, filed April 23, 2008). Division Five of the First District Court of Appeal held that “the trial court erred when it concluded that the sheriff’s department’s act of releasing [the subpoenaed defense witness] to federal custody was state action,” a necessary prerequisite to a compulsory process claim. In addition, the Court of Appeal held: “Without knowledge of the materiality of the deported witness’s testimony, there was no violation of appellant’s rights to compulsory or due process, and the trial court erred in granting the motion to dismiss.”

Note: One key question for the Supreme Court will be the validity of the Court of Appeal’s assertion that “the action of the sheriff’s department or county jail personnel may not be attributed to the prosecution” because “the sheriff’s department was no more than the custodian of [the] witness” and therefore “was not a part of the prosecutorial investigative team.”

Discovery

Barnett v. Superior Court, no. S165522 (rev. gr. September 17, 2008)

Questions Presented: (1) “Is an out-of-state law enforcement agency part of the prosecution team for purposes of the disclosure obligations under *Brady v.*

Maryland (1963) 373 U.S. 83, if the agency’s involvement is limited to providing the prosecution with previously existing records regarding a defendant’s prior crimes?”

(2) “Is a prisoner seeking post-conviction discovery under Penal Code section 1054.9 required to produce evidence indicating the actual existence of the discovery material he or she is requesting?”

(3) “Is a prisoner seeking post-conviction discovery under section 1054.9 required to plead a theory indicating the materiality of the materials requested if the basis for discovery is the prosecutor’s *Brady* obligation to disclose exculpatory materials?”

(4) “Is section 1054.9 unconstitutional as an unauthorized legislative amendment to the criminal discovery scheme established by Proposition 115?”

Status: Fully briefed

Opinion Below: 164 Cal.App.4th 18 (no. C051311, filed June 19, 2008). The Third District Court of Appeal held, *inter alia*,: “even if the out-of-state law enforcement agencies were not part of the ‘prosecution team,’ the People used those agencies to assist in their prosecution of the capital case against Barnett. Accordingly, the People had constructive possession of information possessed by those agencies, and the People’s constitutional duty to disclose exculpatory information extended to information in the possession of those agencies.”

Note: This capital case is related to the automatic appeal in *People v. Barnett* (1998) 17 Cal.4th 1044. In *People v. Superior Court (Pearson)*, no. S171117, the Supreme Court has ordered briefing on the same issue identified in question number 4 above. *Pearson* has been fully briefed as well.

Galindo v. Superior Court, no. S170550 (rev. gr. March 25, 2009)

Question Presented: “Does a criminal defendant have a right to obtain *Pitchess* discovery (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) prior to the preliminary hearing?”

Status: Fully briefed

Opinion Below: 169 Cal.App.4th 1332 (B208923, filed January 7, 2009). Division

Eight of the Second District Court of Appeal held: “a defendant may not seek *Pitchess* discovery for use in a preliminary hearing.”

Note: In 1974, the California Supreme Court ruled in *Pitchess* that a criminal defendant may discover evidence of citizen complaints alleging misconduct by law enforcement officers if that misconduct assists in the defense. In 1978, the California Legislature codified procedures governing *Pitchess* discovery at Evidence Code sections 1043 to 1045. (See also Pen.Code, §§ 832.7, 832.8 [defining officer’s personnel records subject to *Pitchess* discovery].) Neither the Legislature nor the Supreme Court, however, has previously addressed the availability of *Pitchess* discovery prior to a preliminary hearing.

Kling v. Superior Court, no. S176171 (rev. gr. November 10, 2009)

Questions Presented: (1) “What role does the prosecution have in an in camera hearing to determine whether to disclose third party documents to the defense?”

(2) “Is the prosecution entitled to information at that time about the documents subpoenaed and from whom they were subpoenaed, or is such disclosure only required (see Pen. Code, section 1054.3) once the defense decides to use the documents at trial?”

Status: Appellant’s answer brief due

Opinion Below: 177 Cal.App.4th 223 (B208748, filed August 31, 2009). Division Six of the Second District Court of Appeal held: “Absent exceptional circumstances, the prosecution may not know who the defense has subpoenaed or what documents were subpoenaed unless the defense decides to use them at trial. The prosecution is then entitled to discovery pursuant to the reciprocal discovery provisions of [Penal Code] section 1054.3. At [Penal Code] section 1326 hearings, the prosecution is often seen but not heard. The prosecution’s compelled silence may be broken when the court calls upon it to ‘address any questions the trial court has.’ ([Citation].) This is likely to occur when the subpoena concerns privacy rights of third parties.”

