APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

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NOTES FROM THE DIRECTOR
by Elaine A. Alexander
Executive Director

At the third quarter of 1998, I'd like to offer some status reports on matters affecting the panel.

Claims

As usual, we experienced some delays in claims payments because of the state's failure to pass a timely budget. By gearing up for the annual "June crunch," we did process the claims that reached us by the prescribed dates in June, and even those that arrived after those dates but before July 1.

We have previously issued a "heads-up" advisory that the claim form will be changing in the near future. We have been working with the Administrative Office of the Courts on it. All of us are aware of the need for advance notice and a transitional period, to allow providers of computerized claim forms to make needed changes and for attorneys to acquire the modified programs.

Hourly rate and appointment policies

The proposed change to $85 an hour for cases now paid at $75 (e.g., independent jury trial homicides, serious sex offenses) and to $75 for all other independent cases has been adopted in the 1998-1999 budget, and will go into effect October 1, 1998. The new rate structure may heighten interest in how we select attorneys for cases and especially how we decide whether appointments will be assisted or independent.

As explained in an earlier article, ADI uses separate rotations for offering "premium" rate cases, those currently at $75 an hour. We will probably continue to use the special rotations for $85 an hour cases. The most experienced attorneys with the highest qualifications receive the largest proportion of these cases, because the cases tend to be complex and serious.

The criteria for making appointments independent or assisted are unlikely to change, despite the new payment structure. As we have pointed out repeatedly for the last several years, judicial policy is to favor independent cases and to use assisted cases as a way of training and promoting attorneys whenever possible. In general, therefore, we can say that a case will be independent unless it is especially suitable for training purposes or for some other reason needs to be assisted.

Most assisted-case training is offered to attorneys who are relatively inexperienced but show promise of being able to handle independent cases after a reasonable period of guidance. We find that shorter jury trials, contested probation revocation or juvenile delinquency proceedings, search and seizure pleas, and similar short-to-middle length cases with fairly readily identifiable issues tend to be

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most suitable for this kind of training.

Some assisted-case training is used to help attorneys who now handle simpler independent cases prepare for more complex ones. We most often choose moderately serious and somewhat complex, but not extremely lengthy cases for this purpose.

Always there is the possibility that assisted cases will be needed simply to cover caseload, because attorneys able to handle new appointments on an independent basis are unavailable. (Unavailability may be absolute -- i.e., the attorney cannot or will not accept the case. It may also be a judgment on our part that, even if the attorney were to accept the case, he or she could not handle it with acceptable quality and timeliness.) While the caseload-coverage use of assisted cases has been uncommon in the Fourth Appellate District over the last few years, we know that circumstances change. For example, some of the most experienced attorneys may decide to accept new death penalty cases, or general economic conditions may promote movement toward other areas of practice.

In 1997-98, ADI recommended 2,839 appointments. Of the panel appointments, about 75% were independent. There were 10,503 appointments throughout California; about 64% of statewide panel appointments were independent. (The percentage calculations do not count project direct-representation cases or appointment of minor's counsel in dependency appeals.)

Feedback to panel

We started our pilot project for giving systematic feedback to panel attorneys on May 1. The computer program allowing us to reproduce parts of the internal evaluation was not then completed, and so we had to prepare the feedback on a separate form. Now, however, the program is running as intended.

In the first two months, we sent 37 feedback evaluations to panel attorneys. Of those, 31 were automatically sent because the case was one of the attorney's first eight on the panel and 4 because the grade was less than satisfactory. We received 2 requests for evaluations from attorneys eligible to request them (one of first eight independent cases, any assisted case, any attorney formally on a probationary status with us). Most comments in the evaluations have been positive, and we have received very few letters from attorneys correcting or responding to comments.

We will assess the pilot program after six months and then, unless it has generated substantial problems (which so far hasn't happened), continue it for six more months before making a more permanent decision.

Multiple Current Felonies in Strikes Cases

By Diane Nichols, Staff Attorney

In People v. Hendrix (1997) 16 Cal.4th 508, the California Supreme Court held consecutive sentences are not mandated under the strikes law where the current felonies are not "committed on the same occasion" or do not arise "from the same set of operative facts" (Pen. Code 667, subds. (c)(6), (c)(7), 1192.7, subds. (a)(6), (a)(7)). (Id. at p. 512.) Where such offenses are committed on the same occasion or arise from the same set of operative facts, the trial court retains discretion to impose concurrent or consecutive sentences. (Id. at p. 514.)

The issue left undecided in Hendrix -- whether the analysis for determining if subdivisions (c)(6) and (c)(7) is coextensive with the analysis for determining if section 654 permits multiple punishment -- was recently decided in People v. Deloza (1998) 18 Cal.4th 585. The court concluded that "committed on the same occasion" and arising "from the same set of operative facts is not coextensive with section 654 analysis for multiple punishment; section 654 is irrelevant. The court gave the phrase "committed on the same occasion" its commonly understood meaning, that is, "a close temporal and spatial proximity between the acts underlying the current convictions". Thus, although section 654 may not preclude multiple punishment (e.g., a violent crime against multiple victims), subdivisions (c)(6) and (c)(7) do not mandate consecutive sentencing. The trial court in Deloza having indicated it misunderstood the scope of its discretion to impose concurrent sentences for the current convictions, the case was remanded for resentencing.

In light of this favorable opinion, appellate counsel should review all active and final two and three strikes cases where there were multiple current felonies, whether or not the issue of consecutive vs. concurrent

sentencing was raised in the court of appeal. In cases not yet final, counsel should file appropriate supplemental briefing. The "temporal and spatial proximity" definition is expansive and, until limited by case law, should be argued as encompassing many fact patterns. The phrase "arising from the same set of operative facts," not yet having been construed, should also be applied broadly.

As occurred in People v. Superior Court (Romero) (1996) 13 Cal.4th 497 [court has discretion to dismiss strikes under 1385, subd. (a)], the courts may require a petition to be filed in the trial court where the record is silent (i.e., no indication in record court was unaware of consecutive vs. concurrent sentencing discretion). (See, People v. Fuhrman (1997) 16 Cal.4th 930, 941-947.) All the reasons in the dissent in Fuhrman as to why relief should be available on appeal apply, and, if raised by the Attorney General, should be argued. More importantly, however, the reasoning of the majority in Fuhrman -- en masse remand of large number of inmates from prison for Romero hearings is not wise use of scarce judicial resources -- is completely inapplicable here, because the volume of cases affected is quite small. Therefore, if necessary, it should be argued the procedure laid out in People v. Belmontes (1983) 34 Cal.3d 335, 348, fn. 8 applies.

In cases which are final, counsel should contact trial counsel to determine whether a petition has already been filed and, if not, whether it is appropriate for trial counsel to file one. (Note: The San Diego County Public Defender has already filed petitions in many final cases, particularly those with fact patterns similar to Deloza [i.e., multiple robberies/assaults, multiple victims]. If the client signs an authorization for the file to be released, that office will also file petitions in appropriate cases where there was retained counsel at trial.)

When reviewing cases and advising clients, remember unauthorized sentences (i.e., sentences entered in excess of the court's jurisdiction to impose) are subject to correction at any time they are brought to the attention of the court. (See, In re Harris (1993) 5 Cal.4th 813, 842.) A Deloza petition necessitates a review of sentencing, which may expose an unauthorized sentence in the client's favor and result in correction, to the client's disadvantage. A writ may reveal potential adverse consequences not noticed by the Attorney General or Court of Appeal during the appeal, or decisional law published since your case was final might have created an adverse consequence for the client. Always review the case to reassess adverse consequences already noted and spot any previously undiscovered adverse consequences. Even if the client was warned during the appeal, re-advise the client during any communications about the possibility of a petition.

Please Remember to Federalize

By Alisa A. Shorago, Staff Attorney

Why federalize: Although we are appointed to represent our clients in state court, it is good practice to "federalize" issues whenever possible so that our clients are not precluded from raising a claim in federal court via petition for writ of habeas corpus.

Federal courts will not consider a claim in a habeas corpus petition if it has not been exhausted in state court and will not deem a federal constitutional claim exhausted unless it was specifically identified as a federal claim in the state court proceedings. (Duncan v. Henry

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(1995) 513 U.S. 364 [130 L.Ed.2d 865].) A claim will not be considered even if the state court's resolution of the non-federalized issue necessarily would be dispositive of a federalized issue. (Ibid.)

Federalizing may also help a client in state court. For instance, if the error in question requires a showing of prejudice, federalizing the error generally will allow an argument that the proper standard of prejudice is Chapman, not Watson.

Accordingly, whenever a claim even arguably presents a federal constitutional issue, counsel should federalize the issue.

What should be federalized: Although a number of claims obviously implicate the federal constitution as well as state law (e.g., ineffective assistance of counsel), other errors that may be federalized are not so obvious. For instance, the clear misapplication of state statute or state Supreme Court decisional law may constitute a deprivation of federal due process. (Hicks v. Oklahoma (1980) 447 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227] [sentencing statute created liberty interest in right to jury sentencing].) Accordingly, counsel should consider federalizing such issues as Penal Code section 654 errors, claims of insufficiency of evidence of prior convictions, etc. (Although it is very difficult to prevail on such a claim in federal court, the claim still should be federalized to ensure that the client will have the opportunity to have the issue decided on the merits in federal court.)

Other issues that should be federalized include claims of insufficiency of evidence of substantive offenses (Jackson v. Virginia (1979) 443 U.S. 307 [61 L.Ed.2d 560, 99 S.Ct. 2781]); any trial error, including instructional error or evidentiary error that "so infused the trial with unfairness as to deny due process of law" (Estelle v. McGuire (1991) 502 U.S. 62, 75 [116 L.Ed.2d 385, 112 S.Ct. 475]; see also Duncan v. Henry, supra [admission of prejudicial evidence in violation of Evidence Code section 352 may implicate federal due process clause if the evidence is so inflammatory as to prevent a fair trial]); and, of course, any error which arguably lessens or shifts the prosecution's burden of proof beyond a reasonable doubt [In re Winship; Mullaney].)

How to federalize: Federalizing for the purposes of securing federal review need not take much time or space. It appears it may be sufficient in some cases merely to include a sentence to the effect that the error in question has deprived the defendant of federal due process under the Fourteenth Amendment. For instance, if counsel were to argue the trial court misapplied section 654, counsel might include in the discussion the following sentence or something similar: "The court's misapplication of section 654 also has deprived defendant of federal due process under the Fourteenth Amendment. (Hicks v. Oklahoma (1980) 447 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227].)"

Miscellaneous Notices
Alert! Filing Early Claims in Wende AND Sade C. Cases

Generally, appointed counsel submit a single, final claim in cases in which an opening brief has been filed pursuant to People v. Wende or In re Sade C. Since counsel have been required to await issuance of the opinion before filing the claim, this procedure has resulted in delayed payment.

