Appellate Defenders Issues

The Quarterly Newsletter of Appellate Defenders Inc. | **Number 39, Spring 2000**

Notes from the Director
By Elaine A. Alexander, Executive Director

This is the first newsletter of the first year of the first decade of the first century of the new millennium. Some other "firsts" are pending in the near future, along with, alas, the usual old business.

Appellate Training Program

This is a BIG "first." As most readers know, the projects, the Appellate Indigent Defense Oversight Advisory Committee, and the Administrative Office of the Courts plan to present an appellate training college May 15-26 in San Francisco. The concept will be to give intensive training to a relatively small number of panel attorneys (probably about 12) who now are getting primarily assisted cases, who show special promise of moving to independent, increasingly complex work, and who are committed to making their career on the appellate panel. The training will consist of two weeks of classroom/workshop training, followed by 18-24 months of enriched assistance on actual cases to which the attorney has been assigned and additional seminars.

We have been planning everything from the selection process to logistics to curriculum to budget. Invitations to apply have gone out to panel attorneys. If the program achieves its objectives and receives sufficient funding, we would expect it to be offered on a regular basis.

AIDOAC and the projects are very enthusiastic about the new program, and from what I have heard, the panel's reaction has been one of genuine excitement. The program offers participating attorneys an exceptional opportunity to jumpstart their career on the appellate criminal panels: they will be able develop their knowledge and skills rapidly, study with experienced staff attorneys, network with other panel attorneys, and learn the fine points of running a private law office and managing an appellate caseload.

I personally have been heavily involved in the planning of the program and want to take this chance to encourage attorneys to apply. We are deeply committed to making this program succeed, and the judiciary is devoting substantial resources to it. The participation of talented attorneys is essential to achieve our goals and is likely to provide an invaluable professional advantage to the individuals involved.

Wende-Anders cases

This is old business with a new twist. The United States Supreme Court has decided *Smith* v. *Robbins*. By a 5-4 vote, it upheld California's so-called "*Wende*" practice (see note) of submitting no-merit briefs without a list of rejected issues and pertinent authorities, as had apparently been required by *Anders* v. *California* (1967) 386 U.S. 738 [18 L.Ed.2d 493, 87 S.Ct. 1396]. The court held the *Anders* procedure is not constitutionally mandated and that California's *"Wende"* practice does not constitute ineffective assistance of counsel in violation of the due process principles of the

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In this issue:

Fourteenth Amendment.

> NOTE: Out of a passion for accuracy, I'd like to point out that *People* v. *Wende* (1979) 25 Cal.3d 436 (which was argued by Paul Bell of ADI), was not presented with and did not directly decide the question whether inclusion of issues and authorities is required in a no-merit brief; indeed, in dicta it actually quoted approvingly from passages in *People* v. *Feggans* (1967) 67 Cal.2d 444, 447-448, imposing such a requirement. (25 Cal.3d at p. 440.) However, many attorneys and courts (including both the majority and dissent in *Robbins*) have **assumed** that *Wende* held issues and authorities are not necessary. For ease of reference, in this article I'll use the traditional (but not really accurate) terms "*Wende* brief" to mean one without a list of issues and authorities and "*Anders* brief" to mean one with such a list.

The policy of the Fourth Appellate District since 1997 has been to require *Anders* briefs, and the district has now expressed a strong preference and desire to continue that practice. Their opinion is that *Anders* briefs greatly assist the court in reviewing the record, identifying and evaluating potential issues, and assessing the performance of counsel. Justices also believe *Anders* briefs increase the likelihood meritorious issues will be found. Finally, *Anders* briefs offer some insurance against the vagaries of Supreme Court decision-making: there has never been any question about the constitutionality of *Anders* briefs, while *Anders* itself and four members of the *Robbins* court determined that the absence of issues and authorities (the definitional feature of a *Wende* brief, as that term is used here) is an unconstitutional denial of counsel.

Since the adoption of *Anders* briefs in 1997, many attorneys (much to their own surprise) have found them to be superior to *Wende* briefs in significant ways:

- *Anders* briefs force counsel to put their analysis and research into writing, and in so doing they focus their thoughts more precisely, sometimes persuading themselves that an issue is arguable, after all.

- Explicitly setting forth the results of counsel's work tends to make counsel more accountable to the courts, projects, and clients -- and that in turn stimulates counsel's efforts.

- Attorneys are trained advocates and presumably are more likely than courts to find subtle, novel, or creative issues; if such issues are not listed, the court might never think of them and would not even have a chance to consider them arguable.

- Similarly, counsel can frame the rejected issues in the light most favorable to the client and so elicit a more positive response than the court might have on seeing the issues "cold."

- Finally, and very importantly, we have found better client reaction to *And*ers briefs: clients tend to appreciate briefs that show the attorney worked for them, instead of just telling the court, "I give up. You take over."

We understand and respect the arguments of the many attorneys who prefer *Wende* briefs. However, our courts have asked for *Anders* briefs, and for the reasons I have stated, we believe those briefs serve clients well. Therefore, the expectation is that attorneys in the Fourth District will file *Anders* briefs. If in an individual case, for **case-specific** reasons (NOT a generic preference for *Wende* briefs), an attorney concludes a *Wende* brief is truly necessary to serve the client's interests, please contact ADI.

State Bar membership

New (?) business: "All panel attorneys must maintain active California bar membership throughout the life of the appeals to which they are appointed. If at any time that becomes impossible, because of disciplinary action or any other reason, they must notify the court and the appellate project immediately." This admonition is now posted on ADI's website (www.adi-sandiego.com) and will go in the next revision of the panel attorney handbook.

I would have thought this warning is unnecessary, because the need to maintain bar membership while representing clients seems self-evident. But we have been surprised on rare occasions by a few attorneys' indifference to this basic professional responsibility and/or ignorance of his/her own bar standing. Needless to say, such indifference or ignorance jeopardizes clients, the integrity of cases, and the attorney's standing with the court, the bar, and the projects.

Panel management issues

Very old but perennially vital business: Cindy Sorman has relayed to me a number of concerns panel attorneys have about their status on the panel, how it is determined, what kinds of things affect it, what they can do to get more and better cases, etc. I have addressed all of these issues a number of times, in different ways, but realize new people have come on the panel and memories do fade. Also panel profiles, judicial concerns, project policies, district caseloads, etc., change. In the next column or so I will review and provide updates on ADI panel management practices and try to offer pointers on what to do and not to do.

