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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SIRGIO JIMENEZ,

Defendant and Appellant.

B268930

(Los Angeles County  
Super. Ct. No. GA096070)

Appeal from a judgment of the Superior Court of the  
County of Los Angeles, Rupa Searight Goswami, Judge.  
Affirmed.

Marta I. Stanton, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,  
Chief Assistant Attorney General, Lance E. Winters, Senior  
Assistant Attorney General, Steven D. Mathews, Supervising  
Deputy Attorney General, and J. Michael Lehmann, Deputy  
Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant and appellant Sergio Jimenez (defendant) appeals from his conviction for robbery after a court trial. He contends that insufficient evidence supported the trial court's finding of guilt for aiding and abetting codefendant Fernando Frescas (Fernando)<sup>1</sup> in the robbery of victim Joseph Ramirez (Ramirez). Defendant also argues that the condition of probation requiring his probation officer's approval of his residence is constitutionally vague and overbroad on its face.

We conclude that substantial evidence supported defendant's robbery conviction and that he forfeited his challenge to the probation conviction by failing to object to it in the trial court. We therefore affirm the judgment of conviction.

## FACTUAL BACKGROUND

### A. Prosecution's Case

Codefendant Fernando had an older brother, Rene Frescas. In July 2013, Rene had purchased a white Chevrolet Trailblazer (SUV) from victim Ramirez. Ramirez was the fiancé of Fernando's and Rene's cousin, Michelle Frescas.

Rene had paid Ramirez \$1500 for the SUV. When Rene drove the SUV home, however, "it started to flicker." Ramirez advised Rene to take the SUV to Ramirez's mechanic the next day. The mechanic estimated that it would cost \$6,000 to repair

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<sup>1</sup> Because they all share the Frescas surname, for clarity we refer in this opinion to codefendant Fernando, as well as his brother Rene, cousin Michelle, and mother Leticia, by their respective first names. Fernando, who was tried with defendant and convicted, abandoned his appeal.

“the electric board.” In addition, when Rene attempted to register the SUV in his name, he could not do so because Ramirez was not the registered owner. Due to these problems with the SUV, Rene returned it to Ramirez on July 27, 2013. Ramirez, however, did not return Rene’s money.

In November 2013, Ramirez contacted Rene to ask whether Rene wanted “your truck, a car or cash.”<sup>2</sup> Rene responded that he just wanted the cash. In the beginning of 2014, Michelle gave Fernando \$220 to give to Rene as partial payment of Ramirez’s debt to Rene.<sup>3</sup>

Rene’s family, including Fernando, was aware of Ramirez’s unpaid debt to Rene. But Rene would tell all of them, including Fernando, not to get involved, because he could “fight [his] own battles.”

In February or March 2015, Fernando began working on a tattoo for Ramirez. Ramirez paid Fernando \$300 for the tattoo work. When Rene learned about Ramirez’s payment for the tattoo, he told Fernando that, if Fernando was on good terms with Ramirez and could “get the money back, great. [Otherwise] leave it alone.” Fernando responded, saying: “Regardless of whatever happens, I am tired of people taking advantage of mom and you. . . . I’m going to help out. I am going to get the truck back.” Rene told Fernando, “Stay out of it.” Rene also

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<sup>2</sup> Throughout trial, various witnesses referred interchangeably to the vehicle Rene purchased from and returned to Ramirez as both an “SUV” and a “truck.”

<sup>3</sup> By then, Ramirez owed Rene \$1,600, comprised of \$1,500 for the SUV Rene returned and an additional \$100 Rene had loaned to Ramirez after returning the SUV.

explained to Fernando that if Rene “[w]anted anything [it was] to get paid back, but if [he] didn’t get paid back, [he] would be fine.”

On April 11, 2015, the day of the robbery, Ramirez was living with Michelle at the Golden Hotel<sup>4</sup> in San Gabriel. That night, the SUV was parked in the hotel parking lot.

At around 6:00 p.m., Ramirez heard a knock on their hotel room door. Ramirez looked through the peephole and saw Fernando. Ramirez opened the door to allow Fernando to enter because Ramirez believed Fernando was there to finish Ramirez’s tattoo. At that point, however, Ramirez saw defendant standing to Fernando’s right. Ramirez told Fernando to “hold on” and closed the door because Ramirez believed “it was weird for [Fernando] to bring somebody unannounced.” When Fernando told Michelle, “Your cousin is here with some dude,” Michelle put on a robe and went outside, while Ramirez put on his shirt and shoes. Ramirez could hear Michelle and Fernando talking outside as he dressed.

