APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

NUMBER 36 **JANUARY 1999**

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

Best wishes for the new year to all of you from ADI. The year promises to be busy and productive for the indigent appellate defense system.

Claims

Holdback. We start off with some good news that undoubtedly has already made the rounds: the interim claim holdback has been reduced from 10% to 5% for claims filed after January 1, 1999. The Appellate Indigent Defense Oversight Advisory Committee (AIDOAC) has determined this is a sufficient margin to ensure against ultimate overpayment. We will be sending a mailing on this subject and on time limits (next paragraph) as soon as we get answers to a few questions on how to apply this policy in special situations.

Time limitation on filing. AIDOAC also decided that final claims must be submitted within six months of the filing of the opinion. We are trying to resolve several questions on the application of this policy and, as just mentioned, will send a follow-up mailing.

Speed of processing claims at ADI. We are investigating complaints of increased delays in our internal processing of claims. Our objective is to take no more than 10 working days for a routine claim, and on some occasions that time has not been met. We are trying to identify possible bottlenecks in the office and to remind all employees who handle claims of their individual responsibility to expedite the process. Very soon, too, we will start electronic submission of claims, which will eliminate the delays and risk of loss inherent in mailing paperwork to San Francisco.

Meanwhile, some tips on things panel attorneys can do to reduce the time needed to process their claims:

When any item is not self-explanatory, give us your explanation with the claim. Examples are any items over the guidelines and any services that are not apparent from the filed documents (unusual communications with the client, research that did not yield any fruit, etc.). Many delays are caused by the need to contact the panel attorney for further information. A number of panel attorneys have developed the practice of submitting a memo with each claim to clear up any possible questions; as a result, their claims almost always can be handled smoothly and quickly.

Be sure to declare and identify all recycled materials, to assist the staff attorney in

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checking for this. AIDOAC is very concerned that the projects review documents for copying of previously done work. For example, we need to determine if an argument was taken from a briefbank or another brief, if parts of a petition for review were copied from the briefs and/or a petition for rehearing, or if a habeas borrowed from the AOB -- and, in each case, how much. You can greatly facilitate this determination by giving us the information up front. If you don't and we find evidence of recycling, we will probably have to send the claim back, and that will start the process all over again.

Double-check math, make sure all items are complete and accurate, and be sure to sign the claim. An amazing number of claims have to be sent back for formal errors.

Appropriate Use of Associate Counsel

The responsible use of associate counsel (and law clerks or paralegals) is a recurring and difficult one. Major problems have been: failure to supervise the associate adequately, so as to ensure the quality of the final product is at the level expected of appointed counsel; delegation of so much responsibility to the associate that the appointed attorney does not fully understand the case and is unable to discuss it in depth when contacted about it; and inappropriate use of an associate to handle oral argument. I would like to repeat here some guidelines. (See also the ADI handbook for appointed counsel.)

Appellate Defenders uses a complex method of evaluating attorneys and selecting them for particular cases. This system is undercut when attorneys delegate undue authority to individuals not put through this screening process. Thus, the attorney of record has full and final responsibility for his or her cases. This includes (a) meeting all deadlines, (b) personally reviewing the record for issues, (c) making sure the record is adequate, (d) filing briefs and other pleadings, and (e) making personal appearances.

While an attorney may employ others to *assist* in any of these functions, the attorney is fully accountable at all times for the result. For example, an associate may research a particular issue, but it is the attorney's own responsibility to ensure that the research is complete, accurate, and current. Similarly, an associate may draft part or all of a brief, but the appointed attorney must see that the document is complete in form and substance and is argued coherently, grammatically, and persuasively.

The work at all times, including pre-AOB stages, must reflect the appointed attorney's own qualifications. ADI attorneys cannot be expected to revise the work of relatively inexperienced associate counsel when we have intentionally selected more experienced counsel. When a staff attorney calls to discuss an aspect of the case, we expect the appointed attorney personally to be knowledgeable about the relevant facts and law.

Personal appearances such as oral arguments are extremely difficult to supervise. It is one thing to edit an associate's draft brief before filing, but quite another to send an associate off to a courtroom alone. Unless advance arrangements have been made, we expect appointed counsel to make all appearances personally. The court may require the client's consent to argument by an associate.

Associate counsel or law clerk costs are included with appointed attorney's time to determine if the overall claim is reasonable. Counsel thus needs to monitor the assistant's time.

Use of associate counsel can be an efficient way of approaching cases and a help in developing the skills of newer attorneys, but only if the interests of the client and the goals of the appointed counsel system are not compromised. These guidelines will help attorneys who use the associate counsel resource meet our expectations.

CPC Alert!

By Anna M. Jauregui, Staff Attorney

At last, the California Supreme Court has addressed the issue of whether a defendant, who has pleaded guilty or nolo contendere to a charge in superior court and who wishes to obtain review of issues challenging the validity of that plea (a.k.a. "certificate issues"), must comply with Penal Code section 1237.5 and California Rules of Court, rule 31(d), first paragraph, in a timely fashion, that is, literally within 60 days after the rendition of judgment. The Supreme Court has said yes. (People v. Mendez (1999) __ Cal.4th __[99 Daily Journal D.A.R. 489].)

Penal Code section 1237.5, subdivision (a), requires a defendant to file with the trial court a "written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" whenever he or she wishes to raise an issue regarding the validity of a plea of guilty or nolo contendere or of an admission to a probation violation on appeal. This written statement is known as a "request for a certificate of probable cause" or a "CPC" request. No time limit is proscribed in this statute.

The time limit is set forth in the California Rules of Court. Rule 31(d) applies where guilty plea appeals are involved. It states, in relevant part and with emphasis added, the "defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 . . . ; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause . . . ." The trial court must grant or deny the CPC request within 20 days of the filing of that request. (Cal. Rules of Court, rule 31(d) [first paragraph].)

Mendez, a case arising originally from the Fourth Appellate District, Division Two, has interpreted and applied these two procedural authorities in a strict manner. A defendant must request a certificate of probable cause within 60 days of judgment and obtain that certificate from the superior court within 20 days after the filing of the request (and, hence, within a maximum of 80 days after rendition of judgment) or lose the right to raise issues on appeal concerning the validity of the plea. [Although the Supreme Court did not specifically include in its discussion or in its holding cases in which a defendant seeks to challenge the validity of his/her "admission" to a probation violation, it consistently referred to "certificate issues," which would logically include a challenge to an "admission" under Penal Code section 1237.5, subdivision (a). Interestingly, rule 31(d) does not specifically include "admissions" within its 60-day time limitation.] If the defendant is late in filing the CPC request, the Court of Appeal will not entertain any issues going to the validity of the plea. If there is no other **non**certificate ground for appeal (e.g., appealing the denial of a motion to suppress evidence or a matter arising after the entry of the guilty plea, such as, the sentence which does not attack the validity of the plea) from which the defendant timely filed a notice of appeal (see rule 31(a) [first paragraph] and 31(d) [second paragraph]), the Court of Appeal must order dismissal of the appeal. What this also means is that, if a notice of appeal was timely filed within 60 days and stated only noncertificate grounds for appeal, noncertificate issues can be raised on appeal but that timely notice of appeal can not be used to expand the questions on appeal to include certificate issues.

Rather harsh outcome for our clients. However, an avenue still exists for seeking redress - the petition for writ of habeas corpus based on ineffective assistance of trial counsel in failing to seek the CPC on time. (Note, the Supreme Court did not make any suggestions regarding any method of relief, although Division Two in its earlier opinion in the same case suggested the writ process and further mentioned that Mr. Mendez never asked the Court of Appeal to relieve him from his failure to comply with rule 31(d) by way of a motion for relief from default (Cal. Rules of Court, rules 45(c) and 45(e)), implying that this was another avenue for

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relief.)

If appellate counsel determines that the circumstances of his or her particular case warrant looking into a writ petition, we suggest the following: (1) evaluate whether any certificate issues that are discovered in reviewing the record are, in fact, meritorious, that is, have a reasonable chance of success, (2) find out why trial counsel did not file a CPC request, and (3)
consult with our office (consistent with our office policy that panel attorneys contact us whenever a writ petition is contemplated).

DUI Convictions In Orange County

During the time period of January 1, 1997 through June 25, 1998, most Orange County law enforcement offices used unlicensed breath-testing machines to determine drivers' blood alcohol levels. (It appears the only law enforcement agency which did not use the machine was Huntington Beach Police Department.) DMV will remove drunken driving convictions from drivers' records when licenses were revoked or suspended solely on the basis of readings from the machine (BAC Datamaster) during this time period.

In order to obtain administrative remedies such as having suspended or revoked licenses reinstated, motorists must submit written requests to DMV to have the convictions removed. However, criminal convictions must be challenged on the basis of the reliability of the readings. At the appellate level, the challenge would by petition for writ of habeas corpus.

At the time of this writing, the Orange County Public Defenders Office is in the process of formulating a strategy for handling the potential issues surrounding these cases. The contact person at that office is Don Landis, Deputy Public Defender. The office number is (714) 834-2144.

