# APPELLATE DEFENDERS ISSUES

## The Quarterly Newsletter of Appellate Defenders, Inc.

NUMBER 38 AUGUST 1999

# NOTES FROM THE DIRECTOR
## by Elaine A. Alexander, Executive Director

***Communication between ADI and panel attorneys***

We are frequently told that panel attorneys are reluctant to approach the projects with questions about their cases or their status on the panel, because they do not want to "make waves," raise their profile, become known as troublemakers, ask questions that reveal lack of knowledge, etc. Apparently, they feel they would suffer repercussions from saying or asking the wrong thing.

In a column not too long ago, I repeated a consistent theme from over the years: it's not so. We want to hear from you. On case-related questions, for example, it's much better to ask and do the right thing than not to ask and make a blunder. While a *very* few questions may make the "oh, come on, give me a break" category, our attorneys have dealt with a huge range of questions and understand why other attorneys might have them, and they are pleased to help.

With respect to panel-status questions, as I have said in this column before, we are pleased to talk to attorneys about their evaluations, the types of cases and assistance they are getting and why, the near and far future, etc. Developing a strong panel is a central objective of our program, and giving feedback of this sort directly promotes that end. Like answering case questions, it's our job.

Readers know that, as one way of giving feedback, ADI offers written evaluations to attorneys new to the panel and to those who request them. Just send in the special form with ADI's copy of the AOB. Call ADI if you have lost yours. Or get it off the Internet from ADI's Web site, http://www.adi-sandiego.com. It's in the appointed counsel corner under "forms."

We are experimentally trying another channel of communication, as well. We understand why some attorneys may be reluctant to inquire of persons who directly make the actual panel status decisions, for the reasons mentioned. They may want a way of asking quietly and unofficially where they stand, for example, or whether a particular action they took was viewed negatively, or whether a disagreement with a staff attorney was written in their file or affected an evaluation, or when they might be getting independent cases. They may want to register a complaint in a low-profile way.

Staff attorney Cynthia Sorman has agreed to act as a kind of panel liaison or contact person. Panel attorneys are encouraged to call her and confidentially discuss matters that are on their mind, ask questions, get information -- whatever. Cindy is a team leader and senior attorney who has been here 11 years and is very

(Continued on page 2)

**TABLE OF CONTENTS**

knowledgeable about the policies and practices of the office. Attorneys who know her have found her to be extremely approachable, fair, level-headed, and forthright. She can be reached at (619) 696-0284, extension 22.

Finally, we invite letters to the editor of this newsletter on matters of general interest (subject to space allowances and editorial discretion) and inquiries or comments to me, Cindy, or other staff on more specific matters. Phone calls, letters, faxes, e-mail, whatever -- your ideas are important.

***Claims***

Please excuse a touch of pride, but I do want to use a little of this space to give the ADI staff a huge KUDO for their efforts during the June claims crunch this year. Many employees went extra miles to get claims filed before the 1998-99 state fiscal year ended and the typical "July dead time" set in. Lots of people -- attorneys, paralegals, supervisors, office assistants, administrative assistants, files assistants -- worked overtime, weekends, and nights to get as many claims filed as possible, even last-minute ones. Their efforts were aimed at helping panel attorneys, whose bread and butter were in those claims. In addition, the Administrative Office of the Courts no doubt appreciated our help in relieving pressure on the budget for the new fiscal year.

We always say claims are a high priority at our office -- and efforts like this prove it!

A welcome postscript is that apparently the turn-of-the-fiscal-year delays were minimal this year. We hope that is an auspicious sign the system is streamlined and working efficiently, and that such delays are a thing of the past.

***Covering your cases when you can't***

A few years ago I discussed the importance of providing coverage for your cases while you are unavailable because of a vacation, short-term illness, schedule conflict, the pressure of several deadlines unexpectedly occurring in a short time, etc. The summer vacation season is a good time for a reminder.

The simplest and best approach to temporary unavailability often will be to ask for a continuance. But an extension may be inappropriate or unavailable, as when delay could hurt the client or a jurisdictional deadline is pending or the case is a so-called "fast-track" one such as a dependency appeal. Then it may be necessary to have another attorney cover for you. Accordingly, we recommend that *every attorney have standing arrangements with one or more attorneys of similar or greater relevant experience to cover in the event of absence or emergency.*

Notify the covering attorney of your upcoming unavailability, discuss any special needs of your cases, tell the attorney who the assigned ADI staff attorney is, tell the ADI attorney who your covering attorney is, and of course leave a way for everyone to get in touch with you.

Please do not assume that the ADI staff attorney assigned to the case will routinely cover. Our general role is to consult and advise, not to represent other attorneys' clients. If an emergency situation arises, discuss possible alternatives with the staff attorney. Always have the previously discussed arrangements with other attorneys as an option.

***Wende-Anders update***

The issue of whether no-merit briefs must include a list of legal issues and authorities, as apparently required by a literal reading of the 1967 case of Anders v. California, is before the United States Supreme Court in Smith v. Robbins, __ U.S. __, cert. granted Mar. 8, 1999 (Docket No. 98-1037).

Since September of 1997 ADI has required discussion of issues and authorities in no-merit briefs. The Fourth Appellate District courts have indicated their support of this policy. We continue to expect full compliance.

***Recent facts and figures***

At times attorneys have found it informative and helpful to get a brief statistical summary of some aspects of our work. Some of the following might be of interest:

*Caseload:* ADI handled 2,902 Court of Appeal appointments in fiscal year 1998-99, an increase of 2% over 1997-98. About a third of those were in dependency cases -- a big increase. Of the

panel appointments, 77% were independent (excluding appointments of minor's counsel in dependency cases). Appointments under the Three Strikes law numbered 587.

We also handled 22 appointments in the California Supreme Court. As you may know, ADI acts as the administrative and assisting project in that court for Fourth Appellate District cases granted review.

*Panel profile:* At present we have 391 attorneys on the Fourth Appellate District panel. Of those, 37 are in rank 1 (least experienced or probationary), 73 in rank 2 (generally speaking, offered shorter, simpler cases on an assisted basis), 163 in rank 3 (generally, offered simpler independent cases and more complex assisted cases), 91 in rank 4 (generally, offered moderately complex independent cases), and 27 in rank 5 (generally, offered the most complex cases on an independent basis). These categories are of course very fluid, since attorney rankings are continually reviewed as new work is performed.

The above numbers include 48 attorneys who handle only dependency cases. The geographic distribution is: 167 San Diego area, 117 Orange County-LA area, 24 San Bernardino-Riverside area, and 83 northern California.

## Prosecutorial Misconduct Reverses Murder Convictions

**by David Kay, Staff Attorney**

Panel attorneys Martin Buchanan, Lynda Romero, Clay Seaman, and Roberta Thyfault, the 1999 winners of the Paul Bell Award for Appellate Advocacy, were rewarded for their efforts by a Court of Appeal opinion reversing the murder and conspiracy convictions of all four defendants in a highly publicized police killing case. On July 20, 1999, the Court of Appeal, Fourth Appellate District, Division I, cited prosecutorial misconduct so serious that the "...foundation of the jury's decision has been so undermined as to require reversal of the convictions in this case...."

It was a hard won victory for the four panel attorneys and the four trial attorneys appointed to help them through a month-long evidentiary hearing.

In People v. Butler, et. al., the four clients were convicted of conspiracy and murder charges stemming from the 1988 death of San Diego Police Officer Jerry Hartless. The lengthy trial proceedings included a capital trial, a hung jury, a retrial and extensive pre-trial and post-trial motions. The record totaled more than 30,000 pages. After appointment in 1994, the attorneys successfully divided up the appellate issues and worked cooperatively to avoid duplication in filing over 500 pages of briefing in the appeal. The work on the case, however, was just beginning.

When nude pictures of a jailhouse informant and his wife, apparently taken in the D.A.'s offices, surfaced in 1997, the attorneys launched a time-consuming and persistent investigation into the possibility of undisclosed benefits conferred on the witness to testify against the four defendants. Based on the investigation, a 150-page writ petition with over 600 pages of exhibits was filed with the Fourth District Court of Appeal, which resulted in an 18 page order, requiring an evidentiary hearing on the allegations.

The attorneys sought the appointment of trial attorneys to assist them and Tom Bowden, John Cotsirillos, Steve Feldman, and Michael Roake joined the defense effort. The eight attorneys conducted a 45-day evidentiary hearing before Judge Kennedy, spread over several months, which resulted in over 8,000 pages of transcripts.

In December 1998, Judge Kennedy issued a 76-page opinion, suggesting that the writ petition should be granted. The Court of Appeal Opinion echoed Judge Kennedy's outrage at the misconduct involved. The Court stated, "Frankly, we are dismayed by the revelations of misconduct which were discovered in the evidentiary hearing we ordered in this case. The instances of misconduct cannot be condoned in a justice system which seeks to determine the truth of criminal charges in a manner consistent with reliability and fundamental fairness...."

The Court of Appeal decision went on to explain that Darrin Palmer, the chief witness against the four defendants, was portrayed by the prosecution as a repentant gang member, facing a minimum of 17 years in prison, who decided to testify against his fellow gang members after being forced to spend long periods of time in the isolation of austere protective custody. The Court of Appeal found that, in fact, the prosecution had

secret discussions with the witness to assure him he would serve no time on his subsequent robbery conviction. The witness was also provided with the opportunity to have sex with his wife and other women in the D.A.'s offices, as well as being provided with unlimited phone calls and other undisclosed amenities.

Although the attorneys argued forcefully for the dismissal of all of the charges, due to the misconduct, the reversals of the murder convictions was still one of the most significant appellate victories in recent memory.

Throughout the proceedings, the attorneys put most of their other work on hold to address the unique needs of this case. The hardship was substantial. It is unclear whether the clients will be retried. Deputy District Attorney Keith Burt, the prosecutor involved, is now being investigated by various authorities.

## Request For Information Concerning Prosecutorial Misconduct

ADI Board member Jerry Blank would like to know about any cases involving suppression of discoverable exculpatory material by San Diego Deputy District Attorney Peter Longanbach and D.A. Investigator William "Jeff" O'Brien. Contact Jerry by E-mail: jerryblank@compuserve.com, or by telephoning immediately at (619) 238-1111. If Jerry isn't in, please leave details with his assistant, Mary.

## Input from Panel on Plans for Statewide Appellate Advocacy Program

The Appellate Indigent Defense Oversight Advisory Committee is considering the possibility of offering special training to a small number within the group of panel attorneys now getting primarily assisted cases. The concept would be to provide systematic, relatively intense instruction in a variety of subjects related to appellate advocacy, with the objective of developing the skills necessary to do independent work and ultimately, it is hoped, complex cases. Participants would likely be chosen on the basis of their performance and interest in remaining in the appointed appeal area of practice.

The committee is weighing the pros and cons of different formats. One would be a single, two-week session in one locale. Another would be a series of weekend sessions (probably three or four) covering the same material in smaller segments, perhaps alternating northern and southern California locations. Some combination of those might also be possible, such as two one-week sessions. The state might reimburse participants at least in part for their travel, room and board, and materials, but at this time no decision has been made.

An important factor to be weighed in choosing the format would the needs of prospective participants. We would appreciate hearing from ***panel attorneys who are now getting assisted cases***. If you are in that group, please return the form below to Elaine Alexander at ADI ***by the end of September***. Please be aware that returning the form in no way affects your potential eligibility for the program: it is for general planning purposes only.

---

Name
Address

Phone

*If offered a chance to participate in the special appellate advocacy training program, I would be most likely to accept if the format were:*

A single, two-week session

3-4 weekend sessions

Other (specify)

Explanation and comments:

## The Perils of Unauthorized Sentencing

**by Howard C. Cohen, Staff Attorney**

First, what is an unauthorized sentence, also often referred to as an unlawful or illegal sentence or a sentence imposed in excess of the court's jurisdiction? The nature and concept of a jurisdictional sentencing error was described by the California Supreme Court in People v. Scott (1994) 9 Cal.4th 331, 354, as follows: "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." The reasoning is that "such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.] As defendant suggests, legal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement." (Ibid., fn. omitted.)

In People v. Welch (1993) 5 Cal.4th 228, 235, the California Supreme Court described various examples of jurisdictional sentencing error: "[C]ases generally involv[ing] pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court [include] In re Ricky H. (1981) 30 Cal.3d 176, 190-191 [failure to characterize offense and apply permissible term of confinement]; In re Sandel (1966) 64 Cal.2d 412, 418 [violation of statute mandating consecutive terms for escape]; People v. Irvin (1991) 230 Cal.App.3d 180, 192-193 [failure to strike or impose enhancement]; People v. Skeirik (1991) 229 Cal.App.3d 444, 468 [erroneous imposition of determinate terms]; People v. Baylor (1989) 207 Cal.App.3d 232, 235-236 [erroneous stay of sentence]; People v. Levell (1988) 201 Cal.App.3d 749, 751 [applicability of enhancement]; People v. White (1981) 117 Cal.App.3d 270, 278-279, disapproved on another point in People v. Scott, supra, 9 Cal.4th at p. 353, fn. 16 [alleged dual use of aggravating fact and nonuse of mitigating fact]; People v. Salazar (1980) 108 Cal.App.3d 992, 1000-1001 & fn. 4 [failure to state reasons for prison term]. Implicit in each of these decisions is the reviewing court's unwillingness to ignore clear and correctable legal error, particularly where the defendant might otherwise spend too much or too little time in custody. (See §1259.)"

