APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

NUMBER 27 **JANUARY 1996**

WHAT'S NEW IN THE NEW YEAR

by Elaine A. Alexander, Executive Director

As the new year kicks off, a variety of changes continue to evolve in appellate practice. I'll go into a few here and as always will cover later developments in future columns.

Refinements to Independent Cases

The move to make far more cases independent and the recent enormous growth in caseload have required some innovations to make sure staff attorney input is available when needed. Some independent cases will now be assigned with the initial expectation that a staff attorney will review a draft of the opening brief before filing. We'll do this when we think the complexity of the case will require more staff consultation than normal for an independent case, but not as much as in an assisted case. Panel attorneys are notified at the time the case is offered if this expectation applies.

As has been the practice for several years, some assisted cases, too, are assigned with the initial expectation that the staff attorney will read a draft of the brief but probably not read the record. The difference between assisted and independent cases is often only a matter of degree, and there is much overlap. Staff attorney input covers a continuous spectrum, reflecting our long-standing practice of tailoring assistance to the complexity of the case and the background of the attorney.

To help implement the changes, we are now notifying panel attorneys on independent cases when a staff attorney is assigned. In those cases where review of the opening brief before filing is expected, the notice will let the panel attorney know whom to consult. In other independent cases, it will let the panel attorney know what staff attorney is evaluating the brief and reviewing the claim, in case there are questions.

Outside Review of Panel Removals

With the help of California Appellate Defense Counsel, a panel attorney group, ADI is starting an "outside review" pilot project. It will apply to panel attorneys removed from the panel after January 1, 1996, on the basis of quality of work, who have received from the executive director a final denial of an application for reconsideration. At the panel attorney's request, briefs the panel attorney feels were not accurately evaluated by ADI can be submitted to an outside reviewer for a "second opinion" as to their quality.

The outside reviewer will be an experienced appellate attorney not associated with ADI or the Fourth Appellate District panel. CADC will be available to help select reviewers for individual cases. The reviewer will evaluate the briefs in question, using published appellate project criteria and other commonly accepted standards. The "second opinion" will be advisory only, and will address only the quality of the disputed briefs, not the removal decision itself.ADI will consider the reviewer's evaluation in deciding whether to reinstate the attorney.

Further details will be available soon, and any attorney who is eligible and elects to participate will be given full information.

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We hope this program will strengthen relationships between ADI and panel attorneys. It is intended as an additional way of helping us make accurate and fair decisions about panel membership and promoting panel attorneys' confidence in those decisions.

Other approaches to these goals have been in place a long time and should be seen as primary. For instance, we have published our evaluation criteria and repeatedly explained that process in much detail. We give feedback in individual cases through assistance and evaluation. We will give an attorney an assessment of his or her performance on request and often, when problems emerge, will provide notice and an opportunity to improve. An attorney's ranking is normally determined by multiple evaluations, not just one or two, and by different staff attorneys to avoid personal factors. Attorneys who have been removed may seek reconsideration. These cross-checks and opportunities for communication maximize the chances for fully informed decisions and a perception of fairness on the part of the attorney.

Claims

The Appellate Indigent Defense Oversight Advisory Committee continues to do quarterly audits of claims. We have made a number of changes, both micro and macro, in our claims reviews to reflect committee policies as they become articulated to us through the audit process. Ultimately, considerably more consistency among the districts will be achieved, but it will require time and a lot of give and take.

In some instances the committee is asking panel attorneys to repay fees that the committee determines were overpaid. Panel attorneys may offer further explanation and justification if their claim is chosen for audit.■

TO WHAT EXTENT MAY THE ATTORNEY GENERAL RAISE ISSUES IN A DEFENDANT'S APPEAL, PURSUANT TO PENAL CODE SECTION 1252?

As most are aware, Penal Code section 1238 specifies a list of decisions from which the people may appeal, "and it is well settled that such an appeal will not lie except in a case so specified." (People v. Knowles (1915), 27 Cal.App. 498, 506. See also People v. Thompson (1970) 10 Cal.App.3d 129, 135.) Examples of the types of decisions the People may appeal are an order granting new trial, an order setting aside the information, an order made after judgment which affects the substantial rights of the People, an order modifying a verdict or finding by reducing the degree of the offense or punishment, etc. Lately, there have been a number of People's appeals in strike cases, using Penal Code section 1238, subdivision (A)(10), which allows the District Attorney to appeal an unauthorized sentence.

However, when an appeal is filed by a defendant, may the Attorney General independently raise issues which would not have been authorized as a People's appeal pursuant to Penal Code section 1238? The answer is yes, but not without limitations. Penal Code section 1252 additionally provides that upon an appeal by the defendant, "the appellate court shall, in addition to the issues raised by defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General."

While the Attorney General may raise rulings adverse to the People pursuant to Penal Code section 1252, this right has limitations. However, those limits seemed to have expanded as case law has interpreted section 1252 to allow the Attorney General to raise a number of issues on a defendant's appeal. Prior to 1979, the People's review under section 1252 could only be taken to raise points that might be involved on retrial in the event of a reversal. (See People v. Green (1968) 264 Cal.App.2d 614, 623, disapproved in People v. Braeseke (1979) 25 Cal.3d 691, 701, ["Penal Code section 1252 does not empower us, on a defendant's appeal, to overturn a trial ruling unfavorable to the prosecution where affirmance results."]; People v. Dykes (1966) 243 Cal.App.2d 572, 577 [People's request in the event of a reversal of the judgment, proper.]; People v. Ditson (1962) 57 Cal.2d 415, 432, vacated 371 U.S. 541 [9 L.Ed.2d 508. 83 S.Ct. 519, app. dismd. 371 U.S. 937 [9 L.Ed.2d 273, 83 S.Ct. 311], 372 U.S. 933 [9 L.Ed.2d 769, 83 S.Ct. 885] [People may contest point which in the event of a reversal, might be involved on a retrial.]; and People v. Zelver (1955) 135 Cal.App.2d 226, 236-237 ["[Section 1252] was intended to give the People the right, on an appeal by the defendant, when a judgment of conviction is reversed, to raise points that might be involved on a retrial."].)

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The above holdings were consistent with the idea, expressed in People v. Valenti, that where an order is not specifically appealable, "we should not by fiat announce that it is appealable merely because it is egregiously erroneous." (People v. Valenti (1957) 49 Cal.2d 199, 204, disapproved on other grounds in People v. Sidener (1962) 58 Cal.2d 645.)

In 1979, however, the California Supreme Court held in People v. Braeseke, that pursuant to section 1252, the People may obtain review of allegedly erroneous rulings by the trial court in order to secure the affirmance of a conviction.[1] (See Endnotes on next page.) (People v. Braeseke (1979) 25 Cal.3d 691, 701, vacated 446 U.S. 932 [64 L.Ed.2d 784, 100 S.Ct. 2147], on remand 28 Cal.3d 86.) The court justified its conclusion based upon the constitutional maxim that judgments may be reversed only when a miscarriage of justice has occurred, in conjunction with an analysis of the statutory language and legislative history of section 1252, stating that "[n]either the language of section 1252 nor the statement of purpose by its drafters suggests that its scope was intended to be limited to authorizing review only when judgment is being reversed."[2] (Id. at pp. 700-701, citing Cal. Const., art. VI, §13.) Other cases which have similarly held include People v. Davis (1987) 189 Cal.App.3d 1177, 1191, disapproved on other grounds in People v. Snow (1987) 44 Cal.3d 216, 225; and People v. Pacheco (1981) 116 Cal.App.3d 617, 631.