Note: In *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, the Supreme Court left unanswered the question to what extent the prosecution may participate during in camera hearings to determine whether the defendant is entitled to receive documents subpoenaed pursuant to Penal Code section 1326. It appears the Court has now decided to answer that question.

Speedy Trial Rights

People v. Sutton, no. S166402 (rev. gr. October 28, 2008)

Question Presented: “Were defendants’ statutory speedy trial rights violated when defense counsel announced ready but that he might be in another trial, and the court continued trial for six days over defendants’ personal objection, and if so, was the error prejudicial?”

Status: Fully briefed

Opinion Below: 165 Cal.App.4th 646 (B195337, filed July 30, 2008). Division Three of the Second District Court of Appeal held: “an appointed counsel’s present engagement in another matter is good cause to continue the joint trial of jointly charged defendants.”

Note: This case will lead the Supreme Court to revisit *People v. Johnson* (1980) 26 Cal.3d 557, which held that when a client expressly objects to waiving his or her right to a speedy trial under Penal Code section 1382, “counsel may not waive [the speedy trial] right to resolve a calendar conflict when counsel acts not for the benefit of the client before the court but to accommodate counsel’s other clients.” In this case, the question is whether *Johnson*’s holding should be extended to include counsel’s ongoing engagements in another matter (as opposed to counsel giving preference to other matters in which counsel is not yet presently engaged).

People v. Hajjaj, no. S175307 (rev. gr. September 30, 2009)

Question Presented: “Was defendant denied his statutory right to a speedy trial where the trial court found good cause for a one-day continuance when a courtroom became available on the last day for trial but it was too far away to be reached before the normal close of business on that day?”

Status: Respondent’s answer brief due

Opinion Below: 175 Cal.App.4th 415 (D054754, filed June 29, 2009). Division One of the Fourth District Court of Appeal held: “when, on the last day of the statutorily prescribed time period for commencement of trial in a criminal case, a courtroom becomes ready and available for trial in the late afternoon at a branch court that is physically remote from the criminal calendar court at the main

courthouse and that remoteness prevents the parties and counsel from appearing for trial that day, the physical remoteness constitutes good cause within the meaning of [Penal Code] section 1382(a) to commence the trial the next day at the branch court.”

Note: Penal Code section 1382 provides, in relevant part: “The court, unless *good cause* to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] . . . [¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant’s arraignment on an . . . information However, an action shall not be dismissed under this paragraph if either of the following circumstances exist: [¶] . . . [¶] (B) The defendant requests or consents to the setting of a trial date beyond the 60-day period. Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be *brought to trial* on the date set for trial or within 10 days thereafter.” (Pen. Code, § 1382, subd. (a)(2)(B), italics added.) The Supreme Court’s focus will likely be on the meaning of the phrases “good cause” and “brought to trial,” as used in Penal Code section 1382. The Supreme Court previously addressed the meaning of both phrases in *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772.

People v. Wagner, no. S175794 (rev. gr. September 30, 2009)

Questions Presented: (1) “Did the trial court err in dismissing this case for violation of defendant’s statutory right to a speedy trial on the ground no criminal courtroom was available?”

(2) “Should criminal cases facing dismissal on speedy trial grounds be given precedence over civil cases pursuant to Penal Code section 1050, subdivision (a), either as a matter of law or under the circumstances of this case?”

Status: Fully briefed

Opinion Below: 175 Cal.App.4th 1377 (E047167, filed July 21, 2009). Division Two of the Fourth District Court of Appeal held that the trial court “properly exercised its discretion in finding no available courtrooms [] and in denying the People’s request for a continuance due to court congestion.” The Court of Appeal continued: “Consequently, . . . dismissal was necessary in order to avoid a violation of defendant’s statutory speedy trial rights.”

Note: Determining whether criminal cases facing dismissal on speedy trial grounds

should be given precedence over civil cases pursuant to Penal Code section 1050, subdivision (a)¹, will require the Supreme Court to revisit *People v. Osslo* (1958) 50 Cal.2d 75, which held, in part: “The precedence to which criminal cases are entitled is not of such an absolute and overriding character” The same issues presented in this case are also under review in *People v. Engram*, no. S176983.

Competence To Stand Trial

People v. Ary, no. S173309 (rev. gr. July 29, 2009)

Questions Presented: “At a retrospective competency hearing, does the prosecution or the defendant bear the burden of proving competence by a preponderance of the evidence?”