Other examples include People v. Dotson (1997) 16 Cal.4th 547, 554, footnote 6 [failure to impose a mandatory enhancement or other sentence]; People v. Karaman (1992) 4 Cal.4th 335, 350-352 [though a trial court generally loses jurisdiction to resentence a defendant upon commencement of execution of his or her sentence, where a court is required to impose a certain minimum term but imposes a lesser term, the latter is unauthorized and may be increased even after execution of the sentence has begun]; People v. Davis (1999) 71 Cal.App.4th 1492, 1501 [25 years to life for a Pen. Code § 288, subdivision (a), plus a five year enhancement for a prior similar conviction unauthorized; rather Pen. Code § 667.61 plus Three Strikes law requires 75 years to life]; People v. Fond (1999) 71 Cal.App.4th 127, 134 [lack of restitution fine unauthorized; but see below re cruel and unusual determination]; People v. Terrell (1999) 69 Cal.App.4th 1246, 1251, 1255 [failure to impose parole revocation fine and requisite state and county penalty assessments results in unauthorized sentence]; People v. Pelayo (1999) 69 Cal.App.4th 115, 122-125 [one-third term for each non-violent sex offense unauthorized where offender must be sentenced to full terms for violent sex offenses pursuant to Pen. Code § 667.6, subd. (d), i.e., one of the nonviolent offenses must also be sentenced full term under Pen. Code § 1170.1]; People v. Durant (1999) 68 Cal.App.4th 1393, 1401-1402 [pursuant to Pen. Code § 1170.2, subd. (c)(7), concurrent sentence for serious or violent felonies not committed on the same occasion or not arising from the same set of operative facts, unauthorized]; People v. Ayon (1999) 46 Cal.App.4th 385, 395-396 [failure to impose five year enhancements for each prior serious felony conviction unauthorized]; People v. White Eagle (1996) 48 Cal.App.4th 1511, 1521 [imposition of an additional term under Pen. Code § 667.5 is mandatory unless the additional term is stricken, i.e., the court determines that there are circumstances in mitigation of the additional punishment and states its reasons for striking the additional punishment]; People v. Irvin (1991) 230 Cal.App.3d 180, 190-192 [failure either to strike or to impose sentence enhancement analogous to failure to pronounce sentence on all counts and was an unauthorized sentence which could be corrected by remand on defendant's appeal, even though prosecution had not itself appealed]; People v. Rowland (1988) 206 Cal.App.3d 119, 126-127 [failure either to impose a statutorily mandated restitution fine or to state on record compelling or extraordinary reasons for waiving same, unauthorized]; People v. Eberhardt (1986)186 Cal.App.3d 1112, 1121-1124 [staying, vice striking,

imposition of sentence enhancement unauthorized, appealable by People]; People v. Grimble (1981) 116 Cal.App.3d 678, 684-685 [whenever a person is sentenced to prison on a life sentence and any other term of imprisonment for a felony conviction and the sentences are to run consecutively, determinate term shall be served first and the life sentence consecutive to the determinate term, and not vice versa]; People v. Superior Court of Mercedes (Duran) (1978) 84 Cal.App.3d 480, 483, 488 [where applicable sentence choices for attempted robbery are 16 months, 2 or 3 years, 18 month sentence unauthorized; on resentencing, term greater than 16 months may be imposed]; In re Robinson (1956) 142 Cal.App.2d 484, 485-487 [for forcible rape, suspension of execution of sentence and grant probation, unauthorized]. [See Endnotes on page 6.]

Cases citing examples of legal error, but not an unauthorized sentence, include People v. Scott, supra, 9 Cal.4th at p. 355 [failure to object that reasons used for sentencing were "inapplicable, duplicative, and improperly weighed" waived because no jurisdictional error occurred]; People v. Fond, supra, 71 Cal.App.4th at pp. 133 [determination that 25 years to life for rape during commission of first degree burglary was cruel and unusual, not unauthorized]; People v. Middleton (1997) 52 Cal.App.4th 19, 36 [citing Scott, use of improper fact to impose the upper term]; People v. Mustafaa (1994) 22 Cal.App.4th 1305, 1310-1311 [failing to state reasons for upper term as required by Pen. Code § 1170, subd. (c)]; and People v. Neal (1993) 19 Cal.App.4th 1114, 1121 [failing to state reasons for consecutive sentences as required by Pen. Code § 1170, subd. (c)].)

What consequences may emanate from an unauthorized sentence? For one, the People may appeal. Penal Code section 1238, subdivision (a) provides in relevant part: "An appeal may be taken by the people from any of the following:

. . . (10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, "unlawful sentence" means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction."

More important, however, "A claim that a sentence is unauthorized, however, may be raised for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court. [Citations.]" (People v. Dotson, supra, 16 Cal.4th 547, 554, emphasis added.) "A judgment rendered by a court wholly lacking jurisdiction may be challenged at any time." (In re Harris (1993) 5 Cal. 4th 813, 836.) Indeed, "[a]n unauthorized sentence is no bar to the imposition of a proper, even if more severe, judgment thereafter." (People v. Panizzon (1996) 13 Cal.4th 68, 88; People v. Serrato (1973) 9 Cal.3d 753, 764-765 [distinguishing People v. Henderson (1963) 60 Cal.2d 482, 495-497 [based on state double jeopardy protection, after a guilty plea to murder, defendant cannot be sentenced to death upon reconviction of crime which did not involve any sentencing errors which were unauthorized or unlawful].)

If one portion of a sentence is unauthorized, but another portion is unaffected by the illegality, upon remand, the unaffected portion cannot be increased in violation of state double jeopardy protection. (People v. Price (1986) 184 Cal.App.3d 1405, 1413). (However, upon successful appeal, an individual component of a sentence may be increased - for instance, by imposing an upper term vice midterm for the principal term - so long as the total, aggregate term is not increased, without offending state double jeopardy principles. (People v. Craig (1998) 66 Cal.App.4th 1444, 1449-1552.))

Because an unauthorized sentence may be corrected at any time, even if an appeal is voluntarily dismissed, the risk always exists that an erroneous judgment will be discovered in the future (even years later) and corrected. Of course, if an issue exists as to whether or not the judgment was indeed unauthorized, any detrimental change in judgment on the basis that the previous sentence was purportedly unauthorized could be appealed as "an order after judgment."

If counsel perceives a sentence to be unauthorized and perceives a risk of correction in the

future, still, the likelihood of correction increases if an appeal is not abandoned. If an appeal raises an arguable issue, the probability that either respondent or the Court of Appeal may discern the unauthorized sentence is substantial. The possibility that an unauthorized sentence will be discovered by the Court in a *Wende-Anders* review is also significant. Thus, a client should be counseled as to the existence of an unauthorized sentence, the possibility of its discovery and correction at any time, and the greater probability of discovery should the appeal not be abandoned. Abandonment, though, remains the client's choice - after he or she is properly counseled. If the issue on appeal has a high probability of being meritorious and if the remedy is substantial (for example, reversal), then the risk of discovery of the unauthorized sentence may be substantially outweighed by the potential of success on appeal.

If, though, the potential for success is low and/or the remedy may not be significant (e.g., the failure to stay a low grade felony pursuant to Pen. Code § 654 or a few days of extra time credits) and the adverse consequence of correction of the unauthorized sentence is likely and severe, abandonment - with the hope that the unauthorized sentence will remain undiscovered - may be the preferential course. Should counsel have any question about the appropriate course to take, consultation with Appellate Defenders, Inc. would be essential.

**ENDNOTES:**

i. Similarly, in People v. Massengale (1970) 10 Cal.App.3d 689, imprisonment was the only authorized sentence, and hence, probation was unauthorized. If a trial court refuses to correct an illegal sentence, the People may obtain relief in the appellate court by writ of mandate. (*Id*. at pp. 691-693.)

ii. The holding in Neal was limited to the failure of trial counsel to interpose an objection that no reasons were stated for imposing consecutive sentences, while there would not be a waiver or forfeiture of the right to argue that there was insufficient evidence to permit the imposition of consecutive sentencing, notwithstanding a failure to interpose an objection on that ground. (Id. at p. 1117, fn. 2.)

iii. Other post-Scott decisions which have required an objection to be interposed in the trial court for the failure to state any or appropriate reasons for a sentence choice without, however, discussing the non-jurisdictional nature of the error include People v. de Soto (1997) 54 Cal.App.4th 1, 7-8 [improper dual use of facts underlying weapons use to impose the upper term waived by failure to impose a more specific objection at sentencing]; People v. Kelley (1997) 52 Cal.App.4th 568, 581-582 [failure to consider mitigating factors]; People v. Minder (1996) 46 Cal.App.4th 1784, 1791-1792 [failure to comply with requirement in rule 433(b) of the Cal. Rules of Court to state reasons for imposing upper term when imposition of sentence is suspended]; People v. Erdelen (1996) 46 Cal.App.4th 86, 91 [improper dual use of facts to impose upper term waived]; People v. Zuniga (1996) 46 Cal.App.4th 81, 83 [failure to state any reason for sentence choices in violation of § 1170, subd. (c) ]; People v. Dancer (1996) 45 Cal.App.4th 1677, 1693, disapproved on another point in People v. Hammon (1997) 15 Cal.4th 1117, 1123 [improper use of particularly vulnerable aggravating factor to impose upper term]; People v. Douglas (1995) 36 Cal.App.4th 1681, 1691 [referring to application of waiver rule as to improper use of enhancement to impose upper term but nevertheless addressing the merits of the issue].)

iv. For appeals from a judgment or order in an infraction or misdemeanor case, the same provision applies. (Pen. Code § 1466, subd. (1)(G).)

v. In People v. Hanson (S078689, review granted July 28, 1999), the California Supreme Court shall decide whether an increase in fines during resentencing after a reversal on appeal violates state double jeopardy.

vi. Also, in People v. Lister (1984) 155 Cal.App.3d 132, 135, the trial court sentenced defendant to serve a state court sentence consecutive to a federal sentence which had not yet been pronounced. The trial court had no authority to order a sentence to be served consecutively to a sentence which had yet to be imposed. On remand, the court could not impose a consecutive term, because the court could not impose a consecutive term in the first instance.

**The Following Are Updated And Re-Printed From The A.D.I. Newsletter, numbers 10 and 11, April 1989 and July 1989.**

## Raising IAC Claims, Or: Trial Counsel Is Your Friend

**by Carmela Simoncini, Staff Attorney**

Not every act or omission of trial counsel constitutes a violation of the accused's constitutional right to effective assistance of counsel. Recklessly challenging the effectiveness of trial counsel on appeal

may actually backfire. This will be the first of a two part article. Appellate claims of ineffective assistance of counsel (IAC) at trial fall, by and large, into two categories: (1) failure to investigate facts or potentially meritorious defenses, and (2) unreasonable tactical decisions. This article will deal with challenges relating to incompetence of counsel based upon questionable tactical decisions.

Few people appreciate being second-guessed over matters of strategy or having their professional judgment be labeled "ineffective" or, worse, "incompetent." This is especially true where the attack may have the added effect of instigating a state bar disciplinary proceeding. Most reviewing courts share this distaste for IAC claims; they are reluctant to be dragged into the second-guessing, reputation-endangering process.

While trial lawyers and appellate courts presumably would acknowledge that the concept of IAC is a valid issue appropriately raised from time to time, they complain that the claim is often made unmeritoriously and recklessly in many cases. There is the feeling that appellate counsel too often second-guess the client's trial attorney without investigating the circumstances leading to the trial attorney's decision. This article discusses the need for investigation, some of the factors appellate counsel should weigh in deciding whether to go forward with the claim, and some of the procedural considerations in raising IAC.

**The Importance of Investigating a Potential Claim of IAC Challenging Trial Counsel's Tactics**

Careful inquiry -- almost always direct contact with trial counsel -- is mandatory before deciding whether to raise IAC based on a tactical decision. Not only must you establish that trial counsel acted below the accepted level of competence in failing to do a certain thing, you must be able to prove what it was that would have been proven had trial counsel done as he or she should have. Thus, if your client asserts trial counsel failed to call defense witnesses, you must investigate those witnesses and be prepared to prove to the reviewing court that their testimony would have helped your client's case.

At the trial level, counsel are faced with tactical decisions of critical dimension from the date the criminal complaint is filed in the municipal court in felony cases, or the date of the receipt of the petition in juvenile cases. These decisions may be grounded on many factors: the type of witness the client will make; the availability of witnesses on the client's behalf; the credibility of any witnesses either favorable or adverse to the client; the existence of circumstantial evidence which either supports or refutes the client's position or theory of the case; the existence of extra-judicial admissions or confessions by the client; and the rules of admissibility with respect to all of these factors.

It is not unusual -- nor is it by any means necessarily incompetent -- for an attorney to decide not to allow his or her client to testify; the attorney may have concluded, for example, that the client would make a bad witness for one reason or another. Nor is it necessarily incompetent for counsel to waive cross-examination of a key witness, or to forego the making of a specific motion.

The failure to make objections during a trial or other proceeding is generally considered to be a matter of trial tactics as to which an appellate court will not exercise judicial hindsight. (People v. Lanphear (1980) 26 Cal.3d 814, 828-829.) Where an objection or motion would have been futile, the failure to object or make a particular motion does not constitute ineffectiveness. (See People v. Robinson (1989) 209 Cal.App.3d 1047, 1056.)

Upon contacting counsel, you may learn that the witnesses, who-- according to the client-- were supposed to give exonerating testimony, would actually have convicted him or her; or that those witnesses all had long felony conviction records which would have seriously impacted their credibility and prejudiced the client by way of association. You might also learn that certain evidence was received without objection because to have interposed an objection would have tipped off the prosecutor about a potential problem with the defense case. Or you might learn that trial counsel waived cross-examination and rested on the state of the evidence because the prosecutor had failed to introduce any evidence with respect to an essential element of the charge, and trial counsel did not want to alert him or her to this fact.

For these reasons, the courts recognize trial counsel ordinarily were in the best position to determine trial tactics in light of his or her observations of the proceedings and therefore will refrain from indulging in judicial hindsight. (People v. Najera (1972) 8 Cal.3d

504, 516-517.)

An argument that trial counsel's tactical decisions deprived appellant of effective assistance of counsel requires careful investigation of facts which will support the claim. It is of no benefit to the appellant to argue that trial counsel should have called potential defense witnesses unless you have previously determined those witnesses would actually have assisted the defense. Bear in mind that in order to establish defense counsel was incompetent for failing to discover and present evidence, you must prove the un-presented evidence would have undermined the prosecution's entire case. (In re Clark (1993) 5 Cal.4th 750, 766.) Not only must you demonstrate that counsel knew or should have known that further investigation was necessary, but also you must establish the nature and relevance of the evidence that counsel failed to present or discover. (In re Clark, supra; People v. Williams (1988) 44 Cal.3d 883, 937.)

For this reason, challenging counsel's failure to present a mental health defense requires proof of a mental condition that would justify such a claim. (People v. Webster (1991) 54 Cal.3d 411, 437 [not IAC to fail to advance mental defense where counsel had had defendant examined but report did not encourage pursuit of the defense].) Similarly, an argument that counsel's tactical decision to forego an objection or motion will not avail the appellant if the objection or motion were not meritorious.

The current standard of review of claims of ineffective assistance of counsel is governed by the case of Strickland v. Washington (1984) 466 U.S. 668. The Strickland test is a two-pronged inquiry: (1) whether the trial attorney's performance fell below an objective standard of reasonableness; and (2) whether it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

It should be noted that California decisions have long held it is not sufficient to allege merely that an attorney's tactics were poor, or that the case might have been handled differently. (People v. Floyd (1970) 1 Cal.3d 694, 709.) The fact that other attorneys or the client do not approve of the trial attorney's choice of tactics, or that the tactics simply did not work, will not in itself establish IAC. Even the most competent counsel may from time to time make decisions or act in a manner which might be criticized by other equally competent counsel, but that is not the measure of competency of counsel on review by an appellate court. (People v. Wallin (1981) 124 Cal.App.3d 479, 485.)

Thus, before appellate counsel attacks a tactical decision made by trial counsel, it necessary to establish that no reasonable trial attorney would have made such a tactical decision, i.e., that under an objective standard the tactic was not one which any reasonably competent attorney would have employed in the same circumstances. You must also demonstrate, under Strickland, that there is a reasonable probability that but for such a tactical approach the defendant would not have been convicted. According to the high court, "a reasonable probability" is a probability sufficient to undermine confidence in the outcome.