One procedural limitation remains, however, as a gesture of respect towards the exclusive list of grounds of appeal contained within Penal Code section 1238. The People are not entitled to raise issues under section 1252 which they could have raised under section 1238. (People v. Zelver, supra, 135 Cal.App.2d at pp. 236-237, and People v. Burke (1956) 47 Cal.2d 45, 54, disapproved on other grounds in People v. Sidener (1962) 58 Cal.2d 645.) Braeseke considered and distinguished both Zelver and Burke on the grounds that the cases involved issues which the People could have raised under section 1238. (People v. Braeseke, supra, 25 Cal.3d at p. 700, vacated 446 U.S. 932 [64 L.Ed.2d 784, 100 S.Ct. 2147], on remand 28 Cal.3d 86.) That distinction was not a basis of the ruling in either case, however. In Zelver, the court stated that "[Section 1252] was not designed to give the People a right in the nature of an appeal. The right of appeal is governed by other sections of the code." (People v. Zelver, supra, 135 Cal.App.2d at pp. 236-237, quoted in People v. Burke, supra, 47 Cal.2d at p. 54, disapproved on other grounds in People v. Sidener (1962) 58 Cal.2d 645.)

While the court in Braeseke is correct in its finding that nothing in the language of section 1252 appears to limit the right to review only upon reversal of judgement, it also appears that section 1252 has evolved into a subsidiary right of appeal, contingent merely upon bringing of the appeal by the defendant, and without limitation beyond that described above.

ENDNOTES:

1. Examples of rulings which the people are entitled to "question" under section 1252 include legal insufficiency of a search warrant (People v. Reagan (1982) 128 Cal.App.3d 92, fn. 2.), and that evidence was illegally seized and therefore inadmissible (People v. Smith (1983) 34 Cal.3d 251, 270.)

2. The drafter's statement of purpose reads, in part, "At the present time the state has no way to review rulings adverse to it made during the trial. The proposed amendment will give this right, and thus a way will be opened to settle many disputed questions." (Rep. of Com. for Reform of Crim. Proc., Sen. J., p. 26 (1927).)■

COMMON WOBBLERS

In light of the numerous strikes cases pending and on appeal, it is important to recognize those cases which are "wobblers," i.e., alternate felonies/misdemeanors. In such cases, the trial courts still retain the power to reduce the current offense to a misdemeanor and thereby avoid the draconian punishment mandated by the strikes law. What follows is only a list of the more common offenses seen by defense attorneys. An exhaustive list is available from Appellate Defenders, Inc.

Drug Offenses

Health and Safety Code section 11350, subdivision (b) - Unlawful possession of a controlled substance.

Health and Safety Code section 11355 - Prohibits unlawful sale or transportation of a controlled substance.

Health and Safety Code section 11357, subdivision (a) - Unlawful possession of a controlled substance.

Health and Safety Code section 11363 - Prohibits unlawful planting, processing or harvesting a controlled substance.

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Health and Safety Code section 11375, subdivision (b) - Prohibits possession for sale and sale of certain controlled substances.

Health and Safety Code section 11377, subdivision (a) - Possession of certain controlled substances.

Health and Safety Code section 11379.2 - Sale or possession for sale of certain controlled substances.

Health and Safety Code section 11550, subdivision (e) - Unlawfully under the influence of certain proscribed drugs

Falsifying Evidence
Penal Code section 136.5 - Possession of deadly weapon with intent to prevent or dissuade a witness or victim from testifying or doing other act.

Penal Code section 139 - Threats of force or violence against witness or crime victim.

Conspiracy
Penal Code section 182, subdivision (a) - Criminal conspiracy.

Street Terrorism Prevention
Penal Code section 186.22, subdivision (a) - Participation in a criminal street gang. (Operative until January 1, 1997.)

Murder/Manslaughter
Penal Code section 193, sections (1), subdivision (c), section (3), subdivision (c) - Vehicular manslaughter.

Penal Code section 193.5, subdivision (a) - Manslaughter committed during operation of vessel in violation of Penal Code section 192.5, subdivision (a).

Penal Code section 193.5, subdivision (c) - Manslaughter committed during operation of vessel in violation of Penal Code section 192.5, subdivision (c).

False Imprisonment
Penal Code section 237 - False imprisonment.

Assault and Battery
Penal Code section 243, subdivision (c) - Battery against peace officer or other public safety provider.

Penal Code section 243, subdivision (d) - Battery inflicting serious bodily injury.

Penal Code section 245, subdivision (a)(1) - Assault with a deadly weapon other than a firearm or by force likely to produce great bodily injury.

Penal Code section 245, subdivision (a)(2) - Assault with a firearm.

Penal Code section 246 - Discharge of firearm at inhabited dwelling house or occupied building, vehicle, or aircraft.

Penal Code section 247, subdivision (b) - Discharge of firearm at unoccupied motor vehicle or uninhabited building or dwelling house.

Rape/Sex Crimes
Penal Code section 261.5, subdivisions (c) and (d) - Unlawful sexual intercourse with a minor

Penal Code section 273.5 - Infliction of injury on spouse, cohabitee or parent of child.

Penal Code section 273.55 - Second conviction for infliction of injury on spouse, with prior conviction.

Penal Code section 288, subdivision (c) - Lewd or lascivious acts.

Penal Code section 288a, subdivisions (b)(1), (e), (h) - Oral copulation with a person under 18 years of age; while in prison; with disabled.

Penal Code section 289, subdivisions (c), (h) - Penetration by foreign object

Arson
Penal Code section 452, subdivisions (a), (b), (c) - Unlawfully causing a fire; burning inhabited structure; forest lands.

Theft Crimes/Forgery
Penal Code section 461, section (2) - Burglary in the second degree.

Penal Code section 473 - Forgery.

Penal Code section 487h, subdivision (a) - Grand theft of motor vehicle, trailer, or vessel. (Operative until January 1, 1997.)

Penal Code section 489, subdivision (b) - Grand theft (not of a firearm).

Penal Code section 496, subdivisions (a), (e) - Receiving stolen property.

Penal Code section 666 - Petty theft with a prior theft conviction.

Vehicle Code section 10851, subdivision (a) - Unauthorized taking or driving a vehicle.

Extortion
Penal Code section 524 - Attempt to extort money or property by means of threat.

Miscellaneous Crimes
Penal Code section 646.9, subdivision (a) - Stalking
Penal Code section 12021, subdivisions (c)(1), (d), (e), (g) -Possession of a firearm within 10 years of a specified convictions; by probationer; by ward; by person subject to restraining order.

Vehicle Code section 2800.2 - Driving recklessly to elude a police officer.

Vehicle Code section 2800.3 - Flight from police officer causing death or bodily injury.

Vehicle Code section 23104, subdivision (b) - Reckless driving which causes great bodily injury.

MISCELLANEOUS

Welfare and Institutions Code section 10980, subdivisions (b), (c)(2), and (g) - Welfare fraud.**THERE IS NO "TELEPHONE EXTENSION" PROCEDURE IN DIVISION TWO, THOUGH TELEPHONE NOTICE THAT A BRIEF OR EXTENSION HAS BEEN MAILED IS USEFUL.**

In order to save counsel the expense of using express mail or other express services (which the court does not generally reimburse), Division Two of the Fourth Appellate District has suggested counsel notify the court by telephone that a brief or extension request has been mailed, if it is mailed so near the due date that it will not be received by the due date. The court will make a note of this if the call is made prior to the due date. However, some attorneys have misunderstood this practice and have called the court seeking an informal "telephone extension" when they have not completed or mailed the brief, but want additional time to do so. *Don't be one of those attorneys.* The purpose of the procedure is to save you the expense of express mail and allow you to file a timely brief by regular mail, not to provide an informal extension when you have not completed the brief. If you have not completed the brief and need another extension, ask for it in the usual way.

If you do call the court to say "the brief is in the mail," make sure that it actually is in the mail. Members of the court staff have told ADI that sometimes attorneys call to say they are mailing the brief that day, but the brief is actually received a week later, postmarked several days after the attorney called to say it was being mailed. Based on the postmark, the court concludes the attorney misrepresented the facts during the telephone call, and that misrepresentation is considered in the court's future dealings with that attorney.

