# APPELLATE DEFENDERS ISSUES

**The Quarterly Newsletter of Appellate Defenders, Inc.**


# THOUGHTS FROM THE DIRECTOR
## Elaine A. Alexander, Executive Director

This is a fairly new year, but a number of old issues keeping coming up, and I'd like to take some time to address a few of the more or less chronic ones, with an emphasis on the ever-sensitive issue of claims.

*Self-Cutting*

An old dilemma facing attorneys has been whether to cut their own claims back to guidelines or whatever they think they will be paid, rather than submitting actual time. As early as 1984, when ADI did the first survey of attorneys which was used to help establish the guidelines, attorneys indicated they cut their own claims in about half their cases, and on the average of about eight hours when they did. I haven't seen very recent stats, but anecdotally we hear all the time about self-cutting.

The reasons for doing it are several. First, of course, is the dislike of **being** cut, and the implication of criticism of some kind behind it. Another reason may be embarrassment at having taken longer than guidelines, or fear of being seen as inefficient or, worse, as "padding" claims. Attorneys may be apprehensive that giving such an impression will affect their reputation with the project or court, and maybe their standing on the panel.

The arguments against it are also several. One is that if a sufficient explanation is given, full compensation may be paid. Why foreclose the possibility? Another reason is that cutting back to the guidelines may create the impression in an observer that you are just "claiming the guidelines," instead of keeping track of your time. Another, systemic argument is that the guidelines are continually being re-evaluated. Claims are the principal way of testing the relationship of the guidelines to reality. Understating actual time leads to the false impression that the guidelines in a particular category are perfectly adequate, when in fact they are not -- or even, in some categories, that they need to be lowered, when that is not true.

I tend to advise attorneys to take the latter, full-disclosure route. Being candid and factual is usually the best policy. However, I admit that severely excessive claims can give a bad impression of the attorney. A good compromise in such a circumstance is to claim what you think is objectively reasonable, then state in a note or memo what you actually spent and why you are not claiming it. That approach will allow tracking of self-cutting for purposes of assessing the guidelines and at the same time give a good impression of yourself as someone who is both reasonable and fully open.

*Classification of issues*

We have been told that attorneys are confused about how we classify issues as simple, average, etc. There's a good reason for that: statewide standards are in a process of gradual articulation as the AIDOAC committee audits

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claims and gives feedback to the projects and panel attorneys. We are learning, and that means that our classification of issues may sometimes be different from what it used to be.

The basic concepts haven't changed so much as their application to particular situations. We still use page length as a starting point, then take a critical look at the issue. It will be reduced in complexity if it contains a number of long quotes or extensive borrowed material (see below), or if it unnecessarily digresses or goes on and on about a simple point. It will be upgraded in complexity if it involves new law, a creative approach, difficult concepts, unusually dense or concise text, subtle distinctions among cases, review of a large body of law, etc. Quality, both above and below norm, is always taken into consideration.

Since, over the last two years, we have slowly refined our application of these standards, sometimes the classification of an issue for the final claim will be different from the interim one. This is a correction to what it should have been in the first place. Attorneys always need to remember that interim recommendations are not and never have been an irrevocable award, but instead are a tentative estimate of what the final will be.

*Recycled materials*

I believe a number of attorneys misread our mailing on use of recycled materials as an announcement of a broad new policy and new reporting requirements necessitating detailed tracing of every part of every brief. That is not the case at all, and I want to reassure attorneys that we are seeking only enough very basic information to enable us to classify issues knowledgeably. This is really a restatement of a long-time, common-sense position.

We ask that you tell us only when you have made <u>substantial</u> use of borrowed materials -- which in this context means only when it would affect the issue classification. We do <u>not</u> need to be told about passages (even if of some length) on general principles such as standard of review, prejudice, elements of an offense, tests for sufficiency of the evidence, etc., and the citations for such principles. We assume an experienced attorney will have done such work before, and the guidelines already take that into account; thus the borrowing does not affect issue classification.

An example of borrowing that does affect classification would be reuse of the entire substance of an argument -- e.g., standard Three Strikes or CALJIC No. 2.90 issues. Another would be reuse of an unusually complex passage in an argument -- e.g., a state-by-state review for a cruel and unusual punishment argument or a legislative history analysis. In those examples, facial appearances would suggest substantially more difficult work than was actually necessary for this case, and so you should let us know what was borrowed.

Letting us know what was borrowed certainly does not require a lengthy audit trail. As we said in the mailing, a one-sentence estimate will often be sufficient: "About 2/3 was borrowed." "Most was reused, but I spent about 2.5 hours updating citations and analyzing a new case." "The legislative history section was taken from a previous brief."

It is necessary, however, to be quantitative or descriptive (as in the preceding examples), even though you are only estimating. Merely saying "I had briefed issue II before" doesn't tell us enough. That could mean everything from "Issue II was a word-for-word copy" to "I had briefed an issue like number II before, but this was mostly original." The guiding, common-sense principle is: Give us enough information to assess how much work you had to do for the issue in this case.

*Other claims issues*

A quick rundown of a few claims matters we think you should know includes:

- *Routine* extension requests are normally compensated at no more than 0.3 hours.

- A petition for certiorari to the U.S. Supreme Court, if justified, can be compensated under the appellate appointment, but it is considered extraordinary, and the attorney has a stiff burden of showing justification. Consult with us first.

- Habeas writs in federal court are not paid by the state (unless you can get preapproval for one -- something I have never seen). File the petition and then ask the federal court for appointment. If the request is granted (and it's by no means

automatic), work on the petition may be compensated.

- ADI's policy is to notify the attorney when we are recommending a cut of more than five hours or 10% of the claim.

*To call or not to call*

I was quite stunned a few months ago when a panel attorney told me he frequently advised other attorneys: "Never call the projects." The reason? You might ask a stupid question or give the impression you require too much assistance, and that could affect your standing.

I can't imagine worse advice than never to call the projects. We're here to provide assistance, bounce ideas off of, channel information, offer a second opinion, etc., etc. It's one of the major advantages of working in a system such as ours. If someone doesn't ask for guidance and ends up doing the wrong thing, that'll hurt far more than a mere inquiry. Believe me, except in extreme cases, staff attorneys don't want to spend their time reporting that so-and-so asked a question s/he really shouldn't have asked.

Still, of course, reasonableness is a guide. Ask whether you'd want to pose the question to a colleague who was amiable, patient, and "there to help," but busy. Do your homework first: be organized and concise in your presentation, be familiar with the relevant record, check basic research resources such as the rules of court, the applicable code section, and so forth. An attorney who calls several times a day to ask questions such as "When is a brief due?" or "What is the citation to Miranda?" or who isn't able to answer relevant questions about the facts may eventually create a bad impression. But by and large the best advice is, "When in doubt, call." ■

# STRIKES LAW UPDATE

**by Diane Nichols, Staff Attorney**

Romero Remands in "Silent Record" Cases

The Fourth District Court of Appeal has not acted consistently in "silent record" cases, that is, cases where the record does not indicate whether the trial court knew it had sentencing discretion to strike a prior under People v. Superior Court (Romero) (1996) 13 Cal.4th 497. Footnote 13 of the Romero opinion states a petition may be denied if there is an affirmative showing in the record that either the trial court was aware of its discretion or it would not have exercised such discretion. The holding is fully retroactive, and there is no apparent reason why the Supreme Court would deny relief to a petitioner *only where* the record affirmatively shows a trial court *correctly* understood its discretion, yet also deny relief to an appellant *unless* the record affirmatively shows the trial court *incorrectly* understood its discretion. That is the interpretation of footnote 13 we are seeing in many cases, as defendants are told their remedy is not on appeal, but through a petition for writ of habeas corpus.

Division Two refuses to remand in such cases, relying on the presumption the law was followed and official duty was properly performed and on the proposition that appellants must affirmatively show error. (See In re Arthur N. (1976) 16 Cal.3d 226 and Ross v. Superior Court (1977) 19 Cal.3d 899 for an excellent discussion of how the normal presumption a trial court followed the law is applicable only where the law is *established.*)

Division One, which initially remanded all cases based partly on its vigorous and well-known enforcement of its appellate court opinion in Romero, now also refuses to remand in many silent record cases, with some dissents. The court has begun to find the issue waived because defense counsel failed to ask the trial court to strike, following People v. Askey (1996) 49 Cal.App.4th 381 and also presumes the trial court was aware of its discretionary power, following People v. White Eagle (1996) 48 Cal.App.4th 1511.

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Recently, thanks to panel attorney Cliff Gardner, the dissents resulted in a published opinion by one panel, People v. Houck (March 11, 1997) 97 Daily Journal D.A.R. 3280, which finds remand appropriate even in silent record cases with no defense "motion." The court disapproved Askey and found no forfeiture-type waiver under People v. Scott (1994) 9 Cal.4th 331, because (1) the clear weight of authority at the time of sentencing established lack of discretion to strike, (2) it is unreasonable for defense counsel to ask the court to exercise discretion it apparently lacked, and (3) applying waiver did not meet the policy considerations of Scott, because raising the issue would not have fixed the problem, as it would have in Scott. The court also disapproved White Eagle because (1) the normal appellate presumption the law was followed does not apply where the law was not clearly established, (2) failure to remand would disregard the defendant's entitlement under Romero unless the court, on the record, was aware of its discretion or clearly indicated it would not have struck a prior, (3) the practical effect of White Eagle's holding would contravene the Supreme Court's express holding that Romero be fully retroactive, and (4) the defendant is entitled to exercise of a court's "informed discretion" at sentencing. Houck thus creates a split among the published opinions of the courts of appeal as well as an opportunity to raise a violation of equal protection based on Meyers v. Ylst (9th Cir. 1990) 897 F.2d 417 [while state court may make ruling retroactive or prospective, once it has established a rule, courts must apply rule with even hand].

