APPELLATE DEFENDERS ISSUES
The Quarterly Newsletter of Appellate Defenders, Inc.

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NOTES FROM THE DIRECTOR
by Elaine A. Alexander

As we head through the fall season, I'd like to address a few questions of recurring and/or new interest, as posed to us by panel attorneys.

How do you assign $75 per hour cases?

Last year, when the rate was created, all murder appeals from jury trials appointed on an independent basis on or after July 1, 1995, were designated as second tier. Later in 1995, all independent jury trial appeals with a sentence of life without possibility of parole were added. This year, sex offense convictions under specified Penal Code sections and appeals with records of 3000 pages or more were added, for independent appeals from a jury trial appointed after August 1, 1996.

At the time the second tier was instituted, this office decided the "premium" rate cases should be assigned in a separate rotation, consisting of attorneys who have the experience and other qualifications to handle independent cases of the types in the second tier. One reason for not using the regular rotation was to ensure the cases are offered systematically and not randomly: if we used the regular rotation, it would be a matter of chance who was at the front of the rotation when a $75/hour case came up. Another reason was to avoid discouraging attorneys from taking regular appointments, especially those under Three Strikes; with the special rotation, taking a regular case does not affect how soon one may be considered for a $75/hour case.

We cannot honor requests for an appointment to a $75/hour case outside the special rotation.

Some attorneys have said they want only $75/hour cases. Such a request will not entitle them to more than their share of $75/hour cases or change their position in the second tier rotational system. It will merely remove them from consideration for regular cases.

How do you deal with attorneys who stipulate they want only certain kinds of cases?

How we respond depends on the type of request.

Sometimes the request is to get certain types of cases that involve specialized knowledge and skills, and we will usually accommodate those requests. For example, we have an entirely separate dependency rotation, and most appointments in those cases are made out of that rotation. Attorneys who want to specialize in search and seizure, or DNA, or conservatorships, or other types of substantive issues will be allowed to do so, but not to get more than their share of appointments overall.

Sometimes the attorney stipulates he or she does not want certain kinds of appeals. For example, the attorney may have a personal aversion to handling sex offense or child or animal abuse cases, or may lack familiarity with an area of law such as juvenile delinquency or mental health. We will usually honor such preferences.

The above examples are different from requests for cases that are widely perceived as more desirable and are in general demand. I have already explained how we handle one such category, $75/hour cases. Another common example is a request for only jury trials -- in other words, the attorney does not want guilty pleas.

(Continued on page 2)

TABLE OF CONTENTS

Our experience is that the large majority of attorneys also prefer the trials, but are willing to help us out by taking a mix including pleas. In fairness to them, our policy is that a request to get only jury trials will not increase the number of jury trials above what the attorney would normally get and what others get, but will merely remove the attorney from consideration for plea appeals.

Why are so many independent appointments guilty pleas, and how can I get "meatier" cases?

The preceding discussion brings up a related topic -- frequent complaints from attorneys getting independent appointments that a large part of their workload is guilty pleas.

This state of affairs is likely to stay around for a while. As I have previously reported, several years ago we agreed with the court and Appellate Indigent Defense Oversight Advisory Committee that we would handle guilty pleas (rule 31(d) cases) in a special way. Our staff attorneys are to review the record for potential issues before an appointment is made. Likely Wende cases are usually to be kept in house, often handled by students or paralegals working under an attorney's supervision. The large majority of the rest are to be assigned as independent cases.

Because we have agreed most of the non-Wende, non-staff plea cases will be independent and because this district has a large number of plea appeals (about a quarter of our caseload), many independent offers will of necessity be pleas. We do try, however, not to burden any individual attorney with a disproportionate share of pleas. Generally, if an attorney has several plea cases, we try to balance that out with a few trials or other, "meatier" work.

How should I handle dependency cases where I can find no issues, in light of Sade C.?

In In re Sade C. (1996) 13 Cal.4th 952, the California Supreme Court held that the prophylactic procedures of Anders v. California (1967) 386 U.S. 738, and People v. Wende (1979) 25 Cal.3d 436, do not apply to dependency cases. The court was primarily addressing federal constitutional and policy issues and did not specify what no-merit dependency briefs should look like. Unless and until the court gives direction otherwise, the most reasonable approach for fulfilling counsel's obligation under a Court of Appeal appointment is probably to continue along lines previously laid down by the court.

As with Wende briefs, Sade C. briefs should be discussed in advance with Appellate Defenders. (See In re Angelica V. (1995) 39 Cal.App.4th 1007, 1015, and fn. 4 at 1015 [cited with approval in In re Sade C., supra, at 990].) A Sade C. brief can set forth a statement of the case and facts, highlight potential legal issues the court should consider along with the applicable law, advise the court of the steps counsel has taken (e.g., sending the record to the client, explaining the appellate process to the client, and telling the client of the opportunity to present issues in pro per), and ask the court to give the client an opportunity to file his or her own statement or brief. Normally counsel would not ask to withdraw but would remain available to perform further services at the request of the court.

In a dependency case you cannot say the court **must** review the record for error. However, you can invite the court to exercise its discretion to do so. Your description of facts and potential legal issues may be especially important here in persuading the court to take a closer look.

This type of presentation will allow the court to determine whether its statutory responsibility to provide counsel to indigent parties has been satisfactorily discharged. It will give a reliable background for resolving any pro per issues. It will also provide a tangible product by which to evaluate the compensation claim.■

THE ROMERO WATCH

By Joyce Meisner Keller, Staff Attorney

Cases decided before the Supreme Court's decision in People v. Superior Court (Romero) (1996) 13 Cal.4th 497 that are currently on appeal have created a number of interesting wrinkles that must be ironed out by appellate counsel.

Counsel may find himself or herself evaluating records which run the gamut from no mention whatsoever of the court's discretionary power, to some vague mumbling of unfairness, to almost a clear indication if the court had discretion it would not have exercised it.

Two of the most prevalent issues which will be discussed, albeit briefly, involve a "silent" record, and a guilty plea by the defendant with a stipulated term.

(Continued on page 3)

A. SILENT RECORD

In a "silent" record case, the issue is whether the trial court was aware of its discretionary power under Penal Code section 1385 to dismiss a strike during sentencing.

In a recent series of cases involving, "pure", silent record cases, i.e., where neither counsel for the appellant or the prosecutor made any suggestion that the court exercise its sentencing discretion, courts have upheld the decision of the sentencing court without requiring remand. (See People v. White Eagle (1996) 43 Cal.App.4th 1053 as modified at 96 Daily Journal D.A.R. 11653; People v. Alvarez (96 Daily Journal D.A.R. 11637.)

Further in People v. Deguzman 96 Daily Journal D.A.R. 12001, 12004, the court held where the record is silent regarding how the trial court perceived its authority to strike the priors, and review of the appellant's prior record revealed a bad record, it would have been a, "manifest abuse" of the trial court's discretion to strike under Penal Code section 1385. The court found no prejudice inured to the defendant. See also, People v. Askey 96 Daily Journal D.A.R. 11326, where the court held that because defendant was an, "incipient Nightstalker", it would have been an abuse of discretion to strike the prior. Moreover in Askey, the court found that any error was waived because the trial court was not asked to exercise its discretion.

Nonetheless, despite the above discussed opinions, counsel must evaluate each case on an individual basis, before deciding how to proceed. Thus, if there is silence in the record of trial combined with a confused state of the law prior to the Supreme Court's ruling in Romero, counsel should strongly consider raising the argument that the trial court sentenced the appellant without knowledge of discretionary alternatives. Where a sentence is imposed without an awareness of discretionary sentencing choices, a court is, "...no more exercising that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (People v. Belmontes (1983) 34 Cal.3d 335, 348, fn. 8.)

Counsel should also argue that taken in context, footnote 13 clearly provides that a defendant is entitled to resentencing unless the record of trial clearly shows that, (1) the sentencing court knew it could dismiss a strike prior and chose not to, and (2) stated on the record that it would not dismiss a strike whether it had the power to dismiss or not.

Appellate counsel might be wise to anticipate that the Attorney General in its Respondent's Brief may raise a generic waiver argument to counter Romero arguments. In his or her Reply Brief, appellate counsel should argue against waiver on the premise that a criminal defendant should not be held accountable for a failure to raise an issue at trial where it was overwhelmingly unsupported by existing law. (See, People v. Scott (1994) 9 Cal.4th 331, People v. Welch (1993) 5 Cal.4th 228, 237, 238; and People v. Santiago (1969) 71 Cal.2d 18, 22-23, where the court held an issue may be raised for the first time on appeal when the absence of a defense objection below was attributed to the lack of appellate guidance on the issue.)

Counsel may also consider arguing that a formal defense motion to strike a prior was not necessary. While a defendant may informally suggest a court consider the dismissal of charges, Penal Code section 1385, does not provide for such a motion. Under Romero, a court may exercise the power to dismiss granted in section 1385 either on the court's own motion, or on that of the prosecuting attorney. The defendant has no statutorily conferred authority to move for dismissal; thus, trial counsel was not required to bring a motion to dismiss in order for the court to exercise its own power. (People v. Superior Court (Flores) (1989) 214 Cal.App.3d 127, 137.)

Further, counsel should consider arguing that nowhere in footnote 13, or in the rest of the Romero opinion does the Court state that relief is not available to defendants who failed to ask the trial court to dismiss a strike under section 1385. As the court of appeal held in People v. Sotomayor (1996) 47 Cal.App.4th 382, 390, "the Supreme Court did not say a defendant seeking reconsideration of sentence must show he or she brought a motion to strike the allegation in the trial court..."