Ramirez finished dressing and went outside. Thinking that Fernando and Michelle were talking about a tattoo that Fernando was going to do for Ramirez’s neighbor, Ramirez walked over to knock on the neighbor’s door. But, as Ramirez walked toward the neighbor’s room, he heard Fernando say: “I’m here for my brother’s money. I want my brother’s money.” Ramirez turned around, walked back, and stood between Fernando and defendant with his arms crossed.

The discussion between Fernando and Michelle became louder and turned into an argument, during which Fernando told her, “My brother wants his money back.” As Fernando and

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<sup>4</sup> Some witnesses also referred to the location of the robbery as the Golden Motel.

Michelle argued, Ramirez listened in and could see defendant was leaning against a rail and “always had his hand on his right waist.” When Ramirez chimed in stating, “So, what, your brother sent you here to strong-arm me,” he noticed that defendant “tensed up” and reached under his shirt exposing the butt of a gun in his waistband.<sup>5</sup>

Wanting to “deescalate” the situation, Ramirez guided Michelle toward the door to their room and said, “Just get inside.” As Michelle and Ramirez entered their room, Ramirez attempted to close the door, but Fernando prevented him from closing it by putting his foot in the doorway. Ramirez told Fernando to come inside and talk, but “to leave [his] friend outside.” Ramirez “just wanted to get away from the kid with the gun.”

Fernando agreed and came inside alone. Ramirez locked the door behind him. Ramirez sat down to try and calm Fernando, but Fernando began arguing with Michelle again. Ramirez then told Fernando that the keys to the SUV were on the air conditioner in an effort to keep the situation from escalating.

At that point, Fernando pulled out a crowbar from his pants and swung it at Ramirez, screaming “Give me the fucking keys. Give me the fucking keys.” Ramirez said, “There’s the fucking keys.” Fernando made a second threatening motion with the crowbar and said, “I’m not fucking around.” Ramirez then

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<sup>5</sup> A hotel security camera video that was played for the trial court showed defendant stand up from the railing on which he had been leaning and reach for his waistband at the point in the video where, according to Ramirez, the “strong-arm” comment was made.

picked up the keys to the SUV and gave them to Fernando, saying, “Here, take them. Get out of here.”

Throughout this exchange in the hotel room with Fernando, Ramirez “was still thinking about the guy outside coming in the whole time.” According to Ramirez regarding what was paramount in his mind at the time: “[T]hat was the only thing. I wasn’t worried about [Fernando] and the crowbar. I was worried about a guy outside with a gun.”

Fernando took the keys and ran out of the room. Ramirez closed and locked the door while Michelle dialed 911. Ramirez heard the two men running down the stairs.<sup>6</sup>

When Ramirez heard sirens and a helicopter, he opened the door and saw a pair of black rubber “zip ties” or handcuffs on the ground outside his room. Ramirez had seen two pairs of zip ties under Fernando’s shirt when Fernando pulled out the crowbar. When Sheriff’s deputies responded to the Golden Hotel at approximately 6:15 p.m., Ramirez spoke to Deputy Bradley Dietz and showed him the “black flex cuff” or “two zip ties” that were formed together to simulate handcuffs on the walkway near Ramirez’s room.

Later that same night, at approximately 7:45 p.m., Rene returned home and saw defendant and Fernando in Rene’s garage.<sup>7</sup> Fernando was “prepping to give [defendant] a tattoo.”

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<sup>6</sup> A hotel security camera video played for the trial court showed defendant and Fernando running through the hotel parking lot.

<sup>7</sup> Rene lived in a duplex in Alhambra. He lived in one unit, and his mother and sister lived in the other unit. At the time, Fernando “was visiting [his mother] for a couple of days.”

As Rene exited his vehicle, Fernando came up to him and “dangled the lanyard . . . with a key at the end.” Rene understood that Fernando had “somehow got the keys to the [SUV].”

Rene went inside the house and later came back to the garage where Fernando appeared “pissed” that Rene did not appreciate what Fernando had done for him. Rene, in turn, was “livid” that Fernando “went to get the [SUV].”