Despite Houck, Division One's unpublished opinions remain inconsistent, as shown in two recent unpublished silent record opinions filed the same day (by the same author). In one case, the court applied waiver and the presumption a trial court was aware of its discretion. In the second, the court noted it had "enforced its view [that trial courts lacked the power to strike priors] by reversing trial courts which did strike serious/violent felony priors". The court therefore resolved "the uncertainty of this record in favor of the appellant and in an attempt to carry out the spirit as well as the letter of the Supreme Court's direction."

Division Three, while generally remanding in silent record cases, has sometimes found no remand needed because striking a prior would amount to an abuse of discretion as a matter of law.

The good news, in addition to Houck, is the issue of whether a defendant is required to file a petition for writ of habeas corpus in a silent record case, as opposed to receiving a remand on appeal, is on review in a Division Two opinion, People v. Fuhrman, granted 11-13-96 (S055920) formerly at 47 Cal.App.4th 1740 (panel attorney Roberta Thyfault).

## Strikes Activity in the Supreme Court

Since the last newsletter, the Supreme Court has decided four "strikes" cases. In People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, the Court held the three strikes law left undisturbed a trial court's discretion to declare a wobbler a misdemeanor under Penal Code section 17, subdivision (b). The trial court must consider the offense (nature and circumstances), the offender (attitude, character traits, and criminal history), and sentencing objectives (societal protection, punishment, specific and general deterrence, incapacitation, restitution, and sentencing uniformity). No one factor, such as public safety, predominates. On appeal, the appealing party carries the burden of showing the decision was "irrational or arbitrary", and the standard of review is "extremely deferential and restrained."

In Garcia v. Superior Court (1997) 14 Cal.4th 953, the Court held a defendant may not challenge prior convictions on the ground of ineffective assistance of counsel in a current prosecution for a noncapital offense because such an adjudication would be "an intolerable burden upon the orderly administration of the criminal justice system." Such claims may still be raised in a court of appropriate jurisdiction, and, if a prior conviction is vacated, it cannot be used to trigger recidivist treatment for a subsequent offense.

In People v. Hazelton (1996) 14 Cal.4th 101, the Court held that, although Penal Code section 1170.12 (Proposition 184) is ambiguous regarding whether it includes out-of-state convictions, in light of the unequivocal evidence of voters' intent, the statute is properly construed to include out-of-state convictions. (An argument remains: use of such foreign convictions as strikes results in due process and ex post facto violations in pre-Hazelton, post-1170.12 cases.)

In People v. Rosbury (March 17, 1997) 97 Daily Journal D.A.R. 3559, the Court held that the provisions of Penal Code section 667, subdivision (c)(8) ["Any sentence imposed pursuant to subdivision (d) will be imposed consecutive to any

other sentence which the defendant is already serving . . . ."] do not mandate consecutive sentencing for a defendant whose probation for a pre-strikes law offense is revoked. A defendant on probation does not begin to serve his sentence following probation revocation until he is committed (perhaps to the sheriff's custody or, more likely, to prison).

Cases and Issues Still on Review

The following cases are pending:

People v. Jones, granted 2-29-96 (S051058) formerly at 49 Cal.App.4th 160 [whether an out-of-state felony conviction qualifies as a third strike under the initiative version of the three-strikes law, codified in Pen. Code § 1170.12] (grant and hold with Hazelton);

People v. Nelson, granted 5-29-96 (S053008) reprinted at 47 Cal.App.4th 1784 [whether consecutive sentences are mandatory under the three strikes law when the crimes occur on the same occasion and arise out of the same set of operative facts];

People v. Hendrix, granted 9-25-96 (S055275) formerly at 47 Cal.App. 4th 11 [whether section 667, subdivisions (c)(6) and (c)(7) require consecutive sentencing for robberies based on a single act involving multiple victims];

People v. Helms, granted 8-21-96 (S053937) reprinted at 49 Cal.App.4th 241 [whether the application of a three strikes mandated consecutive sentence to a crime committed before the enactment of the law, but for which defendant had received execution of sentence suspended, violates ex post facto principles];

People v. Davis, granted 7-10-96 (S053934) reprinted at 48 Cal.App.4th 1785 [whether juvenile adjudication for residential burglary qualifies as a strike; whether express finding of fitness is required for prior juvenile adjudication to qualify as strike];

People v. Renko, (S053739) reprinted at 48 Cal.App.4th 1417 (grant and hold with Davis);

People v. Rodriguez, granted 10-23-96 (S055670) formerly at 50 Cal.App.4th 1013 [whether fact defendant was convicted of assault with a deadly weapon sufficient to establish conviction as serious felony (strike); whether trial court may exercise its discretion in deciding whether to strike a prior in defendant's absence and outside the presence of counsel];

People v. Fuhrman, granted 11-13-96 (S055920) formerly at 47 Cal.App.4th 1740 [whether prior conviction stayed under 654 can be used as a strike, overruling People v. Pearson; whether a defendant is required to file a petition for writ of habeas corpus in a silent record case; whether individual counts of a prior conviction can each be considered separate strikes];

People v. Dotson, granted 1-15-97 (S056839) unpublished [whether three strikes law allows enhancements used in determining minimum parole eligibility period of an indeterminate sentence to be imposed consecutive to that indeterminate term in a determinate sentence];

People v. Ochoa (S056787) formerly at 49 Cal.App.4th 697, grant and hold with Dotson;

People v. LLoyd, granted 2-19-97 (S057937) (unpublished) [whether court of appeal erred in summarily dismissing appeal following nonstipulated term guilty plea for failure to obtain CPC where defendant specifically reserved Romero issue for appeal].

People v. Jefferson, granted 2-19-97 (S057834) 96 Daily Journal D.A.R. 13525 [whether sentencing defendants to doubled indeterminate term under the three-strikes law is proper where there is no "minimum term" to be doubled].■

# Obtaining Confidential Telephone Calls With Your Client

**by Patrick DuNah, Staff Attorney**

Appellate counsel who are unable to effectively communicate with their clients through letters may need to do so via telephone calls. Counsel should understand that normal incoming or outgoing phone calls with inmates are subject to monitoring and recording by prison personnel. (See Cal. Code of Reg., Title 15, §3282, subd. (h).) Therefore, such telephone communication is not necessarily confidential and/or protected by the attorney-client privilege. Sensitive matters should not be discussed during telephone conversations subject to monitoring/recording as it is possible things said by either party could be used against the client.

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Counsel who require confidential telephone calls with their clients should seek to set up an unmonitored telephone conversation by contacting the inmate's counselor. Normally, counselors are very cooperative in arranging and facilitating such calls. Sometimes, they will refer you to designated prison personnel who are in charge of approving such calls. Pursuant to section 3282, subd. (g) of Title 15 of the California Code of Regulations, "Specific staff may be designated by the [correctional] institution head to approve an emergency telephone call or a confidential telephone call between an inmate and their attorney or other person when the designee determines that an emergency exists or that confidentiality is warranted. Confidential calls shall not be made on inmate telephones and shall not be monitored."

It should be sufficient to explain that the call is necessary because sensitive matters requiring protection under the attorney/client privilege must be discussed. Certain prisons have suggested that in lieu of a confidential call, the attorney should instead arrange for an in-person visit with the client. In such instances, it should be explained to the particular official that the policy of the Court of Appeal is to approve and pay for such in-person visits only in extraordinary situations after all other avenues of communication have been demonstrated to be unsuccessful. Explain that an unmonitored phone call is a much more cost-efficient means of confidentially communicating with the client than an in-person visit. In-person visits must be pre-approved by ADI.■

# Those Elusive Dependency Writ Petitions

**by Cheryl Geyerman, Staff Attorney**

At the twelve- or eighteen- month review hearing, and now, in certain circumstances, at the six-month review, the trial court in a dependency proceeding may refer the case to a hearing pursuant to Welfare and Institutions Code section 366.26. (§ 366.21, subds. (e) and (f), § 366.22, subd. (a).)

To challenge the referral of a dependency case to a termination hearing, a party must file a petition for extraordinary writ with the Court of Appeal. (§ 366.26, subd. (l); Cal. Rules of Court, rule 39.1(B).) Unfortunately, the rules of court do not clearly require the parties to serve the juvenile court nor do the rules require the juvenile court to include writ documents as part of the normal record in a subsequent appeal.

Because determination of the writ petition issues likely will affect what can be raised in an appeal from the .26 hearing, appellate counsel must determine if a petition was filed, and must get a copy of the writ petition and the opinion. If it is convenient, counsel should check the juvenile court file, and get copies of any writ documents. If there are no writ documents in the file, counsel should check with trial counsel. Sometimes trial counsel fails to respond, and if that is the case, contact the other trial counsel or the Court of Appeal.

Be aware that having an actual copy of the petition and the opinion is the only true reflection of what was raised and what was decided. Occasionally, getting the information over the telephone has turned out to be inaccurate. We are working to revise the court rules so that these documents are made a normal part of the record, but until then, appellate counsel needs to be diligent in obtaining them.■

## Unsworn "Statement of Probable Cause" insufficient to support warrant: People v. Leonard (1996) 50 Cal.App.4th 878.

Panel attorney Michael Dashjian recently handled an appeal in the Third District which resulted in a published decision and which could have a significant effect in future cases throughout the state.