Although such details as extension requests and the exact mailing date of briefs may seem like minor parts of appellate representation, they are a major part of the relationship between counsel and the court.■

REGARDING FILING OVERLENGTH BRIEFS IN DIVISION TWO

Exercise caution where attempting to file an opening brief in excess of 75 pages in Division Two. Where attempting to file an overlength opening brief, be aware of that Court's policy that, to justify granting a motion to file an overlength brief, appellant must present proof of: (1) an extremely long record; (2) a brief which contains no long quotations from either the record or case law; and (3) evidence that a serious effort was made to edit the brief to get it down to 75 pages. Although the Court is reluctant to grant such requests, it does review each motion on an individual basis.

Presenting the necessary information to the Court will save time and money. It will also help ensure that appellate counsel is not required to spend additional money and time re-drafting, copying and serving the unaccepted brief.■

OBTAINING COPIES OF AUDIO AND VIDEO TAPES IN DIVISION TWO

All appointed counsel are aware of a recurring problem (in all courts) where there were audio and/or video tapes used at trial, but no transcripts of the tapes were prepared as required by California Rules of Court, rule 203.5. This creates a problem where appellate counsel would like to listen to or view tapes, but the superior court is a branch court distant from appellate counsel. In addition, in some cases, the tapes are very lengthy and listening to them in the exhibits room is not convenient for either the exhibits clerk or appellate counsel.

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Chief Research Attorney Don Davio (Division 2) suggests that an augment request be filed, which references Rule 12(c), asking for the preparation of the transcript and also requesting a copy of the tape. Division Two will then order the superior court to prepare a transcript and to provide copies of the tape(s) themselves. **NOTE**: the copies of the tapes will NOT be part of the record. Only the originals are part of the record (and they can be forwarded to the Court of Appeal via Rule 10). The copies of the tapes are provided for comparison only. **IF** counsel in comparing the copy of the tape with the provided transcript notes a material variance, the next step would be a motion to correct the record (i.e., correct the transcript), especially if there is a dispute between the parties as to the accuracy of the transcript (which, however, is usually not the case).■

PROBATION REPORTS IN DIVISION TWO

As most of us know, after 30 days, probation reports are sealed and become confidential. Only the attorney of record will normally have access to the probation report in a superior court file. However, appointed counsel often ask ADI to review a file including the probation report. This matter was brought to the attention of Division Two. Thereafter, Division Two issued a standing order that an ADI attorney may have access to the probation report as an agent of the appointed attorney. ADI staff attorneys Howard Cohen and Paul Bell have copies of the order to take with them in the event a probation report must be reviewed. Thanks to Division Two for helping ADI assist the Panel!■

FAST TRACK IN DIVISION TWO

Everyone should be aware of the **New "semi-fast track"** for non-fast track dependency and juvenile criminal (Welfare and Institutions Code section 602) appeals employed by Division Two. To speed up all juvenile cases, the court will both change its internal procedures and tighten up on extensions. Special good cause will need to be given for even the first extension, and no second extensions will be granted except for extreme, genuine emergency situations. The new practice is presently effective.■

LATE NOTICE OF APPEAL IN DIVISION THREE

In the event appointed counsel finds him/her self required to file a motion for constructive notice of appeal, please make sure this is not filed in the form of a motion. Chief Research Attorney Sharon Strople in Division Three reminded ADI that Division Three desires Benoits in the form of a petition for writ of habeas corpus rather than as a "motion." (In re Benoit (1973) 10 Cal.3d 72.)■

NEW RULE EFFECTIVE 1/1/96: SEND COMPUTER DISK TO SUPREME COURT, REDUCE NUMBER OF COPIES IN SUPREME COURT FILINGS

The new text of rule 44, California Rules of Court, provides for fewer paper copies of petitions for review and briefs on the merits to be filed in the California Supreme Court, but requires a computer disk containing the document to be included. (If you do not prepare your pleadings on a computer, you may do a declaration to that effect and send the paper copies instead, but few people still use a typewriter. This exception is most likely to be of importance to clients who file petitions on their own.)

These are the details:

(1) Send 9 copies of a petition for review or brief on the merits to the Supreme Court, instead of the previous 13 (petitions) or 14 (briefs).

(2) Send the court a computer disk with the text of the petition or brief. The label on the disk must be typed or computer printed, with the following information:

a) Name of court (in criminal and juvenile cases, that will always be the Supreme Court; the rule also applies to the extra copies of civil briefs filed in the Court of Appeal which had to be sent to the Supreme Court.)

b) Case name and number

c) Counsel's name and telephone number

d) Statement that the disk is IBM or Macintosh compatible

The Supreme Court isn't leaping into the electronic age itself--the Supreme Court will be reviewing the 9 paper copies you file. The disk will replace the "archive" copies which used to be sent to certain designated law libraries for research purposes. A law publisher intends to collect the disks and make all these pleadings available on CD-rom, so the briefs will be more readily available than they are now at the handful of big city law libraries which receive them.

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CORRECTION

In the last Newsletter it was reported in regard to claims that communications with an appellant's family should be placed in category #15, Other Services, rather than in category #3, Communications with Appellant/Trial Counsel. Since the publication of the last Newsletter, however, a change in policy has occurred which now requires communications with family or friends of appellant to be included within category #3.■

BIZARRE LAWSUITS

Yes, there is a case in which someone sued himself, and when the superior court dismissed the complaint, appealed (against himself, of course). He lost as the appellant but won as the respondent! (See Lodi v. Lodi (1985) 173 Cal.App.3d 628.)■

KUDOS

We know that excellent work often goes unrecognized because it is done in unsuccessful cases. But we think it is important to recognize successful efforts so we can all be aware of issues that may benefit our clients. Kudos are listed alphabetically by attorney name. ["A" indicates a panel assisted case, "I" a panel independent case, and "ADI" a staff case.]

Fay Arfa, P. v. Rodriguez, #E014152, Prior prison term enhancement struck based upon insufficient evidence: no 969 packet, no evidence superior court file reviewed by sentencing court contained abstract of judgment or commitment form; application of improper standard: sentencing court stated it did not care whether the prison term was completed or not. (A) 2) P. v. Luis B., #E015155, Judgment reversed where juvenile court improperly lifted stay on CYA commitment without having first filed a §777, subd. (a) petition. Minor was shorted 10 days custody credits. (A)

J. Peter Axelrod, P. v. Forde, #G015324, Solicitation of murder conviction reversed for improper denial of new trial motion in which defendant claimed ineffective assistance by trial counsel, but was denied new counsel to assist in the motion. In hearing the new trial motion, trial court refused to relieve trial counsel at whom it was directed and refused to permit defendant the opportunity to argue the motion. Remanded with directions to appoint new trial counsel and to rehear the new trial motion. (A)

Susan Bauguess, P. v. Camacho, #G016135, Defendant awarded 2 additional days of presentence credits. (A)

Thomas Billingslea, Jr., P. v. Zamora, #D021445, Reversed. The trial court abused its discretion under Evidence Code §352 by allowing the prosecutor to ask questions about appellant's prior arrest and the presence of drugs at appellant's auto repair shop in cross-examining appellant's three character witnesses. (A)

Janyce Keiko Imata Blair, P. v. Munoz, #G015778, Gang enhancement under PC §186.22 reversed because insufficient evidence of predicate offense. Case remanded to determine whether battery offenses were misdemeanors. In dissenting opinion, Justice Crosby indicated he would reverse all convictions based on involuntary confession. (I)

Fred Blum, P. v. Johnson, #G016278, Defendant was retried on PC §246 (maliciously firing at occupied car) after a mistrial. Court found retrial was barred on collateral estoppel principles. (A)

