APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

NUMBER 37 **APRIL 1999**

NOTES FROM THE DIRECTOR
by Elaine A. Alexander
Executive Director

This column will be a mixture of updates, reminders, and a very special kind of kudo.

Wende-Anders cases

As most of us know already, the United States Supreme Court has granted certiorari in Smith v. Robbins, ___ U.S. ___, cert. granted Mar. 8, 1999 (Docket No. 98-1037). In that case the Ninth Circuit held a no-merit brief must contain legal issues and authorities, as well as facts. (Robbins v. Smith (9th Cir. 1998) 152 F.3d 1062, cert. granted.) In two later cases, the same court found failure to include issues and authorities to be a denial of counsel altogether, and thus prejudicial per se. (Davis v. Kramer (9th Cir. 1999) F.3d __ [1999 Daily Journal D.A.R. 879]; Delgado v. Lewis (9th Cir. 1999) __ F.3d __ [1999 Daily Journal D.A.R. 1717].)

The Fourth Appellate District has required legal issues and authorities in Wende briefs since September of 1997. We are aware of a few pro per habeas petitions (based on pre-September 1997 Wende briefs) filed in this district since the Ninth Circuit decisions. We will monitor those cases and inform former appellate counsel of developments.

Feedback to panel attorneys

We have reviewed our feedback to panel attorney program. During the first 11-12 months, we sent out well over 100 evaluations. More than 80% were sent because it was one of the attorney's first four (originally eight) cases on the panel. About 10 per cent were sent because the evaluation was less than satisfactory. Only 3% were sent at the attorney's request.

We will continue the program, but because of the low rate of requests, have not yet decided to move it from the pilot project stage to a more permanent status. First, we want to make sure it is needed and wanted.

Experimentally, we will allow any attorney who wishes to request an evaluation to do so. (The original program allowed requests only for certain categories.) If this proves to be onerous to our staff, we may have to create some restrictions. We will honor requests for a formal evaluation only if the request is submitted with the AOB. Request forms were sent out a year ago; please contact us if you have misplaced yours.

Please give us "feedback on our feedback." Is the program filling a real or perceived need? How can it be improved? It was adopted to assist panel attorneys and facilitate communication between us and the panel. We need your help to make it work most effectively.

(Continued on page 2)

TABLE OF CONTENTS

Claims

Attorneys are reminded that the guidelines are geared to the time it would take a reasonably experienced attorney to perform the various services. The guidelines are not rigid floors or ceilings, but are simply objective measurements of what might ordinarily be reasonable. Factors in an individual case may dictate compensation above or below the guidelines.

The Appellate Indigent Defense Oversight Advisory Committee is concerned that statements of the case and facts be concise and geared to the issues raised. Statements merely repeating lengthy testimony or procedural events are inappropriate in many cases. Attorneys should focus on the facts relevant to understanding and evaluating the issues and should present them clearly and succinctly. A reasonable amount of time spent in filtering and organizing facts is a valuable and compensable service.

Adverse consequences

Attorneys are reminded to evaluate every case for the possibility that the client might get a more severe result from pursuing the appeal or particular issues that might be available. I'd like to repeat the vital steps attorneys must follow to protect their clients:

1. Analyze each case for potential adverse consequences.

In all cases you should be alert for possible injury to the client from pursuing the appeal or a particular argument. Examples might be errors in the defendant's favor and arguments that would entail vacating a favorable plea bargain.

2. If there is a reasonable possibility of adverse consequences, warn the client.

If you conclude there is a reasonable possibility that adverse consequences could occur, the client should be warned. You should address these points in the warning: (1) the nature and likelihood of the risk; (2) the nature and likelihood of the potential benefits from pursuing the appeal or the issue; and (3) the possibility that the adverse consequences will occur even without the appeal (for example, unauthorized sentences may be corrected at any time and may be discovered in a Department of Corrections review). There is no sure way to appraise these possibilities. The only thing you can do is to warn the client they exist and are inherently speculative, and to give the best assessment you can for the individual case. Sometimes a personal visit is the best or even the only way adequately to discuss such a matter with a client; check with ADI.

3. Ask the **client** to make the decision.

In the end, the **client** is the one whose interests are at stake and who must make the decision how to gamble. Obtain the client's decision in *writing*. To protect both your client and yourself, seek an affirmative response one way or the other, but also advise the client of your "default" position.

Whenever you detect, or even suspect, potential adverse consequences, we ask that you contact ADI for help in evaluating the consequences and advising the client fully and accurately.

Paul Bell Award

The Paul Bell Award honors appellate attorneys who have demonstrated exceptional skill and dedication in serving their clients. It is presented in the memory of Paul Edward Bell, former assistant director of Appellate Defenders, Inc. Paul was with this office for almost 24 years. His legal knowledge and acumen, his deep compassion, and his burning commitment to the defense of the indigent inspired a whole generation of attorneys in this community.

Elsewhere in this newsletter is a story about the second annual Paul Bell Award. It details the extraordinary efforts of appellate attorneys Martin Buchanan, Lynda Romero, Clay Seaman, and Roberta Thyfault to represent their clients in an enormous LWOP appeal that turned into a still more enormous habeas corpus proceeding. I want to take this space to say how personally proud I am of these colleagues and friends. They have brought magnificent credit to our program and to our profession. Our constitutional liberties and laws would be mere words on paper if attorneys like Martin, Lynda, Clay, and Roberta, and others on our panels and staffs, were not there to bring flesh-and-blood and living breath to them. I am sure somewhere Paul is beaming, knowing that his legacy is being carried so faithfully.

Accelerating Appeals In Division Two

by Dave Rankin, Staff Attorney

Division Two wants to take advantage of six additional attorneys it has recently hired through a state program, and move appeals from record preparation to full briefing more quickly. The catch is, the attorneys are only available for the next year. Therefore, in order to avoid a backlog, the Court wants to get as many cases as possible fully briefed while the attorneys are available.

Division Two's caseload is steadily increasing, with no prospect of a decline. Approximately half of the Court's cases are record-ready but not fully briefed. The other half are about equally divided between cases with no records yet, and those that are fully briefed.

Present Division Two policy gives an appellant 100 days to file an opening brief in usual circumstances. That includes 40 days from the date the record is filed, 30 days for one extension request, and another 30 days for a second request. The order granting the second request usually explains that no further extensions will be granted absent unusual case-specific circumstances, such as very large records.

Although no change has yet been made to the current 100-days policy, panel attorneys should be aware that the Division Two hopes to get briefs filed in less than 100 days in shorter-record cases. The Court has been very strict lately regarding delays in filing briefs. In one instance, the Court decided a case so quickly that an attorney's request to file a supplemental brief was denied because it was untimely. Consequently, panel attorneys should strive to file their briefs quickly in Division Two and avoid unnecessary delay.

Congratulations To The Winners Of The 1999 Paul Bell Award For Appellate Advocacy

by David A. Kay, Assistant Director

Panel attorneys Martin Buchanan, Lynda Romero, Clay Seaman, and Roberta Thyfault are the 1999 winners of the Paul Bell Award for Appellate Advocacy. This award, given each year by the Board of Directors of Appellate Defenders, Inc., recognizes outstanding contributions to the defense of indigent clients on appeal.

At a ceremony on April 15, 1999, the attorneys were honored for their extraordinary work on one case--People v. Butler, et. al. The four clients were convicted of conspiracy and murder charges stemming from the 1988 death of San Diego Police Officer Jerry Hartless. The lengthy trial proceedings included capital trial, a hung jury, a retrial and extensive pre-trial and post-trial motions. The record totalled more than 30,000 pages. After appointment in 1994, the attorneys successfully divided up the appellate issues and worked cooperatively to avoid duplication in filing over 500 pages of briefing in the appeal. The work on the case, however, was just beginning.

When nude pictures of a jailhouse informant and his wife, apparently taken in the D.A.'s offices, surfaced in 1997, the attorneys launched a time-consuming and persistent

(Continued on page 4)

investigation into the possibility of undisclosed benefits conferred on the witness to testify against the four defendants. Based on the investigation, a 150-page writ petition with over 600 pages of exhibits was filed with the Fourth District Court of Appeal, which resulted in an 18-page order, requiring an evidentiary hearing on the allegations.

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

In December 1998, Judge Kennedy issued a 76-page opinion, suggesting that the writ petition should be granted. The case is currently scheduled for oral argument before the Fourth District Court of Appeal in May.

Throughout the proceedings, the attorneys put most of their other work on hold to address the unique needs of this case. The hardship was substantial. Although the final chapter of the case has not been written, the attorneys were recognized for their dedication, persistence, courage, and skill in taking on what is probably the biggest criminal appeal in San Diego history.

Trial Counsel Has A Duty To File A Notice Of Appeal Unless Defendant Tells Trial Counsel Otherwise

by Cindi B. Mishkin, Staff Attorney

To begin an appeal, a notice of appeal must be filed with the superior court within 60 days of judgment, that is, within 60 days of the date on which sentence was imposed (Pen. Code, 1237, subd. (a)) or within 60 days of the date on which the court made a ruling that affected defendant's substantial rights. (Pen. Code, 1237, subd. (b); see also Cal. Rules of Court, rule 31(a).) If the appeal proceeds from a guilty plea or admission of a violation of probation and defendant wants to challenge the validity of the plea or the admission, a request for a certificate of probable cause must also be filed with the superior court within 60 days of judgment. (People v. Mendez (1999) 19 Cal.4th 1084; People v. Panizzon (1996) 13 Cal.4th 68; Pen. Code, 1237.5.) If the certificate is granted, defendant may raise any certificate issue, even one not delineated within the granted certificate. (People v. Hoffard (1995) 10 Cal.4th 1170.) A notice of appeal is considered to be timely filed if, within the 60-day period, defendant submits it to prison authorities for mailing, even if it reaches the superior court clerk after the 60-day period has expired. (In re Jordan (1992) 4 Cal.4th 116.)

Under Penal Code section 1240.1, trial counsel who represents an indigent defendant has a duty to execute and file on the client's behalf a timely notice of appeal when (1) "the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of judgment or orders to be appealed from and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal;" or (2) "when directed to do so by a defendant having a right to appeal." (Pen. Code, 1240.1, subd. (b).)