The “next thing [Rene] kn[e]w,” he saw flashing lights and heard a police officer say something. He walked out of his front door and saw “all the cops there with the lights on [him].”

Deputy Dietz testified that, after speaking to Ramirez at the Golden Hotel, he went to Rene’s house, where he located Fernando and defendant. While searching the garage, the deputy recovered a set of keys hanging on the garage door. Additional deputies also assisted in searching Rene’s duplex, but did not recover any guns.

Later that evening, Deputy Dietz went to a location “a few blocks southwest of the Golden [H]otel.” The SUV was parked at that location and locked. Deputy Dietz was able to unlock the SUV with the key he had recovered from Rene’s garage. Inside the vehicle, the deputy recovered a black crowbar and a “flex cuff which matched the flex cuff recovered from the Golden [H]otel.” No handguns were recovered from the SUV.

## **B. Defense Case**

Defendant testified at trial and explained that Fernando was his neighbor, whom defendant described as a “family friend.”<sup>8</sup>

On the day of defendant’s arrest, Fernando and his girlfriend, Gabby,<sup>9</sup> picked defendant up in Gabby’s car. Defendant believed they would be going to Fernando’s house to “get” a tattoo that Fernando had started a few days earlier on defendant. Defendant did not have a gun when he left his house, and neither Fernando nor Gabby gave him a gun when he entered the car.

As the three drove, Fernando and Gabby argued about “cashing in a check or paying off a loan or something like that.” Although he “really wasn’t paying attention,” defendant got out of the car when Gabby stopped and Fernando exited. Fernando said something to defendant about going to his cousin Michelle’s house and “seeing if he could pick up his brother’s car or something.” As they walked to the Golden Hotel, defendant did not see Fernando with a crowbar.

When defendant arrived at the Golden Hotel, he did not know anything about a dispute involving Rene and an SUV, and

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<sup>8</sup> Fernando’s mother, Leticia Frescas, testified for the defense that she knew defendant for over 22 years, since he was “months old.” According to Leticia, defendant had grown up in Leticia’s neighborhood, but he did not socialize frequently with Fernando.

<sup>9</sup> “Gabby” is Gabriela Rodriguez, who also testified for the defense at trial. We refer to her as Gabby because that is how she was referred to in the trial testimony.



he did not know Ramirez. Defendant believed he was with Fernando to have his tattoo finished.

When the two men arrived at the hotel, Michelle came out of a room and Fernando introduced her to defendant. Defendant did not pay attention as Fernando and Michelle spoke. At some point, Ramirez came out of the room and “exchanged some sort of words” with Fernando. Defendant believed Ramirez was yelling out something like, “[A]re you here to strong-arm me . . . ?” Defendant, who had been leaning on a railing with his fingers in his waistband, “just tensed up,” because he believed that a “strong arm” meant “some sort of a robbery.”

At that point, Michelle, Ramirez, and Fernando went into the room, but Michelle indicated to defendant that he could not come inside. Defendant heard Michelle inside the room talking loudly. Then Michelle opened the door, Fernando came out, and defendant left with him, both walking at a normal rate of speed. They went to the back parking lot of the hotel and entered the SUV. As Fernando entered, he threw a crowbar on the passenger floor without saying anything about it.

Fernando and defendant pulled out of the parking lot, but the SUV broke down a block or two later. Fernando called Gabby, who picked the two men up and drove them to Rene’s house so that Fernando could finish defendant’s tattoo. After Gabby dropped off Fernando and defendant, the police arrived and arrested them.

According to Gabby, on April 11, 2015, she drove to Fernando’s house and told him she had to run some errands. Fernando asked her to give him a ride and to pick up defendant so that Fernando could finish a tattoo for defendant. That was the first time Gabby had met defendant.

Fernando told Gabby that he would go with her to pay her loan, so she drove to “the loan place” called Pay Back. It was located less than a block from the Golden Hotel. On the way to Pay Back, Fernando and Gabby began arguing about the loan Gabby had taken out. Fernando told Gabby to “let [him] out of the car,” so she stopped, and Fernando and defendant exited her car. Fernando did not say anything to Gabby about visiting Michelle or the dispute between Ramirez and Rene over the SUV. Gabby did not see either Fernando or defendant with a crowbar or gun.

Later on, Fernando called Gabby and asked her to pick him up on the same street where she had dropped off Fernando and defendant. When she picked up the two men, Fernando told her that he had picked up Rene’s SUV, but that it had broken down. She dropped them off at the duplex where Rene and his mother lived.

