

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

**CALENDAR YEAR 2009
SELECTED UNPUBLISHED
FIRST DISTRICT VICTORIES**

Tara Mulay

INTRODUCTION

One hundred and twenty-five victories... In 2009, FDAP staff and panel attorneys prevailed on claims for relief in approximately 125 cases in the First District Court of Appeal. The vast majority of these cases resulted in the issuance of unpublished opinions.

Congratulations are in order for all of the victorious appellate advocates. The 125 victories yielded a wide range of results, from the reversal of serious felony convictions, to the lowering of fines, to the award of additional credits, to the reversal of juvenile dispositional orders. Each of these victories conferred a benefit on the client and, by calling trial courts' and other trial participants' attention to errors which occurred in the process, helped to ensure that fair trial and sentencing procedures will be followed in the future.

Summaries of all 125 victories, with links to the unpublished opinions, can be found in the searchable "Victories Blog" on FDAP's website (www.fdap.org/victories.php). We urge you to consider the advantages of using this resource in your panel work. The Victories Blog includes summaries of all First District victories dating from March 2005 and is searchable by keyword or by category. The list of categories and subcategories, numbering 284 as of January 2010, is quite user friendly and extremely comprehensive. For example, there are: 25 subcategories under the category "insufficiency of the evidence," with each subcategory corresponding to a distinct offense; 17 subcategories of instructional error under "jury instructions"; and 22 subcategories under "sentencing error."

Reviewing unpublished opinions can help with issue selection, research, analysis, and argumentation. Unpublished opinions shed light on the types of arguments regarding error, waiver, and prejudice that the Courts of Appeal find most persuasive. The Victories Blog also makes it easy to search First District opinions by Division so you can know if the particular Division to which your case is assigned has addressed a specific issue.

In the following materials, we synopsise just a small sample of 2009 victories. We do not claim to have provided a significant or representative sample of the broad range of appellate arguments that prevailed in 2009. Rather, we have tried to choose one or two victories from each of several of the types of criminal cases appointed counsel handle in the First District - jury trials, juvenile delinquency, guilty plea, probation revocation, and search and seizure cases. Additionally we have included a section highlighting 2009 habeas victories.

SELECTED JURY TRIAL VICTORIES

People v. Clites & Cox, A115826 (Division Two)

**Subjects: Admission of Police Officer Testimony that Defendants Were Guilty;
Instructions on General Principles of Law Closely Connected to the Case**

Date Filed: January 29, 2009

Attorney: Susan Shors (Clites) & Alan Stern (Cox)

FDAP Buddy: Paula Rudman & Richard Braucher

The Court of Appeal reversed the defendants' convictions for theft from an elder or dependant adult under Penal Code¹ section 368(d) because the trial court erred both by admitting opinion testimony by a police officer that the defendants committed theft and fraud and by failing to define a number of technical terms closely connected to the case.

Ms. Shelton, the alleged victim and an elderly woman with possible dementia, signed a document giving her son, Cox, and her pastor, Clites, power of attorney. In Ms. Shelton's presence, her account of \$108,000 was then closed and the money was transferred into Cox's account. Clites was designated beneficiary if Cox and Shelton died. Cox then withdrew approximately \$104,000 from the account, gave about \$40,000 of it to Clites' church, wrote additional checks to himself, and used a portion of the money to pay for his dental work and a computer.

The prosecutor and Cox asked a series of questions of the investigating officer, Hoskings, which elicited his opinions that Cox and Clites were guilty of fraud and theft because they had promised to act in Ms. Shelton's best interest when they signed the power of attorney and had used "undue influence." Clites objected to these lines of questioning and moved to strike the officer's testimony. On appeal, Cox joined Clites' claim that the court erred in admitting the testimony. The Court of Appeal agreed that Hoskings should not have been allowed to testify that the defendants were guilty and as to the statutory definitions of crimes.

The Court of Appeal also found instructional error. The jury was instructed on theft by larceny and theft by false pretenses. The prosecutor during closing argued that the power of attorney was the document used to commit theft by false pretenses and that theft by larceny was shown because the power of attorney required the defendants to act in Ms.

¹ All further statutory references in these materials are to the Penal Code unless otherwise specified.