Please let me or Cindy know specific questions you'd like me to address in this forum. Two subjects for the next newsletter will be the importance of proofreading and attention to other "small" details (evidence of true professionalism) and the devastating effects of "getting personal" with the court or your opponent (evidence of a **lack** of true professionalism). I may have a few grim examples of failings in both categories -- stay tuned! •

Justice O=Leary Joins Division Three

The appointment of Justice Kathleen E. O=Leary to the California Court of Appeal, Fourth Appellate District, Division Three by Governor Gray Davis was confirmed by the Commission on Judicial Appointments on January 21, 2000. Prior to serving on the appellate court, Justice O=Leary served on the Orange County Superior Court. She was appointed by Governor George Deukmejian to the Orange County Superior Court on July 1, 1986, and was in her third term as the Presiding Judge of that court when elevated to the Court of Appeal. Justice O=Leary began her judicial career at the West Orange County Municipal Court, where she also served as the presiding judge, having been appointed in 1981 by Governor Edmund G. Brown, Jr.

Throughout her judicial career, Justice O=Leary has been active in judicial and law-related education efforts. She is a member and past chair of the Governing Committee of the California Center for Judicial Education and Research (CJER). A primary focus for her has been an effort to increase awareness of the need to facilitate access to justice for all through judicial education. In addition to teaching a number of courses in California for judicial officers, judicial branch staff, law enforcement and lawyers, she has taught courses for the Hawaii Judiciary and the Virginia-based National Center for State Courts.

Justice O=Leary has served as a member of the Judicial Council and a number of its advisory committees, and has also served on a variety of task forces by appointment of the Chief Justice. Recent awards received by Justice O=Leary include the Judicial Council=s Jurist of the Year Award (1999), the California Consumer Attorneys

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Outstanding Judicial Achievement Award (1999) and the Southwest University School of Law Outstanding Judicial Officer (1999). Other organizations which have recognized her achievements include the Hispanic Bar Association, the American Legion, the League of Women Voters, the Sons of the American Revolution, and the Orange County Women Lawyers. •

Division Two Topics

By Carmela Simoncini, Staff Attorney

The clerks at Division Two try hard to be responsive to the needs of panel attorneys, and to understand the exigencies of representing indigent clients. In this regard, they ask for a few indulgences in return. Cooperation between the court and counsel aids the administration of justice, and this benefits everyone involved in the process, especially the client.

1. Attorney Addresses

The address that is entered into the court=s docket/database is the address used for all court notices. Panel attorneys should make sure that the address on the cover of the brief is the same as the address on the appointment order. If your address has changed, or if you want the court and other counsel to use a different address, please send a
change of address to the court, so its database can changed.

Here=s what happens: When counsel, including the Attorney General=s office, or County Counsel, files a brief, the clerk checks the proof of service against its database to ensure all parties are properly served with the brief, motion, or writ. In some cases, the panel attorney has used a street address on the cover of his or her brief, although the business address, used in the appointment order and subsequently entered into the court=s database, uses a Post Office box number. The respondent generally uses the address on the cover of the AOB to serve its brief. When the respondent=s brief is filed, the clerk will examine the proof of service and will reject the brief if the address in the proof of service is not the address in the database (which was gathered from the appointment order.)

So, once again: Please make sure the address on the cover of your brief is the same as the address on the Notice of Appointment. If they are different, please notify the court of your change of address so the database can be modified accordingly.

2. AIt=s In the Mail.@

Division Two has tried to be accommodating on deadlines by making a docket notation on a due date if the attorney calls and tells the court the extension request or the brief has been mailed. The clerk will then wait a few days to see if the document comes in. On a couple of occasions, the document did not come in as expected. The clerk had to call these attorneys, only to find that the document had not actually been deposited in the mail as counsel had represented to the clerk previously.

As attorneys, our word is our oath, and our reputations depend in large part on the reliability of our word. Telling the clerk that a document is in the mail, when it has not even been completed, is courting disaster. Unfortunately, this could hit like an earthquake wave, and you will not be the only person wiped out: we could all be swept out to sea if the court feels it cannot trust the word of counsel.

So please be careful; if the document has not already been deposited in the mail, do not tell the court it has been. •

Really Early Transmission Of Exhibits In Division Two

By Dave Rankin, Staff Attorney

Here=s a question. When is early transmission of exhibits under rule 10(d) not really early? At least in Division Two, the answer is when counsel sends the rule 10(d) request to the superior court after oral argument is

put on calendar. By then, as a practical matter, it=s too late because the court has already reviewed the record, read the briefs, and written a tentative opinion. The upshot is, in Division Two, it=s advisable to send a letter to the Court of Appeal along with your opening brief asking the Court to exercise its own power under rule 10 for transmission of specific exhibits.

Rule 10 provides two ways for original exhibits to be transmitted to the Court of Appeal for review during an appeal. The first is for counsel to send a notice to the Superior Court asking for transmission of the exhibits to the Court of Appeal, *after the appellate court has set the appeal for hearing.* (*See* Cal. Rules of Court, rule 10(d), sent. 1.) Although this may still be useful in Divisions One and Three it is not in Division Two.

As we are all well aware, Division Two=s decision-making process is front-loaded. By the time the appeal is set for a hearing, the court has already read the briefs, reviewed the record, and, most importantly, *written a tentative opinion.* It won=t do our clients much good for us to ask the court to review exhibits for oral argument, if the court has already written its tentative opinion on the case.

This brings us to the second way in which exhibits can be transmitted to the Court of Appeal under rule 10. AThe reviewing court may at any time request that any original exhibits be transmitted to it by the clerk of the superior court.@ (Cal. Rules of Court, rule 10(d), sent. 5.)

In Division Two if appointed counsel wants the Court to review certain exhibits in the case before making its decision, counsel should file a letter with the Court of Appeal at the same time as the opening brief that lists the exhibits counsel wants the Court to look at. This letter should not only list exhibits counsel has referred to in the brief, but also those that counsel believes will help the court better understand the facts or arguments. The Court has told us that it will exercise its own power under rule 10 to ask for the exhibits counsel has listed in the letter. This will ensure that the exhibits are reviewed timely during the appeal. •

Reminder About Requests For *Wende/Anders* Or *Sade C.* Record Reviews

By Cheryl Geyerman, Staff Attorney

All requests for a *Wende*/*Anders* review should be accompanied by the following: 1) the record; 2) the draft *Wende*/*Anders* brief, with statement of the case and facts; and 3) a cover letter with relevant information, including the brief=s due date and how many extensions have been requested.