Status: Fully briefed

Opinion Below: 173 Cal.App.4th 80 (no. A113020, filed April 20, 2009). Division Two of the First District Court of Appeal held: “the presumption of competency created by the Penal Code (§ 1369, subd. (f)) was designed to apply only to competency hearings conducted during the pendency of a criminal action, not to a postsentencing hearing conducted nunc pro tunc after a *Pate*^[2] violation. Because the fundamental fairness implicit in the concept of due process creates a rebuttable presumption of incompetency upon the vindication of a *Pate* claim, the burden at a retrospective hearing lies with the prosecution to show by a preponderance of the evidence that the defendant was competent to stand trial at the time he was tried.”

Note: As the Court of Appeal noted, the question of the proper burden of proof at a retrospective competency hearing has never been addressed by California’s Legislature or by Congress, and perhaps not by any state legislatures. The United States Supreme Court has held that placing the burden of proof on the defendant to

¹Penal Code section 1050, subdivision (a), provides in relevant part: “criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.”

²In *Pate v. Robinson* (1966) 383 U.S. 375, the United States Supreme Court held that due process requires trial courts to suspend criminal proceedings and hold a competency hearing when faced with substantial evidence of the defendant’s incompetence, irrespective of whether a doubt has been declared.

prove incompetency at the time of trial or sentencing is not inconsistent with federal due process principles. (*Medina v. California* (1992) 505 U.S. 437.) This appeal is the second *Ary* appeal, with the previous one having been the first California case to authorize a retrospective competency hearing. (*People v. Ary* (2004) 118 Cal.App.4th 1016.)

Confrontation

People v. Herrera, no. S171895 (rev. gr. May 20, 2009)

Question Presented: “Did the trial court err in determining that a prosecution witness who had been deported and could not be extradited to the United States, was unavailable within the meaning of Evidence Code section 240, or was the prosecution required to show further due diligence to establish the unavailability of the witness before introducing the witness’s prior testimony from the preliminary hearing?”

Status: Fully briefed

Opinion Below: 2009 WL 498627 (no. G039028, filed February 26, 2009). Division Three of the Fourth District Court of Appeal held: “Defendant’s appeal asserts that the court erred in permitting a witness’s preliminary hearing testimony to be read into evidence after the witness could not be found. For reasons stated below, we agree the prosecution failed to exercise due diligence and the court erred in permitting this testimony to be read. We therefore reverse the judgment.”

Note: This case will require the Supreme Court to apply the unavailability standard it articulated in *People v. Cromer* (2001) 24 Cal.4th 889: “Generally, a witness is not unavailable for purposes of the right of confrontation ‘unless the prosecutorial authorities have made a good-faith effort to obtain [the witness’s] presence at trial.’ [Citations.] (As we mentioned at the outset, and as we explain in detail later, under California law the prosecution must show reasonable or due diligence in locating the witness.)”

On December 2, 2009, the California Supreme Court granted review in several cases dealing with the United States Supreme Court’s recent decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2257, which held that laboratory reports are testimonial hearsay evidence within the meaning of *Crawford* and are inadmissible in a criminal proceeding unless the person creating the report is unavailable and the defendant had a prior opportunity to cross-examine the creator. Richard Braucher has

prepared a presentation examining the impact of *Melendez-Diaz* for this seminar. Therefore, these materials will only list the cases where review has been granted to address this issue without further discussion:

People v. Dungo, no. S176886

People v. Gutierrez, no. S176620

People v. Lopez, no. S177046

People v. Rutterschmidt, no. S176213

Homicide and Collateral Estoppel

People v. Superior Court (Sparks), no. S164614

Questions Presented: (1) “Did principles of collateral estoppel, as applied in *People v. Taylor* (1974) 12 Cal.3d 686, preclude the prosecution from trying defendant for murder on a felony-murder theory after the actual killer had been acquitted of murder on such a theory?”

(2) “Is *Taylor* still good law, or should that decision be overruled or disapproved?”

Status: Argued and submitted on December 8, 2009

Opinion Below: 2008 WL 2316504 (no. C057766, filed June 6, 2008). The trial court ruled that “the doctrine of collateral estoppel precluded petitioner (the People) from trying real party in interest ([the defendant]) for felony murder based on a plan to steal marijuana plants that resulted in the killing of two people. The superior court’s ruling was based on the fact that separate juries in separate trials found that two others who also were involved in the plan to steal marijuana [] were either not guilty of any crimes, including felony murder, or guilty only of the lesser included offense of voluntary manslaughter.” The Third District Court of Appeal reversed and held: “the doctrine of collateral estoppel does not apply here where [the defendant’s] alleged guilt is not premised solely on vicarious liability and the evidence to be introduced at his trial is different than the evidence in the other two trials.” The Court of Appeal therefore granted “the People’s petition for a writ of mandate to compel the superior court to vacate its order barring the People from trying [the defendant] for crimes greater than voluntary manslaughter.”