B. GUILTY PLEAS WITH A STIPULATED TERM

Where a defendant has pled guilty and agreed to a stipulated term, a trial court may be precluded from exercising discretion to strike prior felony allegations. In People v. Cunningham 96 Daily Journal D.A.R. 11997, the court held the defendant's express agreement to a 32-month term precluded remand for the purpose of obtaining a lesser term by virtue of the trial court's striking a prior offense. (See also, People v. Couch 96 Daily Journal D.A.R. 10198.)

(Continued on page 4)

Because the ruling in Romero affects each case differently, counsel must individually evaluate each situation where a client was sentenced to prison as a second or third striker. Independent analysis of each case is essential because while some clients will benefit from the ruling in Romero (and may in fact be serving "dead time" as you read this), not all clients will be in this position.■

KNOW WHEN TO SAY WHEN, • • •

By Howard C. Cohen, Staff Attorney

The nation's largest brewery, which owned a major league baseball team of some note, (Anheuser-Busch, Inc., and St. Louis Cardinals) for a period of time has a slogan, "Know When to Say When," which is, of course, excellent advice in regard to the consumption of alcohol.

It is also excellent advice in regard to continuing to raise certain appellate issues which have not gained acceptance by any appellate court and for which there is a plethora of contrary published authority, with nary a glimmer of any possibility of a grant of review by the Supreme Court.

Amongst such class of issues are some of the erstwhile Three Strikes issues. It is not the purpose of this commentary to mandate that appellate counsel not continue to raise the litany of all the Three Strikes issues. Because of the continued pendency of some or all of these issues in present appeals, it would not be appropriate to suggest that any particular issue is moribund so as to undercut any pending appeal.

I am well aware that a continued attack on the legislation on federal due process grounds in the federal courts requires exhaustion of remedies in the state courts. Aside from that factor, however, the time may have come for all counsel to reconsider the worth of certain issues and the value of continuing to raise them.

If an assigned staff attorney will review a draft of the opening brief, appointed counsel of record and the staff attorney can confer on the wisdom on maintaining any particular issue in the context of that review. In independent cases, appointed counsel may call ADI to get feedback on the viability of an issue under consideration.

As appointed counsel of record, the panel attorney maintains the responsibility for the case. Of course, if counsel of record in good faith and conscience believes an issue -- though not yet accepted by any court -- should or must be raised, then counsel would have the duty to raise the issue. (I would parenthetically add here, however, that if any such issue is raised for which there is an abundance of adverse authority, counsel should recognize and cite the authority.)

Still, the expense of time and material to raise issues which do not appear to have any future appears significant. Therefore, it would be wise for counsel who is inclined to raise such issues pro forma to consider discontinuing the practice or, at the very least, confer with a duty staff attorney. If counsel does not raise a particular Three Strikes issue because the issue has been repeatedly rejected, then, if the issue were ever ruled upon favorably by the Supreme Court, one remedy would be habeas corpus, even if the issue had not previously been raised. (See, e.g., In re Harris (1993) 5 Cal.4th 813.)■

YOUR CLIENT HAS WON-- WHAT HAPPENS NEXT?

By Cindi B. Mishkin, Staff Attorney

When the court of appeal issues its opinion, it sends a copy of the opinion to the California Department of Corrections (CDC). CDC receives these opinions at a central address and then forwards them to the central file of the defendant. This central file follows the defendant and is located at the facility in which he or she is housed.

The defendant is not automatically transferred to the trial court for further proceedings, but is only transferred upon receipt of a removal order, otherwise known as an order to produce, issued by the trial court. CDC may contact the district attorney before an opinion becomes final, that is, before the court of appeal issues the remittitur, to alert the district attorney action needs to be taken on a specific case. However, it is the trial court's issuance of the removal order which causes the release of the prisoner from prison to the trial court for further proceedings consistent with the opinion.

(Continued on page 5)

It is the trial court, therefore, which controls the process whereby a prisoner is released from prison and transferred back for further proceedings. To comply with a defendant's speedy trial rights, codified in Penal Code section 1382, the government must begin re-trial proceedings within 60 days of the issuance of the remittitur.

CDC does not release the prisoner unless CDC receives written confirmation that the case will not be re-tried. CDC prefers a minute order from the trial court showing the district attorney will not re-prosecute the defendant, but written confirmation to this effect from the district attorney will suffice.

If the appellate opinion holds the case is to be dismissed permanently, the district attorney may wait until the remittitur is issued before it provides confirmation to the trial court. The appellate attorney can, however, attempt to expedite appellant's release from prison with a motion in the trial court, entitled a Motion For Own Recognizance Pending Issuance of the Remittitur. This motion is made pursuant to Penal Code sections 1272 and 1291, and the applicable case law is In re Pipinos (1982) 33 Cal.3d 189 and In re Podesto (1976) 15 Cal.3d 921. A sample motion is reproduced in the ADI Appellate Practice Manual at page 648. In the event the trial court improperly denies appellant's motion for own recognizance release, appellate counsel may then apply to the reviewing court for relief. California Rules of Court, rule 32, however, requires such a motion be made in the trial court before the issue can be raised in the reviewing court.■

THE GOLDEN RULE

By Howard C. Cohen, Staff Attorney

Whether surprising or not, there is comparatively little reference to the Golden Rule in California case law, and I am not referring to the cynical maxim, "He (or she) with the gold, rules."

While there is a goodly amount of appellate cases regarding the "golden rule of summary adjudication" (e.g., North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 30-31), the "golden rule of statutory construction" (e.g., People v. Stripe (1996) 42 Cal.App.4th 1487, 1489-1490), or the impermissibility of the "'golden rule' argument" (e.g., Brokopp v. Ford Motor Co. (1977) 71 Cal.App.3d 841, 860), there is only sparing reference to the applicability of what most people recognize as the Golden Rule, "Do unto others as you would have them do unto you." For example, in EDC Assocs. v. Gutierrez (1984) 153 Cal.App.3d 167, 178, fn. 9, there is reference to the irony of a lease containing a pledge by a landlord to practice the Golden Rule, while in Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal.App.3d 268, 272, fn. 2, the appellate court equated professional courtesy and the golden rule and lamented the lack of same when attorneys seek procedural advantage rather than decision on the merits.

Notwithstanding the comparative paucity of citation to the Golden Rule in case law, a practitioner would do well to keep it in mind, *especially when dealing with court personnel.* For example, the Court's staff is mindful that if a brief is due on a particular day and counsel is just finishing the completed draft (including approval by ADI when necessary), it will be an unnecessary expenditure of counsel's (and eventually the Court's) time and expense to make a written request for an extension. Under these circumstances, certain Court personnel will be receptive to a telephone call that the brief ***is*** being mailed.

The "is" in the preceding sentence is italicized in boldface to emphasize the present tense. The Court's acquiescence to such a telephonic request -- or *any* other similar informal request -- MUST be honored. If counsel says the brief will be in the mail today, it MUST be mailed the same day. Counsel should never take advantage of a cooperative deputy clerk with a promise of action without a fulfillment of such promise.

Not only is failure to act a breach of the Golden Rule, failure to fulfill one's promise will sully one's reputation. Moreover, if counsel take advantage of the generosity of court personnel, such generosity will evaporate.

The lesson is simple, "Do unto others as you would have them do unto you," and honor -- rather than take advantage of -- the cooperation by Court personnel.■

Notices

University of San Diego School of Law Seminar - November 16, 1996

USD is holding a seminar on **"Demystifying Priors, Rap Sheets, Sentencing and Corrections -- The Truth is Out There**" on Saturday, November 16, 1996 from 8:30 a.m. to 3:15 p.m. This program has been approved for 5.0 hours MCLE credit.

Preregistration fees are $45 (including lunch). To be preregistered, USD must receive your payment by 5 p.m. on November 5, 1996. Registration fees after this time are $75.00 and may not include lunch. For further information, please call (619) 260-4600, ext. 2874. Please mail your registration and payment (check, Visa or Mastercard information) to: USD School of Law, Attn: Marti Hans, 5998 Alcala Park, San Diego, CA 92110-2492.■

Division Two - San Bernardino County Cases

The Court of Appeal in Division Two has asked that counsel handling San Bernardino County cases (i.e., not Riverside or Inyo) file a **motion to augment** for missing portions of the record, even if the missing portion is part of the normal record under rule 35(e). Division Two is very concerned about 35(e) requests being lost or mishandled and would prefer that motions to augment be filed in **San Bernardino County cases**. Please refer to this policy on such motions.■

Rule 15 - The last ADI Newsletter (July 1996) noted changes to Rule 15 of the California Rules of Court dealing with the format and typography of briefs. Although the rule is "effective July 1, 1996", it actually only applies to criminal cases "in which the appellant's opening brief is filed on or after January 1, 1997." (See amendment to Rule 37(d) -- 1996 advance sheets, No. 17.)■

Rule 44 - The January 1996 ADI newsletter noted changes to Rule 44 of the California Rules of Court, which required copies of certain filings on disk and reduced the number of paper copies. Effective July 1, 1996, those provisions were deleted and Rule 44 returned to its previous language.■

Please Identify Your Correspondence Panel attorneys should list the first and last name of the client and the Court of Appeal number on all correspondence to ADI and/or to the Court of Appeal. (This includes copies of correspondence sent to ADI.) We can look up a case by the client's last name or by the panel attorney's name, but it's much more efficient if we have the appeal number particularly when the client has a common last name.■

ADI Issues Bank Available For Purchase On Disk

The purpose of the ADI issues bank is to provide panel attorneys with recent briefs and cases pertaining to issues that come up frequently in our work. The criterion for inclusion of an issue in the bank has been that the issue must be a current issue of great interest or an older one which recurs frequently. Emphasis has been placed on including recurring issues and panel attorneys should be aware that because of the lag time between updating, the issues bank is not intended to keep attorneys abreast of "cutting edge" issues. Sample arguments are intended to be starting points for research and **must** be Shepardized to update the case law contained within them.