Please keep in mind that a staff attorney must review the record before a *Wende*/*Anders* brief may be filed, even if the record has been screened before (for instance, as a guilty-plea or assisted case.) Also, we ask that you submit all requests with adequate time for the staff attorney to review the record, research the issues, and advise you of the result of the review.

All requests for a *Sade C.* review should be accompanied by a letter with relevant information, including the brief=s due date, and whether the client and the trial counsel have been contacted. If your client is not the only appellant in the case, the co-appellate counsel should be asked whether an issue will be raised. If the co-appellant=s interests are not opposed to your client=s position, rather than file a *Sade C.* brief, you could file a joinder with co-appellant=s brief. However, before you decide to file a joinder, please contact the supervising staff attorney to discuss the case. A *Sade C*. review may be required.

Requests for *Sade C.* review in Division One or Two cases should be accompanied by draft *Sade C./Anders* briefs. A request for a *Sade C.* review in a Division Three case should be accompanied by a summary of relevant facts and procedure. The juvenile dependency appeals division is required to

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send Appellate Defenders, Inc. a record for its use. Unfortunately, there are many times when we do not receive a record. A call to the staff attorney before you send in the *Sade C.* request will give us an opportunity to find out if we have the record, or if we will need a copy. Please call Cheryl Geyerman at extension 23 if you have questions about the procedure to follow in any of the divisions. •

When Filing A *Sade C.* Brief, Division Three Requires A Due Diligence Search For The Client

By Cheryl Geyerman, Staff Attorney

P rior to a Sade C. filing at the Fourth District Court of Appeal, Division Three, counsel must have made efforts to contact the client. If the original address provided for the client is no longer valid, counsel must search for the client. Because the Court in Division Three sends an order allowing the client to file a supplemental brief, the Court needs an updated address. Counsel will need to keep a checklist of efforts made.

The following search efforts should be undertaken, as well as any others counsel believes may turn up a good address:

1. Check the background information sheet from both trial counsel and the client for addresses and telephone numbers listed, and call and write to them. If you call and leave a message, let the party know a collect call will be accepted. Convey the best time of day to reach you by telephone. When you write, enclose a self-addressed, stamped envelope for a reply.
2. Call the trial counsel, even if the case was a termination of parental rights. Trial counsel may know how to reach the client from past experience.
3. Review the social worker reports in the clerk=s transcript. Included in the reports may be addresses or telephone numbers for family members to contact.
4. Call custodial institutions if the client is likely to be incarcerated. You will need to get the birth date from the record, usually available in the clerk=s transcript from the screening summary or a social worker=s report. Call Prison Locators at (916) 445-6713 and give them your client=s full name and date of birth. You will need to call county jails separately. Check our website for telephone numbers, or ADI paralegals or administrative assistants may be able to provide it.
5. If your client is in the military, call the service involved.
6. If you think your client could be at an Immigration and Naturalization detention center for deportation, call the INS for information.
7. If all else fails, call Appellate Defenders, Inc. Be sure to have a list of all the search efforts you have made prior to calling.

Put this or a comparable check list in the file for each client and use it when it becomes necessary. If you are unable to contact your client when you are about to file a Sade C. letter, you should call the supervising attorney at Appellate Defenders, Inc., to let them know of the efforts you have made before you file the letter. •

Protecting Your High-Risk Client=s Safety in Prison

By Dave Rankin, Staff Attorney

Used properly, and in the right circumstances, a simple change of address notice filed with the Court of Appeal can protect your client=s safety and life.

It=s probably common knowledge that our clients who have been convicted of child molestation or abuse, rape, and other sexual offenses run the risk of being attacked by other inmates who are inexplicably

revolted by these crimes. What might not be as well known, is that these high-risk offenders are not automatically segregated from the general prison population during their incarceration. This puts an extra burden on us to help protect our clients= safety during their incarceration.

One way we can do that is by helping our clients keep the facts of their offenses from other inmates. It=s obviously important to inform our clients about their cases, but for high-risk clients it can be dangerous for them to receive legal mail that describes their offenses. Therefore, arrangements can be made with the client to have legal mail delivered to a trusted friend or relative. If that=s not possible, the client can also agree to having the appellate attorney accept service.

The nuts and bolts work this way. After getting the client=s consent, appellate counsel must send a change of address notice for the client to the Court of Appeal. If the panel attorney has agreed to accept service, the change of address should indicate that all mail, which would ordinarily be sent to the client personally, should be sent Ain care of@ of the attorney at the attorney=s address. Similar language should be used if the client has asked that legal mail be sent to a relative or friend.

The Court of Appeal will enter the new address listed on the change of address form in its computer database. Thereafter, the Court will send all notices to the designated address, rather than the defendant.

Counsel can then mail appellant=s copy of briefs and other filings to the new address if it=s a relative=s or friend=s, or keep the copy, if counsel is accepting service. Obviously, counsel should list the new address on any proof of service filed with the court. •

Links in the Law - A.D.I.=s Website News

By Amanda F. Doerrer, Staff Attorney

Welcome to Y2K! As we approach the first spring of the new millennium, A.D.I. is pleased to be celebrating the one year anniversary of the A.D.I. Website. During the past year, the A.D.I. website has grown by leaps and bounds in an effort to make our site your number one on-line resource for criminal appellate practice. What=s New? - Plenty! In AAppointed Counsel Corner@ you will find news flashes from A.D.I., links to frequently used addresses and telephone numbers, forms from the Judicial Council and A.D.I. which utilize Adobe Acrobat and can be filled in on your computer, as well as links to MCLE courses you can complete on-line in the comfort of your home or office.