Note: In *Taylor*, the Court addressed whether a defendant’s murder conviction was barred by application of the doctrine of collateral estoppel based on the prior acquittal of his confederate of the same charge. The Court reversed the defendant’s

murder conviction, because the defendant's guilt, "if any, of the murder charge is vicarious and can be predicated only on the guilty conduct of his confederates. Since the People failed to establish such guilty conduct at [the confederate's] trial, they are now barred from relitigating that identical issue." The Court held: "the lack of identity of parties defendant does not preclude the application of the doctrine of collateral estoppel . . ." But, the Court limited its holding to "the particular circumstances of the instant case where an accused's guilt must be predicated on his vicarious liability for the acts of a previously acquitted confederate."

Sex Offenses and the Defense of Consent

People v. Soto, S167531 (rev. gr. December 10, 2008)

Question Presented: "Is the victim's consent a defense to a charge of committing lewd acts with a child under 14 years of age by 'use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury' (Pen. Code, § 288, subd. (b))?"

Status: Fully briefed

Opinion Below: WL 4147345 (no. H030475, filed September 9, 2008). The Sixth District Court of Appeal held: "the trial court told the jury that consent was not a defense though the People were relying on duress. This was error and deprived defendant of a defense. A defendant has a constitutional right to have the jury determine every material issue presented by the evidence."

Note: According to the Court of Appeal: "[A] conviction based on 'duress,' . . . necessarily implies that the 'will of the victim' has been overcome." Therefore, the Court of Appeal reasoned: "It follows that, whether characterized as a substantive element or affirmative defense, the concept of consent is a defense to a section 288, subdivision (b)(1), charge if the People rely on duress."

Gang Crimes and Enhancements

A number of cases involving gang crimes and enhancements are pending in the California Supreme Court. Only the names of these cases and the questions presented are included here, as Jonathan Soglin's seminar materials and presentation on "Gang Crimes and Enhancements" will deal with them in greater detail.

People v. Abillar, no. S163905 (rev. gr. August 13, 2008)

Questions Presented: (1) “Did substantial evidence support defendants’ convictions under Penal Code section 186.22, subdivision (a), and the true findings with respect to the enhancements under Penal Code section 186.22, subdivision (b)?”

(2) “[W]hether the phrase felonious criminal conduct, appearing in Penal Code section 186.22, subdivision (a) should be interpreted to mean felonious criminal *gang-related* conduct?”

People v. Tran, no. S176923 (rev. gr. December 12, 2009)

Question Presented: “Did the trial court abuse its discretion in allowing the prosecution to introduce evidence of defendant’s own uncharged criminal acts in order to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) and (e)?”

Robbery

People v. Anderson, no. S175351 (rev. gr. October 14, 2009)

Question Presented: “Was defendant entitled to a jury instruction, without a request, on accident as a defense to robbery, and, if so, was the court’s failure to give the instruction prejudicial?”

Status: Respondent’s answer brief due

Opinion Below: 2009 WL 1913308 (D054740, filed July 2, 2009). Division One of the Fourth District Court of Appeal held: “a [Penal Code] section 26 defense of accident would necessarily apply when a defendant only accidentally strikes his or her victim during asportation of stolen property. In a case in which there is substantial evidence to support a defense theory of accident, the trial court has a duty to instruct sua sponte on that defense.” The Court of Appeal further concluded “there was substantial evidence to support the defense of accident to the charge of robbery and that defense was not inconsistent with Anderson’s defense theory (and Anderson, in fact, relied on that defense theory).” Although the Court of Appeal held the trial court erred in not instructing on the accident defense, it deemed the instructional error nonprejudicial under both *Watson* and *Chapman*.

Note: If the Supreme Court finds instructional error, it will likely have to decide whether *Watson* or *Chapman* applies. As the Supreme Court recently noted in *People v. Salas* (2006) 37 Cal.4th 967, 984: “We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense.”

Probation and Plea Bargains

People v. Feyrer, no. S154242 (rev. gr. September 12, 2007)

Question Presented: “Did the trial court have the power, over the People’s objection, to declare defendant’s offense a misdemeanor, terminate probation, and dismiss the case when defendant had pled no contest to a felony charge of assault by means of force likely to produce great bodily injury and had admitted an enhancement for the personal infliction of great bodily injury?”