In addition to this statutory duty, trial counsel has a broader duty under the Sixth Amendment of the United States Constitution's requirement of effective assistance of counsel to file a timely notice of appeal on behalf of the client unless the client directs counsel not to do so. Until recently, the Ninth Circuit had only applied this rule where the convictions flowed from jurisdictions other than the state of California. (Lozada v. Deeds (9th Cir. 1992) 964 F.2d 956 [Nevada state conviction]; United States v. Horodner (9th Cir. 1993) 993 F.2d 191, 195 [federal conviction]; United States v. Sterns (9th Cir. 1995) 68 F.3d 328 [federal conviction resulting from guilty plea]). Late last year, it applied the rule where the conviction flowed from a guilty plea taken in California state court. (Ortega v. Roe (9th Cir. 1998) 160 F.3d 534.)

In Ortega, petitioner pled guilty to second degree murder in California state court. Although a note made in trial counsel's file at the time of the plea indicated "bring appeal papers," petitioner's notice of appeal, submitted more than five months after sentencing, was rejected as untimely. A magistrate found petitioner had not shown that trial counsel had promised to file the notice of appeal. However, petitioner had shown that he had failed to consent to trial counsel's failure to file a notice of appeal. (Id. at p.

535.) Reversing the district court's denial of relief, the Ninth Circuit found that petitioner had not consented to the failure to file a notice of appeal resolved the matter in petitioner's favor. (Id. at p. 536.)

Under the doctrine of constructive filing, the Court of Appeal is empowered to order the superior court clerk to accept a notice of appeal and, arguably, a request for a certificate of probable cause as timely filed, even though the document is tendered after the 60-day time period. (In re Benoit 1973) 10 Cal.3d 72; see People v. Ribero (1971) 4 Cal.3d 55 "[[C]ounsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by [Penal Code] section 1237.5.") In Benoit, the high court allowed constructive filing of a notice of appeal on the basis of ineffective assistance of counsel, where the notice of appeal was filed late due to trial counsel's error and where defendant had been diligent in attempting to have the notice of appeal timely filed. The recent Ortega case, which found that trial counsel has a duty to file a notice of appeal on behalf of his client unless the client consents otherwise, constitutes an additional basis on which constructive filing can be ordered.[1] (See Endnote.)

In a recent writ proceeding where one basis for constructive filing was based on the ruling in Ortega, the Court of Appeal denied relief. (In re Donald Pham Le (G024256).) A petition for review was filed and granted. In its order, the high court transferred the matter back to the Court of Appeal "with directions to vacate its summary denial dated December 23, 1998, and to issue an order to show cause, returnable before the Orange County Superior Court. The Director of Corrections is to be ordered to show cause, when the matter is placed on calendar, why petitioner was not denied his constitutional right to the effective assistance of trial counsel due to counsel's failure to file a timely notice of appeal, and why petitioner should therefore not be allowed to file a belated notice of appeal. (See Pen. Code 1240.1; Cal. Rules of Court, rule 470; In re Serrano (1995) 10 Cal.4th 477, 458; In re Benoit (1973) 10 Cal.3d 72; Lozada v. Deeds (9th Cir. 1992) 964 F.2d 956; In re Arthur N. (1974) 36 Cal.App.3d 935; 940-941.)" (In re Donald Pham Le (S075784) ___ Cal.4th ___ [1999 Daily Journal Daily Appellate Report D.A.R. 2828].) A briefing schedule has been set, and a hearing is scheduled in May.

Endnote: 1. If a request for constructive filing is granted based on ineffective assistance of counsel grounds, there is no mandatory requirement for the Court or the trial attorney to report the ruling to the State Bar. No such requirement exists because permission to file a belated notice of appeal does not constitute a "reversal of judgment in a proceeding" (Bus. & Prof. Code, 6068, subd. (o)(7) [counsel's self-reporting duties]) or a "modification or reversal of a judgment in a judicial proceeding" (Bus. & Prof. Code, 6086.7, subd. (b) [court's reporting duties]), which would be necessary to trigger the reporting duty. The granting of the request for constructive filing simply allows a defendant to file a belated notice of appeal and/or request for certificate of probable cause and to have the documents be considered as if they were timely filed; it does not modify or reverse the judgment rendered.

Payment For Legal Representation of Appellate Clients In Superior Court

By Anna M. Jauregui, Staff Attorney

Recently, a panel attorney faced a challenging experience in superior court, which is shared here to offer some forewarning in the

(Continued on page 6)

handling of writ matters in that court. Division One granted a petition for writ of habeas corpus based on ineffective assistance of counsel and issued an order to the superior court to conduct an order to show cause hearing. The panel attorney successfully sought appointment in the superior court to handle the hearing. She was told to obtain a superior court order for payment and submit that with her claim to the San Diego County Bar Association Private Conflicts Counsel (PCC). After doing so, she received a letter from PCC stating she could not be compensated. According to the letter, PCC was limited by contract with the County of San Diego to only paying attorneys' fees to attorneys who are on the PCC panel. The superior court's appointment order had no bearing on compensation eligibility.

The panel attorney next sought help from an administrator at the superior court. That administrator apparently helped her by making other payment arrangements due to the unusual circumstances involved here. However, according to the panel attorney, the payment arrangement was not standard practice and probably will not be repeated. Consequently, it appears panel attorneys will not be paid for superior court work unless they are PCC panel members. This, however, should not discourage continuity in the legal representation of our clients. Panel attorneys may still choose to handle the matter in superior court and, if unsuccessful in obtaining superior court payment, may seek payment in the Court of Appeal.

If you are not comfortable handling the matter at the trial court level, ask the Office of the Public Defender for help. If there is a conflict of interest, the Alternate Public Defender should be contacted. It is not guaranteed that those offices will take over the matter for you because, at least in the case of the Office of the Alternate Public Defender, an appointment order must still be sought. For cases arising out of San Diego County, the panel attorney may contact attorney Gary Nichols of the Office of the Public Defender at (619)338-4768 (email: gnichopd@co.san-diego.ca.us) or attorney Jackie Crowle of the Office of the Alternate Public Defender at 236-2515.

San Diego County Public Defender -Appellate Counsel Liaison

[The following article contains information the San Diego County Public Defender's Office wanted to share with the panel. Subsequent ADI newsletters are likely to contain other articles or information from the Public Defender's Office. If you are aware of topics of widespread interest to panel attorneys, call or email Gary (information below).]

In an effort to foster meaningful dialog between appellate counsel and trial counsel, the San Diego Public Defender s Office has created an appellate liaison position. It is the policy of the Public Defender that all public defender attorneys cooperate fully with appellate counsel to the benefit of our mutual clients. To assist in opening and maintaining the lines of communication, Gary Nichols, the supervising attorney of the Public Defender s Writs & Appeals section will gladly assist appellate counsel in locating and contacting public defender trial attorneys and obtaining information, documents, and files which appellate counsel need. Gary is also available and pleased to discuss issues of mutual concern with any member of the criminal defense bar. Please contact Gary at (619) 338-4768 or email him at gnichopd@co.san-diego.ca.us. (Jackie Crowle is appellate liaison at Alternate Public Defenders. Her direct line is (619) 236-2515.)

Additionally, the Public Defender is soliciting material, information, suggestions, and expertise from appellate attorneys. We are in the process of performing a long overdue update of our Briefbank. Many of the outstandingly well-researched and written arguments which go into your appellate briefs would be extremely useful and persuasive when presented to the trial courts in motion format. If you are willing to share your work product with your brothers and sisters in the trial court trenches, please send them to us as either email attachments or on disc via snail mail. We can handle just about any electronic document format you might be using. Ed Kinsey is the Briefbank guru. Contact Ed at (619) 338-4669 or email him at ekinsepd@co.san-diego.ca.us. Mail should be addressed to Ed at 233 A St., 4th Floor, San Diego, CA 92101 or you can just drop it off at our 4th floor receptionist when you are in the building at ADI.

We also know that you sometimes see recurring issues or trends which you believe could be more effectively addressed in the trial courts. Please notify us

of those issues or trends and your suggestions for effectively dealing with them. We will disseminate these suggestions to our trial lawyers. Please contact either Gary or Ed with such issues.

Finally, training is an important function at the Public Defender s Office. We hold regular, free, MCLE certified training on alternate Wednesdays from 5:30 to 6:30. Our May trainings are on the 12th and the 26th. All members of the criminal defense bar are invited. Training is held at our downtown office, 233 A Street, (the same building ADI is in) on the 5th floor. You are cordially invited. You are also invited to suggest topics for future training and to offer your own services in presenting a training session on a topic in which you are interested. Remember, as a presenter you get triple MCLE credits! Please keep in mind that our trainings are trial practice oriented. You can contact the Public Defender Training Coordinator, Ray Aragon, raragopd@co.san-diego.ca.us, (619) 338-4778, for a schedule of upcoming trainings or to discuss topics you would like to see or teach.

The Public Defender recognizes that there is sometimes a certain amount of tension between trial and appellate counsel. It is our goal to encourage the sharing of ideas and concerns between us in the belief that we have a lot more in common than not. Our goals, after all, are the same: the best representation possible for our clients.

Miscellaneous Notices:

New Management At The AOC

Marcia Taylor is the new Managing Attorney for Appellate Court Services at the AOC. She accepted the position recently vacated by Mary Carlos, who left to become the Assistant Director at the Habeas Corpus Resource Center. While Marcia believes Mary's shoes will be "hard to fill," she can take her time growing into them -Mary is still close and has proved to be a valuable and available resource.

Marcia was a "panel attorney before there were panels" and before there were projects. She started her private practice after graduating from law school in 1978 and passing the bar exam. At that time, counsel who wanted to represent indigent clients on appeal requested appointment directly from the courts. Attorneys simply wrote the court and asked for an appointed case when they wanted one. Marcia was appointed counsel on approximately 30 to 40 indigent appeals. She believes the present system works much better, crediting the improvement to factors such as requirements for panel membership, training and resources offered to panel attorneys, and peer review.

Marcia has worked for the AOC for the past 10 years. The first eight years she spent in the legal division and worked in the education division the last two years. She is extremely familiar with the court system. During her long tenure at the AOC, Marcia has also become familiar with the individual projects and project administrators. She plans to become even more familiar and will start with a visit to each of the project sites during the summer.

Marcia wants to convey to the panel that she and other staff members realize many panel attorneys are concerned about claim delays. Eliminating the recent delay in claims payments is a top priority. She believes many of the problems will be resolved in the next couple of

(Continued on page 8)

weeks. At that time, the AOC will also be able to provide more information to panel attorneys that will aid in expediting claims. Currently, claims are paid within 4 to 6 weeks after the project submits the claim to the AOC. If you have a claim that has not been paid within this time period, call (415) 865-4250 for assistance.

