CRIMINAL COURTS BAR ASSOCIATION
NEWSLETTER
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IN THE TRENCHES WITH M. GERALD SCHWARTZBACH

The Criminal Courts Bar Association is pleased to welcome M. Gerald Schwartzbach at our May Dinner Meeting to be held at McCormick & Schmick's located at 206 North Rodeo Drive, Beverly Hills, CA 90210, on Tuesday, May 10, 2005.

We look forward to seeing all of our members but specially those of you from the westside. Please feel free to invite an interested friend because the evening promises to be quite remarkable.

Mr. Schwartzbach is listed in the publication The Best Lawyers in America , published by Woodward/ White. Mr. Schwartzbach has been a trial lawyer for 34 years. He is a recipient of the Skip Glenn Award, presented for outstanding service in defense of a client by California Attorneys for Criminal Justice, a statewide organization of over 2,000 criminal defense attorneys.

Mr. Schwartzbach has lectured extensively on a variety of subjects related to trial practice and the criminal justice system. He has spoken to audiences at seminars/ meetings sponsored by the following organizations: American College of Forensic Psychiatry, Bar Association of San Francisco, California Attorneys for Criminal Justice, California Continuing Education of the Bar, California Public Defenders Association, Commonwealth Club of California, Compton Bar Association, Hastings College of Law Litigation Advocacy Program, Lawyers Club of San Francisco, National Association of Criminal Defense Lawyers, National Lawyers Guild, Oregon Criminal Defense Lawyers Association, San Diego Criminal Trial Lawyers Association, Santa Cruz Criminal Trial Lawyers Association, Stanford University School of Law, State Bar of California, State Bar of Nevada, University of San Francisco School of Law, Contra Costa County Bar Association, Marin County Bar Association.

Mr. Schwartzbach has also testified in capital murder habeas corpus proceedings as an expert on the competence of counsel, and has served on the boards of numerous professional organizations.

The following is a partial list of Mr. Schwartzbach's more publicized cases.

2005 - Mr. Schwartzbach obtained an acquittal of the actor Robert Blake in a highly publicized Los Angeles murder trial that received both national and international attention. A national television audience viewed the trial's opening statements, closing arguments, and rendering of verdicts.

2003 - Mr. Schwartzbach was lead counsel for Glen Buddy Nickerson, who, based upon a finding of actual innocence, was released from prison after having been incarcerated for 18 1/2 years for a 1984 double murder. Mr. Nickerson's federal habeas corpus petition was granted by the Honorable Marilyn Hall Patel, Chief Judge of the United States District Court for the Northern District of California. Judge Patel found that Mr. Nickerson was denied a fair trial as a result of police misconduct. The court concluded that the manipulation of evidence and failure to disclose exculpatory materials pervaded the law enforcement investigation and the evidence at trial. *(cont. pg. 2)*

CCBA ANNUAL WESTSIDE MEETING

Guest Speaker

M. GERALD SCHWARTZBACH

"The Robert Blake Trial- Separating Myth from Reality"

Tuesday, May 10, 2005

Board of Directors Meeting
(Everyone welcome to attend)
5:30 p.m.

Cocktails/Reception
6:30 p.m.

Dinner Meeting begins promptly at 7:00 p.m.
$30.00 per person

McCormick & Schmick's
206 North Rodeo Drive
Beverly Hills, CA 90210

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Reservations advised. Call Chris Chaney at (626) 577-5005. CCBA certifies that this activity conforms to the standards for approved education activities prescribed by rules and regulations of the State Bar of California governing minimum legal education.

(cont. from pg 1)

2000 - In a landmark case involving a man who had already served 16 years of a life sentence for murder, and based upon what the court found was "a satisfactory showing of actual innocence," Mr. Schwartzbach persuaded the Chief Judge of the United States District Court for the Northern District of California to set aside the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996.

1999 - Mr. Schwartzbach was one of the plaintiffs' counsel who obtained a jury verdict in excess of $295 Million Dollars in the landmark personal injury/products liability case of Romo v. Ford Motor Co. in Stanislaus County Superior Court.

1995 - On behalf of former San Francisco Police Officer Joanne Welsh, Mr. Schwartzbach, along with his co-counsel, won judgments of sex discrimination and retaliation against the City and County of San Francisco in a federal civil rights trial.

1992-1995 - Mr. Schwartzbach was chief trial counsel for Murray John Lodge, Jr. in Santa Clara County Superior Court. After two lengthy trials, Mr. Lodge received a life sentence, as opposed to the death penalty, despite the fact that he had been convicted of a double murder and an attempted murder, and 45 separate incidents in aggravation had been alleged against him.