In People v. Leonard (1996) 50 Cal.App.4th 878, the Court of Appeal agreed the officer's unsworn "Statement of Probable Cause" was insufficient to support a warrant, which can only be issued "upon probable cause, **supported by oath or affirmation**. . ." (U.S. Const., Amend IV.) Although the officer had also submitted a signed affidavit in which he swore that based on the information in the Statement of Probable Cause, he believed the subject property to contain seizable items, this was not enough. That affidavit did not swear to any **facts**, and thus added nothing.

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Unfortunately, the Leonard court upheld the search based on the good faith exception rule of United States v. Leon (1984) 468 U.S. 897. However, after the publication of this opinion, it would seem law enforcement would not be justified in relying on warrants based on unsworn statements.

According to Michael, in the petitions for rehearing and review filed in the cases the Attorney General disclosed the standard warrant form at issue in Leonard was approved 10 years ago by the California District Attorneys' Association and has been used on a statewide basis. If the warrant form is used frequently, and if some jurisdictions continue to use it after the Leonard case, strong suppression issues will likely arise in future cases. Congratulations to Michael for a job well done.■

## Reminder: 2933.1 Credits

Penal Code section 2933.1, effective September 21, 1994 and applicable to crimes committed on or after that date, limits both presentence and prison conduct credits to 15% if the defendant is convicted of a violent felony listed in Penal Code section 667.5. Although this statute has been on the books for awhile now, some trial judges still mistakenly award 50% presentence credits under Penal Code section 4019.

When this happens, it is likely the Department of Corrections will notice the error and send an inquiry to the trial judge, thus bringing the matter to the court's attention. The trial court may then act to correct the credits by reducing the amount awarded. But despite the likelihood any miscalculation will be caught by the DOC, proceeding with an appeal will make it more likely the error in the client's favor will be caught. The client therefore should be advised of this possible adverse consequence.

Also, when presentence credits are awarded under section 2933.1, be sure to check the applicability of that statute. We have seen cases in which the court assumed the present offense was listed under section 667.5, when in fact it was not. A common example would be second degree robbery without a weapon use or great bodily injury enhancement. This type of robbery is not listed under section 667.5, but qualifies as a serious felony under Penal Code section 1192.7, and may therefore be grouped with the section 667.5 offenses in the minds of some judges. Another thing to watch for is the date of the violent offense. Especially in cases where a range of dates is alleged in the information, we are still seeing a fair number of cases in which the offense occurred before section 2933.1's effective date.

If the credits limitation of section 2933.1 is erroneously applied to the client, relief should first be sought in the superior court. (See Penal Code, § 1237.1.) If the superior court denies relief, the issue can then be raised in the court of appeal.■

## Restitution: Section 1202.45

Penal Code section 1202.45, effective August 3, 1995, requires a restitution fine in the same amount as the fine imposed under section 1202.4, subdivision (b). The fine under section 1202.45 is applicable to all defendants whose prison sentences include a period of parole, and it is to be suspended unless the defendant's parole is revoked. In some cases, judges are imposing fines under section 1202.45 when the crimes were committed before the effective date of that law. In such cases, the fine should be challenged as ex post facto punishment. (See People v. Zito (1992) 8 Cal.App.4th 736, 741.)■

# New Justice In Division Two: Justice James D. Ward

Justice James D. Ward was born in Sioux Falls, South Dakota, and in 1957 was graduated from the University of South Dakota. He and his wife then came to California (her home state) where he received his Juris Doctorate in 1959 from the University of San Francisco.

After graduation from law school, he and his wife desired to move to a small town located close to an urban area, and they chose Riverside. He began his law career as a deputy district attorney, quickly moved on to a small private firm, and then, in 1964, was invited to join Thompson and Colgate with whom he practiced for thirty years before his appointment as a Riverside County superior court judge.

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When appearing before Justice Ward, an appellate practitioner should realize that as an attorney he was well accustomed to appearing and arguing before appellate courts. During his thirty years with the firm, he was friends with the owners and editors of the Riverside Press Enterprise and had the privilege of representing the newspaper twice before the United States Supreme Court in Press Enterprise Co. v. Superior Court (I and II).

Justice Ward reminisced that in the Supreme Court, counsel were much closer to the bench than practitioners are to the justices in the Fourth District courtroom. He was no further than seven feet from Chief Justice Burger and counsel quite clearly could hear sidebar comments one justice would make to his or her colleagues.

Justice Ward has been active in the community and legal activities too numerous to mention. Of particular note, however, is that he is the founder and chairman of UCR LAW, a civic group whose goal it is to bring a law school to UC Riverside. When other have criticized such an endeavor, noting the number of attorneys already, the justice has responded that while there may be a surfeit of lawyers, there is not an over-abundance of good lawyers.

Though Justice Ward began his law career as a deputy district attorney and did try a couple of criminal trials during his superior court tenure, as an appellate justice he has found criminal law totally new. He has to work hard because of the high volume of criminal appeals. Originally, he was deferential to his colleagues but more recently has been resisting and dissenting more often. He is pleased that he has become proficient to his satisfaction.

As an appellate justice, he has agonized on some decisions. He "could work a case to death or perfection," but at some point in time, one has "to quit and decide." Once he has decided though, he doesn't look back.

Recently, Justice Ward was chosen as the vice-chair of a Task Force to review the standard California jury instructions. Justice Ward is a worthy addition to the Fourth District bench, and practitioners should look forward to appearing before him in Division Two.■

# New ADI Staff Attorneys

Attorney **Patricia Scott** joined the ADI staff in August of 1996. Patti first arrived in San Diego in 1974 to attend San Diego State University, and received her Bachelor of Arts degree in Journalism in 1979. In 1987, Patti returned to San Diego State and completed three years of graduate training in the area of experimental psychology. Her interest in law was sparked during a graduate seminar in child abuse interventions, and she received her law degree in 1993 from California Western School of Law. Upon passing the bar, she joined the San Diego law firm of Ault, Deuprey, Jones and Gorman, where she practiced in the areas of medical malpractice and construction injury. One year later, Patti entered private practice with a focus on family law matters. A writer at heart, she joined the ADI panel in March of 1995. Patti is now a dedicated appeals attorney by day, and by night, a devoted "mom" to her three cats, Sadie, Olivia and Marble.

Attorney **Alisa Shorago** joined the ADI staff in February, 1997. Alisa attended UCLA and participated in several internship programs, including a summer internship with the United States Supreme Court. She received her Bachelor of Arts degree in English from UCLA in 1989. Alisa then attended Hastings College of the Law, where she served as Articles Editor for the school's International and Comparative Law Review and received an American Jurisprudence Award for Legal Writing and Research. She also enrolled in the Hastings Criminal Practice Clinic and interned for the San Francisco Public Defender's office.

After graduating from Hastings in 1992, Alisa clerked for the Honorable Stephen Bistline, a now-retired justice on the Idaho Supreme Court. She then returned to California, which she greatly preferred to Idaho, and worked as a deputy public defender with the Orange County Public Defender's Office for almost two years. She next spent approximately one and one-half years at a civil litigation firm in Orange County, practicing in the areas of employment law and toxic torts. Alisa is enjoying both her return to criminal defense and her move to beautiful San Diego County.

Attorney **Chris Truax** joined the ADI staff in March, 1997. Chris received his undergraduate degree in Physics and Political Science from the University of California, Santa Barbara. He received his law degree from the University of Notre Dame in 1995. During law school, Chris had the opportunity to work for the Appellate Division of the Colorado Public Defender where he caught the appellate bug. After graduating from

Notre Dame, Chris attended Queens' College at the University of Cambridge as a Trust Scholar where he received an LL.M. in Private International Law with an emphasis on Intellectual Property Law.

(Please see ADI's new telephone roster on the last page.)■

# Miscellaneous

**CIVIL TONGUES** is not included in this issue due to space limitations. It will be included in our next issue.

## Extension Requests Pending Wende Review

When a panel attorney sends a record to ADI for a Wende review, an extension of time of the AOB due date is often necessary. However, such extension requests should **not** indicate the Wende review is the reason more time is needed. Informing the court a Wende review is pending suggests the case contains no arguable issues. While this may well be the ultimate outcome, on many occasions a staff attorney will spot an issue or encourage the panel attorney to raise an argument previously identified but rejected. In such cases, it could be prejudicial for the court to consider an issue on the merits while knowing a Wende brief was originally contemplated.

Similarly, an extension request should not disclose the attorney needs the extra time to secure an abandonment of the appeal or advise the client of adverse consequences before proceeding with briefing. In the event the client does not abandon, it is likely the court's curiosity will be piqued as to just what those adverse consequences are, or why the client was previously willing to drop his challenge to the conviction.

An extension request is signed under penalty of perjury and must of course be accurate. But careful wording of such requests can honestly inform the court of the reason more time is needed while protecting the client's interests. (Example: "I have reviewed the record and researched potential issues but need to further consult with ADI before filing the brief," rather than "More time is needed so ADI can complete a Wende review.")

## New Extension Policy Re Juvenile Appeals in Division Two

Commencing soon, Division Two will begin implementing tighter deadlines in all juvenile appeals. Up to this point, only appeals from Welfare and Institutions Code section 366.26 hearings have been handled on a fast track basis. The change in procedure will mean that extensions of time will require a showing of exceptional good cause, and the two-extension-with-little-or-no-question policy (applicable in criminal appeals) will no longer apply to juvenile appeals.