AOC & Claims:

New telephone numbers for the Administrative Offices of the Court:

Main Telephone Number:	(415) 865-4200
Appellate Court Services:	(415) 865-4250
Managing Attorney:	
Marcia Taylor	(415) 865-4255
Accounting: Yvonne Pham	(415) 865-7924

Panel attorneys should also notify the AOC with any address changes. The AOC mails payment to the address in their present database. Therefore, even though the correct address may be included on the old claim form, checks may be sent to the old address unless the AOC is directly notified of any changes.

When the new claim form template is available, ADI will post it on our website. Please see subsequent notice for website update.

Claim Reminders

Communication billed under "Other Services": Time billed for communication under other services should be itemized for each party or agency spoken to. Communication with ADI is billed on a separate line and should not be combined with any other service.

Expenses: Computerized research needs to be itemized by the service to which it related, so that it can be added to the appropriate guidelines category. Paralegal and/or law clerk time also needs to be itemized by the service to which it related. (Note that the new claim form requires the breakdown.) Claims without this information may be delayed.

Busy Signals

We wanted to remind panel attorneys how frustrating it can be to callers when their calls are met with busy signals time after time. This problem has become more common with more and more panel attorneys using the Internet. If your business phone will be busy for more than a few minutes during the business day, please consider other options so that callers can leave messages for you to return. There are many inexpensive alternatives, including voicemail services, additional phone lines, answering services, etc. Please be courteous to your callers.

Internet Access To ADI

Last spring, we were pleased to announce ADI's presence on the Web. The official ADI homepage was created and panel response was positive. Unfortunately, the internet provider who hosted our website discontinued this service. Due to the high level of interest in maintaining ADI's presence on the internet, we are recreating our homepage. ADI's new site will contain information on filing requirements, helpful addresses and telephone numbers. Additionally, there will be a page of legal research links to other internet sites, downloadable sample forms (including the new AOC claim form template), and a copy of our current newsletter.

From our homepage, panel attorneys will be able to send e-mail messages to ADI staff. Our goal is to have the ADI homepage up and running by the end of April so, please bookmark our site (Http://www.adi-sandiego.com).

Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
NUMBER 21 April 1999

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

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

The Second District Court of Appeal reversed a jurisdictional finding against the father in In re Sergio C. (1999) ___ Cal.App.4th ___ [1999 Daily Journal D.A.R. 2501]. In this case, the mother physically abused the younger of two children, aged 1 and 3, bringing them to the attention of the L.A. Department of Children and Family Services [DCFS]. The whereabouts of Adelaido C., the father of Sergio, were not immediately known. The children were released to the mother initially, and she left the county. She was later located in San Bernardino County.

DCFS then learned mom was abusing drugs and had left the children with a cousin. The cousin notified Adelaido, who picked up Sergio C., and reported the mother's abandonment of the children to DCFS. Mom was located, and informed DCFS that Adelaido had a history of arrests, that he had been jailed for domestic violence, and that he used and sold drugs. Adelaido admitted he had been arrested for a misdemeanor more than 2 years previously, but denied any drug involvement. There were no convictions. Although DCFS allowed Sergio to remain with Adelaido, it filed a supplemental petition alleging that he had a history of convictions of various offenses which endangered the minor's physical and emotional health and safety. The petition was sustained and Adelaido was ordered to submit to random drug testing, attend parenting classes and complete a domestic violence treatment program.

The Court of Appeal reversed because there was insufficient proof of Adelaido's alleged history of prior convictions to support the order sustaining the petition, although Sergio remained subject to the dependency court's jurisdiction. (In re Sergio C., supra, [1999 Daily Journal D.A.R. at p. 2502].) The court also agreed there was insufficient evidence to justify the drug testing order, where the only [emphasis by the court] evidence of Adelaido's alleged drug use was the mother's unsworn and unconfirmed statements, which were flatly denied by Adelaido. "While we agree with DCFS that the trial court has broad discretion to make virtually any order deemed necessary for the well being of the child (361.2, subd. (b)(2)), we do not think that drug testing ought to be imposed based solely on the unsworn and uncorroborated allegation of an admitted drug addict who has abandoned her children. Where, as here, the custodial parent has flatly denied all involvement with drugs and has otherwise cooperated fully with all of the court's orders, there must be some [emphasis by court] investigation by DCFS to warrant the kind of invasive order that was made here." (In re Sergio C., supra, [1999 Daily Journal D.A.R. at p. 2502].)

B. Dispositional Issues

TIP: A recent byline appearing in the Southern California section of the Los Angeles Daily Journal [3/24/1999, p.2], revealed the County of Los Angeles no longer tolerates a policy of the Department of Children and Family Services by which children are placed in foster homes outside their communities.

The article refers to a preliminary analysis of Supervisor Zev Yaroslavsky's district, where at least one-fourth of the children are sent to live outside their neighborhoods, depriving them of their support network. Supervisors Yaroslavsky and Michael Antonovich introduced a motion instructing DCFS management to report back on April 13, 1999 about how it will begin insuring that foster children are close to their homes and

(Continued on page 10)

schools. Supervisor Yvonne Braithwaite suggested setting a five-mile radius on placements, and asked DCFS to explain the financial impact of using higher-cost providers.

Reading this article, I experienced deja vu. Many times I have told groups of trial attorneys to object to foster placements outside the family's part of town. In at least three training sessions, I recall telling dependency seminar attendees to pay attention to Welfare and Institutions Code section 16000, which expresses the legislative purpose to "secure as nearly as possible for the child the custody, care and discipline **equivalent** to that which should have been given to the child by his or her parents." Subdivision (c) of section 16501.1, goes even further, expressing the legislative commitment that children who are in out-of-home placement should live in the least restrictive, most family-like setting and to live as close to the child's family as possible.

Once again, I suggest trial counsel for parents object--in court--to a foster placement which moves the child to a distant part of the city where visitation will be impacted by transportation difficulties and the child's emotional welfare will be impacted by being isolated from his or her school, friends, and familiar surroundings. Having more toys may mask some symptoms of separation in a child, which may anesthetize the child from a certain amount of emotional pain. It may even buy a child's affection. It may even fill in a childless void for well-meaning foster parents. But it does not serve any legitimate purpose of the Juvenile Court Law.

In other words, the juvenile court's discretion to remove a dependent child from a parent's home is not intended to introduce the child to a 'higher standard of living," or a "bigger house." It is intended to protect the child from a perceived risk of substantial harm.

Now, on to the news: In In re Joshua M. (1998) 66 Cal.App.4th 458, Division One of the Fourth Appellate District held the denial of reunification services under Welfare and Institutions Code section 361.5, subdivisions (b)(10) and (12), did not constitute an unfair retroactive application of newly enacted provisions, even though the circumstances that activated the provisions took place before their effective date.

In this case, Joshua had been the subject of an earlier dependency, which was filed under section 300, subdivisions (b) and (g), where he had been left unattended in a motel room full of electrical appliances after his parents were incarcerated and unable to arrange care for him. The father substantially complied with most of the requirements of his reunification plan, so Joshua was detained with his father, on condition the father cooperate with family preservation workers, continue to drug test for an additional 60 days, and enroll in anger management classes. Just as the department was on the verge of recommending termination of the dependency, the father was arrested again, and Joshua was placed in foster care again.

Eventually, in 1995, Joshua was detained with his mother, and, for reasons not explained, the father was awarded supervised visits and restrained from any other contact with mom or Joshua. Between dad's next two arrests (one for ripping a phone out of the wall after threatening his new girlfriend) and mom's arrest for public intoxication (upon which arrest she left Joshua with a roommate, who turned him over to an 18 year old half-sister at which point he was found to have a bad case of head lice), Joshua's situation was that there was no one able to care for him. So, in 1997, the department re-detained him.

Following amendment, this new petition alleged the father had a history of substance abuse, and referred to the father's domestic violence history. It also alleged the custodial parent was incarcerated and unable to arrange care. After a contested jurisdictional hearing, the court sustained both counts of the petition against the father. At the contested disposition hearing, the court ordered no reunification services for the father, although services were to be provided to the mother if she wanted them. Father appealed.

The court affirmed the juvenile court's findings, interpreting the legislative intent underlying section 361.5, subdivisions (b)(10) and (12) was that they be triggered by prior dependency proceedings. Additionally, the court construed the basic purpose of section 361.5, subdivision (b), to limit reunification services to situations in which they are likely to be successful, and stated this intent would be frustrated by a construction that did not take into account a parent's historical circumstances, such as past failures of the parent in previous dependency proceedings. (In re

Joshua M., supra, 66 Cal.App.4th at pp. 470-471.)

My criticism of the court's construction is that it fails to take into account the past **successes or progress** of the parent. In this regard, it places too much emphasis on the personal opinion or prognostication of a social worker that services are not likely to be "successful." Such an opinion, which is not always based on the circumstances of the individual family, is manifestly unfair, particularly where there is no way to test a social worker's expertise in predicting the success of services, and, more particularly, where it fails to take into account the possibility a previous "failure" may not have been the "fault" of the parents.

Addressing the constitutionality of the amendment to Welfare and Institutions Code section 361.5, subdivision (b), the court concluded the statute was constitutional on its face (despite not being based upon current circumstances as required under federal constitutional principles), and that it was constitutional in light of M.L.B. v. S.L.J. (1996) 519 U.S. 102 [136 L.Ed.2d 473, 117 S.Ct. 555], relating to access to appellate review. The court concluded section 361.5, subdivision (b), does not treat indigents differently from nonindigents and does not directly affect the fundamental right of maintaining a parental relationship. It observed that the father was not denied reunification services because he is indigent, but because the court found section 361.5, subdivision (b)(10) and (12) applied by virtue of "David's **failure to reunite with his other son** [emphasis added] and his noncompliance with substance abuse programs." (In re Joshua M., supra, 66 Cal.App.4th at p. 476.) Hmmm. The final editing of the opinion must have left out something.

In the published part of Karen S. v. Superior Court (1999) 69 Cal.App.4th 1006, the Third Appellate District denied the father's petition for writ of mandate, which challenged a denial of reunification services pursuant to section 361.5, subdivision (b)(12), on the ground he had "resisted prior treatment" for his chronic substance abuse. The court explained that when a parent participates in a substance abuse treatment program but continues to abuse illicit drugs or alcohol, the parent has "resisted" treatment within the meaning of the code section.