A.D.I. understands that keeping up on current changes in the law can be a time consuming and frequently expensive task. To assist appointed counsel, we have provided links to the United States Supreme Court and the California Supreme Court. Counsel can easily obtain free copies of appellate briefs filed in the U.S. Supreme Court, obtain rulings from the U.S. Supreme Court and the California Supreme Court within hours of publication, and view weekly listings of cases accepted for review by the California Supreme Court. All this information is FREE and can be found in the AAppointed Counsel Corner@ under AOpinions & Briefing.@

Despite the constant changes at A.D.I.=s website, the site=s focus remains the same: providing a quality on-line resource for appointed appellate counsel. In order to better serve your needs, we would like to hear from you about ways in which A.D.I. can improve the site to better suit your needs. Are there forms you wish were available on the site? Is there a legal research tool, helpful to appellate practice, not included on our AResearch Links@ page? Is the site easy to navigate?

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Do you have suggestions or ideas on how the site could be easier to use? Remember, this site is for you! Tell us what you need and we will do our best to accommodate your needs. Please email all suggestions, comments and questions to the A.D.I. webmaster: afd@adi-sandiego.com. •

Miscellaneous Notices:

News Flash - Red Alert

Mark your calendars! As of **April 1, 2000,** all three divisions of the Court of Appeal will cease sending copies of the opinion to the defendant. Appellate counsel will be solely responsible for notifying the defendant of the results of the opinion. •

New Rule 35(e) Procedure in Division 3

Division 3 has developed a new procedure to help alleviate delays associated with rule 35(e) requests. Division 3 now requires the Superior Court to send them a copy of every rule 35(e) notice they receive. Upon receipt of the notice, Division 3 will send out an order giving the Superior Court 30 days to file the supplemental transcript. To help Division 3 track all 35(e) requests, appellate counsel should include Division 3 on their 35(e) request mailing list. •

ADI'S Newest Paralegal

ADI is proud to welcome its newest paralegal, San Diego native Jacquelyn C. Jovenal. Jacquelyn graduated this past June from the University of California, Irvine, where she earned two Bachelor degrees in the areas of psychology and social behavior. She obtained her Paralegal Certification from UCSD in December 1999. Her extension is 42. Welcome Jacque! (ADI=s updated staff roster is on page 31.) •

Reminder About E-mails Sent To ADI

When sending an e-mail to ADI staff, please be sure to include the case name and number, if applicable, on the e-mail=s subject line. All e-mails sent to ADI staff will be routed both to the recipient and through a central box so that the ADI mail room can maintain a hard copy for ADI=s records in the appropriate file. •

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.]

This newsletter includes kudos through January 31, 2000. Occasionally a kudo is missed or held back due to space limitations. If you have a case where a kudo was due and the opinion issued prior to January 31, please notify Elaine Sinagra.

Dorothy Almour, In re Robert O., #D032482, "Re-establishment" of a conservatorship after expiration of the conservatorship term was reversed where the county failed to give the conservatee adequate notice of the hearing to "re-establish". (I)

Cheryl Anderson, P. v. Cordova, #D031603, Two counts of assault with a firearm reversed for failure to instruct on the definition of assault (CALJIC No. 9.00). (A)

Patricia Andreoni, P. v. Arrington, #G023008, GBI enhancement under PC ' 12022.7, subd. (d) stricken and replaced with enhancement under subdivision (a). Sentence reduced by one year. (I)

Craig Arthur, In re Mark & Michael G., #E025388, In an appeal submitted as a petition for writ of mandate by the minors, the court reversed an order for six more months of reunification services where it appeared the parents had never complied in the two years of the dependency. (A)

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Civil Tongues

Number 23 Supplement to the Quarterly Newsletter of Appellate Defenders, Inc. Spring 2000

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

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

A juvenile court may be compelled to conduct a jurisdiction hearing in dependency proceedings on consecutive court days until conclusion, absent a showing of exceptional circumstances justifying a continuance. In Renee S. v. Superior Court (1999) 76 Cal.App.4th 187, the juvenile court continued the jurisdiction hearing for approximately 3 weeks because of a court policy to conduct such hearings on Thursdays and Fridays, and due to scheduling conflicts, the court would not be available on some upcoming Thursdays and Fridays. The mother's counsel requested transfer of the matter to another court in order that the jurisdiction hearing could be conducted on a day-to-day basis, relying upon the decision of Jeff M. v. Superior Court (1997) 56 Cal.App.4th 1238. The request was denied. A petition for extraordinary relief was then filed.

Although issuance of the writ was ultimately unnecessary because the dependency proceedings had already been concluded, the Court of Appeal determined the issue was widespread and urgent, requiring a decision for guidance. On the merits, the court considered the tension between timely resolution of dependency cases and the thoughtful exercise of judicial discretion. It observed that Welfare and Institutions Code section 352 governs all continuances; the statute requires a showing of good cause, along with a statement in the record of the facts proven in support of the continuance, and prohibits continuances which would result in the disposition hearing being completed longer than 60 days after the detention of the child.

Here, there was no good cause cited for the continuance, and the continuance resulted in the disposition occurring more than 60 days after detention. It felt the mandate that the juvenile court ensure the hearing is adjudicated and concluded, under ordinary circumstances, within 60 days of detention, may mean that the matter must be transferred to another department. While the court acknowledged there is no specific statutory provision requiring dependency proceedings to be heard on a day-to-day basis, the juvenile court is required to give calendar preference to such proceedings. Thus, trial on a continuous basis in this case was warranted. (Renee S. v. Superior Court, supra, 76 Cal.App.4th at pp. 197-198.)

In In re Carissa G. (1999) 76 Cal.App.4th 731, Division Three of the Fourth Appellate District held that a mother had no standing to appeal a juvenile court's dismissal of a dependency petition. In this case, mother applied to the family court for an ex parte order limiting her husband's visitation, alleging he had molested their daughter. The allegation was based on a statement made by the 4 year old daughter that the father had touched her genitalia; however, a medical examination revealed nothing suspicious. The family law court denied mother's request to limit father's visitation.

Mother then contacted the Social Services Agency, which investigated and filed a petition. After a contested jurisdictional hearing, the court dismissed the petition. Mother appealed, claiming the evidence failed to support the juvenile court's dismissal. The Court of Appeal dismissed the appeal holding that the mother was not a "party aggrieved" to obtain a review of the ruling on the merits. (In re Carissa G., supra, 76 Cal.App.4th at p. 734, 738.)

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In reaching its decision, the court noted a conflict exists in state law concerning whether a parent has standing to appeal an order dismissing a juvenile dependency petition after a contested jurisdictional hearing. On the one hand, In re Tomi C. (1990) 218 Cal.App.3d 694, holds a parent lacked standing to appeal such an order. On the other hand, In re Lauren P. (1996) 44 Cal.App.4th 763, holds that a parent does have standing to appeal.