Susan Bookout, In re Marquis D., #D023165, W&I §300 finding reversed because court failed to apply W&I §361.2, subds. (a) and (b) to determine whether the children should have been placed with father. Further, in published opinion, Court of Appeal concluded that a finding under §361.2(a) must be supported by clear & convincing evidence. (A)

J. Thomas Bowden, P. v. Perez, #D021975, Judgment modified to stay concurrent sentences on two counts pursuant to PC §654 and to add one day credit for time served. (I)

Robert Boyce, P. v. Cooper, #E014500, One count of continuous sex abuse under PC §288.5, subd. (a) reduced to PC §288(a) because of insufficient evidence. Remand for resentencing. (A)

Philip Bronson, P. v. Timmons, #E013123, Gun use enhancement stayed under Culbreth where offense committed before King. (I) 2) P. v. Papaj, #E015178, Judgment modified to reduce length of probation from 5 years to 3 years, to obtain specific performance of plea bargain. (I) 3) P. v. Ellison, #G015884, Enhancements for prior narcotics conviction and narcotic sale within 1,000 feet of a school reversed on the ground appellant's personal waiver was inaudible and therefore inadequate. Remanded for retrial on the enhancements. (I)

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Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
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HOT TOPICS IN DEPENDENCY, FREEDOM FROM CUSTODY, AND CONSERVATORSHIP CASES

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

Before we get started, let me extend my appreciation to former-law-clerk-now-attorney, Blair Nichols, for his assistance in compiling the cases for this season's issue. Without his tender loving care (apropos of dependency, don't you think?), the supplement might not have made it into this issue. Grazie, Blair! (We are very Continental at A.D.I.)

A. Jurisdictional Issues

In a sibling petition, a parent is precluded from relitigating the issue of whether he abused the other child under principles of res judicata and collateral estoppel. In In re Joshua J. (1995) 39 Cal.App.4th 984 (mod. 10/25/95), the court held since there had been a final judgment in the earlier dependency action, in which the father had been a party, and since the issue was identical to the first prong of the determination required pursuant to Welfare and Institutions Code section 300, subdivision (j) (governing sibling petitions), the father was collaterally estopped from relitigating the issue.

B. Dispositional Issues

In In re Johnny S. (1995) __Cal.App.4th__ [95 Daily Journal D.A.R. 15903], the Sixth Appellate District held that compliance with the Interstate Compact on the Placement of Children (ICPC) (Fam.Code. § 7901 et seq.) is not mandatory when a California court places a child with a parent residing in another state. Relying on the decision in Tara S. v. Superior Court (1993) 13 Cal.App.4th 1834, the court concluded that ICPC is intended to apply only to interstate placements for foster care and preliminary to a possible adoption, not to placements with a parent. Although it was contended that compliance with ICPC was essential because the out-of-state placement needed to be monitored by in-state officials, the Court of Appeal stated that the Department of Family and Children's Services in California is allowed to monitor the out-of-state placement or may choose to enter into an agreement for such services.

If a child has been removed from the custodial parent, and there is a non-offending non-custodial parent available to care for the child, Welfare and Institutions Code section 361.2 mandates placement with that non-offending non-custodial parent unless the juvenile court determines that placement with such parent would be detrimental. In In re Marquis D. (1995) 38 Cal.App.4th 1813, the Fourth District Court of Appeal held there is no power to "detain" the child with that parent under the code.

In Marquis D., Division One of the Fourth Appellate District differentiated between "detaining" a child with a parent, and "placing" the child. It held there was no statutory authority for orders "detaining" children in the home of the noncustodial parent, and no statutory void which requires such non-statutory practice by the juvenile court. The court also noted that the nonstatutory procedure, which would allow the department and the court to circumvent section 361.2's requirement of placement of a child with the noncustodial parent requesting custody, gives the department more control to remove a child from the noncustodial parent without meeting statutory requirements under section 387, and is in derogation of the goal to preserve family ties and limit court's control of the minor to that which is necessary for protection of the minor and the public.

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Moreover, a "detention" with the noncustodial parent exposes that parent to the potential for termination of the noncustodial parental rights. It held if the court regularly denies "placement" with a noncustodial parent requesting custody and instead "detains" the minor with that parent, "the gravity of the decision required by section 361.2, subdivision "a" is subverted. It is subjectively easier for a court to find "placement" with the parent is detrimental when, through the use of "detention," the minor still lives with that parent. Section 361.2 requires a difficult decision; it does not serve the court or the system well to diminish its impact." (Id., [95 Daily Journal D.A.R. at 13937].)

The court also held a finding of detriment could not be implied under circumstances where it was not clear from the record the trial court even considered the requirement applicable to the noncustodial parent's request that the children be placed with him. The reviewing court generally implies findings only where the evidence is clear, which, in this case, it was not.

The court further held that on remand, the standard of proof to be applied is whether there is clear and convincing evidence of detriment to justify non-placement with a noncustodial parent under 361.2. It reasoned that although the preponderance standard is the standard generally applied where no specific burden is specified by statute, that standard does not apply when to do so violates a constitutional right to due process. Since a parent's right to care, custody and management of children is a fundamental right, a clear and convincing standard applies.

C. Review Hearings

In In re Paul E. (1995) 39 Cal.App.4th 996, Division Three of the Fourth Appellate District reversed a removal order made following a section 387 petition. In that case, the juvenile court had assumed jurisdiction of a possibly autistic minor based upon dirty house allegations, but the minor had not been removed. Instead, the service plan required improvement of the living conditions. Although the parents complied with the social workers directions to remedy several specific hazards, they removed the child 8 days later and filed a supplemental petition. The juvenile court ordered that the child be placed in foster care.

The reviewing court reversed, holding the provisions of Welfare and Institutions Code section 361, governing removal of children pursuant to an initial dependency petition, also applies to removal sought in a petition filed pursuant to section 387. In both situations, in order to sustain the juvenile court's order, there must be clear and convincing evidence that there is a substantial danger to the physical health of the minor and there or no reasonable means to protect the minor's physical health without removal. In this case, the court noted that chronic messiness by itself, apart from any unsanitary conditions, is not clear and convincing evidence of a substantial risk of harm, particularly where the child had suffered no ill effects from his environment.

In San Diego County Dept. of Social Services v. Superior Court (Sylvia A.) (1995) 40 Cal.App.4th 1152, the Fourth Appellate District held that once a court orders long-term foster care after a Welfare and Institutions Code section 366.26 hearing, a social service agency is not required to file a Welfare and Institutions Code section 388 petition, in order to change a permanent plan of long-term foster care to adoption.

The Court of Appeal declined to follow the decision in In Re Nina P. (1995) 26 Cal.App.4th 615 decided by the First District Court of Appeal. In Nina P. the court held a verified section 388 petition is required "each time a modification is requested" after the implementation of a permanent plan. The Nina P. court reasoned that section 388 contains "procedural safeguards" which may not be available pursuant to post-permanent plan procedures.

The Court of Appeal, however, disagreed with the reasoning in Nina P. on the basis that a section 366.26 hearing provides a parent whose rights have not been terminated to receive notice and an opportunity to appear and present evidence at the review hearing. Additionally, the same issues would need to be decided at each hearing with the primary difference being that the Department has a more demanding burden of proof to prove adoptability at a section 366.26 hearing. Therefore, the court held that there is no legitimate reason to hold a separate section 388 hearing.

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In Joyce G. v. Superior Court (Child Protective Services) (1995) 38 Cal.App.4th 1501, the Third District Court of Appeal held the failure to tender an arguable issue in a petition for extraordinary relief warranted a summary denial. However, expressing extant frustration over the new procedures, the Court of Appeal went further hold that the summary denial was **on the merits**. Sounds a little oxymoronic, does it not? After all, by definition, a summary denial is not a decision on the merits. And since no arguable issue was deemed to have been presented, how could a decision have been rendered "on the merits?" After all, if it was not there, how did they decide it on the merits? Hopefully, these and other probing issues will be resolved by the Supreme Court.