If you accept an appointment in a juvenile appeal, whether a dependency or a delinquency, please be aware that all juvenile cases are entitled to priority. When you accept an appointment, it should be with the intention of filing an opening brief without delay.■

## Tips For Extensions

Frequently, the clerks of all three divisions have commented that attorneys seeking an extension of time will cite as a reason the fact that ADI needs time to review the draft of the brief, or that the draft was sent to ADI and that it has not been returned in time to file the AOB. ADI and the Courts recognize that reviewing the draft is a time factor, but the 'ADI excuse' will only go so far: All three divisions are aware that we request panel attorneys submit their drafts early enough to allow for this review. When the ADI-excuse is used, it looks like the attorney has waited until the last minute to turn in the draft. You do not want to convey that impression.

Although extensions are not usually permitted in fast-track cases, if you need an extension in any other type of case because the draft is being reviewed, simply advise the court that an initial draft has already been completed, but that additional time will be necessary for revisions, generation of tables, duplication, service and mailing.■

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# Augmentation Requests

Because the policy of liberality favors granting augment requests, we sometimes tend to take it for granted that one will be ordered no matter how we present our requests. However, liberality aside, there are some rules applicable to augments (Cal. Rules of Ct., rule 12 (a)), and following the rules may expedite an order granting your request.

Bear in mind that augmentation is inappropriate for "fishing expeditions" for issues. Rather, one should be able to point to a potential issue apparent from the record, or from information you have received from the client or trial counsel, which has indicated to you there is a possible appealable issue. You do not need to reveal client confidences or attorney work product, but you do need to show why the augmented material is relevant.

For instance, if you wish to have the voir dire transcript added to the record, it is recommended that you mention whether the clerk's transcript revealed a chambers conference to discuss a Wheeler motion [ref. People v. Wheeler (1978) 22 Cal.3d 258], or that trial counsel has indicated such a motion was made if the record is silent. Sometimes the Background Information form which is attached to the notice of appeal refers to problems in areas not made a part of the normal record. A simple statement that the issue was mentioned in the form attached to the notice of appeal will let the court know you are not requesting the voir dire just to delay the filing of the brief.

Other examples of sample explanations: "The transcript of opening statements is necessary to evaluate a potential issue of prosecutorial misconduct/ineffectiveness of defense counsel." "The probation report from Superior Court case XXXXX should be made a part of the record in this appeal because the trial court referred to information contained in that report in sentencing appellant to state prison for the aggravated term. In order to resolve the sentencing issue in the current case, the reviewing court will need to evaluate the information considered by the trial court."

The Courts appreciate it greatly when we attach to our requests copies of documents which need to be augmented to become part of the clerk's transcript. Sometimes a supplemental probation report does not make it into the clerk's transcript. Sometimes it is quicker to get a copy of the transcript of a taped interview from trial counsel than to get the record corrected with the transcript which was admitted into evidence, notwithstanding rule 203.5.

However, when you attach the document to your request, be sure to describe where you got the documents, so authentication can be established. For instance, if the probation report from a prior case was considered as part of the government's proof on the issue of a prior conviction, and the clerk's transcript does not include it, but you have obtained a copy from either the superior court or trial counsel, simply state in the request that you have obtained the copy from [wherever], and that you are informed it is a true and correct copy of the document submitted to the trial court.

A lot of times the copy you receive from trial counsel or the court will have a file stamp on it, which is further proof the document is an actual copy of what was filed. However, even where the document is not file-stamped, if you certify it is a correct copy of that with which trial counsel was served, augmentation is appropriate.■

## Reminder: No 35(e) Letters In San Bernardino County Cases

Division Two has asked that **in all San Bernardino cases**, counsel file a request to augment the record rather than a letter to the superior court under Cal. Rules of Court, rule 35(e). This applies even when the missing record is part of the normal record on appeal under rule 33, and would otherwise be the proper subject of a rule 35(e) letter.

This policy is designed to avoid some of the difficulties which have arisen in obtaining additional parts of the record in San Bernardino cases and to give the Court of Appeal a greater ability to monitor and control the superior court's preparation of the additional record. It benefits us and our clients to get missing portions of the record as quickly as possible, so please remember to file augments whenever your case arises from San Bernardino County.■

(Continued on page 11)

# Writ Forms in Division Two

Rule 56.6 of the Cal. Rules of Court, which provided for an experimental writ form in Division Two, has been repealed. Division Two has asked that clients and attorneys use the 1992 version of the Judicial Council Habeas Corpus Petition when habeas petitions are filed using a Judicial Council form.■

# Motions to Recall Rule 17 Notices in Division Two

From time to time panel attorneys ask if we know of the policy on withdrawing rule 17 notices which were issued in error by the Court. In Division Two, a successful motion to remove a rule 17 notice must allege that:

1) The extension request was sent to the court "as early as possible" or "in an emergency" **and** the sender called to make sure the court knew the request was coming.

2) The rule 17 notice was issued due to an error by the Clerk's Office. In other words, postal delay is not a sufficient excuse to get relief.■

## Division One Changes Rule 17 Notice Procedure

Previously when Division One issued a rule 17 notice on an appeal, the default notice would not be held against any subsequently appointed attorney. Attorneys appointed after the rule 17 notice had issued were still able to file their own extension requests and would receive a new rule 17 notice if they went into default. This is no longer the case.

Now, Division One will issue only one rule 17 notice per case. The default notice is case specific and not attorney dependent. In Division One appeals, newly appointed counsel will be bound by the time limitations of any previously issued rule 17 notice. If an extension of time is needed, the newly appointed attorney will have to request a "post-rule 17" extension request.■

## Change of ADI Paralegal Terminal Digit Case Number Assignments

Appellate Defenders, Inc. is pleased to announce that ADI paralegal, Amanda F. Doerrer, who formerly handled terminal digit case numbers 6-8, has become our new law clerk. Amanda is a second-year law student at University of San Diego, and we look forward to having her as our full time law clerk as of April 16th. Please note the new paralegal terminal digit case number assignments on page 24.■

# 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 client. In an effort to identify those issues which are likely to be successful, we have changed the format of the KUDOS to list KUDOS by issue category rather than alphabetically by attorney name. The categories are:



["A" indicates a panel assisted case, "I" a panel independent case, and "ADI" a staff case.]

## Attorney Index - Alphabetical
**(not including Three Strike straight Romero wins)**

Joan Anyon - see Insufficient Evid., Sentence §B
Fay Arfa - see Sentence
Neil Auwarter - see Romero §C, Sentence §A
Michael Bacall - see Misc.
Steven Barnes - see Sentence §A
Douglas Benedon - see Sentence §A
Janyce Blair - see Jury Instructions
Christopher Blake - see Romero §C
Robert Boyce/Laura Schaefer - see Jury Instr., Misc., Sentence §A, Search & Seizure

Philip Brooks - see Romero §C
Gordon Brownell-see Romero §C, Search & Seizure
Martin Nebrida Buchanan - see Romero §§B & C, Sentence §A, Insufficient Evid, Misc.
Steven Buckley - see Dependency
Charles Bumer - see Romero §B
Kathy Chavez - see Sentence §B, Romero §C
Mark Christiansen - see Insufficient Evidence
Howard Cohen - see Sentence §A, Misc.
Thomas Coleman - see Misc.
James Crowder - see Sentence §A
Rodger Curnow - see Misc.
Michael Dashjian - see Romero §C, Jury Instr.
Linn Davis - see Sentence §B
Karen DiDonna - see Restitution, Misc.
Rebecca Donaldson - see Search & Seizure
Brett Duxbury - see Insufficient Evidence
Suzanne Evans - see Misc.
John Edwards - see LIOS
Judith Fanshaw - see LIOS
Cliff Gardner - see Romero §C
Jeffrey Garland - see LIOS
Stephen Gilbert - see Jury Instructions
Carl Hancock - see Sentence §B
M. Elizabeth Handy - see Dependency
Marianne Harguindeguy - see Sentence §B
Robison Harley - see Search & Seizure
Mark Hart - see Sentence §§A & B
Patrick Hennessey - see Romero §C, Sentence §A
Michon Hinz - see Jury Instructions, Misc., Sentence §A, Romero §C
Janice Deaton Hogan - see Misc.
Handy Horiye - see Sentence §A
J. Michael Hughes - see Dependency
Anna Jauregui/Steven Hubachek - see LIOS
Sharon Jones - see Romero & Sentence §A
Willard Jones - see Insufficient Evidence
Michaelyn Jones - see Misc.
David Kay - see Romero §C
Joyce Meisner Keller - see Sentence §A
Charles Khoury - see Insufficient Evidence
Harold LaFlamme /John Dodd - see Dependency
Janice Lagerlof - see Misc.
Thomas Lawrence - see Restitution
Mark Lippman - see Sentence §A
Gideon Margolis - see Jury Instructions
Gregory Marshall-see Insufficient Evid., Sentence
Marilee Marshall - see Misc.
Thomas Mauriello - see Sentence §A
Janice Mazur - see Misc.
Martha McGill - see Romero §C
Richard Miggins - see Misc.
Cindi Mishkin - see Search & Seizure, Misc.
Gary Nelson - see Insufficient Evidence, Misc.
Diane Nichols - see Romero §B, Sentence §A
Ronda Norris - see Romero §C
Nancy Olsen - see Insuff. Evid. Search & Seizure
Richard Peters - see Sentence §A
Debi Ramos - see Sentence §B, Misc.
Michael Randall - see Dependency
Sharon Rhodes - see Jury Instructions
Lynda Romero - see Sentence §A
Leslie Rose - see Jury Instructions
Andrew Rubin - see Sentence §A, Misc.
Stefanie Sada - see Misc.
Steven Schorr - see Sentence §A, Sentence §B
Steven Schutte - see Sentence §B
Richard Schwartzberg - see Misc.
Terrence Scott - see Jury Instructions
J. Courtney Shevelson - see Insufficient Evidence
Michael Sideman - see Misc.
Carmela Simoncini - see Romero §C, Misc.
Barbara Smith - see Sentence §A
Howard Specter - see Restitution
David Stanley - see Sentence §A
Jeffrey Stuetz - see Search & Seizure, Misc.
Robert Swain - see Misc.
Joseph Tavano - see Dependency
Roberta Thyfault - see Sentence §A
Beatrice Tillman - see Sentence §A, Restitution
Michael Totaro - see Insufficient Evidence
David Tucker/Howard Cohen - see Jury Instructions, Insufficient Evidence
Deborah Tuttleman - see Insufficient Evidence
Robert Valencia - see Romero §B
Christine Vento - see Misc.
Robert Visnick - see Insufficient Evidence
Scott Wahrenbrock - see Sentence §B
Richard Walker - see Misc.
John Ward - see Insufficient Evidence
Michael Weinman - see Search & Seizure
Nancy Weiss - see Sentence §B
Jerry Whatley - see LIOs
Jane Winer - see Dependency