Here, the Carissa G. court came down on the side of the court saying there is no standing. The court noted that issues of concerning custody and visitation can be dealt with in a family law proceeding, so the mother was not left without a remedy. The mother was not barred from seeking relief in a family law proceeding despite the fact the allegations were litigated in the juvenile court, because the different issues involved in the different proceedings precluded application of res judicata principles. Further, dismissal of the petition did not negatively impact the mother's fundamental parenting right.

In In re Eric A. (1999) 73 Cal.App.4th 1390, the father learned a hard lesson about signing a stipulation at a 6-month review hearing that acknowledges the circumstances giving rise to the existence of jurisdiction still exist.

In this case, father appealed a jurisdictional finding and declaration of dependency by which his Down's Syndrome child was removed from his custody. While the appeal was pending, the 6 month review hearing was conducted and in accordance with Orange County's local procedures, prior to this hearing, the father's attorney signed a stipulation which stated, "pursuant to Section 364(c)...conditions still exist which would justify initial assumption of jurisdiction under Sec. 300 [of the Welfare and Institutions Code]."

One does not need to be a rocket scientist to see that by signing a stipulation which has this box checked off, one might be conceding the very issue which is currently on appeal. But it is done every day. Indeed, the Court of Appeal noted it has pointed out the distinction between a stipulation to jurisdiction, as in this case, and a stipulated disposition--as in In re Jennifer V. (1988) 197 Cal.App.3d 1206 -- which does not waive jurisdictional issues. However, that distinction had been drawn only in unpublished decisions. "Unfortunately, our repeated application of the distinction has gone unheeded. In fact, the practice described appears to be increasing in frequency. This decision should serve notice that such stipulations are fatal to pending appeals." (In re Eric A., supra, 73 Cal.App.4th at p. 1395.) The appeal was dismissed. Amen.

B. Permanent Plan Issues

In In re Janee J. (1999) 74 Cal.App.4th, the First District Court of Appeal refused to review multiple errors of notice and findings at various stages of the dependency, which had been presented with argument that counsel was ineffective in failing to object. It concluded that mother's failure to appeal the disposition order, or any order made between then and the 366.26 hearing, or her failure to file a petition for writ review, precluded her from raising the issues. The court set out the waiver rule and describes some of the circumstances in which the waiver rule may be relaxed. However, the mother's claims here were not excused by any apparent defect that fundamentally undermined the statutory schemes so, she was kept from availing herself of its protections as a whole. (Id., 74 Cal.App.4th at p. 209.)

In Dawnel D. v. Superior Court (1999) 74 Cal.App.4th 393, Division Three of the Fourth Appellate District issued a writ of mandate directing the trial court to vacate its orders terminating reunification services and setting a section 366.26 hearing. The mother filed her writ petition when, at the 6 month review hearing, the trial court terminated services and referred the matter for permanency planning, arguing that the trial court used the wrong time frame when it determined there was no substantial probability she would reunify.

Mollie was born with positive toxicology test results and was placed out of the home. The mother, Dawnel, was ordered to comply with certain court-ordered rehabilitation programs. Mother sporadically complied with the plan, and despite this, the social worker recommended an additional 6 months of services. Minor's counsel objected to additional services, so a contested hearing was set. (Dawnel D. v. Superior Court, supra, 74 Cal.App.4th at p. 396.)

At the hearing, the court inquired whether the limitations on the time period for services contained in section 361.5, subdivision (a) also limited the time frame it considered pursuant to subdivision (e) of section 366.21 as to whether there was a substantial likelihood of reunification within six months. The court concluded it must look only at the time remaining before the 12 month review hearing had to be scheduled, and decided there was not a substantial likelihood of reunification by that date. (Dawnel D. v. Superior Court, supra, 74 Cal.App.4th at p. 397.)

The Court of Appeal determined first that the court did not abuse its discretion in terminating services where mother's dismal performance in the most crucial aspects of the reunification plan could not be viewed as "regular participation in services." However, as to the issue of time period to be considered in determining whether to extend services, the court held the trial court correctly calculated when the last day for the 12 month review period would occur, but held it incorrectly determined that the question of whether the child can be returned within six months must relate to that time period. The reviewing court concluded the plain language of section 366.21, subdivision (e) demonstrates the Legislature's intent that the court look at a full six month period, regardless of when the twelve-month period would expire in a particular case. (Dawnel D. v. Superior Court, supra, 74 Cal.App.4th at p. 399.)

Unfortunately for Dawnel, although the court abused its discretion in failing to exercise it, it did not abuse its discretion in refusing to order additional services. Not only was her participation in the programs dismal, she had continued to use drugs a little over a month before the 6-month review hearing and at that time she had yet to commit herself to a rehabilitation program. Since "[a] judge is not required to indulge in what appear to be idle acts," the reviewing court directed the trial court to conduct another hearing pursuant to section 366.21, subdivision (e), at which the sole question for reconsideration is whether there is a substantial probability of return within 6 months.

In In re Rashid B. (1999) 76 Cal.App.4th 442, the Third Appellate District agreed to review, on the merits, the mother's assignment of errors occurring prior to the section 366.26 hearing. In this case, the mother appeared at the detention hearing, where the court appointed counsel and advised mother to keep the counsel and the social worker apprised of her address.

However, the court did not order mother to provide a permanent mailing address, and because she was homeless, mother did not do so. Thus, appellant did not receive timely notice of the referral for the permanency planning hearing or the advisal regarding the need to file a rule 39.1B writ. Citing In re Cathina W. (1998) 68 Cal.App.4th 716, 722, the court of appeal noted that where the court fails to give a party notice of writ review, the party's claims on appeal are not limited by the provisions of section 366.26, subdivision (l)(1) and (l)(2).

Here, the mother was not present at the referral hearing, and the record of the detention hearing reveals the court made no attempt to have appellant provide a permanent mailing address, nor did the court advise appellant that the address would be used for notice purposes. Although the court did advise appellant to keep counsel and the social worker informed of any change of address, that admonishment did not constitute substantial compliance with Welfare and Institutions Code section 316.1, and rule 1412(l) of the California Rules of Court. (In re Rashid B., supra, 76

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Cal.App.4th, at pp. 449-450.) [Note: in the unpublished portion of the opinion, reaching the merits of the contentions, the court affirmed the referral order and termination of parental rights.]

