APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

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NEWS FROM THE DIRECTOR
by Elaine A. Alexander, Executive Director

On behalf of everyone at ADI, I want to wish all readers a healthy, enjoyable, and success-filled new year. Like Janus looking backward and forward at the same time, we have some old business and "new" news to deal with here.

Wende-Anders Briefs and the Continuing Saga of Robbins v. Smith

The Fourth Appellate District continues to require that no-merit briefs conform literally with Anders v. California (1967) 386 U.S. 738 [18 L.Ed.2d 493, 87 S.Ct. 1396], by including a discussion of the legal issues involved in the case and citation to relevant authority. We will probably be doing a mailing to the panel later this month, and I would like to explain that policy briefly again at that time.

Meanwhile, be aware that on October 8, 1997, the Attorney General filed a petition for rehearing and rehearing *en banc* in Robbins v. Smith (1997) 125 F.3d 831. In that case the Ninth Circuit found a brief filed under People v. Wende (1979) 25 Cal.3d 436, which did not include legal discussion, to be violative of Anders. (See also Griffy v. United States (9th Cir. 1990) 895 F.2d 561, 562.) The position of the state on rehearing, from what I can determine, is that the California system of project review of potential no-merit cases provides far greater protection than Anders procedures and therefore is an adequate substitute for strict compliance with that case.

The Fourth Appellate District policy on including legal discussion in a no-merit brief will not necessarily change even if the Ninth Circuit reverses itself in Robbins or the United States Supreme Court overrules Anders. As will be explained in the later mailing, there are reasons independent of case law requirements for encouraging treatment of legal issues in Wende briefs.

Claims in 1997 and 1998

Last year saw the last-minute defeat in the Legislature of a proposal to raise the hourly rate for appointed appeals in a number of cases. It would have provided for a rate of $85 in the categories of serious cases now paid at $75, a rate of $70 for other independent cases, and the current rate of $65 for remaining cases. I understand that a similar proposal with a $75 middle rate will be submitted for fiscal year 1998-99, to start January 1, 1999. We certainly will give our strong support to it.

The claims review process seems to be working smoothly at this time. All of us had to make a number of changes when the system of project review, with quarterly audits by the Appellate Indigent Defense Oversight Advisory Committee, was adopted. The transitional period seems to have passed, however, and I think the projects, the panel, and AIDOAC now have (Continued on page 2)

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similar expectations and understandings about most claims issues.

Service of Briefs on Public Defender

Another plea from the Public Defender's office: Please send a copy of the brief to **the specific trial deputy**, not just the Public Defender's office. They spend many hours tracking down intended recipients and re-routing briefs.

ADI's 25th Anniversary

I want to thank all the many people who took the time to drop by our 25th anniversary open house or send a word of greeting. We enjoyed the occasion and the chance to remember the enormously important services the organization performs and the fulfilling work it has offered us as individuals.

Feedback to the Panel

For many years panel attorneys have entreated us to provide regular feedback to them on the quality of their work, so that they can improve their performance and have a better idea of where they stand on the panel. Indeed, we have always strongly encouraged staff attorneys to provide assessments to panel attorneys of cases which they review, and we have issued frequent invitations for panel attorneys to contact the executive director about their panel status. However, with staff attorneys' heavy workloads, the natural reluctance to bear or hear bad news, the sometimes wrong assumption that the panel attorney will accurately infer the staff attorney's overall evaluation of the brief from the suggestions made on a draft, and the proliferation of independent cases which offer only limited opportunities for attorney interaction, we acknowledge that the feedback being provided tends to be sporadic.

Providing more systematic, formal assessments would not be easy. We are concerned they might provoke needless anxiety or quibbling about every negative (or not positive enough) comment. Preparing an evaluation for outside consumption would probably take more time than the typical informal internal evaluation. The message has to be both specific to the case and informative in some way about how the case might affect the attorney's panel standing. It has to be candid and accurate, even though that can be exceedingly difficult when the news is bad, and of course it must be consistent in tenor and detail with what the staff attorney has reported internally.

Despite these very serious reservations and potential problems, Appellate Defenders is considering a pilot project offering formal written evaluations in certain situations. If we decide to implement it, the start-up date and more details will be provided in a mailing to the panel. I am offering some advance notice here, in order to get input from attorneys as to what kinds of feedback would be most useful, understanding the constraints and difficulties just described.

Our tentative thought is that, to minimize workload pressure on staff attorneys and ensure the outside evaluation faithfully reflects the internal one, the form would be computer-generated from the computerized internal evaluation filed in the case. It might describe the overall assessment and very briefly discuss what that might mean in relation to overall standards for panel membership and/or independent cases. It might incorporate the comments made by the staff attorney explaining the overall assessment, including strong or weak points noted and any suggestions for follow-up or future improvement. The form might also include any observations made in relation to the specific factors by which we judge performance: issue spotting and definition, research, style and form, argumentation, responsibility, and client relationship.

Because of uncertainty as to how the system might affect staff attorney workload, we do not feel it would be practical to send an evaluation in every case, at least at first. For the pilot project, we have considered making it available on request, for assessments of "less than satisfactory," and for attorneys new to the panel.

We think we would ask panel attorneys who wish to comment on an evaluation to do so in writing, addressed to the executive director, not the staff attorney. That system would help ensure any

corrections or explanations get into the panel attorney's file. It would also give us a way to measure how often there are such comments and thus how much the formal evaluation system may potentially affect workload.

If we implement a program, after an initial period we would review our experience with the system and then extend, discontinue, or modify it. We would invite panel attorneys to let us know how useful they find the evaluations and what could be done to improve them.

Please let us know as soon as possible if you have some ideas as to what features would help you most in a feedback program such as the one sketched out here. We hope that this interchange of ideas and the program if implemented will promote both project-panel relations and the quality of representation provided in our district.■

David Kay Named New Assistant Director

Appellate Defenders, Inc. announces the promotion of staff attorney David Kay to the position of Assistant Director. Kay has devoted his entire career to appellate work, first in private practice and, since 1983, with ADI.

The San Diego native graduated from USD law school and received his undergraduate degree from the University of California, San Diego.

He has served on a number of appellate committees, including chairing the San Diego County Bar Association Appellate Court Committee in 1990. He was on the State Bar's Appellate Court Committee from 1989 to 1994, and was chair in his final year on the committee. Kay served on the Appellate Law Advisory Commission from 1995-1997, serving as chair in 1997.

Kay takes over as Assistant Director following the death of Paul Bell.■

Panel Attorney Awarded First Paul Bell Memorial Fellowship

Nancy King, a 1992 graduate of California Western School of Law, won the first Paul Bell Memorial Fellowship. She received an expense-paid trip to the National Legal Aid and Defender Association Appellate Defender Training Program in November in New Orleans.

"I am confident the learning experience will contribute to my being a better appellate attorney," King said after returning from the conference. "I'm certain my clients will be grateful as well," she continued.

The four-day national conference included intensive training and individualized workshop activities with nationally known appellate advocates.

"The conference was fantastic," King said. "[It] covered all aspects of a basic appeal -- from reviewing the record and brainstorming issues to oral argument.

"The entire conference was interactive, and approximately half of it was spent in small groups working on actual cases that each of us brought from home. The input of defenders with far greater experience than myself was invaluable.

"It was also very interesting to interact with people from other jurisdictions," King concluded. "They inspired me to keep fighting on constitutional issues that have taken a beating in recent years here in California, but are still recognized in at least some other states."

Since Paul Bell, the late Assistant Director of Appellate Defenders, Inc., always encouraged

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the development of young panel attorneys in any way he could, the board of directors found it only appropriate to award a fellowship in his name to a panel attorney.

Applicants were required to demonstrate dedication to the defense of the indigent accused, be an active member of the ADI panel, and have the potential to become an outstanding appellate advocate. Applicants with more than four, but fewer than 15 briefs on file were preferred.