In this case, the father had admitted he had a history of chronic substance abuse (including heroin, marijuana and alcohol), but urged that his voluntary participation in substance abuse treatment programs both before and after the dependency petition was filed showed he had not "resisted" prior treatment. The court acknowledge father had voluntarily sought out treatment programs but noted he had never had a significant period free of substance abuse notwithstanding the programs. Even when father was in methadone maintenance and not drinking because he was taking Antabuse, he was smoking marijuana. By "failing to benefit" from treatment for his chronic substance abuse, the court held he had "resisted prior treatment." (Karen S. v. Superior Court, supra, 69 Cal.App.4th at p. 1009.)

C. Review Hearings, Etc.

In Christine M. v. Superior Court (1999) 69 Cal.App.4th 1233, Division Three of the Second Appellate District denied a father's petition for extraordinary relief following the trial court's denying his request for a stay of proceedings pursuant to the Soldier's and Sailor's Civil Relief Act (50 U.S.C. Appen. 501, et seq.)

(Continued on page 12)

In this case, dad was in the Navy and stationed out of state when his daughter was born with a positive toxicology screen for methamphetamine. The minor's older sibling was also born drug exposed, and the petition alleged the mother was a frequent user of methamphetamine. As to the father, the petition alleged he was unable to care for the minor. In March 1997, the children were placed with a maternal great aunt.

In July of 1997, the social worker located and met with the father who had just enlisted and was supposed to report for training on August 25, 1997. He requested that the minor be placed with the paternal aunt and uncle who adopted the minor's sibling. On August 27, 1997, counsel was appointed to represent the father. In a September, 1997, report, however, the social worker stated the father had no interest in parenting the minor. (Id., 69 Cal.App.4th at p. 1236.) On September 29, 1997, the court declared the minor a ward [sic] of the court, ordered the mother to attend parenting class and drug treatment programs, and ordered the father to attend an approved program of parent education.

During the next six months, it appears the father would be out to sea at the time the review hearing was scheduled to take place. Although he had visited the minor once before this deployment, he was unable to call or visit thereafter due to his circumstances. (Christine M. v. Superior Court, supra, 69 Cal.App.4th at p. 1237.)

On April 27, 1998, the juvenile court denied father's request for a stay of the proceedings, and found reasonable efforts had been made with respect to the father. The father apparently kept in contact with the social worker, and informed her that if the child were placed with the paternal relatives, she would enjoy military benefits. The paternal aunt and uncle contacted the social worker expressing a willingness to adopt the minor and requested visitation.

During the next few months, the social worker was unable to contact the father, eventually learning from the paternal relatives that he was out to sea. (Id. at p. 1238.) In November, 1998, the court denied the father's renewed request for a stay and proceeded to conduct a contested hearing under section 366.22.

After the hearing, the court terminated services finding that neither parent had complied with the case plan. This finding was made despite evidence no services were available while the father was out to sea. The court found the father had shown no interest in the minor, denied a request for placement with paternal relatives (in connection with a supplemental petition alleging the maternal aunt, with whom the minor had been placed, had left the minor in the care of a 9 year old), terminated services, and set a 366.26 hearing.

The court found "no reversible error" in the juvenile court's denial of father's requests to stay proceedings pursuant to the Soldier's and Sailor's Civil Relief Act. (Christine M. v. Superior Court, supra, 69 Cal.App.4th at p. 1243.) The court's reasoning focuses on the fact the "father made ambivalent statements about his desire to parent" the minor **with** the mother, which it interprets by referring to his "stated lack of desire to parent the minor **without** the mother." In addition, even though he was at sea in the Persian Gulf, the court said he had not demonstrated how his military service had prevented him from complying with the order that he attend an approved parenting class. (Id., at p. 1244.)

I am sure this will boost recruitment efforts in time like these. I would hate to see the effect on national security if other courts adopt this reasoning. I can just envision a guy, aboard a nuclear submarine or destroyer, trying to explain why he needs to be relieved of his watch so he can attend an approved parenting class. Not to mention the reaction of the Department of Defense when faced with a demand to institute parenting classes on command ships in war zones so military parents can comply with juvenile court orders.

The Third District Court of Appeal recently held that reunification services should be provided to parents whose children are removed pursuant to adjudication of a supplemental petition, where the children had previously been maintained in the family home. In In re Joel T. (1999)__ Cal.App.4th__ [1999 Daily Journal D.A.R. 1808], five children were originally detained and declared dependents when the father of the youngest child had been allowed into the mother's home, despite the fact he had molested the older children. However, the children were detained with their mother on a trial placement based on her voluntary participation in drug testing, counseling, a housing program and parenting classes. At the dispositional hearing, which allowed the minors to

remain in the mother's custody, the court ordered a "reunification" plan.

Things went along fairly well until January, 1998, when the social worker reported the mother had terminated her therapy and stopped drug testing, in addition to allowing the father of the youngest child (the perp) into her home, in violation of the previous court order. A supplemental petition was filed and all five children were removed. At the dispositional phase of the Welfare and Institutions Code section 387 petition, which was combined with the 12/18-month status reviews, the court ordered all children placed in long-term foster care, denied appellant's requests for relative placements, and denied her request for additional services. (In re Joel T., supra, [1999 D.A.R. at p. 1809].)

The Court of Appeal reversed the denial of reunification services and remanded for a new dispositional hearing. The court compared the original placement with the nonstatutory procedure disapproved of in In re Damonte A. (1997) 57 Cal.App.4th 894. The reviewing court pointed out there is a distinction between the services provided when the minors remain in parental custody and when the minors have been removed. Family maintenance services are designed merely to support a family's functioning and may not be the same as those designed to reunify a family, even if the ultimate goal in each case is to ameliorate the problems which led to the dependency at the outset. (In re Joel T., supra, [1999 Daily Journal D.A.R. at 1809-1810].)

The Court of Appeal ruled that when the juvenile court removes a minor from parental custody for the first time, section 361.5, subdivision (a), requires the court to order reunification services except in the circumstances specified in subdivision (b) of that section. (In re Joel T., supra, [1999 Daily Journal D.A.R. 1810].)

Note: The headline in the Daily Journal Daily Appellate Reports, published on February 26, 1999, erroneously stated that reunification services are not necessary. This editing error was corrected when the modification was printed on March 23, 1999. Also, in a footnote added by way of modification of the opinion, filed on March 19, 1999 [1999 Daily Journal D.A.R. 2629], the Court of Appeal noted it is true that family maintenance services may be limited to 12 months, however, family preservation services are not so limited. It concluded that since services in this case had exceeded 12 months, the services in this case were family preservation services. (In re Joel T., supra, modified at 1999 Daily Journal D.A.R. 2629 [filed March 19, 1999].)

In In re Casey D. (1999) 70 Cal.App.4th 38, the Fourth Appellate District affirmed orders relating to the denial of section 388 petitions and termination of parental rights. In this case, the parents had long drug histories. They had 2 older children, the oldest of which remained in the parents' care and was not at risk, and a middle daughter who was born drug exposed and had been removed from their custody in 1995. The parents did not reunify with the second child. Casey D. was also born with a positive toxicological screen, and removed immediately from parental custody.

At the disposition hearing in March, 1997, only 6 months of services were provided, because

(Continued on page 14)

Casey was under age 3. The services included participation in drug treatment programs and NA meetings. At the 6 month review hearing in October, 1997, the parents had not complied with their programs and the matter was referred for a hearing pursuant to section 366.26. A Rule 39.1B writ was filed, challenging the constitutionality of the 6 month limitation of services, which resulted in a denial. (Daria D. v. Superior Court (1998) 61 Cal.App.4th 606 [Note: Although the writ decision addresses the constitutionality of the statute limiting services, nothing in it deals with the unrealism that 6 months of services will alleviate the causes leading to dependency in a family with substance abuse problems. Most experts agree that at a minimum, a successful drug treatment program requires at least 12 months of residential treatment, and another year of out-patient follow-up care].)

Prior to the 366.26 hearing, a section 388 petition was filed by each parent. The father's petition showed he had been taking Orlaam for his heroin addiction since July, 1997, and had been sober since that time, was drug testing, and attending NA meetings. However, he did not visit Casey over an extended period of time, and she did not appear comfortable around him unless the mother was also present.

The mother's petition showed that during 1997, Daria had at least three or four relapses, but beginning in November 1997, she switched from methadone treatment to Orlaam. During the interim between the referral hearing and the permanency planning hearing, when the mother was switched to Orlaam, the mother's progress improved. Although she was actively participating in the Options drug treatment program, testing clean, attending anger management classes and NA meetings, and visiting consistently, she failed to write her autobiography, which was considered "a significant part of the recovery process" in the drug program. Mother's counselor gave very favorable reports of the quality of mother's visits with Daria and the bonding between them, although the social worker disagreed with the counselor's opinion.

The juvenile court denied both parents' petitions and terminated parental rights. As to the mother, the juvenile court concluded 6 months of sobriety was not enough, since there was a chance she would relapse again. As to the father, although his petition showed 9 months of sobriety, and the court found his circumstances had changed, his lack of a relationship with Casey compelled the conclusion it would not be in her best interests to return her to his custody. (In re Casey D., supra, 70 Cal.App.4th at p. 45.)

The reviewing court affirmed the trial court's orders. It did not address the merits of the claim that termination of services after 6 months was a violation of due process. Without addressing the great body of law permitting a constitutional claim to be made for the first time on appeal, the reviewing court held the claim was waived because it was not made at the 6 month hearing stage. Additionally, the court stated that since the due process issue had been raised in the rule 39.1B writ which was denied without discussion of this particular claim, it could not be raised again in this appeal. (In re Casey D., supra, 70 Cal.App.4th at p. 46 [But what about section 366.26, subdivision (l)(1)(C)?].)

It also concluded there was no federal due process violation of the right to reasonable services. It criticized mother for citing to the federal statutory scheme for provision of reasonable services instead of citing a single statute mandating 12 months of services. As to the denial of the section 388 petitions, the court found there was no abuse of discretion by the trial court in denying mother's petition because she had an extensive drug history and had not done her 12-step program or written her autobiography, which the court considered significant. (Id. at p. 48.) Although the evidence was clear mother was regular and consistent in visits, the reviewing court felt it was proper for the juvenile court to reject the opinion of one counselor about the quality of parent-child contact in favor of the social worker's opinion, in analyzing whether granting the petition would be in the minor's best interests. (Ibid.) It concluded mother's circumstances were changing, not changed, and thus the court was entitled to conclude that granting the 388 petition was not in the child's best interests. (Id. at p. 49.)