ADI asks panel attorneys to review all Orange County DUI cases or cases -- open or closed -- in which the BA level was part of the evidence at trial, e.g., driving under the influence (Veh. Code 23152), driving under the influence causing bodily injury (Veh. Code 23153), gross vehicular manslaughter while intoxicated (Pen. Code 191.5), or vehicular manslaughter (Pen. Code 192). Further, keep in mind that felony prior convictions which occurred during the relevant time period may also be implicated.

Although trial counsel will most likely be pursuing relief for clients, if you have clients on appeal who may be eligible for some relief, please contact ADI staff attorney Ronda Norris at (619) 696-0284, ext. 56.

Justice Terry B. O'Rourke Joins Court Of Appeal, Division One

Welcome to **Justice Terry B. O'Rourke**, our most recently appointed justice in Division One of the Fourth Appellate District. Justice O'Rourke was born in 1947 and grew up in San Diego. Becoming a lawyer was a logical choice given his lineage -- his cousins, uncle, and grandfather were all attorneys. The other reason, he jokes, was "bad judgment."

Justice O'Rourke received his bachelor's degree from Claremont McKenna College in 1969 and his juris doctor degree from Harvard Law School in 1972. After law school, he returned to San Diego, where he practiced civil law with the law firm of Davies & Birch. The bulk of his practice was business litigation, including antitrust and security cases. He later moved to Los Angeles, where he continued to practice civil litigation.

From 1984 to 1987, Justice O'Rourke served as a superior court judge in Los Angeles County. For several months during that period, he sat on the Second District Court of Appeal by assignment.

In 1987, he again returned to his hometown when Governor Wilson appointed him to the San Diego County Superior Court. As a superior court judge, Justice O'Rourke handled both civil and criminal trial calendars, presiding over more than 50 murder trials.

On December 7, 1998, Justice O'Rourke was appointed to Division One by Governor Wilson and was sworn in on December 7, 1998. He values the rule of law and takes his job as a judicial officer very seriously. He has been described as having "exceptional intellect, legal experience, [and a] diligent work ethic."

Justice O'Rourke is a welcome addition to the Court.

What To Do To Expedite Your Client's Release From Custody Following A Successful Appeal Or When It Appears During The Progress Of The Appeal That Your Client's Chance At Success Is Strong

By Elaine A. Alexander, Executive Director and Anna M. Jauregui, Staff Attorney

When a client wins an appeal that entitles him to immediate release, he runs the risk of serving unnecessary time unless appellate counsel takes precautions to protect against this. Sometimes, the circumstances of the case alert the client's release should be sought beforehand. Here is a list of some useful tips.

1. During your initial review of the case following appointment, determine the client's expected release date and calculate how that might be affected by a victory on appeal.

2. File a motion to expedite the appeal and for calendar preference if the circumstances warrant it. (See Cal. Rules of Court, rules 19.3 and 45(d).) And, avoid asking for extensions of time and oppose extensions of time by the Attorney General's Office.

3. If appropriate, file a writ petition, in addition to a brief, asking for extraordinary relief on the ground appeal is not an adequate remedy.

4. Seek release (bail or OR) pending appeal, either from the outset or upon receiving a firm indication of how the case is proceeding (for example, from the opinion, tentative opinion or a concession by the Attorney General regarding the issue which would lead to your client's acquittal or release). (See Pen. Code, secs. 1272, 1272.1.) Ask trial counsel to do this. If that's not possible, then the panel attorney should do it. If trial counsel agrees to do it, follow up with telephone calls and letters to assure the matter is being handled in a timely fashion. For cases arising out of San Diego County in which a client qualifies for services of the Office of the Public Defender, panel attorneys may contact Gary Nichols, supervisor of the Writs and Appeals Division of the Office of the Public Defender, for assistance (phone: (619) 338-4768; email: gnichopd@co.san-diego.ca.us). Any cases in which there may be a conflict of interest with the Public Defender's Office may be referred to the Alternate Public Defender's Office.

5. After receiving a favorable opinion, seek immediate issuance of the remittitur via stipulation with the Attorney General under California Rules of Court, rule 25(b). That rule permits immediate issuance in the Court of Appeal by party stipulation only and in the Supreme Court by stipulation or upon good cause.

6. Make certain that custodial officials know about the issuance of the remittitur, the grant of a writ, or issuance of a release order and take action on it as sometimes courts delay informing the prison and the prison, itself, delays taking action.

One final note - any work done which is reasonably necessary to prevent service of time beyond what is required by law is compensable. Contact our office if you have any questions on whether your particular proposed action would qualify.

Wiretaps, Lies And Audiotapes

By Chris Truax, Staff Attorney

Last year, in People v. Gaxiola (BA132597), the Los Angeles District Attorney's office revealed that the LAPD had been engaging in a program of "secret" wiretaps since 1985. This new procedure, known as the "hand-off" policy was designed to allow the District Attorney to prosecute suspects without revealing that a defendant's phone had been tapped. Los Angeles police would install a court-ordered wiretap and gather evidence. However, rather than use this evidence directly, the investigative team manning the wiretap would "hand off" a tip to a completely separate investigative team that a particular individual was suspected of dealing drugs. The new team would then concentrate its investigation on the suspect in an effort to develop probable cause completely separate from evidence gathered via the wiretap. If the new team was successful, the defendant would be prosecuted based solely on the "independent" evidence and the existence of the wiretap would never be revealed.

Once this policy came to light, it was immediately challenged. The propriety of this procedure is currently being litigated in several criminal cases in Los Angeles. In addition, the Los Angeles Public Defender's Office has filed a class action suit on behalf of its current and former clients seeking to force the District Attorney to reveal the names of all defendants who were prosecuted under the "hand-off" policy. (In Re Salcido (BA159367).) In November, the trial court refused to certify the class because it believed the potential defendants were not similarly situated. While the court refused to enjoin the District Attorney from using the "hand-off" technique, it did require the prosecution to either reveal the existence of a wiretap to current defendants or to seek an in camera hearing if it believed that revealing the wiretap would endanger an ongoing investigation.

As far as we know, this procedure was only in effect with respect to wiretaps in Los Angeles County. However, every one of the defendants prosecuted using this technique *was talking to someone else* on his wiretapped phone. As a result, it is extremely likely that many of our own clients' conversations were picked up by one of these wiretaps. It is also extremely likely that the LAPD "handed off" the resulting "tip" to a fellow law-enforcement agency. The exact number of "hand-offs" is not yet known. While the Los Angeles District Attorney claims it prosecuted a total of 58 cases using this technique, reports issued by the California Attorney General's office show that 151,229 conversations were intercepted in Los Angeles County in 1997 alone. While not all of these interceptions are attributable to the "hand-off" policy, the scale of wiretapping in Los Angeles makes it a near-certainty that many of our own clients were prosecuted through "hand-off" wiretaps.

As of this writing, it is unclear whether past defendants who were subject to this procedure will have a remedy. The Los Angeles District Attorney argues this policy is completely proper and that the existence of the wiretap need never be revealed because the actual criminal prosecution is grounded on wholly separate probable cause. Defense attorneys argue that the existence of the wiretap must be revealed for several reasons, not the least of which being that a defendant has a right to discover all of his statements that are in the possession of the prosecution.

ADI will be monitoring this situation and the Los Angeles Public Defender's class action suit which is now before the Court of Appeal. In the meantime, be on the lookout for cases where the police appear to be reaching to justify a detention or search. It may be that your client has been "handed-off." Should this occur, contact the trial lawyer and alert him or her to the possibility that a wiretap may have been involved.

Miscellaneous Notices:

When Confronted With Either Filing An Anders/Wende Brief Or Raising A CALJIC 2.90 Or Other Consistently Rejected Issue

Occasionally, we see the boilerplate CALJIC 2.90 issue raised as the only issue in an appellant's opening brief. This issue has been rejected consistently for quite some time now. In such a case, it is preferable to have the matter reviewed for a possible Anders/Wende brief. This at least gives the client the benefit of a review of the record by the court in the event an issue was missed. The same rationale applies to stale Three Strikes issues that no reasonable attorney believes would have any possibility of success. If you are confronted with such a situation, please consult us.

New Court Addresses:

The **California Supreme Court** has moved back to the Civic Center in San Francisco. Effective January 19, 1999, the address is:

Supreme Court of California, 350 McAllister St.,
San Francisco, CA 94102-3600
Office of the Clerk: (415) 865-7000

The **Court of Appeal, Division Two**, has moved from San Bernardino to Riverside, effective January 11, 1999 the address is:

Court of Appeal Fourth Appellate District,
Division Two, 3389 12th Street, Riverside, CA 92501
Clerk's Office: (909) 248-0200, 248-0201

Division Two, Terminal Digit Assignments:

Terminal Digit:	**Deputy Clerk:**
0, 1, 5	Ann Dee Smith
2, 3, 4	Kelly Conn
6	Linda Lewis
7	Madeline Mozee
8	Paula Garcia
9	Susie Driller

New Policy For Requesting Oral Argument In Division Two

In the beginning of July 1998, Division Two implemented a new policy regarding the timing of a request for oral argument. Now, there is no need to request oral argument at the end of the briefing, i.e., when the reply brief is filed or the time allotted for the reply brief to be filed has passed; the Court will not send out an oral argument inquiry letter. Instead, the Court will automatically prepare a tentative opinion in all cases and will send it to all counsel with an attached form. After counsel has had a chance to read the tentative opinion, counsel can request or waive oral argument using the form provided by the Court.