(Continued on page 13)

## Three Strike Wins:

**A. Cases remanded in light of People v. Romero (1996) 13 Cal.4th 497:** (Due to space limitations only attorney names are listed.)

Joan Anyon, J. Peter Axelrod, Russell Babcock, Douglas Benedon, Diane Berley, Christopher Blake, Alison Braun, Janice Brickley, Philip Bronson, Gordon Brownell, Martin Nebrida Buchanan, David Carico, Dennis Cava, Ward Clay, Anthony Dain, John Dodd, Gregory Ellis, Linda Fabian, Patrick Ford, Cliff Gardner, Leslie Conrad Greenbaum, Waldemar Halka/Jeffrey Stuetz, John Hardesty, Robison Harley, Handy Horiye, Susan Joehnk, Sharon Jones, David Kay, David Kelly, Ivy Kessel, Sylvia Koryn, Charles Khoury, John Lanahan, Linda Casey Mackey, Gregory Marshall, David McKinney, Kevin McLean, Jonathan Milberg, Stephen Miller, Cindi Mishkin, Elizabeth Missakian, Richard Moller, Anne Moore, David Morse, Gary Nelson, Diane Nichols, Ralph Novotney, Jr., John Olson, Debi Ramos, J. Michael Roake, JoAnne Roake, Stefanie Sada/Robert Tayac, William Salisbury, Richard Schwartzberg, Terrence Scott, R. Clayton Seaman, Maureen Shanahan, Athena Shudde, Carmela Simoncini, Victoria Stafford, Howard Stechel, Ava Stralla, Wesley Vanwinkle, Christine Vento, John Ward, Lizabeth Weis, A. Weisman, Francia Welker, Kyle Wesendorf, Jeffrey Wilens, Harry Zimmerman.

## B. Remand/Reduction to misdemeanor:

**Robert Boyce**, P. v. Dehorta, D022685 (A)

**Philip Brooks**, P. v. Gamba, D023542 (A)

**Martin Nebrida Buchanan**, P. v. Perkins, #E015803 (I)

**Patrick DuNah**, P. v. Cordova, #D024082 (ADI)

**Ava Stralla**, P. v. Espinoza, #D024720 (I)

**Charles Bumer/Kristine Watkins**, P. v. Rodrigues, #D023304, (A) [Tragically, Mr. Bumer died in an automobile accident prior to oral argument. In this case, as in all his other cases, he fought hard and skillfully for his clients.]

**Diane Nichols**, P. v. Michael M., #G018627, Trial court's reduction of petty theft with a prior to a misdemeanor affirmed. (ADI)

**Robert Valencia**, P. v. Maldonado, #D023982 (I)

## C. Other Strike Wins:

**Gordon Brownell**, P. v. Hernandez, #D024939, Allegations of defendant's prior strike convictions stricken and matter remanded for resentencing where alleged priors impliedly found true without evidentiary support (no admission or trial on priors). Jeopardy attached upon submission of the entire case (current offense and prior allegations) to the court, and retrial on the priors is barred. (I)

**Martin Nebrida Buchanan**, P. v. Short, #D025061, foreign prior conviction can qualify to initiate sentencing under PC § 667.61, only where it meets the least adjudicated elements test of People v. Crowson (1983) 33 Cal.3d 623, 632 and not the more expansive analysis of People v. Guerrero (1988) 44 Cal.3d 343 and People v. Myers (1993) 5 Cal.4th 1193. (I)

**Michael Dashjian**, P. v. Stanton, #G017654, Dismissal based on Bailey. (I)

**Cliff Gardner**, P. v. Houck, #D025705 published. Div. One finds: (1) No waiver in silent record three strike case, in which defendant was sentenced before Romero was issued. Div. One specifically disagreed with People v. Askey (1996) 49 Cal.App.4th 381 and People v. White Eagle (1996) 48 Cal.4th 1511; (2) preliminary hearing transcript of a prior conviction obtained by a jury trial was not part of "record of conviction" to prove the serious felony nature of prior conviction. (I)

**Mark Hart**, P. v. Callahan, #E016347, Court modified the judgment to provide that appellant earned nonstrike credit (PC §2933) for those offenses committed before the three strikes law and strike credit (PC §667(c)(5)) for his strike offenses. (I)

**Michon Hinz**, P. v. Holiday, #D024765, People failed to proved strike prior, double jeopardy bars retrial; sentence reduced from 32 months to 16 months. (I)

**Sharon Jones**, P. v. Acosta, #E017705, Partial reversal and remand for resentencing because parties below were confused about defendant's 1989 conviction - it was not really a "strike prior," so admission set aside. Romero remand as to other strike prior. (I)

**David Kay**, P. v. Franck, #D026087, Remand for Romero resentencing despite sentence bargain with court, where trial court suggested defendant might get a second sentencing if the law changed. (ADI)

(Continued on page 14)

**Martha McGill**, P. v. Red, #E017655, OSC issued to determine whether there was prejudicial IAC where defendant entered plea to a 5 year enhancement which attached to a conspiracy to commit robbery, since conspiracy is not listed as serious felony. (I)

**Ronda Norris**, P. v. Santibouth, #D025691, People's appeal; judgment affirmed. Trial court struck prior conviction allegation based on juvenile adjudication under PC §667 (d)(3)(C). (Issue on review in People v. Renko (1996) 48 Cal.App.4th 1417 and People v. Davis (1996) 48 Cal.App.4th 1785.) (ADI)

**John Ward**, P. v. Davis, #D024082, Strike prior reversed because evidence insufficient to show prior ADW conviction involved weapon use or other conduct making it a serious or violent felony. (I)

## Sentence Remand, Reduction, Credits and PC §654:

## A. Remand, Reduction, and Credits:

**Fay Arfa**, P. v. Boske, #E017644, Judgment modified to give defendant a total of 593 days of pre-sentence custody credits. (I)

**Neil Auwarter**, P. v. Stogsdill, #D025510, 15-year term by one year based on miscalculation of consecutive terms. (ADI)

**Steven Barnes**, P. v. Jimenez, #G018066, Sentence following probation revocation reversed and case remanded where trial attorney was ineffective in failing to object to trial court's improper consideration of defendant's post probationary conduct in imposing sentence. (A)

**Douglas Benedon**, P. v. Browne, #E017134, Full strength consecutive sentence for prior sentence reduced to one-third of the middle term. (A)

**Philip Brooks**, P. v. Gamba, #D023542, Gun use enhancement (PC §12022.5) improperly imposed when underlying offense is itself possession of a firearm. (A)

**Martin Nebrida Buchanan**, P. v. Morales, #D024776, Sentence modified to LWOP only where trial court imposed both LWOP and consecutive 25-life sentence for single first degree murder count. (I)

**Howard Cohen**, P. v. Cebrun, #G018035, Reversed and remanded to permit appellant to withdraw his plea or for a limited trial on a no probation allegation which was neither admitted nor proved. (ADI)

**James Crowder**, P. v. Cruz, #G018165, Abstract of judgment corrected to reflect the proper amount of custody credit. (I) 2) P. v. Warren, #E016351, Two 8 month gang enhancements imposed consecutively (1/3 the midterm) ordered stricken pursuant to PC §1170.1, subd. (a) because counts they were attached to were not violent felonies. (I)

**Sharon Jones**, P. v. Brown, #E017101, Prison prior stricken because term was concurrent with other prison prior. (I)

**Patrick Hennessey**, P. v. Meyer, #E017364, Sentence as to PC §12022.5 enhancement modified from five years to four years where (1) great bodily injury was included in underlying crime of voluntary manslaughter, (2) facts did not indicate particular viciousness or callousness and (3) there were no other available aggravating factors (rule 42(a)(1)). (I)

**Michon Hinz**, P. v. Clark, #D021925, Reversed for resentencing based on failure of trial counsel to present any mitigating information at sentencing. (A)

**Handy Horiye**, P. v. Stringer, #E017003, 102 additional presentence custody credits awarded where appellant not subject to PC §2933.1 because offense committed in June 1994. (I) 2) P. v. Saucedo, #G017999, Two prior prison term enhancements stricken as concurrent with another term for which an enhancement was imposed; 124 day presentence custody credits added. (I)