Status: Argued and submitted on January 6, 2010

Opinion Below: 151 Cal.App.4th 506 (B192752, filed September 12, 2007). Division Six of the Second District Court of Appeal held: “if as in the instant case, *imposition* of sentence is suspended, judgment is not imposed and the trial court retains jurisdiction over the case. (§§ 1203, subd. (a), 1203.2, subd. (c), 1203.3, subd. (a); Cal. Rules of Court, rule 4.435(b)(1).) This includes the power to impose judgment and sentence or modify the terms and conditions of probation in the event of a violation, and to grant reduction of a wobbler offense to a misdemeanor and dismiss the case.”

Note: When review was first granted in this case, the Supreme Court ordered briefing deferred behind *People v. Segura* (2008) 44 Cal.4th 921. The Supreme Court ordered briefing in this case after deciding *Segura*, which held: “when, as in the present case, the parties negotiate a plea agreement that, among other express provisions, grants probation incorporating and conditioned upon the service of a specified jail term, the resulting term of incarceration is not - and may not be treated as - a mere standard condition of probation. Rather, the term of incarceration is in the nature of a condition precedent to, and constitutes a material term of, the parties’ agreement. [Footnote] As such, the jail term is not subject to subsequent modification without the consent of *both* parties, and cannot be altered solely on the basis of the trial court’s general statutory authority to modify probation during the probationary period.”

People v. Martin, no. S175356 (rev. gr. October 22, 2009)

Question Presented: “Can factors underlying a charged criminal offense that is dismissed as part of a plea bargain be considered in setting conditions of probation if the plea agreement did not include a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) permitting the dismissed count to be considered in determining the sentence to be imposed?”

Status: Appellant’s opening brief due

Opinion Below: 175 Cal.App.4th 1252 (E046579, filed June 24, 2009). Division Two of the Fourth District Court of Appeal held: “the court was well within its discretion in imposing the domestic violence conditions” where the only allegation of domestic violence stemmed from a dismissed count, and “the court was not barred by *Harvey* from imposing them.”

Note: By granting review in this case, the Supreme Court will address the conflict between *Martin* and the Fifth District Court of Appeal’s decision in *People v. Beagle* (2004) 125 Cal.App.4th 415, which held that *Harvey* applied to conditions of probation as well as prison sentences.

Rape Shield Law

People v. Fontana, no. S170528 (rev. gr. April 15, 2009)

Question Presented: “Did the Court of Appeal correctly hold (a) that the protections of the rape shield law (Evid. Code, §§ 782, 1103) did not apply in this case due to defendant’s denial that he had sexual intercourse with the victim and (b) that the trial court thus committed reversible error when it excluded evidence that the victim had engaged in consensual sexual intercourse with her boyfriend on the morning of the alleged sexual assault?”

Status: Fully briefed

Opinion Below: 2009 WL 74347 (no. A117503, filed January 13, 2009). Division Five of the First District Court of Appeal held: “Because [] evidence [the alleged victim had consensual sexual relations with someone other than the defendant on the morning of the alleged sexual assault] was relevant and admissible to corroborate appellant’s version of events and show that injuries attributable to the assault could have been caused by the earlier consensual encounter, and because

the record does not establish that this evidence was harmless beyond a reasonable doubt, we reverse.”

Note: The Court of Appeal applied the federal constitutional *Chapman* prejudice standard of review because the error violated appellant’s federal constitutional rights to confront witnesses and present a defense.

Presumption of Innocence

People v. Hernandez, no. S175615 (rev. gr. September 9, 2009)

Question Presented: “Did the trial court abuse its discretion in requiring a uniformed, armed deputy sheriff to stand or sit immediately behind the defendant during his testimony?”

Status: Respondent’s opening brief due

Opinion Below: 175 Cal.App.4th 940 (no. A119501, filed July 10, 2009). Division Two of the First District Court of Appeal held: “The *routine* procedure of placing an armed deputy sheriff closely behind a defendant when he or she takes the stand to testify is rational only upon the assumptions that (1) *all* criminal defendants are potentially violent or disruptive and present a risk to courtroom security, (2) the risk is *always* sufficient to warrant the routine procedure, and (3) the routine procedure *never* infringes a defendant’s due process right to a fair trial and therefore need not be modified in order to accommodate that right. The first two assumptions are so irrational as to go beyond the legal pale, and the third is outside the legal boundaries that constrain discretion. The trial judge’s indulgence of these assumptions constituted a dereliction of her preeminent judicial responsibility to insure that trials are conducted as fairly and impartially as the circumstances permit. [¶] The fact that the trial court felt it unnecessary to even inquire whether appellant posed any danger to courtroom security, the absence of any showing appellant presented such a danger, and the likelihood that the challenged procedure prejudiced appellant in juror’s eyes, compel us to conclude, as we do, that the court abused its discretion.” The Court of Appeal continued: “The abuse of discretion was exacerbated by the trial court’s puzzling refusal to give a cautionary instruction that might have diminished the possibility that the jury would infer from the deployment of the armed guard that appellant was dangerous and untrustworthy.”