New ADI Staff:

Welcome to **Michelle Rogers**, our newest attorney. Michelle has worked at ADI as a law clerk during the last two years while attending California Western School of Law. She passed the bar in November, 1998. She is originally from Lancaster, California and attended UCSD. During her junior year, she studied abroad at the University of Barcelona, Spain. During that year she traveled throughout Europe and North Africa.

Between undergrad and law school, she ran a day care center in Rancho Santa Fe. Michelle originally planned to practice child advocacy law and worked as a research assistant in that area during law school. After clerking at ADI, she became interested in dependency law and decided to join us for the next two years.

Michelle now has time to read, travel and study foreign languages and plans to take an Arabic class next semester. Her dream is to one day live in a foreign

country, but we hope that is far in the future.

Carl Dersham is ADI's newest staff member. Carl's official title is File Clerk but in (Continued on page 17)

Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
NUMBER 20 January 1999

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

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

The Sixth Appellate District has concluded that policies permitting challenges to the pleadings' sufficiency for the first time on appeal does not apply in dependency proceedings. In In re Shelley J. (1998) 66 Cal.App.4th 322, the Court of Appeal took issue with the conclusion of In re Alysha S. (1996) 51 Cal.App.4th 393, agreeing with the county that Alysha S. was wrongly decided. It held appellant waived her right to challenge the sufficiency of the allegations of the petition. This opinion might make more sense to Yussarian, who was more familiar with Catch-22 than me. But I seem to recall that demurrers, and such, are inapplicable in dependency proceedings, so there was no challenge available to appellant to waive in the first place. So, the county can allege whatever it wants in a petition, the appellant cannot formally object to the pleadings because there is no procedural device available, and then appellant is precluded from appellate review. Hmmm.

In In re Robert L. (1998) ___ Cal.App.4th [98 Daily Journal D.A.R. 12787], the Second District Court of Appeal held that juvenile courts cannot extend jurisdiction beyond the age of majority solely to provide special assistance for such things as completing their college education. In this case, four children were placed with grandparents under a permanent plan of long term foster care. (The grandparents opted not to become guardians in order to remain eligible for foster care benefits.) Jurisdiction as to one of the minors terminated when he turned 18, and another minor died in a swimming accident, leaving Robert and Michelle. Robert had been in college for two years and was 20 at the time of the hearing, and Michelle had graduated from high school and was planning to attend college. The minors opposed termination of jurisdiction wanting to continue the dependency to help defray educational and living expenses. At the January, 1998, hearing, the trial court extended jurisdiction but scheduled another hearing for March 12, 1998.

At the March, 1998, hearing, the department made a motion to terminate jurisdiction on the ground that the purpose of dependency was not promoted by retaining jurisdiction over adults to provide for a college education. The trial court denied the motion and retained jurisdiction. The reviewing court disagreed. The Court analyzed the terms of Welfare and Institutions Code section 303, which permits retention of jurisdiction but does not delineate what factors should be considered in extending jurisdiction beyond majority. However, the Court was guided by section 300.2, which declares that the exercise of jurisdiction must be based upon existing and reasonably foreseeable future harm to the welfare of the child. It concluded similar factors should come into play in determining whether jurisdiction should extend beyond the age of majority.

Applying these factors to the instant case, the Court noted there is no evidence either child was currently being physically, sexually, or emotionally abused, neglected or exploited, and there was no evidence suggesting such harm may occur in the future. The sole basis for extension of jurisdiction was to afford special assistance to Michelle and Robert to allow them to complete their college education. The Court observed there is no legislative mandate that the dependency system is to be utilized to subsidize higher education, in the absence of any evidence of current or future threatened harm, and reversed.

Division One of the Fourth Appellate District has held that hearsay evidence of alleged sexual abuse, consisting of statements by a child, whom all parties stipulated was incompetent to testify, were admissible, even though they did not qualify for admission under the Child Dependency Hearsay Exception because they were uncorroborated. (In re Lucero L. (1998) Cal.App.4th __ [98 Daily Journal D.A.R. 12886].)

In this case, the statements were made by a less-than-3-year-old child in very ambiguous language in response to inappropriately asked questions by an inexperienced worker, after being reported by an older daughter who claimed, variously, that she had, and then

had not, been molested by her mother's companion. Experts agreed the statements made by the child were incompetent and the trial court acknowledged the statements were uncorroborated and thus inadmissible under In re Cindy L. (1997) 17 Cal.4th 15. The statements were nonetheless ruled admissible under Welfare and Institutions Code sections 355, subdivisions (c)(1)(B) and (C).

The amendments to section 355 provide that if a timely objection to the admission of specific hearsay evidence contained in a social study is raised, the specific hearsay evidence will not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless the petitioner establishes one of several exceptions. The exception in issue in this case was the exception dealing with a hearsay declarant who is a minor under age 12 and who is the subject of the jurisdictional hearing. That subdivision goes on to provide that the hearsay statement is not admissible if the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence.

The Court of Appeal concluded that the legislative amendment was intended to eliminate, as a ground for exclusion, incompetence due to inability to tell the difference between truth and lie as a ground for excluding hearsay from a very young declarant. It also concluded that the Child Dependency Hearsay Exception in the Evidence Code did not apply to juvenile dependency proceedings. Based upon the court's reasoning, it appears that the Juvenile Court Law expressly condones the use of uncorroborated, incompetent testimony.

B. Dispositional Issues

In Laura B. v. Superior Court (1998) Cal.App.4th ___ [98 Daily Journal D.A.R. 12790], Division Three of the Fourth Appellate District affirmed an order denying reunification services to a mother pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(12). The minor, Alicia, was born drug exposed. The mother had three other children, all of whom were placed with their maternal grandmother, although mother had reunified with one of the boys before consenting to the guardianship. She had an 18-year drug habit and had participated in numerous rehabilitation programs, including residential programs. Her compliance with the rehabilitation programs was punctuated with relapses.

When she discovered she was pregnant with Alicia, mother had been using cocaine at least twice a week, but she cut down to using every other week because of the pregnancy. At the time of the hearing, the mom had completed 100 hours of substance abuse instruction and 32 hours of parenting classes while in jail. Upon her release from jail, she entered a residential recovery program for women with children. Nonetheless, the trial court felt the requirements of section 361.5, subdivision (b)(12) were satisfied by proof of her use of drugs during pregnancy because such drug use constituted resistance to treatment of her drug program during the 3 years prior to the filing of the petition.

In her Rule 39.1B writ petition, the mother contended use of drugs during pregnancy alone does not prove resistance during the requisite time period. Although the Court of Appeal agreed with this contention as a statement of legal principle, it concluded the evidence presented in support of the dispositional order was not limited to that.

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The Court pointed out that the language of the statutory provision does not require proof that the prior treatment occurred during the 3-year period; it required proof that the resistance to such treatment occurred during that period. What SSA is required to show is that a parent has previously undergone or enrolled in substance abuse rehabilitation; then, during the 3 years prior to the petition being filed, the parent evidenced behavior that demonstrated resistance to that rehabilitation. Such proof may come in the form of dropping out of programs, but it may also come in the form of resumption of regular drug use after a period of sobriety.

In making its ruling, the Court cautioned that it did not agree that the mere fact mom used drugs while pregnant sufficiently evidenced resistance to treatment. It recognized that a mother who regularly attends her program could experience a brief relapse during pregnancy but immediately resume treatment. That type of behavior would not necessarily prove resistance. However, a situation where the mother returns to consistent, habitual, semiweekly and then biweekly substance abuse cannot be considered a simple relapse.

De Facto Parent Status

In In re Michael R. (1998) 67 Cal.App.4th 150, Division Two of the Fourth Appellate District affirmed the trial court's denial of a grandmother's petition for de facto parent standing. The minors had been declared dependents in 1995 due to their father's physical abuse of the oldest child. Subsequent petitions resulted from continuing problems father had with anger management and inappropriate discipline. The department did not favor placement of the children with the paternal grandmother because she was in denial about the father's conduct, and it feared she would not comply with court restrictions on his visitation. Thus, the children were placed with a paternal aunt.

Unfortunately, the aunt was also unable to protect the children from the father's abuse during visits, so in 1997, the children went to live with the paternal grandmother, on condition the father was not to live in the grandmother's home and all visits were to be supervised and take place at DPSS offices.

Prophetically, it turned out grandmother did allow the father to visit at the grandmother's residence, and the father was reported to have stayed overnight on frequent occasions. When the social worker arrived to take the children into protective custody, she found no one at home. Two months later, the grandmother and children were discovered to be living in Texas. The children were brought back to California and supplemental petitions were filed. The grandmother sought de facto status, which was denied by the trial court.