Nancy King joined the ADI panel in 1995. Her practice is dedicated to appointed appellate criminal defense.■

New Justices Appointed In Divisions One and Three

While many individuals seeking judicial appointment have political allegiances, **Justice Barton C. Gaut**, Fourth Appellate District, Division Two, is an exception. He describes himself as "apolitical," one who "hates politics" and has "never contributed a dime."

Justice Gaut (pronounced "Gott") was raised in Hawthorne in metropolitan Los Angeles. He was graduated Phi Beta Kappa from U.C.L.A. in 1957 and then from Boalt Hall (University of California, Berkeley), where he was Order of the Coif, in 1962. Thereafter, he moved to Riverside.

Before appointment to the Riverside County Superior Court, Justice Gaut was a senior partner in the law firm of Best, Best & Krieger. Justice Gaut was a trial lawyer specializing in civil litigation. He was lead counsel in excess of one hundred court and jury trials in federal District Court, Riverside Superior Court, and San Bernardino Superior Court and represented nine municipal corporations and counties in the Inland Area in a successful court challenge on environmental grounds to the construction of a tire burning plant. Amongst his many cases, he has represented the Desert Sun Publishing Company and the Press-Enterprise in libel cases and the University of California, Riverside, in wrongful termination cases. He handled trials in anti-trust matters, 10B-5 damage claims, numerous condemnation actions, and a wide range of other civil matters. He served as president of both the Riverside County Barristers and the Riverside County Bar Association.

After his long tenure as an attorney, he desired a change from lawyer to jurist. He was appointed to the superior court bench in November, 1995. While on that bench, he sat as supervising civil judge. He had little contact with criminal law, although he handled some preliminary hearings when the municipal court was congested.

While he did handle appeals in civil practice, he was not looking toward elevation to the appellate bench. Nevertheless, when friends asked him to apply for a vacancy in Division Two, he did and was appointed in May, 1997. He has noted that the greatest differences between the trial and appellate courts are the rapid decision-making and greater contact with individuals (attorneys, witnesses, jurors) in the former.

Justice Gaut recognizes that he has little familiarity with criminal law, and it is too early in his appellate career for him to have gained an expertise. His reaction is to explore the criminal law and rely, at least initially, on the other justices with criminal law backgrounds.

Justice Gaut has also been very involved in the restoration of the old Riverside County Courthouse. The restoration has been "an enormous task." The old courthouse has no foundation and the task to conform to present day plumbing and electrical codes as well as the Americans with Disabilities Act has been daunting.

Justice Gaut is married, lives in Riverside, and has two sons and two daughters. He served as a First Lieutenant in the United States Army, assigned to Counterintelligence. His hobbies and interests include bicycling and reading.

Justice William W. Bedsworth, II, Fourth Appellate District, Division Three, was born in Long Beach, California, on November 21, 1947, and grew up in Gardena in metropolitan Los Angeles. He

received a Bachelor's Degree (cum laude) from Loyola University of Los Angeles in 1968 and his Juris Doctorate from the University of California at Berkeley (Boalt Hall) in 1971.

After graduation from law school, he joined the Orange County District Attorney's Office where he served as a felony trial deputy, an appellate attorney, and finally as a managing attorney in charge of the Appellate Division of that office. He handled cases in both the California and United States Supreme Courts, and his argument before the California Supreme Court in In re James Edward D. was videotaped by the National School Safety Center for use in schools. During that time he was twice chosen President of the Association of Orange County Deputy District Attorneys and twice elected to the Board of directors of the Orange County Bar Association.

In 1986, he was elected to an open seat in the Orange County Superior Court and took office in January, 1987. In 1994, he sat on Division Three by assignment for eight months. In February, 1997, he was appointed to the appellate bench.

Justice Bedsworth has been a member of the adjunct faculties of both Western State University College of Law and Chapman University School of Law, as well as the California Judicial College in Berkeley.

His articles on the law have been published nationwide, most recently in Sierra and Coast magazines, and quoted in court opinions. His column "A Criminal Waste of Space" is self-described as the most aptly named feature of the monthly Orange County Lawyer. His first book, What I Saw and Heard, a collection of essays on the law, was published in 1996.

Because of his background in criminal law, Justice Bedsworth is more familiar with criminal law than civil law, especially the ramifications of decisions. In drafting or joining an opinion, he is attuned to what seems to make sense on paper has to balanced with what will happen in day to day practice in the trial courts. He is less concerned with unintended consequences in criminal cases because of his greater confidence in his understanding of criminal law. Also in regard to criminal law, from his experience in issuing complaints as a prosecutor, he is well aware that human beings, including law enforcement officers, are "quite capable of making mistakes."

Justice Bedsworth lives in Mission Viejo with his wife Cheryle (an attorney), his daughter Caitlin, their cat Kiwi and their dog Trouble. A son, Bill, is a graduate engineer in Berkeley, and a daughter, Megan, attends UCSB. His primary recreational interests are softball, country music, and ice hockey.

Justice Bedsworth serves as a judge in two "jurisdictions." In addition to his vocation as an appellate justice, he works for the National Hockey League as a goal judge at all Mighty Ducks home games and selected road playoff games.■

Pending Three Strikes Law Supreme Court Cases And Issues

as of January 13, 1998
compiled by Diane Nichols, Staff Attorney

People v. Rodriguez (S055670) formerly at 47 Cal.App.4th 424, granted 10-23-96 [(1) Is mere fact defendant was convicted of assault with a deadly weapon sufficient to establish that the conviction was a strike? (2) May trial court exercise discretion in deciding whether to strike prior serious felony in defendant's absence & outside presence of counsel?].

People v. Jefferson (S057834) formerly at 50 Cal.App.4th 958, review granted 2-19-97 [when new sentence carries a life term, is the minimum period served before defendant is eligible for parole doubled?].

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People v. **Woodell** (S060180) formerly at 52 Cal.App.4th 1341, granted 5-28-97 [whether out-of-state appellate opinion is admissible to corroborate or explain other admissible evidence of prior conviction].

People v. Benson (S061678) formerly at 54 Cal.App.4th 282, granted 7-23-97 [whether prior conviction stayed under Penal Code section 654 may now be used as a strike or whether Pearson rule applies].

Note: Where one strike conviction in a case with multiple strike convictions has been stayed, the stayed conviction may be formally dismissed on completion of the defendant's sentence and parole. (People v. Pearson (1986) 42 Cal.3d 351, 359-363, fn. 4.) **Where a prior strike was 654'd, it may be possible to file a collateral petition for writ of habeas corpus in the trial court where the conviction originated seeking dismissal. If the strike prior is dismissed, a second petition in the Court of Appeal, alleging that the strike is no longer a prior felony may be filed.** As with other collateral writs, the panel attorney should call ADI for samples.

People v. Deloza (S061929) unpublished, granted 8-13-97, designated lead case on issue on 10-29-97 [to determine the relationship, if any, between the phrase "not committed on the same occasion and not arising from the same set of operative facts" in Penal Code section 1170.12, subdivision (a)(6) and the principles embodied in Penal Code section 654].

People v. Nelson (S053008) formerly at 43 Cal.App.4th 329, review granted 5-29-96 [whether consecutive sentences are mandatory under the three strikes law when the crimes occur on same occasion and arise out of same set of operative facts].

People v. Martinez (S062266) formerly at 54 Cal.App.4th 1533, granted 8-27-97 [whether the trial court erred in admitting computer printouts of appellant's criminal history under the business records exception to prove the existence of the prior felony convictions and prison terms].

People v. Nguyen (S064081) unpublished, granted 11-12-97 [whether, in two strikes case, subordinate offenses are one-third the midterm doubled or full strength consecutive].