Note: Briefing in this case had originally been deferred pending the outcome in

People v. Stevens (2009) 47 Cal.4th 625. After the Supreme Court decided *Stevens*, the Court directed respondent to file an opening brief in this matter. Respondent filed a motion to dismiss review in light of *Stevens*, but the Court denied the request. *Stevens* held: “the stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice that must be justified by a showing of manifest need. Defendant Lorenzo Stevens attempts to bring his case under the exacting manifest need standard by asserting that the deputy’s presence is akin to a ‘human shackle.’ A divided Court of Appeal rejected this argument, and we do so as well.” *Stevens* offered the following guidelines for future consideration: “Trial court decisions regarding courtroom security continue to be reviewed for abuse of discretion. Any exercise of discretion must be informed by the particular circumstances of a given case. Many security and decorum procedures are routine and do not run the risk of prejudice. However, when the court imposes a measure that is inherently prejudicial to the defendant’s right to assist in his defense, competently present his own testimony, or enjoy the presumption of innocence, the trial court must take particular care. In order to employ an inherently prejudicial procedure, the court must find a manifest need sufficient to justify the risk of prejudice. When an inherently prejudicial procedure is employed, a reviewing court will inquire whether, based on the record below, the trial court reasonably balanced the need for heightened security against the constitutional rights afforded the defendant. Only a showing of manifest need will support the use of such measures. Inherently prejudicial practices include visible shackling, stun belts, or other affronts to human dignity, or methods that convey to the jury that the defendant must be separated from the community at large because he is especially dangerous or culpable, or is the cause of some official concern or alarm. ([Citation.]) Although the stationing of a security officer at the witness stand during an accused’s testimony is not an inherently prejudicial practice, the trial court must exercise its own discretion in ordering such a procedure and may not simply defer to a generic policy.”

Victim Restitution

People v. Anderson, no. S170778 (rev. gr. April 29, 2009)

Question Presented: “Did the trial court err in awarding restitution to the hospital that treated the victim of the defendant’s hit-and-run offense?”

Status: Fully briefed

Opinion Below: 170 Cal.App.4th 910 (no. D050432, filed December 31, 2008).

Division One of the Fourth District Court of Appeal held: “Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria. It is not limited to damages specifically caused by the crime of which the defendant was convicted.”

Note: In affirming the restitution order, the Court of Appeal distinguished *People v. Slattery* (2008) 167 Cal.App.4th 1091, which held that a hospital that treated a victim injured by a defendant is itself not a “victim” for purposes of restitution under Penal Code section 1202.4, subdivision (f). *Slattery*, however, was not a case in which the victim restitution order was imposed as a condition of probation.

Parole Hearings

In re Molina, no. S172589 (rev. gr. July 29, 2009)

Question Presented: “When a court determines the Board of Parole Hearings abused its discretion in denying parole to an inmate, may it order the Board to release the inmate on parole or must it allow the Board to redetermine the inmate’s parole suitability and afford the Governor the opportunity to exercise his or her independent constitutional right to review parole decisions?”

Status: Fully briefed

Opinion Below: 2009 WL 1026596 (no. B208260, filed April 16, 2009). The trial court granted the prisoner’s habeas petition seeking reversal of the Board’s finding he was unsuitable for parole. Division Six of the Second District Court of Appeal affirmed and remanded the matter to the trial court with directions to “remand to the Board with instructions to release Molina on parole in accordance with conditions set by the Board.”

Note: The Supreme Court is not reviewing the Board’s parole suitability determination. Rather, review in this case extends only to the proper course of action following reversal of a Board determination denying parole.

In re Prather, no. S172903 (rev. gr. July 29, 2009)

Question Presented: “When a court determines the Board of Parole Hearings abused its discretion in denying parole to an inmate, may it order the Board to find the inmate suitable for parole unless new and different evidence of the inmate’s

conduct in prison subsequent to the parole hearing at issue supports a determination that the inmate currently poses an unreasonable risk of danger to society if released on parole?”