The Court of Appeal affirmed, concluding there was no abuse of discretion. It acknowledged grandmother showed significant involvement in the children's lives and had been a day-to-day caretaker for several months in 1997. However, it concluded the court was entitled to take into account additional facts, the grandmother's conduct in defiance of court orders, which placed the children at serious risk of harm. The Court relied on the Supreme Court decision of In re Keisha E. (1993) 6 Cal.4th 68, holding that a person may be denied de facto parent status if the person has inflicted substantial harm on the child. The Court noted that while grandmother did not herself abuse or molest them, she directly inflicted substantial harm by fleeing the state to permit unrestricted access to the children by their father, thus deliberately placing them in harm's way. "Kidnapping the children, keeping them in hiding from the DPSS, and removing them without authority from the juvenile court's jurisdiction, purposely to allow free access by the abusing parent, is tantamount to aiding and encouraging the abuse. Such conduct is 'fundamentally at odds with the role of a parent.'" (In re Michael R., supra, 67 Cal.App.4th at p. 158.)

C. Permanent Plan Issues

In Elvis P. v. Superior Court (1998) 67 Cal.App.4th 1363, Division Four of the Second District Court of Appeal granted the father's Rule 39.1B petition and directed the juvenile court to order additional reunification services. The trial court had refused to extend services beyond the 18 months specified in section 366.22, subdivision (a), finding no exceptional circumstances. However, the father, who was incarcerated, had fully complied with all the services offered to him. The only component he could not complete was the regular visitation requirement, and, as to this, the department failed to make a good faith effort to assist him in fulfilling the court-ordered monitored visitation.

The Court of Appeal recognized the practical difficulties in arranging visits between a very young child and a parent incarcerated a long distance away, but concluded the department was not excused from offering or providing court-ordered reasonable reunification services because of difficulties in doing so or the prospects of success. (Elvis P. v. Superior Court, supra, 67 Cal.App.4th at p. 1370, citing Mark N. v. Superior Court (1998) 60 Cal.App.4th 996, 1014-1015.)

The Court also pointed out the social worker never mentioned visitation in any letters to petitioner and did not attempt to facilitate visits, nor were any alternatives, such as telephone calls or letters, offered or suggested.

In In re Pablo D. (1998) 67 Cal. App.4th 759, Division Three of the Fourth Appellate District dismissed an appeal filed by the minor from an order at the 12-month review hearing extending reunification services to the 18-month review hearing. The minor was born three months after all five of his siblings had been removed for severe physical abuse of one sister. Pablo was taken into custody days after his birth and was declared a dependent.

In December 1997, a 12-month review was held respecting Pablo and an 18-month review was held respecting three of the siblings. Although the court terminated services as to the older siblings, the court expressed the hope that services would be of value as to Pablo, and extended them. It, therefore, found there was a probability of return by the time of his 18-month review. The minor appealed, claiming there was no substantial evidence supporting the claim.

The Court of Appeal noted that while the minor might be correct in arguing there was no evidence to support the finding Pablo could be returned home in 10 weeks, the services have been received, not only for the 10 weeks originally contemplated, but continuing 10 months thereafter. The Court concluded it could not rescind services that had already been rendered and was unable to fashion an effective remedy, rendering the appeal moot.

The Fifth Appellate District recently ruled that a normally nonappealable order may be reviewed following a 366.26 order, despite the mother's failure to file a Rule 39.1B writ, where the juvenile court failed to notify the mother timely or correctly of the entry of the order setting the .26 hearing. In In re Cathina W. (1998) ___ Cal.App.4th ___ [98 Daily Journal D.A.R. 12744], the mother was not present at the hearing when the 366.26 hearing was set. The court directed that the 39.1B(1) notice be sent to the mother, but the juvenile court clerk did not mail the notice to the mother within 24 hours of the court's order.

Instead, it was mailed 4 days later and included the wrong date for the .26 hearing. The Court of Appeal concluded these circumstances warranted review of the merits of issues arising from the referral hearing. Of course, on the merits, it affirmed the order, but at least she got a review on the merits.

Note that, in passing, the Court also disagreed with the county's argument that it was incumbent upon the mother's attorney to ensure the mother's rights of appeal were protected. It noted the burden is on the parent in a dependency hearing to pursue his or her
appellate rights; in the absence of a specific direction from the mother, her attorney in the juvenile court was not obligated to take any (Continued on page 12)

steps to comply with section 366.26(l). Because the mother had not been notified that she must seek relief by writ petition under the statute, she could not very well have directed her attorney to take the steps to do so.

The Second Appellate District recently denied Rule 39.1B writ relief to a father, following an order setting a hearing pursuant to Welfare and Institutions Code, section 366.26. (Elijah R. v. Superior Court (1998) 66 Cal.App.4th 965.) The father, who was incarcerated during most of the dependency proceedings, contended he was not provided reasonable reunification services while he was incarcerated. Angel R., the minor, was born with prenatal exposure to drugs and tested positive for PCP. Initially, she was detained with the father, Elijah. The father was living in the home of the paternal grandmother; the department was given discretion to allow the mother of the minor to move in with them on condition she complied with drug program and counseling.

The father permitted mother to move in without the department's prior approval, resulting in the filing of a supplemental petition pursuant to Welfare and Institutions Code, section 387. Neither parent appeared at the subsequent disposition hearing, at which custody was removed on the grounds the minor was at risk due to, among other things, the father's abuse of the mother. Father was ordered to attend domestic violence counseling in addition to other treatment programs.

A month later, father was incarcerated in Las Vegas, but no one was quite sure where. By the 6-month review hearing, the department reported its efforts to contact the father had been unsuccessful, and reunification could not be realized. At this hearing, father's counsel also disclosed he was unable to locate the father, and was unaware whether any treatment programs were available at the facility, or when he would be released. Nonetheless, the court continued its order for reunification services and directed the department and father's counsel to continue efforts to contact the father.

By the 12-month review, father was still in federal custody on federal narcotics charges in Nevada and had written to his attorney expressing the desire that custody of Angel be given to an unrelated caretaker, who was determined to be inappropriate. Father's letter "clearly indicated he did not seek to have Angel returned to him, and he was thus not interested in reunification." (Elijah R. v. Superior Court, supra, 66 Cal.App.4th at p. 969.)

In his petition, father contended insufficient services were provided to him while he was incarcerated based upon the criteria in section 361.5, subdivision (e). In its opinion, the Second District Court of Appeal highlighted the statutory language which so provides "'if these programs are available.'" (Elijah R. v. Superior Court, supra, 66 Cal.App.4th at p. 970, italics omitted.) The court noted that telephone calls, referred to in the statute, would be meaningless based upon the tender age of the minor. It pointed out that visitation was not feasible because of the distance between the minor's location and the father's incarceration. (Id. at pp. 970-971.)

It also observed the father had failed to appear for the disposition hearing, had no contact with his own attorney since his incarceration, and made no attempt to seek custody of the child. "By his own actions, Elijah thus placed himself out of the reach of any meaningful rehabilitative services the Department could have provided. [Citation omitted.] Under these circumstances, there is substantial evidence in the record to support the juvenile court's finding that the services provided by the Department to Elijah were reasonable under the circumstances of his case. [Citation omitted.]" (Elijah R. v. Superior Court, supra, 66 Cal.App.4th at p. 971.)

In In re Charmice G. (1998) 66 Cal.App.4th 659, the Fifth Appellate District held that an order denying a Welfare and Institutions Code section 388 petition was not appealable, since it was "integrally related" to the order for a permanency planning hearing. The oddest part of this case is that the mother filed a rule 39.1B writ petition after the referral hearing. In this case, guardianship had been selected as the permanent plan, by stipulation of all parties in 1993. In 1997, DSS filed a modification petition pursuant to section 388, to permit the guardians to move out of state with the minor. Mom filed a counter 388 petition in order to set aside the guardianship. Then, the guardians filed a 388 in order to upgrade the guardianship to adoption.

At the 388 hearing, the trial court held mom had shown changed circumstances, but had not made a sufficient showing that the modification she sought was in Charmice's best interests. At the same time, it granted both DSS's and the guardians' 388 petitions, and set the matter for a new 366.26 hearing. Mom filed her writ petition from the referral order, and also appealed from the denial of her 388 petition.

The appeal was dismissed. The reviewing court concluded that section 366.26, subdivision (l) bars direct appeals from an order setting a section 366.26 hearing. (In re Charmice G., supra, 66 Cal.App.4th at pp. 664, 668-671.)

This ruling seems to be at odds with prior published decisions. See In re Elizabeth M. (1997) 52 Cal.App.4th 318, 324, and In re Daniel D. (1994) 24 Cal.App.4th 1823, 1832-1833, for starters. In the latter case, the reviewing court specifically held a parent could not raise a challenge to a 388 ruling upon appeal from a section 366.26 hearing because the 388 order is separately appealable and was final by the time the notice of appeal from the .26 hearing was filed.