Supreme Court Decides People v. Williams

The Supreme Court, in **People v. Williams** (S057534) 97 D.A.R. 99, recently held (1) minute orders failing to provide reasons for dismissing strikes are ineffective and should be remanded; (2) an exercise of discretion under Romero (or review of an exercise) hinges on whether, in light of the nature/circumstances of both present offense and strikes, and defendant's background, character and prospects, he or she "may be deemed outside the [three strikes] scheme's spirit"; (3) where a trial court abused its discretion in dismissing a strike and a defendant's decision to plead guilty was influenced by the court's indication of willingness to consider striking a strike, the defendant is permitted to withdraw his plea on remand; (4) although a party may forfeit the right to present an error to the appellate court under Scott by not preserving it below, the appellate court is not deprived of authority to reach the issue and may do so, within its discretion.■

Recent "CPC" Developments In The Fourth District

By Anna M. Jauregui, Staff Attorney

In People v. Mendez (1997) 58 Cal.App.4th 773, Division Two of the Fourth Appellate District ruled the defendant was barred from raising an issue challenging the validity of his guilty plea because he failed to request a certificate of probable cause under Penal Code section 1237.5, subdivisions (a) and (b) within 60 days after the judgment was entered, as required under California Rules of Court, rule 31(d). In so holding, the Court expressly disagreed with People v. Clark (1996) 51 Cal.App.4th 575 (Fourth District, Division One), and People v. Vento (1989) 208 Cal.App.3d 876 (Fifth District).

In order to raise an issue regarding the validity of a plea of guilty or nolo contendere or of an admission to a probation violation on appeal, section 1237.5, subdivision (a), requires a defendant to file

with the trial court a "written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings."

This written statement is known as a "request for a certificate of probable cause" or a "CPC" request. Section 1237.5, subdivision (b), requires the trial court to "execute and file a certificate of probable cause for such appeal ...." This statute does not set a time limitation on the filing of the CPC request.

Rule 31, however, does provide a time limit. Rule 31(a) states, in relevant part, "an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment ...." Under rule 31(a) to (c), an appeal becomes "operative" by simply filing the notice of appeal within the 60 days.

Rule 31(b) states, in relevant part, the notice "shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency."

Rule 31(d) specifies an exception to the normal process where guilty plea appeals are concerned. It states, in relevant part and with emphasis added, the "defendant shall, within 60 days after the judgment is rendered, file as an **intended** notice of appeal the statement required by section 1237.5 . . . ; but the appeal shall not be **operative** unless the trial court executes and files the certificate of probable cause . . . ."

In Mendez, the defendant filed a notice of appeal within the jurisdictional time limits. The only ground noted for the appeal at that time was the sentence or other matters occurring subsequent to the plea. On May 2, 1996, before the appellant's opening brief was filed but after the 60 days from the date judgment was rendered, appellate counsel filed a request for a certificate of probable cause in the trial court. The request was granted. Appellant filed his opening brief raising an issue concerning the validity of his guilty plea. The Attorney General responded by addressing the merits of the issue without challenging the procedure by which the CPC was obtained. Appellant later filed a supplemental brief raising a sentence credits issue. On its own motion, Division Two raised an inquiry as to the failure to request the CPC within 60 days of judgment. It subsequently held a CPC must be sought within that 60 day time limit.

In contrast, the appellate courts in Clark and Vento did not deem fatal the failure to request a CPC within the 60 days from the date judgment was entered. In Clark, like Mendez, there was another ground for the appeal noted in the notice of appeal. (People v. Clark, supra, 51 Cal.App.4th at p. 579.) In Vento, the opinion did not mention another ground for appeal.

Appellant Mendez filed a petition for review on December 1, 1997, arguing rule 31(d)'s 60-day time limit only precludes a belated request for a certificate of probable cause in those appeals in which the CPC request serves only as the **"intended"** notice of appeal.

In other words, under the normal process set forth in rule 31(a) to (c) an appeal becomes **"operative"** by simply filing the notice within the 60-day time limit. The record is prepared and other necessary functions take place. This would include notices based on the sentence or a motion to suppress or a combination of those two and, also, could include in the combination a challenge to the validity of the plea or admission.

However, if a defendant is **only** challenging the validity of the plea or admission to a probation violation, rule 31(d) permits the CPC request to also serve as the notice of appeal. The key word in rule 31(d) is **"intended"** as outlined above. It is a **provisional** notice of appeal because the trial court has not yet ruled on the CPC request.

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Based on the above, a defendant appealing from a plea or admission can choose from three options. First, file a notice of appeal listing as the basis of the appeal an error in sentencing or in a search and seizure ruling. In this situation, the defendant does not need a CPC to make the appeal "operative." Once the notice is filed within the 60-day time limit, the appeal is "operative" and the clerk

of the court commences the preparation of the record and other functions take place.

Second, a defendant can file **only** a CPC request, which is treated as a **provisional** notice of appeal by virtue of the rule 31(d)'s language "**intended** notice of appeal," until it is ruled on. Once the trial court rules on the request, the appeal becomes either operative or not operative, depending on whether the CPC is issued.

Third, the defendant can file an appeal from the sentence or from the denial of a search and seizure motion, and a request for a certificate of probable cause. In that case, his appeal is "operative" upon the filing of the notice of appeal, even though the trial court has not yet ruled on the CPC request.

If a defendant chooses to file only a CPC request, the 60-day time limit makes sense. Because there is no other document which is being filed, the rule treats the request for a CPC as an "**intended** notice of appeal" and states it will not be "operative" until the trial court "executes and files" the CPC. The trial court must render a decision on the CPC request within 20 days, to make sure the clerk will find out soon whether or not there is an operative appeal.

Logically, then, the purpose of the rule is to determine whether or not an appeal is "operative," not what issues can be raised in an operative appeal. Based on this reasoning, in Mendez the appeal was "operative" from the time the notice of appeal was filed because it was filed within the 60-day time limit and because it stated sentence or other matters occurring after the plea as the ground for the appeal.

Until the California Supreme Court resolves the issue, appellate counsel should continue in their efforts to obtain CPCs where needed in order to protect the client's interests. However, keep in mind the following. Division Two in the Mendez opinion suggested a defendant can seek relief for failure to obtain a CPC by filing a petition for writ of habeas corpus based on ineffective assistance of trial counsel. (People v. Mendez, supra, 58 Cal.App.4th at p. 783.) Recently, Division Two informed Appellate Defenders, Inc. a writ petition is necessary to pursue relief.

Going directly to the trial court to obtain a CPC, whether or not the appellate court has yet permitted the notice of appeal to be amended to include a challenge to the plea, can be beneficial in supporting a writ petition. If appellate counsel is successful in obtaining the CPC from the trial court, an argument can be made in the petition that, had trial counsel requested a CPC in a timely fashion, the trial court would have granted it and the grant of the CPC suggests the issue is not frivolous.

Division One's practice is essentially consistent with that division's decision in Clark. Appellate counsel should first seek and obtain the CPC in the trial court, even if it is beyond the 60-day time limit. If the trial court denies the CPC request, counsel can seek relief by filing a petition for writ of mandate. (See In re Brown (1973) 9 Cal.3d 679, 683; People v. Manriquez (1993) 18 Cal.App.4th 1167, 1170; People v. Warburton (1970) 7 Cal.App.3d 815, 820, fn. 2.)
Once obtained, the next step is to file a motion to amend the notice of appeal to include a challenge to the validity of the plea or admission. To date, there has been no published case in Division One challenging this process.

Appellate Defenders, Inc. is unaware of any published or unpublished opinions in Division Three in which the rulings are akin to Mendez. The practice in Division Three appears consistent with the principles of Clark.■

Petty Theft With A Prior Theft-Related Conviction

By Cindi Mishkin, Staff Attorney

There is a current issue brewing with respect to a petty theft with a prior theft related conviction (Penal Code sections 484/666) when a defendant has stipulated to the prior conviction.