The issues bank is now available to panel attorneys in disk form. These disks contain "shrunken" files which can be "expanded," copied onto your hard drive and utilized in Word Perfect format. If you have software which can transform Word Perfect formatted files into your own word processing format, you can also make use of these disks. Please note that the issues bank is only available on 3 1/2" disks.

ADI has two different versions of the issues bank. The criminal version contains over 400 briefs covering a wide variety of topics in adult and juvenile criminal law, including pre-trial, trial and post-trial issues. The one year subscription price of $54 includes the initial release plus a six month update.

The civil version contains over 110 issues pertaining to juvenile dependency law. The one year subscription price (including initial release plus a six month update) is $27.

Both the criminal and civil disk set will also include a forms directory which contains over 90 samples of documents and forms which are often used in our everyday work.

To purchase, please specify whether you want the criminal disk set, the civil disk set, or both and send your name, address, telephone number and payment (by check payable to ADI) to: Appellate Defenders, Inc., Attn.: Amy Spintman, 233 "A" Street, Suite 1200, San Diego, CA 92101-4010.■

Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.

NUMBER 16 November 1996

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

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

An order finding dependency jurisdiction based upon the parents' default in failing to show up at a pretrial settlement conference--despite the appearance of counsel for the parents--was upheld, although the reviewing court questioned the default procedure. In In re Brian W. (1996) 48 Cal.App.4th 429, the parents had appeared at the detention hearing and denied the petition, but neither parent was present at the pretrial settlement conference. The trial court found both parents had wilfully failed to appear and entered their defaults. The court then proceeded to adjudicate the merits of the petition based upon the social worker's report and the information presented at the detention hearing, and, after making a true finding, proceeded with the disposition, ordering the minors placed in foster care.

The reviewing court agreed the procedure was flawed, stating in a footnote that entry of a default is not authorized where an answer is on file and the parents were represented by counsel who were present. A default occurs when a defendant in a civil case fails to answer and is unauthorized when an answer is on file, even if the defendant fails to appear at the hearing.

However, it concluded the error was harmless beyond a reasonable doubt. The court noted appellant mother was represented by counsel who sought clarification of certain findings and reunification services, but did not object to the summary adjudication procedure, nor did counsel assert he was taken by surprise or needed additional time. Nor did the appellant seek relief from default after the summary adjudication.

B. Dispositional Issues

First, let's look at a delinquency case interpreting a statute which applies to dependencies: In In re Clifford C. (1996) 48 Cal.App.4th 402, Division Two of the First Appellate District held an order granting rehearing, served 18 days after the referee's order committing the juvenile to the California Youth Authority, was in excess of its authority. The court reviewed the statutory scheme pertaining to referees' orders, in Welfare and Institutions Code sections 250-253. It observed that pursuant to section 250, the referee's orders are final 10 days after service of the order. Section 253 permits the juvenile court to order rehearing any time within 20 days of the date of the hearing. In this case, the rehearing was ordered within the 20 day period, but beyond the 10 day finality period, and the juvenile court had approved the original referee's order within the 10 day period.

The appellate court observed a minor may seek a rehearing by filing an application within 10 calendar days after service of the referee's written order and findings, pursuant to section 252. Independently, the juvenile court may order rehearing, if the order for rehearing issues within 20 judicial days of the original hearing, pursuant to section 253. Construing the two sections together, even if the referee's order has not been approved by the juvenile court judge, it becomes final within 10 days after service, and the juvenile court lacks jurisdiction to order a rehearing after the expiration of that time.

The Sixth District Court of Appeal interpreted the nature of the statutory right to counsel in the context of a claim of ineffectiveness of counsel at the jurisdictional/disposition phase in In re Kristin H. (1996) 46 Cal.App.4th 1635. In the appeal, the mother challenged the sufficiency of the evidence to support the jurisdictional and disposition orders, which the appellate court affirmed under well-settled principles of appellate review. However, in the petition for writ of habeas corpus, the mother argued her trial attorney did not effectively represent her because counsel failed to present favorable evidence of her mental state.

Interpreting the provisions of Welfare and Institutions Code section 317.5, the court reached the question of whether the statutory right to counsel includes a right to effective assistance of counsel. It concluded the Legislature, in enacting section 317.5,

did not intend the right to competent counsel to be a "hollow right." It noted that changes in the statutory scheme cast the assumptions formerly relied upon in a new light, and determined that while parents in dependency proceedings are not prosecuted as defendants, petitions often contain allegations of criminal activity, and the proceedings are "adversarial in nature," citing In re Emily A. (1992) 9 Cal.App.4th 1695, 1709.

Review was just granted by the Supreme Court in In re Cindy L. (1996), formerly at 47 Cal.App.4th 509, where the Second District Court of Appeal concluded that statements by an incompetent child witness which would not be admissible if the child testified herself, were admissible and credible when repeated by a teacher. In this case, a 4 year old reported to her preschool teacher that her father had touched her vagina, resulting in the filing of a dependency petition. At the disposition hearing, the court found the child was not competent to testify as a witness because she could not distinguish between truth and falsity. However, it admitted into evidence the child's statements to the teacher under the "child dependency exception" to the hearsay rule, and sustained the petition.

The Court of Appeal affirmed. It concluded that California courts have long concluded that out-of-court statements by children are admissible under the spontaneous declaration and excited utterance exceptions to the hearsay rule, and relied on In re Carmen O. (1994) 28 Cal.App.4th 908, the decision which foreshadowed the new hearsay exception. The long and the short of it is that what is incredible when offered in the courtroom where the witness can be confronted and cross-examined, becomes credible when it is repeated third hand.

C. Permanent Plan Issues

In In re Ebony W. (1996) 47 Cal.App.4th 1643, the Third District Court of Appeal affirmed an order terminating parental rights at the six month review hearing where the mother's whereabouts were unknown, and she had never appeared in the proceedings. The minor was detained at age two weeks because of a positive toxicology screen at birth. The mother failed to appear at the detention, jurisdiction or disposition hearings. Notices of the jurisdictional and dispositional hearings were served at a Stockton address, although the petition alleged the mother's whereabouts were unknown. The notice of the permanent plan hearing was served on a Sacramento address, although the report noted the appellant's whereabouts were unknown. The notices of the various hearings all referred the citee to the right to appointed counsel.

On appeal, the mother contended it was improper to remove the child without appointing counsel, regardless of whether the parent has indicated a desire for representation. The Court of Appeal disagreed, concluding that Welfare and Institutions section 317 requires an indigent parent to communicate in some fashion his or her desire for representation before the juvenile court is obligated to appoint counsel.

The court observed the record reflects the Human Services Agency "served appellant, or made efforts to locate her for service" in connection with each hearing. (Id., 47 Cal.App.4th at p. 1648.) It says nothing about whether she ever **received** those notices, or whether there was any evidence to support the conclusion by HSA that she **could** be served at the two different locations where the various notices were sent. The court omitted to address the situation where the record does not show the parent was ever served with the notice which would notify her of this requirement.

Where a parent has petitioned for extraordinary relief following a juvenile court order setting a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26, and the petition is decided on the merits, the parent may not then raise the same issues on appeal following the termination of parental rights. (In re Julie S. (1996) 48 Cal.App.4th 988.) Note that Division Five of the Second Appellate District issued an order to show cause in the writ proceeding, and afforded the parties an opportunity to fully brief and orally argue the cause, before issuing its decision on the merits.

(Continued on page 9)

No party is required to file a 388 petition to seek modification of a previous permanent plan at a post permanent plan 18-month review hearing, based upon a change of circumstances. In San Diego County D.S.S. v. Superior Court (Sylvia A.) (1996) 13 Cal.4th 882, the court interpreted Rule 1466(b) to prove that, if the juvenile court determines that circumstances have changed since it ordered long-term foster care as the permanent plan, it may order adoption or legal guardianship as a new permanent plan at a subsequent hearing, as appropriate. The court noted the language of the rule and its interpretation presupposes the juvenile court can make the determination in question through information made available at the mandatory six-month status reviews. The court concluded its reading of the rule also presupposed the juvenile court should make the order at issue, even in the absence of a petition by a party. This is based on the provisions of section 366.3, which compels the court to conduct post-permanent plan hearings pursuant to section 366.26, at least every 18 months following the adoption of a permanent plan.

The Supreme Court held there was nothing in the Rules of Court or elsewhere proscribing the court from making a change of circumstances determination unless it acted sua sponte. Further, it found nothing in the rule barring a party from making a request of the juvenile court for a determination of a change of circumstances unless the party does so through a petition for modification. The Court determined its interpretation of the rule did not impinge upon due process rights because the determination that a change of circumstances exists can be made at the request of any party.

In other section 388 news, Division Three of the Fourth Appellate District ruled in the published portion of an opinion that where a biological parent is a respondent in an appeal, the court is not required to appoint appellate counsel, but has discretion to do so which will be liberally exercised. In In re Joshua B. (1996) 48 Cal.App.4th 1676, the mother filed a 388 petition which was granted. The foster parents appealed from the order returning the minor to the mother's custody and continuing the dependency under a family maintenance plan.