This is directly at odds with Charmice G., which reasons that its interpretation does not prevent an aggrieved parent from obtaining appellate review of the crucial order by either a rule 39.1B petition "...or by later appeal from the order made at the section 366.26 hearing." (In re Charmice G., supra, 66 Cal.App.4th at p. 669.) I cannot tell if a petition for review was filed or not, but I do not think this opinion should be relied upon by attorneys in deciding whether or not to appeal from a 388 denial.

FREEDOM FROM CUSTODY CASES

Division Four of the Second Appellate District reversed an order terminating parental rights in In re Julian L. (1998) 67 Cal.App.4th 204, because inadequate notice was provided to the mother. In this case, the court had improperly relieved mother's counsel at the originally scheduled hearing pursuant to the 366.26, as to which mother had signed a waiver of her right to appear. However, the permanent plan was not determined at this hearing, which was continued for 3 months. No notice was sent to mother. For the next hearing, a new attorney was appointed for mother, but he informed the court he had not had an adequate opportunity to review the file or contact the mother. His request for continuance was denied, and the court determined the mother's previous waiver of attendance applied to this hearing as well. The court went on to terminate parental rights.

The Court of Appeal held the trial court erred in relieving trial counsel at the initial permanent planning hearing, noting that an attorney may be relieved in a noticed hearing upon substitution of another attorney or for good cause, none of which conditions had been met. (In re Julian L., supra, 67 Cal.App.4th at pp. 207-208.)

The Court went on to hold the trial court improperly concluded mother had waived her appearance for the later hearing and that no further notice was necessary. The waiver was specific and covered no other hearing. Section 366.23 requires that a parent receive notice whenever the juvenile court schedules a hearing pursuant to section 366.26. While there is an exception to the notice requirement if the parent is present when a hearing is continued, there is no exception applicable where a parent is absent from the hearing.

The Court held the notice error was exacerbated by the trial court's failure to make a timely appointment of substitute counsel, and the record did not elucidate why the court

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refused to grant a continuance, when new counsel, who had been assigned to the case for only one week, informed the court he had not yet had an opportunity to ascertain mother's wishes.

In In re Yuridia (the Daily Journal Daily Appellate Report does not include a last initial) (1999) _ Cal.App.4th ____ [99 Daily Journal D.A.R. 58], Division Three of the Fourth Appellate District reversed a finding that two minors, a sibling pair, one of which suffers from AIDS, were adoptable, and denying relatives de facto parent status. The children's parents had died of AIDS in Mexico, where the children were born, in 1994, and the mother had expressed the desire that the maternal grandmother care for the children. The younger child was diagnosed with AIDS, prompting the grandmother to send the children to the United States, in order to obtain medical treatment.

The girls lived with a maternal aunt for two and one-half years, until they were removed from her care upon her arrest for child abuse of her own child. Within a year, the juvenile court terminated all parental rights of either the aunt and uncle or the two maternal grandparents, and found both children adoptable. The Court of Appeal noted that as an abstract matter, a child with AIDS may be adoptable. However, where the only people interested in adopting were maternal relatives deemed unacceptable by the department, and where there is no evidence of any prospective adoptive parents outside the family, who, being fully informed of the one child's medical condition, still desire adoption, there is no clear and convincing evidence of adoptability.

The Court was careful to limit its holding to the unique circumstances and facts of this case, but it held the net effect of the juvenile court's order was to deprive the girls of the extended family who wanted to adopt them in what may prove to be the chimerical hope that a better arrangement will come along. Therefore, it reversed and remanded for a new hearing on the issue of adoptability.

In In re Richard C. (1999) ___ Cal.App.4th [99 Daily Journal D.A.R. 5], the First District Court of Appeal held that a parent who failed to show she had maintained regular visitation and contact with her children during the reunification period was not entitled to a bonding study to develop further evidence regarding her bond with the children with which to base an argument for the beneficial contact exception to adoptability. [The opinion is ambiguous in its rendition of the procedural posture of the case, failing to mention the fact that a 388 petition had been filed and the motion sought the bonding study for purposes of the 388 petition hearing.]

In this case, the social worker's report prepared for the 366.26 hearing noted the mother was visiting the children every other week and the boys, Scott and Richard, enjoyed the visits. However, the social worker concluded mom had failed to reunify with her sons, her supervision had been supervised, son Richard did not trust her due to her failure to believe him about the abuse which had given rise to the dependency, and both boys had bonded with their prospective adoptive families. Appellant's counsel made a motion for a bonding study (mother's counsel even offered to pay for it), but the motion was opposed by the children's counsel.

The court denied the motion because the boys had not been getting "consistent and persistent" care and support from the mother. On appeal, mother contended it was an abuse of discretion to deny the motion for a bonding study, claiming she had a due process right to rebut the evidence provided by the department. The Court held that at such a late stage in the proceedings the mother's right to develop further evidence regarding her bond with the children was approaching the vanishing point. (In re Richard C., supra, [99 Daily Journal D.A.R. at p. 5].)

The Court of Appeal acknowledged that a bonding study may have enabled mom to make a stronger case at the 388 hearing, but held that the mother was required to muster evidence before the termination of reunification services. "The kind of parent-child bond the court may rely on to avoid termination of parental rights under the exception provided in section 366.26, subdivision (c)(1)(A) does not arise in the short period between the termination of services and the section 366.26 hearing." (In re Richard C., supra, [99 Daily Journal D.A.R at p. 6].)

The Court commented the bonding study sought by the mother would have necessitated a delay in the permanency planning beyond the delay already entailed in hearing her 388 petition. It noted similar

requests to acquire additional evidence in support of a parent's claim under section 366.26, subdivision (c)(1)(A) might be asserted in nearly every dependency proceeding where the parent has maintained some contact with the child. However, it concluded the Legislature did not contemplate such last-minute efforts to put off permanent placement. (In re Richard C., supra, [99 Daily Journal D.A.R at p. 6].)

In In re Jeanette V. (1998) ___ Cal.App.4th [98 Daily Journal D.A.R. 12837], the Second District Court of Appeal has held that there is no due process violation in admitting the social worker reports into evidence at the .26 hearing without making the social workers available for cross-examination. The Court held that the right to cross-examination based upon statute and court rule applies only to the jurisdictional hearing. Of course, it acknowledged, nominally, that a parent has a right to "due process" which the court put in quotations, by the way at the hearing under section 366.26 which results in actual termination of parental rights. It further acknowledged this requires a '"meaningful opportunity to cross-examine and controvert the contents of the report."' [Id. at p. 12838, citation omitted.]

But, it held, due process is not synonymous with full-fledged cross-examination rights. (In re Jeanette V., supra, [98 Daily Journal D.A.R. at p. 12838].) Apparently, when it comes to the party with the burden of proof at the .26 hearing where fundamental parental rights may be permanently severed, the rule of due process is a flexible concept. This flexible concept permits admission of the most incompetent material see the discussion of the Lucero L. case above contained in a report, without the need to either corroborate it or subject it to the rigors of cross-examination before considering it as substantive evidence in support of the government's position. But the same due process concept does not require the court to allow a parent to have a bonding study conducted. (See Richard C., supra.) The nerve of those parents wanting to cross-examine the party trying to make their child an orphan!

INDIAN CHILD WELFARE CASES

There were no new ICWA cases to report this quarter. However, Assemblywoman Denise Moreno Ducheny has proposed a bill in the State Legislature, which would revitalize the law by eliminating the "existing family doctrine." The bill, AB 65, can be downloaded from the governmental website on the internet. Take a look at it and write to your state representative.

GUARDIANSHIPS AND CONSERVATORSHIPS

In Guardianship of Simpson (1998) 67 Cal.App.4th 914, Division Three of the Fourth Appellate District reversed an order terminating the guardianship of O.J. Simpson's two children. The Court concluded the trial court erred in declining to consider "the murder issue," applied the wrong statute in making its ruling, and erroneously put the burden on the guardians to prove it was detrimental to return the children to their father, and excluding evidence found in the mother's diaries bearing on the father's possibly violent tendencies. Instead, it should have examined the totality of evidence bearing on the father's fitness with the burden on him to show sufficient overall fitness to justify the termination of the guardianship. This case has been analyzed to death so I do not need to add my two cents worth.

In Conservatorship of Coombs (1998) 67 Cal.App.4th 1395, Division Five of the First Appellate District dismissed an appeal by the

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person who had served as temporary conservator of the person and estate of Guy Coombs. The order, which appointed David Coombs as conservator, directed appellant to account for California assets owned by the conservatee at the time of his incapacity, and to deliver all assets to the permanent conservator. The probate court entered an order awarding the conservator nearly $500,000 from appellant in February, 1998. Appellant made a motion to reconsider the judgment, which was denied in May, 1998.

In the meantime, in March, 1998, the trial court in Coombs made an order settling the first account and report of the suspended conservatrix, which surcharged appellant more than $700,000. Appellant moved for reconsideration of this order, which was denied at the same time as it denied the other motion to reconsider.