The Appellate Indigent Defense Oversight Committee has considered this matter and finds that a single claim is still appropriate in these cases. However, appellate counsel may now choose whether to file that claim either (1) after the time has passed for the court to receive a supplemental brief filed by the appellant or (2) after the opinion is filed.

If counsel elects to file the final claim before the opinion issues, no additional compensation may be sought in the case. There would be an exception in cases where the claim is submitted after the time expires for a pro per brief to be filed and the court requests supplemental briefing. Under these circumstances, appointed counsel would be allowed to tender a supplemental claim after the opinion is filed.

Corrections To Briefs

When a correction to a brief is necessary, there may be a question as to whether or when a completely new AOB would be necessary instead of a simple erratum letter. It depends upon the extent of the "erratum." If it is, for example, the correction of a word or one sentence, an erratum letter is sufficient. If, however, the correction or modification is more

extensive, Division Two for example wants a completely new AOB. Division Two can note a small correction either by pen-and-ink correction or stapling a small erratum on to the briefs. However, if it is not a small correction, there can be no assurance that the briefs were corrected accurately.

"Telephone" Extensions

Sometimes counsel call in for a "telephone extension," promising to mail something that day but failing to do so. Be aware that at least one court is now entering the names of any such attorneys into their case management and will no longer extend the courtesy of a "telephone extension" to any attorney who fails to keep his/her promise. Please remember to follow through on promises you make to the Court of Appeal. Otherwise, all appellate counsel may find the courts less willing to accept such assurances by telephone.

Notice Regarding San Diego Dept. of Social Services

A letter dated 8/11/98 from San Diego County Counsel stated that the San Diego Co. Dept. of Social Services has now been brought under the San Diego County Health and Human Services Agency. The Dept.'s Children's Services Bureau, which provided services to dependent children no longer exists as a separate bureau. As such, HHSA is now the governmental organization handling the cases of dependent children in San Diego County.

The letter advised: "Please be advised that future correspondence from this office, including briefing on appeals and writs, will reflect this change. Should you have any questions...." call Gary Seiser at (619) 495-5546.

New Appellate Courthouse In Riverside

The new Courthouse in Riverside is coming along. Exterior stucco has been added, and interior drywalling is in process. Scheduled completion is November, 1998.

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.]

Dorothy Almour, In re Andres G., #D029494, In an appeal after the disposition hearing in which the trial court found it would be dangerous to return the children to the parental home, gave physical custody to the Department of Social Services, ordered the children placed with relatives, but immediately detained the children with the parents with the consent of all the parties, the Court of Appeal in a published decision, calling the hearing a "nonstatutory disposition," held the orders were in excess of the court's jurisdiction which vitiated the consent. (I)

Patricia Andreoni, P. v. Aubrey, #G021616, Published decision holding PC 667, subd. (a), finding does not deprive sentencing court of its discretion to grant probation, where defendant is otherwise eligible. (I)

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

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

In In re Kelley L. (1998) 64 Cal.App.4th 1279, the Second District Court of Appeal reversed an order terminating dependency jurisdiction. In that case, six minors were involved in a dependency petition which was filed in 1993, alleging they were periodically exposed to violent confrontations between their parents. The children were detained with their mother.

The case was punctuated by appeals filed by the father. It was also punctuated by review hearings at which dad appeared but counsel did not. In September, 1995, the department recommended terminating jurisdiction with exit orders. It was put over to October due to counsel's failure to appear, and culminated with an order to show cause issued against counsel re sanctions for failing to appear. When counsel did finally appear, he informed the court there were still appeals pending from prior orders and opposed termination of jurisdiction. The court terminated jurisdiction subject to proof there was another appeal pending.

In April, 1996, father appeared but his attorney did not. Father requested a continuance because his appeal was still pending and the court had not issued an opinion yet. It was continued until October 1996, with all prior orders still in effect and the prior order terminating jurisdiction stayed pending the appeal. While dad appeared at the hearing, his attorney did not, so the court directed father to notify his attorney.

In May, 1996, the minors requested the court to terminate jurisdiction. Father's counsel was notified of the hearing, but did not appear. Minor's counsel was directed to notify father's attorney. While there was notice to father's attorney, there was no evidence father had received notice of this hearing. In June, father's counsel requested a continuance, but the court denied it, and terminated jurisdiction. Minor's counsel informed the court there had been a stipulation regarding visitation prior to her moving out of state, and offered to prepare exit orders based on that stipulation. The court directed minors' counsel to prepare the order and serve a copy on father's counsel. Father's counsel appeared at the next hearing, and objected to the proposed order; father was not present. The court asked minors' counsel to rewrite the exit order and mail it to father's counsel. Father's counsel requested, however, that the order staying the termination of jurisdiction remain in effect until the appeals were concluded. The court denied the request, stating the appeal appeared to be specious.

At the next hearing, in August, 1996, neither father nor his attorney were present when the court received the family law order and signed it. The father appealed contending he was not given notice of the proceedings. The Court of Appeal reversed, citing the language of Welfare and Institutions Code, section 388, which requires notice to such persons as described in section 386, which in turn specifies notice to the parent or guardian. The notice requirements are also included in the Rules of Court, rule 1431(c).

By not giving notice to the father vis-a-vis the August hearing, he was deprived an opportunity for input regarding the substance of the exit orders. As a result, the exit order required monitoring of his visits and phone calls. The court agreed father should have been given notice, although in footnote 9 the court was careful to point out it was not implying there was any impropriety regarding the exit orders.

Division Two of the Fourth Appellate District has determined that a man who is not a "presumed father" is not entitled to notice of jurisdictional/dispositional proceedings, in In re Genesha S. (1998) 63 Cal.App.4th 1206. If there was any question whether unwed fathers were the second-class citizens of the nineties, the current trend -- manifested in the recent statutory amendments which allow reunification services to be provided only to presumed fathers, as well as case law -- should eliminate any doubt.

In Genesha, the child was born with a positive

toxicological screen for cocaine, and the mother had a long history of substance abuse. The mother had given a false name in the hospital, and refused to name the father. Genesha was detained, and notices of the pending jurisdictional proceedings were sent to the mother at her last known address, but her current whereabouts were unknown. At the jurisdictional/dispositional hearing, the allegations of the 300(b) petition were found true, and reunification services were denied. The court found notice had been given as the law requires.

Sometime after that hearing, the new social worker learned the name of Genesha's father, performed an absent-parent search, and located Eugene in state prison. She sent him notice of the Welfare and Institutions Code section 366.26 hearing, and counsel was subsequently appointed to represent him. In the meantime, Genesha had been placed with maternal cousins, outside the state, who wished to adopt. Prior to the .26 hearing, Eugene filed a 388 petition, seeking to set aside the orders made at the jurisdictional/dispositional hearing, on the ground he had not been given any notice. At the hearing, his counsel did not call any witnesses to testify, and, after argument, the petition was denied on the ground a biological father who is not a presumed father is unentitled to any notice until the section 366.26 hearing.

The Court of Appeal disagreed with the reason for the denial of the petition, but affirmed it nonetheless. After analyzing the California precedents, it observed the trial court's reasoning was troublesome because it would mean a "quasi-presumed" father under Adoption of Kelsey S. (1992) 1 Cal.4th 816 would not be entitled to notice, despite coming forward promptly and demonstrating full commitment to parenting, and because it assumes the department will automatically know with certainty, from the moment the petition is filed, which alleged fathers are presumed fathers and which are not.

However, in this case the Court held Eugene was not entitled to notice because, at the time of the detention hearing, and until after the disposition hearing, his identity and whereabouts were unknown, and could not be ascertained with due diligence, within the meaning of the statutes requiring notice to parents. Also, the father's due process rights were not violated because he did not file an action to establish paternity, and did not demonstrate a full commitment to parenting. Citing Lehr v. Robertson (1983) 463 U.S. 248 [77 L.Ed.2d 614, 103 S.Ct. 2985], it noted the mere existence of a biological link does not merit equivalent constitutional protection. Therefore, it held a quasi-presumed father is entitled to notice of the jurisdictional and dispositional proceedings, and not merely the 366.26 hearing, but a mere biological father has no constitutionally protected liberty interest in his relationship with his child. "He simply has no relationship to protect." (Id., [98 Daily Journal D.A.R. at 5038].)

Therefore, it's official: a biological link is good enough to give rise to constitutional protection for a mom, married or not, committed to parenting or not; however, a biological link is not good enough to give rise to any constitutional protection for a father. Notice that in situations where the mother unilaterally prevents the unwed father from learning of his paternal status, by refusing to tell him of the pregnancy and birth, refusing to put his name on the birth certificate, and refusing to tell the department of his identity, a perfectly wonderful dad may be prevented from ever taking part in the proceedings, and will inevitably suffer termination of parental rights (Continued on page 8)

without so much as a postcard.

B. Dispositional Issues

The Second District recently granted the county's application for an extraordinary writ directing the trial court to vacate its order permitting unmonitored visits. In Los Angeles County Dept. of Children and Fam. Svcs. v. Superior Court (Juan S.) (1998) 63 Cal.App.4th 1299, the minor was declared dependent based upon a petition alleging the minor's father had stabbed a woman in 1985, and the mother had stabbed her daughter (not the minor in this case) to death in 1986. Both parents were found not guilty by reason of insanity in their separate cases, and had been institutionalized. They were released from Patton under a supervised community release program and begat Victor in 1996. Neither parent had been legally restored to sanity.

Victor was declared a dependent finally in July, 1997, and custody was removed. Reunification services were ordered and monitored visitation was authorized. In September, 1997, the parents filed a 388 petition, requesting modification of the "jurisdictional" order and a 60 days visit, as a trial return to parental custody. The hearing was conducted in October, 1997, at which the department's case worker testified he was unaware of any professional opinion that it would be unsafe to return the child to the parents' care. The father also testified, describing hallucinatory episodes he had suffered in 1992 and 1995. No other experts testified.

Indeed, the court declined the mother's attempt to cross-examine the social worker concerning a report by a court-appointed psychologist, Dr. Crespo, and disallowed testimony from her therapist. The department objected to admission of Rosa's therapist's report and declined to receive any expert reports in evidence. However, excerpts from the proffered report would have illustrated the professionals were not unanimous in concluding the parents posed no danger to Victor. Dr. Crespo had recommended return despite his acknowledgment that another psychologist had reached the opposite opinion, and noted that the father was still on psychotropic medication and had negative feelings about the medication.

The court modified the prior order to allow the parents unmonitored overnight visits in the expectation of eventually granting the 60 day visit. The department requested a stay to bring the writ. On review, the Court of Appeal held the trial court failed to support its conclusion that unmonitored visits were safe for Victor. It observed that Welfare and Institutions Code 362.1 authorizes orders for parental visitation with minors, with the proviso that no visitation order shall jeopardize the safety of the minor.

The court went on to observe that at the jurisdictional hearing, the court found clear and convincing evidence that Victor's continued residence with his parents was substantially dangerous; it further observed that in order to modify this finding/order, it was incumbent upon the parents to show changed circumstances or new evidence to depart from the court's earlier conclusion.