1988 - Representing the controversial co-founder of Neuro-Linguistic Programming, Mr. Schwartzbach secured an acquittal of Richard Bandler in a celebrated Santa Cruz County Superior Court murder trial.

1986 - Mr. Schwartzbach was chief trial counsel for attorney Stephen Bingham, who was acquitted of conspiracy and multiple murder charges in a Marin County Superior Court trial. This internationally publicized case arose out of an alleged attempted escape from San Quentin Prison by Black Panther George Jackson. The incident resulted in the death of Mr. Jackson, and three prison guards.

1982 - As counsel for the petitioner in the landmark case of Keenan v. Superior Court , Mr. Schwartzbach persuaded the California Supreme Court to establish the presumptive right of defendants in capital murder cases to have two court-appointed attorneys.

1982 - Mr. Schwartzbach obtained an acquittal of Reuben Vizcarra in an Alameda County Superior Court trial in which Mr. Vizcarra was charged with having masterminded the assassination of the Police Chief of Union City, California.

1981 - Helping to pioneer the Battered Women's Syndrome Defense, Mr. Schwartzbach successfully defended Delores Churchill against an attempted murder charge in a San Francisco Superior Court trial.

1978 - Mr. Schwartzbach was counsel in Hawkins v. Superior Court , an opinion of the California Supreme Court in which the court held that all California felony defendants have a right to a preliminary hearing, whether prosecuted by indictment or by complaint.

1972 - Successfully arguing that the state of Arkansas' penal system violated the constitutional prohibition against cruel and unusual punishment, Mr. Schwartzbach convinced the Governor of Michigan to deny a request by the Governor of Arkansas, for the extradition of black prison escapee Lester Stiggers. At age 15, Mr. Stiggers had been convicted, by an all-white jury in a one day trial, of the murder of his physically abusive father.

Mr. Schwartzbach was born in Wilkes-Barre, Pennsylvania. He attended college at Jefferson College in southwestern Pennsylvania. He attended law school at George Washington University. Although he wanted to be a sportscaster he had decided to quit school after his first year to become a high school basketball coach. Instead, because of his competitive nature he decided to stay in school where he got involved in poverty law and realized that the law could be an instrument to do social good. That changed everything for him, that changed his life.

When asked in an interview "what has been the most difficult challenge for you as a lawyer?" he responded "to be the best lawyer I could be, while being the best husband and father I could be. Our family has paid a price for my dedication to my work. My wife Susan has been enormously supportive. I have received great satisfaction from my work, but without Susan and our son Micah, my life would had been a huge void."

The Criminal Courts Bar Association invites you to join us in honoring a distinguished man and a distinguished career.

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CCBA Newsletter Case Digest

By Gary Mandinach

People v. Saffold (2005) __ Cal.App.4th __, reported on March 28, 2005, in 05 Los Angeles Daily Journal 3473, the Second Appellate District, Division 6 held that In prosecution for disobeying a domestic relations order within the meaning of section 273.6, the court did not err in admitting the proof of service that the defendant was served with notice of the order. The Court of Appeal found that the evidence did not constitute "testimonial" hearsay and its admission did not violate defendant's right to confront witnesses within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, [124 S.Ct. 1354].

People v. Carmony (2005) __ Cal.App.4th __, reported on March 29, 2005, in 05 Los Angeles Daily Journal 3552, the Third Appellate District held that a violation of section 290, for the failure to "update" sex offender registration within five working days of offender's birthday, where defendant had registered his correct address one month before his birthday and the parole agent knew that the defendant continued to reside at that address, was an offense so minor that there would be a violation of the prohibition against cruel and/or unusual punishment provisions of the United States and California constitutions, if a three strike sentence was imposed. The majority of the court, in this 2 1 opinion, does an extensive analysis of the intrajurisdictional and interjurisdictional comparisons for both the state and federal standard, and the majority found that the sentence is clearly disproportionate by any measure. (Cf. *People v. Cluff* (2001) 87 Cal.App.4th 991, 1004.) The majority distinguished People v. Meeks (2004) 123 Cal.App.4th 695, do to the fact that Meeks failed to register after he changed his residence, and unlike the defendant in this case, the police did not know Meek's correct address and information (see fn. 11.)