Los Angeles County Sheriff’s Deputy Mike Bayer testified that he participated in the search of the duplex where Rene and his mother lived. He did not recover a gun during that search. Deputy Bayer also interviewed defendant and Fernando; neither admitted to using a gun or committing a robbery. Defendant told the deputy that he was with Fernando on the day of the robbery because he wanted Fernando to finish defendant’s tattoo.

### **PROCEDURAL BACKGROUND**

In a second amended information, the Los Angeles County District Attorney charged defendant with second degree robbery in violation of Penal Code section 211.<sup>10</sup> The District Attorney

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<sup>10</sup> All further statutory references are to the Penal Code.

also alleged that, in the commission of the robbery, defendant personally used a handgun within the meaning of section 12022.53, subdivision (b)(2).

Defendant waived his right to a jury trial and, following a bench trial, the trial court found him guilty of robbery, but found that the firearm allegation was not true. At the sentencing hearing, the trial court suspended imposition of sentence and placed defendant on formal probation for a term of three years, subject to various terms and conditions.

## DISCUSSION

### A. Sufficiency of the Evidence

#### 1. *Standard of Review*

Defendant's challenge to the sufficiency of the evidence in support of his conviction for aiding and abetting the robbery of Ramirez is governed by the substantial evidence standard of review. When a defendant challenges the sufficiency of the evidence, "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] [Citations.] . . . 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.] [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

## 2. *Analysis*

The trial court found defendant guilty of robbery on an aiding and abetting theory. To prove that defendant aided and abetted the robbery of Ramirez, the prosecution was required to prove: (1) Fernando committed the robbery; (2) Defendant knew that Fernando intended to commit the robbery; (3) Before or during the commission of the robbery, defendant intended to aid and abet Fernando in committing the robbery; and (4) Defendant's words or conduct did in fact aid and abet Fernando's commission of the robbery. (See CALCRIM No. 401; see also *People v. Hill* (1998) 17 Cal.4th 800, 851 ["A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime"].)

Defendant contends that there was insufficient evidence that he knowingly aided and abetted the robbery of Ramirez because he remained outside while Fernando robbed Ramirez and because he supposedly did not know about the dispute over the SUV or Fernando's intent to rob Ramirez. We disagree.

Ramirez's testimony concerning defendant's conduct outside the hotel room just before the robbery was sufficient to support the trial court's finding that defendant was a knowing participant. According to Ramirez, Fernando arrived at Ramirez's room unannounced with defendant, who was a stranger to Ramirez. The sudden and unannounced arrival of the two men made Ramirez suspicious of their motives. As the argument outside the room over the SUV escalated, Ramirez

accused the two men of trying to strong-arm him, a comment that immediately caused defendant to “tense up” and reach into his waistband, partially exposing what appeared to Ramirez to be a handgun. Ramirez responded to defendant’s conduct by attempting to retreat with Michelle back into their room and close the door. Ramirez said he just wanted to get away from “the kid with the gun.” When Fernando prevented Ramirez from closing the door to the room, Ramirez allowed Fernando to enter, but only on the express condition that defendant remain outside the locked room. Ramirez explained that, while he was in the room with Fernando, he was not concerned about Fernando or the crowbar, but rather was worried about the “guy” outside with the gun coming into the room.

This testimony by Ramirez supported a reasonable inference that defendant accompanied Fernando to the hotel room to assist in recovering either Rene’s money or the SUV. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181 “[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction”].) Defendant’s conduct before the robbery, including his actions in response to the strong-arm comment, caused Ramirez to fear him, and, when combined with Fernando’s brandishing of the crowbar in the room, contributed to Ramirez’s decision to give his keys to Fernando.

In addition, security camera video footage corroborated Ramirez’s description of defendant’s reaction to the strong-arm comment, thereby providing further support for the conclusion that defendant went with Fernando to the Golden Hotel to intimidate Ramirez into turning over the money he owed to Rene or the SUV.

We therefore conclude that there was sufficient evidence to support the trial court's finding that defendant aided and abetted the robbery.