In this case, the only "new evidence" was the social worker's testimony that he was unaware of any professional who was opposed to return, and the trial court declined to hear expert testimony or consider expert reports. The reviewing court thus concluded the social worker's testimony was insufficient to support the finding, by a preponderance of evidence, that modification was justified.

Bottom line: The department's witness can testify there is no danger in returning a child to parents's custody, county counsel does not need to offer evidence to refute or contradict it, and may even object to other testimony or reports which would contradict it, and the County is still permitted to appeal and obtain relief from the Court of Appeal. Waiver principles apparently apply only to parents and their counsel who fail to dot all "i's" and cross all "t's."

Division One of the Fourth Appellate District recently reversed a dispositional order which placed the children with the Department of Social Services, but detained them with their parents. In In re Andres G. (1998) 64 Cal.App.4th 476, the San Diego County agency was again chided for its unauthorized, nonstatutory dispositional scheme. The court stated it was troubled by, "what at least appears to be, the artifice of making a finding that it is necessary to remove a child from the physical custody of the parents, and, thus, place custody with Department, and then immediately place the child physically back in the home.

Not only does such a procedure entail an unseemly inconsistency, its effect is to either remove children from the home under circumstances the Legislature did not authorize or to place children in a dangerous setting." (Id., at p. 481.)

The court went on to address the County's claim that the father failed to object to the court's use of the nonstatutory dispositional scheme by holding the issue was not waived. It concluded the judgment was in excess of the trial court's jurisdiction. The court's act, even if agreed to by all, systematically contravenes a comprehensive statutory scheme operating in an area of special social interest and has the effect of reconfiguring the responsibilities of the court and the Department in a manner not contemplated by the Legislature. (Id., 64 Cal.App.4th at p. 483.)

The Court of Appeal did find moot the issue relating to the propriety of ordering a psychological evaluation of the father, who was the nonoffending, noncustodial parent, because the evaluation had already been completed. The court acknowledged that while it may be that often, but not always, the issue will be moot before it can be reviewed on appeal, the appropriateness of any given order is so case-specific that little use would be served by its review of the matter in any given case. The court thus suggested if a parent believes an order requiring submission to a psychological evaluation is improper, he may always seek redress by way of writ. (In re Andres G., supra, 64 Cal.App.4th at p. 483-484.)

The Fifth District Court of Appeal has ruled that an incarcerated parent may not be denied visitation based solely on the age of the child. In In re Dylan T. (1998) ___ Cal.App.4th ___ [98 Daily Journal D.A.R. 7940], Dylan was found to be a dependent child under Welfare and Institutions Code section 300, subdivision (b), due to his mother's failure to protect Dylan due to her substance abuse, and subdivision (g), due to her incarceration. The court ordered no visits if the mother was incarcerated. At the disposition hearing, the court considered the social worker's report, which contained information regarding the mother's conviction for possession of a controlled substance and her one-year jail sentence. The social worker included in the report the opinion that due to the minor's young age, visits while the mother was incarcerated would be detrimental to the minor. The report also recommended reunification services for the mother. At the hearing, the court adopted the social worker's recommendation: ordered no visits while the parent was incarcerated. It further ordered if mother were transferred to a residential treatment program, she could have one visit per month.

On appeal, the reviewing court reversed this dispositional order. First, it noted the issue was not moot despite the fact mother had already been released to a treatment center, relying upon the legal principle that an issue is not moot if the purported error infects the outcome of subsequent proceedings, and citing In re Joshua C. (1994) 24 Cal.App.4th 1544, 1548. It concluded the issue of visitation will not only prejudice a parent's interests at a section 366.26 hearing but may virtually assure the erosion (and termination) of any meaningful relationship between mother and child, citing In re Monica C. (1995) 31 Cal.App.4th 296, 307. It then noted that mother's release did not alleviate all damage from the purported error since she had been denied visitation, due to Dylan's young age, since she was incarcerated, and her relationship with him was subject to erosion during this time.

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Further, although released to a residential treatment facility, she remained subject to incarceration, and, if reincarcerated, she would again suffer the consequence of no visitation.

Finally, because Dylan was under the age of three when removed from mother's custody, his case is on the dependency "fast track" which permits a juvenile court to terminate services after only 6 months. Because reunification efforts could be terminated after six months, the court concluded the lack of all opportunity for visitation during a significant portion of this time is an error which could infect the outcome of subsequent proceedings.

On the merits, the Court of Appeal analyzed several leading cases discussing the importance of visitation, and reasonableness of orders limiting or denying visitation rights of incarcerated parents. It concluded from the cases that visitation between an incarcerated parent and a minor cannot be arbitrarily determined based on factors which do not show by clear and convincing evidence that visitation would be detrimental to the minor. (In re Dylan T., supra, [98 Daily Journal D.A.R. at p. 7942-7943].) The Legislature could have set forth a statutory presumption that visitation with an incarcerated parent by a child of a young age would be detrimental based on age alone, but it did not. The court's finding was therefore not supported by substantial evidence.

Division Three of the Fourth Appellate District recently upheld an order denying reunification services, denying a petition for writ of mandate/prohibition. In Randi R. v. Superior Court (1998) 64 Cal.App.4th 67, it affirmed the juvenile court's conclusion it was not in the child's best interests to attempt reunification based upon the parent's previous failures to rehabilitate.

Randi has had 4 children. The oldest lives with an aunt out of state. The second child, Dallas, was the subject of a petition alleging neglect when he was found crossing a busy intersection at age 4 (the opinion does not say whether his mother had told him to go play in traffic), and when Randi was found to be in possession of drugs when she arrived at the police station to pick him up. A reunification plan was ordered and Dallas was returned to her custody in 1991.

Three years later, Dallas and Adrian, child number 3, were removed based upon allegations of physical and emotional abuse and the risk posed by Randi's use of drugs. The opinion does not outline the allegations of the petition, or mention whether the allegations of abuse related to specific acts committed upon the children, or if they were merely recitations of the statutory language of Welfare and Institutions Code section 300, subdivision (b). That same year, the fourth child, Christopher, was born with a positive toxicology screen, so he, too, was removed.

In 1995, Adrian and Christopher were returned to Randi upon her completion of a drug treatment program. Dallas stayed in foster care because of severe behavioral and emotional problems. Nevertheless, in 1997, Randi found herself overwhelmed and called SSA to pick up the children. But before they arrived, Randi dropped them off at a friend's house for 2 days. She was arrested for drug possession about a month later, and the children, who had been left unattended, were taken into custody and new proceedings instituted.

The court affirmed the premise found in Welfare and Institutions Code section 361.5, subdivision (b)(10), over Randi's assertion that Dallas's nonreturn was based upon problems unique to himself, and not relating to any failure on her part to rehabilitate. The Court of Appeal observed the language of subsection (10) makes no reference to why reunification did not occur; it merely authorized denial of reunification services whenever reunification with a sibling previously failed. The court went on to question Randi's entire premise, accusing the mother of refusing to accept the connection between the abuse she repeatedly inflicted upon Dallas (which is not described in the decision other than the incident where he was unsupervised in traffic) and the emotional problems he developed as a consequence (which is also lacking in connective tissue since there is no discussion of any expert testimony or evaluations of Dallas attributing his emotional and behavioral problems and delays to any abuse by the mother).

Citing In re Joseph B. (1996) 42 Cal.App.4th 890, the court concluded that when a parent causes severe emotion damage to her child, the failure to reunify is attributable to the parents conduct, even where she completes any and all rehabilitation programs. (Id., 98 Daily Journal D.A.R. at 5367.)

Reviewing the legislative history underlying the amendments to section 361.5, subdivision (b), the court concluded the Legislature intended to prevent parents from causing additional emotional and/or physical harm to successive children when such harm prevented the return of a previous child, even when the parent has apparently cured her own problems. (Randi R. v. Superior Court, supra, 64 Cal.App.4th at p. 72.)

As to the finding under section 361.5, subdivision (b)(12), which applies whenever the parent has a history of extensive, abusive or chronic use of drugs or alcohol and has resisted prior treatment for the problem during a three-year period immediately prior to the filing of the petition, Randi had argued she neither refused nor failed to comply nor resisted prior treatment, and pointed to her "successful" completion of two drug programs. The court noted that while she "technically" completed the rehabilitation programs, her failure to maintain any kind of long-term sobriety must be considered "resistance" to treatment. (Id., at p. 73.)

Here's what I don't get: there is not a single mention by the Court of Appeal of any **current** circumstance justifying the denial of services, nor any evidence connecting any prior mistreatment of Dallas to any present risk vis-a-vis the other children. Nor does the court mention any psychiatric reports establishing a nexus between Dallas' behavior and any conduct of the parent. Whether or not the mother "inflicted" emotional abuse on Dallas, there was no mention in the opinion how the old facts and prior circumstances justified the denial of services on other children in the current proceedings. Absent such a nexus, I see a serious due process problem.

C. Review Hearing Issues

In Andrea L. v. Superior Court (1998) 64 Cal.App.4th 1377, the Second District Court of Appeal denied a petition for extraordinary relief following the trial court's termination of services and denial of mother's request for a contested permanency planning hearing. The three children involved in the dependency had been placed out of home since 1996 pursuant to a petition alleging excessive punishment, a history of drug use which rendered mom periodically unable to provide regular care, and violent altercations between parents. The case plan required mom to submit to individual counseling, parenting class, domestic abuse counseling, conjoint counseling with two of the minors, and drug counseling including random testing.

In April, 1997, mom had enrolled in a drug program, but the social worker 'could not verify' her participation. Mom had also enrolled in parenting classes, but had not enrolled in a domestic violence class or individual counseling; also, her visitation was sporadic. In August, 1997, mom was located in county jail. She was released in September, 1997, and enrolled in parenting class, drug counseling and individual counseling; she also commenced random drug testing and all tests were negative for samples actually submitted in November, 1997, January, 1998, and February, 1998. However, she failed to test on several dates between October, 1997, and January, 1998, and one test in January came back positive.

Mother's drug program was scheduled to be completed in March, 1998. Although mother's visitation had improved, the social worker recommended termination of services in the February, 1998 report. At the referral hearing, mother's attorney disagreed with the recommendation and requested a contested (Continued on page 12)

hearing. At the court's insistence, counsel made an offer of proof that counselors at the drug treatment facility would contradict the county's characterization of mother's progress as "back to square one" on the basis of the isolated positive drug test, and that aside from that lapse, mom had been in complete compliance with the plan. Their prognosis was that mother would successfully complete the program, and recommended continuation of the reunification process. The court denied the request for a contested hearing, terminated services, and referred the matter for a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26.