Shelton's best interest. Cox argued in response that Ms. Shelton was competent to execute the power of attorney, he had a good faith belief he could transfer the money into his account, he did not have the state of mind required for theft, and Ms. Shelton wanted much of her money given to Clites' church. Clites similarly argued that Ms. Shelton had given the money as a gift to her son and then later regretted it, so that no crime was committed.

Clites had asked the trial court to instruct that there was no legal provision establishing a mandatory fiduciary duty on a person who has power of attorney. The trial court conducted research and denied the request after finding that one who has a power of attorney does undertake some fiduciary duties. On appeal, Clites did not claim that the trial court should have instructed as defense counsel requested. Instead he argued, and Cox joined in the argument, that the trial court should have sua sponte defined certain general principles of law closely and openly connected with the facts of the case regarding the legal effect of a power of attorney.

The Court of Appeal agreed and found that the omitted instructions would have both assisted the defense, by demonstrating that Ms. Shelton had given her attorney-in-fact the authority to make gifts, and assisted the prosecution, by demonstrating that Cox and Clites were under fiduciary duties and that a person holding a power of attorney may be guilty of theft by false pretenses. On balance, considering the credibility disputes at trial, the Court of Appeal found the errors prejudicial under the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of review and reversed both defendants' convictions.

***People v. Jerome*, A119737 (Division Three)**

Subjects: Improper Restriction of Voir Dire

Date Filed: April 24, 2009

Attorney: Joseph Shipp

FDAP Buddy: Richard Braucher

The Court of Appeal reversed the defendant's convictions for kidnaping to commit robbery and second degree robbery because the trial court improperly prohibited defense counsel from voir diring the jurors regarding whether they would be biased or prejudiced if they heard evidence of an alleged prior offense committed by the defendant.

The defense was based on the defendant's statement to arresting officers and his trial testimony that, contrary to the alleged victim's testimony, he never pointed a gun and threatened the alleged victim in the defendant's moving car in order to steal a Sony Playstation 3 video game. Rather, defendant testified, he offered the alleged victim an

amount of money plus some marijuana for the game, and, after contentious negotiations, they were unable to agree on a price.

The original record on appeal showed that the prosecution's evidence included Evidence Code section 1101 testimony that the defendant allegedly committed a 1996 robbery for which he was arrested but never prosecuted. After the defendant was convicted, trial counsel moved for a new trial on the grounds that the court had prohibited counsel from voir diring the jurors regarding bias or prejudice they may have based on learning of the 1996 incident. When the trial court denied the motion, it stated that it had not restricted voir dire as described by defense counsel.

Appellate counsel obtained the transcript of the voir dire in light of the claim made in the new trial motion. The Court of Appeal found that the discussions between court and counsel at the voir dire demonstrated that the trial court had prohibited any voir dire on whether the jurors would be able to follow the court's instructions that the 1996 incident would come in for a limited purposes and that they were not to use the evidence as evidence of bad character.

Relying in part on *People v. Ranney* (1931) 213 Cal. 70, 74 and on its own precedent in *People v. Chapman* (1993) 15 Cal.App.4th 136, Division Three found that the court's improper limitation on the scope of voir dire failed to provide a reasonable assurance that juror prejudice would be discovered if present and therefore that the court committed reversible error.

***People v. Lieske*, A121402 (Division Three)**

Subjects: Instructions on Legally Inadequate Theory of Liability

Date Filed: June 22, 2009

Attorney: Richard Neuhoff

FDAP Buddy: Stephanie Clarke

The Court of Appeal reversed the defendant's conviction for maintaining a place for selling or using a controlled substance (Health and Saf. Code, § 11366). The Court of Appeal found that the trial court had instructed on an inadequate theory of liability by instructing the jury that personal use of heroin on a repeated basis while in one's own home constitutes a violation of section 11366.

After a woman walked out of the defendant's hotel room and dropped a bag containing heroin, officers entered the room, found approximately 58 grams of heroin, a digital scale, baggies, and a "hide-a-can." Defendant testified on his own behalf that he was a long-

time heroin addict who needed to use a large amount of heroin and inject it into his muscles and that he had purchased the heroin the day before his arrest in bulk because it was less expensive. He denied selling heroin and said he did not need to do so because he had inheritance money.