People v. Neidinger (2005) __ Cal.App.4th __, reported on March 29, 2005, in 05 Los Angeles Daily Journal 3572, the Third Appellate District held that the court erred by instructing the jury that the defendant had the burden of proving, by a preponderance of the evidence, the defense that he had a good faith and reasonable belief that the children, if left alone with the mother, would suffer immediate bodily injury or emotional harm. (See § 278.7, subd. (a); Evid. Code § 501; *People v. Mower* (2002) 28 Cal.4th 457, 479 480] [a defendant is merely required to raise a reasonable doubt as to the underlying facts when such defenses relate to the defendant's guilt or innocence because they relate to an element of the crime charged].) When the defense is collateral to the issue of guilt, the defendant has to establish that defense, by a preponderance of the evidence. (See CALJIC 9.71.5; *People v. Dewberry* (1992) 8 Cal.App.4th 1017, 1021.) Furthermore, that the court erred by failing to give an instruction that clarified the relationship between the good faith defense and malice. (*People v. Mower, supra* 28 Cal.4th at pp. 483 484.) The error was not harmless, and the matter sent back for a new trial.

In re Annis (2005) __ Cal.App.4th __, reported on March 30, 2005, in 05 Los Angeles Daily Journal 3585, the Second Appellate District, Division 2 held that a Superior Court judge has the authority to revoke a defendant's own recognizance release (see § 1318) when he is charged with committing a new offense while on probation, (see § 1319.5, subd. (a)), regardless of the defendant's prior performance on probation and history of making court appearances as required. It was argued that the release was improper by reason of the defendant not having executed an OR release agreement, (see § 1318), and the magistrate who granted the release did so without the benefit of an investigative report, and judge considered relevant evidence before granting revocation. (See § 1289.)

People v. Martinez (2005) __ Cal.App.4th __, reported on March 30, 2005, in 05 Los Angeles Daily Journal 3590, the Second Appellate District, Division 8 held that a probation violation hearing need not be held in same branch of superior court in which probation was granted, or in front of the same judge who originally granted probation. (See *People v. Arbuckle* (1978) 22 Cal.3d 749; *People v. Beaudrie* (1983) 147 Court of Appeal 3d 686, 693 694 [*Arbuckle* does not apply after the defendant is sentenced, or to probation violations].) Additionally, the defendant's proposition 36 probation may be revoked for a check forgery violation, since that is not a drug possession offense. (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1398 [the probation violation must be drug related to apply § 1210.1, subd. (f)].)

In re Sean W. (2005) __ Cal.App.4th __, reported on March 30, 2005, in 05 Los Angeles Daily Journal 3596, the First Appellate District, Division 2 held that the trial court erred in failing to take into account, in setting appellant's maximum confinement time in the California Youth Authority, the 2003 amendment to Welfare and Institutions Code section 731, subdivision (b), which granted to the juvenile court the discretion to set the maximum term of a California Youth Authority commitment at less than maximum term of confinement for adult convicted of same offense. As a result of its failure to consider such a disposition, the court committed reversible error.

People v. Benitez (2005) __ Cal.App.4th __, reported on March 31, 2005, in 05 Los Angeles Daily Journal 3683, the Third Appellate District held that under "one strike" provision (§ 667.61), requiring imposition of 15 year to life sentence if defendant is convicted of child molestation involving multiple victims (§ 667.61, subd. (e)(5)), unless defendant is qualified for probation pursuant to section 1203.066, subd. (c), the question of whether the defendant is qualified for probation is to be made by judge rather than by jury. Since the granting of probation is an act of clemency and not a form of punishment (see *People v. Superior Court (Kirby)* (2003) 114 Cal.App.4th 287, 293 295), the sentence was not increased, and therefore, there was no *Blakely* violation.

People v. Jennings (2005) __ Cal.App.4th __, reported on April 6, 2005, in 05 Los Angeles Daily Journal 3958, the Fourth Appellate District, Division 1 held that the court erred in failing to apply the proceeds paid to the victim by the defendant's insurance carrier in a civil settlement (see *People v. Bernal* (2002) 101 Cal.App.4th 155), against the amount of restitution ordered by the court in the criminal case, to the extent that the payments were made to cover the costs of items included in the court's restitution order.

CRIMINAL COURTS BAR ASSOCIATION
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CCBA Newsletter Case Digest

By Gary Mandinach

People v. Terry (2005) _ Cal.App.4th _, reported on March 21, 2005, in 05 Los Angeles Daily Journal 3207, the Sixth Appellate District held that the defendant could not be prosecuted for continuous sexual abuse within the meaning of section 288.5, as it was untimely under the six year statute of limitations where the criminal complaint was filed within six years of last alleged criminal act, but no arrest warrant was issued or information filed within the statutory period. Section 803, subdivision (g), which permits the prosecution after the six year period has expired, if initiated within one year of reporting such events to law enforcement and if allegation is corroborated, did not apply where no warrant was issued or information filed within the one year period. The victim's preliminary hearing testimony, wherein she alleged instances of childhood sexual abuse that had not been charged up to that point, did not constitute a report to law enforcement within the meaning of section 803, subdivision (g).