On review, the Court of Appeal held it was not a denial of due process to refuse mother's request to set a contested hearing. The reviewing court acknowledged the denial of the hearing was error, pursuant to the holding of In re Johnny M. (1991) 229 Cal.App.3d 181. But it concluded the failure to set a contested hearing was harmless because the social worker's recommendations were supported by substantial factual information and cross-examination would not have altered the result. The court observed that the trial court accepted mother's offer of proof, but it had correctly determined the showing would be insufficient to warrant either return of the children to the mother's custody, or an extension of family services. However, even if the mother's relapse had been an isolated incident, the trial court was justified in its ruling because the incident was too recent, and there was evidence of other missed tests around the same date. (Andrea L. v. Superior Court, supra, 64 Cal.App.4th at p. 1386-1387,)

On the issue of whether services should have been extended another four months to permit the mother to complete the drug treatment program, the Court of Appeal found there were no extraordinary circumstances which prevented mom from completing the reunification plan within the time frames, and mom did not contend the services provided were not reasonable. the court cited several published cases in which services were ordered extended. It concluded that in each case the reason for not being able to complete the plan within the statutory limit was due to some extraordinary circumstance. From this, it concluded that in order to justify extending services beyond the 12 month or 18 month date, a parent must show either that the services were not reasonable or that some force beyond parental control prevented completion of the plan requirements. Interestingly, the court cited no language in the statute, nor any language in any of the cases to support this conclusion. (Id., 64 Cal.App.4th at p. 1388.)

Since the failure of the case plan in this case was not caused by inadequate services or an external force over which mother had no control, but by the mother's relapse. The court held the trial court was justified in concluding mother's relapse does not constitute extraordinary circumstances or special needs necessary to support an extension of services beyond the statutory date.

FREEDOM FROM CUSTODY CASES

This case may have some cross-over with the paternity section, but since there were no cases in this section, I decided to put it here. The Second District Court of Appeal recently reversed an order denying reunification services to, and terminating the parental rights of, an unwed father. In In re Julia U. (1998) 64 Cal.App.4th 532, the minor was born to a teenager who suffered emotional and mental problems interfering with her ability to meet the baby's needs. The presumed father was a man with an extensive criminal history who was named on the birth certificate. Paternity testing was completed on December 2, 1996. At the disposition hearing conducted on December 23, 1996, Julia was removed from mother's custody but allowed to reside with her so long as the mother remained in her own foster home. The paternity tests showed that the man presumed to be Julia's biological father was not.

In March, 1997, a Welfare and Institutions Code section 387 petition was filed due to the mother's rough treatment of the minor. In the course of these proceedings, "a new alleged father" had been named, but DSS had not located him yet. Later that same month, the county filed a section 388 petition, which, for the first time, named appellant, himself a minor, but the department stated appellant's whereabouts were unknown. In May, 1997, a new 388 petition was filed, seeking termination of services to the mother, because the mother had signed a relinquishment of her parental rights. The department acknowledged in this petition that appellant was willing to take a paternity test, and

sought an opportunity to reunify with Julia, but averred he had no established relationship with the child. At the hearing on this petition, appellant voluntarily appeared and stated his commitment in court. Although the court ordered paternity testing, it would not appoint counsel until the testing was complete. Before paternity testing was conducted, the court terminated all reunification services, and determined appellant had not established either his paternity or a relationship with the minor.

The testing had still not occurred in June, 1997, because a court order was needed to get appellant's mother to sign the "stipulation" for his blood testing. By August, 1997, at a special paternity hearing, the court announced the testing revealed appellant was Julia's father, and appointed counsel for him. In September, appellant's new attorney requested reunification services for him, but the court insisted this issue be raised in a 388 petition. The court denied appellant's request for visitation. A few weeks later, appellant's counsel filed a section 388 requesting that appellant be declared Julia's presumed father, and requesting services as well as physical custody. The trial court denied the petition because it was in the minor's best interests to deny services "given the present posture of the case and the lack of significant effort by [appellant] to establish a relationship with the child." (In re Julia U., supra, 64 Cal.App.4th at p. 539.) On October 20, 1998, his parental rights were terminated and an appeal ensued.

The judgment was reversed. The reviewing court acknowledged only a presumed father is entitled to reunification services, and a father must fall within one of several categories enumerated in Family Code section 7611 in order to achieve the status of presumed father. However, if an unwed, biological father promptly comes forward and demonstrates a full commitment to his parental responsibilities, his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. (Id., 64 Cal.App.4th at pp. 540-541.) The court went on to distinguish this case from that of In re Zacharia D. (1993) 6 Cal.4th 435, based on the fact appellant had no way of knowing he was the biological father prior to the results of the blood testing, due to the mother's promiscuity (multiple relationships resulting in 3 persons named as possible fathers) and the fact appellant's relationship with her was a casual and transitory one. Indeed, the mother did not inform anyone appellant might be the father until the blood tests showed the presumed father was not the father. Moreover, the Court held the department's unreasonable delay in establishing appellant's paternity was without justification.

Finally, the Court commented that the trial court erroneously focused solely on the minor's best interest, overlooking appellant's recognizable interest in his parentage. It held the court's refusal to allow him the opportunity to prove his presumed father status and his fitness as a parent contravened the statutory scheme. The termination of services occurred prior to any consideration of the trial court of appellant's commitment to Julia and his fitness to parent.

PATERNITY CASES

Ah, Fatherhood. Where were we. Oh, yes: In April, the California Supreme Court issued its decision in Dawn D. v. Superior Court (1998) 17 Cal.4th 932, holding that an alleged biological father of a child who is born to woman who is married and living with her husband, has no fundamental liberty interest in establishing a

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parental relationship with a child, sufficient to defeat the statutory presumption favoring the husband. The Court held that the presumption created by Family Code section 7611, and the standing rule embodied in section 7630, preclude an alleged biological father from establishing his paternity of a child born during the mother's marriage to another man.

In Dawn D., the mother and her husband had separated when she began a live-in relationship with the biological father. After two months, however, she returned to her husband, pregnant with the other man's child. Prior to the child's birth, the biological father filed an action to establish a parental relationship, seeking eventual visitation. He even completed a parenting course. Eventually, a son was born to Dawn, and was received into the home of her husband. When negotiations between the biological father and the mother for visits and child support broke down, Dawn filed a motion for judgment on the pleadings in the paternity action.

The trial court denied Dawn's motion on the grounds the biological father had satisfied the criteria to

meet the definition of presumed father. Dawn petitioned for extraordinary relief but the Court of Appeal denied the petition.

On review by the Supreme Court, the court noted that had mother been residing with the husband when the child was conceived, the husband would be conclusively presumed to be the father. The facts of this case gave rise to a rebuttable presumption the husband is the father. Nevertheless, the Uniform Parentage Act restricts standing to challenge the rebuttable presumption of the husband's paternity to the child, the child's natural father, or a presumed father. The Act thus precluded the biological father from bringing the paternity action.

The court distinguished the holdings of Adoption of Kelsey S. (1992) 1 Cal.3th 1272, and Michael H. v. Gerald D. (1989) 491 U.S. 110 [105 L.Ed.2d 91, 109 S.Ct. 2333], by pointing to a distinction drawn by the high court in the latter case between an unwed father's interest in maintaining and preserving an existing parent-child relationship and claim that an unwed father's biological connection alone gives rise to a protected liberty interest.

In her concurring opinion, Justice Kennard points out that a man who wishes to father a child and ensure his relationship with that child can do so by finding a partner, entering into a marriage and undertaking the responsibilities marriage imposes. (Dawn D. v. Superior Court, supra, 17 Cal.4th at p. 947.) Justice Chin dissented, being of the opinion that the biological father had a constitutionally protected interest in the **opportunity** to develop a relationship with the child, with which opinion Justice Mosk concurred.

In the Fifth Appellate District, the appellate court affirmed the dismissal of a paternity proceeding on the ground the natural father, who was the mother's second husband, lacked standing. In Miller v. Miller (1998) ___ Cal.App.4th ___ [98 Daily Journal D.A.R. 5438], the mother had been married to Michael and had 3 children during this marriage. The couple separated in 1991, and mother moved in with father's brother, Gary. She informed Gary that the youngest of her children, Samantha, was his child. Michael and the mother divorced in 1993, the family court ordering joint legal and physical custody to both, with an order that the children shall reside with Michael except for specified periods of time. Samantha spent approximately half the time with each parent under this arrangement.

Mother and Gary married in 1993, and attempted to modify the custody arrangement after moving to a new county. Ultimately, Gary filed the paternity action after obtaining laboratory results which determined Gary was the biological father of Samantha, "assuming that no close biological relative could also be the father." (Id., 98 Daily Journal D.A.R. at p. 5438.) Michael made a motion to quash the complaint on the ground Gary lacked capacity or standing to bring the action, which motion was granted.

On appeal, the court observed Gary had to overcome 2 hurdles in order to prevail: First, the trial court found he failed to establish presumed father status; second, Michael is the conclusively presumed father and the presumption can only be rebutted under limited circumstances. As to the first, the court noted that under Family Code section 7630, subdivision (b), any interested party can bring an action to determine the existence of the father/child relationship presumed under section 7611, subdivision (d).

Thus, a broad class of men, including alleged fathers, can bring an action to establish paternity when the claim is based on the presumed father status which is obtained by virtue of receiving the child and openly acknowledging paternity. Therefore, Gary had standing as an interested party to pursue a claim of paternity, but he could not establish he was a presumed father because the living situation was not tantamount to receiving the child into the home because Gary lived with the mother who had a joint custody order. As Samantha's stepfather, Gary would have Samantha in his home regardless of any paternity claim.

As to the second prong of presumed father status, the court concluded the evidence belied Gary's claim he has continuously acknowledged Samantha was his child ever since learning he was her father. It noted that Michael was named as the father in the dissolution judgment, which was entered over one year after Gary was informed of his possible paternity. He did not assert his paternity claim either before or during this time. Additionally, Michael had been paying child support for Samantha the whole time without objection

from Gary. These facts countered Gary's claim he had openly held himself out as the father since 1991.

Finally, and perhaps most significantly, the court held the conclusive presumption that Michael is the father could not be rebutted by Gary. Family Code sections 7540 and 7541 refer to the conclusive presumption and the manner in which it may be rebutted. Significantly, subdivisions (b) and (c) of section 7541 limit who may make the motion for blood tests to the husband, the child, the mother, and the "presumed father." Further, there is a 2 year time limit within which such a motion may be made. The court held the blood tests obtained by Gary could not, of themselves, override the conclusive presumption because they were not authorized by section 7541 inasmuch as they were neither ordered by the court, nor performed by court appointed experts. Moreover, they were not performed within 2 years of Samantha's birth, and Gary lacked standing to request them since he did not satisfy the criteria for presumed father status.

On July 16, 1998, review was dismissed, on stipulation of the parties, and the cause was remanded to the Court of Appeal, Second Appellate District, Division One, in the case of Steve H. v. Wendy S. (1997) [formerly at 57 Cal.App.4th 379], S064838. That was the case where a man sought to recover damages for emotion distress he suffered in response to his former wife's effort to terminate his parental relationship with the daughter of the marriage, by offering blood test evidence in dissolution proceedings showing he was not the biological father. The decision discussed public policy concerns surrounding interspousal tort actions.