In In re Brittany C. (1999) 76 Cal.App.4th 847, the Sixth District Court of Appeal affirmed a termination of parental rights over the parent's objection that a beneficial parent-child relationship existed. Citing the legislative preference for adoption (In re Brian R. (1991) 2 Cal.App.4th 904, 923-924), the court observed that when the juvenile court finds that the child is adoptable, it must terminate parental rights unless it finds one of the four specified circumstances in which termination would be detrimental.

In Brittany C., the mother argued that the language of section 366.26, subdivision (c)(1)(A) was clear and unambiguous and that the decisions of In re Autumn H. (1994) 27 Cal.App.4th 567 and In re Beatrice M. (1994) 29 Cal.App.4th 1411, misinterpreted the statute by requiring the parent to prove the child would be "greatly" harmed by termination of parental rights and that the child must hold the parent in a "parental" role. The appellate court declined to depart from the decisions of Autumn H. or Beatrice M. and decided the issue accordingly.

Another recent case involving the (c)(1)(A) exception to section 366.26 is In re Urayna L. (1999) 75 Cal.App.4th 883. In this particular case, mother had a drug problem which led to the dependency. Mother did not complete the service plan, so services were terminated when 'time ran out.' (Id., 75 Cal.App.4th at p. 885.) At the 366.26 hearing, the trial court considered a report which included a review of the amount and nature of contact between the minor and her relatives during the dependency. This report described mother's supervised visitation, which occurred approximately 1-2 times per month, and which visits were arranged by the maternal grandmother. This report described the minor's discomfort with mother and earlier reports noted the grandmother was more consistent in visiting the minors than the mother.

On appeal, the mother argued the trial court erred in terminating parental rights based on a report which did not indicate the nature of the minor's relationship with her maternal grandmother. The court concluded that by failing to raise the adequacy of the report in the trial court, the mother waived this issue. (Id., 75 Cal.App.4th at p. 886.) It observed that if there had been unreported contacts between Urayna and her grandmother such that Urayna's adoption would have been detrimental to Urayna, the mother could have raised them herself. The court held the mother's silence below signified she did not see anything which was not included in the reports which might have helped her case.

Here Comes the Soap Box

Before you say to yourself, "Why do those pesky appellate attorneys keep beating this dead horse," please refer to the Congressional expression of intent on this subject. Why should you care about federal law on this supposedly state subject? Because California's Health and Human Services programs for foster care and adoption must conform to federal law in order to qualify for federal funding. (Yes, they do it for money.)

Also, if California's interpretation of familial rights violates federal constitutional principles, we would all agree that the interpretation would violate federal due process. Considering that federal constitutional rights of privacy, which include the fundamental parenting rights, are merely implied under the First and Fourteenth Amendments to the Federal Constitution, and that the right of privacy is expressly guaranteed under Article I, ' 1 of the State Constitution, one would expect greater protection under state law than under federal law.

But, in fact, state law provides less protection to familial rights -- both the parent's and child's right to

retain familial integrity [see In re Kay C. (1991) 228 Cal.App.3d 741, 749; Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1418; Duchesne v. Sugarman (2d Cir. 1977) 566 F.2d 817, 825 -- based upon its construction of the statutory language of the beneficial parent-child relationship.

So let's look at the federal law regarding permanency planning and adoption: 42 U.S.C. '' 602, et seq., to see what approach Congress intended the states to adopt. As one can see from a survey of Subchapter IV of Chapter 7 of the Social Security Act, the states are required to implement certain child protection, family preservation, and adoption assistance programs in order to qualify for federal grants. (42 U.S.C '602.) One such requirement is the duty to provide certain "family preservation services." (42 U.S.C. '' 629a, 629b.) Another requirement is that each state require development of a "case plan" for each child and family which under the jurisdiction of the A.F.D.C.

The case plan must include a "case review system" as a procedure for assuring each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family-like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child, and that the status of each child is reviewed periodically, but no less frequently than once every 6 months by either judicial or administrative review.

The case plan must also incorporate safeguards to assure each child in foster care a permanency plan, which is to occur no later than 12 months after the date the child is considered to have entered foster care, which hearing shall determine the permanent plan for the child, which includes whether, and if applicable when, the child will be returned to the parent, placed for adoption, or referred for legal guardianship, or placed in another planned permanent living arrangement. (42 U.S.C. '675, subd. (5)(C).)

Section 675 of Title 42 goes on to provide that in the case of a child who has been in foster care for 15 of the most recent 22 months, or if the child has been declared to be an abandoned infant, or if the parent of the child has killed another child, the state shall petition to terminate the parental rights of the child's parents and to concurrently identify, recruit, process and approve a qualified family for adoption **unless** (i) the child is being cared for by a relative; (ii) the state agency has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or (iii) the state has not provided to the family of the child, consistent with the time period in the state's case plan, such services as the state deems necessary for the safe return of the child. (42 U.S.C. ' 675 subd. (5)(E).

Note that Congress apparently contemplated that states would consider return of the child to the family at the permanency plan hearing. Note that Congress did not contemplate that parental rights must be severed where the child is placed with a relative. Note that adoption by a non-relative is not the congressionally preferred permanent plan if the child is placed with a relative. Note that Congress does not require a parent to prove that he or she stands in a parental role in order to be excepted from a permanent plan of adoption.

In short, California's statutory scheme not only conflicts with federal constitutional principles relating to the fundamental nature of the familial rights of both parent and child, it violates the terms of the congressional grant which fuels the system by which more than 105,000 have been declared dependent children, but only 2,340 of which have been adopted.

California courts, which follow Autumn H. and Beatrice M. in reading additional elements into section 366.26, subdivision (c)(1)(A), are putting the state system at risk of losing funding for social services. It is only a matter of time before federal civil rights lawsuits start getting filed (several cases in Los Angeles are heading in that direction) over
the departures taken by the courts in interpreting a

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statute which implicates fundamental familial rights.

So long as congressional pronouncements, which protect federally guaranteed constitutional familial rights while also protecting children, requires consideration of the return of a child to parental custody, or relative placement via guardianship, on the same footing as adoption except in limited circumstances, a state interpretation that diminishes the child's and parent's interests in maintaining the familial relationship will be at risk of being declared unconstitutional.