In People v. Bouzas (1991) 53 Cal.3d 467, 480, the California Supreme Court resolved a split of authority in the Courts of Appeal and concluded "the prior conviction and incarceration requirement of section 666 is a sentencing factor for the trial court and not an 'element' of the section 666 'offense' that must be determined by a jury." Thus, the court reasoned, a "defendant ha[s] a right to stipulate to the prior conviction and incarceration and thereby preclude the jury from learning of the fact of his prior conviction." (Ibid.)

Because the prior conviction is a "sentencing factor" which would enhance a defendant's sentence, his stipulation is akin to an admission of a prior felony conviction which, pursuant to In re Yurko (1974) 10 Cal.3d 857, 863-864, would require the advisal and waiver of the right against self-incrimination and the right to confrontation, in addition to the advisal and waiver of the right to a jury trial traditionally taken during the stipulation, in order to be constitutionally valid. (See Boykin v. Tahl (1969) 395 U.S. 238 [23 L.Ed.2d 274, 89 S.Ct. 1709]; In re Tahl (1969) 1 Cal.3d 122; People v. Howard (1992) 1 Cal.4th 1132, 1176-1179.)

A case out of the Fifth District Court of Appeal is directly on point and supports this position. (People v. Shippey (1985) 168 Cal.App.3d 879.) A more recent case out of the First District Court of Appeal rejects this reasoning. (People v. Witcher (1995) 41 Cal.App.4th 223.) It is not clear whether the Shippey opinion was cited to the Witcher court before it made its decision, but the Shippey opinion is not discussed in the Witcher decision. Moreover, the fact that the court in Bouzas did not address this point should not be considered as a rejection of this argument. In Bouzas, the court only addressed the question before it: whether a defendant could stipulate to a prior theft-related conviction in the petty theft with a prior context and did not contemplate the requirements of such a stipulation. (People v. Heitzman (1994) 9 Cal.4th 189, 209 ["It is well settled that a decision is not authority for an issue not considered in the court's opinion."). ■

Psst, Wanna Win An Appeal?

By Stephen Gilbert, Panel Attorney

Penal Code section 186.22, subdivision (b) provides for a one, two or three year enhancement to the sentence for a felony committed for the benefit of a "Criminal Street Gang." Section 186.22 enhancements have become quite common, the "war" against gangs resulting in substantial sentences. Some of those sentences have recently been held to be unlawful.

In People v. Ortiz (1997) 57 Cal.App.4th 480, the Fourth Appellate District Court of Appeal held the one, two, or three year sentence enhancement provided for by Penal Code section 186.22 may not be added to a life term. When a defendant is convicted of murder and punished by a 15 or 25 year to life sentence, section 186.22 does not provide for an additional one, two, or three years added to that sentence.

Penal Code section 186.22, subdivision (b)(1) provides, "[e]xcept as provided in paragraph (4), any person who is convicted of a felony which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony," be subject to a sentence enhancement of one, two, or three years.

Paragraph (4)[1] [see endnotes] provides that "[a]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years

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have been served." These provisions limit the additional one, two, or three year term provided for by subdivision (b) to those felonies which are not punishable by imprisonment in the state prison for life. (People v. Ortiz, supra.) In Ortiz, the Attorney General conceded and the court held that section 186.22, subdivision (b)(4) permits only an extended parole term, but not a three year sentence enhancement. (Id., at p. 485.)

Even where there is no objection on the ground made by trial counsel, the Court of Appeal may reach the issue. Although a defendant generally must object to sentencing error to preserve the issue for appeal under People v. Scott (1994) 9 Cal.4th 331, 354, there is an exception to this rule for "unauthorized sentences." (In re Ricky H. (1981) 30 Cal.3d 176, 190-191.)

> "A sentence is 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (People v. Scott, supra, citing People v. Welch (1993) 5 Cal.4th 228, 235.)

A gang enhancement added to a life term is unauthorized. (People v. Ortiz, supra.) Penal Code section 186.22, subdivision (b) clearly provides the proper enhancement of a life term is not an additional term of years, but a 15-year minimum parole eligibility date.[2] This short argument should result in the removal of gang enhancement terms in gang murder cases.

ENDNOTES:

1 The subdivision has been variously numbered, first as subdivision (b)(2), now as subdivision (b)(4). Its text remains unchanged.

2 It is unlikely that a defendant convicted of a gang murder will be paroled in less than 15 years in any case.■

MISCELLANEOUS NOTICES

Brief Reminders

Lately, we have noticed some briefs were filed without the superior court case number. When preparing the opening brief, remember to put the superior court case number on the cover as well as the Court of Appeal number.

When filing extension requests, panel attorneys are reminded the Court does not favor the excuse the brief is late because it must be reviewed by ADI. The opening brief should arrive at ADI in plenty of time before the filing date.

When a brief is sent to ADI for a Wende review, an extension of time is frequently necessary. However, the extension request should **not** indicate the extension is necessary for a Wende review. On many occasions, a staff attorney identifies an issue. In such cases, it could be prejudicial for the Court to consider an issue on the merits while knowing a Wende brief was originally contemplated. Wording such as "I have reviewed the record and researched potential issues, but need to consult further with ADI before filing the brief," should be sufficient.

Similarly, an extension request should not disclose the attorney needs the extra time to secure an abandonment or advise the client of adverse consequences before proceeding with briefing. If the client does not abandon the case, the Court's curiosity might be piqued as to what the adverse consequences are or why the client was previously willing to drop his challenge to the conviction.■

Dependency Sade C. Briefs

Panel attorneys are reminded that all Sade C. briefs must be approved by an ADI staff attorney. Please inform ADI as early as possible when it appears the case may have no issues, as we do review the record. As noted in a recent mailing to panel attorneys, Sade C. briefs now have a different form in which issues are presented with citations to the law. Please consult the dependency "hot line," Carmela Simoncini, or Cheryl Geyerman for further details.■

Request For Judicial Notice

A request for judicial notice should be submitted to the Court of Appeal in a separate motion, served on all opposing parties, not in a footnote in the opening brief. (Fourth District Court of Appeal Local Rules, rule 8(g).) This requirement holds true even where appellant is proceeding in a second appeal from a conviction; for example, where the first appeal was partially successful and secured a remand for resentencing and the second appeal follows that resentencing. A separate motion is necessary to ensure the Court's ruling on the request. While the Court of Appeal may grant a request for judicial notice which is dropped in a footnote in an opening brief, it also may refuse to rule on such a request because it is not considered formally submitted to the Court.■

Area Code Changes

Many areas of California have recently been given new area codes. If your area code has changed, please send notification of your new area code on each pending appeal to the Court of Appeal, opposing counsel and ADI.■

Mileage Reimbursement Increase

On December 30, 1997, the Administrative Office of the Court informed us the state employee mileage reimbursement rate increased to 31 cents a mile. Panel attorneys can claim this amount for any trips after October 1, 1997. However, if a claim has already been paid, it would not appear a second claim should be filed just for the mileage.■

Video Link Between Courts Of Appeal In San Diego And Santa Ana

Video conferencing for oral argument is now possible in San Diego and Santa Ana. If your oral argument is in Santa Ana, you may elect to argue via closed circuit television at the Court of Appeal in San Diego, or vice versa. The pilot project began last year and has been operating for several months.■

Division One Home Page Is On The Internet

The Fourth District Court of Appeal, Division One, has a home page located at http://www.courtinfo.ca.gov. Among the features includes the oral argument calendar and the justices who will hear argument. A biographical profile is available on each justice, including pictures.■

California Criminal Appellate Practice Manual Available

The California Criminal Appellate Practice Manual, prepared by the Standing Committee on Legal Services for Prisoners, State Bar of California, is now on sale for $45. This is a "How To" manual, and was updated as of July 1997. If you are interested in purchasing the manual, please contact Leslie Ann Rose at ADI [(619) 696-0284, ext. 32].■

Justice Mosk Featured At The California Appellate Practice Seminar in February

Supreme Court Justice Stanley Mosk is the featured speaker at the tri-annual all-day appellate practice seminar presented by the Court of Appeal, Fourth District, Division One, on Saturday, February 28, 1998, at the Marriott Mission Valley Hotel. The Court of Appeal justices will address brief writing, oral argument, ethics, and the decision-making process, and will conduct a general question and answer session. Criminal and juvenile dependency topics will be discussed. Local appellate counsel are among participants in the program.