The Court of Appeal held the appeal was untimely. The two rulings were made in February and March, 1998, but the notice of appeal was not filed until June 2, 1998. It disagreed with appellant that Rule 3 extended the time for filing the notice of appeal because she made a motion to reconsider. Rule 3(a) addresses the time for appeal when a valid notice of intention to move for a new trial is served and filed, and rule 3(b) addresses the time for appeal when a valid notice of intention to move to vacate a judgment is served and filed.

The Court noted that a number of appellate decisions evidence confusion over whether a motion to reconsider should be treated as a motion for new trial or a motion to vacate. The Court came down on the side of the decisions which strictly construe the language of the rule as not including any exception for instances when a party has filed a motion for reconsideration.

HOT RESOURCES

You will need to become familiar with "Concurrent Services Planning Resource Guide," Revised 6/19/98, published by the California Department of Social Services, Adoptions Initiative Bureau. This publication describes the criteria employed in assessing the viability of reunification and the new policy of concurrent permanent planning. (Contact Laura Williams at (916) 322-6554, or fax (916) 445-9125 or email at lwillia3@dss.ca.gov.)

Interestingly, in the section relating to Attachment, the document acknowledges that a child is capable of maintaining attachment relationships with more than one person at a time, although a hallmark of a well-functioning attachment system is that there is a limited number of specific individuals with whom the child develops attachment relationships. Commenting on transferability, it says, "If the child had a healthy attachment to the previous care provider, in time he will attach to a new loving/r e s ponsive/appropriate/consistent care provider, if this person does not 'disappear' from his/her life quickly." (Concurrent Services Planning Resource Guide, ch. II: Benefits, p. II-10, citing Farquhar, "Update on Attachment Theory and Research: Application to Adoptions -Relevant Issues [no additional cite provided].)

This supports the theory I have espoused for years, although the government applies it a little differently. From this publication it appears the philosophy is that if you have a healthy child, he or she is capable of forming healthy attachments with other persons, so all we have to do is find a good family and the child will attach him or herself to that caretaker and his or her best interests will be served thereby. Have I not been saying for years that we are operating a sort of "Daisy Hill Puppy Farm" [ref. Peanuts Cartoon Strip]?

After you have read the "Concurrent Services Planning Resource Guide," compare it with the raw data regarding "Selected Characteristics of Children in Foster Care at the End of Three Consecutive Years," for the Month of August, 1998, also published by the California Department of Social Services. This can be downloaded from the internet (dss.ca.gov) and indicates the state may be a little overly optimistic about the adoption opportunities available for the transferable attachments which are the subjects of the concurrent planning.

For example, in 1998, of 6,265 open cases, 1,221 were reunified during the year, and only 172 were adopted. The latter figure represent 9.4% of the cases closed last year. At the same time in 1997, the figure was 14.8%. It looks to me like there are a lot of orphans who will be dependents until they reach the age of majority or are emancipated.

While termination of rights might serve some purpose (money for the state from federal sources) and may appear to serve the immediate needs and interests of the minor, in the long run what we have is a whole generation of kids whom we have saved from parental neglect but, who have no family ties. I wonder where they go for holidays after they reach adulthood? Does DSS invite them over?

New ADI Staff **(continued from page 7)**

addition to those duties, we call on Carl's unique talent to solve computer problems. ADI is extremely lucky to have snagged Carl from the San Diego Superior Court where he worked for thirteen years prior to accepting a position at ADI in December, 1997.

Prior to his tour at the superior court, Carl worked for the Navy for ten years in personnel, administration and operations. This experience permitted him to travel the Philippines, Japan, Korea, Sri Lanka, India, Kenya, Indonesia, China, Hong Kong, and Thailand.

In addition to being a computer genius, Carl also plays the trumpet and trombone in a local band, "The Noteables," and is a writer. His published works include two science-fiction/fantasy short stories and six non-fiction articles on computer technology. Currently, he is working on several screenplays, a novel, and some short stories. In his spare time, he has almost completed three separate degrees in history, anthropology, and music.

Carl is from Poway and has lots of family in the San Diego area. He is here to stay at ADI. Welcome, Carl.

Staff Transitions: Many of you have spoken with **Amanda F. Doerrer** throughout the last four years. Amanda first came to ADI as a paralegal in 1994. In 1995, while maintaining her full time paralegal position at ADI, Amanda enrolled as a night student at the University of San Diego School of Law. In 1997, Amanda changed positions at ADI and became a law clerk, assisting staff attorneys in the preparation of briefs, record reviews and special research projects. This past summer, Amanda completed her studies at USD and took the California Bar Examination. After receiving passing scores on the Bar, Amanda changed job positions at ADI once again and moved into a staff attorney position. She has been a great asset to ADI!

Although **Omar Palacio** has been with ADI nine years, he has recently advanced from his original position in the file room to office assistant. As of December, 1997, he took on the responsibility of paradoxing all claims. As of May, 1998, he began to assist paralegals with some of their duties. Omar does a little bit of everything and is invaluable to ADI.

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.]

Joan Anyon, P. v. Rodriguez, #D027941, Murder conviction reversed; details of prior assault improperly admitted under EC 1101(b). (I)

Russell Babcock, 1) P. v. Hicks, #E021608, Six prison priors stricken from 3X

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sentence because not admitted, but case remanded for further proceedings on priors. 2) P. v. Singleton, #D028071, Assault with firearm conviction reversed; no evidence D pointed gun at victim or threatened to use gun against him. (I)

Christopher Blake, P. v. Khonsavanh S., #D029627, Maximum confinement term reduced from 23 years 4 months to 18 years 4 months. Unauthorized order for AIDS test stricken. (I)

Randall Bookout, P. v. Judd, #D029455, Error to accept plea to both possession and possession for sale of PCP. (ADI)

James Bostwick, P. v. Sharkey, #E020622, Warrantless search of premises for meth lab based on anonymous tip not justified by exigent circumstances where no indication lab was active. Anonymous tip itself did not provide sufficient self-verifying information to justify search. (A)

Robert Boyce/Laura Schaefer, P. v. Garnett, #D029377, Cruelty to elder conviction (PC 268 (a)(1)) reversed; insuff. evidence D had duty to control elder victim's conduct as required by People v. Heitzman (1994) 9 Cal.4th 189. (I)

Julie Braden, 1) In re Isabel D., #D029801, Juvenile court judgment finding one man presumed father after paternity testing confirmed another man to be biological father and ordering reunification services for both, appealed by the Health and Human Services Agency; affirmed. (I) 2) In re Marshawn S., #E023117, Stipulated full reversal of 366.26 judgment with remand to conduct new hearing per 366.22, following tentative opinion recommending reversal based upon fundamentally unfair procedures. (DSS unilaterally added new therapy requirement to reunification plan after it had reported reunification was likely to occur if mother maintained visits and parenting classes.) (I) 3) In re Nadine B., #D031709, Judgment finding father's reunification plan was appropriate reversed because no plan ever provided to father. (I)

Phillip Bronson, P. v. Yates, #E020622, Warrantless search of premises for meth lab based on anonymous tip not justified by exigent circumstances where no indication lab was active. Anonymous tip itself did not provide sufficient self-verifying information to justify search. (I)

Philip Brooks, P. v. Smith, #E020624, Full reversal for inadequate reasonable doubt instruction. (I)

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

Doris Browning, 1) P. v. Castaneda, #E020776, OSC issued returnable in trial court for IAC based on failure to object to amendment of information which added charge for which no evidence presented at prelim. (Prosecution relied without objection on police report.) (A) 2) P. v. Moreno, #E020594, PC 654 stay. (I)

Stephen Buckley, P. v. Parrish, #G021574, PC 654 stay. (I)

Elizabeth Bumer, P. v. Hernandez, #E020695, Abstract of judgment corrected to reflect PC 654 stay. (A)

David Carico, P. v. Garcia, #G019860, Remand in strikes case because trial court believed it lacked discretion to impose concurrent rather than consecutive sentences. (I)

Janette Cochran, 1) In re Justin E., et al., #E020664, Trial court found child could not be returned to home because of potential danger and awarded custody to the DSS. Trial court also detained child in home on condition that child could be removed without further proceedings. Orders unauthorized by statute. (I) 2) In re Julie M., #G023194, (Published.) Reversal of lower court's order vesting entire discretion regarding visitation with the minor children; abuse of discretion and essentially delegated judicial power to

the children. (I)

Elizabeth Corpora, P. v. Joshua S., #E022092, Sexual battery reduced to misdemeanor for insufficient evidence. (A)

Rodger Curnow, P. v. Reynoso, #G022156, PC 654 stay of consecutive sentence for assault (burglary term imposed). (I)

Anthony Dain, P. v. Funk, #D030369, PC 1202.45 restitution fine stricken as ex post facto to crime committed in 1988. (I)

Michael Dashjian, 1) P. v. Demyers, #G022488, Custody credit remand. (I) 2) P. v. Mitchell, #D028246, Published. On second appeal, strike/serious felony prior reversed for insufficient evidence of federal bank robbery conviction where appellate counsel on first appeal was ineffective for failing to challenge sufficiency; retrial on prior permitted under Monge but any resulting aggregate sentence limited to 9-year sentence imposed at trial (not 12-year sentence imposed following D's filing of in pro per Romero petition); motion for costs and sanctions against appellate attorney in instant proceeding denied. (I)