As to the father, the reviewing court found no abuse of discretion because the father lacked a relationship with Casey, despite demonstrating changed circumstances.

On the issue of whether it was error to find no exception to adoptability exists under section 366.26, subdivision (c)(1)(A), the reviewing court relied predominantly on the In re Autumn H. litany. (Ref. In

re Autumn H. (1994) 27 Cal.App.4th 567, 575.) However, it did make some interesting distinctions: at page 51 of the decision, the court stated, "...we observe the Autumn H. language, while setting the hurdle high, does not set an impossible standard **nor mandate day-to-day contact**." In describing the type of relationship "characteristically arising from day-to-day interaction, companionship and shared experiences," it concluded, "Day-to-day contact is not necessarily required, although it is typical in a parent/child relationship." (Ibid.)

D. Permanent Plan Issues

Since our last issue went to press, a modification of the opinion in In re Richard C. (1998) 68 Cal.App.4th 1191, was filed on January 26, 1999, and may be found at 69 Cal.App.4th 909k. The modification was filed in response to a petition for rehearing, which was denied, and did not change the judgment. The modification added a few sentences relating to the fact that Renee's motion for the bonding study came too late in the proceedings to be a necessary part of the court's efforts to develop a permanent plan for the children, and that the Supreme Court had emphasized a shift in emphasis at the section 366.26 hearing. It also amended the last paragraph of the decision reemphasizing that bonding studies require delays in permanency planning and such requests could be ordered in nearly every dependency proceeding where the parent has maintained some contact with the child. Mysteriously, the appellate court concludes the Legislature did not intend such "last minute efforts to put off permanent placement," citing In re Marilyn H. (1993) 5 Cal.4th 295, at p. 310.

I may be wrong but it seems like it was the Legislature that included the beneficial contact exception to adoptability. This seems to indicate it contemplated the existence of a parent-child relationship, evidenced by what "professionals" call "bonding," which could form the last minute basis to put off permanent placement. The court did acknowledge that it was not beyond the juvenile court's discretion to order a bonding study late in the process "under compelling circumstances." Does this mean that DSS will not be able to offer bonding studies showing the existence of a foster parent/child bond? Or will a request by the county automatically be considered "compelling?"

In In re Zachary D. (1999) __Cal.App.4th__ [1999 Daily Journal D.A.R. 3043], the Third Appellate District held that recent legislation authorizing the entry of a kinship adoption agreement does not require notice to the parent and an opportunity to enter such an agreement before terminating parental rights.

In that case, the maternal grandparents had custody of Zachary during the dependency and were identified as the adopting family. The mother did not satisfy the requirements of her reunification plan, and the minor did well with his grandparents, who encouraged the mother to visit the minor as often as possible.

The mother did not appear at the section 366.26 hearing, but her counsel urged the court not to terminate parental rights, although no mention was made of the possibility of entering into a kinship adoption agreement. The court found the minor adoptable and terminated parental rights.

The reviewing court affirmed, finding no violation of due process. It referred to the legislative scheme pertaining to kinship adoptions and observed nothing contained in the provisions

(Continued on page 16)

imposed an obligation on the juvenile court to order the Department to provide the birth parents an opportunity to negotiate a kinship adoption agreement, nor did the Legislature require the court to notify the birth parent of such an opportunity.

So holding, the Court of Appeal did acknowledge that a minor's best interests would be promoted by guaranteeing him continued parental contact as well as the permanency afforded by a conventional adoption. However, "[a]bsent statutory authorization, the correctness of that proposition does not impose upon the juvenile court an obligation to ensure the Family Code provisions are considered by the parties to the section 366.26 proceeding." (In re Zachary D., supra, [1999 Daily Journal D.A.R. at p. 3044].) It also noted the parties are not foreclosed from entering into such an agreement following the termination of parental rights. (Ibid.) The court did not explain how this would be feasible, since after parental rights are terminated, a parent is not entitled to notice of the adoption petition or hearing thereon.

In another last minute development, the decision in In re Yuridia G. (1999) 68 Cal.App.4th 1301, a case concerning the adoptability of an AIDS-afflicted child and her sibling, was depublished.

GUARDIANSHIPS AND CONSERVATORSHIPS

In Conservatorship of Angela D. (1999) __Cal.App.4th__ [1999 Daily Journal D.A.R. 3045], Division Two of the Fourth Appellate District affirmed a probate court order approving a petition filed by the parents/conservators for an order authorizing them to give medical consent for Angela's sterilization under Probate Code section 1950, et seq. Angela, 20 years old, has been severely mentally retarded since birth and suffers from autism, a complex seizure disorder, and diabetes. The conservators petitioned for authorization to consent to sterilization because they were advised if Angela were to become pregnant, it would initiate an event of seizures which would result in her death and that of any fetus. The conservators were also advised she could not be placed on any form of birth control because of the medications she takes for her seizures and diabetic condition. Her doctors had recommended sterilization.

In the probate court, counsel was appointed to represent Angela. Counsel reported to the court the statutory factors which had to be established by the conservators in order to have the petition granted. Counsel concluded that every element could be proven with the one possible exception of the required showing that Angela was likely to engage in sexual activity. Counsel then concluded that in the absence of continual parental supervision, or upon placement in a residential facility, she could easily engage in sexual activity. Counsel therefore did not oppose the petition. (Conservatorship of Angela D., supra, [1999 Daily Journal D.A.R. at p. 3046].)

At the hearing on the petition, Angela was not present because she had the flu, but the probate court decided to proceed anyway. The physicians who prepared the reports were not present either, because counsel for Angela and the conservators had agreed they could be made available for questioning by telephone. After the hearing, the court authorized the conservators to consent to sterilization.

Appeal is automatic in these cases. On appeal, the main thrusts were: (1) there was insufficient evidence to support the required findings Angela would engage in sexual activity, and (2) Angela was denied equal protection and due process when her counsel elected not to oppose the petition and when the court conducted the trial in Angela's absence.

The Court of Appeal acknowledged the burden of proof in sterilization cases is proof beyond a reasonable doubt of all the factors set forth in Probate Code section 1958. (Conservatorship of Angela D., supra, [1999 Daily Journal D.A.R. at p. 3047].) As to the sufficiency of the evidence that Angela is 'capable of engaging in and is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy' the court observed the experts established she was physically sexually mature. (Conservatorship of Angela D., supra, [1999 Daily Journal D.A.R. at p. 3049].) Although it then acknowledged, "No evidence was presented that Angela was sexually active as of the time of the hearing," it noted, "that is not an issue in this appeal." (Ibid.) Instead, the court limited its review to whether she was likely to engage in sexual activity in the future. (The court may have overlooked the conjunctive "**and**" in the statutory language it used as its guide.)

The court looked at Probate Code section 1959, which it concluded must be read in conjunction with section 1958. Section 1959 states that "[t]he fact that, due to the nature or severity of his or her disability, a person for whom an authorization to consent to sterilization is sought may be vulnerable to sexual conduct by others that would be deemed unlawful, **shall not** be considered by the court in determining whether sterilization is to be authorized under this chapter." [Emphasis added.] Ironically, the reviewing court concluded the probate court was required to consider Angela's vulnerability to "sexual conduct by others that would be deemed unlawful" if it was to conclude that she was likely to engage in sexual activity, as it was not clear Angela could ever engage in sexual activity that would not be deemed unlawful under Penal Code section 261.

Acknowledging that evidence Angela is likely to engage in sexual activity is "slim," (Conservatorship of Angela D., supra, [1999 Daily Journal D.A.R. at p. 3050]), it concluded the evidence of Angela's future sexual activity was sufficient to support the trial court's ruling, because she was "passive and compliant," and "highly likely to participate sexually if asked to do so." (Ibid.)

On the issue of trial counsel's failure to oppose the petition, the court agreed counsel failed to satisfy his statutory obligation, but held the "success of appellate counsel's advocacy, ... serves also to defeat this claim." (Ibid.) "While arguing persuasively that trial counsel had a greater obligation to show in what way the evidence failed to meet the statutory standards, appellate counsel has also demonstrated that on the facts before us, even the best and most complete argument will not prevail. Appellate counsel has ably pointed out the weaknesses in the evidence, and has nonetheless failed to persuade this court that the showing was insufficient." (Ibid.)

The Court of Appeal did not refer to any standard of review in reaching this conclusion, and in the absence of appropriate language, it must be assumed it did not apply the Chapman standard. Given the high burden of proof at trial (beyond a reasonable doubt), the court's admission the evidence was weak, and the finding that trial counsel did not effectively represent Angela's interests in the hearing, from which she was absent, it is not entirely clear the evidence met even the lowest standard of review under Watson.

Additionally, the court found Angela's absence from the hearing was not a constitutional violation because "we are persuaded that the court would have continued the hearing **if there had been a possibility that Angela's presence would have had any impact on the outcome of the hearing, ...**" (Conservatorship of Angela D., supra, [1999 Daily Journal D.A.R. at p. 3051.] I guess with counsel not opposing the petition, and the petitioners failing to show evidence beyond a reasonable doubt Angela would actively engage in sexual activity, not being present at a hearing where fundamental rights will be implicated is a minor technicality.

The Fourth Appellate District, Division One, has ruled that a conservatee's unwillingness to take medication for his mental disorder establishes grave disability sufficient to re-establish the conservatorship. In Conservatorship of Guerrero (1999) __Cal.App.4th__ [1999 Daily Journal D.A.R. 721], the conservatee objected to a jury instruction by which the jury was told to consider Guerrero gravely disabled if he would

(Continued on page 18)

not take the medication prescribed for his mental disorder and would be unable to provide for his basic needs without medication. He contended the instruction created an alternative basis, which is not contained in the statute, for the jury to find him gravely disabled and expanded the definition of the term.

The reviewing court acknowledged decisional authority holding an LPS conservatorship may not be established just because of a future failure to take medication where the evidence establishes a person is not presently gravely disabled, but might become so without medication. It also acknowledged an individual cannot be found gravely disabled merely because he will not voluntarily accept treatment. It relied upon the analysis of Conservatorship of Walker (1989) 206 Cal.App.3d 1572, holding that evidence the conservatee could not provide for himself without medication, and that he would not take the medication without supervision, supported a finding he was presently gravely disabled.