The program is sponsored by the Appellate Court Committee of the San Diego County Bar. More information may be obtained by calling the Bar at (619) 231-0781.■

CIVIL TONGUES

CIVIL TONGUES is not included in this issue, but will appear in the next newsletter.■

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.]

Romero Wins: J. Peter Axelrod, Christopher Blake, Dennis Cava, Irma Castillo, John Dodd, Carl Fabian, Robert Gehring, Harvey Goldhammer, Leslie Greenbaum, Katharine Greenebaum, Kimberly Grove, Handy Horiye, David Kelly, Ivy Kessel, Charles Khoury, David Macher, Ellen Matsumoto, Richard Moller, Diane Nichols/Steven Schutte, Gary Nelson, Shawn O'Laughlin, John Olson, J. Michael Roake, Terrence Scott, J. Courtney Shevelson, Howard Stechel, Jeffrey Stuetz, John Ward, A.M. Weisman, Harry Zimmerman

Dorothy Almour, In re Laverne S., #D028118, Although the Court of Appeal affirmed jurisdictional findings and removal of custody based on excessive discipline, it reversed a part of the disposition order which "purport[ed] to condition conjoint therapy on [father] first admitting he abused [the minor]..." The court noted father's acceptance of responsibility would presumably be an issue address during any therapy but should not be a condition of obtaining it. (I)

Joan Anyon, P. v. Zimmerman, #D025194, Romero remand on third strike and reversal of true finding on a strike because court erroneously decided the jury question of whether the prior conviction involved an assault with a deadly weapon and, hence, was a serious felony. (I)

Neil Auwarter, P. v. Gavan, #G019403, Five-year prior serious felony enhancements stricken because defendant's current offense, assault with a firearm (PC •245, subd.(a)(2)) is not a "serious felony" where defendant is convicted as an aider and abettor. (ADI)

Russell Babcock, 1) P. v. Soto, #D027268, Trial court erred in staying rather than striking three prison priors. (I) 2) P. v. Kasim, #D021800, Defendant's conviction of aggravated mayhem and conspiracy to commit aggravated mayhem reversed by Court of Appeal on habeas corpus based on prosecution's misconduct in not disclosing to the defense benefits afforded to key prosecution witness-accomplices. (A) 3) P. v. Sherrod, #D027124, Affirmance of People's appeal contesting trial court's granting of defendant's motion for new trial on the grounds that court's previous denial of defendant's request for a continuance denied defendant a fair trial. (I)

Sylvia Baiz, P. v. Lopez, #D025809, Receiving stolen property count reversed as LIO of vehicle taking. (A)

Steven Barnes, P. v. Leonardo G., #D027893, Sentence for battery stayed because crime was part of indivisible course of conduct that included assault with a firearm for which minor was punished. (A)

Susan Bauguess, P. v. Valtierra, #E019169, Trial court directed to correct abstract of judgment to reflect concurrent rather than possible consecutive term. (I)

John Bishop, P. v. Bagsby, #E016735, a) Insufficient evidence of false imprisonment by violence or menace where defendant not aware of victim's presence. b) Insufficient evidence to sustain true findings that defendants each used a handgun during the conspiracy, as no evidence defendants used handguns while agreeing to commit the robberies. c) False imprisonment by violence/menace not a LIO of charged crime - false imprisonment of a hostage (court so instructed over defendants' objections), and thus counts reversed. d) Under PC •654, defendant cannot be punished for both possession of firearm as an ex-felon & for other offenses (robberies, assault and false imprisonment). (I) (I)

Jill Bojarski, P. v. Ho, #G019119, Sentence modified to eliminate four years where court erroneously doubled gun enhancement in two strike case. (I)

J. Thomas Bowden, P. v. Lliles, #D026083, Burglary conviction reversed for insufficient evidence of specific intent. (I)

Philip Bronson, P. v. Dominguez, #E019034, Conditional reversal to permit trial court to conduct an in camera hearing re discovery of police officers' personal records of excessive force, if

any. If such discovery exists, new trial ordered; if not, judgment reinstated. (I)

Doris Browning, P. v. McMillan, #D026232, Matter remanded for new probation and sentence hearing. Trial court erred in concluding defendant's post-conviction claim of innocence showed lack of remorse which contributed to the denial of probation. (A)

Martin Nebrida Buchanan, 1) Washington v. DeMorales, 9th Cir., No. 96-55275: The Ninth Circuit remanded with instructions to grant a habeas petition originally denied by the federal district court, after affirmance by the Court of Appeal. The court found defendant asserted his right to remain silent during police interrogation, that his subsequent confession was involuntary and improperly admitted in evidence, and that the admission of the evidence was prejudicial. (A) 2) P. v. De La Cruz, #G016887, Two counts of forcible rape reversed because each was a LIO of rape in concert. (I) 3) P. v. Jackson, #D023707, Consecutive life term stayed under PC •654 when life terms imposed for both possession of firearm by felon and being under influence of methamphetamine while possession a firearm because acts were the same (possession of same firearm at the same time) and same intent and objective (sale of gun to obtain money to buy drugs). DA's theory of the case supported finding of same intent and objective. Also, conviction of being under the influence reversed because LIO, and error, though harmless, for DA to cross-examine defense expert on defendant's past arrests and convictions and to argue to jury that defendant's criminal history showed he knew right from wrong during sanity phase. (I) 4) P. v. McGee, #E018470, Abstract of judgment corrected to reflect actual pre-sentence credits of 1,213 days, where clerk erroneously recorded 214 days total credits. (I) 5) P. v. Harrison, #D025023/D025024/D024933. Where defendant sentenced on three separate three strike cases at the same time, trial court did not err by imposing the two PC •667, subd.(a)(1) prior conviction enhancements only as to one case and not as to any of the others. The overall sentencing scheme, see People v. Tassell (1984) 36 Cal.3d 77, directed that these "nature of the offender" enhancements be added only once as a component of the aggregate sentence rather than added as multiples of each new conviction. 2) When defendant is sentenced to multiple terms of conviction, calculated pursuant to PC •1170.12, the limitations of PC •1170.1, subd. (a) apply such that enhancements appended to any consecutive count which is not the base term are not full term enhancements, but 1/3 the mid-term. (I)

Susan Cardine, P. v. Dail, #D027827, $600 fine imposed pursuant to PC • 290.3 reduced to $200. (I)

Dawn Chan, P. v. Renteria, #D025322, Conviction of both attempted auto burglary and attempted auto theft requires one be stayed pursuant PC •654. (I)

Ward Clay, P. v. Ben M., #D023223, Remanded for calculation of maximum term of confinement. (I)

Janette Freeman Cochran, In re Anthony B., #G020483/G021240, Trial court's order reflecting reasonable services were provided or offered to mother was modified to reflect reasonable services were not offered. In a footnote, court states "alternatives ... should be vigorously explored." (I)

James Crowder, P. v. Riggs, #E019488, In three strikes case, trial court erred in applying PC

(Continued on page 14)

•2933.1 to limit presentence credits when current offense was not enumerated in PC •667.5 (I)

Rodger Curnow, P. v. Rico, #E017857, Partial reversal based on court's failure to instruct on the force necessary to constitute robbery (defense requested instruction) (I)