In Jonathan M. v. Superior Court (1995) 39 Cal.App.4th 1826, the First Appellate District held that a notice of intent to file a writ petition seeking review of a trial court's order setting a permanency planning hearing, must be timely filed. Here, petitioner filed the writ petition one day late. The court reasoned that timeliness is the only practical way to administer rule 39.1B writs. Therefore, the court concluded that the filing of the writ petition outside the ten-day period prescribed by rule 39.1B(k), excuses the court from determining a petition on its merits and warrants its dismissal.

D. Permanent Plan Issues

After a permanent plan of long term foster care has been adopted, the department need not file a petition pursuant to Welfare and Institutions Code section 388 in order to seek modification of that plan at regular post-permanent plan review hearings. In San Diego County Department of Social Services v. Superior Court (1995) 40 Cal.App.4th 660, Division One of the Fourth Appellate District issued a writ of mandate vacating an order of the juvenile court which had required the Department to file a section 388 petition.

The Court noted that the prior decision of In re Nina P. (1995) 26 Cal.App.4th 615 recognized the procedural safeguards of section 388 may not be available in post-permanent plan situations. Further, Rule 1466(b), which governs post-permanent plan review hearings, contains specific provision addressing modifications of long-term foster care which provide that the court may order a new permanent plan under section 366.25 or 366.26, or any party may seek a new permanent plan by a motion filed under rule 1432, which governs section 388 petitions. The court also noted the legal and factual issues at a section 388 hearing would be identical to the threshold issues at a section 366.26 hearing, obviating the need to hold a separate 388 hearing.

GUARDIANSHIPS AND CONSERVATORSHIPS

In Guardianship of Stephen G. (1995) __ Cal.App.4th __ [95 Daily Journal D.A.R. 16401] the First Appellate District held that a non-parent attempting to gain custody of child over a parent's objections must show by clear and convincing evidence that the child would suffer detriment if returned to the mother. In doing so, the court declined to follow the Fourth District's decision in Guardianship of Diana B. (1994) 30 Cal.App.4th 1766, which held a preponderance of the evidence is sufficient to support an award of custody to a nonparent.

In In re Vanessa P. (1995) 38 Cal.App.4th 1763, the Fourth Appellate District held that nomination as a guardian by a deceased minor's parent shall, unless abandoned by the nominee or denial of such appointment by the court after an appropriate hearing on the merits, entitle the nominee to de facto parent status. Also, the court concluded that in cases involving the custody of an orphan child, the matter is properly decided in superior court pursuant to Family Code section 8600 et seq. or Probate Code section 1514, whereas the juvenile court should confine itself to making only temporary custody orders.

Here, there was a dispute between aunts over the custody of an orphaned child. Despite the deceased mother's nomination of the maternal aunt as the minor's guardian, the juvenile court declared the minor a dependent, awarded temporary custody of the child to the paternal aunt, and the maternal aunt was only allowed "relative standing" in the juvenile court proceedings. Subsequently, the trial court found that adoption was in the best interest of the orphan, refused to let the maternal aunt's counsel to act on her behalf, and stated that the fact that the maternal aunt had been nominated as guardian in the will did not constitute de facto parent status.

Relying on Guardianship of Walsh (1950) 100 Cal.App.2d 194, 196, the Court of Appeal concluded that the juvenile court's refusal to grant the maternal aunt de facto parent status effectively deprived the orphan's mother of her wishes for her child's care.

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The Court of Appeal also concluded that although the dependency statutes fail to address a situation where two relatives are seeking custody of an orphan child, there is no reason for the juvenile court to determine whether parental rights should be terminated when the minor's parents are deceased and relatives are willing to accept responsibility for the orphan. Based on these conclusions, the court ordered the case remanded to allow the juvenile court to make any necessary short term, emergency custody orders, and the superior court to determine who should adopt or be appointed guardian of the orphan.

MISCELLANEOUS

I reported in the last letter the grant of review in In re Angela G., S046375, which involves the question of whether a parent is entitled to independent court review of the record upon the filing of a brief by appellate counsel stating there were no arguable issues. This issue sees an update: on October 19, 1995, the Supreme Court granted review in a new [old] case, In re Sade C., S048796, and appears to have made Sade C. the lead case. ([95 Daily Journal D.A.R. 14119].) Briefing in Angela G. has been deferred.

In Adoption of Chad T. (1995) 39 Cal.App.4th 1107, the First Appellate District held that the court of appeal is not required to conduct an independent review of the record pursuant to People v. Wende (1979) 25 Cal.3d 436, when parental rights have been terminated pursuant to Family Code section 7822. Relying on the decision in Ronald S. v. Superior Court (1995) 34 Cal.App.4th 1467, the court held that inasmuch as a parent is not entitled to independent review on appeal from an order involving dependent children when parental rights are terminated under the Welfare and Institution Code section 300, et seq., it follows that appellant is not entitled to independent Wende review from a proceeding terminating parental rights in cases of nondependent children under Family Code section 7822.

It is not known if the grant of review in In re Angela G. [rev. gtd. 6/15/95] will affect this decision, since Angela G. addresses the applicability of Wende review to parental rights terminations for dependant children. It was urged by the court, however, to extend its review to cases involving parental rights terminations conducted under the Family Code in order to have uniformity in all actions terminating parental rights.

In In re Andrew B. (1995) 40 Cal.App.4th 825, Division Three of the Fourth Appellate District held that the Court of Appeal is compelled, per Anders v. California (1967) 386 U.S. 738 and People v. Wende (1979) 25 Cal.3d 436, to independently review the record when appointed counsel in juvenile dependency appeal submits, as a matter of statutory right, a brief that does not argue against the client, but advises the appellate court no issues were found to raise on the client's behalf. This issue, which was decided differently than Robert E. v. Jerry T., Jr. (1995) 39 Cal.App.4th 1107, is before the California Supreme Court which should put an end to the disparity of decisions on this issue. (In re Angela G. (1995) 33 Cal.App.4th 398, hearing granted June 15, 1995; In re Sade C. (1995) 37 Cal.App.4th 88, hearing granted October 19, 1995.)

Of course, on that same day, the same court decided In re Kayla G. (1995) 40 Cal.App.4th 878, which came to the exact opposite conclusion.

KUDOS AND ANECDOTES

1. **John Dodd** has earned special recognition for his post-reversal efforts to make sure reunification would work. In the published decision in In re Paul E. (1995) 39 Cal.App. 4th 996, discussed earlier in this issue, Division Three of the Fourth District Court of Appeal reversed an order removing a child from his parents' custody under a 387 petition, which was based upon dirty house allegations. The minor was ordered to be returned to the home as long as it was cleaned up.

The problem confronting most appellate practitioners at this stage is how to ensure the victory is not lost by subsequent events, especially where the family was overwhelmed by the task and there was resistance by the county to return the child. To address this problem, John Dodd, the father's appellate counsel, recruited his stepson to solicit volunteers from his high school Key Club to clean and assist in repairs. Then, Dodd inquired of Home Depot if they had a community service program which would be willing to assist in the home clean up. "Team Depot" donated cleaning supplies, a wet and dry vacuum, miniblinds, and labor to assist in the repairs.

Dodd learned from his own father that the nonfunctional wall heater was made by only one company, which donated a new heater when Dodd inquired about repairs. Dodd's associate, Ann, obtained donations of a children's bed, wardrobe, and linens from Ikea. The volunteers in the clean up and repair activities received refreshments donated by a bagel shop and Domino's Pizza.

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John Dodd has definitely earned a special kudo for these efforts.