This is certainly not to say trial tactics are never the proper subject of a claim of IAC. Tactical decisions may demonstrate incompetence if made without benefit of substantial inquiry, or reflection, or in ignorance of the applicable law. (People v. Frierson (1979) 25 Cal.3d 142, 163 [where defendant's sole defense was diminished capacity, but counsel made a tactical decision not to obtain expert evaluation of defendant nor offer expert opinion on the effects of Quaalude and angel dust on his mental state because he feared the jury would react negatively]; People v. Bess (1984) 153 Cal.App.3d 1053, 1061 [IAC for failure to interview robbery witnesses on grounds of tactical decision where the record developed at new trial motion demonstrated their testimony would have cast doubt on prosecution theory, but counsel feared they would be impeached].)

In People v. Zimmerman (1980) 102 Cal.App.3d 647, the appellate court found IAC where there was no plausible tactical explanation to justify omissions by counsel which permitted the jury to learn about prior convictions which otherwise would not have been admitted into evidence. In People v. Sundlee (1977) 70 Cal.App.3d 477, the court found IAC for counsel's failure to object to tapes and a transcript of radio conversations of police officers on a surveillance.

Later, in People v. Guizar (1986) 180 Cal.App.3d 487, a court of appeal reversed a judgment for ineffective assistance of counsel based on counsel's failure to object to portions of a tape introduced into evidence, wherein a witness discussed the fact defendant had committed two murders in the past. The

court stated: "It is inconceivable to us that a defense attorney would make a tactical decision to admit evidence that a defendant, on trial for murder, had committed other murders in the past." (Id. at 492, fn. 3.) More recently, it was held to be IAC for counsel to fail to object to "tangentially relevant prejudicial evidence." (People v. Stratton (1988) 205 Cal.App.3d 87.)

Thus, even where the record sheds no light on the reasons for counsel's conduct or omission, reversal may be appropriate if there simply could be no satisfactory explanation. (People v. Pope (1979) 23 Cal.3d 412, 428; People v. McCary (1985) 166 Cal.App.3d 1, 12.)

As discussed in Elaine Alexander's accompanying article, ADI strongly recommends that potential IAC claims be discussed with a staff attorney before being pursued. This is particularly important if your trial experience is limited and your view of counsel's effectiveness is colored by unfamiliarity with trial procedure.

If, after reviewing the entire record, it appears that a viable and valid claim of IAC may exist, contact one of the ADI staff attorneys. If it is an assisted case, you would, of course, run it past the assisting attorney. The staff attorney can give you a "second opinion" and also help you plan a proper way of investigating the issue.

Careful investigation into the circumstances behind the questioned tactic will help appellate counsel evaluate whether the trial attorney in fact had valid reasons for the act or omission.

Therefore, before raising any claim of IAC you should discuss the questioned act, omission or tactic with counsel to rule out the existence of any valid tactical reason. Trial counsel is ethically bound to cooperate in this regard. Very frequently, open discussion with trial counsel and review of trial counsel's files will reveal a valid tactical explanation for counsel's actions. The suggested protocol and investigation will therefore help eliminate inappropriate claims of IAC, and insure that, when raised, the issue is appropriate.

Decreasing the frequency of ungrounded IAC claims will reduce the overall hostility of the bench and trial bar to the issue generically, enhance the credibility of the issue when it is well-founded, and ensure a more thoughtful review of the meritorious issues involved in a given appeal.

**How to Establish IAC**

Once consultation with ADI and investigation have led to the conclusion an issue relating to IAC must be raised in the brief, the next question is how to get the issue before the Court of Appeal. In People v. Pope, supra, the Supreme Court noted that if the act or omission is shown on the record, and an unacceptable tactical reason is apparent on the record, or there is no conceivable proper tactical reason, the issue may be raised on appeal from the judgment. Where the record is silent as to counsel's act or omission or the reasons behind it, the claim of ineffective assistance of counsel must be made in a petition for habeas corpus.

The latter method is the one which presents the greatest challenge. Assuming you have contacted trial counsel and are confirmed in your assessment that no reasonable tactical decision justified counsel's acts or omissions, or that no reasonably competent attorney would have employed such a tactic, you will need to include supporting declarations with your petition.

While trial counsel may be cooperative in preparing a declaration that they had no deliberate tactical reason, or an improper tactical reason, often they may become reluctant to commit to paper what they told you orally in earlier contacts. To avoid having to become a witness yourself, it is often advisable to have an investigator or colleague participate in your discussions with trial counsel. (Naturally, if these discussions are on the telephone, you need to inform trial counsel that the other person is listening.) You should promptly follow up any conversations with a letter to trial counsel summarizing what was said.

In addition to contacting counsel, you will often have to go beyond the record to establish the lack of a valid tactical reason for counsel's act and to demonstrate the necessary prejudice. If the problem was a failure to call defense witnesses, for example, you need to secure declarations from those witnesses setting out the nature of the favorable testimony which would have been presented had the witnesses been called.

Or, if you have the resources to retain an expert in a case where favorable expert testimony might have resulted in a different judgment, you may be required to

obtain a declaration of the expert. In such a situation, failure to do so will result in an adverse decision. However, before expending any funds for investigation or retaining experts, you will need to seek pre-approval from the Court of Appeal, in order to seek reimbursement. The ADI staff attorney assigned to your case will be able to provide input as to how to go about doing this.

The client's own statement as to what was said or done, or not said or done, might be of value. Even if trial counsel does not recall or declines to sign a declaration regarding what he did or did not tell the client, the client is competent as a witness to make a declaration in support of the claim. Particularly where the client has pled guilty pursuant to advice from counsel, in order to seek relief from the plea, the client needs to establish that but-for the representations of counsel, he would not have waived his constitutional trial rights and entered a plea. (In re Alvernaz (1992) 2 Cal.4th 924, 936-941 [IAC in advising client to reject plea bargain].)

As a matter of your own tactics, you should keep in mind that the superior court will probably need to conduct evidentiary hearings to decide a claim of IAC brought by way of writ. At those hearings, trial counsel may be called to testify as to his or her reasons for doing or not doing the challenged acts. The attorney-client privilege will be likely deemed waived as to matters relevant to the IAC claim at this hearing and counsel will be asked to explain why he or she did or did not do whatever is in issue. Be aware that most petitions for writs of habeas corpus, filed in the first instance in the Court of Appeal, are denied without prejudice to re-file in the superior court.

Also be aware that the evidentiary hearing procedure can prove to be a double-edged sword, working to the great detriment of the client. At the hearing, the prosecution will have an opportunity to learn facts of the defense case and/or theory which would otherwise be deemed privileged work product and confidential. Should the matter be reversed and remanded for retrial, the prosecution will be better armed and you may have scored a very hollow victory.

**Conclusion**

This article has only dealt with one type of claim of IAC. Claims of incompetence flowing from tactical decisions present special problems for the appellate practitioner, just as the tactical choices themselves presented problems to trial counsel.

The decision to raise the issue should be well considered to avoid the risk of distracting the court from the client's strongest points, alienating your natural ally (trial counsel), and exposing the client to potential prejudice. Thoughtful discretion in preparation of the appeal where a meritorious claim does exist will work to guarantee the client a better result on appeal as well as on remand. You will also be providing effective assistance of counsel on appeal.

## Appointed Counsel Should Consult ADI Before Raising IAC Claims

**by Elaine A. Alexander, Executive Director**

In this issue ADI staff attorney Carmela Simoncini explores the factors appellate counsel should consider before deciding to raise a claim of ineffective assistance of counsel (IAC). The theme running through these articles is that IAC is a claim too often made without adequate investigation, without a clear understanding of the limitations on the doctrine, and ultimately without justification.

All appointed attorneys on ADI cases -- independent or assisted -- are advised and strongly encouraged to consult with an ADI staff attorney before going forward with a claim of IAC.

We most emphatically are not and shall not be trying to discourage all IAC claims. The argument properly used is a valid tool of appellate defense; in fact, failure to raise a viable IAC claim may call appellate counsel's competence into question.

Nevertheless, we all need to recognize that unmeritorious IAC claims may have uniquely detrimental repercussions. They can poison the relationship between the trial bar and appellate defense bar, a relationship that in the vast majority of the cases needs to be cooperative one, working toward the best interests of the client. They unnecessarily besmirch the professional reputations of trial counsel. The threat of recklessly advanced IAC claims may inhibit counsel from filing notices of appeal. Raising the issue inappropriately may unnecessarily result in the revelation

of privileged or strategically sensitive information. Unwarranted IAC claims call the credibility of the IAC defense itself into question, making it more difficult to succeed when the issue is in fact a good one.

Most importantly, an unjustified claim of IAC may hurt the appeal itself and thus the client. IAC is a claim viewed with disfavor by the appellate bench. If not well-founded, it can damage the credibility of the appellate attorney. It can both distract and detract from the client's stronger issues on appeal. For these and other reasons, IAC is an issue that, unless carefully considered and approached, may do more harm than good.

Please do not think encouraging consultation with ADI means attorneys must get ADI's "permission" to raise an IAC issue. The appointed attorney controls the case. It does mean that we would like all attorneys to get a second opinion on the issue and to reflect carefully on strategic considerations for investigating and raising it.

## Immigration Consequences of Guilty Pleas

**by Michelle Rogers, Staff Attorney**

The Fifth District Court of Appeal recently found ineffective assistance of counsel where trial counsel simply advised the defendant that he might be deported if he agreed to a plea bargain to a felony drug offense while armed with a handgun, but did not advise the defendant that as a result of his guilty plea he definitely would be deported and thereafter permanently barred from the United States. (People v. Sandoval (1999) 73 Cal.App.4th 404.) In Sandoval, trial counsel told the defendant he "might" be deported, but did not explain the risk of deportation and exclusion was extremely high with the particular plea being considered. The Court of Appeal found that "the message given to appellant,....by both the court and his counsel, was that there was only a possibility of deportation. Because the reality was significantly different, we believe appellant was misled concerning the consequences he faced." (Id. at p. 437.) In light of this, the court found ineffective assistance of counsel. The court remanded with directions for reconsideration of the motion to withdraw the guilty plea to determine the prejudice to the defendant under the factors the Court of Appeal laid out in the decision regarding the defendant's credibility in his assertion that if he had been properly advised, he would not have pled guilty.

Review was recently granted on the Fourth District Court of Appeal, Division Three, decision in In re Resendiz, which likewise found ineffective assistance of counsel where trial counsel failed to properly research the immigration consequences of his client's guilty plea and failed to advise the client that a direct result of his guilty plea was mandatory deportation. (In re Resendiz, S078879, review granted July 21, 1999.)

What has brought about these recent decisions? In 1996, the Immigration and Nationality Act ("INA"; 8 U.S.C. §1227) was amended and significantly altered by the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act. As a result of these amendments, the immigration consequences of a guilty plea have changed dramatically. Before these legislative changes, deportation was only a possibility when a defendant committed certain enumerated crimes, because the defendant could apply for relief from deportation. The new laws have made deportation (now called "removal") mandatory when an alien has been convicted of certain offenses, and have limited an immigration judge's ability to provide discretionary relief from removal.

A conviction for INA purposes includes any proceeding in which adjudication is withheld where the alien has entered a plea of no contest or "has admitted sufficient facts to warrant a finding of guilty." (8 U.S.C. § 1182(a)(2)(A).) Under this statute, deferred adjudication is considered a conviction, as well as regular adult probation, even in cases where the alien has successfully competed his probation and had the judgment set aside.

The following is a very brief synopsis of the type of convictions that will lead to mandatory removal of the alien. It does not attempt to cover all the crimes involved, and should not replace a careful reading of the INA statute by counsel. There are four major categories of convictions that can lead to mandatory removal.

### 1. Aggravated Felonies

An alien is not eligible for most discretionary relief with an aggravated felony conviction, therefore, removal is mandatory. The aggravated felony statute

consists of 21 paragraphs which encompasses 50 crimes and general classes of crimes. (8 U.S.C. § 1101 (a)(43)(A)-(U).) It includes most felonies and even some misdemeanors. The following are examples of some general categories of aggravated felonies: (a) Crimes of Violence and Theft, including receiving stolen property and burglary. Crimes in this category are considered aggravated felonies if the sentence imposed is at least one year, regardless of any suspension of the imposition or execution of sentence. (b) Fraud and Deceit Crimes: Crimes involving fraud may be designated an aggravated felony where the loss to the victim exceeds $10,000. The statute does not define which crimes involve fraud or what is meant by "loss to the victim".

The following crimes are considered aggravated felonies only when a sentence of imprisonment of 365 days or more is imposed: Crimes of violence, theft, burglary, receiving stolen property, commercial bribery, and forgery crimes.

**2. Crimes involving moral turpitude**

Generally, a crime includes moral turpitude if it requires criminal intent or intrinsically immoral behavior. The more common crimes that are considered crimes of moral turpitude are serious property crimes, such as theft, burglary, robbery, receiving stolen property, or fraud. Negligent manslaughter, simple battery or assault are not considered moral turpitude crimes. (8 U.S.C. § 1227(a)(2)(A).)

Whether the alien is subject to removal depends on if the alien has one or two convictions of crimes involving moral turpitude. If the alien has one conviction, the crime of moral turpitude must be punishable by at least one year imprisonment and committed within five years of the alien's admission into the United States. There is no minimum sentence required if the alien has two convictions of moral turpitude not arising out of the same "scheme." "Scheme" has no definition in the INA. (8 U.S.C. § 1227 (a)(2)(A).)

**3. Crimes "related to" controlled substances**

This basically includes every conviction of a crime "related to" drugs, except a single offense involving 30 grams or less of marijuana for personal use. (8 U.S.C. § 237 (a)(2)(B).) Abusing drugs at any time after admission into the United States is a ground for removal, and this does not require a conviction. Convincing evidence that the person is addicted to drugs or has abused drugs may be enough for removal.

**4. Firearms**

This category includes convictions of "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying.... a firearm or destructive device.... in violation of any law." (8 U.S.C. § 1227 (a)(2)(C).) This includes attempts and conspiracy to commit any of the above offenses.

There are also several miscellaneous categories of crimes that will affect an alien's immigration status. For example, included are crimes of domestic violence, which encompass virtually every type of domestic violence conviction or protective order violation, and no sentence of imprisonment is required. Further, "national security" crimes are grounds for removal. (8 U.S.C. § 1227 (a)(2)(D).)

The current structure for the removal of alien defendants and the serious implications for alien defendants mandate an understanding of the amended INA.

## Calculating The "Minimum Term" For Indeterminate Term Offenses In Two and Three Strike Cases

**by Neil Auwarter, Staff Attorney**

The California Supreme Court has clarified, to some extent, the method of calculating sentences for indeterminate term offenses in two and three strikes cases. (*People* v. *Jefferson* (1999) 21 Cal.4th 86.)