On appeal, the court appointed counsel for the biological mother, but, by its own motion, questioned whether it was required to do so. Following In re Bryce C. (1995) 12 Cal.4th 226, the Court of Appeal concluded although a respondent parent is not entitled to appointed counsel as a matter of right, the appellate courts retain the authority to appoint counsel for an indigent parent who is a respondent in any appeal in which the parent's custody and control of the child is at stake, and should do so whenever the appearance of counsel may reasonably affect the ultimate decision. The court stressed its agreement with the Supreme Court that an accurate determination whether to terminate parental rights is of fundamental importance to the parent and society, and, for that reason, intends to exercise its discretion to appoint appellate counsel liberally.

FREEDOM FROM CUSTODY

In a private action to free a child for adoption, the First District Court of Appeal ruled that the parent's act of signing a refusal to consent to an adoption within the six-month period provided by statute, negated any inference of an intent to abandon the infant. In Mark and Stacy A. v. Elizabeth L. (1996) __ Cal.App.4th __ [96 Daily Journal D.A.R 12289 on rehearing; formerly at 48 Cal.App.4th 1858], appellant Elizabeth L. found herself in unfortunate circumstances at age 28, while living with her parents and working for them. Elizabeth's mother did not look forward to the joys of grandparenthood, and pressured her to put the child up for adoption. (They threatened to cut her off from the family and make her life difficult, including, but not limited to, killing appellant's boyfriend.) She consulted a friendly adoption lawyer who arranged for an adoption by Mark and Stacy.

The mother had serious misgivings about adoption from the beginning, but did not communicate them. After the baby was born, she was released to the adoptive parents and appellant was informed if she did not relinquish, consent, or reclaim the child within six months, the court might determine she had abandoned the child. She understood that if she did not want to consent to the adoption, she could sign a refusal to consent. The child was born on February 23, 1994, and released to the respondents on February 25; appellant informed the adoptive parents she wanted the baby back on August 25, 1994. On August 26, 1994, she advised the social worker of that fact, and wrote a letter to the court the same day, informing it of her decision to refuse consent to the adoption. On September 15, 1994, the prospective adoptive couple filed the action to terminate her parental rights on the ground of abandonment. The trial court found appellant had abandoned the baby by failing to sign the refusal to consent within 6 months and failing to take reasonable steps to reclaim her child within that period.

(Continued on page 10)

The Court of Appeal held that the communication on August 25, 1994, was within 6 months of the release and was timely. The court analyzed many statutes and cases to reach the conclusion that the computation of the time excludes the first day and includes the last day, unless it is a holiday. The court also determined that by refusing consent on the last day of the 6 month period, the mother was entitled to full protection of the statute requiring return of the child to her, rejecting the respondents' contention that she must act prior to that time. The court reasoned that to hold a parent must act sooner than the last day of the six month period would in effect shorten the period provided by statute. It also held the "intent to abandon" element must be present throughout the statutory period, and that expression of nonconsent to an adoption negated the inference of any intent to abandon. (Id., [96 Daily Journal D.A.R. at 12296].)

The respondents then argued that the best interests of the child required a determination that she remain in their custody. The Court of Appeal rejected this contention, along with the argument that the child's constitutional right to a stable and secure home outweighs the mother's constitutional right to raise her own child, because, "Prospective adoptive parents would have only to resist returning the child long enough, and no matter how quickly the birth mother asserted her refusal to consent to the adoption, she might lose the battle to obtain custody." (Id., [96 Daily Journal D.A.R. at 12299].)

The court went on to observe "It is only due to respondents' decision to litigate the issue, and the trial court's erroneous decision, that Haley faces the prospect of separation from the only family she has known for more than two and a half years. Appellant, however, is not responsible for this situation." It went on to note
that the mother changed her mind about adoption within the shortened statutory time but her child was not returned to her; that the ensuing litigation which had consumed two years was a fact which could not determine the outcome of the case because it would not only condone the contravention of appellant's rights, but encourage adoptive parents to refuse to honor legitimate demands for return of a child in the hope that sufficient time would pass to convince the courts to retain the status quo. "Indeed, introduction of an inquiry into the interests of the child before ordering a change in custody would inevitably result in adoptive parents' prevailing over natural parents as long as they could sufficiently prolong the litigation." (Id., [96 Daily Journal D.A.R. at 12301].)

It should be noted that upon the filing of the original decision, on September 5, 1996, the adoptive parents decided to petition to the court of public opinion for their rehearing, revealing the identities of the child and her birth parents. On September 13, 1996, the Court of Appeal had to issue an order because of the adoptive parents' violations of the confidentiality rules relating to adoption proceedings. The opinion following rehearing was filed on October 7, 1996.

MISCELLANEOUS RULINGS

The big news this quarter was the California Supreme Court's decision in In re Sade C. (1996) 13 Cal.4th 952, which does not fit nicely under any of the above sub-headings. In this case, counsel had filed a brief in accordance with the procedures outlined in People v. Wende (1979) 25 Cal.3d 436, extended to dependency cases in In re Brian B. (1983) 141 Cal.App.3d 397, and In re Joyleaf W. (1984) 150 Cal.App.3d 865. Counsel requested the Court of Appeal conduct an independent review of the record to determine the existence of meritorious issues. The Second District Court of Appeal declined the invitation, dismissing the appeals as abandoned. A petition for review was filed seeking review of the dismissal, and review was granted to determine if Wende/Anders extended to dependencies.

The Supreme Court concluded there is no constitutional right which **requires** the reviewing court to conduct an independent review of the record to determine the existence of meritorious issues in dependency cases. The right to a Wende review flows from the United States Supreme Court decision in Anders v. California (1967) 386 U.S. 738 [18 L.Ed.2d 493, 87 S.Ct. 1396], which requires a reviewing court to conduct such a review whenever appointed counsel in a criminal case seeks to withdraw based on the assertion the appeal is frivolous. This right is related to the right to effective assistance of counsel which is guaranteed to criminal defendants and extends to the first appeal as of right.

(Continued on page 11)

The Supreme Court concluded that there was no constitutional right to counsel in dependency cases, and that Anders could not be extended. However, it acknowledged an indigent parent may have a right to assistance of appointed counsel in his or her appeal from a state-obtained decision affecting child custody or parental status, on a case by case basis, under the due process clause of the Fourteenth Amendment to the U.S. Constitution and/or article I, section 7, subdivision (a), of the California Constitution. It justified this conclusion by relying on Pennsylvania v. Finley (1987) 481 U.S. 551 [95 L.Ed.2d 539, 107 S.Ct. 1990], which limited entitlement to Anders "prophylactic" procedures to indigent **criminal defendants** in their first appeal of right.

The majority's opinion was approximately 43 pages long. I assume many hours of work went into the decision, just as many hours of work went into the briefing, the petitions for review, and the intermediate appellate decisions. The result: reviewing courts are not required to, but **may**, in their discretion, conduct an independent review of a record to determine the existence of meritorious arguments upon request by appellate counsel.

Query: What does appellate counsel do when faced with a case which does not appear to have any issues? We are not sure. However, suffice it to say no-issue letters, requests to withdraw, and briefs requesting independent review of the record will not be approved lightly since there is no way to insure a uniform approach statewide. (Compare the reasoning and results of In re Kayla G. (1995) 40 Cal.App.4th 878, vs. In re Andrew B. (1995) 40 Cal.App.4th 825, decided the same day, by the same division of the same District Court of Appeal.) To safeguard the rights of appellant parents, no-issue briefs should only be filed as an absolute last resort.

PATERNITY CASES

It appears that in order to be qualified as a presumed father, one must not only satisfy the criteria of Family Code section 7611 by receiving the child into his home, but the home into which the father receives the child must be a separate residence of his own. In In re Spencer W. (1996) 48 Cal.App.4th 1647, Leonard B. lived with the mother in her apartment. They lived together from 1989, the year of Spencer's birth, until 1992. During this time, Leonard was unemployed, and he and the mother lived on AFDC. Noting that Leonard was "equivocal" in asserting his parental relationship with Spencer, the opinion acknowledges he told his friends, neighbors and relatives he was the father, took Spencer on outings, provided child care and disciplined Spencer. However, the dastardly Leonard never contacted AFDC officials to inform them of his relationship to the child. (He is probably the first father in the state to have failed in this regard.) His name was not on the birth certificate and he did not file any action to establish paternity.

The mother apparently supplemented her AFDC income by means of her profession as a prostitute, which led to her ultimate arrest and cessation of AFDC income. Leonard separated from mother, allegedly because the income had ceased. Anyway, Spencer and his sister were left with a friend of the mother's, and later with the maternal grandparents. While the children were with the grandparents, Leonard took no steps to assert paternity or to support the child.

Leonard was incarcerated between 1992 and 1994, during which period he attempted to contact the social worker assigned to Spencer's case, and informed the social worker he was the father. The social worker would not give him any information about the case because the mother had told her Leonard was not the father. The trial court found Leonard was not a presumed father.

The Fourth District Court of Appeal held that neither statutory element was present. He had failed to receive Spencer into his home because the home was the mother's residence, paid for by the mother and when the mother ceased to receive funding, he ceased to live there. Further, the court concluded Leonard did not openly and publicly admit paternity because he did not contact AFDC or take formal steps to place his name on the birth certificate. Having read these additional requirements into an otherwise silent statute, the court held the trial court's findings were correct.