2. **Greg Obenauer** won a **writ** victory! In a case in which a parent had admitted a petition following the dismissal of a count, he objected to a social services report including facts of the dismissed count and to proposed reunification services related to those dismissed allegations. The trial judge, on his own motion, thereupon set aside the plea and reinstated the dismissed count, an action which did not please either Greg or his client. He petitioned for extraordinary relief which was granted, and the previously vacated plea was reinstated.

All right, Greg, so **now** how do you spell relief?

HOT RESOURCES

"Research in Brief: Prosecuting Child Physical Abuse Cases: A Case Study in San Diego." Report NCJ 152987. Office of Justice Programs, National Institute of Justice, U.S. Department of Justice, Washington, D.C., 20531. (Free!)■

KUDOS

(Continued from page 7)

Martin Nebrida Buchanan, P. v. Pedroza, #D021598, Abstract corrected to properly reflect armed rather than firearm use enhancement. (I) 2) P. v. Lopez, #G016850, Multiple conspiracy convictions to perform one series of acts were improperly found. (I) 3) P. v. Clinton, Jr., #E013103, Murder was reduced to second degree because jury failed to make finding on degree; trial court to reconsider amount of restitution fine and computation of custody credits and to correct erroneous notation of personal firearm use on the judgment of commitment. Note: dissent by Justice Ramirez disagreeing with majority conclusion that defendant was not entitled to reversal of his conviction due to his representation by conflicted counsel at the PC §1368 hearing. (I)

Elizabeth Bumer, P. v. Cook, #E014463, Judgment modified from 6 years to the original 4 year term court had imposed. The trial court had no jurisdiction to recall the sentence and impose a greater term. (A)

Marilyn Burkhardt, P. v. Fields, #E015130, Judgment reversed where trial court did not inform defendant of PC §1192.5 rights, sentenced defendant to four years (instead of two years in plea agreement) because he failed to appear for sentencing and did not permit him to withdraw plea. (I)

E. Thomas Chavez, P. v. Radigan, #G016507, Abstract of judgment modified pursuant to PC §654 to stay execution of sentence for possession of methamphetamine for sale rather than serving it concurrently with transporting sentence. (A)

Robert Castle, P. v. Tolbert, #E013770, Trial court erred in sentencing by imposing an enhancement for weapon use in addition to assault with a deadly weapon, by applying a prior prison term enhancement to a non-violent consecutive term, and by imposing a restitution fine in excess of the minimum where the plea agreement did not contemplate same. (A)

Irma Castillo, P. v. Rangel, #G016194, Reversed for resentencing to allow the defendant his right of allocution. (A)

Dennis Cava, P. v. Kilpatrick, #E014573, ADW conviction reversed where prosecutorial misconduct deprived appellant of confrontation and cross-examination. (I) 2) P. v. La Soya, #E014790, Concurrent sentence stayed pursuant to PC §654. (I) 3) In re Manuel G., #G016185, W&I §602 finding reversed. Juvenile defendant's threatening a police officer was not a PC §69 offense because threats were made during illegal detention of defendant and

thus officer was not engaged in the lawful performance of his duties. (I)

Dawn Chan, P. v. Carter, #E014285, PC §1538.5 motion improperly denied where defendant originally consented to search but subsequently withdrew the consent and police failed to halt the search. (I)

Janette Freeman Cochran, In re Breeana S., #G017678, Guardianship order reversed where trial court erroneously established a permanent plan. The parent's situation had significantly improved to the point where there was insufficient evidence of detriment to justify continued removal. (I)

Howard Cohen, P. v. Stanley, #E014849, Sentence on insurance fraud stayed pursuant to §654 where the fraud was the ultimate objective for the arson upon which appellant was also sentenced. (ADI)

Thomas Coleman, P. v. Sanchez, #E015871, After reluctantly following People v. Hoffard which allows an appellant to raise issues other than those stated in his request for a certificate of probable cause, the Court reversed the conviction of receiving stolen property where appellant had also been convicted of burglary under the same facts. The Court held the trial court's stay of sentence on the receiving charge was insufficient, as the conviction itself was invalid. (I)

Elizabeth Corpora, P. v. Grissom, #E013792, Burglary conviction reversed because the trial court failed to define "felony assault" as a necessary intent element of burglary when instructing the jury. (A)

J. Michael Crofts, P. v. Deslouches, #D022092, Defendant's sentence reduced from 9 to 7 years where trial court had erroneously imposed the full 3-year great bodily injury enhancement on a subordinate consecutive term in violation of PC §1170.1, subd. (a). Enhancement was ordered reduced to 1 year (one-third the ordinary enhancement). (A)

Jeffrey Davis, P. v. Hamrick, #G017026, Additional 185 days of custody credit ordered. (A)

Linn Davis, P. v. McCrumb, #E014336, 16-year sentence reduced to original 4 years because court lacked jurisdiction to impose lengthier sentence once shorter sentence had been entered in the minutes. (Application of the McCallister rule, 15 Cal.2d 519 as modified by People v. Karaman (1992) 4 Cal.4th 335.) (A)

John Dodd/Jane Winer, In re Paul E., #G017932, Published reversal. The safeguards afforded parents by W&I §361 apply to supplemental petitions under §387. Chronic messiness in housekeeping is not the clear and convincing evidence of a substantial risk of harm to a child which may justify a child's removal from a parent under §361. (I)

Carl Fabian, P. v. Garcia, #D019803, Conviction for possession of heroin stricken because it was LIO of possession for sale. (I)

Judith Fanshaw, P. v. Kegerbein, #E012997, Prior prison term and prior serious felony findings reversed because court failed to admonish defendant of constitutional rights. One of two gun enhancements stricken under Culbreth. (A)

Patrick Morgan Ford, P. v. Benford, #E014952, Robbery conviction reversed where trial court erroneously ruled defendant's Wheeler motion was untimely when made after jury selected and before jury sworn. (A)

Stephen Gilbert, Keith Monroe, John Ward, P. v. Serrano, et al., #G016209, Since the total amount of cocaine involved in transaction is the basis for quantity enhancements, the defendants could not receive both a quantity enhancement for transportation and a different quantity enhancement for possession. The concurrent 15 year enhancement for quantity of cocaine possessed was stricken. (A/I/I)

David Goodwin, P. v. Marin, #E015356, Concurrent terms imposed for assault with a deadly weapon and false imprisonment ordered stayed pursuant to PC §654 because those offenses were incidental to kidnapping for which defendant was separately sentenced. (I)

Laura Gordon, P. v. Vences, #D020631, Conviction for carrying a concealed firearm reversed because of insufficient evidence. (A)

Kimberly Grove, P. v. Morales, #D020722, Second degree murder conviction reversed because court instructed jury that sale of cocaine was an inherently dangerous felony. Court found the crime of selling or furnishing cocaine does not require the use of physical force or threat of harm to accomplish the crime. It was therefore reversible error for the trial court to instruct on felony murder based on sale of cocaine. (A)

M. Elizabeth Handy, In re Ashley S., #D023206, Termination of parental rights was reversed for lack of reasonable services where father had moved to Arkansas to be near minor who was placed there with relatives. Father completed all the court ordered programs but had difficulty finding steady employment and thus could not find adequate housing. Court held department had a duty to assist dad in finding employment or housing. (I)

(Continued on page 14)

John Hardesty, P. v. Hattar, #E014619, Sentence on ex-felon possessing a firearm should have been stayed pursuant to PC §654 because it was simultaneous with drug sale charged in other count; $4,000 restitution fine reported in minute order reduced to statutory minimum of $200 because court failed to orally pronounce fine at sentencing. (I)

Mark Hart, P. v. Stringer, #E013123, Gun use enhancement stayed under Culbreth. (I) 2) P. v. Meredith, #E012446, Consecutive knife use enhancement stricken pursuant to Culbreth where defendant received gun use enhancement for same attack on a single victim. (A)