The impact of the Three Strikes Law on *determinate* term sentences is fairly simple. In two strikes cases, the determinate term is doubled. (§ 667, subd. (e)(1).) In three strikes cases the defendant receives a life term with a minimum term calculated as the greater of: (i) three times the ordinary term; (ii) 25 years; or (iii) the ordinary term applicable under Penal Code section 1170, including certain enhancements. (§ 667, subd (e)(2)(A).)

The impact of the Three Strikes Law on *indeterminate* term offenses, explored in *People* v. *Jefferson*, is less simple. At this point, you may want to grab your Penal Code (no crude retorts, please).

In *Jefferson*, the defendants were convicted of attempted premeditated murder, which normally carries a term of life with the possibility of parole. There were also findings the crimes were committed for a criminal street gang (§ 186.22, subd. (b)), and each defendant admitted a single strike prior. The court addressed the question of how to apply the doubling provision of the Strikes Law to indeterminate term offenses. The court found this simple enough where the offense specifies a minimum term because section 667, subdivision (e)(1) provides for the doubling of "the minimum term for an indeterminate term." But premeditated attempted murder, like other "straight" life term offenses, simply provides for "life with the possibility of parole" and does not specify a minimum term. (" 664.) The defendants argued that there was no "minimum term" to double, so they could only be sentenced to the term prescribed by section 664--life with the possibility of parole.

The Supreme Court majority disagreed, finding that the parole eligibility provision found in section 3046 amounts to a "minimum term." Section 3046 provides: "No prisoner imprisoned under a life sentence may be paroled until he or she has served at least seven calendar years or has served a term established pursuant to any other section..., whichever is greater. ..." The majority concluded that the seven-years-before-parole provision of section 3046 is the "minimum term" for indeterminate term offenses whose statutes do not specify a minimum term. Thus, a second strike defendant convicted of attempted premeditated murder would receive a term of 14 years to life.

The calculation in *Jefferson* was further complicated by the gang findings under section 186.22. Section 186.22, subdivision (b)(4) provides that a defendant who receives a life sentence for an offense committed for a gang may not be paroled until he or she has served at least 15 years. The court found section 186.22, subdivision (b)(4) was an "other section of law that establishes a minimum period of confinement" within the meaning of section 3046. Thus, the 15-year period was the defendants' "minimum term" within the meaning of section 667, subdivision (e)(1). The result: a life term with a minimum term of 30 years for each defendant.

*Jefferson* is bad news for second strike defendants convicted of indeterminate term offenses. But the opinion also addresses the calculation of indeterminate terms for *third* strikes defendants, and here the court's interpretation was more lenient than defense attorneys might expect. The dissent (Werdegar and Mosk) asserted the majority's doubling of section 3046's minimum-period-before-parole was anomalous because the *tripling* provision of section 667, subdivision (e)(2)(A)(i) is inapplicable in such cases. This, the dissent reasoned, is because section 3046 is expressly mentioned in section 667, subdivision (e)(2)(A)*(iii)* as one of the three alternative means of calculating the minimum term of a third striker's life term. The majority agreed the tripling provision would be inapplicable to an indeterminate term governed by section 3046 and found this was not anomalous.

The court's musings on third strikers is dicta in *Jefferson*, but it suggests the following: When a third strike defendant is sentenced for an offense carrying a straight life sentence (one not specifying a minimum term), the minimum term of the life sentence is calculated not by tripling the minimum period before parole, but as the greater of the other two alternatives (§ 667, subdivisions (e)(2)(A)(ii) and (iii)). So, for example, had the defendants in *Jefferson* been third strikers, they would have received terms of 25 years to life rather than 45 years to life (triple the earliest parole period). What is not entirely clear is whether the court's interpretation was meant to include indeterminate term offenses that *do* specify minimum terms. Arguably, the court's analysis would include such offenses because the analysis is based on the reference to section 3046 in section 667, subdivision (e)(2)(A)(iii). Section 3046 governs all indeterminate term offenses, not just straight life terms. So it is at least arguable that all indeterminate term offenses are exempt from the tripling provision of the Strikes Law. Be forewarned "the opinion is in some places self-contradictory and is not entirely consistent with the notion its third strike analysis extends to all indeterminate term offenses. If you encounter this issue, you will want to scrutinize the opinion closely to best craft your argument.

# MISCELLANEOUS NOTICES:

## Sade C. Reviews And Record Problems

If you have a case requiring a Sade C. review, please call to alert the assigned staff attorney to check to see if we have the record. Often we are not getting enough records to keep one at ADI for review,

especially if there are two parties besides the minor in the case, and we will need you to send it in.

If there is co-appellate counsel in the case, be sure to discuss the case with that counsel if there is a possibility of joining in the co-appellant's brief. In Division 3 cases, a letter with a synopsis of the facts and why potential issues are not cognizable would be helpful.

## Reminder: Division Two Is Now Accepting 35e Requests In Both Criminal And Dependency Cases

While Division Two formerly only accepted augments, it now requires criminal and dependency counsel to file 35e letters when parts of the normal record are missing. Kudos to the improved efficiency of the superior court appeals!

## Pondering Extensions

All three divisions of the Fourth Appellate District have worked hard towards reducing their backlogs of cases and reducing delay. To this end, the respective policies regarding extensions of time to file the opening brief have been changing gradually, since part of the delay in deciding a case is necessarily tied to delay in filing the briefs.

ADI is reminded to monitor cases and the number of extensions requested by attorneys. In this vein, panel attorneys are asked to try to avoid unnecessary extensions. To many courts, the excuse of 'working on other cases' means the attorney has taken on more than he or she can reasonably handle. ADI encourages panel attorneys to be realistic in accepting only as many cases as can be reasonably handled, so that the need to request an extension of time will be minimized. If you have several long record cases outstanding, it is okay to reject a new case. You will not lose your spot on the rotation. However, it might not be okay to accept a case that cannot be worked on right away and might require numerous extensions.

Filing briefs with less extensions means faster payment on those cases. It also means faster resolution for the clients, and smoother internal processing of the cases for the Courts of Appeal. Sometimes the exigencies of the case or circumstances of the attorney require an extension of time. The courts understand this and do not want to see quality sacrificed for speed. Yet, we all benefit from improved efficiency. Please keep these thoughts in mind and try to minimize the need for extension requests except where absolutely necessary.

## Wende Brief Covers

Recently, a court clerk reminded ADI to make sure the cover of a Wende brief (ref. People v. Wende (1979) 25 Cal.3d 436) mentioned the fact that it was a brief in accordance with the procedures outlined in People v. Wende. ADI was asked to remind counsel of the importance of this reference on the cover, since it affects internal case assignments at the Court of Appeal.

While reviewing the Guidelines for Appointed Counsel, it was noticed that there is nothing in our handbook, nor in any of our appellate practice manuals, which discusses the format of the cover of a Wende brief. Nevertheless, the recommended title of a Wende brief should include the information that it is a Wende. Here is a sample:

> **Appellant's Opening Brief Submitted In Accordance With The Procedures Outlined In People v. Wende (1979) 25 Cal.3d 436, and Anders v. California (1967) 386 U.S. 738.**

Please remember to include reference to the fact that the brief is a Wende brief on the cover.

## Keeping In Touch By U.S. Mail: Inform the Court, AOC and ADI of Address And Telephone Number Changes

Because of recent changes in U.S. Postal Service policy, the USPS is requiring patrons using an address and suite number which is actually a personal mail box and not the patron's actual office site, to change the address to reflect that it is a personal mail box (PMB). In addition, when your area code changes, ADI, the court, the AOC, and the parties need to know. ADI sent a mass mailing to the panel to send a change of address and/or phone number form to the AOC. In addition, changes of address/phone number must be sent to the court on every case with a proof of service. ADI would like your e-mail address and fax number as well.

## ADI & Email

ADI staff can now be reached via Internet e-mail. E-mail addresses for each staff member are available on the ADI Web site under "About ADI." ADI requests that e-mail be used for business purposes only. Be sure to list the case name and number to which your message pertains. E-mail will be treated the same as all other incoming mail and will be routed to the file room, logged, and a hard copy placed in the case file.

At present, we prefer to use e-mail for communications about cases and claims. At this point we are exploring the possibility of accepting drafts over e-mail, but no decision has been made. For the time being, if you wish to send a draft or attachment by e-mail, alert the staff attorney by telephone.

Be aware that there is no guarantee of confidentiality when sending and receiving e-mail. Privileged or other sensitive material should be conveyed either by letter or telephone.

## 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.]

**J. Peter Axelrod**, P. v. Johnson, #E022768, Remanded for resentencing where trial court imposed one year enhancements for each of eight out of nine alleged prior prison terms but where appellate record was ambiguous and the probability existed that several of the priors were concurrent prison terms for which separate enhancements are improper. (I)

**Susan Bauguess**, In re Aaron W., #E023707, Juvenile probation order by San Bernardino juvenile court reversed because court lacked power to hold new disposition hearing where the Los Angeles juvenile court had previously held disposition; but COA noted SB court could on remand "modify" the previous disposition. (I)

**Sylvia Beckham**, P. v. Sauvaine, #E023304, Trial court erred in imposing one year for deadly weapon enhancement because weapon use was the means by which defendant committed the assault with a deadly weapon. (A)

Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
NUMBER 22 August 1999

# HOT TOPICS IN DEPENDENCY, FREEDOM FROM CUSTODY, AND CONSERVATORSHIP CASES

**by Carmela F. Simoncini, Staff Attorney**

## DEPENDENCY CASES

### A. Disposition Matters

In Riverside County D.P.S.S v. Superior Court (1999) 71 Cal.App.4th 483, Division Two of the Fourth Appellate District reversed a juvenile court dispositional order to provide reunification services to the mother of a dependent child, whose older children were previously declared dependents. Prior to the dispositional hearing, the court had terminated parental rights as to one of the older siblings, and terminated services at the 12 month review as to another older sibling. However, a month later, the court refused to deny services to the mother pursuant to either Welfare and Institutions Code section 361.5, subdivision (e), or section 361.5, subdivision (b)(10). The trial court reasoned that because mother's parental rights vis-a-vis the older minor had not been terminated until after the current dependent minor had been detained, subdivision (b)(10) did not apply. D.P.S.S. sought an extraordinary writ.

The reviewing court granted the writ. Relying on language in In re Joshua M. (1998) 66 Cal.App.4th 458, the court agreed the effectiveness of the new denial-of-services rules would be delayed and impeded substantially if they could only be applied to conduct occurring after their enactment. The court acknowledged that there has long been a presumption that parents would receive reunification services, but noted the legislative intent reflected the decision that in some cases the likelihood of reunification is so slim that scarce resources should not be expended on such cases. (Riverside County D.P.S.S. v. Superior Court, supra, 71 Cal.App.4th at pp. 487-488.) It observed the premise for the application of the new subdivisions is that a parent who has failed in one course of reunification services, or who has suffered the drastic step of termination of parental rights, is unlikely to succeed with a new round of services.

Thus, the court held subdivision (b)(10) of section 361.5 authorizes the court to deny services to any parent whose rights to another child have been terminated, or who has another child under a permanent plan after reunification efforts have failed. It does not matter whether the actions were taken before or after the current dependency petition was filed; the only requirement is that they have occurred before a disposition is made in the current case. (Id., 71 Cal.App.4th at p. 491.)

### B. Review Hearing and Referral Issues

In another Fourth District case, Division Three denied a writ of mandate to a petitioning mother who waived reunification services following the filing of a subsequent petition pursuant to section 342. In Cynthia C. v. Superior Court (1999) 72 Cal.App.4th 1199, Christina had been a dependent child since 1997, when she was 6 years old. Christina was a problem child, and her parents were openly hostile to her. Christina's behaviors included lying, stealing, impulsivity, hyperactivity, somatic complaints, explosive tantrums, fearfulness and inability to respond to directions, and deviousness. In 1998, Christina struck both mom and her half brother, prompting her mom, now at "the end of her rope," to call the social worker and request removal of Christina.

At the hearing on the section 342 petition, mom waived her right to reunification services in writing and even offered to relinquish Christina for adoption. She was encouraged to carefully consider the decision beforehand, but she signed the waiver of services in August, 1998. By January, 1999, Cynthia, who had been ostracized by her extended family for her actions respecting Christina, had had second thoughts and wanted to withdraw her waiver of services. In support of her application, she did not assert she mistakenly waived services, or was coerced into waiving them; instead, she stated she simply changed her mind about having Christina adopted. However, by this time, Christina was in pre-adoptive placement and was doing well. The trial court found Cynthia's waiver was knowing and intelligent and she had made no showing it would be in Christina's best interests to start reunification services. (Cynthia C. v. Superior Court, supra, 72 Cal.App.4th at p. 1200.)

On review, the decision was affirmed. First, the court noted there is no provision in the code or the rules of court for withdrawal of a waiver, although it found it would be permissible in appropriate cases where the requirements of the statute were not met or a parent was coerced or misled into waiving her rights. It observed that a parent who has an immediate change of heart and promptly seeks to withdraw the waiver, relief might be appropriate.

However, here, mom did not demonstrate she was misled, coerced, or confused when she signed the form and gave her waiver on the record. Although she claimed to have changed her mind shortly after requesting Christina's removal from her home in January, she waited months before communicating that change of heart to either the social worker, her attorney, or the court. Consequently, the Court of Appeal could not conclude the juvenile court had abused its discretion when it declined to allow Cynthia to withdraw her waiver of services. (Id., 72 Cal.App.4th at p. 1201.)

In Miguel V. v. Superior Court (1999) 73 Cal.App.4th 9, Division Three of the Fourth Appellate District issued a writ of mandate challenging a referral order. In this case, reunification services were terminated at the 6 month review hearing and the matter referred for a hearing pursuant to section 366.26. At the time the children were declared dependents, petitioner dad was incarcerated for sexual battery. He also had a history of alcohol abuse, including a previous conviction for driving while intoxicated, and was alleged to have physically abused the mother of the children. At the disposition hearing, however, reunification services were ordered, requiring petitioner to participate in counseling, parenting classes, substance abuse treatment and vocational training, to the extent available within the institution. Upon his release from custody, he was to participate in and complete substance abuse treatment and counseling for sexual abuse and domestic violence.

By the time of the six-month review, dad was still incarcerated but expected to be released in a few months. He had been unable to participate in any of the court-ordered programs because they were not available in the prison. He was on a waiting list for some programs that had become available, he had maintained contact with the social worker, read parenting education reading material that had been sent to him by the social worker at his request, and had complied with prison rules. At the hearing, he did not object to the adequacy of the services; rather, he contended he had substantially complied with the plan and was entitled to another 6 months of services. The trial court rejected the father's position, terminated services and referred the matter for a .26 hearing.