## **B. Challenge to Probation Condition**

As a condition of probation, the trial court ordered that defendant was "to maintain a residence as approved by the probation officer, and keep the probation officer advised of [his] work and home address and telephone numbers at all times." Defendant contends that the residence approval condition is unconstitutionally vague and overbroad because it violates his federal constitutional rights to travel and freedom of association. Defendant characterizes his challenge as a "facial" challenge to the validity of the condition. The Attorney General, however, argues, *inter alia*, that defendant's challenge is an "as applied" challenge to the constitutionality of the condition that was forfeited by defendant's failure to raise it in the trial court.

### *1. Legal Principles*

"Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 [43 Cal.Rptr.2d 681, 899 P.2d 67]; see § 1203.1, subd. (j); Cal. Rules of Court, [former] rule 410.) If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' (*People v. Peck* (1996) 52 Cal.App.4th 351, 362 [61 Cal.Rptr.2d 1].) [¶] However, the trial court's discretion in setting the conditions of probation is not

unbounded. A term of probation is invalid if it: ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.’” (*People v. Lent* (1975) 15 Cal.3d 481, 486 [124 Cal.Rptr. 905, 541 P.2d 545].) [Footnote omitted.] Conversely, ‘. . . a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.’ (*Ibid.*)” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

“The [trial] court’s power to condition probation ‘is not boundless . . . . Human liberty is involved. A probationer has the right to enjoy a significant degree of privacy, or liberty, under the Fourth, Fifth and Fourteenth Amendments to the federal Constitution.’” (*People v. Keller* (1978) 76 Cal.App.3d 827, 832 [143 Cal.Rptr. 184].) Nevertheless, if necessary to effect the goals of probation, its conditions may limit constitutional rights. (*People v. Pointer* [(1984)] 151 Cal.App.3d [1128] 1137.)” (*People v. Bauer* (1989) 211 Cal.App.3d 937, 940-941.)

In general, a challenge to the constitutionality of a probation condition is forfeited on appeal if it is not first raised in the trial court. “It is settled that failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal. [Citations.] No different rule should generally apply to probation conditions under consideration at the same time. [Fn. omitted.] A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a

reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]” (*People v. Welch* (1993) 5 Cal.4th 228, 234-235 (*Welch*).)

The court in *In re Sheena* (2007) 40 Cal.4th 875, however, recognized an exception to the forfeiture rule in *Welch, supra*, 5 Cal.4th 228, for so-called facial constitutional defects in a probation condition. “In common with a challenge to an unauthorized sentence that is not subject to the rule of forfeiture, a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law. Correction on appeal of this type of facial constitutional defect in the relevant probation condition, similar to the correction of an unauthorized sentence on appeal, may ensue from a reviewing court’s unwillingness to ignore ‘correctable legal error.’ (*Welch, supra*, 5 Cal.4th at p. 236.) Thus, at times a Court of Appeal has exercised its discretion to hear a constitutional claim despite its holding or assumption that the rule of forfeiture applies.” (*In re Sheena, supra*, 40 Cal.4th at p. 887.)

## 2. *Analysis*

Although defendant couches his challenge to the residence approval condition in terms of a facial challenge to its constitutionality, his argument in support of that challenge describes an as applied challenge, i.e., he contends that the condition, as applied to him, is unconstitutionally vague and



overbroad. According to defendant, the condition is unconstitutional because the State's interest in locating him and restricting him from residing with persons who might corrupt him was already satisfied by two other probation conditions that restricted the persons with whom he may reside and required him to notify his probation officer of his current address or any change in address.

Defendant's challenge is specific to his sentence in this case and to the particular probation conditions imposed by the trial court at the sentencing hearing. It naturally requires reference to the record of the sentencing hearing and raises an as applied challenge subject to forfeiture. Defendant gave the trial court no opportunity to address any concerns about vagueness or overbreadth when imposing the condition, and we therefore reject defendant's constitutional challenge due to his failure to raise it in the trial court.<sup>11</sup>

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<sup>11</sup> We do not address defendant's contention that we should consider his constitutional claim due to ineffective assistance of counsel, which defendant raised for the first time in his reply brief and provided no discussion or analysis in support thereof. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered . . ."]; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215 ["Contentions are waived when a party fails to support them with reasoned argument and citations to authority"].)

### **DISPOSITION**

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIN, J.\*

We concur:

TURNER, P. J.

KRIEGLER, J.

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\* Judge of the Superior Court of the County of Los Angeles, appointed by the Chief Justice pursuant to article VI, section 6 of the California Constitution.