Christopher Hennes, In re Jesus Z., #G016114, The trial court improperly revoked probation for possessing a weapon, where there was no express condition that the defendant not possess weapons in the probation order. (A)

Patrick Hennessey, P. v. Butler, #E015398, Knife use enhancement stricken because defendant pled guilty to assault with a deadly weapon. (I)

Julie Sullwold Hernandez, P. v. Sangster, #G015705, DUI conviction reversed where trial court erroneously instructed the jury defendant was required to prove the act of driving was not volitional. (A)

Handy Horiye, P. v. Vasquez, #D021598, Abstract amended to properly reflect armed rather than firearm use enhancement; credits miscalculation corrected. (I) 2) P. v. McCormick, #E014393, One of three counts of penetration by a foreign object was not supported by the evidence. The abstract was ordered modified to reflect the stay of one firearm enhancement (Culbreth) and to reflect a straight life sentence instead of erroneous 25 year-to-life-sentence for attempted murder. (I) 3) P. v. McPherson, #E014641, First degree murder conviction reduced to second because jury failed to make finding as to degree. (I)

Susan Joehnk, In re Moises R., #D023224, Restitution fines imposed after minor admitted to transporting cocaine & resisting arrest reduced to statutory minimum because the court failed to advise minor of the fines at the time of the plea bargain. (I) 2) P. v. Cothran, #D022283, People's appeal. Trial court's decision to declare "wobbler" offense a misdemeanor in case charged as a two strikes case affirmed. Court basically follows its earlier decision in People v. Superior Court (Perez) (1995) 38 Cal.App.4th 347. (A)

Judy Keim, In re Steven E., #D023784, The Court (Div. 1) reversed an order terminating jurisdiction in a dependency case, where the mother was not given a hearing on why placement with the father in Florida would not be in the child's best interests. (A)

Daniel Koryn, P. v. Brooks, #D021515, Sentence for carrying a loaded firearm stayed pursuant to PC §654 where defendant's sentence also included an armed enhancement. (A)

Sylvia Koryn, P. v. Sikairos, #D022242, Three year concurrent sentence for petty theft with a prior stayed because court had already imposed sentence for the greater offense of auto burglary. (A)

Joseph Kozakiewicz, P. v. Kersey, #D022084, Reversal of count for simple possession of methamphetamine where defendant was also convicted of the greater offense of possession for sale. (A)

John Lanahan, P. v. Partida, #D021567, Court of Appeal vacated enhancements under H&S 11370.2 and PC §667.5 on the ground defendant was not given full Boykin/Tahl waivers before admitting the prior conviction. Remanded for retrial on the prior. (A)

Marsha Levine, In re Emma R., #G017075, The order denying reunification services was not supported by substantial evidence because there was no competent evidence as to whether psychotropic medication would render the mother capable of benefiting from reunification services, and the denial was based on the mother's hypothetical unwillingness to use those services. (A)

Michael Linfield, P. v. Nunez, #G017080, Remand for resentencing because trial court erred in imposing full consecutive subordinate term in non-violent felony case where only 1/3 of the midterm is authorized. (I)

David Macher, P. v. Vasquez, #E013493, Concurrent sentence for robbery stayed under PC §654 where robbery was underlying crime of burglary conviction. (A) 2) P. v. Murphy, #E015494, One firearm use was stayed pursuant to Culbreth and the case was remanded so the trial court could reimpose a "misdemeanor" sentence of no more than 6 months rather than a felony sentence for evading a police officer. Abstract was amended to reflect additional 3 days of credit. (I)

Marilee Marshall, P. v. Stuart, #E014512, Case remanded for resentencing where court relied on improper factor in giving aggravated term and because it was sole factor relied upon error not harmless. (I)

Debra Maurer, In re Sean S., #D023340, Juvenile CYA commitment remanded for recalculation of erroneous maximum term. (A)

(Continued on page 15)

Janice Mazur, P. v. Zarate, #E014333, True findings on prior prison term & prior drug conviction reversed because of defective admonitions. (A) 2) In re Brian B., #D021294, The conviction for unlawful intercourse was reduced to a misdemeanor, since both parties were 15 years old. (I)

Frederick McClellan, P. v. Smith, #E015213, Pursuant to plea bargain, defendant was placed on probation but subsequently violated. Defendant entered an agreement to admit the violation in exchange for a sentence of 16 months. The court released defendant pending sentencing. In exchange, defendant agreed to upper term if he failed to appear. Defendant FTA'd and court imposed upper term. Reversed to permit defendant opportunity to withdraw admission of violation. Where defendant was never advised pursuant to §1192.5, there was no valid Cruz waiver. (A)

Paula Mendell, In re Brittany D., #D023551, After appellant's (Father's) opening brief was filed, county counsel conceded on the issue that the Department should have been precluded from filing the §342 subsequent petition alleging a §300(d) allegation which had been previously dismissed as part of an agreement. In the interest of justice, county counsel requested the Court of Appeal to reverse the juvenile court order finding the §300(d) allegation on the subsequent petition to be true and all parties stipulated to the reversal. (A)

Richard Miggins, P. v. White, #E014607, False imprisonment ordered stricken as an LIO of kidnapping, of which defendant was also convicted. (A)

Susan Milliken, P. v. Escalante, #D022240, Juvenile matter remanded for resentencing where juvenile court's imposition of consecutive term was arbitrary & where maximum term was not properly calculated; People conceded. (A)

Elizabeth Missakian, P. v. Meyers, #D020417, Court of Appeal found prosecutor's withdrawal of plea offer following a spat between the prosecutor and defense counsel amounted to vindictive prosecution in violation of due process. The court remanded the case to the trial court for determination of prejudice, i.e., whether defendant would have accepted the offer had it not been withdrawn. The court noted that the remand also permitted the parties to resolve the case by entering into a new plea agreement, which the parties had proposed during the appeal. (A)

Anne Moore, P. v. Grey, #D021515, Sentence for carrying a loaded firearm stayed pursuant to PC §654 where defendant's sentence also included an armed enhancement. (I)

Diane Nichols/Ronda Norris, P. v. San Nicholas, #G016593, Abstract of judgment modified to strike reference to two dismissed PC §667.5, subd. (b) enhancements. (ADI)

Diane Nichols, P. v. Campbell, #D023101, People's appeal, published. Trial court had discretion under PC §12022.5, subd. (d) not to impose additional punishment for a personal gun use enhancement that is an element of an underlying assault offense. Court of Appeal affirmed trial court and refused to impose additional 4 year enhancement which People argued was mandatory. (ADI)

Ralph Novotney, Jr., In re Edward O., #E015218, Modification of jurisdictional order by striking finding minor committed a burglary. (Reduction in sentence from 7 years 10 months to 6 years 10 months.) Court found IAC on part of trial counsel who consented to an amendment of the petition to add burglary charge mid-hearing. (A)

Ronda Norris, P. v. Shaffer, #D021976, Superior court's grant of probation pursuant to PC 17(b)(3) in a "three strikes" case upheld in People's Appeal. (ADI)

Richard Peters, P. v. Lock, #D021526, Judgment reversed and remanded because the court erred in failing to conduct any meaningful inquiry into appellant's indigency. The court allowed appellant's private retained attorney to withdraw from the case and refused to appoint counsel for appellant, effectively leaving appellant in pro per to represent herself on her motion to withdraw her guilty plea and at sentencing. (A)

Theodore Pinnock, P. v. Kirk, #E014916, Meth possession for sale conviction reversed because trial court erred in denying motion to suppress. Appellate court reversed because search warrant affidavit did not show probable cause. Leon did not apply because affidavit was so lacking indicia of probable cause "that it would be objectively unreasonable for a well-trained officer to rely on the warrant." (A)

Jonathan Purver, P. v. Rodriguez, #E013493, Concurrent sentence for robbery stayed under PC §654 where robbery was underlying crime of burglary conviction (I)