The court concluded there was no inadequacy in the services offered, but also found there was no failure on father's part to take advantage of services to the extent they were available to him. The court held father had substantially complied with his reunification plan in that the record was quite clear he did everything within his power while he was in custody to maintain a relationship with his daughters and to prepare himself to parent them. He kept in regular contact with the girls and the social worker and requested parenting education materials from the social worker when he discovered they were unavailable to him in prison.

Although he had not participated in counseling to address his substance abuse or the sexual battery, absent a showing such programs were available in prison, the court could not conclude he had "failed to participate regularly" in court-ordered services. Thus, substantial evidence did not support the court's finding of Miguel's noncompliance with the service plan.

### C. Permanent Plan Issues

In In re Brandon C. (1999) 71 Cal.App.4th 1530, Division Four of the Second Appellate District affirmed an order establishing guardianship as the permanent plan for two minors placed in the home of their paternal grandmother. The county appealed from the finding made at the section 366.26 hearing that the mother had maintained regular contact and that it would be in the children's best interests to maintain the relationship with her.

In this case, the review hearing reports had noted mother's regular visits, the fact she had completed drug rehabilitation programs, submitted to random drug tests with negative results, had had stable housing and employment. (Id., 71 Cal.App.4th at p. 1536.) Nevertheless, the social worker recommended termination of parental rights. At the hearing, the grandmother acknowledged the children had a close

relationship with their mother, and she would go along with guardianship although she preferred to adopt the children. It was undisputed that mother visited the boys consistently for the entire lengthy period of the dependency, "to the extent permitted by the court's orders." (Id., at p. 1537.)

The court rejected the department's position that mother didn't present evidence that during her monitored visits she regularly provided the children with comfort, nourishment or physical care: "The benefit of continued contact between mother and children must be considered in the context of the very limited visitation mother was permitted to have. In this case, mother was not the boys' primary caretaker, and a quantitative measurement of the specific amount of 'comfort, nourishment or physical care' she provided during her weekly visits is not necessary." (In re Brandon C., supra, 71 Cal.App.4th at p. 1538.)

In In re Derek W. (1999) ___ Cal.App.4th [1999 Daily Journal D.A.R. 7465], the Second District affirmed an order made following a post-section-366.26 permanency planning hearing in which a permanent plan of guardianship was changed to adoption, and parental rights of the father were terminated.

In this case, the minor, who is of "mixed race but dark skinned," was born in 1989 addicted to cocaine and amphetamines. He was place with caucasian foster parents and lived with the same family continuously. The mother relinquished her parental rights, but the father regularly visited. Services for the father were terminated in 1991 because he had not completed the parenting classes and drug treatment programs, and long term foster care was ordered as the permanent plan. At that time, Derek was found to be unadoptable due to multiple special needs. Between 1991 and 1997, the father visited regularly (except when the father was in jail or participating in a residential treatment program), and the parties agreed he and Derek had an emotional bond.

Although unwilling to adopt in 1991, the foster parents expressed a desire to do so in 1998. The father opposed adoption because, despite assurances of the foster parents, he feared visitation would discontinue, and he felt Derek needed an African-American role model in his life. After a contested hearing, parental rights were terminated.

The Court of Appeal held the father failed to establish the existence of a beneficial-parent child relationship within the meaning of the exception to adoption found in section 366.26, subdivision (c)(1)(A). The court concluded the father failed to met his burden of proof that he had developed such a significant positive emotional attachment to Derek to show he occupied a parental role. Derek has lived with the foster family since he was 9 days old, and they are the only adults who have provided him with food, shelter, protection and guidance on a daily basis. "While the relationship between David W. and Derek is pleasant and emotionally significant to Derek, it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (In re Derek W., supra, [1999 Daily Journal D.A.R. at p. 7465].)

In In re Jasmine T. (1999) ___ Cal.App.4th [1999 Daily Journal D.A.R. 6713], the Second Appellate District affirmed a termination of parental rights where the child was placed with a relative who could provide a stable home as a legal guardian. In this case, the juvenile court had placed Jasmine with her paternal grandmother after she had been found alone in her mother's apartment. Services had been denied because of mother's extensive history of substance abuse. The paternal grandmother was eager to adopt Jasmine, and the child had a "strong, positive, full of love, and characteristic of a parent child relationship" with the grandmother. The court terminated parental rights, finding Jasmine adoptable.

On appeal, mother's counsel argued only that legal guardianship should have been ordered, instead of adoption, because Jasmine's placement with her relative had fulfilled the goal of family preservation. The Court of Appeal disagreed, noting that the appellant mother had pointed to no assignment of error in the trial court's findings. It held that family preservation ceases to be of overriding concern if a child cannot be safely returned to *parental custody* and the juvenile court terminates reunification services. It then concluded that the fact the potential adoptive parent happens to be a relative does not constitute an exception to section 366.26, subdivision (c)(1), allowing the court to order legal guardianship.

I disagree with the court's analysis that "family

reunification" and family preservation are somehow restricted to the parents. Such a policy elevates form over substance, disregarding the fact familial relationships have been recognized in the United States Supreme Court to be a substantive due process right shared by all extended family members. (See discussion in Lipscomb v. Simmons (1992) 962 F.2d 1374, 1378, and cases there cited.) I think the Jasmine T. outcome might have been a little different had the argument been couched in terms of a legal assignment of error, such as a violation of statutory or constitutional law and principles.

In In re Anthony B. (1999) 72 Cal.App.4th 1017, the Fifth Appellate District dismissed a mother's appeal from an order denying her petition pursuant to Welfare and Institutions Code section 388 and referring the case for a section 366.26 hearing. In the section 388 petition, mother had sought reinstatement of visitation which had been terminated in December, 1995, when reunification services were terminated pending a section 366.26 hearing then set for March, 1996. At the selection and implementation hearing, the court ordered guardianship as the permanent plan.

In December, 1997, mother petitioned to re-institute supervised visitation. In February, 1998, the department filed a review report requesting that a new section 366.26 hearing be set at which the court could select a more permanent plan for Anthony. The contested hearing on mother's petition took place in February, 1998, and was taken under submission. On March 3, 1998, the court took the periodic review of the dependency under submission. On April 16, 1998, the court issued a minute order denying mom's 388 petition and referring the case for a 366.26 hearing.

On review, the Court of Appeal followed the lead of In re Charmice G. (1998) 66 Cal.App.4th 659, and extended the principle of that case to all orders, regardless of their nature, entered at a hearing at which an order is issued setting a section 366.26 hearing. The court observed the holding of Wanda B. v. Superior Court (1996) 41 Cal.App.4th 1391, which limits review of issues arising out of the contemporaneous findings and orders made by a juvenile court in setting a section 366.26 hearing, included issues based upon the denial of a parent's 388 petition where reversal of such a denial would require vacation or reversal of the setting order itself.

The court agreed with mother that, unlike the situation in Charmice G., overturning the order denying her 388 petition would not necessarily require vacation or reversal of the contemporaneous setting order. Nevertheless, it concluded the rule of Charmice G. applied to any order, regardless of its nature, made at the hearing at which a setting order is entered. The court expressed with approval the possible result its decision might cause, in terms of prompting juvenile courts to defer rulings on interim motions and petitions filed by parents until status review hearings, thereby making these rulings reviewable under section 366.26, subdivision (l), if a setting order were issued at the status hearing. "We do not find anything objectionable about such a practice." (In re Anthony B., supra, 72 Cal.App.4th at p. 1023.)

My only problem with this decision is that the order denying the 388 petition was not "made at the hearing at which a setting order" was entered. The two hearings were conducted completely independently, and the decisions as to each matter taken separately under submission. The order denying the 388 petition was made after the hearing following which the setting order was subsequently entered by minute order.

In the "How did this get past me" Department: I found a case involving a change of venue issue that was apparently overlooked when it was first decided. Better late than never, let me tell you about it. In In re Christopher T. (1998) 60 Cal.App.4th 1282, the appellate court affirmed a transfer of a dependency case from Los Angeles to Santa Barbara County, where the minor and his caretakers had relocated. The minor had been in out-of-home placements since 1990, and, since 1992, he had been placed with foster parents who subsequently became his legal guardians.

The guardianship had been established in 1994. In 1997, a permanent plan review hearing was conducted pursuant to Welfare and Institutions Code section 366.3, at which the social worker recommended transfer of the case to Santa Barbara County where Christopher and his guardians were then living. The mother opposed the transfer and appealed the court order transferring venue.

The court of appeal analyzed the language of

Welfare and Institutions Code section 375, which permits transfer "whenever, subsequent to the filing of a petition in the juvenile court of the county where such minor resides, the residence of the person who would be legally entitled to the custody of the minor were it not for the existence of a court order issued pursuant to this chapter is changed to another county... ." The mother contended this language meant the juvenile court's authority to order transfer only if her residence changed, since she was the person who would be legally entitled to custody of the minor were it not for the existence of a court order.

The reviewing court concluded that the legal maxim *expressio unius est exclusio alterius* had no controlling application for a variety of reasons, not the least of which was the fact that section 375 uses the permissive word "may" rather than a mandatory term. Further, rule 1425(d), of the California Rules of Court, adopted pursuant to Welfare and Institutions Code section 265, permits transfer of a dependency to the minor's residence. It concluded that in all dependency proceedings, the primary concern is the best interests of the child, and this interest is addressed in section 375 and rule 1425(d), permitting a transfer based upon the residence of the child.

In In re Matthew P. (1999) 71 Cal.App.4th 841, Division Three of the Fourth Appellate District reversed an order denying a section 388 petition which had been filed by de facto parents who were seeking to have two children returned to their home. In this case, the petitioners were the former foster parents of two children who had been in their care since 1995. In December, 1997, the social worker reported that the de facto parents were interested in adoption, but only if they qualified for the Adoption Assistance Program because both children had special needs. Based on this information, a new permanency planning hearing was set and the foster parents were accorded de facto standing.

The permanency planning hearing was scheduled for June, 1998. However, in April, the de facto mother had requested that Matthew be placed in respite care due to complications she was experiencing with her pregnancy. The social worker's report which was prepared in April informed the court that the children had been well cared for until March, but were not currently well supervised. The social worker also reported that Matthew and the natural son of the de facto parents had been involved in a theft of money and that the de facto mother, without notifying the foster care agency or SSA, had taken the boys to the police department for booking on felony charges in order to scare them. The social worker also reported that the foster mother had told Matthew he was not adoptable because he wanted to retain a relationship with his mother, and then, when they adopted his sister, he would have to be moved to another foster home.

The foster parents filed their 388 petition seeking return of the children from respite care, explaining that twins had been born in April and there was no reason to keep the children out of their home. At the hearing, the de facto parents objected to the admission of the social worker's report unless they were permitted to cross-examine the preparer. However, the court refused to permit the de facto parents to cross-examine the social worker, although it eventually admitted a letter from the de facto mother which took issue with many of the representations contained in the report. The court then denied the 388 petition, based on the social worker's recommendations and the information contained in the report, finding that there were insufficient changed circumstances to justify the modification. It then ordered a new permanent plan of long term foster care. The de facto parents appealed both orders.

On appeal, the court held that the parties to dependency proceedings have a due process right to confront and cross-examine witnesses which is confirmed by court rule. (In re Matthew P., supra, 71 Cal.App.4th at p. 849.) By attaining status as de facto parents, the foster parents were allowed to participate "as parties," and, as such, were entitled to the same procedural rights as the parent. (Id., at p. 850.)

The court acknowledged that rule 1432(f) of the California Rules of Court, which permits the juvenile court to exercise discretion to make its ruling on applications on the basis of a declaration or documentary evidence in lieu of formal testimony, and noted that procedural due process is not absolute. However, under the circumstances of this case, where the denial of the de facto parents' petition rested entirely on the content of the social worker's reports, and where there were allegations of inaccuracies in the reports, it

concluded the court should not have exercised its discretion under rule 1432(f), which is not absolute and which does not override due process considerations. (Id., at p. 851.) It therefore reversed the order denying the section 388 petition.

As to the selection and implementation of a long term foster care permanency plan, the court affirmed that order because the foster parents, through counsel, had stipulated to that order. It noted that the due process considerations relating to the section 388 petition weighed differently vis-a-vis the permanent plan order.

And here's a scary thought: Division One of the Fourth Appellate District recently ruled that appointed counsel for the minor may be relieved when the trial court, in its discretion, finds the representation no longer beneficial to the child. (In re Jesse C. (1999) 71 Cal.App.4th 1481.) In this case, counsel was relieved at a post-permanency planning review hearing. Parental rights had been terminated in 1997 pursuant to the original permanent plan, but there were signs the children would be difficult to place. Jesse had behavioral problems and Yvette appeared to be retarded. The foster mother was willing to keep Yvette, but not Jesse. A third half sibling, Timothy, was in a different foster home, and his foster family was interested in adoption.

At the next post-permanency review hearing, Jesse and Yvette had "been cleared for adoption" but no family had been identified. Timothy's family had applied to adopt him. At the 12-month post-permanency review hearing, Jesse and Yvette had been placed in an adoptive home and Timothy continued in his placement. Because the minors were in stable placements, the court relieved counsel. Minors' counsel objected because adoption was not completed and the case was not at an end.

The court of appeal affirmed the order relieving counsel. It concluded that appointment of counsel for parents is dependent merely on their desire for representation, while appointment of counsel for the minor is based, rather, on the perception of the trial court that the minor would benefit from the appointment of counsel. This difference in the basis of appointment was held to affect the basis for which the parent's or minor's counsel may be legitimately relieved. It held the determination of whether such an appointment would be beneficial is clearly a matter within the sound discretion of the trial court.

The court disagreed with the assertion that, pursuant to section 317, subdivision (d), once counsel is appointed, the representation must continue until there is a substitution of counsel or until counsel is removed for cause. (In re Jesse C., supra, 71 Cal.App.4th at pp. 1488-1489.) The court relied on the holding of Janet O. v. Superior Court (1996) 42 Cal.App.4th 1058, which held the juvenile court may revisit the issue of whether a parent continues to desire representation and relieve counsel where the parents manifested lack of interest in either the proceedings or their children. It held the reasoning of Janet O. was applicable here and that the order relieving counsel was within the sound discretion of the court. It did agree that notice of the court's intent to relieve counsel should have been given.

My sources inform me a petition for review was filed, so I will try to keep my finger on the pulse of this issue. For legal orphans to bse their attorney before their adoptions are final seems folly to me, particularly in light of recent newspaper reports of abuse in foster homes and inadequate supervision of children in out-of-home placement by social services. Without counsel, this information will never come to light and be addressed.

**PATERNITY CASES**

In In re Margarita D. (1999) 72 Cal.App.4th 1288, Division One of the Fourth Appellate District held that even though the mother and the named father of a child had lied to the juvenile court concerning paternity of the child, their fraud was not a valid ground for setting aside the judgment of paternity since it did not prevent the alleged biological father from coming to court and claiming paternity.