Here, the court pointed to evidence presented by the psychologist that Guerrero did not believe he was ill and would not take his medication without supervision. The psychologist also opined Guerrero could not provide for his basic needs without the assistance of others, that such assistance was unavailable outside the conservatorship, and that his mental condition would further deteriorate without medication. Thus, the Court held that but for medication, which Guerrero would not take without supervision, Guerrero was presently gravely disabled. The jury instruction provided "an appropriate framework for the jury to consider these factors when determining whether Guerrero was presently gravely disabled." (Conservatorship of Guerrero, supra, [1999 Daily Journal D.A.R. at p. 722].)

UNIFORM CHILD CUSTODY JURISDICTION ACT

The last chapter in the stormy relationship between Shelley Brown and John Brown may not end their saga, but it at least transfers it to Austria. (Brown v. Brown (1999) __Cal.App.4th__ [1999 Daily Journal D.A.R. 3513.] This couple was international. They met in 1986 when John, described by Division Three of the Fourth Appellate District as "a peripatetic Australian-born international entrepreneur," was in California on business. They moved to Austria where they married and lived.

In January, 1992, Shelley gave birth to a daughter, S., in California, but she returned with the child to Vienna three weeks later. When S. was 5 months old, Shelly, pursuing studies in photography, took photographs of the nude child posed with nude men [there is no indication of pornography]. John found the photographs in September, 1992, showed them to his lawyer, and decided to keep them on hold for leverage in anticipated divorce proceedings. John absconded with the baby to Germany after an altercation with Shelley, and sent copies of the photos to Vienna authorities, before going on to Australia.

In Australia, John obtained temporary custody of S. However, Shelley had obtained an ex parte order in Vienna for physical custody, and she initiated efforts in the Australian court for return of S. Eventually, the Australian court concluded Austria had jurisdiction under the Hague Convention on the Civil Aspect of International Child Abduction, which was implemented in the United States in the International Child Abduction Remedies Act, 42 USC 11601, et seq.

So, Shelley and S. return to Vienna, where, for the next year, Shelley's progress is monitored by the Austrian equivalent of D.S.S. Because of Shelley's cooperation, and the strength of the mother-daughter bond, no dependency petition was filed by the Austrian authorities. Meanwhile, peripatetic John engaged in an international media blitz to call attention to Shelley's untoward conduct.

In December 1993, when the Austrian juvenile matter was concluding, Shelley and the minor flew to California for a holiday visit with Shelley's family. Very shortly thereafter, John arrived, complete with his photo album, handing out copies of the photos to police and the social services agency. S. was taken from Shelley on the basis of this evidence, and in March, 1994, the Orange County Juvenile Court found jurisdiction.

Concurrent appeals were filed in the state appellate court and in the federal courts. The state appeal was dismissed in April 1995 because the U.S. District Court had denied Shelley's petition for S.'s return to Austria, which the Court of Appeal construed as subsuming the Hague Convention and jurisdictional

issues, leaving the court without power to grant relief. In the meantime, the juvenile court had ordered shared custody between the parents, which the reviewing court felt mooted the issues. Subsequently, the juvenile court terminated jurisdiction, giving Shelley physical custody and awarding visitation rights to John.

In October, 1995, Shelley and S. returned to Vienna. However, by that time, John had not visited, contacted or supported S., and Austria's appellate court had rejected John's appeal from the custody order.

In July 1996, the Ninth Circuit Court of Appeal dismissed the appeal from the district court's order, because S. was no longer under court protection. John immediately filed an order to show cause in the Orange County Family Court and managed to obtain a default order granting him sole legal and physical custody of S. However, because of defective notice to Shelley, and John's failure to inform the court of the prior custody order of the Austrian court, Shelley's motion to set aside the order was granted. The next day, the Austrian court denied John's petition for S's return to California.

In August, 1996, John returned to California and filed a second order to show cause, again seeking to modify child custody on the basis of changed circumstances, to wit: Shelley's "wrongful removal" of S. from California in violation of "a federal order barring such removal." On Shelley's motion, the case was dismissed for lack of subject matter jurisdiction, and on the basis of forum non conveniens.

The Court of Appeal affirmed in a tone expressing judicial exasperation with an individual who has been manipulating forums on three continents. It first "disenchant[ed]" John of any notion the district court's order somehow compelled Shelley to remain in California. (Brown v. Brown, supra, [1999 Daily Journal D.A.R. at p. 3514].) It then analyzed the child custody jurisdictional issues, and found there was no evidence Austria, which rendered the initial custody decree, did not now have jurisdiction, nor had it declined to assume jurisdiction.

Further, there was no basis for California to exercise jurisdiction based on S.'s best interests or any significant connection with the state. As to the inconvenient forum, the trial court was correct in its finding because another state/country was the child's home state and it had closer connection with the child and the child's family. (Brown v. Brown, supra, [1999 Daily Journal D.A.R. at p. 3515].) The Court of Appeal concluded "express[ing its] ardent hope John will, at long last, give up his 'judicial fishing [using S.] as bait.' [Citation omitted.] For the child's sake, this sorry tale must come to an end." [Emphasis added.] (Ibid.)

CONCLUSION

That's all for this issue. Be sure to send in any anecdotes or kudos (other than the kudos for reversals on appeal) you would like to share, and remember to keep your Civil Tongue.

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, 1) In re Tyler R., #D031436, Father not given notice termination hearing would involve "exit orders," and would involve changes in custody and visitation. Court agreed father was entitled to proper notice; case reversed and remanded for another hearing. Only visitation orders will be addressed as there was no change in custody status, and father did receive notice of termination hearing. (I) 2) In re Taneshea H., #D032227, Parties stipulated to have the juvenile court's order reversed. Order, made on the court's own motion, terminated jurisdiction over the minor, & was made without notice to social worker or the parties. (I)

Susan Bauguess, P. v. Serrano, #G022958, 1-year prior prison term under PC 667.5 subd. (b) stricken when imposed along with a prior serious felony enhancement based on same underlying conviction. (A)

Sylvia Beckham, P. v. Bowker, #G022941, Reversal. Jury was never instructed on what burden of proof applied to appellant's defense; prosecutor compounded error by presenting "egregiously improper argument," in telling the jury appellant had to prove the elements of her affirmative defense beyond a reasonable doubt. (A)

Diane Berley, P. v. Damian, #G021073, Trial court erred (harmless) by proceeding on the wrong information and allowing retrial of acquitted counts. Trial court also erred in sentencing defendant to longer term following retrial from a successful appeal per double jeopardy principles. Sentence reduced from 24 years to 21 years and 8 months. (I)

Susan Bookout, P. v. Snook, #D021913, True findings of prior DUI convictions reversed because admissions not voluntary under totality of circumstances. (A)

Phillip Bronson, P. v. Rutledge, #D028984, Conviction for drug possession stricken because LIO of conviction for possession for sale of the same drugs. (I)

Doris Browning, P. v. Aaron M., #D031511, Maximum term of CYA confinement reduced by 2 years because court added 2 personal use enhancements (PC 12022(b)(1)) to 2 ADW counts. Enhancements precluded under Summersville (1995) 34 Cal.App.4th 1062, [knife use was element of offense]. (I)

Dennis Cava, P. v. Branch, #E022314, Romero resentencing ordered after trial court announced it had no discretion to give anything other than a strike sentence. (I)

Kate Chandler, 1) In re Jason P., #G023326, Order terminating parental rights reversed based on subsequent events, brought to light by mother's counsel on appeal, establishing changed circumstances. The trial court had found Jason adoptable because at the .26 hearing he had been recently placed in the same adoptive home as his baby brother. The prospective adoptive family of his sibling expressed a desire to adopt Jason as well. However, during the appeal, the placement failed. The Court of Appeal took judicial notice of the post-judgment events, reversed the judgment and remanded for further proceedings. (A)

Mark Christiansen, P. v. Rodriguez, #E021525, Remand for resentencing. Court must stay pursuant to PC 654, count of discharging firearm at unoccupied vehicle or count of discharging firearm in grossly negligent manner. (Trial court also forgot to pronounce sentence on one count.) (I)

Janette Cochran, In re Jeremy R., #G023038, Jurisdictional finding under Welf. & Inst. Code 300(e) (severe physical abuse inflicted on minor under 5 resulting in permanent disfigurement or disability) was reversed. Because a 300(e) finding has significant implications (denial of services, prima facie evidence for removal, and fast track referral for permanency planning), court strictly applied statutory language. Insufficient evidence to sustain 300(e) finding. However, atmosphere of neglect in the home supported the 300(b) finding and removal of custody. (I)

Janette Cochran, Lori Fields, John Dodd &

Patricia Ihara, In re Yuridia G., #G022986, Judgment terminating parental rights and ordering adoption as permanent plan was reversed to permit another hearing on adoptability. Court found two siblings adoptable even though one child suffered from AIDS, and even though no prospective adoptive parents had been identified for the child who was ill. Further, family members wanted to adopt the children. Court found there was no clear & convincing evidence both children would be adopted. The result of the trial court's ruling was to deprive the children of relatives who wanted to adopt them in the hope "something better" would come along. (I)

Marianne Cox, In re Frederick G., #D029845, True finding of assault by means of force likely to produce great bodily injury and GBI enhancements reversed for insufficient evidence. (I)

John Dodd, P. v. Escobar, #G021610, Two year sentence for street terrorism stayed pursuant to PC 654. (I)

Casey Donovan, P. v. Salcido, #D028847, Possession of controlled substance reversed because LIO of possession for sale conviction. (A)

Ronnie Duberstein, 1) P. v. Perkins, #G022107, Assault conviction reversed as LIO of corporal injury to spouse conviction. (A) 2) P. v. DeAlba, #G022691, Conviction for assault reversed and remanded because the trial court erred in allowing defendant to be impeached with a prior misdemeanor for assault and failing to give a limiting instruction. (A)

Brett Duxbury, P. v. Carroll, #E020773, Two convictions of pandering reversed for insufficient evidence where defendant solicited a woman to engage in an act of prostitution with him only. Sentence for the subordinate terms improperly exceeded the 5-year limitation of former PC 1170.1, subd. (a). (I)

Suzanne Evans, In re Zarco, #D031026, Dispo order with respect to visitation reversed because inadequate visitation services were offered to incarcerated father. (I)

Patrick Ford, P. v. Barcheers, #D029588, Murder conviction reversed because trial counsel inadequately investigated a mental health defense. The record showed ample indication of such a defense from W&I 707 proceedings, but counsel failed to follow up on same and introduced no defense evidence. Juvenile defendant's well established history of major depression with psychotic features, as well as bi-polar disorder coupled with her ceasing to take prescription medications 2 days before murder may have triggered a manic episode. COA found there no tactical basis for abandoning the mental defense counsel had informed the jury (during opening statements) he would present. (I)

Robert Gehring, In re Stephanie G., #D031396, Order dismissing W&I 300 petition at jurisdictional reversed and remanded because the trial court applied dispositional criteria (whether removal from custody was proper) to the question of whether it should exercise jurisdiction under W&I 300(j). COA concluded the dismissal was based on the wrong test, requiring a new jurisdiction hearing using the correct standard and current information. (I)

Jacquelyn Gentry, In re Hunter S., #G023842, Juvenile court order denying a hearing on the merits on a parent's petition pursuant to W&I 388 was reversed with directions to hold a hearing on the merits.