Scott Davenport, P. v. Smith, #D029439, Conviction reversed where prosecutor committed misconduct by comparing reasonable doubt to decision to marry. (A)

John Dodd, 1) P. v. Ahearn, #E021536, Hearsay evidence at probation revocation violated 6th Amendment confrontation and due process rights when all evidence was hearsay. (I) 2) P. v. McCurdy, #D025058, Romero remand. (I)

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

Brett Duxbury, 1) P. v. Wancho, #E020940, Trial court erred in instructing jury on incorrect target offense for conspiracy. Remanded to trial court with directions to modify D's sentence on that count to midterm for proper target offense. (I) 2) P. v. Young, #E021311, Prior prison term enhancement stricken for insufficient evidence. (I)

Suzanne Evans, In re Angellina G., #D031445, Abuse of discretion to terminate jurisdiction to award custody to father where protective issues concerning father. (I)

Carl Fabian, P. v. Jauregui, #E019448, Reversed/remanded for Wheeler error because prosecutor did not remember challenged juror and stated no reason for excusing him. (I)

Patrick Ford, P. v. Rodriguez, #D029607, Imposition of 9- year term for forcible rape (PC 264.1) error; abstract of judgment corrected to reduce sentence by 1 year. (I)

Cliff Gardner, P. v. McFadden, #D028870, Serious felony prior stricken because not brought and tried separately. (I)

Leslie Greenbaum, P. v. Castrejon, #G020559, Conviction of misdemeanor assault reversed because necessarily included offense of ADW. (A)

Katharine Greenebaum, P. v. Le, #G021174, Reversal of felon in possession conviction due to Green/Guiton error. (A)

Kimberly Grove, P. v. Brunn, #D027148, Conviction for possession of meth reversed because LIO of possession of meth for sale. Case remanded for resentencing to permit trial court to determine if two counts (conspiracy & transportation) were part of same transaction a la Deloza. (I)

Waldemar Halka, 1) P. v. Guzman, #D029184, VC 10851 conviction reversed because defendant convicted of both taking vehicle and receiving it as stolen property. Court found receiving stolen property evidence strong while VC 10851 evidence relatively weak, so elected to reverse greater offense. (A) 2) P. v. Sele, #D029080, Remand for resentencing; term improperly calculated per former PC 1170.1(a). (A)

M. Elizabeth Handy, In re Amanda R., #E020979, Abuse of discretion when juvenile court denied grandparents de facto parent status

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and a full hearing on their 388 petition. (I)

Robison Harley, In re Carol S., #E021626, Remand to determine whether offenses were felonies or misdemeanors. (I)

David Hendricks, P. v. Miller, #E022252, Dismissal of strike under Romero affirmed in People's appeal where proper factors considered under Williams and court did not engage in plea bargaining. (I)

Patrick Hennessey, P. v. Genzler, #D028150, Second degree murder conviction reversed because trial court recused a retained attorney over D's objection and willingness to waive any conflicts of interest. Not subject to harmless error analysis because structural error in the trial. (I)

Melissa Hill, P. v. Moriarity, #E022228, 24 additional days of presentence custody credits awarded. (I)

Michon Hinz, 1) P. v. Quintero, #D028211, Second strike residential burglary conviction reversed because prosecutor's misconduct violated Griffin and attorney-client privilege and because third party culpability evidence excluded. (A) 2) In re Mario H., #E022376, Declaration that minor's offense was a strike error under PC 667(d)(3)(a) because minor under 16 years old when offense committed. (I)

Handy Horiye, P. v. Giannini, #E020224, Reversal based on improperly admitted statements under EC 1235 when witness not deliberately evasive or untruthful. (Also, statements inadmissible under EC 1237 when no evidence introduced at trial that the statements were recorded in a report.) Reversal of attempted sodomy count because statute of limitations had expired. (I)

Sharon Jones, 1) P. v. Harris, #G020831, Abstract of judgment corrected to delete reference to erroneous conviction. (I) 2) P. v. Rubalcava, #G021366, 3-yr PC 186.22(b)(1) enhancement stricken and 15-year minimum parole eligibility date imposed instead per Ortiz. (I)

Roni Keller, In re Daniel B., #G023523, Appellant grandmother-de-facto parent petitioned under W&I 388 which juvenile court declined to hear. Pursuant to stipulation in COA, pending appeal stayed for full evidentiary hearing on petition in juvenile court, and supplemental briefing by aggrieved party in appellate court thereafter. (I)

Ivy Kessel, P. v. Bloxson, #E021858, 1-year prison prior stricken where based on prior concurrent prison term. (I)

Nancy King, P. v. Ricks, #D028870, Attempted murder conviction reversed because jury erroneously instructed D could be found guilty if he aided and abetted a simple assault. (A)

Charles Khoury, P. v. Guzman, #D027839, 2 counts of attempted murder and 1 count of shooting at occupied vehicle reversed. Trial court's denial of motion to sever drug possession charge from unrelated shooting offenses prejudicial error when no evidence shootings were drug-related. (Gang expert's testimony drugs provided motive/intent too speculative.) Prejudicial error to refuse to hold evidentiary hearing to limit gang expert's testimony. (I)

Dan Koryn, 1) P. v. Corral, #D030447, Conviction for attempted grand theft reversed because LIO of attempted robbery. (I) 2) P. v. Hayes, #D029453, PC 12022(d) [3-yr firearm enhancement] stricken because no requisite drug offense. (I)

Kimberly Knill (for mother), **Michael Randall** (for father), In re Khalifia J., #G022894, Jurisdiction and disposition findings reversed with orders to return minor to mother and terminate jurisdiction because mother no longer incarcerated and no evidence of current drug use. (I)

David Lampkin, 1) P. v. Gabryelski, #E021107, Consecutive 1-year term for forcible assault ordered stayed pursuant to PC 654. 2) P. v. Muse, #E021224, Possession of meth conviction reversed because LIO of possession of meth with a firearm. (I)

Jill Lansing, P. v. Matz, #E020433, ADW conviction reversed because court allowed DA to grant D immunity to an unrelated charge for sole purpose of requiring D to admit that charge before the jury. Forcing D to testify for the purpose of making him destroy his own credibility violated immunity statute and his 5th Amendment privilege. (A)

Deanna Lamb, P. v. Eults, #D029951, Court erred in staying, rather than striking, prior prison terms. (I)

Konrad Lee, In re Eric F., #G022840, Judgment removing children on a supplemental petition reversed where court applied wrong standard of "best interests of the child" for removal and found department had made reasonable efforts to prevent removal. Also, parent did not receive a fair hearing where court stated after 25 years in this business I can "put my hand on a file and feel what I'm going to do ... I'm never wrong." (A)

Sharon Leib, P. v. Curnutt, #D028694, Attempted murder conviction reversed where trial court ruled D's testimony regarding victim's violent character opened the door to evidence of D's violent character where prosecutor, not defense counsel, elicited D's testimony regarding victim. (A)

Marsha Levine/Rich Pfeiffer, In re Brittany C., #G022868, Abuse of discretion to deny defacto parent status to aunt/uncle who had custody over 3 months and were very involved. (I)

Michael Linfield, P. v. Aranda, G021413, Evidence insufficient to support conviction of assault of a peace officer with a semiautomatic firearm because there was no evidence gun was functional as a semiautomatic firearm. Conviction reduced to assault on a peace officer with a standard firearm. (I)

David Macher, P. v. Richardson, #E019313, Remand due to improperly imposed 5-year enhancements; court ordered to reconsider imposition of high term for gun use enhancements. (I)

Linda Mackey, P. v. Johnson, #D029856, 1-yr prior prison term stricken pursuant to People v. Jones (1993) 5 Cal.4th 1142. (A)

Marilee Marshall, P. v. Johnson, #E020554, 4 gross vehicular manslaughter convictions reversed because LIO's of appellant's 4 second degree murder convictions. 1 of 2 counts of DUI reversed because only one driving occurred. 2 of 3 "causing bodily injury enhancements" on remaining DUI convictions stayed. (I)

Ellen Matsumoto, P. v. Flores, #E020579, Abstract ordered amended to stay term for burglary where appellant imprisoned for kidnapping and assault which were the bases for burglary conviction. (A)

David McKinney, 1) P. v. Frazier, #D027148, Conviction for possession of meth reversed because LIO of possession of meth for sale. Case remanded for resentencing to permit trial court to determine if 2 counts (conspiracy & transportation) were part of same transaction a la Deloza. (I) 2) P. v. Lacanilao, #D027789, First degree murder conviction modified and reduced to second degree; insuff. evidence of premeditation and deliberation. (I)

Michael McPartland, 1) P. v. Petrelli, #G021269, Remanded to conduct restitution hearing in D's presence. (I) 2) P. v. Gibbs, #E021596, Enhancement under PC 667.5(b) stricken because sentence on original offense was stayed. (I)