**Joyce Meisner Keller**, P. v. Rivas, #D021952, Judgment modified - trial court incorrectly imposed 5 years for a prison term rather than 1 year. (ADI)

**Mark Lippman**, P. v. Rucker, #D025355, Sentence on driving with blood alcohol of more than .08% count ordered stricken for all penal and administrative purposes because defendant already punished for VC §23153 violation. (A)

**Gregory Marshall**, P. v. Turk, #D024174, Abuse of discretion in trial court's granting of appellant's Faretta motion for purpose of sentencing. (I)

**Thomas Mauriello**, P. v. Nicholas G., #E016029, PC §602 case remanded for court to declare possession of weapon misdemeanor or felony. (A)

**Diane Nichols**, P. v. Christopher R., #D025128, Remand for juvenile court's determination as to whether VC §10851 violation is misdemeanor or felony. (ADI)

(Continued on page 15)

**Richard Peters**, P. v. Moore, #D025519, Case remanded to strike violent felony and resentence defendant because court found prior Ohio kidnapping conviction did not qualify as serious felony in California, i.e. asportation of victim required in Ohio. (A)

**Lynda Romero**, P. v. Cramer, #E017065, Presentence custody credits corrected to reflect an additional 30 days. (I)

**Andrew Rubin**, P. v. Colson, #E016126, Abstract of judgment modified to give defendant a total of 7 days credit. (I)

**Steven Schorr**, P. v. Kim, #D023987, Remand for resentencing where trial court erred in imposing one PC §12022.5 enhancement and two PC §12022.7 enhancements on conspiracy to commit murder conviction in violation of PC §1170.1, subd. (e) - one GBI enhancement should be stayed pursuant to §654. Trial court may, at resentencing, make attempted murder conviction, rather than conspiracy, the base term, thus permitting both a weapons and GBI enhancement. (I)

**Carmela Simoncini**, P. v. Sanchez, #D024629, Judgment modified to strike three prior prison term enhancements which had been improperly stayed by the trial court. (ADI)

**Barbara Smith**, P. v. Bouldin, #D023107, Abstract of judgment modified to reflect striking of four (PC §667.5) prison priors. (I)

**David Stanley**, P. v. Vasquez, #D024207, Consecutive full term firearm use enhancement reduced to one-third upper term. (I)

**Roberta Thyfault**, P. v. Koudssi, #G018092, Court improperly imposed $200 restitution fine off of the record, in the absence of defendant. (I)

**Beatrice Tillman**, P. v. Volz, #D026258, Abstract of judgment ordered corrected to reflect an additional 5 days of custody credit. (ADI)

**Christine Vento**, P. v. Tenorio, #G017010, Trial court erred by failing to state reasons for denying probation; probation department report recommended probation. (I)

## B: PC §654:

**Joan Anyon**, P. v. Cook, #E015880, PC §654 bars punishment for both burglary and robbery convictions where objectives were not independent of each other. (I)

**Kathy Chavez**, P. v. Thibedeau, #E016739, Remand where trial court incorrectly imposed sentence on kidnapping count and stayed PC §667.8 kidnapping enhancements; court should have imposed sentence on kidnapping enhancements and stayed sentence on kidnapping offense. (A)

**Linn Davis**, P. v. Rentas, #E017717, Concurrent sentence stayed per PC §654. (I) 2) P. v. Garcia, #E018072, Sentence on felon in possession of gun stayed per PC §654. (I)

**Carl Hancock**, P. v. Monteiro, #D025393, Consecutive sentence for false imprisonment reversed pursuant to PC §654. Sentencing remand also ordered so trial court can decide whether to strike a prison prior. (A)

**Marianne Harguindeguy**, P. v. Bryant, #D023045, Count two (concurrent sentence) for possession of burglary tools ordered stayed under PC §654 because two year sentence was also imposed for car burglary. (I)

**Mark Hart**, P. v. Revels, #G017991, Remanded for trial court to stay one concurrent life term under PC §654 because the offenses (possession of a firearm by an ex-felon and assault with semi-automatic firearm) occurred on same occasion and arose from the same set of operative facts, thus precluding consecutive sentencing under PC §667(c)(b). Further, court must study the use enhancement as to the assault because the sentence on that count must be stayed. (I)

**Debi Ramos**, P. v. Aviles, #E016734, Based on facts of the case, counts of possession for sale, possession, and use and control of false compartment with intent to conceal and transport contraband were stayed as incident to one intent and objective of unlawful transportation. (A)

**Steven Schorr**, P. v. Neal, #D025583, Two of three prison priors under PC §667.5(b) were stricken as record showed only one continuous period of incarceration; AG's waiver and estoppel arguments rejected (I) 2) P. v. Gutierrez, #E016015, only one prison prior can be imposed where defendant served only one separate prison term.

**Steven Schutte**, P. v. Sanchez, #E016734, Based on facts of the case, counts of possession for sale, possession, and use and control of false compartment with intent to conceal and transport contraband were stayed as incident to one intent and objective of unlawful transportation. (I)

**Scott Wahrenbrock**, P. v. Liftee, #D024475, PC §667.8 enhancement stayed because PC §654 prohibited imposition of both that enhancement and the life term for kidnapping for purposes of rape. (I)

**Nancy Weiss**, P. v. Jackson, #D024212, Sentence for brandishing a firearm stayed pursuant to PC §654 where defendant also sentenced for being a felon in possession of a firearm. (A)

(Continued on page 16)

## Restitition:

**Karen DiDonna**, P. v. Coomes, #E018781, In a Wende Brief, counsel noted that while the mandatory minimum restitution was included in the abstract of judgment, it had not been orally ordered by the court. While recognizing that the restitution was mandatory, the Court of Appeal nevertheless ordered the restitution stricken from the abstract since it would cost more to generate the restitution than it was worth. (I)

**Thomas Lawrence**, P. v. Davenport, #E017327, Because defendant committed offense before amended PC §1202.4 became effective, and because court did not consider ability to pay although defense counsel objected on those grounds, reduction to $200 minimum was appropriate ($800 fine imposed in error). After the People petitioned for rehearing, the court modified the opinion and remanded the case to allow the trial court to exercise is discretion regarding the restitution fine and/or victim restitution. (A)

**Howard Specter**, P. v. Tauber, #D022697, Published remand for recalculation of restitution as no final determination was made as to how much victim would be compensated by other sources: "A victim who has been compensated by insurance cannot be compensated again through restitution for that loss." (I)

**Beatrice Tillman**, P. v. Dean, #D024542, Judgment reversed insofar as it directed payment of restitution to insurers. (ADI)

## LIOS:

**John Edwards**, P. v. Zapari, #D025889, Simple possession of methamphetamine reversed where defendant was also convicted of possession for sale. (A)

**Judith Fanshaw**, P. v. Gallegos, #D023947, Three of six counts in sexual assault case reversed as LIOs of other counts. (I)

**Jeffrey Garland**, P. v. Ruben S., #G018364, True finding of carrying a concealed firearm (PC §12025) reversed because it was not an LIO of the offense charged (PC §12021, subd. (d).) (I)

**Anna Jauregui/Steven Hubachek**, P. v. Sargent, #D023855, Possession of methamphetamine for sale reversed and remanded because trial court prejudicially erred in failing to instruct the jury sua sponte on simple possession as a lesser included offense. (ADI)

**John Ward**, P. v. Davis, #D024082, Two robbery counts reversed due to failure to instruct on theft as LIO; although jury returned guilty verdict on separate petty theft count, they were not told theft was LIO of robbery. (I)

**Jerry Whatley**, P. v. Preciado, #E017400, VC §10851 reversed because court failed to instruct on joyriding as LIO. (I)

## Jury Instructions:

**Janyce Blair**, P. v. Alcazar, #E017133, Two counts of second degree murder reversed due to erroneous imperfect self defense instruction; perpetrator need not be reasonable in his assessment of the imminence of the peril, but only actually believe he is in danger of immediate or GBI. (I)

**Christopher Blake**, P. v. Fugate, #D026149, Case reversed where CALJIC 2.90 was modified by same judge (Raymond D. Edwards, Jr.) and in same manner as People v. Malave (1996) 49 Cal.App.4th 1425. (I)

**Robert Boyce/Laura Schaefer** P. v. Reyes, #D024260 (Certified for partial publication), With regard to the element of "knowledge," receiving stolen property is a "specific intent crime" as that term is used in section 22, subd. (b), and section 28, subd. (a). Trial court's preclusion of evidence regarding defendant's mental disorders which were exacerbated by drug abuse unfairly denied him the opportunity to prove he lacked the requisite knowledge. (I)

**Michael Dashjian**, P. v. Schwartz, #E015606, Conviction of assault with a deadly weapon reversed as trial court erred in instructing on a lesser related offense (assault) of attempted murder over defendant's objection. (A)

**Stephen Gilbert**, P. v. Senner, #G016966, First degree murder conviction reversed because trial court erred in refusing to instruct on lesser related crime of accessory after the fact. (Geiger issue.) (I)

**Michon Hinz**, P. v. Clark, #D021925, Assault conviction reversed for failure to give instructions in defense on necessity caused by excessive force used by officer to extract defendant from prison cell. (A)

**Gideon Margolis**, P. v. Martinez, #D024733, The trial court committed prejudicial error by not instructing on joyriding (PC § 499b) as a lesser included offense of unlawfully taking or driving a vehicle (VC §10851, subd. (a)). (I)