Since the Supreme Court did not order re-publication of the Court of Appeal decision, my reading of Rule 976(d), California Rules of Court, gives rise to the conclusion the former decision is not citable.

INDIAN CHILD WELFARE CASES

Division One of the Fourth Appellate District has held that only clear and convincing evidence is required for termination of parental rights under the Indian Child Welfare Act [ICWA], but reversed a judgment terminating parental rights for insufficient proof of active remedial efforts directed at remedying the basis for parental termination proceedings. In In re Michael G. (1998) __ Cal.App.4th __ [98 Daily Journal D.A.R. 4433], the court held, as a matter

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of first impression, that in California "clear and convincing" proof is the applicable standard.

In this case, Michael and Larissa G. are twins who were born prematurely to Clyde, who is a registered Navajo Indian, and Gina, who has five other children, the three youngest of which are dependents as a consequence of Gina's inability to control her anger. In 1994, the parents submitted on the petition which alleged domestic violence and abuse of a sibling as well as abuse of another child, and the children were placed in a confidential placement. The parents were ordered to comply with a reunification plan.

By 1995, both Gina's and Clyde's progress and compliance with reunification plan requirements was noted to be lacking. In September 1995, the Navajo Nation requested transfer of jurisdiction, and the Department of Social Services (DSS) requested a change of placement to the home of a paternal aunt and uncle on the Navajo reservation in Arizona. Gina opposed these motions, and the trial court ruled she lacked veto power over the decision, transferring jurisdiction and placing the children in the relatives home in Arizona. In 1996, the orders transferring jurisdiction and suspending visitation were reversed, with directions the children remain in Arizona pending the outcome of the hearing on remand.

However, by that time, June, 1996, both Gina and Clyde were incarcerated. The trial court resumed dependency jurisdiction and set a 12 month review hearing [beyond the 18-month date], and deferred ruling on the visitation issue until that time. At the 12-month hearing, the court found reasonable services had been provided and return would be detrimental, so it terminated services and set a hearing pursuant to section 366.26. Gina did not raise the visitation issue at the hearing, and neither parent raised the issue of inadequate services in a Rule 39.1B writ.

At the contested .26 hearing, parental rights were terminated and adoption selected as the permanent plan. On appeal, Gina and Clyde each challenged the termination of rights using the clear and convincing evidence standard, and challenged the sufficiency of evidence to support the findings that active efforts had been made to prevent the breakup of an Indian family. The Court of Appeal affirmed. It concluded that the insertion of a specific standard of proof for termination of parental rights in subdivision (f) of 25 U.S.C.S. 1912, but not in subdivision (d) evidenced the intent that no specific federal standard applies to a determination under the latter section. Subdivision (d) prohibits termination of parental rights absent the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

As to the parents' claim that there was insufficient evidence to support the finding of adequacy of DSS's remedial efforts, the court compared the federal statute's reference to "active efforts" with the reasonable services required under state law and concluded they were undifferentiable. It did acknowledge that under the ICWA, the court is required to take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe and use the available resources of the extended family, tribe, Indian social service agencies and individual Indian caregivers. It observed that, with minor exceptions, after the July 19, 1995 hearing, the reunification services provided by DSS were "essentially nil." (Id., [98 Daily Journal D.A.R. at p. 4437].) During the time jurisdiction had been transferred to the Navajo Nation, DSS offered neither parent any remedial services. It treated the case as closed even though the mother's appeal was pending. The Nation's social workers had no contact with either parent throughout the reunification period because the parents resided in California. Also, the parents lost their court-appointed attorneys when jurisdiction was transferred so there was no one to protect their interests during much of the reunification period. Thus, through no fault of the parents, the court's erroneous transfer of jurisdiction resulted in a lengthy hiatus in services, supervision and representation.

The court closed the opinion with a final note on the not-bright prospects of the parents and the tragic fact that more than three years later, Larissa and Michael remain without permanence and stability. However, it declined to reduce the statutory reunification period simply because the parents are not expected to comply or succeed. It also instructed the trial court on remand to reconsider the mother's visitation issue, which it failed to do on the prior remand.

The ink had barely dried in the Michael G. case when the Fifth Appellate District adopted a different spin. In In re Alicia S. (1998) 65 Cal.App.4th 79, the reviewing court concluded the ICWA applied regardless of a child's or family's subjective relationship with the tribe or Indian heritage. In Alicia S., the mother is 3/8 Paiute Indian, enrolled as a member of the Paiute Tribe in Bishop, California, and the father is 1/2 Pima Indian, enrolled as a member of the Gila River Indian Community in Arizona. The four children who were the subject of the dependency were not eligible for membership in the mother's tribe, but were eligible for membership in the father's tribe. They were so enrolled in 1995.

The mother appealed from the order terminating parental rights; the trial court made the orders upon finding that neither parent had any significant relationship with the Indian community, and it refused to apply the ICWA to the proceedings. In so doing, it relied upon "existing family doctrine," the validity of which has been the subject of considerable debate.

The reviewing court analyzed all the major decisions. It shared the trial court's concern for a dependency child's interest in permanence and stability, which may, in some cases, outweigh the competing interests of the parents and the tribe. However, the court believed this concern could and should be accommodated by the ICWA without resort to the "existing Indian family" doctrine's strained interpretation of the Act. It noted the cases of In re Bridgett R. (1996) 41 Cal.App.4th 1483, In re Alexandria Y. (1996) 45 Cal.App.4th 1483, and Crystal R. v. Superior Court (1997) 59 Cal.App.4th 703, all arose in circumstances where strict application of the Act's placement preferences would have caused an Indian child to be removed from the non-Indian home where she had spent most or all of her life and placed in an Indian environment with which she was completely unfamiliar.

However, the Act permits a court to depart from statutory preferences where good cause exists to do so, so this reasoning is insufficient to justify an exception to the congressional mandate to follow the ICWA procedures. Further, the court noted that factually this was not a case where Indian children had been removed from a home having no connection whatsoever to the Indian community. The mother lived on the reservation for several years, both parents attended pow-wows and intertribal gatherings of their respective tribes, participated in tribal activities, prepared Indian food and spoke Indian words in the home, and dressed her children in swaddling clothes until they were about 6 months old to make her children aware of their Indian heritage. The father, though not as involved as the mother, attended yearly pow-wows since 1995, enrolled in Indian programs to deal with his alcohol problem, and attended several "sweats." In other words, this was not a case where the children had been removed from a home having no connection whatsoever to the Indian community. Thus, the reviewing court held the "existing Indian family" doctrine frustrates the policies underlying the ICWA.

In reversing the judgment, the court noted it does not necessarily follow that the mother's parental rights may not be terminated or that the children must be removed from their present homes and placed in an Indian home; However, in making its decisions, the trial court must comply with the procedural rules of the ICWA, requiring proof beyond a reasonable doubt, including testimony by a qualified expert, that continued custody of the child by the parent or Indian custodian would result in serious

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emotional or physical damage to the child. Further, if parental rights are terminated and the children placed for adoption, the Act's placement preferences must be followed in the absence of "good cause." Finally, all interested parties,
including the Indian tribes, must be given the opportunity to appear and be heard at the proceedings leading to these determinations.

GUARDIANSHIPS AND CONSERVATORSHIPS

In Guardianship of Kassandra H. (1998) 64 Cal.App.4th 1228, Division Three of the Fourth Appellate District reversed an order terminating a guardianship. In that case, the maternal grandmother was appointed guardian of children whose parents were experiencing marital difficulties, brought on in large part by the father's drinking. Following the institution of the guardianship, the father attended counseling and Alcoholics; after three years of sobriety, father sought return of his children by terminating the guardianship. The trial court found, based upon the father's rehabilitation, it was not detrimental to return the children to him, within the meaning of Probate Code section 1601. It stayed the order terminating the guardianship, however, to allow appellate review.

The Court of Appeal agreed the father had met his burden as to one prong of Probate Code section 1601. Section 1601 provides a guardianship may be terminated if either one of two conditions is met: (1) it is no longer necessary that the ward have a guardian, or (2) it is in the ward's best interest to terminate the guardianship.

Notwithstanding the statutory language, which uses the disjunctive "or," Division Three of the Fourth Appellate District concluded a guardianship should not be terminated without a finding it is in the ward's best interest to terminate the guardianship. The court concluded the trial court employed the wrong standard and misconstrued the words, "no longer necessary," to mean it would not be detrimental to return the child to the natural parent. It noted case law governing the termination of guardianships require the court to evaluate the overall moral fitness of the natural parent, although it does not cite any of these case. (Id., 64 Cal.App.4th at p. 1233.)

The decision is disturbing because it relies on cases which predate the current statutory provisions for establishing and terminating guardianships. One case cited by the court, Guardianship of Boulad (1949) 90 Cal.App.2d 135, was described to have been established because the child was born out of wedlock. The Court of Appeal refers to the case as supporting its conclusion because in Boulad the mother's subsequent marriage was held insufficient to justify termination of the guardianship.

The court does not address the fact that in Boulad, the guardianship had been established because the mother had abandoned the child, in addition to being unwed. Thus, the change in her marital status did nothing to show a change of that circumstance. The decision reversing the order revoking the letters of guardianship was grounded not on the overall evaluation of the mother's moral fitness, but on the fact there was no change of circumstance as to her abandonment of the child.

The court also cited the case of Guardianship of Brock (1957) 154 Cal.App.2d 431, in support of its determination that in order to terminate a guardianship, a parent must establish a "definite showing of a reformed way of life." (Italics added by Court.) However, in that case as with the Boulad decision, the underlying problem was the failure of the petitioning parent to establish a change of circumstances. In that case, the parents had divorced; the father married another, but lived with his ex-wife, the mother of the ward. The grandmother obtained letters of guardianship upon unrefuted allegations of unfitness, insofar as it was alleged the mother had contributed to the delinquency of the minor.

Subsequently, the parents remarried and petitioned to remove the guardian on grounds of changed circumstances. However, prior to the hearing, the parents again separated and the father withdrew from the petition, and witnesses testified to incidents showing mother was still "unfit." Thus, this case also does not stand for the proposition that the court must review the parent's "moral fitness" in determining whether or not to terminate a guardianship.

Nevertheless, after reviewing these and some other older decisions, Division Three of the Fourth Appellate District ruled that juvenile dependency law is

not a paradigm which can be imported into guardianship termination law. The court refers to the guardianship in the instant case as a "voluntary" guardianship, because it did not involve governmental coercion. It thus differentiates between dependency, where the law must take into account a parent's fundamental right to act as parent to his or her children in light of the state's interest in protecting children against abuse and neglect, and non-governmental guardianships which it likens to any classic family law custody change. (Guardianship of Kassandra H., supra, 64 Cal.App.4th at p. 1237.) The errors in the court's reasoning are that (a) guardianship by a nonparent is an award of custody to nonparent, subject to Family Code section 3041, which requires a finding of detriment (See Probate Code 1514, subd, (b)); and (b) unless a parent nominates the guardian himself or herself, the guardianship is no more voluntary, and no less an interference with the parent's fundamental parenting interest, than a dependency order.