Status: Fully briefed

Opinion Below: 2009 WL 1124976 (no. B211805, filed April 28, 2009). Division Five of the Second District Court of Appeal granted the prisoner’s habeas petition seeking to overturn the Board’s parole unsuitability determination and directed the Board “to find Mr. Prather suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new and different evidence of Mr. Prather’s conduct in prison subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole.”

Note: Like *Molina*, the Supreme Court is not reviewing the Board’s parole suitability determination. Rather, review in this case extends only to the proper course of action following reversal of a Board determination denying parole.

Civil Commitment

People v. Lara, S155481 (rev. gr. September 25, 2007)

Questions Presented: (1) “Did the untimely filing of the petition to extend an insanity commitment deny defendant due process, when there was no good cause for the delay and the late filing allegedly left him with insufficient time to prepare for the hearing on the petition?”

(2) “Does Penal Code section 1026.5 authorize the confinement of a defendant pending a recommitment hearing when the prosecution files a recommitment petition, without good cause, so late that the defense is unable to prepare for trial before the commitment expires?”

(3) “Do the facts of this case allow this court to reach question No. [2]?”

(4) “In the absence of a time waiver, does a trial court have jurisdiction to continue an NGI recommitment hearing beyond the expiration date of the defendant’s current commitment?”

(5) “If the court loses jurisdiction to hold a committee once the NGI commitment

expires, is there any other authority for the court to order a committee held for the protection of the committee or others?”

Status: Argued and submitted on December 9, 2009

Opinion Below: 2007 WL 2040584 (H028895, filed July 17, 2007). According to the Sixth District Court of Appeal: “Appellant’s counsel made an unchallenged claim that the late filing left inadequate time to prepare for a predeprivation hearing. The onus was then on the People to show that the government had extraordinary reasons for the delay that warranted deprivation of appellant’s liberty following expiration of the current commitment pending a post-deprivation hearing. In the absence of any such showing, appellant was entitled to dismissal of the petition.”

Note: In finding a due process violation, the Court of Appeal observed: “We do not believe that a person whose personal liberty is placed at risk by a recommitment petition is required to forgo a predeprivation hearing to which he is entitled and suffer further deprivation of liberty without constitutionally adequate procedures in order to retain other safeguards of procedural due process, namely adequate time to prepare and a fair hearing.”

The Court of Appeal’s reasoning in *Lara* is consistent with that of Division Five of the First District Court of Appeal in *People v. Price*, which is also pending before the California Supreme Court (S151207). On similar facts, *Price* held: “the statute requires that a defendant be given adequate time to prepare for trial *before* the previous commitment expires. Here, because the petition was filed so late, appellant was not given adequate time to prepare for trial before his commitment expired. He therefore was forced to choose between proceeding to trial without adequate preparation, or remaining in custody past the date on which he normally would be released.”

Both *Lara* and *Price* conflict with the decision of Division Three of the First District Court of Appeal in *People v. Mitchell* (2005) 127 Cal.App.4th 936, which held: “We conclude that because defense counsel ‘was afforded at least as long to prepare the case [for trial] as would have been available had the petition been timely filed’ ([citation]), appellant suffered no actual prejudice from the delay. Consequently, the trial court’s decision not to dismiss respondent’s petition, and to proceed to trial, was not an abuse of discretion or a violation of due process, regardless of whether respondent was able to show good cause for its failure to file the petition in accordance with the directory time guidelines. Appellant’s

arguments to this court simply ignore the fact the trial court granted ample time to the defense to prepare its case for trial, obviating the kind of serious prejudice that has led appellate courts to reverse in other cases of belatedly filed petitions to extend involuntary commitment.”

People v. Cobb, S159410 (rev. gr. March 12, 2008)

Questions Presented: (1) Was defendant denied due process and a fair trial by delay in the prosecution of a petition for continued involuntary treatment and continued detention until 23 days after his release date?”

(2) “Did defendant’s pre-parole certification as a mentally disordered offender, which required him to accept treatment as a condition of parole, suffice to justify his continued detention pending trial on a petition for continued involuntary treatment?”

(3) “Does Penal Code section 2972 authorize the continued confinement of a person previously found to be a mentally disordered offender when the trial on the continuation petition has not commenced before the person was otherwise to have been released, the person has not waived time, and good cause for the delay has not been shown?”

(4) “Do the facts in this case allow this court to reach question No. [3]?”

(5) “In the absence of a time waiver or good cause for a continuance, does a trial court have jurisdiction to continue an MDO continuation hearing beyond the expiration date of the defendant's current commitment?”