(Continued on page 17)

**Sharon Rhodes**, P. v. Lemon, #D024254, Reversal of residential burglary conviction when trial court refused to instruct jury on lesser related offense of trespass and facts would have supported a trespass conviction; court held Geiger was still good law despite the AG's argument that it had been overruled by Schmuck v. United States. (A)

**Leslie Ann Rose**, P. v. Johnson, #E017583, Error for court to give the additional definition of reasonable doubt over defendant's objection
(same as was given in People v. Malave) - new trial required. (ADI)

**Terrence Scott**, P. v. Salgado, #E016964, First degree murder conviction reduced to second degree for failure of jury to specify degree per PC §1157, and enhancement pursuant to PC §12022.55 stricken for failure to instruct on the element referring to its application where the firing of a weapon injures or kills a person "other than the occupant of a motor." (I)

**David Tucker/Howard Cohen**, P. v. Fernandez, #E016744, Instructions on conspiracy to commit murder were deficient when the instruction failed to state that intent to kill was a required element. (I/ADI)

## Insufficient Evidence:

**Joan Anyon**, P. v. Calhoun, #D022229, One count of grand theft reversed due to insufficient evidence; trial counsel's failure to object to erroneous grand theft instruction based on neglect or mistake not invited error or waiver. (I)

**Martin Nebrida Buchanan**, P. v. Tejeda, #D023816, Conviction for possession of methamphetamine reversed due to insufficient evidence of usable quantity. (I)

**Mark Christiansen**, P. v. Warren, #E015694, Insufficient evidence that appellant had personally used a firearm in a prior assault conviction; 5 year enhancement pursuant to PC §667(a) was ordered stricken. (I)

**Willard Jones**, P. v. Llamas, #D024368, (Published) Unlawful vehicle taking and receiving stolen property convictions reversed for insufficient evidence where nothing in record shows jury relied on theory appellant intended to permanently deprive wife of car and jury not properly instructed that his presumptive community property interest rejected guilt based on intent to temporarily deprive. Retrial based on People v. Garcia (1984) 36 Cal.3d 539, because there was no clear statement of law prior to instant case and hence prosecution could not have presented evidence rebutting presumption of community property. (I)

**Charles Khoury**, P. v. Hasan, #D023647, Reversed on personal use of firearm enhancement based on insufficient evidence. (I)

**Gregory Marshall**, P. v. Milbry, #E016237, Gang enhancement reversed due to insufficient evidence to prove murder was committed for the benefit, at the direction of or in association with any criminal street gang. Defendant was not the actual shooter and the identity of the three other participants, one of whom was the actual shooter, was never established. (I)

**Gary Nelson**, P. v. Hillard, #D022229, One count of grand theft reversed due to insufficient evidence. Trial counsel's failure to object to erroneous grand theft instruction based on neglect or mistake is not invited error or waiver. (I)

**Nancy Olsen**, P. v. Ledesma-Ruiz, #D024804, True finding reversed based on insufficient evidence defendant was guilty of burglary as perpetrator or as an aider and abettor. (A)

**Brett Duxbury**, P. v. Morales, #D024392, Conviction for offering to sell methamphetamine and possession of burglary tools reversed. Case remanded for new sentencing on remaining counts. (A)

**J. Courtney Shevelson**, P. v. Riddle, #D024441, Cocaine possession conviction relied upon by DA in possession of syringes (in prison) case. Reversal required because earlier cocaine possession case was subsequently reversed for insufficiency of evidence on appeal, and pre-judicial impact outweighed probative value. (I)

**Michael Totaro**, P. v. Williams, #E015175, Insufficient evidence to sustain H&S §11370.1, subd. (a) conviction [possession of methamphetamine while having a loaded, operable firearm] because not proven firearm was operable. (I)

**David Tucker/Howard Cohen**, P. v. Fernandez, #E016744, Evidence insufficient to prove an in intent to kill. (I/ADI)

**Deborah Tuttleman**, P. v. McCann, #D023260, Judgment following probation revocation reversed and remanded for resentencing based upon insufficient evidence to support four of five probation violations found by the trial court. (I)

**Robert Visnick**, P. v. Lomas, #D023644, Conspiracy to commit robbery conviction reversed because the trial court prejudicially erred in admitting evidence of prior robberies to

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show overt acts in furtherance of the instant conspiracy relevant to defendants intent - no evidence linking defendants to any of the prior crimes, association with persons involved in prior crimes or instrumentalities used in prior crimes. (A)

**John Ward**, P. v. Elsalem, #E016125, Insufficient evidence of one count of rape under PC §261(a)(2) where no evidence of force, violence, fear of bodily injury, or duress or menace. (I)

## Search & Seizure:

**Robert Boyce**, P. v. Hall, #D025369, 4 counts reversed where inventory search of closed containers in car improper because Escondido Police Department lacked policy setting forth criteria for opening of containers during an inventory search. (I)

**Gordon Brownell**, P. v. Ohm, #G017896, In People's appeal, trial court's suppression of evidence found in warrantless nonconsensual search of residence is upheld. Police searched residence based on unreasonable belief that a probationer lived at the residence with the defendant. (I)

**Rebecca Donaldson**, P. v. Silva, #D024130, Denial of suppression motion reversed because border patrol agent's detention of suspect that led to arrest and discovery of drugs was not supported by adequate facts of criminality (Alien Smuggling.) (I)

**Robison Harley**, P. v. Corey P., #E016732, Defendant denied effective assistance of counsel where trial attorney failed to move to suppress weapon found as a result of an unlawful detention. Trial attorney had successfully argued that unlawful detention made it impossible for defendant to be convicted of resisting arrest charge but failed to argue that this sole unlawful detention required that fruits of illegal detention (i.e. weapon found during search) be suppressed as well. (I)

**Cindi Mishkin**, P. v. Reynolds, #E017947, Defendant stopped for shoplifting as he left the store. At interview, inside the store, defendant produces contraband to officer. Officer's subsequent search of defendant's car, parked in the store lot illegal because no probable cause connecting car to criminal activity. Search not justified as inventory search because officer did not know standardized procedure specified in Vehicle Code or by his law enforcement agency. (ADI)

**Nancy Olsen**, P. v. Martinez, #D024664, Denial of PC §1538.5 motion reversed in part - search of car trunk during traffic stop was not a lawful inventory search. Officer's purpose in impounding car was investigating and decision to impound was not made until defendant withdrew consent to search. (A)

**Jeffrey Stuetz**, P. v. Davis, #E016850, Reversed - no probable cause to arrest and search defendant based on mere furtive hand gestures on a street corner in area known for drug sales. (I)

**Michael Weinman**, P. v. Juan V., #D025352, Reversed -officer's prior arrest of juvenile in same high-crime area coupled with defendant walking away upon seeing officer's patrol car did not support reasonable suspicion of criminal activity. 2) P. v. Sarah C., #G018668, Drunk driving and hit and run true findings reversed - officer's testimony he could see front of vehicle parked head first in a garage by kneeling and looking through 2 to 3 inch gap at bottom of garage door held to be so "inherently incredible" and "physically impossible" that it constituted no evidence at all. (ADI)

# Miscellaneous:

**Neil Auwarter**, P. v. Lamonte, #D024844, Court of Appeal issued writ of mandate ordering trial court to return defendant's property which was neither contraband nor forfeitable under any provision of law. (ADI)

**Michael Bacall**, P. v. Volk, #D025481, Probation condition requiring chemical testing for alcohol, drug and narcotic testing was improper and stricken for burglary conviction where defendant admitted only marijuana use, and drug use not related to offense. (I)

**Robert Boyce**, P. v. Gonzalez, #D024426, Conviction reversed where prosecutor twice commented on defendant's failure to testify over defense objection, which objections were sustained by the trial court. (I)

(Continued on page 19)

**Martin Nebrida Buchanan**, P. v. Marshall, #D023615, Lewd and lascivious conduct convictions reversed because prior crimes evidence admitted but trial court failed to consider probative value as to separate current counts, did not restrict evidence (permitting uncharged crimes evidence), and did not weigh probative value versus prejudice. (I) 2) P. v. Grigsby, #E016764, Reversal on Miranda grounds. Court of Appeal noted it would also have reversed on numerous other errors such as 1) IAC where trial counsel's questioning at Miranda hearing on officer's subjective intent and not on custody issue; 2) erroneous admission of officer's statements defendant was a parolee at time of arrest and was considered "armed and dangerous;" 3) shackling of defendant without determination it was necessary to do so. (I)

**Kathy Chavez**, P. v. Kelley, #G018069, Stalking conviction reversed because trial court failed to consider appellant's post-conviction Marsden motion and motion for new trial. (I)

**Howard Cohen**, P. v. Barraza, #D025610, Petition for writ of habeas corpus granted by superior court, allowing defendant to withdraw plea - trial counsel on the record erroneously advised defendant would be entitle to 50% time credits, when he was only entitled to 15% credits. (ADI)

**Thomas Coleman**, P. v. Gutierrez, #E017514, One of two counts of possession of short-barrelled shotgun reversed when at the time of offense, only one conviction for multiple firearms was appropriate; statute has since been amended to permit multiple convictions. (I)

**Rodger Curnow**, P. v. Dominguez, #E016323, Drug convictions conditionally reversed for trial court to conduct an adequate inquiry into whether a confidential informant was a material witness where identity should have been disclosed to the defense. (I)

**Michael Dashjian**, P. v. Schwartz, #E015606, Trial court erred in refusing to release to defendant's brother the guns, ammunition, and other property seized from defendant's apartment. (A)