GUARDIANSHIPS AND CONSERVATORSHIPS

(Continued on page 12)

In Wendland v. Superior Court (Wendland) (1996) 49 Cal.App.4th 44, the Third District Court of Appeal held independent counsel must be appointed for a conservatee, a brain injured man who was not in persistent vegetative state, where family members decided to withhold food and fluids, assertedly because he had previously told his wife and relatives he would never want to live in a state of total dependence. The conservatee had been comatose for more than a year before awakening and with therapy he had made limited progress. He still received food and fluids through a nasogastric tube, but was able to follow simple commands, had the use of extremities on the left side of his body, but was paralyzed on the right side. In July, 1995, his wife determined to withhold nourishment based upon his expressed wishes and the hospital ethics committee agreed with her decision, and made plans to transfer the conservatee to a convalescent hospital where the tube would be removed and he would die within 30 to 60 days.

The conservatee's mother and sister obtained a temporary restraining order, and the conservatorship investigator recommended appointment of independent counsel for the conservatee. The trial court denied the request. On appeal, the court held Probate Code section 1471(b) applied because the issue was whether the conservatee was entitled to counsel at further conservatorship hearings at which the court would consider whether to appoint his wife as permanent conservator. Since his wife also planned to withdraw life-sustaining treatment, the court observed her appointment as conservator could lead to his death.

Relying upon several dependency decisions discussing the need for independent counsel for the minor, the court noted the investigator's recommendation required the court to consider whether the conservatee's interests required the appointment of counsel for him. Since the conservatee's very life was at stake, it held he was entitled to counsel to represent his interests, whatever those interests might be.

An order denying substitution of attorneys in a conservatorship proceeding was ruled to be a nonappealable order in Conservatorship of Rich (1996) __ Cal.App.4th __ [96 Daily Journal D.A.R. 7929].) In this case, the conservatee filed a motion to substitute a new attorney over the objection of her conservator. The court denied the motion and the 91 year old conservatee appealed. The First District Court of Appeal noted the three categories of appealable judgments and orders: [1] final judgments as determined by case law; [2] orders and interlocutory judgments made appealable by statute; [3] certain judgments and orders that, although they do not dispose of all the issues in the case are considered final for appeal purposes and are exceptions to the one-final-judgment rule. It concluded the order denying substitution of attorney was not a final judgment, was not made appealable by statute, and was not excepted by the one-final-judgment rule. Cases falling in the last category are typically collateral rulings directing the payment of money or performance of an act, rather than preventing the performance of an act. The court concluded that judicially compelled payment of money or performance of an act remains an essential prerequisite to the appealability of a final order regarding a collateral matter. The order denying substitution of attorney does not overcome that obstacle.

HOT RESOURCES

Look at the September 6, 1996 article entitled "The 'Daubert Deposition' [96 Daily Journal, Verdicts and Settlements Supplement, p. 1], which addresses the Kelly-Frye implications of psychotherapist's opinions based upon the new standards established in Daubert v. Merrell Dow Pharmaceuticals (1993) 509 U.S. __ [125 L.Ed.2d 469, 113 S.Ct. 2786]. John F. Fielder writes in the article that, "Daubert can also be used to prevent the introduction of evidence such as experimental diagnoses of post-traumatic stress disorder and major depression. In the view of many experts, the validity and reliability of these diagnoses remains unproved and they are potentially prejudicial."

The article suggests questioning the expert by first focusing on the qualifications of the expert as a **scientist**, and then directing the line of questioning to the scientific reliability and validity of the expert's methods of obtaining data; methods of causation determinations (dynamic diagnosis); methods of assigning diagnoses (differential diagnosis); and methods of prognostic determinations. He recommends eliciting a complete account of the published and unpublished research that the expert relied upon to support the reliability of the diagnosis. He implies that an honest expert will admit that the validity and reliability of current methodologies in clinical psychology and psychiatry are poor and that research results are equivocal.

(Continued on page 13)

To do this effectively, you will need to obtain all reports, scoring records, test protocols and summary sheets to forward to an independent expert for review. When the expert who prepared the report testifies, insist on detailed answers itemizing every piece of information, including test data used as a foundation of opinions, and question the expert on the reliability and validity of every method relied on in the evaluation and analysis leading to causation opinions, diagnoses and prognoses. Do not accept evasive responses. Your expert will need to cover issues of validity and reliability.

Considering the high percentage of cases for which an evaluation by an appointed expert "makes or breaks" the parent's ability to retain custody of his or her children in dependency cases, and the fact that such opinions are relegated to the position of "junk science" by most scientific experts, it might be a good idea to start compelling these experts to justify their opinions in court, and to begin educating the courts on the unfairness of having critical questions relating to fundamental liberties decided by such unreliable opinion testimony.

Another interesting article appeared in the August 14, 1996, edition of the San Diego Union-Tribune, in the Quest Section, on the subject of lying. The article discussed two studies published in the Journal of Personality and Social Psychology on lying and the ability to detect when someone is lying. The research shows that while most people are well-practiced prevaricators, relatively few people make decent lie detectors.■

KUDOS

We know that excellent work often goes unrecognized because it is done in unsuccessful cases. But we think it is important to recognize successful efforts so we can all be aware of issues that may benefit our client. In an effort to identify those issues which are likely to be successful, we have changed the format of the KUDOS in this newsletter to list KUDOS by issue category rather than alphabetically by attorney name. The new categories are:

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

Attorney Index - Alphabetical
(not including Three Strike Wins)

Russell Babcock - see PC §654, Misc.
Christoper Blake - see Misc.
Jill Bojarski - see Restitution
Randall Bookout - see Search & Seizure
Susan Bookout - see Misc.
Douglas Benedon- see PC §654
Jancye Blair - see Sentence
Robert Boyce - see Misc.
Philip Bronson - see PC §654, Restitution
Douglas Brown - see Sentence, Misc.
Doris Browning - see Sentence
Martin Nebrida Buchanan - see Misc.
Stephen Buckley - see Sentence
Marilyn Burkhardt - see Restitution
D. Cava- see Sentence, PC §654, Search &Seizure
Howard Cohen - see Sentence
Linn Davis - see PC §654
Patrick Ford - see Misc.
Cliff Gardner - see Restitution
Mark Hart - see Misc.
Conrad Herring - see Dependency
Donal Hill - see LIOs
Handy Horiye - see PC §654, LIOs
Robert Howell - see Sentence
Steven Hubachek - see Sentence, Misc.
Anna Jaurequi - see Sentence
Ronald Kaplan - see Search & Seizure
Joyce Meisner Keller - see Jury Instructions
Ivy Kessel - see Jury Instructions
Charles Khoury - see Misc.
Terry Kolkey - see Insufficient Evidence
Thomas Lawrence - see LIOs
Marcia Levine - see Restitution
Marsha Levine - see Dependency
Frederick Marr - see Dependency
Gregory Marshall - see Misc.
David McKinney - see Sentence
Richard Miggins - see Insufficient Evidence
Susan Milliken- see Sentence, Jury Instr., Misc.
Cindi Mishkin - see Insufficient Evidence

(Continued on page 14)

Richard Moller - see LIOs
Laurel Nelson - see Insufficient Evidence
Diane Nichols - see Sentence
John Olson - see Jury Instr., Search & Seizure
David Rankin - see Restitution
Robert Russo - see Insufficient Evidence
Merle Schneidewind - see Insufficient Evidence
Steven Schorr - see Sentence
George Schraer - see Sentence, Misc.
Patricia Scott - see Jury Instructions
Terrence Scott - see Misc.
Michael Sideman - see LIOs
Carmela Simoncini - see Search & Seizure
Howard Stechel - see Jury Instructions
Theresa Osterman Stevenson-see Jury Instr.
Jan Stiglitz - see Misc.
Roberta Thyfault - see Misc.
Deborah Tuttleman - see Insufficient Evidence
Scott Wahrenbrock - see Sentence
Robert Weinberg - see Sentence
Alisa Weisman - see Restitution
Brian Wright - see Misc.

Three Strike Wins:

A. Cases remanded in light of People v. Romero (1996) 13 Cal.4th 497:

Neil Auwarter, P. v. Hunt, #D024383 (ADI)
Russell Babcock, P. v. Soto, #D022122 (A), P. v. Rubio, #D025840 (I), P. v. Sanders, D024603 (I)
Michael Bacall, P. v. Lucero, #E017886 (I)
Steven Barnes, P. v. Mendez, #D024810 (A)
Douglas Benedon, P. v. Stewart, #D023456 (A)
Christopher Blake, P. v. Duckett, #D024269 (I), P. v. Romero, #D024736 (I)
J. Thomas Bowden, P. v. Howard, #D022870 (A)
Philip Bronson, P. v. Deaver, #D023324 (I)
Gordon Brownell, P. v. Watkins, #E017013 (I)
Martin Nebrida Buchanan, P. v. Howard, #E016558 (I)
Stephen Buckley, P. v. Thieson, #G018192 (I)
Irma Castillo, P. v. Ortegon, #G018486 (A)
E. Thomas Chavez, P. v. Castro, #G016553 (A)
James Crowder, P. v. Croghan, #G017356 (I)
Rodger Curnow, P. v. Kirby, #D025151 (I)
Anthony Dain, P. v. Hodge, #D023704 (I), P. v. Wiggins, #D023750 (I)
Michael Dashjian, P. v. Thornberg, #G017486 (I)
Linn Davis, P. v. Featherstone, #E017112 (I)
Judith Fanshaw, P. v. Henry, #D024541 (I), P. v. Knighton, D024422 (I), P. v. Segura, D024675 (I)
Wendy Forward, P. v. Maldonado, #D025943 (A), P. v. Lozano, #G018568 (A)
Cliff Gardner, P. v. Davis, #E016245 (I)
Cheryl Geyerman/Mary Hibbs/Michelle Paradise, P. v. Cruz, #D024402 (ADI)
Mark Greenberg, P. v. Montemayor,#D022934 (I)
Carl Hancock, P. v. Dubose, #D025789 (A)
Melody Harris, P. v. Padilla, #D023242 (I)
Patrick Hennessey, P. v. Contreras, #D023321 (I), P. v. Mora, #D023747 (I), P. v. McManus, #D023316 (I), P. v. Brown, #E016435 (I)
Handy Horiye, P. v. Small, #D025064 (I)
Robert Howell, P. v. Cottingham, #D023817 (A)
Debra Huston, P. v. Hogrefe, #D025010 (I)
Greg Kane, P. v. Castillo, #D024840 (I)
David Kelly, P. v. Noe, #D022905 (I)
Ivy Kessel, P. v. Ramirez, #D023310 (I), P. v. Perez, #D025080 (I)
Nancy King, P. v. Williamson, #D024862 (A)
Daniel Koryn, P. v. Steelman, #D024696 (I), P. v. Cervantes, #D025112 (I)
Janice Lagerlof, P. v. Casey, #D023253 (I)
Marcia Levine, P. v. Simon, #E016353 (I), P. v. Young, D024989 (I), P. v. Gonzales, D024786 (I)
Gideon Margolis, P. v. Agulto, #D024581 (I)
Marilee Marshall, P. v. Hartle, #G017590 (I), P. v. Cortez, #D024431 (I)
David McKinney, P. v. Walter, #D023620 (I), P. v. Lopez, #D023774 (I)
Kevin McLean, P. v. Howard, #D025454 (I), P. v. Sierra, #D024909 (I), P. v. Ramirez, D024997 (I)
Paula Mendell, P. v. Johnson, #D025402 (A)
Cindi Mishkin, P. v. Hampton, #D024019 (ADI)
Richard Moller, P. v. Mitchell, #D023732 (A)
Anne Moore, P. v. Newman, #D025082 (I)
Eric Multhaup, P. v. Rosado, #D022913 (I)
Diane Nichols, P. v. Martinez, #G016362 (ADI)
Kenneth Noel, P. v. Moore, #D025255 (A)
Ronda Norris, P. v. Wright, #G018230 (ADI)
Shawn O'Laughlin, P. v. Whitaker (I)
John Olson, P. v. Scheerlinck, #G018153 (A)
Richard Power, P. v. Hernandez, #E015755 (I)
Sharon Rhodes, P. v. Eddington, #D025266 (A)
Lee Rittenburg, P. v. Scott, #D023996/97 (A)
JoAnne Roake, P. v. Martinez, #D025749 (I)
Michael Satris, P. v. Lopez, #D023317 (I)
John Schuck, P. v. Monroe, #D025916 (I)
Steven Schutte, P. v. Govan, #D024330 (A), P. v. Evans, #D025670 (I), P. v. Miller, #D024881 (I).
R. Clayton Seaman, P. v. Letchaw, #D023727 (I), P. v. Sullivan, #E016527 (I)
Susan Shors, P. v. Ybarra, #D024821 (I)
Corinne Shulman, P. v. Thompson, #E015975 (I), P. v. Hooper, #D023186 (I)
Michael Sideman, P. v. Satterfield, #D024665 (I)
David Stanley, P. v. Richards, #D022721 (I), P. v. Savala, #D025168 (I)
Howard Stechel, P. v. Ramirez, #G016365 (I)
Theresa Osterman Stevenson, P. v. Hale, #D024979 (A)

(Continued on page 15)

Ava Stralla, P. v. Foster, #D025016 (I)
Jeffrey Stuetz, P. v. Carballo, #D024185 (I)
Roberta Thyfault, P. v. Rodarte, #D022563 (I), P. v. McGuire, #G018053 (I)
Beatrice Tillman, P. v. Lantow, #G017282 (ADI)
Patricia Ulibarri, P. v. Williamson, #D024566 (I)
Wesley Vanwinkle, P. v. Nakata, #D024420 (I)
Robert Visnick, P. v. Guerrero, #D025200 (A)
Scott Wahrenbrock, P. v. Neal, #D023975 (A), P. v. Ramirez, #D024204 (I), P. v. Rangel, #E017289 (I)
George Winkel, P. v. Castanada, #D023764, Romero remand despite plea bargain context with stipulated term and no certificate of probable cause obtained. NOA ground of motion to suppress was sufficient. (A)
Michael Weinman, P. v. Barton,D024471 (ADI)
Alisa Weisman, P. v. Mills, #D024075 (A)
Brian Wright, P. v. Romes, #D024211 (A)
Alan Yockelson, P. v. Jimenez-Ruiz,#D023455(A)

B. People's Appeals dismissed based on People v. Bailey (1996) 45 Cal.App.4th 926, and/or People v. Galindo (1996) 45 Cal.App.4th 1479 [subsequently depublished]:

Mark Christiansen, P. v. Roberts, #D022921. (I)
Sharon Jones, P. v. Serna, #G019167. (I)
Diane Nichols, P. v. Alvarez, #G019183, P. v. Silva, #G017673, P. v. Vordale, #G018755 (ADI)
Ronda Norris, P. v. Ryan, #G017613 (ADI)

C. Reduction of wobbler to misdemeanor upheld based on Perez, Trausch, and Vessell:

Sylvia Koryn, P. v. Cruz, #G017993 (I)
Cindi Mishkin, P. v. Reyes, #G017019 (ADI)
Ronda Norris, P. v. Brown, #G017987 (ADI)
Louis Wijsen, P. v. Kirkpatrick, #G018094 (I)

D. Other Strike Wins:

Dennis Cava, P. v. Viramontes, #E017412, Case remanded because trial court erroneously believed it had to impose 3 prison prior enhancements under the strikes law. Trial court could decide whether to dismiss a strike prior on remand even though opinion states an appellant ordinarily waives Romero issue on direct appeal by failing to ask for dismissal of strike prior at sentencing. (I)

Merle Schneidewind, P. v. Tritchler, #D021748, Sentences of both appellants vacated because they constitute cruel and unusual punishment. (A)

Carmela Simoncini, P. v. Wayne, #D024282, Sentence reversed and remanded where appellant's guilty plea did not include an express admission of a prior conviction for a serious felony under the three strikes law. The guilty plea form contained an ambiguous reference to the admission of a "serious felony prior/strike prior," but there was no stipulated sentence and, in taking the plea, the court obtained only an admission of a prior conviction pursuant to PC §667, subd. (a)(1). (ADI)

John Ward, P. v. Gavette, #D023038, A third strike, an alleged serious prior from Georgia, stricken because the elements of the Georgia offense are not coincidental with California's statute and the prosecutor failed to prove the offense fell within California's definition. Also, the case was remanded for resentencing as a two strike case with the trial court having discretion to dismiss the remaining strike. (I)

Jerry Whatley, P. v. Graham, #G017576, People appealed trial court's refusal to impose a PC §667, subd. (a) prior where the trial court found it was an improper dual use of facts to impose both the prior and to double the term under the "two strikes" law. The court, noting that it could be a "pyrrhic victory for the prosecution," remanded the case for the trial court to exercise its discretion under Romero to strike the "strikes" allegation. (I)

Alan Yockelson, P. v. Sult, #D022827, In a three strikes case, the court set aside the true findings on the prior strike allegations and remanded the case for retrial on those allegations and sentencing before a different judge. The court found that there was an appearance of conflict and doubt as to the trial judge's impartiality because the trial judge was the prosecutor who signed the charging documents in the prior case on which the "strikes" allegations were based. (I)

Sentence Remand, Reduction, Credits and PC §654:

A. Remand, Reduction, and Credits:

Janyce Blair, P. v. Magee, #D023089, Sentence reversed and case remanded for re-sentencing where court stated it had imposed lowest sentence possible but had not considered possibility of staying sentence on gun use enhancement. (I)

(Continued on page 16)

Douglas Brown, P. v. Johnson, #G019415, 171 additional days of credit awarded following successful habeas petition. (A)

Doris Browning, P. v. Cooper, #D022535, Sentencing remand so trial court can clarify whether it meant to impose sentence and suspend execution, or suspend imposition of sentence on its grant of probation. (A)

Stephen Buckley, P. v. Parrish, #G017175, Remand pursuant to Romero. Also, at resentencing, pursuant to Norrell, the trial court may impose judgment on the lesser related petty theft and stay imposition on burglary. (A)

Dennis Cava, P. v. Acosta, #G018133, Case remanded for determination of presentence conduct credits. (I)

Howard Cohen, P. v. Lawrence P., #E017435, Juvenile commitment to Youth Authority remanded for juvenile court to determine maximum confinement calculation correctly.