Mother agreed to a guardianship while she engaged in a treatment program on her own. (She waived services). After completing a 12-step program, parenting class and obtaining a job and

(Continued on page 22)

an apartment, she petitioned for a modification of the order. Under the liberality standard, the court concluded it was manifestly unreasonable to deny the petition without a hearing. (I)

Harvey Goldhammer, In re David G., #E022735, True finding and dispositional order to CYA reversed where only evidence of violation at hearing was inadmissible hearsay. (I)

Leslie Greenbaum, P. v. Le, #G022640, Gang enhancement imposed pursuant to PC 186.22(b)(1) stricken because defendant subject to 15-year minimum parole eligibility under 186.22, subd. (b)(4). (I)

Mark Greenberg, P. v. Bayard, #D030767, $10,000 restitution fine pursuant to PC 1202.45 stricken because defendant's offense committed before section's enactment. (I)

Kimberly Grove, P. v. Cutts, #D029280, Murder conviction reversed because trial court erred in failing to give voluntary manslaughter instruction. (I)

M. Elizabeth Handy, In re Shawn P., #E022375, Juvenile court violated mother's due process rights by changing legal & physical custody of her child to the father without notice or a reasonable opportunity to be heard. (I)

Robison Harley, P. v. Gill, #G022286, Two convictions for violation of PC 4573.6 [unauthorized possession of controlled substances/paraphernalia in jail] where heroin & paraphernalia were found near appellant cannot stand per People v. Rouser (1997) 59 Cal.App.4th 1065. Case remanded to allow trial court to determine which count to dismiss and for resentencing. (I)

Melody Harris, P. v. Febles, #D028087, Conviction (with 69 years to life sentence) reversed because court refused to dismiss juror who expressed fear of defendant unless defendant was in custody; refusal to dismiss deprived defendant of trial with fair and unbiased jury. (A)

Mark Hart, 1) P. v. Garcia, #E021070, Court erred in imposing serious felony prior enhancement on each count, rather than on aggregate sentence. Also, court erred in imposing enhancement for two serious felony prior enhancements when only one found true. Sentence reduced from 32 years to 17 years. (I) 2) P. v. Zambrano, #E020275, Reversal. Incomplete record failed to demonstrate whether instructions regarding appellant's unconditional right to enter his home vis-a-vis the burglary conviction were given; due process required reversal. (I)

Patrick Hennessey, P. v. Hale, #D029608, Foreign priors reversible per se because jury directed to find defendant had suffered the priors. (I)

Robert Hicks, P. v. Delagado, #D031168, Conviction for providing false information to a police officer reversed where trial court instructed the jury an element of the offense was true [arrest was lawful]. (A)

Michon Hinz, 1) P. v. Alexander C., #D029600, Two juvenile court true findings by Judge Kapiloff (possession of heroin and concealed knife) reversed for insufficient evidence. (I) 2) P. v. Fletcher, #D029893, Judgment reversed on 1538.5 grounds, where 1) defendant had standing to assert privacy interest in two safes in his bedroom despite initial denial of ownership and 2) defendant's consent to search was involuntary based on "police pressure, confinement, isolation and outright coercion". (I)

Handy Horiye, P. v. Ennis, #E020998, Robbery and false imprisonment counts reversed because LIO's of kidnapping for robbery. Parole restitution fine stricken because appellant got LW0P sentence. (I)

Robert Howell, P. v. Avia, #D028681, Reversal of attempted premeditated murder and related convictions & enhancements based on evidentiary and instructional error which deprived appellant of a fair trial. DA's "cooperation agreement" with the victim - a major drug dealer - and the probation report outlining the agreement - was excluded from evidence although relevant to victim's (the only eye witness) credibility. On the hand, propensity evidence of defendant's prior police contacts (police database search) was admitted although marginally relevant at best. Finally, instructing with CALJIC No. 2.04 [fabrication of evidence] was error. Cumulative effect of error required reversal. (I)

Rebecca Jones, P. v. Mere, #E020658, Court reversed convictions for manufacturing meth and possession of meth for sale because the evidence was

insufficient. Case remanded because defendant could be retried on simple possession. Even though some chemicals and equipment associated with manufacturing were found in the trash outside the home, there was no lab in operation and no evidence when a lab might have been in operation. (A)

Sharon Jones, P. v. Le, #G021737, Consecutive 25 to life sentence stayed per 654 where defendant convicted of possessing two drugs - heroin & cocaine - to use as a "speedball." (I)

Greg Kane, P. v. McMullen, #D027198, Auto burglary reversed for insufficient evidence of entry. (I)

Susan Keiser, P. v. Benitez, #E021058, Remanded for hearing. Denial of PC 1538.5 motion reversed where officers obtained a search warrant based on observations made during a previous search which exceeded the scope of consent. Prosecution has burden of proving warrant would have been sought absent the observations. (I)

Joyce Keller, 1) P. v. Herrera, #G021034, Sentence modification. Trial court improperly imposed 8-month term for gang enhancement on one attempted murder count. Execution of sentence on 6 additional counts stayed per PC 654. 2) P. v. Rangel, #G021244, Affirmed in part and reversed in part. Case remanded to superior court with directions to again remand case to CYA with directions to perform diagnostic evaluation of appellant under W&I 707.2. (Note: CYA claimed appellant was statutorily ineligible for CYA commitment per W&I 1732.6. However appellate review of record determined ineligibility may have resulted from incorrect information included in the indeterminate sentence report which erroneously stated appellant was convicted of attempted murder rather than attempted voluntary manslaughter.) (ADI)

Roni Keller for mother, **Harold LaFlamme/Craig Arthur** for minor, In re Zebari G., #G023100, Reversal for erroneous denial of mother's W&I 388 petition where trial court based its denial on a subjective finding the mother had not "internalized" the lessons she learned where the objective evidence was to the contrary. (I)

Ivy Kessel, P. v. Bobbitt, #G022242, Robbery conviction reversed due to trial court's failure to sua sponte instruct on unanimity when prosecutor argued defendant could be convicted of robbery based on either the theft of his mother's ATM money or the theft of her car. (I)

Nancy King, 1) P. v. Knight, #D028304, LIO of possessing a controlled substance (H&S 113767(a)) stricken. PC 654 barred concurrent term for possessing narcotic paraphernalia (11364). (I) 2) P. v. Hill, #E020592, Remand based on unauthorized sentence. Appellant guilty of possession of not more than 28.5 grams of marijuana. Remand because 1) he was erroneously sentenced for possession for sale of marijuana, 2) arming allegation pursuant to PC section 12022(a)(1) had to be dismissed because he was convicted of a misdemeanor and not a felony. (A)

Marleigh Kopas, P. v. Lupercio, #G020545,Forcible rape conviction reversed because LIO of forcible rape in concert. (I)

Daniel Koryn, P. v. McIntyre, #D030652, Suppression ordered where police violated curtilage by entering defendant's back yard. (I)

Sylvia Koryn, In re Tyler H., #D031047, Vehicular burglary reversed for insufficient

(Continued on page 24)

evidence. (I)

Eleanor Kraft, P. v. Little, #D030968, People conceded that the consecutive term for second degree robbery which is not a violent felony cannot include a weapon use enhancement under 1170.1, subd. (a). The Court of Appeal ordered the abstract modified to strike the four-month enhancement on count 22. (A)

Janice Lagerlof, P. v. Ortiz, #E021315, In 3X case trial court erred by tripling a 15-year to life sentence for attempted premeditated murder because non-strike punishment is life, not 15-to-life. Sentence reduced from 45-to-life to 25-to-life. (I)

David Lampkin, P. v. Robbins, #G021687, Abstract of judgment modified to show misdemeanor rather than felony conviction for passing bad check. (A)

Marcia Levine, P. v. Gibson, #E021230, Armed enhancement improperly imposed where sentence on underlying robbery stayed. (I)

Michael Linfield, P. v. Nguyen, #E020418, Abstract of judgment corrected to reflect actual sentence. (I)

David Macher, P. v. Ennis, #E020998, Robbery and false imprisonment counts reversed because LIO's of kidnapping for robbery. Parole restitution fine stricken because appellant got LWOP sentence. (I)

Kathleen Mallinger for father, **Dorothy Hampton** for minor, In re Anthony B., #E023029, Reversal of a judgment terminating parental rights because the father was not appointed counsel during the dependency although he asked for counsel; publication was used for notice although social services knew where the father was incarcerated, but falsely represented it had no contact with him. After father filed a notice of intent to file a writ and COA appointed trial counsel, counsel said there were no grounds to submit a writ. Father submitted his own writ. At the termination hearing, appointed counsel stated the record indicated a statutory basis for termination of services and for adoption, and submitted. IAC of trial counsel (appellate counsel listed actions the trial counsel could have taken to investigate and present father's position); among statutes violated were W&I 307.4, 316, 317, 317.5, 336, 337, 353, 361.5, 366.21, subd. (e). Remanded for new jurisdictional hearing. (I)

Gideon Margolis, In re Michael D., #D031208, Patdown search conducted without reasonable suspicion appellant was armed & dangerous. Officer did not feel hard object during patdown which would justify subsequent detention & search. (I)

Marilee Marshall, In re Travis M., #D030626, CYA commitment order reversed and matter remanded for juvenile court to order juvenile to CYA for evaluation of psychiatric needs and proper placement in facility which can provide psychiatric treatment and protect the public. (I)

Janice Mazur, P. v. Robert S., #G022413, Reversal of the lower court's true findings that appellant possessed or brandished a "firearm" based on insufficient evidence. (A)

Lynne McGinnis, P. v. Zazueta, #D030243, Insufficient evidence to support the convictions of soliciting a felony & offering to sell an assault weapon; remanded for resentencing. (A)