In In re Andrea R. (1999) 75 Cal.App.4th 1093, Division Seven of the Second Appellate District affirmed an order terminating parental rights, holding the juvenile court was not required by section 366.3 to hold a separate evidentiary hearing to review the permanent plan of guardianship and determine if circumstances supported a change in the permanent plan. At the time of selection of the original permanent plan, Andrea had been living with foster parents who did not wish to adopt her for a few years. Prior to that, she had been placed with an aunt who cared for her for approximately two years. Although a prospective adoptive family had been found, guardianship was selected because Andrea had a good relationship with both parents and would be upset to lose contact with them.

Subsequently, the guardians informed the social worker they still wanted to adopt Andrea but felt pressured to accept a guardianship, rather than adoption, out of fear of losing custody of her. In 1998, Andrea's mother filed a petition to terminate the guardianship pursuant to section 388, based upon her improved circumstances. The social worker's report indicate Andrea wanted to live with her mother, although she was doing well with her guardians, who were committed to adopting her. Andrea's second choice was to live with the guardians. The worker recommended termination of parental rights. (In re Andrea R., supra, 75 Cal.App.4th at pp. 1100-1102.)

At the hearing, mother's counsel argued the court must find a change of circumstances to modify the permanent plan from guardianship to adoption, and that the court could not modify the permanent plan without taking testimony or and receiving evidence of changed circumstances. On appeal, the parents contended the order terminating parental rights was void for noncompliance with Welfare and Institutions Code, section 366.3, because the court lacked jurisdiction to hold a section 366.26 hearing without first determining whether the circumstances supported a change in Andrea's permanent plan. (Id., 75 Cal.App.4th at pp. 1104-1105.)

The court held there was no authority to support such a procedural requirement. (Id., 75 Cal.App.4th, at p. 1106.) Relying on San Diego County Dept. of Social Services v. Superior Court (1996) 13 Cal.4th 882, which holds that either party can seek modification of a permanent plan at any subsequent hearing if circumstances have changed, and citing the "mandatory preference for adoption over legal guardianship," (In re Andrea R., supra, 75 Cal.App.4th at p. 1107, the Court of Appeal concluded the policy "is only furthered by the fact that section 366.3, subdivision (c), permits the court more readily hold a new section 366.26 hearing to determine wither adoption or continued guardianship is the most appropriate plan." (Ibid.)

As to the merits of the argument that the best interests of the child would be disserved by severance of the parent-child relationship, the reviewing court followed In re Autumn H. and its progeny, in requiring the parent to prove he or she occupies a "parental role" in the child's life, and that the parents' relationships with Andrea 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (In re Andrea R., supra, 75 Cal.App.4th at p. 1109, quoting In re Beatrice M., supra, 29 Cal.App.4th at p. 1419, and In re Autumn H., supra, 27 Cal.App.4th 567, 575.) These parents should have no problem making this showing when the child has been placed out of home for 6 or 7 years.

FREEDOM FROM CUSTODY CASES

In a private adoption case, Division Two of the Fourth Appellate District reversed the denial of an adoption petition and remanded the case for a hearing. In Adoption of Baby Girl B. (1999) 74 Cal.App.4th 43, a petition for adoption was denied when the Department of Social Services filed a report stating that the adoptive mother had failed to respond to requests for information, was unemployed, had a criminal record and was living with her ex-husband and son, who also had criminal records. The trial court refused to hold an evidentiary hearing, entering an order removing custody of the child from the adoptive parent's custody in addition to denying the petition for adoption.

The court declined to consider the adoptive parent's constitutional claim, ruling instead that the denial of an evidentiary hearing violated her statutory right to a hearing and was reversible per se. Even if not reversible per se, the court felt it was prejudicial. (Id., 74 Cal.App.4th at p. 45.) The court first observed, relying upon Jinny N. v. Superior Court (1987) 195 Cal.App.3d 967, 971-972, that an adoptive parent has a liberty interest in continued custody, and thus has a constitutional right to notice and hearing before the adoptive placement can be terminated, at least in the absence of urgent or emergency circumstances.

In response to the department's claim the baby was in danger, it did not support the denial of a hearing, since "imminent danger" is needed to justify the remove-now-and-conduct-a-hearing-later procedure, and even then the adoptive parent would be entitled to a post-removal hearing. (Adoption of Baby Girl B. (1999) 74 Cal.App.4th at p. 53.)

I agree with the outcome of this case, but I am concerned about the blurring of substantive and procedural due process principles evident in the court's reference to the adoptive parent's right to continued custody. The cases relied upon by the court refer to adoptive and foster parents' rights to **procedural** due process, not substantive due process. The right to custody is a substantive right reserved to parents and legal guardians entitled to legal and physical custody. An adoptive parent may have physical custody, but absent a guardianship, the department of social services is usually the entity with legal custody after parental rights are terminated.

PATERNITY CASES

Here's a twist for you: a child born in Mexico to an unmarried Mexican woman and an American man who has not acknowledged paternity is a U.S. citizen. (United States v. Ahumada-Aguilar (1999) 189 F.3d 1121.) This was an interesting case. Defendant was convicted of illegal reentry by an alien with prior convictions, and he appealed on the ground he was a U.S. citizen. His conviction was affirmed by the Court of Appeals in an unpublished hearing and he petitioned for rehearing. On rehearing, the 9th Circuit reversed.

The 9th Circuit Court of Appeals held that the additional proof of paternity requirement imposed for citizenship by birth whenever the citizen parent of the child who was born out of wedlock and abroad was the child's father, as opposed to the mother, was an unconstitutional denial of equal protection based upon the sex of the citizen parent. Since he was a citizen, he could not be convicted of illegal reentry to the U.S.

FAMILY LAW CUSTODY ISSUES

In Hoversten v. Superior Court (1999) 74 Cal.App.4th 636, the Second Appellate District held that a prisoner is entitled to a hearing to determine his right to legal custody and visitation. The big issue here was whether the court was required to take measures to ensure the incarcerated father had access to the courts. It noted that any order concerning child custody and visitation must comport with due process and that visitation rights arise from the very fact of parenthood.