Michael Dashjian, 1) P. v. Moore, #E017694, Reversal because trial court erroneously removed a juror during the fourth day of deliberations and following two announcements of jury deadlock. (I) 2) P. v. McDonald, #E016735, a) Insufficient evidence of false imprisonment by violence or menace where defendant not aware of victim's presence. b) Insufficient evidence to sustain true findings that defendants each used a handgun during the conspiracy, as no evidence defendants used handguns while agreeing to commit the robberies. c) False imprisonment by violence/menace not a LIO of charged crime - false imprisonment of a hostage (court so instructed over defendants' objections), and thus counts reversed. d) Vicarious arming enhancements alleged in connection with an attempted murder count (jury found assault with firearm instead) for defendant did not apply as arming is an element of the charged offense. e) Under PC •654, defendant cannot be punished for both possession of firearm as an ex-felon & for other offenses (robberies, assault, and false imprisonment.) (A) 3) P. v. Rhone, #D025859, Trial court erred in staying rather than striking the prior prison term enhancement. (I)

Peter Dodd, P. v. Quick, #G018071, Published Opinion: Search of home made pursuant to protective sweep doctrine found illegal as authorities had no basis reasonably to believe third parties who might be found in home would pose a threat to them. (I)

William Drake, In re Dion A., #D027393, Dependency finding reversed where there was no current risk of harm, even though prior serious accidental injury has occurred. (A)

Glenn Durfee, P. v. Bland, #D025503, Court struck prison prior which trial court had erroneously stayed. (I)

Suzanne Evans, In re Kristine L., #D027191, Insufficient evidence father failed to support or communicate with minor or that he intended to abandon her in light of mother's concealment of minor's whereabouts. (A)

Linda Fabian, In re Jaime J., #E020245, Judgment freeing minor from custody and control of father reversed based on insufficient evidence of abandonment. (I)

Cliff Gardner, P. v. Borquez, #D026189, Defendant's 1988 Arizona assault conviction does not qualify as a "serious felony," because the People failed to prove the defendant intentionally or knowingly, rather than simply recklessly, committed the assault.

Stephen Gilbert, P. v. Ortiz, #G019145, Three year criminal street gang enhancement stricken, because PC •186.22, subd. (b), does not permit addition of enhancement to a life sentence but instead mandates a minimum parole eligibility date of 15 years for life sentences. (I)

Harvey Goldhammer, 1) In re Pedro P., #G020024, True finding on possession of assault weapon reversed, because statute listing banned assault weapons does not include the firearm recovered from the vehicle (a semi-automatic AP-9 machine pistol) and such weapon has not been identified as an assault weapon under PC •12276.5 (h). Court also erred in imposing consecutive terms. Two additional counts were stayed pursuant to PC •654. (I) 2) P. v. Bocanegra, #G018800, Court found that a violation of PC •246.3 may constitute a serious felony, but, here the proof was insufficient to prove that the prior was serious felony. The only document submitted to prove it up was the Tahl form. Reversed and remanded to allow prosecutor to prove it or forgo it. Double jeopardy not applicable citing People v. Monge. On remand, as a matter of judicial economy, trial court should consider the Romero issue. (A)

Laura Gordon, P. v. James, #D025933, Burglary count stayed where purpose of burglary was to commit lewd act. (I)

Mark Greenberg, P. v. Estrada, #E014741, Where trial counsel personally withdrew appellant's not guilty by reason of insanity pleas and indicated appellant did not understand the proceedings, the trial court abused its discretion in accepting the attorney's withdrawal. There was no possibility the court was able to evaluate whether appellant understood the consequences of the withdrawal, necessitating a reversal of the sanity verdicts.

Betty Haight, P. v. Hugo L., #E019198, Juvenile court erred in determining maximum term of confinement. (A)

Martha Hall, P. v. Taylor, #D026307, Trial court erroneously believed it was required to impose a consecutive sentence for appellant's probation violation to the sentence for appellant's current crime pursuant to the three-strikes sentencing scheme; remand for resentencing required. (A)

Thomas Hardy, In re Ryan A., #E019279, Jurisdictional and dispositional orders of juvenile court were reversed, where trial court entered jurisdictional order and findings at a pretrial conference, because mother failed to appear. The Court of Appeal held the juvenile court deprived mother of notice and opportunities to be heard, because the only notice provided related to a pretrial hearing, not a jurisdictional hearing where the allegations against her would be a adjudicated. (I)

Mark Hart, 1) P. v. Crawford, #E017734, Sentence of 25 years to life for attempted premeditated murder reduced to life with possibility of parole, pursuant to PC •664. The sentence for the attempted murder, and for the attached firearm enhancement, were then stayed pursuant to PC •654, where appellant was also convicted of conspiracy to murder the same victim. (I) 2) P. v. Ansaldo, #E018467, One-year prior prison term enhancement stricken as improperly imposed, because it had been dismissed. (I)

David Hendricks, 1) P. v. Trujillo, #D026354, Reversed for new sentence hearing. Trial court failed to comply with statutory duty to read and consider supplemental probation report after probation revocation. (A) 2) P. v. Dounias, #D025968, Concurrent terms for six counts of disobeying a protective order stayed pursuant to PC •654, where defendant was separately sentenced on six counts of making terrorist threats based on the same conduct. (A) 3) P. v. Gladwill, #D028016, Concurrent sentence for commercial burglary ordered stayed pursuant to •654, where appellant also sentenced for petty theft with a prior. (I) 4) P. v. McCruter, #D028831, The lower court denied presentence credits because a parole hold was placed on petitioner when he was arrested on the instant offenses. Court of Appeal granted the habeas petition and ordered the lower court to award presentence credit because the parole hold was based on the identical conduct charged in the instant offenses. (I)

Patrick Hennessey, P. v. Garza, #D026222, Trial court erred in denying motion to suppress evidence, where officer had no reasonable suspicion to detain, because although car lacked any license plates, it bore a valid temporary permit in rear window. (I)

R. Charles Johnson, P. v. Adam R., #D027535, Welfare and Institutions Code •654.2 requires the court to make an informal probation order before true findings are made on a petition. However, since it was clear the trial court did intend to order informal probation and such an order is inconsistent with true findings, court reverses true findings of guilt and dismisses petition. (I)

Rebecca Jones, 1) P. v. Cory L., #D027764, Juvenile disposition remanded for judge to find whether receiving stolen property was a misdemeanor or a felony. (A) 2) In re Otina S., #D027327, One count of attempted vehicle taking reversed for insufficient evidence;
case remanded for reconsideration of C.Y.A. commitment in light of reversal and for designation of a separate vehicle taking as either felony or misdemeanor. (A)

(Continued on page 16)

Susan Keiser, 1) P. v. Mikell, #D026452, Trial court abused its discretion by failing to grant a continuance when appellant's primary witness became suddenly ill and had to be hospitalized, rendering her unavailable to testify the following day at the trial. (I) 2) P. v. Dominguez, #E017913, Court erred by imposing enhancements to minor's sentenced under both •12022.5 (personal use of a firearm) and •12022.7 (infliction of great bodily injury.) Remanded for stay of 3 year enhancement imposed for GBI. (A) 3) P. v. French, #E020055, Conviction for receiving stolen property stricken because defendant cannot be convicted of stealing and receiving the same property. (A)

David Kelly, P. v. Gailord, #D025518, Three strikes conviction (30 years to life) reversed where trial court erred in preventing cross-examination and admission of evidence which bore on defense that no robbery had occurred and where prosecutor committed Doyle error. (I)

Thomas Mauriello, In re Bill G., #G019671, Court reversed gang enhancement finding based on insufficient evidence. (A)

Ivy Kessel, P. v. Clark, #E018514, Conviction following jury trial reversed with directions to conduct a Marsden hearing which the trial court neglected to hear. (I)

Charles Khoury, P. v. Peregrina, #G018831, Involuntary admission to strikes prior where defendant not advised of his confrontation and self-incrimination rights. Defendant had little education and experienced confusion during the proceedings. (I)