Howard Cohen/Randall Bookout, P. v. Clark, #D025773, During pendency of appeal and within 120 days of judgment, request for resentencing pursuant to PC §1170(d) based on sentencing errors resulted in reduction of sentence from 83 years, 4 months, to 55 years, 8 months. (ADI)

Robert Howell, P. v. Baythauong, #D018184, Reversed in part and remanded for resentencing in light of following errors conceded by AG: Use of improper aggravating factor (multiple victims) to impose upper terms on several counts; abstract of judgment incorrectly reflects combination of determinate and indeterminate terms; abstract of judgment incorrectly lists conviction on count for which jury acquitted. (A)

Steven Hubachek, P. v. Chomsavanh, #D024704, Case remanded for new disposition hearing where trial court abused its discretion in committing 17-year old first time juvenile offender to CYA for involuntary manslaughter (Negligent discharge of a firearm killing a friend of his). Trial court had declared minor was not in need of rehabilitation but that CYA commitment was necessary in order to send message to community that negligent handling of loaded weapons would not be tolerated. (A)

Anna Jauregui, P. v. Ward, #D024473, Remand for resentencing on the priors. Only one enhancement can be imposed for the first two prison priors because only one prison term involved. (ADI)

David McKinney, P. v. Barnett, #D023301, PC §288, subd.(a) [lewd and lascivious act involving child under 14 years] reduced to PC §288, subd.(c) in light of insufficient evidence to prove victim was under 14 years old at the time of incident. Remand for resentencing because trial court failed to state ANY reason to justify imposing the upper terms, consecutive sentences, and/or fully consecutive terms pursuant to PC §667.6 subd. (c). (I)

Susan Milliken, P. v. Walsh, #D024713, Sentence reversed because government's failure to comply with statutory time requirements (PC 1203.2a) deprive court of jurisdiction to sentence. This published case holds In re Hoddinot (1996) 12 Cal.4th 992, not limited to prospective application. (A)

Diane Nichols, P. v. Oechel, #D025370, Following sentence recall under PC §1170(d), trial court pronounced sentence of two years (which had been previously imposed but execution suspended at time of probation grant), correcting sentence of three years it was without jurisdiction to impose when it revoked probation. (ADI)

Steven Schorr, P. v. McGuire, #D023952, One-year enhancement imposed under PC §667.5(b) stricken because there was no "completed" prison term when the defendant escaped prior to serving out the term. (I)

George Schraer, P. v. Simmons, #D020960, One count of forcible rape reversed for insufficient evidence in multiple sex offense case, and sentence reduced 8 years accordingly; one day of presentence custody credit added; and restitution fine reduced from $5,000 to $4,000. (I)

Scott Wahrenbrock, P. v. Thomas, #D022700, Prison sentence reversed and case remanded to allow defendant the opportunity to present a supplemental probation report to allow court to decide whether to reinstate probation. (I)

Robert Weinberg, P. v. Cuevas, #D023325, The Court of Appeal, directed the trial court to determine appellant's presentence custody credits and amend the abstract of judgment accordingly. (A)

(Continued on page 17)

B. PC §654:

Russell Babcock, P. v. Antoine, #D023183, In this published opinion which determines the carjacking statute (PC §215) is constitutional, the court held PC §654 prohibits punishment for both the carjacking and possession of a firearm by a felon since evidence reflected defendant possessed weapon to commit crime. (I)

Douglas Benedon, P. v. Le, #G017794, One-year sentence on battery (with serious bodily injury) count stayed pursuant to PC §654 when defendant received a separate term for assault. Justice Wallin concurred, but wrote separately to advocate abandoning the "intent and object" test used in PC §654 analysis. (A)

Philip Bronson, P. v. Madrid, #E014917, PC §654 bars punishment for both conspiracy to commit murder and attempted murder. (A)

Dennis Cava, P. v. Curtean, #G016975, Remanded for resentencing after trial court imposed sentence for both burglary and its target felony in violation of PC §654. (I)

Linn Davis, P. v. Dees, #E017172, The Court of Appeal stayed a previously concurrent sentence under PC §654. (I)

Handy Horiye, P. v. Hussey, #E015645, PC §654 prevents punishment for both conspiracy to commit murder and dissuading a witness, where the object of the conspiracy was to prevent the witness from testifying. (I)

Restitution:

Jill Bojarski, P. v. Meador, #E016116, Restitution fine of $2,000 reduced to statutory minimum of $200 (PC §1202.4) where sentencing court was silent on issue of restitution but abstract included $2,000 fine. (I)

Philip Bronson, P. v. Stevenson, #G017628, Remand to correct restitution order where trial court purported to impose restitution fine and then stayed it in lieu of direct restitution but then failed to identify the amount of direct restitution to be paid or the victim to be paid. (A)

Marilyn Burkhardt, P. v. Jones, #E016796., Remand for trial court to reduce $5,000 restitution fine to $2,500 as originally promised in return for guilty plea. (A)

Cliff Gardner, P. v. Lucas, #D020960, Restitution fine reduced from $5,000 to $4,000. (I)

(Continued on page 20)

Marcia Levine, P. v. Fletcher, #D023100, Restitution fine of $10,000 reduced to $4,000 where the trial court also ordered $6,000 direct victim restitution. (A)

David Rankin, P. v. Wilson, #E017822, $500 restitution fine reduced to $200 as called for in plea bargain. (ADI)

Alisa Weisman, P. v. Taylor, #E017127, At sentencing (following remand), trial court imposed $10,000 restitution fine. Defendant had argued at the hearing he lacked ability to pay because he did not have a prison work assignment. Court of Appeal found that the mere possibility he could be transferred to an institution where work was available, did not justify imposition of the restitution fine where defendant met his burden of showing inability to pay. Court modified restitution fine order to reduce it to the statutory minimum. (I)

Lesser Included Offenses:

Donal Hill, P. v. Rossi, #E016479, Conviction for possession of a pen gun (PC §12020, subd.(a)) reversed because, as pled in the information, the charge was a LIO of the defendant's other conviction of being a felon in possession of a firearm (PC §12021, subd.(a)(1). (A)

Handy Horiye, P. v. Anderson, #D019651, Convictions for kidnapping and false imprisonment reversed as they are LIO's of other greater offense convictions. (I)

Thomas Lawrence, P. v. Badovinatz, #D024308, Conviction of possessing a completed check with intent to defraud (PC §475a) reversed since it was a LIO of forgery (§470) for which defendant was also convicted. (A)

Richard Moller, P. v. Matron, #D019651, Convictions for kidnapping and false imprisonment reversed as they are LIO's of other great offense convictions. (A)

Michael Sideman, P. v. Romandia, #D024981, Simple drug possession conviction reversed because it is a LIO of possession for sale conviction. (I)

(Continued on page 18)

Jury Instructions:

Joyce Meisner Keller, P. v. Gonzalez, #G014247, Court of Appeal reaffirmed its original decision to reverse special circumstances because trial court failed to provide clarifying instruction of "reckless indifference to human life" as found in CALJIC 8.80.1. California Supreme Court requested Court of Appeal reconsider this case in light of People v. Estrada. (ADI)

Ivy Kessel, P. v. Malave, #D024963, The trial court modified, over defense objection, CALJIC 2.90. Court of Appeal reversed, holding the modification injected two concepts into definition of reasonable doubt which have not been approved by legislature or supreme court: "firmly convinced" and "reasonable possibility that defendant is guilty." Both concepts may give rise to confusion when coupled with the approved portion of CALJIC 2.90 (which was also given). (A)

Susan Milliken, P. v. Odum, #D024111, Injury to co-inhabitant, reversed. At preliminary hearing, co-inhabitant gave exculpatory testimony. At trial, co-inhabitant was unavailable and his preliminary testimony was admitted plus an inconsistent statement to a police officer. However, the court erred in instructing the jury pursuant to Evidence Code §1235 that the inconsistent statement could be considered as substantive evidence. (A)

John Olson, P. v. Vaughn, #E015799, Trial court gave involuntary manslaughter instructions, over defense objection, which was not supported by any evidence presented at trial. Since there was not evidence to support an involuntary manslaughter instruction, there was no evidence to support jury's guilty verdict. Although erroneous, jury's guilty verdict on involuntary manslaughter charge constituted an implied acquittal on murder charge. Thus, conviction reversed with directions for trial court to dismiss the case. (I)

Patricia Scott, P. v. Paz, #D023011, Partial reversal in case where defendant was charged with a violation of PC §245(a)(1). Court of Appeal found prejudicial error when trial court failed to instruct on definition of assault (CALJIC 9.00). (A)

Howard Stechel, P. v. Birks, #E016230, Reversal for failure to give a requested lesser related offense jury instruction on trespass where the defendant was convicted of burglary. (I)

Theresa Osterman Stevenson, P. v. Kearsey, #D023977, Reversed and remanded for new trial because court erred in not instructing jury sua sponte on LIO of joy riding, where accusatory pleading charged appellant with VC §10851 violation of "taking and driving" and evidence supported giving of LIO. (A)

Insufficient Evidence:

Terry Kolkey, In re Justin W., #D025021, Juvenile finding that minor was in receipt of stolen property reversed. Minor accepted a ride in a car he knew was stolen. However, the evidence he had control of the vehicle was insufficient to sustain a true finding. (A)

Richard Miggins, P. v. Herbst, #G017174, Conviction of theft by embezzlement reversed based on insufficiency of evidence. Court found appellant was not a fiduciary responsible for collecting rents on behalf of purchasers of property. (A)

Cindi Mishkin, P. v. Luna, #E015471, First degree murder conviction reversed for insufficiency of the evidence. (ADI)

Laurel Nelson, P. v. Jarred B., #D024624, True finding minor possessed live ammunition and court order declaring him a continuing ward because of the finding reversed. Insufficient evidence the ammunition was "live." Only testimony was that 14 rounds of ammo./bullets were found in a suitcase in room minor shared with his brother. (I)