(6) If the court loses jurisdiction to hold a committee once the MDO commitment expires, is there any other authority for the court to order a committee held for the protection of the committee or others?

Status: Argued and submitted on December 9, 2009

Opinion Below: 157 Cal.App.4th 393 (E040848, filed November 28, 2007).

Note: *Cobb* presents many of the same issues that are before the Court in *Lara* and *Price*. *Lara* and *Cobb* were argued on the same day, and it is likely the Court will decide them both on the same day as well. But *Cobb* also will require the Court to address the Court of Appeal’s rather unique characterization of the nature of an

extended commitment trial. In *Cobb*, the Court of Appeal concluded that the prior MDO finding that precedes a subsequent extended commitment trial essentially functions as a probable cause determination that empowers the trial court to hold the defendant past the expiration of his commitment pending the outcome of the extended commitment hearing. According to the Court of Appeal in *Cobb*: “This notice and opportunity to be heard is also constitutionally sufficient to allow the defendant to be confined - even after his or her release date - until the end of trial. Essentially, there has already been a determination that the defendant is an MDO; at the trial, the prosecution simply must prove that the defendant is *still* an MDO.” In this regard, the Court of Appeal’s decision in *Cobb* conflicts with *Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026, which held: “Nothing in the MDPA suggests that, despite the committed person’s receipt of mental health treatment for a year, a presumption of continued dangerousness is effected by the district attorney’s mere filing of a petition for commitment under the MDPA. To the contrary, the MDPA requires the People to prove beyond a reasonable doubt that the committed person continues to pose a substantial danger of physical harm to others. (§ 2972, subd. (a).)”

People v. Castillo, no. S171163 (rev. gr. May 13, 2009)

Question Presented: “Did the Court of Appeal err by increasing the term of defendant’s commitment under the Sexually Violent Predator Act from two years to an indeterminate term pursuant to the 2006 amendments to Welfare and Institutions Code section 6604, when the Los Angeles County District Attorney had stipulated that only the two-year commitment term would be sought?”

Status: Fully briefed

Opinion Below: 170 Cal.App.4th 1156 (no. B202289, filed January 30, 2009). Division Five of the Second District Court of Appeal held: “We agree with the Attorney General’s contention that the trial court’s imposition of a two-year commitment on Castillo was unauthorized because the law in effect at the time of trial required commitment for an indeterminate term.”

Note: This case presents a novel question concerning the interaction between an unauthorized sentence (or, in this case, commitment) and principles of estoppel. In rejecting appellant’s argument that the Attorney General was estopped from seeking a longer commitment on appeal than the District Attorney sought in the trial court, the Court of Appeal maintained: “estoppel does not apply when enforcement of the stipulation would be contrary to the Legislature’s plain

directive, would entail a serious risk to public safety, and where the party seeking estoppel did not detrimentally rely on the position advanced by the public entity below.”

Moore v. Superior Court, no. S174633 (rev. gr. September 17, 2009)

Question Presented: “Can the trial in a commitment proceeding under the Sexually Violent Predator Act be held while the defendant is incompetent?”

Status: Fully briefed

Opinion Below: 174 Cal.App.4th 856 (no. B198550, filed June 4, 2009). Division Three of the Second District Court of Appeal held, “as a matter of constitutional due process, that a defendant cannot be subjected to trial as an alleged sexually violent predator while mentally incompetent. Our decision is based on the following factors: (1) the liberty interest at stake in an SVPA proceeding is significant; (2) proceeding with an SVPA trial against an incompetent defendant poses an unacceptable risk of an erroneous deprivation of liberty; (3) the governmental interest in protecting its citizens and treating sexually violent predators is not significantly burdened by providing for a competency determination in the SVPA context; and (4) the defendant’s dignitary interest in presenting his side of the story is protected by ensuring the defendant is competent to stand trial.”

Note: The California Supreme Court recently reiterated the factors to be considered when deciding what process defendants are due at SVP civil commitment trials. (*People v. Allen* (2008) 44 Cal.4th 843 [holding the right of a criminal defendant to testify over the objection of counsel does not extend to an individual who is the subject of a civil commitment proceeding under the SVPA].) The Court of Appeal applied the *Allen* factors, as noted above, and this case will call upon the Supreme Court to apply these factors once more. Lastly, the Court of Appeal acknowledged that its holding was at odds with *People v. Angeletakis* (1992) 5 Cal.App.4th 963, which held due process does not include the right to be mentally competent during an insanity commitment extension hearing under Penal Code section 1026.5.