Michael Randall, Jane Winer, Harold La Flamme, In re John W., #G016695, In a published reversal, the court found error in the juvenile court order 1) precluding for one year modification of its exit orders concerning custody, and 2) splitting physical custody without using a strict best interest of the child standard. The Court, in an unusual disposition, remanded the case to the Family Court, where, it said, the case had always belonged. (I)

(Continued on page 16)

David Rankin, P. v. Chau, #E014298, Two gun use enhancements stricken under Culbreth. 2) P. v. Botello,, #D022255, Concurrent sentence of four years stayed pursuant to PC §654. Court agreed that guilty plea with a lid did not act as a waiver of the §654 claim. (ADI)

Lee Rittenburg, P. v. Akin, #G015986, Reversal of true findings of assault and battery since each was a LIO of spousal abuse of which a true finding was also made. (A)

JoAnne Roake, 1) P. v. Torres, #D023164, Simple possession of cocaine base stricken as an LIO of possession of cocaine base for sale. (I) 2) P. v. King, #E015690, Court found gang-related conditions of probation were invalid as defendant's nickname of "Big Dog" referred to defendant's weight, rather than a gang moniker, and there was no other evidence that defendant's offense was related to gang activity. (I)

Lynda Romero, P. v. Bass, #G015433, Abstract of judgment modified to increase presentence custody credits. Court rejected A.G.'s argument that issue must first be raised in the trial court, noting the issue will be resolved on appeal when raised in conjunction with other appellate issues. (Citing People v. Guillen (1994) 25 Cal.App.4th 756, 764.) (I)

Andrew Rubin, P. v. Kirkpatrick, #G017000, Prior DUI convictions reversed because defendant did not properly admit. Remanded to determine validity of priors. (I)

Stefanie Sada, P. v. Rico, First degree murder conviction reduced to second degree based on jury misconduct. Juror improperly interjected expertise regarding firing characteristics of gun used in homicide; this could have infected deliberations regarding premeditation. 2) P. v. Bray, #D022097, Additional 52 days of §4019 credits awarded. 3) P. v. Mikhail, #D023353, Serious felony prior enhancement under PC §667(a) stricken because current crime of grand theft not a serious felony. 4) P. v. Gibson, #D021978, Case remanded to allow trial court to exercise discretion under PC §17(b), where judge erroneously believed at time of sentencing that strikes law preempted this power. (ADI)

Steven Schorr, P. v. Chavez, #D022291, Conviction for securities fraud reversed; new California Supreme Court case holding Corporations Code §25401 requires knowledge of falsity of sales statements applies to cases pending on appeal, and defense was that defendant believed statements in printed investment materials given to client. (I) 2) P. v. Vasquez, #D021584, Irrelevant and prejudicial evidence of gang membership requires reversal of assault conviction. Weak identification evidence demonstrated prejudice. (A)

Richard Schwartzberg, P. v. Cortez, #G016069, Two counts child molest reversed because trial court abused its discretion when it denied appellant's request to appoint medical expert. (I) 2) P. v. Boyko, #E012997, Prior conviction allegation reversed. (I)

Terrence Scott, P. v. Torres, #G017512, Court modified the judgment and ordered appellant's determinate term be served before his indeterminate term. (I)

Maureen Shanahan, P. v. Bryant, #E014551, Residential burglary conviction reversed where trial court erroneously refused defendant's request to instruct on the lesser related offense of unlawful entry (PC §602.5.) (I)

Stuart Skelton, P. v. Fleming, #D021924, Case remanded for trial judge to impose sentence when judge other than trial judge imposed sentence. (A) 2) P. v. Smith, #D022916, Sentence reversed and remanded because it exceeded twice the base term. (I)

Jan Stiglitz, P. v. English, #E013751, Trial court erred in imposing two enhancements under PC §667.8, subd. (a) for each victim. Enhancements stricken. (A)

Joseph Tavano, P. v. Ramirez, #G016488, Trial court's true finding on 3 prison priors reversed & remanded for redetermination. Trial court failed to inform defendant of his constitutional rights, and record contained no waiver of right to jury trial or any of his other rights. (A)

Roberta Thyfault, P. v. Longabardi, #E014113, Sentence for robbery stayed pursuant to PC §654, since trial court found the primary emphasis at trial was upon the felony-murder theory. $500 restitution fine stricken. Even though defendant waived his right to contest the fine by not objecting, he was out of the courtroom when fine was imposed. Since defendant did not waive right to be present pursuant to PC §1193(a), it was beyond power of court to add fine in his absence. (I) 2) P. v. Hughes, #E012801, Published reversal of one count transporting meth. Trial court erroneously denied §1118 motion, and although court announces new rule which would allow reviewing court to consider evidence presented by defendant, this rule cannot be retroactively applied to appellant's case. (I)

(Continued on page 17)

Michael Totaro, P. v. Kelly S., #G017077, Reversed and remanded for suppression hearing. Orange County Public Defender's Office provided IAC, where office failed to properly analyze issues before assigning file to deputy the day of adjudicatory hearing & court refused to permit deputy to proceed with motion to suppress. (I)

David Tucker, P. v. Castro, #E014750, Judgment in DUI manslaughter case modified to strike a 1-year VC §23182 victim-injury enhancement erroneously imposed and to stay pursuant to PC §654 a count of drunk driving with injury erroneously listed as concurrent on the abstract of judgment. (A)

Deborah Tuttleman, P. v. Duro, #E014067, Multiple punishment for burglary and robbery barred by PC §654. Robbery and its enhancement, which were run consecutive, were stayed. (A)

Patricia Ulibarri, P. v. Lopez, #D021402, Abstract of judgment modified to reflect concurrent six month term rather than two-year concurrent term for misdemeanor marijuana possession (H&S §11357, subd. (c)). (I) 2) In re James C., #D023131, Confession to sale of non-controlled substance in lieu of drug held inadmissible because there was no independent evidence any crime had occurred. Mere possession of bindles on non-controlled substance doesn't establish corpus delicti of H&S §11382 offense. (I)

Paul Ward, P. v. In re Jason R., #D022066, Court struck $303 from direct restitution order. Stricken amount represented victim's cost for staying in a motel following minor's burglary. Court agreed that the motel bill did not constitute a compensable loss under W&I §729.6, in effect at the time of the crime. (A)

Alisa Weisman, P. v. Nanthavongdouangsy, #G015773, Remand ordered for preparation of abstract of judgment where trial court failed to prepare abstract. (A) 2) P. v. Douglas, #E014602, Published partial reversal. Court erred in imposing consecutive terms for kidnapping enhancements under §667.8(a) when it had already imposed term for kidnapping for robbery. PC §654 required stay of PC §667.8 enhancements. (A) 3) P. v. Rivera, #E014280, Court reversed three counts (genital penetration by foreign object and its knife use enhancement; terrorist threats; dissuading a witness by force or intimidation and its armed and gun use enhancement) for insufficiency of the evidence. (A)

Jerry Whatley, P. v. Vandemark, #G016356, Stalking conviction stricken where it was found to be a necessarily included lesser offense of stalking while a restraining order was in effect. (A)

Brian Wright, P. v. Demara, #D021709, Court reversed two receiving stolen property convictions because appellant was convicted of taking the cars and PC §496, subd. (a) bars convictions for both stealing and receiving the same property. Court also agreed that trial judge erred in permitting testimony that stolen cars were used to transport illegal aliens across the border, but found the error harmless. (A)

Sharon Wrubel, P. v. Pique, #D023010, Court ordered trial court to amend abstract of judgment to show three prison priors as stricken rather than concurrent. (I)

Harry Zimmerman, P. v. Rodebaugh, #D022932, Court erred in not allowing defense evidence but not prejudicial. Dissent concludes trial court erred in ordering aggravated term, rather than midterm. (I)■

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