Robert Russo, In re Richard G., #E017284, Insufficient evidence defendant caused more than $5,000 in damage. Court modified judgment to reducing the true finding minor violated PC §594, subd. (b)(2) to §594, subd. (b)(3). (A)

Merle Schneidewind, In re Sergio M., #D025199, Juvenile's conviction for possession of cocaine reversed for insufficient evidence that juvenile had dominion and control and knowledge of its nature when the cocaine was found in the yard of a known drug house. The only evidence the juvenile had possession was a hand motion he made as if he were throwing something through the chain link fence surrounding the yard of the drug house. The officer was five feet away from the juvenile and saw nothing in or leave the juvenile's hand when he made the motion. (A)

(Continued on page 19)

Deborah Tuttleman, P. v. Cochrane, #E015515, Four counts (one of conspiracy and three of insurance fraud) of eleven counts reversed for insufficient evidence and inadmissible hearsay. (I)

Search & Seizure:

Randall Bookout, P. v. Hall, #E017223, Invasive search of cellular phone for evidence of cloning exceeded scope of consent to search defendant and vehicle for drugs and weapons. (ADI)

Dennis Cava, In re Manuel G., #G016185, True finding of PC §69 reversed because officer was not engaged in the lawful performance of his duties where detention was illegal (Court of Appeal indicated it did not approve of minor's threat to officer, but "our law does not permit police officers to taunt a person to the point where a threat is made and then arrest minor for a violation of Penal Code section 69.") (I)

Ronald Kaplan, P. v. Solis, #G018074, Defective search warrant not saved by Leon. (I)

John Olson, P. v. Hunt, #G018152, True finding of having a deadly weapon on campus reversed based on unreasonable search. Search of student's backpack not justified as an "accelerated booking search" theory where officer in different patrol car from suspect searches backpack and there is no actual inventorying of backpack. Search also not justified as incident to lawful arrest where search not contemporaneous with, or in the vicinity of, the arrest. (I)

Carmela Simoncini, P. v. Edgar, #D023434, Order denying motion to suppress evidence was reversed with directions to set aside guilty plea. Appellant was charged with manufacturing methamphetamine after a warrantless search of his mobilehome. At the hearing, the government presented only a declaration by a judge stating that by mistake his clerk failed to indicate a search waiver on a condition of probation in an earlier case. However, the grant of probation did not contain such a waiver and no evidence was presented at the hearing that the officers relied in good faith on judicial records. Lacking evidence of the existence of a fourth amendment waiver or good faith reliance on judicial records, there was insufficient evidence to support the warrantless search. 2) P. v. Nieto, #G017450, Order denying defendant's motion to suppress evidence reversed where officers, conducting an inventory search of a vehicle impounded pursuant to an arrest for VC §12500 (driving without a license in driver's possession), was conducted for improper investigative purpose. Officers had used a key found during a search of the defendant to unlock the locked hood of the vehicle, after the "inventory" of the car revealed no contraband, and found methamphetamine in a closed container attached magnetically to the wheel well. The court held the search under the locked hood and more specifically, of the closed container under the hood, went beyond what was necessary to conduct an inventory of defendant's property. (ADI)

Miscellaneous:

Russell Babcock, P. v. Kasim, #D026248, People appealed trial court's recusal of entire D.A.'s office from representing the People in an evidentiary hearing. The Court of Appeal had ordered the hearing to explore possible misconduct by D.A.'s office in the underlying criminal trial. The trial court then granted defendant's request to recuse the D.A.'s office for conflict pursuant to PC §1424. The People appealed, and the Court of Appeal affirmed, holding the trial court had not abused its discretion. (I)

Christopher Blake, P. v. Carroll, #D023882, Admission of priors reversed for Yurko error. (I)

Susan Bookout, P. v. Snook, #D021913, In felony DUI case, court reversed true findings of three DUI convictions within seven years of instant offense pursuant to VC §23175. Findings reversed because conviction occurred after defendant committed the instant offense but before he was convicted of the instant offense. Court held that §23175 does not permit subsequent offenses and conviction to be used to increase the penalty for the first offense. To hold otherwise would be inconsistent with purposes of recidivist statute and would result in unconstitutional ex post facto application. (A)

Robert Boyce, P. v. Hough, #D023923, First degree murder conviction reversed & remanded for limited purpose of redetermination of new trial motion where trial court applied appellate standard of review to sufficiency of the evidence. If new trial motion is denied, $10,000 restitution fine to be offset by amount of victim restitution. (I)

Douglas Brown, P. v. Leon, #G017812, Serious felony prior reversed because admitted after inadequate advisals. (A)

(Continued on page 20)

Martin Nebrida Buchanan, P. v. Pinto, et al., #E015860, Remand for new hearing on Wheeler motion. Five counts of forcible rape reversed. Because no "in concert" finding made on count 20 with respect to Mrs. Pinto, in the event the Wheeler motion is denied, sentence is to be modified to reflect only forcible rape with a foreign object. (I) P. v. Browely, #D023923, First degree murder conviction reversed & remanded for limited purpose of redetermination of new trial motion where trial court applied appellate standard of review to sufficiency of the evidence. If new trial motion is denied, $10,000 restitution fine to be offset by amount of victim restitution. (I)

Patrick Ford, P. v. Heagy, #D025155, Erroneous admission of confession reversed because error found not to be harmless beyond a reasonable doubt. (I)

Mark Hart, P. v. Azpeitia, #E016142, Matter remanded to allow defendant to withdraw plea where defendant improperly advised he could raise voluntariness of statement issue on appeal after guilty plea. (I)

Steven Hubachek, P. v. Lino M., #D024895, Reversed and remanded to allow appellant to withdraw his guilty plea. Trial court abused its discretion when it denied motion to withdraw despite its belief "package deal" had been coerced thereby making plea involuntary. (A)

Charles Khoury, P. v. Macias, #E014394, Reversed. Statements made by a minor to a probation officer in the course of the pre-fitness-hearing investigation are compelled and cannot be used at trial to impeach defendant. In this case which turned on defendant's mental state (murder versus vehicular manslaughter), the People's improper use of defendant's compelled statements to destroy defendant's credibility and emphasis of defendant's inconsistencies during closing and rebuttal argument, was not harmless beyond a reasonable doubt. (I)

Gregory Marshall, P. v. Scheid, #G016894, In a first degree felony-murder/robbery case, where appellant was not present at the time of the killing and whose guilt was premised on aiding-abetting with prior action, admission of a particularly gruesome photograph of the victims in their bedroom was prejudicial. (Note: in a previous reversal in the same case, in dictum, the Court of Appeal had suggested the photograph would not be admissible on retrial.) (I)

Susan Milliken, P. v. Rodriguez, #E014971, A doubt as to appellant's competency had been declared pursuant to PC §1368. After trial, but before sentencing, a clerk's minute order indicated the trial court had eventually found appellant competent. However, the court reporter could find no notes for such a hearing, and counsel filed declaration (in a collateral habeas corpus) that they could not recall any such hearing. The Court of Appeal construed the appeal as a motion for new sentencing (PC §1181 (a)), granted same, vacated judgment, and remanded for new competency hearing. (A)

George Schraer, P. v. Fletcher, #D018243, 13 Cal.4th 451. The trial court's admission of a redacted version of the codefendant's (Fletcher's) confession implicating defendant Moord violated defendant's constitutional right of confrontation. (I)

Terrence Scott, P. v. Branson, #G016974, Allegation of prior serious felony conviction stricken when defendant admitted the prior conviction for impeachment purposes only. After court trial, the court found the prior conviction allegation true based on defendant's "admission" during his testimony. The Court of Appeal found the Saunders rule inapplicable, and therefore prosecutor was not allowed another chance to prove the prior, because jeopardy had attached. (I)

Jan Stiglitz, P. v. Pinto, et al., #E015860, Remand for new hearing on Wheeler motion. Five counts of forcible rape reversed. Because no "in concert" finding made on count 20 with respect to Mrs. Pinto, in the event the Wheeler motion is denied, sentence is to be modified to reflect only forcible rape with a foreign object. (A)

Roberta Thyfault, P. v. Tolbert, #E015955, Judgment reversed on the kidnap for robbery conviction. The court held that while knowledge the victim is alive is not an element of the crime, if there is any evidence the defendant honestly and reasonably believed the victim was dead at the time of asportation, the People must prove the defendant lacked such belief. (I)

Brian Wright, P. v. Vasquez, #D024967, Habeas writ granted without AG opposition, because police detective who testified against appellant was subject of ongoing internal investigation for fabricating evidence at the time of testimony, a fact not disclosed by the prosecution. (A)

(Continued on page 21)

Dependency:

Conrad Herring, In re Mila D., #D024731, Order returning child to guardian's home reversed in mother's appeal because there was no substantial evidence to support the return order where improvements in the guardian's home were attributed to having fewer children (due to removal) and there were unresolved issues of abuse and molest in the guardian's home. (A)

Marsha Levine, In re Mimi I., #G018847, Order terminating dependency jurisdiction and delegating control of visitation to the child's father reversed for abuse of discretion. (I)

Frederick Marr, In re Walter P., #E015813, After termination of parental rights, the biological parent and siblings of a child, who was later found to be unadoptable, have no statutory or constitutional right to counsel in a contested hearing in a modification petition. The DPSS is not required to prepare a report prior to the §388 hearing. The biological parent and siblings were allowed to obtain notice of review hearings and have questions answered. The Court chose not to address whether the siblings' relationship to the minor survived the termination of parental rights. (A)■

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