Daniel Koryn, 1) P. v. Scott, #D025860, Two knife use enhancements stricken because of insufficient evidence. Case remanded for resentencing to allow trial court to determine whether it wishes to make subordinate terms concurrent where court believed strike law mandated consecutive sentences. (I) 2) P. v. Graves, #E020018, Four counts of aiding an inmate to escape reversed for insufficient evidence of specific intent to assist escape of the inmates on those counts. (I)

David Lampkin, P. v. Muse, #E018723, Failure to instruct on the elements of possession in a drug case. (A)

John Lanahan, 1) P. v. Puckett, #D027084, Second strike Romero remand because trial court's sentencing statements raise a doubt whether it exercised informed discretion when it refused to strike the strike prior. (I) 2) P. v. Cendejas, #D025263, Evidence of possession of cocaine and marijuana for sale was insufficient (and case remanded for dismissal) where evidence only established that appellant was a momentary guest and there was no indicia of his dominion or control over the premises or contraband. (I) 3) In re Jerry M., #D026400, Court found in case of 11 year old defendant, there was insufficient evidence to support finding of intent to constitute a violation of PC •288, subd. (a). Court found there was insufficient evidence defendant touched victims with specific intent to specifically arouse himself. (A)

Stephen Lathrop, 1) P. v. Harris, #G018613, Conviction of petty theft with a prior stricken as an LIO of the robbery. (A) 2) P. v. Mitchell, #E018376, Restitution award reduced to one victim from $5,000 to $2,000. (I)

Marsha Levine, In re Forrest, #G021018, Denial of •388 motion was an abuse of discretion (unique factual scenario). (I) 2) In re Kimberly F., #G021018 (Writ #G022312), Writ of mandate granted vacating order by juvenile court directing a bonding study (bonding study was to be used against appellant by taking advantage of events occurring during pendency of appeal). (I)

David Macher, P. v. Bencomo, #E017814, One count of grand theft reversed, because trial court abused its discretion when it permitted the prosecutor to amend the information after both parties had rested. (I)

Lee Madinger, P. v. Davis, #E019049, Forty-one days of additional credit awarded after trial court erroneously applied three strikes limitation to pre-judgment custody which is not affected by the limitation. (A)

Kathleen Mallinger, In re Steven D., #E018988, Visitation order reversed and remanded where trial court conditioned visits on request by children. The reviewing court held the order allowed the children unrestricted control over visitation with mother and was an abuse of discretion. (I)

Gregory Marshall, 1) P. v. Hayley, #E017695, Evidence insufficient to support robbery conviction or special circumstance findings that murder was committed during the course of a robbery or burglary. Judgment modified to reflect grand theft conviction rather than robbery. Remand for

resentencing. (I) 2) P. v. Duran, #G018894, Remand to trial court to consider whether offenses should be reduced to misdemeanors under PC •17(b). (I)

Marilee Marshall, P. v. Millsap, #E017918, Appellant's plea was unconstitutional where the record is devoid of any evidence, either express or circumstantial, indicating that defendant was intelligently aware of and voluntarily relinquished her rights. Additionally, this error required reversal of the trial court's sanity finding. (I)

Janice Mazur, P. v. LaChapelle, #D025969, Conviction on PC •148(a) reversed, because LIO of •69 based on "accusatory pleading" test. PC •654 stay on •69, because convictions for •69 and •243 arose from same facts. (A)

Martha McGill, P. v. Fuentes, #E019052, Abstract of judgment corrected to reflect the gun use enhancement attached to count 3, not count 1, pursuant to the plea bargain and the oral pronouncement of the judge. (I)

Michael McPartland, 1) P. v. Graves, #E018789, Murder special circumstances reversed because trial judge did not properly instruct on mental state for an aider and abettor. Retrial not barred by double jeopardy. (I) 2) P. v. Anthony, #E019312, Trial court erred in imposing a concurrent sentence on count 2 (possession of cocaine base for sale), because appellant was convicted in count one of selling the same cocaine. Therefore, count 2 ordered stayed pursuant to PC •654. (I)

Paula Mendell, P. v. Korby, #D027519, Trial court erred in staying rather than striking the prior prison term enhancement. (A)

Richard Miggins, P. v. Bryant, #E018666, Fraudulent insurance claim involving a vehicle does not constitute "use" of vehicle supporting a VC •13350 (mandatory license revocation) finding. (A)

Stephen Miller, P. v. Wilkins, #D024435, Receiving stolen property reversed as LIO of theft. (A)

Ralph Novotney, Jr., In re Scott C., #G020591, Maximum confinement period for juvenile corrected downward because trial court miscalculated. (A)

John Olson, P. v. Diaz, #D027621, Sentence imposed for possession of a controlled substance for sale ordered stayed pursuant to PC •654 where other conviction was for selling a controlled substance. (A)

Sung Park, In re Lucanus K., #D026928, First degree burglary true finding reversed with directions to enter a second degree finding. No evidence that burgled garage was attached to home or that minor took keys to car from home during a break-in as opposed to when he was an invited guest at the house. (A)

Sharon Rhodes, P. v. Donnie M., #D028015, True finding that defendant violated PC •601.1, subd. (b), reversed on basis of insufficient evidence. (A)

David Rankin, P. v. Henson, #E018074, •4019 presentencing credits for third strike defendant ordered where Three Strikes scheme does not permit application of •2933.1's limit on credits, unless the defendant's crime is violent under PC •667.5. (ADI)

J. Michael Roake, In re Hector C., #D027016, Insufficient evidence to sustain minor's burglary conviction where minor's presence on stairs below the burglarized apartment was insufficient to prove he knew about the burglary or intended to facilitate it. Hearsay statement admitted to show defendant's intent was improperly admitted as a statement of a co-conspirator (EC •1223) because it was made several days after the crime and not during or in furtherance of the conspiracy. (I)

Sharon Rhodes, P. v. Valentine, #D025735, Conviction reversed where evidence was insufficient to establish the "sustained fear" element of making a terrorist threat, PC •422. (A)

Lynda Romero, P. v. Jones, #E018547, Published case. Three assault with a firearm convictions reversed where court failed to give requested instruction, CALJIC No. 9.00. Simple kidnapping conviction reversed as LIO of

(Continued on page 18)

kidnapping for robbery for robbery. 25 years to life sentence under PC •667.61, reversed where trial court's implied finding that offenses were committed on separate occasions was not supported by substantial evidence. (I)

Leslie Ann Rose, 1) P. v. Pinedo, #E018626, Insufficient evidence to support attempted murder conviction in gang shooting, where victim was lying on the floor of a van and no evidence to show appellant was aware of her presence. 2) P. v. Pineda, #D028051, Via Fares letter, appellant awarded an additional 143 days of presentence custody credits. (ADI)

Richard Schwartzberg, P. v. Smith, #E018184, Trial court erred in imposing a consecutive term for kidnapping for sodomy count, because the intent for kidnapping was to facilitate the sexual offense. (I)

Patricia Scott, P. v. Thompson, #D026701, Conviction for assault with a firearm reversed, because it was a LIO of assault with a semi-automatic firearm. (ADI)

R. Clayton Seaman, P. v. Kennedy, #E018803, Complete reversal. Defendant was charge with passing a fictitious note for payment from a non-existent financial institution (PC •476). Jury was instructed only as to PC •476(a), which concerns passing insufficient funds checks. Thus, the jury was given no guidance as to what constitutes fictitious note or given an opportunity to determine whether institution was in existence. Also, no evidence to support non-existence of institution. Second count of burglary reversed, where the jury was instructed it must find defendant passed a forged instrument, but the jury was not given the legal or technical definition of a "forged instrument." (I)

Alice Shotton, In re Dion A., #D027393, Dependency finding reversed where there was no current risk of harm, even though prior serious accidental injury has occurred. (A)