In this case, the minor was removed at birth because the mother was incarcerated for killing the infant's older sibling. The child was placed with the maternal grandmother. The appellant, who was the father of the child's older sibling, was contacted about paternity testing, but was not tested because Mom had named another man as the father the child. This second man admitted paternity without testing, and was

adjudged to be the presumed father. Reunification services were ordered and proved unsuccessful; parental rights of the mother and presumed father were terminated.

In 1998, appellant became convinced he was Margarita's father because she resembled him, and filed a section 388 petition. The maternal grandparents simultaneously filed a de facto parent application which was immediately granted. Appellant sought paternity testing, and an order setting aside the paternity judgment naming the other man. The social worker's notes conflicted with appellant's declaration, insofar as they reflected appellant had initially denied paternity when contacted. (In re Margarita D., supra, 72 Cal.App.4th at p. 1292-1293.) The trial court found no evidence of extrinsic fraud and therefore no ground to set aside the paternity judgment. The trial court also ruled appellant lacked standing to bring the section 388 petition.

On appeal, the judgment was affirmed. The court acknowledged the equitable power of the court to set aside or modify a final judgment obtained by fraud, mistake or accident. The ground for the exercise of this jurisdiction is that there as been no fair adversary trial at law. However, the only type of fraud that can be the basis of vacating a final judgment is extrinsic fraud. (Id., at p. 1294.) Here, the fraud of which appellant complained was deemed not to be extrinsic fraud, but, rather, intrinsic fraud, which goes to the merits of the prior proceeding, and which the moving party had an opportunity to protect himself, but neglected to do so. It concluded that the mother's and presumed father's lies at the paternity hearing did not prevent appellant from coming to court and did not prevent him from claiming paternity. Thus, it held, "despite Adelaida's fraudulent attempts to hide her pregnancy from Filiberto and to name Guillermo as the father, she did not prevent Filiberto from claiming paternity in 1996. Rather, Filiberto chose at that time not to pursue it." (In re Margarita D., supra, 72 Cal.App.4th at p. 1295.)

As to the denial of his request for paternity testing, the court noted that existence of a valid paternity judgment bars the use of blood test evidence in a subsequent proceeding to overturn a paternity determination, citing City and County of San Francisco v. Cartagena (1995) 35 Cal.App.4th 1061, 1065-1069.)

Here's what I don't get: With parental rights of mom and presumed father terminated, there is no father currently in the picture. Essentially, Margarita is an orphan. The usual policy underlying the preclusion of blood test evidence to overturn a paternity determination does not seem to apply when the person previously adjudged to be the father has subsequently been adjudicated to be no longer the child's father. Given the costs of support for a dependent child, one would think the government would welcome late-discovered fathers who come forward and seek to take on the responsibility of parenthood.

In In re Ariel H. (1999) 73 Cal.App.4th 70, Division Three of the Fourth Appellate District affirmed a judgment that a 15 year old dad was not entitled to presumed father status. The evidence to support the adoptive family's petition showed that after the father was told of the mother's pregnancy, he continued to spend time with his friends at the mall and spend what money he earned on compact discs, despite knowing she was pregnant. He did not go to see his child nor verbalize protest at her stated intention of placing the child for adoption. He filed his petition to establish parental rights only after the adoptive parents filed their petition to determine whether his consent to the adoption was necessary.

In this case, the father's position seemed to acknowledge that if he were an adult, his conduct would not meet the criteria necessary to establish his status as presumed father, since he did not promptly attempt to assume his parental responsibilities. He attempted to excuse his behavior by arguing it was unreasonable to require a minor to notify his parents immediately when he got himself into a situation he could not handle. He also argued he was immature and could not react as an adult, and that he hoped things would smooth out between himself and the mother of the child after the baby's birth. (Id., 73 Cal.App.4th at p. 74.)

The court noted appellant was "eager to participate in the procreating part," and reminded him that to be declared a presumed father he must first show he has assumed parental responsibility. "A parent, by definition, is someone who protects, guards, and nurtures a child, physically and emotionally. Equally obvious is that a child cannot parent a child."

(Ibid.) Citing the story of Horton the Elephant in the Dr. Seuss story, the court concluded appellant was no Horton and affirmed.

**INDIAN CHILD WELFARE CASES**

The Second District Court of Appeal recently denied a father's petition for writ of error coram vobis, to vacate a judgment terminating parental rights on the ground the juvenile court failed to comply with the Indian Child Welfare Act in In re Derek W. (1999) Cal.App.4th ___ [1999 Daily Journal D.A.R. 7463]. This writ proceeding was companion to the direct appeal which is discussed above.

Derek, of mixed race but dark skin, was born with a positive toxicology screen, and placed in a caucasian foster home. A permanent plan of long term foster care was ordered in 1992 due to his multiple special needs. In 1998, the foster parents expressed the wish to adopt Derek and the court scheduled a section 366.26 hearing.

The father opposed the termination, contending that guardianship would be the preferred permanent plan for Derek because he would benefit from continuing his relationship with the father. At the hearing, the father expressed his concern over Derek's potential adoption by the caucasian foster parents because Derek was of mixed race, part African-American, part Hispanic (the mother was Costa Rican), and part Cherokee. However, at the hearing, the father offered no further information concerning his status as an Indian, or Derek's potential status as an Indian child, within the meaning of I.C.W.A. When the court terminated parental rights, the father did not object on the ground the court had not complied with the I.C.W.A.

Procedurally, the court discussed the nature of the writ of error and noted the scope of the writ is very narrow and it may not be used where some other remedy is available. When urged on the basis of newly discovered information, the petitioner must show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment. The petitioner must also show that the facts upon which he relies were not known to him and could not, in the exercise of due diligence, have been discovered by him at any time earlier than the time of the petition. Here, the father was aware of his Indian status at the 366.26 hearing and did not object to the court's failure to comply with the I.C.W.A. timely.

On the merits, the court ruled the father failed to carry his burden of proving that Derek comes within the I.C.W.A. It observed that several California courts have held the I.C.W.A. is limited by the "existing family doctrine." This doctrine states the I.C.W.A. is inapplicable where the child and the biological parent are not residents or domiciliaries of an Indian reservation, are not socially or culturally connected with an Indian community, and, in all respects except genetic heritage are indistinguishable from other residents of the state.

The court of appeal concluded that a parent seeking refuge under the umbrella of I.C.W.A. must timely do so, although it declined to attempt to say at what stage a parent must timely do so. "But here, as a matter of law, the time has long passed." (Id., [1999 Daily Journal D.A.R. at p. 7464].) To apply the I.C.W.A. at this late date would require the setting aside of all proceedings to determine Derek's tribal membership status, and then require notice to the affected tribe and additional services to the father. (Id., [1999 Daily Journal D.A.R. at p. 7464].) The court would then be required to conduct additional hearings with the mandatory participation of qualified expert witnesses on the question of whether returning Derek to the father would cause him serious emotional or physical damage. "There is no reason to doubt David W.'s love for his child. However, we are unwilling to plunge the parties and the juvenile court into this morass where there is no evidence that doing so would serve the underlying policies of the ICWA by preserving Indian culture and protecting the stability and security of an Indian tribe and family. [Citations omitted.] Somewhere along the line, litigation must cease. [Citation omitted.]" (Ibid.)

**GUARDIANSHIPS AND CONSERVATORSHIPS**

In Guardianship of Z.C.W. (1999) 71 Cal.App.4th 524, Division Four of the First Appellate District affirmed the denial of a guardianship petition filed by a woman seeking visitation rights to two

children with whom she had previously lived during a lesbian relationship with their mother. The petitioner contended she was the children's de facto and psychological parent and that the children were being harmed by the mother's decision to sever their relationship. The trial court denied the petition, finding there was no evidence of "any detriment of significance" to the children remaining in their mother's custody without visitation with appellant. (Guardianship of Z.C.W., supra, 71 Cal.App.4th at p. 526-527.)

The reviewing court affirmed. Citing prior decisions holding that a lesbian partner who is not a biological or adoptive parent is not entitled to custody of children conceived during a same sex bilateral relationship, it agreed a nonparent lacks standing to assert a claim for custody or visitation as against a child's natural mother upon termination of the lesbian relationship. (Id., 71 Cal.App.4th at p. 527.) It also held that appellant's attempt to obtain visitation rights through the guardianship vehicle had to fail, because no decisions authorize granting a guardianship in the absence of clear and convincing evidence that parental custody is detrimental to the children. A finding that parental custody is detrimental is essential before a court can make an order awarding custody to a nonparent, and there is no statutory authority for a limited guardianship providing for visitation rights to a nonparent. (Ibid.)

Finally, the court concluded that being a de facto parent did not entitle appellant to visitation rights. The court reasoned that the concept of de facto parenthood generally refers to foster parents caring for dependent children and has no basis independent of dependency proceedings except in limited guardianship proceedings where there has been a showing that an award of custody to the parent would be detrimental to the child. Aside from dependency cases and specific instances in guardianship and custody proceedings where there was clear and convincing evidence that parental custody was detrimental to a child, California courts have not accorded de facto parent status to a nonparent over the objection of the biological parents. (Guardianship of Z.C.W., supra, 71 Cal.App.4th at p. 528.)

## KUDOS AND ANECDOTES

Congratulations to Kathleen Mallinger on engineering the reunification of Jessica V. with her father in an all-fronts challenge! This case (In re Jessica V.) involved an out-of-state, non-offending dad who persistently tried to get custody of his dependent child. Due to new policies regarding appointed counsel for parents, a string of attorneys became tangentially involved at various stages, but no one seemed to follow through with presenting to the juvenile court the fact he had complied with all requirements of the reunification plan and had been positively evaluated pursuant to the Interstate Compact for Placement of Children (to the extent it applied.) A rule 39.1B writ had been denied without prejudice due to lack of father's signature on the notice and petition. Due to substitutions, no one ever obtained dad's signature or pursued the writ.

At wit's end, after trying to get information from the succession of attorneys, Kathleen filed a petition for writ of habeas corpus. While the writ was denied, it had the desired effect of lighting a fire under his fourth appointed trial counsel, who obtained dad's signature on the Rule 39.1B petition and sought an order vacating the dismissal of the petition. The court did so and granted the writ.

The matter went back to the trial court where dad got his child returned. Kathleen says the moral of the story is to provide trial counsel with as much support and advocacy as you can. I think this illustrates how perseverance can win a war, even if one major battle goes badly.

## HOT RESOURCES

A few issues ago, I mentioned the ugly statistics on the success of the "preference for adoption" push of the legislature, by referring to the inverse proportion of adoptions compared to the number of children actually adopted. Apparently, California is not unique. A recent article by Martin Guggenheim, entitled *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care -- An Empirical Analysis of Two States* (Spring 1995) 29 Fam. L. Q. 121, reveals that the statistics of the states of Michigan and New York enjoy the same unenviable orphan-begetting statistic. I commend the article to you for a bleak picture of what our social engineering policies may be fomenting.

Patti Dikes has alerted me to a couple of other

new articles which also have some great material:
(1) A student article by Leslie Johnson, entitled *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence* (Spring 1998) 22 Law & Psych. Rev. 271; and (2) Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice* (Winter 1998) 9 Hastings Women's L.J. 1.

My thanks to Patti for passing on these valuable cites.

## KUDOS: (continued)

**Christopher Blake**, P. v. Eugate, #D030966, One year prison prior term stricken following a retrial, where initial trial court had stayed term but on retrial had imposed it (Mustafaa & Henderson); six days credits awarded. (I)

**Jill Bojarski**, P. v. Brooks, #E021502, Punishment for robbery stayed because PC § 654 precluded sentence on that count plus a carjacking against the same complainant. (I)

**Randall Bookout**, 1) P. v. Reese, #E022043, Habeas petition granted because of IAC by trial attorney, and judgment reversed on direct appeal because of IAC by attorney appointed to represent defendant on motion to withdraw the guilty plea, where both attorneys failed to recognize defendant could not be charged with serious and violent felony priors. 2) P. v. Sherwin, #G023863, Probation revocation and prison sentence reversed where trial court failed to hold a Vickers hearing or obtain an admission of probation violation. 3) P. v. Cappelli, #D032270, Concurrent term for assault with intent to commit rape stayed because 654'd to spousal rape.

**Randall Bookout/Amanda Doerrer** , P. v. Solano, #D031451, Search condition stricken as probation condition in felony assault cases because Lent criteria unsatisfied. (ADI)

**James Bostwick**, P. v. Barnett, #E023223, Appellant's admission of prior felonies reversed for failure to properly advise of rights. Remanded for determination of truth of priors. (A)

**J. Thomas Bowden**, P. v. Armijo, #D026393, Court of Appeal reversed conviction of conspiracy to commit second degree murder as a nonexistent offense, pursuant to People v. Cortez, but held defendant may be retried for conspiracy to commit murder. (I)

**Robert Boyce**, P. v. Cook, #E021796, Case remanded for resentencing because the court failed to state reasons for imposing consecutive sentences. The court also erred in imposing both a one-year prior prison term and five-year prior. (I)

**Doris Browning**, P. v. Peed, #D030461, Judgment reversed. Trial court erred in denying motion to suppress, because unlawful detention based on uncorroborated, anonymous tip led to seizure of drugs. (A)

**Martin Buchanan**, P. v. Johnson, #D032449, The Court of Appeal awarded 798 additional custody credits, which were omitted when the trial court did not included credit for time between the first and second sentencing. (I)

**Stephen Buckley**, P. v. Smith, #G018356, Romero remand. (I)

**Marilyn Burkhardt**, P. v. Villa, #G023123, Trial court erred in imposing a full consecutive term for appellant's nonforcible escape conviction; remanded for resentencing. (I)

**Elizabeth Corpora**, In re James F., #E022846, True finding for willfully disobeying a court order (PC § 166(a)(4)) reversed where evidence was insufficient: 1) order was in effect on date of alleged violation; 2) to show defendant had knowledge of the order or its terms and conditions. (A)

**Linn Davis**, 1) P. v. Hernandez, #E021984, People's Romero appeal denied because of defendant pled guilty to amended information that omitted strikes. (I) 2) P. v. Graves, #E023017, The trial court erred in imposing sentence for the PC 667.5, subd. (b) enhancement attached to each count rather than once as a component of the aggravated term. (I)

**Amanda Doerrer**, P. v. Gutierrez, #E024005, Appellant was charged with possession of drugs while in prison (PC § 4573.6) and had a strike prior. Defendant pled guilty to the offense in return for a dismissal of the strike prior & a two year sentence. The plea did not specify whether defendant's new prison term had to be served consecutively or concurrent to his current prison term. At sentencing, all parties erroneously believed consecutive terms were required. Defendant's case was remanded for resentencing because trial court had the authority to give concurrent terms per P. v. Arant (1988) 199 Cal.App.3d 294, 297 and consecutive sentences were not mandated by PC § 1170.1(c). (ADI)

**Casey Donovan**, P. v. Albert, #E021840, Sentence reversed because trial court placed burden of proof on appellant to demonstrate he had not violated conditions of his purported Vargas waiver, i.e., that he did not violate any law before returning for sentencing. (A)