Initially, the trial court gave the standard instruction on maintaining a place for sale or use of a controlled substance, CALCRIM 2440. During deliberations, the court received a note from the jury questioning whether the charge of opening or maintaining a place for sale or use of heroin is “intended to include personal use within your own home.” Over defense counsel’s objection, the trial court responded: “[Y]es, it can include, ‘personal use within your own home,’ if it has been proven beyond a reasonable doubt to be on a continuous or repeated basis at that place.”

The Court of Appeal conducted an in-depth legislative history analysis and concluded that, in context, the term “use” in section 11366, while not expressly confined to use by others, refers to use by persons other than or in addition to the defendant. The Court of Appeal also relied on two cases which had, in other contexts, opined that section 11366 does not encompass mere personal, sequential use of a specified substance at home. (*People v. Vera* (1999) 69 Cal.App.4th 1100 [holding section 11366 is a crime of moral turpitude]; *People v. Ferrando* (2004) 115 Cal.App.4th 917 [offender convicted of section 11366 violation is not eligible for Proposition 36 probation because the offense involves more than simple possession].) The Court of Appeal further relied on the “rule of lenity,” which requires that, when a statute defining a crime is susceptible of two equally reasonable interpretations and it is impractical to resolve the ambiguity, courts should ordinarily resolve the doubt in the defendant’s favor. (*People v. Avery* (2002) 27 Cal.4th 49, 57.)

The error constituted instruction on a legally inadequate theory of liability and was therefore federal constitutional error. (*People v. Perez* (2005) 35 Cal.4th 1219, 1232; *Griffin v. United States* (1991) 502 U.S. 46, 59.) Reversal was required because there was “nothing in the record to establish that the jury necessarily rejected [the inadequate] theory and instead convicted appellant on a proper theory.”

SELECTED JUVENILE DELINQUENCY VICTORIES

***In re E.G.*, A121535 (Division One)**

Subjects: Insufficient Evidence; Felony Vandalism; Gang Participation

Date Filed: April 13, 2009

Attorney: Anne Mania

FDAP Buddy: Jonathan Soglin

The Court of Appeal reversed the Juvenile Court’s findings that the minor committed felony vandalism (Pen. Code, § 594(a)) with a street gang enhancement (186.22(b)(1)(A)) and a related gang participation offense (186.22(a)), because there was “a complete failure of proof of the amount of damage” caused by the alleged vandalism.

The charges were based on testimony that the minor, with a group of other “gang bangers,” broke Alvaro’s car window, apparently by throwing a bat. Alvaro neither replaced the window nor got an estimate of the cost of replacement.

The Court of Appeal found that there was no evidence that the damage to the window was \$400 or more, as required by section 594(b)(1), and reduced the jurisdictional finding to misdemeanor vandalism. Since the related substantive offense of gang participation also required felony behavior, the true finding as to that charge needed to be stricken in its entirety. The Court of Appeal rejected the attorney general’s argument that section 186.22(b) elevated vandalism and the gang participation offenses to felonies.

***In re J.C.*, A122665 (Division One)**

Subjects: Juvenile Deferred Entry of Judgment, Manzy W.

Date Filed: April 28, 2009

Attorney: Robert Angres

FDAP Buddy: Jonathan Soglin

The Court of Appeal reversed the dispositional order and remanded for a determination by the Juvenile Court whether the minor was suitable for deferred entry of judgment (“DEJ”) under Welfare and Institutions Code section 790, et. seq.

At age six, the minor had been declared a dependent ward of the court. After placements with relatives were terminated due to non-violent behavioral problems, he was placed in a group home in 2007. According to the dispositional report, he admitted that while he was living at the group home and going to school, he found and kept a loaded firearm for

three weeks because “scary things happen in Richmond” and he felt safer having it.

The wardship petition, alleging the minor was in possession of a concealable firearm in violation of section 12101(a)(1), was originally filed in Contra Costa County. The Contra Costa County District Attorney’s Office also filed a “determination of eligibility form” indicating that the minor was eligible for DEJ. The minor then admitted the firearm offense, and the case was thereafter transferred to Alameda County.