Having decided the trial court employed the wrong standard, the court in Kassandra went on to hold that the "right" standard was to interpret the phrase "no longer necessary" as used in Probate Code section 1601 to determine when a guardianship should be terminated, to mean that the overall moral fitness of the natural parent seeking a termination must be evaluated. Thus, the "no longer necessary" language of Probate Code section 1601 "necessarily requires a showing of overall fitness on the part of the natural parent seeking to end the guardianship sufficient to overcome the inherent trauma of removing a successful caregiver." (Id., 64 Cal.App.4th at pp. 1239-1240.)

Here's what I don't get: In order to establish a guardianship, by removal of the child and awarding custody to a nonparent, a court only needs to find **detriment**. This is a lower threshold than unfitness, statutorily provided out of the parens patriae duty to protect children. So why do parents need to prove **fitness**, a much higher burden, when return of custody is sought? More importantly, who decides the question of the parent's overall moral fitness, and what constitutes moral fitness?

In Guardianship of Jenna G. (1998) 63 Cal.App.4th 387, the Fifth Appellate District affirmed a trial court order denying a grandmother's petition seeking custody. In that case, the grandmother sought custody of the child following the death of the mother in a car crash. Jenna, who survived the crash, had been released from the hospital to her maternal grandmother, who, in turn, took her to live with an aunt in South Dakota. The parents had never married, but paternity had been adjudicated in a child support action; the father opposed the maternal grandmother's petition for guardianship.

At the evidentiary hearing on the petition, the trial court concluded the burden of proof of detriment was by clear and convincing evidence, and it ruled the grandmother failed to establish that removal of Jenna from her father "was essential to prevent harm to her." (Guardianship of Jenna G., supra, 63 Cal.App.4th at p. 390.) Grandmother appealed.

The evidence on which grandmother relied to support her petition included evidence the father tested in the low-average range of intelligence (a score of 89), and exhibited traits of anxiety, insecurity, sense of inadequacy, impulsivity, inability to cope with the environment, lack of ambition, dependence on strong female figures, and hypervigilance.

The minor's therapist was concerned because Jenna had been traumatized by her mother's death, and the continuing conflict between her father and grandmother. She had (Continued on page 20)

emotional and behavioral problems and developed separate anxiety, fearing her father would leave her. However, after several months her separation anxiety and behavioral problems had dissipated. Nevertheless, the minor's therapist felt the father lacked parenting skills, and was concerned about father's ability to control Jenna. She recommended parenting classes for the father and noted a positive change in his parenting skills thereafter. Regarding father's intellectual limitations, the therapist opined, "a person with a lower IQ can be just as good or bad as a person with a very high IQ." (Id., 63 Cal.App.4th at p. 391 [Italics omitted].)

The Court of Appeal affirmed the trial court's finding in favor of the father, citing the policy embedded in Family Code 3041 requiring proof of detriment before awarding custody of a child to a nonparent. The grandmother relied on the decision of Guardianship of Diana B. (1994) 30 Cal.App.4th 1766, which holds such findings must be supported only by a preponderance of evidence.

The Court of Appeal referred to the Family Code sections governing custody of children, specifically the section dealing with award of custody to a nonparent. Pursuant to Family Code section 3041, there must be a "clear showing" of detriment in order to award custody to a nonparent. The court reviewed the standard applicable in dependency cases, termination of rights cases and family law custody cases which hold there must be clear and convincing evidence that an award of custody to a nonparent 'is essential to avert harm, as well as to serve the best interests of the child."

The court disagreed with grandmother's reliance on the Diana B. decision, which was based on the reasoning of Cynthia D. v. Superior Court (1993) 5 Cal.4th 242. However, the rationale of the Supreme Court in Cynthia D. was that at the 366.26 hearing there has been a finding of detriment previously made at the disposition hearing, by clear and convincing evidence, and the parent's conduct has been found to grievously endanger his or her child on numerous occasions. It therefore concluded that the holding of Cynthia D. was inapplicable to guardianships, because when a court hears a guardianship petition, there has been no previous finding based on clear and convincing evidence of parental fault or harm to the child. Instead, it adopted the reasoning of Guardianship of Stephen G. (1995) 40 Cal.App.4th 1418, which held the reasoning of Diana B. was fundamentally flawed.

I would look for this case to appear soon in a Supreme Court near you.

MISCELLANEOUS CASES THAT DON'T FIT IN ANOTHER CATEGORY

In Barrenda L. v. Superior Court (1998) Cal.App.4th ___ [98 Daily Journal D.A.R. 7937], Division Four of the Second District Court of Appeal issued a writ of mandate directing the trial court to reverse its rulings ordering the plaintiffs to answer deposition questions and submit to a psychological examination, relating to sexual encounters other than those directly at issue in the litigation. The plaintiffs were each dependent children at the time of the incidents which gave rise to the litigation, who were placed in the foster home of Karla Jarrett Coleman. The complaint alleged that each was raped, and sexually assaulted by Coleman's adult son. Barrenda became pregnant three times as a result: she had an abortion at age 11, gave birth to a child four years later, and aborted a third pregnancy a year after that.

During the depositions, plaintiff's counsel objected to questions asked of Barrenda which were perceived as an invasion of privacy, relating to the number of children to which Barrenda had given birth, the number of abortions she had had, and whether she had had sexual intercourse with anyone besides the foster mother's adult son. Shiffon, the second plaintiff, was asked if she had been sexually attacked prior to her placement in the Coleman home. Defense counsel obtained an order for discovery from the trial court as to most of the questions asked.

The defendants' motion to compel the independent psychological examination was based on the fact the plaintiffs were seeking damages for emotional distress, thus putting their mental state into evidence. The trial court granted the relief and the plaintiff's filed the petition for extraordinary relief.

On review, the Court of Appeal noted that any party seeking discovery of a plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery. The mere fact that a plaintiff has initiated an action seeking damages for mental and emotional distress arising out of conduct of a sexual

nature does not ipso fact provide good cause for discovery of other sexual conduct. Since the right to privacy is constitutionally protected, discovery may be compelled only upon a showing of a compelling public interest, and the filing of a lawsuit will only be viewed as a waiver of that protection where the material sought is directly relevant to the litigation.

Since the only showing offered in support of the requested orders was the declaration of defendants' counsel, and since that declaration did not establish that counsel had any qualifications or training as a psychologist, the court concluded it failed to lay a foundation to establish any nexus between other sexual conduct and the nature of the damages claimed. The same defect infected the motion to compel the psychological examination, since the attorney's declaration, by itself, cannot establish the relevance of other sexual conduct.

HOT RESOURCES

A. Steven Sparta, PhD, a San Diego forensic psychologist, tipped me off to a new publication which will have relevance to all dependency practitioners. The publication is a document entitled, "Guidelines for Psychological Evaluations in Child Protection Matters," which guidelines were recently approved by the American Psychological Association. These guidelines, which are only recommendations but which highlight the need for specialized competence in certain areas and warn against multiple relationships or partisanship in assessments, may be obtained by contacting the APA Practice Directorate Office of Legal and Regulatory Affairs at (202) 336-5886.

My thanks to Dr. Sparta for sharing this information with me.

B. Fellow A.D.I. staff attorney Cheryl Geyerman and I recently participated in a dependency seminar produced by Central California Appellate Project (C.C.A.P.), in which Beth Samples, from the Adoption Initiative Bureau, part of the adoptions unit of the State Department of Social Services, discussed adoptability assessments. Among the items of interest mentioned in her presentation was the fact DSS considers **every** child adoptable: it is merely a question of reaching out to the right agencies and resources to find a home for a child who has been freed for adoption.

Another point of interest was the following statistic regarding the success rate at finding adoptive homes for all the children freed for adoption. Approximately 80% of the adoptive children for which adoptive families are sought come from the foster care system. In 1993, some 17,000 (three zeroes) children were freed for adoption (i.e., became orphans). Between 1993 and 1994, only 3025 adoption petitions were filed and granted. Do the math: That leaves 13,975 orphans.

Kudos (Continued from page 5)

Russell Babcock, 1) P. v. Brown, #D028982, Court reversed judgment for receiving stolen property based on double jeopardy considerations when it convicted appellant of VC 10851. (I) 2) P. v. Monge, #G020088, Full consecutive term for attempted escape modified to one-third the middle term per Gullbrandson (1989) 209 Cal.App.3rd 1547. (I)

Jean Ballantine, P. v. Pratt, #E020537, The court reversed the conviction for VC 10851 (a) because the trial court erred in refusing to give the LIO of "joyriding". (A)

(Continued on page 22)

Susan Bauguess, P. v. Dvornekovic, #E019893, Judgment modified to add one day of presentence credit. (A)

Diane Berley, P. v. Dean, #G019907, Conviction under PC 288.5 does not qualify for one strike sentencing as legislature omitted this section from one strike sentencing code section. 25-year-to-life sentence reversed and remanded for resentencing. (I)

Christopher Blake, P. v. Briseno, #D029675, Sentence modified to award defendant two additional days conduct credit. No 1237.5 motion filed. Blake argued 1237.5 should only bar raising the issue if that is the sole issue on appeal and no motion was previously filed in the trial court. A.G. conceded additional credits were appropriate, never citing Eares. (I)

Jill Bojarski, P. v. Hong, #G020775, Judgment modified based on three sentence errors, two of which A.G. conceded. As to the disputed error, the court found that vis-a-vis finding defendant personally used a weapon in the course of a kidnap, pursuant to PC 667.61, subd. (e)(1), (4) and (6), imposition of an enhancement pursuant to PC 12022.3, subd. (a), for use of a deadly weapon violated the dual use prohibition, and ordered the enhancement stricken. As to two other counts for which consecutive terms had been imposed, the A.G. and court agreed the multiple punishment violated PC 654. (I)

Robert Boyce/Laura Schafer, P. v. Rios, #D027785, Trial court prejudicially abused its discretion by allowing the prosecutor to cross-examine appellant regarding his parole status at the time of the current offenses. Not only was the relevance of appellant's parole status to the issue of intent in this case "weak at best," but it was also not clear whether the prosecutor asked the questions in good faith, since the correctional records showed appellant was discharged from parole five months before the current offenses. (I)

Gordon Brownell, P. v. Hernandez, #D024939, Sentence imposed reversed because based upon alleged strikes being found true without evidentiary support and for consideration of whether to strike strikes (pre-Romero sentencing); per Monge retrial of priors is permissible. (I)

Doris Browning, P. v. Roldofo C., #G022493, Conviction for possession of a firearm by a minor (PC 12101, subd. (a)(1)) was stayed per PC 654 because possession was simultaneous with the discharge of the firearm in a grossly negligent manner (PC 246.3). (A)