**Ronnie Duberstein**, P. v. DeAlba, #G022691, Conviction for assault reversed and remanded because the trial court erred in allowing

defendant to be impeached with a prior misdemeanor for assault and failing to give a limiting instruction which was prejudicial. (A)

**Patrick DuNah**, P. v. Ulrich, #D026806, Romero remand. (ADI)

**Brett Duxbury**, 1) P. v. Aston, #E022332, Convictions reversed. Appellant was convicted of taking a vehicle and evading police. He was sentenced to two, consecutive 25-life terms pursuant to 3X law. The Court of Appeal held the lower court prejudicially erred in refusing to give voluntary intoxication instruction (CALJIC No. 4.21) because the evidence supported that appellant did not form the necessary specific intent for the crimes due to his level of intoxication. (I) 2) P. v. Hunter, #G021364, Prior prison term enhancement stayed because based upon the same offense as prior serious felony enhancement. (I)

**Carl Fabian**, P. v. Demory, #D030189, One year enhancement for prior prison term ordered stricken where a five year prior serious felony enhancement for the same offense also imposed. (I)

**Linda Fabian, Mitchell Beckloff & Jane Winer**, In re Andrea P. et al., #G023801/G024054, Mother Marjorie P. had two teenage daughters, Andrea and Jodi, each of which had children of their own. Andrea and Jodi were declared dependents under W&I § 300, subdivisions (b) [risk of serious physical harm or illness], (c) [serious emotional damage], and (j) [sibling abuse or neglect]. Andrea's infant, Jordan, was also declared a dependent under § 300, subdivision (b), as well as subdivision (g) [inability to provide care] based on the fact that Andrea was in a children's home. The Court of Appeal reversed the findings of jurisdiction as to both sets of minors. The Court rejected the trial court's reliance on 1) information, including psych. evaluations, from an Arizona dependency action initiated ten years before; 2) Marjorie's "bad" or 'hostile" attitude towards the social worker; and 3) an alleged altercation between Marjorie and Andrea where the only evidence before the court was their denials, which the court could discredit but could not find the opposite to be true. The court held that "a court's low opinion of a parent, even when coupled with its high esteem of a social worker's judgment, is insufficient evidence on which to sustain findings under W&I § 300." (I/I/I)

**Patrick Ford**, P. v. Eilkens, #E023127, $6,000 restitution fine imposed pursuant to PC § 1202.45 ordered stricken as violative of ex-post facto laws. (I)

**Katherine Greenebaum**, P. v. Equihua, #E022311, Trial court erred in ordering terms on possession and conspiracy counts concurrent to the selling and transportation count rather than staying them. (A)

**Waldemar Halka**, 1) In re Frank G., #D030875, True finding for assault with a firearm set aside as a LIO of assault with a semiautomatic pistol. Also, condition of probation not to associate with [gang] members was modified to refer to known [gang] members. (A) 2) In re Holmes on Habeas Corpus, #D031637, Writ petition granted and true finding of inmate's possession of alcohol reversed where inmate's cellmate received not true finding on same count due to prison official's failure to follow proper procedures in verifying seized substance to be alcohol. (I)

**Marianne Harguindeguy**, In re Frederick G., #D029845, Penal Code § 245(a)(1)/12027.7 true finding reversed. Where violation of 245(a) alleged in conjunctive, the phrase "by means of force likely to produce bodily injury" merely describes the manner in which the weapon was used and explains why it constitutes a deadly weapon. This reversal followed supplemental briefing after the People's petition for rehearing was granted, following the first opinion, which also reversed. (I)

**David Hendricks**, P. v. Clark, #E022732, $3,000 restitution fine modified to $200 statutory minimum pursuant to plea bargain; no waiver because no PC § 1192.5 advisement. (I)

**Patrick Hennessey**, P. v. Smith, #D030891, 25 year to life term for false imprisonment, plus 1 year weapon use, ordered stayed pursuant to PC § 654 because occurred during the sexual assault. (I)

**Donal Hill**, 1) P. v. Johnson, #D030141, Conviction for ADW reversed because court refused to instruct that "a conviction for assault may not be grounded upon an intent only to frighten." (People v. Walton.) (I) 2) P. v. Williams, #D031496, No error in allowing prosecutor to use prior PC § 69 violation (resisting arrest) to impeach, since it is crime of moral turpitude. Opinion published. (A)

**Tamara Holland**, P. v. Nolasco, #G022609, Reversed and remanded based on court's failure to instruct on defendant's modification of CALJIC No. 1241 to define elements of criminal possession of a dirk or dagger. (A)

**Handy Horiye**, P. v. Boudreaux, #D029818, Conviction of simple kidnapping reversed as LIO of kidnapping for sexual purposes. Court also struck three out of four enhancements imposed under PC § 667.8 because the enhancements took place pursuant to a single incident. Trial court also erred when it failed to determine credits for pre-sentence custody and left computation to Department of Corrections. (I) 2) P. v. Meza, #E021992, One count of murder based on provocative-act theory reversed because the evidence was insufficient to show that appellant engaged in any provocative act (other than the acts associated with the underlying robbery) before the gun battle erupted which resulted in the death of appellant's companion. Restitution fine of $10,000 reversed because direct victim restitution exceeded the $10,000 limit. (I)

**Anna Jauregui**, In re Alzetta L., #D031704, Reversed and remanded in part. Trial court erred in obtaining a stipulation from both counsel waiving the W&I § 777 notice and hearing procedure should minor violate again, thereby automatically lifting a stayed commitment. Court also erred in failing to award credit for time served. 2) P. v. Grant, #E023827, Petition for writ of habeas corpus granted. Dept. of Corrections had refused to implement plea bargain term calling for 1/2 time credits due to PC § 2933.1 credit limitation. Court of Appeal gave defendant option to withdraw plea or be re-sentenced to low terms, the latter resulting in defendant's release. Defendant chose the latter. (ADI)

**R. Charles Johnson**, In re Anthony V., #D032422, People conceded evidence was insufficient for a true finding of discharge of a firearm where minor was found near the scene of a probable shooting some significant time after the event. (I)

**Rebecca Jones**, P. v. Moore, #E020658, Court reversed convictions for manufacturing methamphetamine and possession of methamphetamine for sale because the evidence was insufficient. However, case was remanded because defendant could be retried on simple possession. Moore was Lopez's girlfriend and an occasional overnight visitor. Even though some chemicals and equipment associated with manufacturing were found in the trash outside the home, there was no lab in operation and no evidence when a lab might have been in operation. (A)

**Sharon Jones**, 1) In re Robert W., #E022892, Juvenile court erroneously failed to stay a false imprisonment count which was part of the course of conduct of a residential robbery. (I) 2) P. v. Amaya, #E022897, Trial court erroneously limited three-strikes defendant to 15% presentencing custody credits. (I)

**Martha Hall**, In re Jeremy P., #E022481, Juvenile court erroneously failed to stay a false imprisonment count which was part of the course of conduct of a residential robbery. (A)

**Mark Hart**, P. v. Collins, #E021378, Remand for resentencing based on violation of the prohibition on ex post facto laws because acts alleged in various counts arguably predated enactment of three strikes law. Also, court failed to state reasons for imposing consecutive sentences on all counts. (I)

**Michon Hinz**, In re Wiley A., #E023113, The Court of Appeal reversed a juvenile court probation order which attempted to retain jurisdiction until the minor was age 25. W&I § 607 limits jurisdiction to age 21. (I)

**Susan Keiser**, P. v. Easton, #D029013, The trial court, as conditions of probation upon conviction for welfare fraud, ordered appellant not to engage in self-employment and to pay restitution in excess of $18,000. On appeal, the non-self-employment condition was stricken as invalid, since there was no connection between appellant's self-employment as a contractor and the fraud. The Court of Appeal also remanded for a new restitution hearing, since the commissioner refused to offset appellant's gross income by valid business expenses, which demonstrated a lesser net income and, hence, a lesser amount fraudulently derived. (A)

**Charles Khoury**, P. v. Islas, #D030488, Appeal from guilty plea abated and remanded where defendant merely indicated he was prepared to waive his right to appeal but never actually waived the right. (I)

**Marleigh Kopas**, 1) P. v. Barrett, #E023197, People's Appeal based on court entering into illegal plea bargain whereby one of the defendant's strikes was stricken affirmed. Court's action determined to be an indicated sentence and strike properly stricken. (I) 2) P. v. Alvarado, #E021830, Parole revocation fine reduced to same amount as restitution fine (PC § 1202.45). (I)

**Sylvia Koryn**, P. v. Shumate, #D031731, Following Romero remand, trial court erred in referring determination of credit for time served to Department of Corrections. (I)

**Rudy Kraft**, P. v. Tobias R., #D031644, Judgment modified to reflect maximum term is 6 years, 3 months and 10 days, reducing term by 2 months. (I)

**Jeffrey Kross**, P. v. Muhovich, #E023601, Case remanded for resentencing because trial court erred in imposing four separate 5-year enhancements rather than one since they were not "brought and tried separately." (I)

**David Macher**, P. v. Simmons, #E021021, Trial court ordered to amend the abstract to reflect correct credits and to strike $10,000 restitution fine not assessed at sentencing. (I)

**Kieran Manjarrez**, P. v. Cruz, #E021829, Trial court erred by failing to give a unanimity instruction where the evidence introduced at trial showed four separate statements which could have been terrorist threats. (A)

**Alister McAlister**, P. v. Gardner, #E022934, Restitution fine reduced to minimum statutory amount by court in its discretion because while fine was referred to in the abstract of judgment it was never mentioned at sentencing hearing. (I)

**Lynne McGinnis**, In re Gregory F., #E022589, Armed enhancement pursuant to PC § 12022, subd. (a)(2) stricken because juvenile court failed to make any findings on the enhancement. Pursuant to P. v. Anthony (1986) 185 Cal.App.3d 1114, 1125-6, court found that, when the record is silent on enhancement findings, it may be inferred that the omission was an act of leniency by the trial court and the silence operates as a finding the enhancement was not true. Commitment also reduced by 8 months, since the subordinate term was not a violent felony. (A)

**David McKinney**, P. v. Simonton, #D030333, Twenty-two assault convictions arising from a driveby shooting reversed based on erroneous CALJIC 9.00 instruction. (I)

**Kevin McLean**, P. v. Cooke, #D030099, Murder conviction reversed because aider and abettor can't be convicted based on natural and probable consequences theory where target offense was merely breach of the peace. Retrial barred because evidence doesn't support aiding and abetting. (I)

**Lynne McGinnis**, P. v. Gomez, #D031600, Reversal of possession conviction when defendant also convicted of possession for sale. The court also remanded for redetermination of the restitution fine because judge referred to the number of convictions when imposing the $5,000 fine. (A)

**James McGrath**, P. v. Strasburger, #G021388, The trial court prejudicially erred where the prosecution alleged appellant committed three acts of sodomy by force and two of forcible oral copulation, where the allegations of each respective crime is couched in the same language, and where no unanimity instruction was given. (I)

**Michael McPartland**, P. v. Anderson, #D030371, The determinate sentence on count two, carjacking, ordered stayed pursuant to PC § 654 because the carjacking and kidnapping offenses were part of an indivisible course of conduct. (I)

**Jeffrey Mintz**, In re Joshua W., #E022770, Superior court ordered to modify restitution order to show that both minors involved were jointly and severally liable for restitution. (Note: No meaningful opportunity to object when court made restitution order 3 weeks after hearing after taking it under submission, although AG (in an unexpected move) argued issue waived.) (A)

**Richard Moller**, P. v. Bailey, #G023090, Abstract of judgment corrected to show conviction for simple possession of cocaine rather than possession for sale. (I)

**David Morse**, P. v. Williams, #D029994, Trial court improperly computed credits between initial

sentencing hearing and resentencing hearing. (I)

**Gary Nelson**, P. v. Sawyer, #D030918, Abstract corrected to reflect one less PC § 667(a) prior which was not found true by trial court. (I)

**Shawn O'Laughlin**, P. v. Avila, #D026393, Court of Appeal reversed conviction of conspiracy to commit second degree murder as a nonexistent offense, pursuant to People v. Cortez, but held defendant may be retried for conspiracy to commit murder.
same as above. (I)

**John Olson**, P. v. Caspersen, #G020820, One count, petty theft with a prior, ordered stayed pursuant to PC § 654. Also, evidence of out of state "strike" was insufficient; remanded for re-trial pursuant to Monge. (I)

**Nancy Olsen**, P. v. Frederickson, #D030608, $1,000 parole-restitution fine reduced to $200, the amount of the ordinary restitution fine. (I)

**Peggy O'Neill**, P. v. Cleghorn, #E020192, Conviction for possession of methamphetamine for sale reversed where the court found there was no probable cause to support the search warrant and the good faith exception did not apply. Eleventh hour effort by AG to justify search of home as a probation search was defeated. The court held this theory had been waived (yes, waived) and further, the facts were not fully developed to apply this new theory on appeal. (ADI)

**Richard Pfeiffer for defacto parents**, In re Matthew P., #G023528/G023882, Social reports are inadmissible if cross-examination of the social worker is not allowed, contrary to the holding in In re Jeanette V. (1998) 68 Cal.App.4th 811. De Facto parents have the due process right to confront & cross-examine witnesses. Rule 1432 (f), giving the court discretion to consider proof by declaration and documentary evidence rather than testimony, is not absolute and does not override due process consideration. (A)

**Debi Ramos**, P. v. Cox, #E021410, Welfare fraud conviction reversed because trial court erred in failing to instruct sua sponte on defense of mistake. (A)

**David Rankin**, P. v. Harris, #D032470, Parole revocation fine reduced from $1,000 to $500 to match restitution fine. Never-admitted prison prior stayed by trial court ordered stricken because to remand for further proceedings would "waste scarce judicial resources." (ADI)

**Sharon Rhodes**, P. v. Navarro, #D029891, One count of possession of a controlled substance while in possession of a loaded firearm (HS 11370.1(a)) reversed because the substance, amphetamine, is not listed in the statute. Abstract amended to specify two counts were stayed under PC § 654. (A)

**Gregory Rickard**, P. v. Puga, #E022611, Because there was no evidence that appellant touched an intimate part of the victim, felony sexual battery is reduced to misdemeanor sexual battery. (A)

**Michelle Rogers**, P. v. Taylor, #D029629, Two prison priors reversed for Yurko error. (ADI)

**Sharon Rollo**, In re Levi M., #D031842, Insufficient evidence to support court's finding that removal was necessary. (I)

**William Salisbury**, P. v. Johnston, #E021937, Three consecutive life sentences remanded for court to exercise discretion to sentence concurrently or consecutively. Companion habeas petition denied without prejudice to file in trial court. (ADI)

**Michael Satris**, P. v. Haro, #E022042, Two counts of possession of a syringe in prison on separate dates are stayed pursuant to PC § 654. (I)