James McGrath, P. v. Perez, #E020561, Defendant could not be convicted of both illegally taking/driving a stolen vehicle and receiving stolen property. Jury instructions inadequate. Defendant's conviction for receiving stolen property reversed. (I)

David McKinney, P. v. Mariscal, #D027728, Abstract corrected to show defendant received life with possibility of parole rather than LWOP. (I)

Kevin McLean, P. v. Renko, #D023059, Two of three strike priors vacated because the two priors were juvenile residential burglaries -not an offense listed in W&I 707, subd. (b), as required by PC 667, subd. (d)(3). (A)

Richard Miggins, P. v. Sanchez, #E021007, Trial court ordered to strike findings of knife and gun use because of insufficient evidence, and reduce sentences for other gun and knife enhancements. (I)

Stephen Miller, P. v. Edmonson, #D031079, Where appellant's current case served as the sole basis to revoke appellant's probation on a prior case, which

ultimately led to the imposition of a prison sentence, appellant is entitled to custody credits in the prior case from the day of his arrest in his current case. AG conceded error. (I)

Elizabeth Missakian, 1) P. v. Vann, #D029825, Sentence on count 2 was stayed pursuant to PC 654 because possession of the rock cocaine was solely for the purpose of furnishing it to the undercover police officers in exchange for money (count 1). AG conceded concurrent sentences as to both counts were improper. (A) 2) P. v. Curtis, #D029200, Reversed and remanded because trial court abused discretion in denying continuance motion for appellant to prepare pro per motion for new trial. (A)

Richard Moller, P. v. Hill, #D028550, Conviction for carjacking reversed where victim was a seven-month-old baby. A seven-month-old baby has no will to overcome and cannot be the victim of either a robbery or a carjacking. (I)

Eric Multhaup, P. v. Jennings, #D027604, Remand for resentencing for the trial court, which had imposed consecutive 25 years to life sentences, to determine whether convictions on two counts for two victims in same robbery, should be concurrent or consecutive. (I)

Gary Nelson, 1) P. v. Bedford, #D028284, 30 varied counts of sex acts on minors reversed for instructional error, evidentiary error, and three separate acts of prosecutorial misconduct. (I) 2) P. v. Rodriguez, #D029497, Because PC 667(a) enhancement was neither pled nor proven, the court erred by adding 5 years to appellant's sentence. (I)

Ronda Norris, P. v. Kromberg, #E021886, Sentence reduction. Increase of original term after sentence was formally entered in minutes violated double jeopardy principles. Also, burglary term stayed under PC 654. (ADI)

Nancy Olsen, P. v. Alvarez, #E021058, PC 654 stay on possession with intent to manufacture count. (I)

Peggy O'Neill, P. v. Marquez, #E021180, PC 654 stay on possession count. (ADI)

Debi Ramos, P. v. Belman, #G021796, Prison-prior admission reversed with remand due to Yurko error. (A)

David Rankin, 1) P. v. Birchfield, #E022217, On People's appeal, trial court's decision to strike a strike-prior and impose a two-strikes sentence upheld. During appeal trial court added statement of reasons to the minutes nunc pro tunc on defendant's request. 2) P. v. Munson, #E021945, Possession of meth for sale reversed because trial court erred in denying appellant's suppression motion where prosecution failed to show justification for traffic stop. (ADI)

Sharon Rhodes, P. v. Mohammad, #E023024, Reversal - defendant given right to withdraw guilty plea because initial plea bargain provided illusory right of appeal. Plea agreement provided court would issue certificate of probable cause but did not advise defendant his right to file an appeal from a guilty plea was limited. (I)

Gregory Rickard, P. v. Ramirez, #D028918, In a pre-Evidence Code 1109 spousal battery case, trial court erred prejudicially in admitting evidence of defendant's prior assaults on the alleged victim. Reversed. Note: such evidence is now admissible under EC 1109. (A)

(Continued on page 26)

Lynda Romero, P. v. Burks, #D027616, In a special circumstances murder with a prior strike, the doubled LWOP reduced to a single LWOP. (I)

Robert Russo, P. v. Matthews, #E020833, (Published opinion.) Evidence insufficient to sustain conviction of taking/removing an officer's weapon where defendant did not reach for officer's gun but it fell out of the officer's hands when defendant hit the officer, and defendant did not attempt to pick up the weapon after it fell. (A)

William Salisbury, P. v. Herrera, #E022258, Consecutive 8-mo. term for violating VC 23153(a) stricken because crime is LIO of PC 191.5, for which appellant received 6-year term. (ADI)

George Schraer, P. v. Ruse, #D028459, Court found that appellant's statements to police and D.A. were not properly admitted under the state of mind exception to the hearsay rule, but error harmless because the statements were cumulative to other testimony. Judgment modified to reduce restitution fine to within the $10,000 limit. (I)

Richard Schwartzberg, 1) P. v. Luna, #E021329, One count of second degree murder and five counts of attempted murder reversed where court erroneously admitted "snitch's" hearsay statements; statements were not declarations against interest subjecting "snitch" to hatred, ridicule or societal disgrace because it is
the facts stated, not the statement, that must be against interest. (I) 2) P. v. Almada, #G021107, Conviction for filing false worker's comp claim (Ins. Code, 1871.1) reversed because insurance company admitted defendant was injured on the job and even though she did not disclose all of her prior claims, under worker's comp law the insurance company was obligated to pay "every penny it paid." (I)

Patricia Scott, 1) P. v. Upton, #E021749, Insufficient evidence defendant entertained multiple criminal objectives in exhibiting a firearm in the presence of a police officer in violation of PC 417 and exhibiting a firearm to a police officer to resist arrest per PC 417.8. The 417.8 was stayed per PC 654. Judgment also modified to delete true finding on firearm use enhancement and the corresponding 4 years imposed because the jury acquitted on the underlying offense. (A) 2) P. v. McKee, #E021973, Appellant's admission of prior conviction reversed and remanded because appellant was not advised of, and did not waive, his constitutional rights. One count stayed per PC 654 and abstract amended to award additional presentence credits. (I)

Alisa Shorago, 1) P. v. Lindley, #E019692, Multiple convictions arising out of a robbery at McDonald's occurred on the "same occasion" and thus the trial court had discretion to sentence concurrently under three strikes; remanded for resentencing because trial court not aware of this discretion. 2) P. v. Cuen, #D028786, Reversal of all priors, including strike priors, based on trial court's failure to comply with Yurko right before the admissions. (AG argued waiver based on Vera and Saunders and trial court's mention of all three Yurko rights months earlier satisfied Howard standard of prejudice.) 3) P. v. Heath, #E019663, Partially Published. Convictions for possession of a controlled substance with a firearm (H&S 11370.1(a)), possession of a deadly weapon (PC 12020(a)) and personal arming allegation reversed on grounds of insufficient evidence defendant knew firearm and pen gun were present. Court rejected AG's argument that inference of possession in Bland applied, finding insufficient evidence that defendant frequented the place where the weapons were found. (ADI)

Susan Shors, P. v. Delgado, #G019577, Romero remand. (I)

Stuart Skelton, 1) P. v. Van Pelt, #D028258, Premeditated attempted murder and residential burglary convictions reversed because trial court imposed excessive discovery sanctions that deprived appellant of right to compulsory process, i.e., trial court excused, limited, and discredited defense witnesses. (A) 2) P. v. Nevarez, #D030504, Improperly stayed prison priors ordered stricken. (I)

Victoria Stafford, P. v. Cornell, #D029976, Reversed. Trial court erred in denying suppression motion. No probable cause to stop car based on claim that hanging air freshener obstructed view of the front window or because appellant gave a ride to another person suspected of engaging in a drug transaction. (I)

David Stanley, P. v. Glenn, #E021296, Remand under Hendrix and Deloza for trial court to exercise its discretion whether to impose concurrent terms. (I)

Theresa Stevenson, P. v. Alvarez, #E022357, Denial of PC 1538.5 motion reversed. (I)

Ava Stralla, P. v. Wood, #D030368, Abstract of judgment and court minutes modified to reflect actual sentence imposed. Trial court had failed to correct error, even though it had been asked to do so. (I)

Jeffrey Stuetz, P. v. Bowman, #D028567, In 3X case, four 25-life convictions for VC 10851 reversed because these crimes occurred before appellant joined conspiracy to commit several other 10851 offenses. (I)

Jeffrey Stuetz/Waldemar Halka, P. v. Johnson, #E022160, On appeal after a resentencing hearing, 3X terms imposed consecutively ordered served concurrently when trial court made clear on the record it would have sentenced concurrently but did not have the discretion to do so. Court also found 3X limitation on credits did not apply to time spent between original sentencing & resentencing hearing. (I)

Patricia Ulibarri, P. v. McGrant, #D029242, Minute order and abstract modified to correctly reflect a fine of $500 instead of $800. (I)

Christine Vento, P. v. Martinez, #G020545, Forcible rape conviction reversed because LIO of forcible rape in concert. (I)

Robert Visnick, P. v. Hinoza, #G019577, Romero remand. (A)

Jerome Wallingford, 1) P. v. Clayton, #G018643, Enhancement for use of firearm reduced from 10 years to 5 years, since offense pre-dated the statutory increase in the term. (I) 2) P. v. Womack, #E021033, Court reduced 10-year enhancement for personal use of a weapon to middle term of 6 years after finding trial court used same aggravating factors to impose upper term on gun use and separate sentence for a conspiracy count. Note: This reduction was ordered despite absence of objection by trial counsel and without a finding of IAC. (I) 3) P. v. McDaniel, #D026671, Judgment modified to strike rather than stay seven prison priors. (I)

Eric Weaver, P. v. Bradford, #E020996, Amended abstract of judgment to reflect correct sentence. (I)

Nancy Weiss, P. v. Hampton, #D029356, Concurrent sentences for receiving stolen property, second degree burglary and grand theft stayed because part of same course of conduct and carried out for same purpose as the forgery of a check offense. (A)

Kyle Wesendorf, P. v. Gutierrez, #D031272, Prior prison term enhancement stricken. Court erred in imposing time when time also imposed for 5-year serious felony based on rape conviction. (I)

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

Harry Zimmerman, 1) P. v. Hubbard, #E020824, Probation violation and 8-year sentence reversed due to insufficient evidence that defendant was presently mentally competent. (I) 2) P. v. Verdugo, #E021225, Trial court erred in not granting PC 1118.1 motion for acquittal - insufficient evidence to support a violation of H&S 11370.9(c). (I)

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