Athena Shudde, P. v. Carey, #D027137, Sentence vacated upon concession by People that trial erred in failing to apply PC •1170.1(a) to consecutive terms under PC •667(e)(1). Trial court had ordered full strength consecutive doubled sentences for a current conviction and a violation of probation. Sentence remanded for recalculation. (I)

Michael Sideman, P. v. Cheatham, #E019409, Trial court ordered sentences to run concurrent, then recalled defendant and sentence offenses consecutively, because it thought three strike law applied. Since prosecutor had alleged no strikes, consecutive sentences not mandated. Court of Appeal modified sentence to original concurrent term. (I)

Carmela Simoncini, P. v. Colon, #G019198, Conviction for possession of methamphetamine reversed because court improperly denied appellant's motion to suppress evidence. Appellant arrived at the residence where police were conducting a probation search vis-a-vis the resident, and was detained. After confirming appellant's ID and the fact he was not a resident, the officers proceeded to conduct a warrant check, yielding an outstanding warrant, for which the officers conducted a more extensive search incident to the arrest. The Court of Appeal held that officers were justified in detaining defendant to ascertain his ID and connection with the house being searched. However, after it was confirmed appellant was not connected to the house further detention was not authorized without specification and articulable facts implicating appellant in criminal activity. (ADI)

Stuart Skelton, P. v. Adkins, #D025675, Conviction of possession of a check in violation of PC •475a is a necessarily LIO of PC •470 (forgery of a check) and thus must be stricken; also, Romero remand. (A)

Barbara Smith, 1) P. v. Rudy Marquez, #G018830, Prior serious felony enhancements (PC •667, subd.(a)) which were stayed by trial court ordered stricken as inapplicable, because defendant's current offense was not a "serious felony." (I) 2) P. v. Samano, #E019398, Trial Court erred in limiting presentence custody credits to 20% in strikes case; 91 additional days awarded. (I)

Laurance Smith, P. v. Vasquez-Guzman, #D027929, Conviction reversed for failure to advise the defendant of his rights prior to taking a "slow plea." (I)

John Staley, P. v. Martinez, #D026055, Officer's removal of cocaine from defendant's crotch area exceeded scope of Terry search. (I)

Theresa Osterman Stevenson, 1) P. v. Ahlschlager, #D026503, One count of PC •288, subd. (a) reversed because not separate incident from other PC •288, subd. (a), count. (A) 2) In re David R., #D028295, True finding of unlawful possession

of an aerosol paint container reversed for insufficient evidence. (A) 3) P. v. Leavel, #G019670, Abstract of judgment modified to reflect no PC •667, subd. (a)(1) enhancement found true, where abstract erroneously reflected stay of that enhancement. (A) 4) P. v. Mowreader, #D028132, Restitution fine reduced from $200 to $100 where true finding of misdemeanor. (A)

Andrea St. Julian, In re Victoria V., #G020945, Dispositional finding was reversed, and the juvenile court was directed to place the child with the non-offending parent. A pre-adjudication failure to protect may not serve as the basis of a detrimental finding. (A)

Jeffrey Stuetz, 1) P. v. Williams, #D024990, Third strike Romero remand even though trial court had ruled at sentencing that sentence was not cruel and unusual punishment. (I) 2) P. v. Lopez, #D025965, Trial court directed to stay sentence pursuant to PC •654, where second count imposed concurrently, showed indivisible course of conduct. (I)

Joseph Tavano, In re Steven D., #E018988, Allegation of severe emotional distress in youngest sibling's petition ordered stricken, where the trial court had dismissed the allegation from the petition of the older sibling to whom it related. On remand, appellate court also directed trial court to state facts upon which removal of youngest child was based. (I)

Stephen Temko, P. v. Hendrix, #D026711, Count of hit and run driving reversed for failure to instruct on the elements of the offense. (I)

Maura Thorpe, P. v. Garcia, #G019867, Case remanded where trial court mistakenly refused to consider CRC evaluation, because it had already sentenced defendant. (I)

Roberta Thyfault, P. v. Broome, #D024081, Attempted first degree murder reversed, where trial court instructed with CALJIC No. 1.22 instead of 8.11. (I)

Beatrice Tillman, 1) P. v. Robert Z., #E018712, 1) True finding on "armed" enhancement stricken because PC •12022(a)(1) is an element of the offense of willful and negligent discharge of a firearm (•246.3). Also, remand for juvenile court to declare whether "wobbler" offenses are felonies or misdemeanors pursuant to In re Manzy W.. 2) P. v. Cortina, #E016568, Trial court erred in doubling the terms imposed for the gun use enhancements on several counts. Appellant's sentence reduced accordingly. 3) P. v. Paul Collins, #G020353, Petition for rehearing granted. Court vacated original opinion affirming and reversed and remanded for new trial on enhancements only. Evidence was insufficient to prove that appellant "personally used" a dangerous weapon so as to qualify the out-of-state priors as strikes. (ADI)

Michael Totaro, P. v. Chernik, #G019510, Concurrent sentence for burglary stayed pursuant to PC •654 where appellant entered residence with single criminal objectively of sexually assaulting victim. (I)

Robert Trujillo, P. v. Rocha, #E018676, Abstract ordered corrected to reflect 344 rather than 324 days of credit. (A)

Patricia Ulibarri, In re Jaime R., #D027918, True finding of malicious discharge of a firearm at a vehicle reversed for insufficient evidence juvenile either shot the gun or aided and abetted in shooting. (I)

Robert Visnick, P. v. Doan, #G020746, Appellant was improperly convicted of petty theft with a prior where petty theft was a LIO of robbery for which he was also convicted. (I)

Jerome Wallingford, 1) P. v. Cohn, #E017703, Reversal of first degree murder conviction based on erroneous instruction of felony murder based on torture. (I) 2) P. v. Herrera, #D026418, Punishment for resisting arrest and possession of a firearm stayed pursuant to PC •654. (I)

Michael Weinman, P. v. Escalante, #D025640, Reversal based on court's failure to instruct that receiving property based on a mistaken good faith belief nullifies necessary intent to steal. (A)

Richard Weinthal, In re Marshall D., #D027150, True finding reversed where juvenile court did not permit defense counsel to complete

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an offer of proof and would not admit relevant evidence which could have lent credibility to minor's testimony. (A)

Lizabeth Weis, 1) In re Jose R., #E019708, Maximum confinement time reduced for minor by two years, because court erred in entering convictions for receiving stolen property and car jacking based on same vehicle, course of conduct. (A) 2) In re Felipe M., #D027661, Juvenile court finding of involuntary manslaughter reversed for insufficient evidence minor who shot at and killed friend was criminally negligent. (A)

George Winkel, P. v. Navarrete, #D025980, One-year consecutive term for battery with serious bodily injury stayed pursuant to PC •654 where battery was incidental to robbery. (A)

Sharon Wrubel, 1) P. v. Griffin, #E016735, a) Insufficient evidence of false imprisonment by violence or menace where defendant not aware of victim's presence. b) Insufficient evidence to sustain true findings that defendants each used a handgun during the

conspiracy, as no evidence defendants used handguns while agreeing to commit the robberies. c) False imprisonment by violence/menace not a LIO of charged crime - false imprisonment of a hostage (court so instructed over defendants' objections), and thus counts reversed. d) Vicarious arming enhancements alleged in connection with an attempted murder count (jury found assault with firearm instead) for defendant did not apply as arming is an element of the charged offense. 2) P. v. Mendoza, #G018872, Court reversed conviction of petty theft with a prior because that offense is an LIO of robbery. Also, Romero remand. (I)

Harry Zimmerman, P. v. Conner, #E018892, Riverside D.A. Arthur Chang negotiated a plea with the defendant when his counsel was not present. He convinced the defendant to accept an extra year on his sentence in return for a Cruz waiver. Chang then both testified and appeared for the prosecution at the motion to withdraw the plea. The trial court abused its discretion in failing to allow the defendant to withdraw his plea. (I)■

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