Martin Nebrida Buchanan, 1) P. v. Eries, #G020110, Sentence modified to delete ten year terms erroneously imposed as enhancements. (I) 2) P. v. Estrada, #D026077, Case reversed for serious misconduct of co-defendant's counsel. In addition, trial court erred in refusing to compel the disclosure of the identify of a confidential informant. Court of Appeal ordered the informant's identity disclosed on retrial unless the prosecution refused, in which case, the trial court was directed to dismiss the action. (I) 3) P. v. Williams, #E018865, Carjacking conviction reduced to grand theft auto because trial court failed to instruct the jury that intent to steal must precede use of force and evidence supported lesser offense. (I)

F. Thomas Caporael, P. v. Trapp, #E020462, Judgment reversed because the trial court erroneously precluded appellant from presenting his affirmative defense that he had a prescription and possessed marijuana for medical purposes pursuant to HS 11362.5. Based on P. v. Trippet (1997) 56 Cap.App.4th 1532, the Court of Appeal reasoned that, because Prop 215 was approved before appellant's trial, he should have been allowed to assert the affirmative defense even though at the time of the offense (pre-Prop 215) there was no such affirmative defense. (A)

Kathy Chavez, P. v. Hines, #D028434, 135-year-to-life sentence for conspiracy to commit murder, attempted murder, kidnapping etc. reversed for Miranda/Edwards violation. Detectives ignored request for attorney and invocation of right to silence by showing disrespect for those rights when they continued to use subtle but persistent methods of getting defendant to waive them, by deliberately lengthening the booking process, and by confronting defendant with the evidence against him. (I)

James Crowder, P. v. Thomas, #E020437, Five-year enhancement for narcotics offense 1,000 feet from school reversed for misinstruction and insufficient evidence. Jury was not instructed offense must occur in "public area or business establishment," as required by HS 11353.6, subd. (g), and offense occurred in locked, private shed. (I)

Rodger Curnow, P. v. Benitez, #E021003, Sentence reversed, case remanded because trial court failed to advise of constitutional rights before taking admission of strike priors. (I)

Anthony Dain, P. v. Kiner, #D028845, Defendant's conviction for receiving stolen property reversed because he could not be convicted of both unlawfully taking a vehicle and receiving it. The receiving conviction served as the basis for a concurrent

25-year-to-life term due to defendant's three strike status. (I)

Michael Dashjian, P. v. Thornburg, #G021295, Certified for publication. When a three strikes sentence is reversed and the cause remanded for resentencing in light of Romero, trial court must re-calculate actual number of days spent in custody, and PC 4019 credits, and issue an amended abstract of judgment. (I)

Linn Davis, P. v. Ortiz, #E020698, Trial court erred in not staying defendant's conviction for robbery (PC 654) (defendant also convicted of carjacking) - when a defendant robs a victim of several items in one continuous transaction he/she can only be punished for one offense. (I)

John Dodd, 1) P. v. Mendoza, #E020808, Case remanded so court could strike improperly stayed enhancements and could state reasons for striking the enhancements. (I) 2) P. v. Cubias, #G021280, Remand for resentencing with defendant present where court committed appellant to prison in his absence following a CYA amenability determination rejecting appellant for housing in CYA. Welfare & Institutions Code section 1731.5, subd. (c) requires the defendant be returned from CYA to trial court for resentencing under these circumstances. (I)

Michele Douglass, 1) P. v. Stewart, #E020361, Trial court erred in ordering possession conviction concurrent to transportation. PC 654 stay ordered. (A) 2) P. v. Zackery, #E021298, Conviction under PC 475 reversed because the altered "purchase order" defendant possessed and used was not one of the documents listed in the statute. Penal Code section 475 specifies the instruments to which it applies and does not contain a catch-all phrase as do PC 470 and 476. (A)

Patrick DuNah, P. v. Jackson, #D029806, Limited remand for resentencing ordered where trial court erroneously believed it lacked authority to sentence probation revocation term concurrently to strikes sentence. (People v. Rosbury (1997) 15 Cal.4th 206). **Patrick DuNah and Amanda Doerrer**, P. v. Channell, #E020708, Defendant credited with an additional 198 days on his probation revocation case which was initially denied because he was also in custody on a new case (the new case resulted in his probation being revoked on his old case). (ADI)

Brett Duxbury, P. v. Sandoval, #E018959, 229 Days of PC 4019 credits originally awarded by trial court but later taken away ordered restored. (I)

Suzanne Evans (Mother), **Dorothy Hampton** (minor) In re Brandon Y., et al., #D029812, Order terminating parental rights reversed for lack of clear and convincing evidence the minors were likely to be adopted where the minors had emotional, behavioral, and psychiatric problems; comprised a bonded sibling group; and no home was approved for adoption. Remand was ordered to consider proceeding under W&I 366.26, subd. (c)(3). (I)

Carl Fabian, P. v. Bryant, #D028274, Sixty additional days of PC 4019 presentence credit awarded. (I)

Linda Fabian, 1) In re Antonio D., et al., #G022115, Order terminating visits between children and their incarcerated father reversed where, during a six month period the dept. arranged only one visit, which went well. Court noted the record showed services were supposed to include at least one visit per month unless there was proof of detriment. The court also held the father did not have the burden of proving noncompliance with the terms of the visitation plan. It was SSA's burden to prove services were provided. (I) 2) In re Jaime H., #D029387, Order terminating juvenile court jurisdiction, denying visitation/contact with children for incarcerated father reversed, because father denied due process. (I) 3) In re Kierra K.,
#D030093, Exclusion of appellant from dependency proceedings on grounds she was not

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a permanent guardian held to be reversible error, where appellant was appointed permanent guardian by probate court although no letters of permanent guardianship were issued. (I) 4) In re Joseph A., #D029668, Jurisdictional order reversed based on insufficiency of the evidence. Record failed to establish injuries to child occurred when he was in the custody of his parents. (I)

William Flenniken, P. v. Gonzalez, #D029085, Appellant awarded 52 days of custody credits ordered by the trial court, but incorrectly modified by the clerk. (I)

Stephen Gilbert, P. v. Robles, #GO20041, Denial of motion to suppress reversed. Police could not rely on probation condition of appellant's brother to conduct a search to find evidence incriminating appellant. (I)

Cheryl Geyerman, P. v. Alvarez, #G018038, Judgment modified to stay under PC 654 the life sentence on an attempted murder conviction because defendant was also convicted of conspiracy to commit murder. (ADI)

Waldemar Halka, P. v. Guzman, #D029184, VC 10851 conviction reversed because defendant convicted of both taking the vehicle and receiving it as stolen property. Courts found the receiving stolen property evidence strong while VC 10851 evidence relatively weak, so elected to reverse the greater offense. (A)

Mark Hammond, In re Derlyn T., #D028257, C.Y.A. disposition remanded for new hearing where judge based commitment in part on erroneous facts. Scott waiver rule found inapplicable because court and both attorneys assumed the same mistaken facts. (A)

M. Elizabeth Handy, 1) In re Ashley R., #D029626, Mother successfully argued court erred in 1) finding placement of minor with father would not be detrimental to minor; 2) placing minor with father at some unspecified time in the future. Dispositional order modified to place minor in foster care and to reflect placing minor with father would be detrimental. 2) In re Kaelyn C., #D030003, An order terminating parental rights was reversed, where the minor was not appointed counsel in the trial court and the incarcerated father was not given proper notice. (I)

Mark Hart, P. v. Myers, #E018221, Serious felony and prison priors reversed because of Yurko error; issue not waived by failure to object. (I)

Marvin Hendrix, P. v. Gullatta, #D028692, Receiving stolen property conviction reversed where defendant convicted of theft of same property. (A)

Robert Hicks, P. v. Celedon, #G021644, Consecutive eight month gang enhancement stricken because the subordinate offence to which it attached (robbery) is not a "violent felony" within the meaning of PC 1170.1, subd. (a). (A)

David Hendricks, P. v. Hardy, #D028593, Court of Appeal modified restitution fine under PC 1202.45 to reflect the same amount ordered under PC 1202.4. (I)

Handy Horiye, P. v. Berg, #D029016, Stayed restitution fine under PC 1202.45 was unauthorized since defendant was sentenced to life without the possibility of parole. (I)

Robert Howell, 1) P. v. Corothers, #D027946, Judgment modified to stay execution on sentence on robbery conviction under PC 654. The trial court had sentenced concurrently with murder conviction. Attorney General had argued appellant had separate intents and objectives. (I) 2) P. v. Pen, #D026526, First degree murder, conspiracy to commit murder, and various related counts of attempted murder, assault and burglary reversed because admission of both statements made by defendant in course of plea negotiations and statements taken in violation of Miranda were prejudicial. (I)

Debra Huston, P. v. Williams, #G019174, Sentence pursuant to PC 667.61 reversed because that section was not effective on the date appellant committed the offense. Although the section would ordinarily have become effective on 11/30/94, it was to become operative only if certain other legislation was "enacted and [became] effective on or before January 1, 1995." Because the contingency upon which PC 667.61 depended did not occur until 1/1/95, the section did not become operative until that date. (I)

Joan Isserlis, P. v. Blunt, #D027675, 25-year-to-life strikes term remanded for resentencing under Romero where defendant's current offense was petit theft with a prior and both strikes were ten or more years old. (I)

Rodney Jones, P. v. Debbie H., #D030302, Where juvenile court found minor committed a misdemeanor battery and not the more aggravated assault with a deadly weapon, the warrantless search condition imposed had no relationship to the crime minor committed and was not reasonably related to future criminality. The warrantless search condition was stricken. (I)

Greg Kane, P. v. Young, #D026052, Robbery conviction reversed because trial court failed to give LIO instructions. (I)

Ronald Kaplan, P. v. Solis, #G021342, Trial court erred by failing to take a new jury waiver at a retrial. (I)

Joyce Meisner Keller, 1) P. v. Barriga, #G020450, Remand based on trial court's failure to obtain proper waiver of constitutional rights before obtaining admission on three prior prison term allegations. 2) In re Francisco T., #G020506, PC 654 barred 20 month additional sentence when defendant was convicted of both PC 246 and two attempted premeditated murders. (ADI)

Ivy Kessel, 1) P. v. Acosta, #E021399, Carjacking count reversed because it was LIO of kidnapping during a carjacking, of which appellant was also convicted. (I) 2) P. v. Linton, #E020466, second degree murder conviction reversed because trial court refused to give requested jury instruction on involuntary manslaughter. Rather than reverse the judgment and remand for a new trial, the Court of Appeal adopted the approach taken by the court in Cameron (1994) 30 Cal.App.4th 591, and reduced the conviction to involuntary manslaughter (the least offense of which the jury could have found him guilty if properly instructed) unless the People elect to retry defendant for second degree murder. (Justice Ramirez dissented, he would have found no basis for giving involuntary manslaughter instruction). (I)

Marleigh Kopas, P. v. Rodriguez, #G020956, Prison prior stricken because served concurrently with another prior. (A)

Sylvia Koryn, P. v. Young, #D028878, Judgment modified by reversing conviction for possessing a controlled substance because it is LIO of possession for sale. Case remanded to allow trial court opportunity to exercise its discretion regarding whether to strike either of defendant's two drug conviction enhancements. Also, trial court erred in modifying CALJIC No. 1.24 by adding "the mere possession of a controlled substance constitutes substantial evidence that the possessor of the controlled substance knew of its nature." However, error was harmless beyond a reasonable doubt. (I)