In Alameda County, the Juvenile Court failed to perform its statutory duty to determine whether the minor was suitable for DEJ. The probation officer recommended escalating his dependency under section 300 to section 602 status, the Juvenile Court terminated the minor’s section 300 dependency, and declared him a minor under section 602.

The Court of Appeal observed that it was unclear from the record whether in Contra Costa County the minor even received notice of the prosecution’s determination that he was eligible for DEJ. But, regardless of whether notice was provided, the trial court’s failure to either grant DEJ summarily or hold a hearing on suitability required reversal. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.) The Court of Appeal distinguished cases in which waiver was found because a minor exhibited no interest in DEJ. (*In re Usef S.* (2008) 160 Cal.App.4th 276, 281, 283; *In re Kenneth J.* (2008) 158 Cal.App.4th 973, 977.)

NOTE: The Court of Appeal also agreed that, if DEJ was not granted, the trial court needed to exercise its discretion to declare the offense a felony or misdemeanor under *In re Manzy W.* (1997) 14 Cal.4th 1199, 1201.

SELECTED VICTORIES IN PROBATION REVOCATION CASES

***People v. Foots*, A124697 (Division Two)**

Subjects: Failure to Order Probation Report

Date of Issuance: December 28, 2009

Attorney: Stephanie Clarke

***People v. Buelna*, A12420, (Division Five)**

Subjects: Failure to Order Probation Report

Date of Issuance: October 26, 2009

Attorney: William Farber

FDAP Buddy: Jonathan Soglin

In each of these cases, after the defendants' probation was revoked the Court of Appeal reversed and remanded for a new sentencing hearing because the trial court prejudicially erred by failing to order an updated probation report.

In *Foots*, the court revoked probation based on the defendant's first probation violation and sentenced the defendant to state prison for sale or transportation of marijuana in reliance on a probation report that was almost two years old. In *Buelna*, the defendant had pleaded guilty to commercial burglary, and the court revoked probation for the defendant's second probation violation, but the only probation report in existence was two and one-half years old.

Both cases relied on *People v. Dobbins* (2005) 127 Cal.App.4th 176, which found that a trial court must order a probation report in preparation for sentencing proceedings that occur a significant period of time after the original report is prepared, and that a claim of error in failing to do so is not waived by defense counsel's failure to object below. (See section 1203(b)(2)(E) & (b)(4) [right to preparation of probation report may be waived only by written stipulation between the parties or an oral stipulation made in open court].)

In finding the error prejudicial, Division Two in *Foots* additionally relied on older precedent: "[W]here a current probation report is required, that right is considered fundamental and its abridgment is generally treated as reversible error." (*People v. Mariano* (1983) 144 Cal.App.3d 814, 824-825; see also *People v. Mercant* (1989) 216 Cal.App.3d 1192, 1196; *People v. Rojas* (1962) 57 Cal.2d 676, 682-683.) Division Five in *Buelna* opined that such errors are prejudicial "absent 'peculiar facts' demonstrating that the 'result would have been the same if a supplemental probation report had been prepared.'" (Quoting *Dobbins, supra*, at 127 Cal.App.4th at 183.) Both opinions also noted the bind this type of error places the defendant in in attempting to show prejudice –

because of the lack of a probation report it is difficult to point to facts demonstrating a different result would be likely to occur in the absence of the error.

SELECTED VICTORIES IN GUILTY PLEA CASES

***People v. Harper*, A120099 (Division Four)**

Subjects: Guilty Plea; Invalid Admission to Prior Conviction

Date Filed: February 20, 2009

Attorney: Roberta Simon

FDAP Buddy: Richard Such

The Court of Appeal vacated the judgement and remanded to permit appellant to withdraw his guilty plea to dissuading a witness (§ 136.1) because at sentencing the trial court had doubled the sentence for that offense for a prior “strike” conviction, but appellant had never personally admitted the prior conviction allegation.

Pursuant to a negotiated disposition, appellant pleaded guilty to dissuading a witness. At the time, his attorney also said that he agreed to admit one of two prior alleged strike convictions. However, appellant never admitted the strike conviction in open court, and the Court of Appeal found that the transcript of the plea proceeding did not demonstrate that appellant authorized or adopted his counsel’s statement. At sentencing, appellant personally moved to withdraw his plea, and the court denied the motion. Appellant subsequently obtained a certificate of probable cause to appeal the validity of the plea.