**Steven Schorr**, 1) P. v. Richardson, #E021059, Probation condition not to associate with anyone actively engaged in felony activity modified to add "known to him" to be actively engaged. (I) 2) P. v. Goodson, #E023697, Prison prior ordered stricken because five-year prior imposed for same conviction. (I)

**George Schraer**, 1) P. v. Gayton, #E019971, Writ petition filed in the trial court resulted in a new sentencing hearing. The defendant was a minor when the crime was committed, allowing the trial judge to impose a lower sentence than LWOP under PC 190.5, subd. (b). The trial judge did not know of this discretion at the first sentencing hearing. (I) 2) P. v. Zavala, #G022165, Two year enhancement for benefitting a criminal gang stricken where base offense,

attempted premeditated murder, carries a life term. (I)

**Jeffrey Schwartz**, In re Danny Z., #E022173, One count of trespass on school grounds while on suspension reversed because minor not given written notice of his suspension as required by statute. (I)

**Richard Schwartzberg**, P. v. Marks, #G023370, Receiving stolen property conviction reversed because appellant also convicted of stealing the same car. (I)

**Wilson Schooley**, In re Arturo E., #D031895, True finding on receiving stolen property reversed where minor was found to have stolen the same property in a count of grand theft. (A)

**Terrence Scott**, P. v. Izquierdo, #E020544, Second degree murder conviction reversed because of introduction of prejudicial gang evidence and prejudicial introduction of a hearsay statement to a police officer regarding appellant's whereabouts on the day of the killing. (I)

**Maureen Shanahan**, P. v. Delgado, #E023289, Because appellant did not have the intent to seduce minor into participating in a sexual act while the victim was still a minor, but rather intended seduction after the victim reached the age of majority, his conviction under PC § 288.2 could not stand. It was modified to reflect the LIO of distributing harmful materials to minor, PC § 313.1, a misdemeanor. (I)

**Alisa Shorago**, 1) P. v. Galvan, #E021905, Two counts of assault with a firearm (PC § 245(a)(2)) stricken as LIO of assault with semiautomatic firearm (PC § 245(b)) counts. 2) P. v. Gonzalez, #E022390, Brandishing count (lesser related offense to charged assault with a deadly weapon offense) stayed under § 654 because brandishing against one person with the same intent as the brandishing against the other person. (ADI)

**Susan Shors**, P. v. Chambers, #D028443, Kidnapping for robbery count reversed because evidence was insufficient as a matter of law to demonstrate asportation of victim was not merely incidental to the robbery and involved greater risk of harm to victim. (I)

**Alice Shotton (for father) Wayne Gehring (for minor)**, In re Keashona N., #D032498, Juvenile court abused its discretion in denying father a stay of proceedings under the Soldiers' & Sailors' Civil Relief Act of 1940. Father admitted paternity, sent support for minor's care, and visited when portside. During proceedings, father was deployed on U.S.S. Duluth to the Persian Gulf. (I)

**Athena Shudde**, P. v. Renteria, #E022781, Remand for reconsideration of restitution fine which was improperly based in part on a count stayed pursuant to PC § 654. (I)

**Michael Sideman**, 1) P. v. Figueroa, #E023288, Abstract of judgment amended to reflect concurrent, rather than consecutive three-year enhancement because substantive crime to which enhancement attached was sentenced concurrently. (I) 2) P. v. Perez, #D030101, Reversal of judgment in unpublished opinion due to erroneous admission of expert testimony re gangs. Appellant and victim got into a fist fight; at some point, the other gang members beat up and stabbed the victim as part of his "jumping out." Appellant was convicted of assault with a deadly weapon based on the group attack. The court held the experts' opinions that Perez would not have walked away because a gang member would not walk away from a fight he was losing was inadmissible because 1) it did not assist the jury, which was capable of resolving the issue of fact of whether appellant walked away; and 2) it violated EC § 1101(b)'s prohibition against demonstrating conduct in a particular occasion based on generic characteristics of gang members (citing People v. Walkey (1986) 177 Cal.App.3d 268). The court also stated that it was error to allow the experts to opine on appellant's state of mind by testifying that a gang member knows his fellow gang members will join an attack if he initiates. (I)

**Carmela Simoncini**, P. v. Salinas, #D031863, Trial court erroneously imposed sentence on both lewd conduct conviction and burglary, where the burglary conviction was based on appellant's entry into the victim's home to commit the lewd act. The judgment was modified to stay the sentence for burglary pursuant to PC § 654. (ADI)

**Stuart Skelton**, P. v. Young, #D030105, Court reversed conviction for robbery and possession of heroin and possession of drug paraphernalia finding the trial court erred in refusing to sever the robbery

count from the drug counts. The court noted robbery is a different class of crime, and the fact the drugs were found in defendant's car was too tenuous a connection where the offenses occurred three weeks apart. While denial of a severance motion does not necessarily require reversal, the court went on to observe the prosecution's case on the robbery charge was not overwhelming and jurors reported being swayed to vote guilty on that charge because of the drug issue. (I)

**Theresa Stevenson**, P. v. Pierce, #D031734, One-year prior prison enhancement for out-of-state prior stricken because the evidence was insufficient to prove that appellant served a full year in prison as required by § 667.5(f). Case also remanded for correction of presentence credits. (A)

**Jeffrey Stuetz**, P. v. Johnson, #D030827, Conviction for petty theft reversed as LIO of robbery conviction. (I)

**Robert Swain**, P. v. Vega, #D027848, Because convictions of attempted extortion and felony dissuasion of a witness were indivisible from the extortion from undercover police officers conviction, sentences on these two counts should have been stayed per PC § 654. (I)

**John Ward**, 1) P. v. Morino, #D031623, Affirmed as modified. $400 fine imposed pursuant to PC § 1202.45 was stricken as violating ex post facto clause (court relied on People v. Tran (1988) 67 Cal.App.4th 1320). Also on remand, trial court must calculate custody credits pursuant to People v. Thornberg (on resentencing in strikes cases trial court must calculate custody credits accrued at time of current sentencing.) (I) 2) P. v. Nugent, #E021864, Holding 1) one count terrorist threat (PC § 422) should have been stayed under PC § 654, rather than imposed consecutively; 2) trial court erred in limiting presentence credits to 15% under PC § 2933.1 rather than § 4019; and 3) the trial court erred in ordering a greater fine under § 1202.45 than under § 1202.4. (I)

**Patricia Watkins**, P. v. Lacy, #G022210, Penal Code § 1538.5 denial, reversed. When a police officer, without reasonable suspicion, parked his car, blocking appellant's vehicle so that he could not depart, appellant was unlawfully detained, and appellant's subsequent discarding of contraband was the product of the unlawful detention. (A)

**Richard Weinthal**, P. v. Myhre, #D027272, Restitution award reduced by value of property related to theft which was never charged and of which defendant never had notice at time entered into his Harvey waiver. (A)

**Nancy Weiss**, 1) P. v. Hernandez, #D028923, Post-arrest questioning by police as to where defendant lived deemed to be in violation of Miranda as it was asked to elicit incriminating response from defendant. Error not harmless beyond a reasonable doubt where defendant's answer was strongest evidence linking him to drugs found in residence. (A) 2) P. v. Hampton, #D029356, Concurrent sentences for receiving stolen property, second degree burglary and grand theft stayed because part of same course of conduct and carried out for same purpose as the forgery of a check offense. (A)

**Jerry Whatley**, P. v. Lopez, #E020658, Manufacturing methamphetamine conviction reversed based on instructional errors, especially prosecutor's pinpoint instruction which shifted the burden of proof. (I)

**Louis Wijsen**, 1) P. v. Lapcheske, #E022901, Rent skimming convictions affirmed but grand theft conviction reversed where defendant occupied real property by renting abandoned homes (where purchaser defaulted on mortgage) to third parties and retained the rent. Court analyzed rent skimming statute and trespass statute in light of adverse possession theory of defense and found that occupancy by adverse possession was intended to be included in those statutory prohibitions. However, grand theft (including conspiracy to commit same) conviction could not properly be grounded on defendant's conduct since, until challenged, an adverse possessor has an equal right to collect rent as against title and mortgage holder. (I) 2) P. v. Ortiz, #E021990, PC § 148.9 (resisting arrest) reversed for insufficient evidence. In this case, defendant gave a false name to police. However, this occurred during a consensual encounter. When the defendant was arrested, he confessed his true identity. Thus, evidence was insufficient as a matter of law that defendant falsely identified himself "as another person" "upon lawful arrest." (I)

**Sharon Wrubel**, P. v. Green, #G022808, Remand to trial court to correct presentence credit

award as the substantive crime of which appellant was convicted is not a violent felony per PC § 667.5, subd. (c). (I)

## Appellate Defenders' Telephone Roster as of August 23, 1999

**Executive Director:**
**Elaine A. Alexander** (619) 696-0282
email: eaa@adi-sandiego.com

**ADI Staff Attorneys:** **(619) 696-0284, ext.:**

**Alisa A. Shorago.....** 59
email: aas@adi-sandiego.com

**Amanda F. Doerrer.....** 62
email: afd@adi-sandiego.com

**Anna Jauregui** **34**
email: amj@adi-sandiego.com

**Beatrice C. Tillman** **35**
email: bct@adi-sandiego.com

**Carmela Simoncini** **28**
email: cfs@adi-sandiego.com

**Cheryl A. Geyerman** **23**
email: cag@adi-sandiego.com

**Cindi B. Mishkin** **55**
email: cbm@adi-sandiego.com

**Cynthia Sorman** **22**
email: cms@adi-sandiego.com

**David Kay** **21**
email: dak@adi-sandiego.com

**David K. Rankin** **33**
email: dkr@adi-sandiego.com

**Diane Nichols** **12**
email: dnn@adi-sandiego.com

**Howard C. Cohen** **24**
email: hcc@adi-sandiego.com

**Joyce Meisner Keller** **61**
email: jmk@adi-sandiego.com

**Leslie A. Rose** **32**
email: lar@adi-sandiego.com

**Michelle Rogers** **11**
email: mrr@adi-sandiego.com

**Neil Auwarter** **27**
email: nfa@adi-sandiego.com

**Panteha G. Ebrahimi** **64**
email: pge@adi-sandiego.com

**Patrick DuNah** **31**
email: ped@adi-sandiego.com

**Peggy A. O'Neill** **25**
email: pao@adi-sandiego.com

**Randall Bookout** **38**
email: rbb@adi-sandiego.com

**Ronda G. Norris** **56**
email: rgn@adi-sandiego.com

**William Salisbury** **29**
email: wrs@adi-sandiego.com

**Office Administrator:** Amy L. Spintman, ext. 50; email: als@adi-sandiego.com
**Legal Administrator:** Ernie Palacio, ext. 40; email: epp@adi-sandiego.com

**Terminal Digit* Case Processing Assignments (email addresses are listed at the end):**

| | | (619) 696-0284, ext.: |
|---|---|---|
| 9, 0, 1 | Kathy L. Hall | 41 |
| 3, 7, 8 | Melia A. Wasserman | 39 |
| 4, 5, 6 | Randy Wright | 42 |
| 2 | Omar Palacio | 48 |

*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.

**Claim Processing Assignments**

**INTERIM CLAIMS:**

| **Digit(s)** | | **(619) 696-0284, ext.:** |
|---|---|---|
| 1, 2, 3, 4, 5 | Omar Palacio | 48 |
| 6, 7, 8, 9, 0 | Zalma A. Rosalez | 65 |

**FINAL CLAIMS:**

| **Digit(s)** | | **(619) 696-0284, ext.:** |
|---|---|---|
| 2, 3 | Lori M. Olhoff | 51 |
| 4 | Elaine O. Sinagra | 45 |
| 5, 6 | Randy Wright | 42 |
| 7 | Melia A. Wasserman | 39 |
| 8, 1 | Joan Price | 44 |
| 9, 0 | Kathy L. Hall | 41 |

**Email addresses for terminal digit & claim processors:**
**Elaine O. Sinagra:** email - eos@adi-sandiego.com
**Joan Price:** email - jkp@adi-sandiego.com
**Kathy L. Hall**: email - klh@adi-sandiego.com
**Lori M. Olthoff:**email - lmo@adi-sandiego.com
**Melia A. Wasserman:** email-maw@adi-sandiego.com
**Omar Palacio:**email: oap@adi-sandiego.com
**Randy Wright:**email: rlw@adi-sandiego.com
**Zalma A. Rosalez:** email: zar@adi-sandiego.com

**ADVANCED APPELLATE PRACTICE SEMINAR**

**Presented by Appellate Defenders, Inc.**

Date: Saturday, November 6, 1999 Time: 9:00 a.m.-3:00 p.m.

Location: California Western School of Law,
225 Cedar Street, Downtown San Diego

(Earn up to 5.0 hours of MCLE credit)

**AGENDA**

8:30 - 9:00 a.m. - **Registration** (Light breakfast)

9:00 - 10:00 a.m. - **Habeas Corpus Writs**
Martin Buchanan, Panel Attorney
Lynda Romero, Panel Attorney
Roberta Thyfault, Panel Attorney

10:00 - 10:30 a.m. - **Nuts & Bolts of Habeas Practice**
Alisa Shorago, ADI Staff Attorney

10:30 - 11:00 a.m. - **Habeas Corpus & Ineffective Assistance of Counsel** David Kay, ADI Staff Attorney
Cindi Mishkin, ADI Staff Attorney

11:00 - 11:30 a.m. - **Federalizing Issues & the AEDPA**
Kurt Hermansen, Habeas Corpus Staff Attorney
U.S. District Court, Southern District

11:30 - 12:15 p.m. - **Lunch** (included in registration fee)

12:15 - 1:15 p.m. - **Everything You Always Wanted To Know About The CDC But Were Afraid To Ask**
Frank Michell, California Department of Corrections

1:15 - 2:00 p.m. - **Double Jeopardy**
Michael Dashjian, Panel Attorney

2:00 - 2:15 p.m. - **Break**

2:15 - 3:00 p.m. **Immigration Law for Appellate Practitioners**
Lilia Velasquez, Attorney
James R. Patterson, Attorney

This activity has been approved for Minimum Continuing Education (MCLE) credit by the State Bar of California in the amount of 5.0 hours, of which one-half hour will apply to legal ethics, and 4.5 hours to general participatory credit. Appellate Defenders certifies that these activities conform to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

# Registration Form For Advanced Appellate Practice Seminar

Cost: $40.00, which includes written materials, light breakfast, lunch, and beverages. **Preregistration is required as seating is limited. Preregister by October 22, 1999.**

To register please make your check payable to Appellate Defenders, Inc. and mail your check and registration form to:

**Appellate Practice Seminar**
**Appellate Defenders, Inc.**
**233 "A" St., Suite 1200**
**San Diego, CA 92101**

Name:

Address:

Telephone:

(For additional information call: Patrick DuNah at (619) 696-0284, ext. 31.)