Rudy Kraft, P. v. Rivera, #D029274, Sentences for receiving stolen property, possessing and tampering with VINS were inherent to chop shop operation and ordered stayed pursuant to PC 654. (A)

Janice Lagerlof, 1) P. v. Mora, #E019336, The trial court erred when it imposed enhancements for gun use when the court also relied upon the gun use for imposing an enhanced 25-year-to-life sentence under PC 667.61 where only the minimum number of circumstances under that statute were pled and proven. Trial court also erred by imposing a 25-year-to-life sentence on kidnapping count when the court relied upon the kidnapping to impose the enhanced sentence. Because of appellant's lengthy sentence, appellate court stayed the sentence on kidnapping unless the trial court recalls the matter for sentencing. (I) 2) P. v. Roberts, #E021213, Two PC 667.5(b) prison priors set aside because of imposition of PC 667(a) priors. (A.G. conceded error.) (I)

Stephen Lathrop, P. v. Leyva, #G020241, Vehicular taking stayed pursuant to PC 654 because vehicle taken following burglary. (I)

Susana Mahady, P. v. Rodriguez, #D029079, Five year prior stricken because current conviction wasn't serious. (A)

Pearl Gondrella Mann, P. v. Godina, #E017603, Sentences on firearm enhancements stricken because jury did not find them true.(I)

Gregory Marshall, 1) P. v. Rodriguez, #E020046, Abstract of judgment modified to reflect correct enhancement under PC 12022. (I) 2) P. v. Luckett, #E018865, Two attempted murder convictions, and one felony-murder reversed because evidence insufficient to prove defendant aided and abetted robbery before the shootings occurred. Additional carjacking conviction reversed because of no evidence

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defendant participated in that crime. (I) 3) P. v. Sandoval, #E019874, Abstract of judgment ordered amended to correct term for knife
enhancement from three years down to one year.
Trial court directed to omit reference to term for knife use in rape count. (I) 4) P. v. Scheid, #G016894, Sentence of 25 years to life consecutive to seven years, four months after appeal and retrial from original trial at which appellant had received a term of 26-year-to-life violates double jeopardy; remanded for a resentencing not to exceed first sentence. (I)

Lynne McGinnis, 1) P. v. Fields, #D0281149, Published reversal. Judgment reversed because under the circumstances, the record affirmatively showed defendant did not full comprehend his right to a jury trial and thus, defendant's right to a jury trial was not knowingly and intelligently waived. (A) 2) P. v. Thompson, #D027747, Prison prior stricken because it predated current offense by more than five years. (A)

David McKinney, P. v. Alexander, #D029084, Court erred in imposing a separate sentence for the robbery underlying the application of the felony murder in violation of PC 654 as to both defendants; in ordering the midterm of 4 years for a robbery when the midterm is a three year term as to defendant Cottingham; and as to both defendants, only one gun enhancement should apply to the murder and not to both the murder and robbery given the PC 654 stay on the robbery noted above. (I)

Kevin McLean, P. v. Cottingham, #D029084, Same judgment as noted above for P. v. Alexander. (I)

Lori Mendez, P. v. Rubalcava, #E020928, Eight month sentence for vehicle theft stayed pursuant to PC 654 because vehicle was one of the items taken during the robbery. (A)

Susan Metsch, P. v. Chanthala, #D028647, When the Department of Corrections notified the trial court of an unauthorized sentence, the court re-calculated the sentence ex parte and imposed a longer term. This violated California's double jeopardy clause and the case was remanded with new sentence not to exceed original ten year term. A.G. conceded the error. (A)

Richard Miggins, 1) P. v. Eolstad, #E019882, Denial of motion to suppress reversed. Court found officer prolonged detention beyond the scope of an ordinary traffic stop based upon a hunch, and not upon any specific, articulable facts necessary to support an objectively reasonable suspicion of criminal activity. (I) 2) P. v. Martinez, #E019732, Insufficient evidence of "strike" when defendant pled to PC 247, subd. (b), when D.A. failed to introduce evidence of personal use of a firearm and court refused to consider police reports of prior which had been stipulated to contain factual basis. NOTE: Pursuant to Monge Court of Appeal remanded for trial court to consider police reports. (A)

Richard Moller, P. v. Humphries, #D028007, Punishment for conviction in count eight, stayed because it relates to the same conduct in count six. Also, A.G. pointed out punishment in count seven should have been stayed because it relates to the same conduct in count six. As a result, defendant's sentence reduced by 16 months. (I)

David Morse, 1) P. v. Ramirez, #G020793, Reversed in part and remanded for trial court to make informed choice re striking strike. (I) P. v. Flores, #D027318, Assault with firearm conviction reversed because evidence insufficient. (I)

Laurel Nelson, In re Ruben S., #D026537, Juvenile Court dismissed petition with true finding on two counts of assault with a deadly weapon pursuant to W&I 782 following review of AOB and writ petition which raised serious questions concerning minor's factual innocence. Appeal and writ petition were abandoned following juvenile court's action. (A)

Shawn O'Laughlin, P. v. Rivera, #D029274, Sentences for receiving stolen property, possessing and tampering with VINS were inherent to chop shop operation and ordered stayed pursuant to PC 654. (I)

Nancy Olsen, P. v. Duong, #GO21098, On-bail enhancement stricken on two five year subordinate terms because enhancement can only be imposed once. (A)

Benjamin Pavone, P. v. Youngwirth, #E019690, Possession of check with intent to defraud reversed as LIO of forgery. (A)

Sharon Rhodes, In re Harold W., #D029028, Juvenile court incorrectly determined maximum term. (I)

Lynda Romero, 1) P. v. Richards, #D026240, First degree murder conviction reversed because the trial court erred when it refused to instruct on malice. The trial court believed that People v. Saille (1991) 54 Cal.3d 1103, eliminated malice as an element of murder. (I) 2) P. v. Rushing, #D027093, LWOP sentence for multiple murders reversed because court erred in instructing jury on second degree felony murder with the underlying felony being domestic

violence, which is not inherently dangerous. (I)

Andrew Rubin, P. v. Stephens, #E019979, Trial court improperly increased defendant's sentence because it had been formally entered in the court minutes, a certified copy of the minute order or abstract of judgment had been furnished to the Dept. of Corrections, and defendant had commenced serving his sentence. Trial court had intended to impose mid term of three years, but in error imposed two years. Since two years was a valid sentence for defendant's crime (PC 213), the sentence was not "unauthorized" as argued by the People. Also, case remanded to trial court to determine amount of presentence credits. (I)

Michael Satris, P. v. Roe, #D028331, Conviction for terrorist threats reversed for failure to instruct on juror unanimity. (I)

George Schraer, P. v. McKinley, #E019866, Affirmed with directions to amend the abstract to reflect defendant was convicted of the LIO of attempted second-degree robbery as to two counts. (I)

Richard Schwartzberg, P. v. Lindguist, #G022467, Romero remand. (I)

Terrence Scott, P. v. Jones, #E020013, Robbery reduced to second degree because verdict form did not find defendant guilty of first degree robbery. (I)

Maureen Shanahan, P. v. Fricker, #E021135, Conviction for possession of controlled substance (H&S 11350 subd. (a)) reversed since defendant also convicted of greater offence of possession of controlled substance with firearm (H&S 11370.1 subd. (a)). (A)

Alisa Shorago, P. v. Luna, #G020747, Two year gang enhancements imposed under 186.22 subd. (b)(1) reversed where fifteen year parole minimum of subd. (b)(4) was imposed.
(ADI)

Carmela Simoncini, 1) P. v. Dabbs, #G020619, A.G. conceded and court agreed conviction of receiving stolen property and grand theft auto should have been stricken, not merely stayed, pursuant to PC 654, upon conviction of VC 10851(a), notwithstanding plea of guilty to face of the complaint. 2) P. v. Hudson, #G020838, The court affirmed the denial of probation but modified the term to stay the sentence on the second count pursuant to PC 654. (ADI)

Richard Siref, P. v. Garcia, #D027864, Trial court erred when it ordered a 13 year term for the current offense to run consecutively to the four year term it imposed for the probation revocation. Sentence modified to reflect 13 year term as principal term, and probation revocation sentence reduced to 16 months. (I)

Barbara Smith, P. v. Feddie M., #D030293, True finding of carrying a concealed dirk or dagger reversed for insufficient evidence, folding knife of four inches qualified. A.G. conceded this issue. (I)

John Staley, P. v. Fonseca, #D029108, Court struck search and seizure condition imposed pursuant to probation because it was not related to defendant's history or his crime (engaging in intercourse with a minor under 16). (I)

Howard Stechel, P. v. Thrash, #G020345, Assault by means of force likely to produce GBI conviction reversed where trial court refused defendant's requested instructions as to LRO's of battery and battery with serious bodily injury. (I)

Ava Stralla, 1) P. v. Ulfig, #D027080, Four molest counts reversed because barred by statute of limitations, ex post facto principles; three molest counts stayed pursuant to PC 654. (I) 2) P. v. Thompson, #E019687, Court erred in imposing restitution fine under PC 1202.45 because offense occurred before the effective date of that statute. (I)

Joseph Tavano (for mother), Julie Braden (for minors), In re Patricia Z., et al., #D030215, Where two brothers were found adoptable but long term guardianship was ordered for older sister, juvenile court erred in denying sibling visitation without an express finding of detriment. Matter remanded for either an order for visitation or finding of detriment. (I)

(Continued on page 28)

Steven Torres, P. v. Aponas, #E020911, One count of possession of ephedrine with the intent to manufacture methamphetamine reversed for insufficiency of evidence. Court agreed that 1) the expert testimony did not confirm the existence of ephedrine in the seized object, 2) the testimony demonstrated it would have been impossible to use whatever ephedrine may have existed to manufacture methamphetamine. (A)

Susan Brandt Wedge, 1) P. v. Whited, #E019183, Concurrent term for petty theft with a prior ordered stayed pursuant to PC 654 where it was part of the single transaction of unlawfully taking a vehicle (VC 10851) for which sentence was also imposed. (A) 2) P. v. Jankowski, #D028431, Reversed because trial court erred in proceeding with the sentencing without allowing defendant to bring motion to withdraw plea. (A)

Michael Weinman, P. v. Rembert, #E019882, Denial of suppression motion reversed. Court found officer prolonged detention beyond the scope of an ordinary traffic stop based upon a hunch and not upon any specific, articulable facts necessary to support an objectively reasonable suspicion of criminal activity. (A)

Alan Yockelson, P. v. Carroll, #D027018, Consecutive three strikes 25-year-to-life term ordered stayed pursuant to PC 654. Defendant was convicted of two heroin sales to the same buyer, separated by about one hour, in the course of an ongoing sales transaction. Court held both sales were motivated by single "intent". (I)

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