People v. Guzman (2005) __ Cal.4th __, reported on March 22, 2005, in 05 Los Angeles Daily Journal 3253, the California Supreme Court held that Proposition 36 does not violate appellant's right of equal protection under either the federal or state constitutions by failing to require that appellant be granted probation when the current offense was a non violent drug possession offenses while on probation for offenses other than non violent drug possession offenses.

Brown v. Payton (2005) _ U.S. _, reported on March 23, 2005, in 05 Los Angeles Daily Journal 3338, the United States Supreme Court held that the California Supreme Court ruling that the trial court was not required to specifically instruct jurors that the defendantís post crime religious conversion could be considered as a mitigating factor, under factor (k), and that the prosecutorís argument against consideration of such evidence could not have misled the jury into believing that it could not treat such conversion as mitigating. The High court held that such a ruling was not contrary to nor an unreasonable application of controlling federal law. (See *Boyde v. California* (1990) 494 U.S. 370 [pertaining to pre crime mitigating evidence].)

Stuard v. Stewart (9th Cir. 2005) _ F.3d _, reported on March 23, 2005, in 05 Los Angeles Daily Journal 3380, the Ninth Circuit Court of Appeal held that where the habeas petitioner, during criminal proceedings in state court, insisted on being tried within the statutory period, despite being warning by the court of the probability that his attorney would be less prepared than if trial were delayed, but did not establish either that his representation at trial was substandard or that to achieve better representation, a delay implicating his federal constitutional speedy trial rights under *Barker v. Wingo* (1972) 407 U.S. 514, 521, would have been required. The defendant was not unconstitutionally required to choose between the right to a speedy trial and right to effective assistance of counsel. (See *McGautha v. California* (1971) 402 U.S. 941 [the criminal process...is replete with situations requiring the making of difficult judgments as to which course to follow. Although a de may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose].)

Muehler v. Mena (2005) _ U.S. _, reported on March 23, 2005, in 05 Los Angeles Daily Journal 3332, the United States Supreme Court held that the detention of occupants of the premises for two to three hours during the execution of a search warrant, was not unreasonable given extent of governmental interest in officer safety, when warrant authorized a search for weapons, a wanted gang member resided on the premises, and officers needed to detain multiple persons. (See *Michigan v. Summers* (1981) 452 U.S. 692.) The questioning of the suspect about her immigration status during her detention, did not violate her Fourth Amendment rights. Mere questioning during detention does not constitute seizure and is therefore reasonable as it occurs during lawful detention.

People v. Cajina (2005) __ Cal.App.4th __, reported on March 25, 2005, in 05 Los Angeles Daily Journal 3435, the First Appellate District, Division 5, held that in a prosecution for failure to register as sex offender, the defendant's offer to stipulate that he was subject to a registration requirement did not require court to grant motion in limine barring mention of his status as sex offender to the jury. The Court of Appeal distinguished the issue from that in *People v. Valentine* (1986) 42 Cal.3d 170, 177, wherein the Supreme Court indicated that a defendant could stipulate, so that the jury does not hear his status as an ex felon, which was an element of the offense. Here, the court indicated that the status of the defendant as an ex felon was not just the issue, but that he had previously committed a prior sex offense, and that the prosecution did not have to stipulate to that fact. (See *Old Chief v. United States* (1997) 519 U.S. 172, 187 189.)

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SAVE THE DATE!

The May Dinner Meeting will be held on

Tuesday, May 10, 2005, at

McCormick & Schmick's located at

206 North Rodeo Drive, Beverly Hills, CA 90210

Dinner will be choice of:
Cedar Roast Salmon, Beurre Rouge Sauce, Jasmine Rice & Spring Vegetables
Free Range Breast of Chicken, Wild Mushroom Sauce, Mashed Potatoes & Spring Vegetables
Rock Shrimp and Bay Scallop Fettuccini, White Wine and Garlic
Mixed Green Salad, Balsamic Vinaigrette
Dessert will be:
Chocolate Truffle Cake, Raspberry Coulis, Coffee, Hot Tea, or Iced Tea