Richard Miggins, P. v. Starr, #D027053, 1 day additional credit awarded. (A)

Cindi Mishkin, 1) P. v. Watson, #D027910, Remand for resentencing in light of P. v. Rosbury (1997) 15 Cal.4th 206, where probation report indicated current sentence must be imposed consecutively to probation revocation matter and no indication on record that court or

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counsel thought differently. 2) P. v. Nkimotu, #E019743, 2 life terms for second-strike sentence improper; 1 term stricken. (ADI)

Diane Nichols, P. v. Mckinney, #D028288, Writ remand; D permitted to withdraw guilty plea after consultation with newly appointed counsel due to Marsden error. (ADI)

Ronda Norris, 1) P. v. Gaston, #G020748, Victim restitution modified to reflect $15,000 deduction when that amount remitted to victim by D's husband as settlement in civil suit; discretion to order probation conditions not exercised in logical manner. 2) P. v. Bright, #D028244, $10,000 restitution fine imposed under PC 1202.45 stricken. 3) **Ronda Norris/Amanda Doerrer**, P. v. Grijalva, #E021891, Stay of burglary and petty theft with prior terms when sentence imposed on robbery count and all three convictions stemmed from same transaction. Court dismissed AG's waiver argument and rejected AG's argument that certificate of probable cause required in "indicated sentence" case. (ADI)

Nancy Olsen, 1) P. v. Glover, #D029562, 2 consecutive sentences for receiving stolen property stayed (receiving different stolen items on same occasion may be punished only once.) (I) 2) P. v. Roberts, #D028950, Reversal based on denial of PC 1538.5 motion. Traffic stop exceeded reasonable duration when officer asked to see driver's license instead of checking sticker on windshield to determine if it was valid and then releasing defendant. (I)

Benjamin Pavone, In re Kenny M., #D031857, Juvenile court erred in imposing consecutive terms for battery and robbery pursuant to PC 654. (A)

Cheryl Renard, P. v. Davis, #D028860, Assault conviction stricken because necessarily included offense of ADW. (A)

JoAnne Roake, 1) P. v. Brandy, #D028417, Vehicular burglary conviction reversed for insufficient evidence. Defendant had been sentenced as three-striker to 25-years-to-life. (I) 2) P. v. Lee, #D026580, PC 12022.1 enhancement stricken because 2-year enhancement under same section already imposed on another count. Full consecutive terms reduced to 1/3 midterm per PC 1170.1(a). (I)

Sharon Rhodes, 1) P. v. Khamsouk, #D029135, Order for defendant to pay probation costs pursuant to PC 1203.1b reversed because no ability to pay hearing. Not waived under Welch because order falls under 1203.1b. (I) 2) P. v. Burleson, #E020461, Court failed to give unanimity instruction requiring jury to agree on which insured part was the "additional victim" under VC 23182. (A)

Michael Satris, P. v. Shipley, #D028570, Trial court ordered to hold in-camera review of arresting officer's personnel file and to grant motion for new trial if file contains any discoverable material. (A)

Richard Schwartzberg, P. v. Gieck, #E021633, Remand for resentencing pursuant to People v. Hendrix. (I)

Patricia Scott, P. v. Avila, #E020862, One life term (prisoner in possession of a weapon) stayed under PC 654 because incidental to another count (attempted murder) for which D also received life term. (A)

J. Courtney Shevelson, P. v. Johnson, #G020789, Error to impose terms for both burglary and robbery as to two separate victims because burglaries perpetrated to accomplish robberies; to order full-term consecutive sentence on attempted rape when attempt offenses not included in PC 667.6(d); to order full-term consecutive sentence for assault with intent to rape when DA did not plead/prove prior conviction as required by PC 667.6(d). (A)

Athena Shudde, P. v. Phillips, #D031053, Restitution fine under PC 1202.45 stricken. (I)

Michael Sideman, P. v. Jeffrey, #D030506, CPC granted by trial court after appellate court issued OSC (petition for writ of mandate). (I)

Laurel Smith, 1) P. v. Girdner, #D030190, Order to pay presentence investigation and probation supervision costs reversed where objection but no hearing or evidence of ability to pay. (I) 2) P. v. Murrieta, #D027600, Reversal of assault with a firearm (PC 45(a)(2) because LIO of assault with a firearm upon a police officer (PC 245(d)(1)). (A) 3) P. v. Wesley, #D028198, 1-year prison prior stricken when based on same conviction for which 5-year enhancement imposed. (A)

Andrea St. Julian & Jennifer Mack, In re Garrett L., #E021673, Sexual abuse allegation under W&I 300(d) reversed for insufficient evidence because child's statements did not qualify under the child dependency exception to hearsay rule. (A)/(I)

John Staley, 1) P. v. Clark, #D030210, Remanded for resentencing where court imposed full term for a consecutive sentence without determining which case constituted principal term. Appeal appropriate notwithstanding Panizzon and no waiver pursuant to Scott because sentence violated basic sentencing law. (I) 2) P. v. Perez, #D029241, Published reversal. Plea to possession of cocaine reversed and remanded. D diverted under PC 1000 but court required him to plead guilty under amended section although D committed offense before 1/1/97. (I)

Theresa Stevenson, P. v. Cazessus, #D028652, Insufficient evidence D violated "no contact" probation condition where evidence showed victim initiated contact with D. Probation revocation order reversed. (A)

Jeff Stuetz, 1) P. v. Hill, #D030653, Conviction for possession of cocaine base stricken because necessarily included in conviction of possession for sale. AG conceded argument and court modified conviction. (I) 2) P. v. Burke, #D029110, Remand for resentencing pursuant to Deloza where trial court erroneously believed consecutive 25-years-to-life terms were mandatory in 3X case. (I) 3) P. v. Thomas, #E021088, Improper calculation of credits. (I) 4) **Jeffrey Stuetz/Waldemar Halka**, P. v. Williams, #D030964, Remand for trial court to calculate credits pursuant to People v. Thornburg (1998) 65 Cal.App.4th 1173. (I)

Robert Swain, 1) P. v. Margetta, #D027148, Conviction for possession of meth reversed because LIO of possession of meth for sale. (I) 2) P. v. Hawkins, #D030234, People's appeal - reversed in part - defendant lost - but, COA suggests if D out of custody, superior court should review dispo in light of Tanner (1979) 24 Cal.3d 514. (I) 3) P. v. Castro, #D028985, Sentence modified to reflect D entitled to 5-year sentence per plea bargain. (I)

Maura Thorpe, P. v. Tran, #G020562, Reversal. Stipulation to D's ex-felon status relating to charge of possession of firearm by a felon. Trial court later allowed DA to inform jury of stipulation. Court erred in denying motion for mistrial on grounds D denied opportunity to test jury for bias or prejudice against an ex-felon. (I)

John Ward, P. v. Morris, #E020019, Ex post facto fine levied under PC 1202.45 stricken. (I)

Paul Ward, 1) In re Lawrence C., #D029388, Trial court erred in calculating maximum term. (A) 2) P. v. Rammal, #D030230, Remanded for trial court to consider favorable supplemental probation report. (I)

Valerie Wass, P. v. Murphy, #E020789, 19 counts of perjury reversed when DA introduced irrelevant evidence of D's cocaine use, (not a moral turpitude offense, and could not be used to impeach D's testimony). (A)

Nancy Weiss, In re Jesus D., #D029332, Reversed and remanded for rehearing on new trial motion where court denied minor's motion without hearing exculpatory testimony of newly

discovered witness. (A) 2) P. v. Ramirez, #D027733, Reversal where DA relied on natural and probable consequences doctrine in proving
attempted murder and trial court failed to instruct with 1992 revised version of CALJIC No.

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3.02. (A)

Mary Wells, P. v. Odish, #D029139, Remand for resentencing. D sentenced on four cases. Errors: 1) imposition of more than double
the base term, 2) imposition of PC 1202.45 restitution order on 2 cases when sentencing occurred before enactment of statute, and 3) incorrect abstract of judgment which reflected stay and imposition of sentence on wrong counts. (A)

Jerry Whatley, 1) P. v. Lee, #G021254, Both strike priors in a 3X case reversed due to insuff. evidence. Priors, both Texas burglaries, were identical to CA residential burglary. Strike allegation remanded for retrial pursuant to Monge. (I) 2) P. v. Arndt, #G021783, Published. Two 1-year enhancements under VC 23182 [causing bodily injury to more than one

victim enhancement] stayed per PC 654 where PC 12022.7 [GBI enhancement] imposed. (I)

Jane Winer, In re Destiny H., #G022909, Reversal when court denied mother's 388 petition and did not follow analysis prescribed in In re Kimberly F. (1997) 56 Cal.App.4th 519. Two of the three Kimberly F. factors -- the mother/daughter bond and the degree to which the mother had overcome her drug problem -- overwhelmingly compelled granting the petition. (I)

Allen Yockelson, P. v. Owens, G021709, POST APPEAL RELIEF. Trial court granted writ petition in 3X case which alleged improper reading of Romero. Trial court lowered D's 25-to-life term to straight 8 years. (I)

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