Based on the authority of *In re Brain* (1924) 70 Cal.App. 334, *In re Breen* (1958) 162 Cal.App.2d 235, 236, and *In re Martinez* (1959) 52 Cal.2d 808, 815, the Court of Appeal found that the defendant had to admit or authorize admission of the strike conviction in open court. The Court of Appeal also found that the defendant’s failure to admit the prior conviction fundamentally changed the character of the negotiated disposition. Accordingly, the Court of Appeal reversed the judgement to allow the defendant an opportunity to withdraw his plea.

***In re Garcia*, A119677 (Division Three)**

Subjects: *Brady v. Maryland*; Habeas Corpus; Guilty Pleas

Date Filed: July 17, 2009

Attorney: Richard Such

The Court of Appeal found a prima facie case that the prosecution had violated *Brady v. Maryland* (1963) 373 U.S. 83 and issued an order to show cause returnable before the superior court.

Defendant was charged with failure to register as a sex offender after his release from prison (§ 290(e)(2)), failure to register his change of address (§ 290(a)(1)(A)), assault with a deadly weapon on a police officer (§ 245(c)), and resisting an officer with use of a deadly weapon (§ 69). The assault and resisting arrest charges were based on allegations made by Sergeant Sean Yates of the Contra Costa County Sheriff's Office.

Defendant pleaded guilty to the failure to register offenses and proceeded to jury trial on the assault and resisting arrest charges. Prior to trial, he alleged that Yates had used excessive force, and he filed a *Pitchess*² motion seeking records of misconduct by Yates. The court limited its *in camera* review to Yates' personnel records from the previous five years and found no records discoverable to the defense.

At trial, the defense theory continued to be that Yates had used excessive force in his attempt to arrest defendant, who had an outstanding no-bail parole warrant. The defense was based on evidence that during his arrest defendant suffered multiple fractures to his left forearm requiring surgery that involved re-fusing the bone fragments by installing a rod and screws, leaving defendant with a large bump on his arm, which was shown to the jury.

Defendant appealed, raising instructional, evidentiary, and credits claims in addition to seeking review of the ruling on the *Pitchess* motion. While preparing the reply brief, appellate counsel decided to do a Westlaw search on Sergeant Yates and discovered that in an unpublished 2005 opinion in a Division One case, *People v. Abusafieh*, A101890, the defendant had proffered evidence implicating Yates in three thefts of cash from suspects. Appellate counsel contacted both appellate and trial counsel in *Abusafieh*, obtained documentation supporting the three theft allegations as well as an additional theft, uncovered evidence of two alleged instances of excessive force by Yates, and learned that in 1999 Yates had been terminated due to one theft allegation, but he was

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

then reinstated in 2001 after an arbitration.

The Court of Appeal consolidated the appeal and habeas cases. It rejected all but the credits claim raised on appeal, but in the habeas proceedings it found a prima facie case that by failing to disclose evidence of Yates' prior misconduct the prosecution violated *Brady v. Maryland, supra*. Notably, the Court of Appeal agreed that Yates' prior theft and excessive use of force incidents were material in that, if the allegations were established, the defendant might have been able to achieve a more favorable result in the form of a more favorable plea bargain, an acquittal, or a guilty verdict of a lesser included offense.

NOTE: In the related appeal, A119677, the Court of Appeal agreed that the trial court had erred in concluding that defendant was entitled only to 15% conduct credits for 816 actual days under section 2933.1. Instead, he was entitled to full section 4019 conduct and work credits, for a total of 286 days (approximately 9 and ½ months) additional presentence credits.

People v. Doyle, A122874 (Division Four)

Subjects: Decision Not to Withdraw Plea Induced by Misrepresentation

Date of Issuance: August 28, 2009

Attorney: Paula Rudman

The Court of Appeal reduced the defendant's prison sentence from four to three years because he had agreed not to withdraw his plea based on the understanding he would be sentenced to the middle term of three years.