**Karen DiDonna**, P. v. Johnson, #D024056, Reversed and remanded for defendant to withdraw his plea where defendant was promised appellate review of issue waived by guilty plea.(I)

**Suzanne Evans**, P. v. Sechrist, #E016786, Petition for writ of habeas corpus writ granted and narcotics convictions reversed where police intentionally withheld information from defense in violation of due process. On habeas, court found the officer's omission was designed to surprise the defense at trial and violated due process. (A)

**Patrick Hennessey**, P. v. McManus, #D023316, Reversed in favor of defendant for combined errors: prosecutorial misconduct in misleading jury on law of PC §459, juror misconduct and failure of court to properly address that misconduct, and procedural problems relating to court's failure to excuse a sick juror after some, but not all, verdicts were reached, but substituting a new juror to replace the sick one for the as yet deadlocked counts. (I)

**Michon Hinz**, P. v. Marco A., #D024389 (Published) Using an oblique statement made by juvenile to his probation officer (describing himself as AWOL), at the conclusion of the court trial, the trial court added a W&I §777 allegation after dismissing the substantive charges, made a true finding, and committed the minor to CYA. Court of Appeal reversed finding there was insufficient evidence to support §777 allegation and double jeopardy principles precluded retrial on that count. (A)

**Janice Deaton Hogan**, P. v. Talo, #D025641, Petition for writ of habeas corpus granted where trial counsel was not timely apprised that the prosecution's only witness to the alleged drug transaction was an officer with a known propensity for fabricating evidence and charges. The People conceded the error based on internal investigation of the officer which had caused them to dismiss or revaluate numerous cases. (A)

**Michaelyn Jones**, P. v. Watson, #E016700, Arson conviction reversed because trial court denied appellant's motion to subpoena an out-of-state witness. (A)

**Janice Lagerlof**, P. v. Harrell, #D027442, Habeas Corpus granted by Superior Court vacating petitioner's murder conviction. (A)

**Marilee Marshall**, P. v. Dias, #E018233, Trial court's order of a two year recommitment as a mentally disordered sex offender after court trial reversed when appellant was not admonished of and did not personally and expressly waive jury trial. (I)

**Janice Mazur**, P. v. Robert S., #G018879, Remand to juvenile court for compliance with W&I §702 so court can determine and state on the record whether the "wobbler" offense is a felony or misdemeanor. (A)

(Continued on page 20)

**Richard Miggins**, P. v. Moszcynski, #G018125, Trial court gave insufficient advisal before appellant admitted prior enhancements; reversed and remanded for new hearing on the priors. (A)

**Cindi Mishkin**, P. v. Simpson, #D023518, Reversal where Faretta motion made informally to court two weeks before trial was timely. Even if the motion was not timely, denial of motion because of defendant's requested continuance was an abuse of discretion where the court did not indicate its calendar was congested and continued the case one week for the attorney to prepare. (ADI)

**Gary Nelson**, P. v. Smith, #D024926, Court granted appellant's habeas petition and remanded the case for a trial by jury. After appellant waived his right to jury trial and court trial began, defense discovered that prosecution had withheld material evidence. Uncontroverted that trial counsel would not have recommended waiver and appellant would not have waived a jury trial; error was **reversible per se**. (I)

**Debi Ramos**, P. v. Velarde, #D023612, Terrorist threats conviction reversed where trial court failed to fully investigate defendant's competency before allowing him to proceed pro per. (A)

**Andrew Rubin**, P. v. Laird, #E016786, Habeas corpus writ granted and narcotics conviction reversed where police intentionally withheld information from defense in violation of due process. Trial court found officer's omission was designed to surprise defense at trial. (I)

**Stefanie Sada**, P. v. White, #D024706, Attempted murder conviction and enhancements reversed because trial court refused to read back testimony of four witnesses requested by jury during deliberations; court eventually read back testimony of victim only. Defense counsel's failure to object did not amount to invited error. (ADI)

**Richard Schwartzberg**, P. v. Fierro, #E016323, Drug convictions conditionally reversed for trial court to conduct an adequate inquiry into whether a confidential informant was a material witness where identity should have been disclosed to defense. (I)

**Michael Sideman**, P. v. Anderson, #D023644, Conspiracy to commit robbery conviction reversed because trial court prejudicially erred in admitting evidence of prior robberies to show overt acts in furtherance of the instant conspiracy relevant to defendants' intent; no evidence linking defendants to any of the prior crimes, association with persons involved in prior crimes or instrumentalities used in prior crimes. (I)

**Carmela Simoncini**, P. v. Harang, #E016905, Conviction for one case reversed where guilty plea was part of a package deal that defendant would receive concurrent terms; because this would be an unauthorized sentence, the entire plea had to be set aside. 2) P. v. Delfino R., #D025331, Juvenile's commitment to CYA for an ADW finding affirmed, but remanded to juvenile court to calculate the proper maximum term on aggregated petitions; court set the term at 7 years, but did not indicate whether previous disposition had imposed consecutive or concurrent term. (ADI)

**Jeffrey Stuetz**, P. v. Wilson, #D027442, Superior court grants Habeas Corpus vacating petitioner's attempted murder conviction. (I)

**Robert Swain**, P. v. Heredia, #G018197, Juvenile conviction reversed because trial court improperly took evidence outside the record in the form of in camera conversations with the court interpreter. (A)

**Christine Vento**, P. v. Tenorio, #G017010, Non-Spanish speaking officer testified defendant was "**Mirandized**" by Spanish speaking officer. Convictions reversed for evidentiary hearing as to whether what officer actually said was an adequate **Miranda** advisement. (I)

**Richard Walker**, P. v. Silva, #G017682, court's order reducing wobbler offense to a misdemeanor - lack of jurisdiction because People limited to appeal to appellate department of superior court. (A)

## Dependency:

**Stephen Buckley**, In re Arturo M., #G018278, Pursuant to settlement agreement and agreement at oral argument, the termination of parental rights reversed. Court ordered a hearing pursuant to W&I §366.26(c)(3), giving DSS 90 days to locate an adoptive home. The child was first found adoptable in May 1995, and no home has been found since. (I)

**M. Elizabeth Handy**, In re Jacqueline K., #D026572, Trial court abused its discretion by denying mother's W&I §388 petition and erred in terminating her parental rights. (I)

**J. Michael Hughes**, In re Arturo M., #G018278, Pursuant to settlement agreement and agreement at oral argument, the termination of parental rights reversed. Court ordered a hearing pursuant to W&I §366.26(c)(3), giving DSS 90 days to locate an adoptive home. The child was first found adoptable in May 1995, and no home has been found since. (A)

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**Harold LaFlamme/John Dodd**, In re Kayla S., #G020081, Dependency dismissal reversed because minor was not provided notice and a reasonable opportunity to be heard. (I)

**Harold LaFlamme**, In re Erik S., et al., #G020140, In a minor's appeal, the court held it was reversible error for the trial court to terminate jurisdiction upon an oral request by the social services agency on the day of the hearing. A petition for modification (W&I §388) must be filed and the parties given notice and opportunity to be heard. (I)

**Michael Randall**, In re Aarika S., #D024712, Biological father appealed from an order dismissing a petition in a dependency proceeding against stepfather; court of appeal held referee erred in failing to sustain the allegation under W&I §300, subd. (a). (I)

**Joseph Tavano**, In re Alicia R., #D025523, Dispo order removing minor reversed because no clear and convincing evidence of substantial risk to minor. DSS had failed to interview mom after her pre-dispo release from incarceration and had no basis for assessing current risk. (I) 2) In re Arturo M., #G018278, Pursuant to settlement agreement and agreement at oral argument, the termination of parental rights reversed; court ordered a hearing pursuant to W&I §366.26(c)(3), giving DSS 90 days to locate an adoptive home. The child was first found adoptable in May 1995, and no home has been found since. (I)

**Jane Winer**, In re Chrystal S., #G019267, At the six month review hearing, court erred in finding a parent had been provided reasonable services. "The harm cited by the parent, who was denied reasonable services, was remote as he did not immediately face termination of parental rights. However, if he failed to appeal the reasonable services finding at the six month review, he would waive the issue, and the finding might ultimately affect his parental rights." (A)■

## Appellate Defenders, Inc. Telephone Extension List

**Executive Director:** Elaine A. Alexander . . . . . (619) 696-0282

| **Staff Attorneys:** | **(619) 696-0284, Ext.** |
|---|---|
| Auwarter, Neil | 27 |
| Bell, Paul | 30 |
| Bookout, Randall | 38 |
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| Tillman, Beatrice | 35 |
| Truax, Chris | 60 |

| **Paralegals:** | **(619) 696-0284, Ext.** |
|---|---|
| De La Trinidad, Maritza | 46 |
| Guerra, Kathy | 41 |
| Kuebler, Dawn | 43 |
| Price, Joan | 44 |
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| **Digit(s)** | **Paralegal** | **Ext.** |
|---|---|---|
| 9, 0, 1 | Kathy Guerra | 41 |
| 2, 3, 4 | Dawn Kuebler | 43 |
| 5, 6 | Randy Wright | 42 |
| 7, 8 | Melia Wasserman | 39 |

*Terminal digits are assigned by the last digit in the appeal number. **Note**: Any questions regarding cases pending in the Supreme Court should be directed to Melia Wasserman at (619) 696-0284, ext. 39.■

**APPELLATE DEFENDERS, INC.**
**233 "A" Street, Suite 1200**
**San Diego, CA 92101 - 4010**

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