Defendant agreed to plead guilty to one count of unlawful intercourse with a minor (§ 261.5(d)) with the understanding that he would not be sent to state prison. The probation department, however, recommended a three-year state prison sentence. The trial court indicated that it was inclined to follow this recommendation and therefore provided the defendant with the opportunity to withdraw his plea. Defendant decided not to withdraw his plea.

After hearing argument from counsel, the trial court opted for the upper term of four years. The Court of Appeal concluded that the trial court erred by sentencing defendant to the upper term instead of the three years he understood he would receive if his guilty plea were not withdrawn. (*People v. Mancheno* (1982) 32 Cal.3d 855, 861.) Accordingly, the Court of Appeal modified the judgment to impose the middle term state prison sentence of three years.

SELECTED 1538.5 SEARCH AND SEIZURE VICTORIES

***People v. Colbert*, A121876 (Division Two)**

Subjects: Search and Seizure, Patsearches, Inevitable Discovery

Date of Issuance: November 13, 2009

Attorney: Patricia Brisbois

FDAP Buddy: Jonathan Soglin

The Court of Appeal reversed the defendant's conviction, based on a no contest plea, to possession of a controlled substance (Health and Saf. Code, § 11350) and being a felon in possession of a firearm (§ 12021(a)(1)).

An officer had stopped the defendant's vehicle for an inoperative rear license plate light, requested the defendant exit the car, conducted a patsearch for weapons, smelled marijuana on the defendant during the patsearch, and told the defendant he smelled marijuana and was not worried if the defendant possessed a little of it. Defendant replied that he had a little marijuana. The officer asked to see it, and defendant said it was in his pocket. During a subsequent search of defendant's pockets, during which he was handcuffed for "safety" reasons, the officer found marijuana and cocaine. In defendant's car, the officer found more evidence of marijuana use and a semiautomatic handgun.

The Court of Appeal agreed that the patdown search was not justified by any specific facts or circumstances giving the officer reason to believe the defendant was armed and dangerous and therefore reversed the trial court's denial of the defendant's suppression motion. The Court of Appeal rejected the attorney general's argument that the officer would have inevitably smelled the marijuana on the defendant, since the officer was entitled to stand as close to the defendant as he chose, and thus would have inevitably asked him about it and discovered it. The Court of Appeal observed that there was "nothing but speculation" to suggest the officer would have smelled the marijuana if he had not moved close enough to conduct the patsearch and that the odor of marijuana apparently came from "green plant material" in a glass jar in the defendant's pocket.

SELECTED HABEAS VICTORIES

***In re Sanders*, A126477 (Division Five)**

Subjects: Right to Presence, Counsel, Notice, and a Hearing at Sentencing/Resentencing

Date Filed: November 23, 2009

Attorney: Alan Siraco

The Court of Appeal granted habeas corpus relief because the trial court had, in violation of the petitioner's rights to counsel, presence, notice, and an opportunity to be heard, responded to a letter from the Department of Corrections suggesting there were errors in an amended abstract of judgment by increasing the petitioner's prison sentence by 1 year and 8 months.

Following an earlier appeal in which petitioner was represented by panel attorney Gail Harper and in which Division Five ordered sentences for two of petitioner's convictions stayed under section 654, the court held a resentencing hearing and reduced his sentence from 9 years, 8 months to 7 years, 8 months in state prison. In a subsequent letter, the CDC suggested that the court's amended abstract of judgment contained numerous errors. Without holding a hearing, the trial court responded by amending the abstract of judgment to increase the sentence to 9 years, 4 months.

Appellate counsel, upon receiving the initial documents regarding the resentencing in petitioner's absence and before the record on appeal was complete, filed a habeas petition alleging a denial of his right to a properly noticed resentencing hearing under *People v. Mora* (2002) 99 Cal.App.4th 397. He also alleged that petitioner's appellate remedy was inadequate because under the previous sentence of 7 years, 8 months he would be entitled to release from prison before the appeal would conclude. In fact, he alleged, he would have already been entitled to release based on that lesser sentence.

The Court of Appeal ordered the attorney general to file an informal response to the petition. The attorney general conceded that relief was warranted, both parties waived issuance of an order to show cause and oral argument, and the parties stipulated to immediate issuance of the remittitur. Accordingly, the Court of Appeal granted habeas relief, vacating the sentence and ordering the trial court to hold a new sentencing hearing.

***In re Chiara*, A124488 (Division Two)**

Subjects: Batson/Wheeler, Habeas Corpus Relief After Change in the Law

Date of Issuance: December 4, 2009

Attorney: Stephen Bedrick

FDAP Buddy: Jonathan Soglin

In 1993, petitioner Chiara and two co-defendants were convicted in Humboldt County of first degree murder with special circumstances and sentenced to LWOP. Division Two affirmed their convictions in 1995, rejecting, among other claims, their argument that the prosecutor had violated *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 by peremptorily challenging Native Americans, Filipinos, and Japanese on the basis of group bias. At the time, Division Two did not conduct a comparative juror analysis because *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 precluded review courts from doing so for the first time on appeal. It did find some of the prosecutor's stated reasons for peremptorily challenging one Native American prospective juror, Rindels, "cause for concern" because the prosecutor mentioned the juror had worked for an Indian Tribe for 12 years and he had concerns about the ability of Native Americans who work for a tribe being able to function in the criminal justice system. However, the prosecutor had described other race-neutral reasons for the peremptory challenge, and the Court of Appeal accordingly found no *Batson\Wheeler* violation.

After his conviction was affirmed on appeal, Chiara did not file a federal habeas petition. Chiara's co-defendants did, and in September 2006 they prevailed on their *Batson\Wheeler* claim before the Ninth Circuit, sitting *en banc*, in *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351. Specifically, the Ninth Circuit employed comparative analysis to find that the prosecutor improperly peremptorily challenged three Native American jurors. Chiara learned of the decision in 2007 and filed a *pro per* state habeas petition in superior court. The Humboldt County District Attorney requested that the petition be granted under the "concept of fairness" and because pending before the California Supreme Court was a case involving the question of whether reviewing courts could conduct comparative analysis. However, the trial court denied the petition on the grounds it was untimely.

Chiara retained counsel, panel member Stephen Bedrick, who filed a habeas petition in the Court of Appeal. Division Two denied the petition, and it was again filed in the California Supreme Court. Subsequently, the California Supreme Court decided *People v. Lenix* (2008) 44 Cal.4th 602, which allowed for comparative juror analysis on appeal. In Chiara's case, the California Supreme Court shortly thereafter issued an order to show cause returnable before the Court of Appeal. The Court of Appeal then granted

petitioner's counsel's request for appointment of Stephen Bedrick as counsel.

The attorney general argued both that the *Batson\Wheeler* claim had been presented previously on appeal and was thus barred by *In re Waltreus* (1965) 62 Cal.2d 218 and that petitioner had failed to raise it on appeal, and it was thus barred by *In re Dixon* (1953) 41 Cal.2d 756. With respect to the latter claim, the attorney general argued that on appeal Chiara had to specifically request that the Court of Appeal conduct a comparative analysis in order to be able to raise the claim on habeas. Division Two rejected this argument on the grounds that Chiara was not required to raise an appellate argument that was contrary to controlling California Supreme Court authority. Moreover, the Court of Appeal found that *Lenix* represented a change in the law affecting the *Batson\Wheeler* claim, triggering the exception to the *Waltreus* rule which allows defendants to raise on habeas corpus issues previously rejected on direct appeal.

Division Two conducted a comparative analysis, and found unsupported the apparently race-neutral reasons the prosecutor had given for peremptorily challenging Rindels. According to the prosecutor, he excused Rindels because her request for hardship excusal on the grounds that she was the only person who could perform her job was "pretentious," she was "emotional about the system" because she "teared up" about her daughter's molestation, and her family was "dysfunctional" because her daughter was molested by her father. But the prosecutor had not stricken other jurors who claimed they were the only employee who could perform their jobs, who had negative attitudes to the criminal justice system, and who had "dysfunctional" family dynamics. Division Two emphasized that the comparative analysis provided it with strong circumstantial evidence that the reasons for excusing Rindels were pretextual, and that the finding of *Batson\Wheeler* error was also supported by the fact that the prosecutor had explicitly cited impermissible racial stereotypes.