The respondent court had argued that the

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father was not entitled to a hearing because of the egregious nature of his conduct both during and after the robbery resulting in his incarceration, which in turn resulted in his inability to appear and seek visitation. The Court of Appeal held that this put the cart before the horse insofar as the purpose of the hearing would be to determine if it is in the best interests of the children to have visitation with him despite his crime and incarceration.

MISCELLANEOUS ISSUES

1. Revenue and Recovery

After the sting of the dependency proceedings, parents typically get hit with the bill for public assistance reimbursement and foster care expenses. Many parents who are involved in the juvenile process are unaware of this ramification even after being expressly admonished by the court of their duty of support and liability for the expenses of care of their dependent children. But what about the parents who were never notified by the department of the pendency of dependency proceedings? Can they be held financially responsible for public assistance and foster care payments?

In County of Orange v. Carl D. (1999) 76 Cal.App.4th 429, Division Three of the Fourth Appellate District held the county may be estopped from recouping public assistance payments from the father where there was more than a passive failure by the county to locate the father, who had been searching for his children on his own.

In Carl D., the dad was a navy serviceman whose wife, a drug user, absconded with three children in 1984. The children were made dependents in 1992, and jurisdiction was transferred to Orange County in 1993, when they began receiving welfare assistance. A parent locator service found an address for Carl upon a referral from the District Attorneys office, but, notwithstanding this information, the next court report indicated Carl's whereabouts were unknown.

In March, 1994, the postal service provided a street address for Carl, but a month later, the social worker's court report again referred to the father's whereabouts as "unknown." Additional supplemental reports in October 1994, and April 1995, made the same assertions regarding the father's unknown whereabouts.

In July, 1995, (16 months after obtaining Carl's address) the District Attorney filed a petition to declare Carl the father of the children and for reimbursement of public assistance paid since June 1993. This was the first Carl had heard of the whereabouts of his wife and children. Carl contacted SSA and requested custody of the children, but it was not until November 1995 that the children were placed with him, and they continued to receive welfare benefits until that time. The trial court ordered Carl to pay $15,975 in arrearages for child support, and he appealed.

The Court of Appeal reversed the order, finding significant distinctions between the facts of Carl's case and that of In re Marriage of Comer (1996) 14 Cal.4th 504, on which the trial court relied. Most significant was the fact that Comer did not involve children who had been declared dependents of the court. In contrast to Comer, the county in this case had a due process obligation to notify Carl of the pending dependency proceedings. "Despite this, the absent parent search declaration misrepresented information within the county's actual possession regarding Carl's known whereabouts. All the elements for an estoppel against the government are present and its application is fully consistent with the public policy principles espoused in Comer." (County of Orange v. Carl D., supra, 76 Cal.App.4th at pp. 434-435.)

The reviewing court discussed at length how Carl would have been fully responsible for the recoupment if mere governmental inaction or delay had prevented him from locating his children earlier. However, in this case, there was more than mere passive failure to locate the father, evidenced by the record demonstrating the county was derelict in its duty, which rebutted the presumption--

applicable in Comer--of official duty regularly performed. The court goes on to discuss the elements of equitable estoppel which must be shown to meet the higher standard for estoppel against a public entity.

The Court of Appeal concluded this was a case of governmental misrepresentation and ensuing reliance. It noted that the county has a constitutional responsibility to use due diligence to notify absent parents before depriving them of that "most basic of civil rights"--the care, custody, and companionship of their children [citation omitted] and that the absent parent search did not comport with due process requirements. Although the court did not go so far as to hold the county had intentionally concealed Carl's whereabouts in order to drive up the bill, it held proof of concealment was not necessary: "neither actual fraud nor an intent to mislead is an essential element to an estoppel against a public entity." (County of Orange v. Carl D., supra, 76 Cal.App.4th at p. 440, citing John R. v. Oakland Unified School District (1989) 48 Cal.3d 438, 445.)

In a similar vein, the Second District Court of Appeal held that where a minor is subject to an individual education plan (IEP), the county cannot seek reimbursement from the parent for past costs of care provided to the minor. In County of Los Angeles v. Smith (1999) 74 Cal.App.4th 500, the court held that the provisions of the Individuals with Disabilities Education Act preempts the power of the court to seek reimbursement for funds expended for support of needy children under title IV of the Social Security Act. (Id., 74 Cal.App.4th at pp. 504-505.)

KUDOS AND ANECDOTES

Informants needed: Someone must win something occasionally. Can things have gotten so bad? It's been so long since I heard a good success story I am ready to write up continuance motions that get granted.

HOT RESOURCES

November, 1999, was declared "Adoption and Permanency Month," according to a news release from the Judicial Council of California, dated October 29, 1999. The news release reveals that the foster child population in the United States had grown to 520,000, based upon a March 1998 U.S. Department of Health and Human Services survey, and over one-fifth (105,000) live in California.

Of those 105,000 foster children in California, only 2,340 were adopted. That represents .02%, according to my calculations. This means that if parental rights are terminated in all 105,000 dependency cases, there are roughly 102,660 legal orphans out there. •

KUDOS (Continued from page 8)

Russell Babcock, P. v. Pena, #D031165, In two trials, appellant was convicted of two counts of kidnaping, residential burglary, unlawful intercourse with a minor, assault with (and personal use of) a firearm. Court of Appeal reversed all counts except unlawful intercourse, because the trial courts erred in admitting evidence of prior unrelated crimes of unlawful intercourse with a different minor, car jacking and firearm importation, and by excluding material evidence that the victim was only staging the kidnapings with appellant. Also, restitution fines were stricken from the abstract where the trial court failed to impose any, requiring a remand. (I)

Jean Ballantine, P. v. Hoppe, #G023952, Remanded for re-sentencing. Defense counsel requested the court to strike a strike and consider probation. The prosecution opposed the request on grounds that appellant had been dealing drugs during the pendency of the prosecution. Defense objected as to the lack of evidence of the accusation. The trial court sustained the objection, twice, and stated she would not consider it. Then, during argument, when the prosecutor again mentioned the insinuation, the trial court stated that was the primary reason she would not strike the strike. (A)

Sylvia Whatley Beckham, P. v. Tran, #G024798, Sentencing errors: (1) conviction for conspiracy to unlawfully take vehicle stayed per PC ' 654 because defendant also convicted of auto burglary; (2) one-year enhancement for prior auto theft conviction dismissed because defendant not convicted of VC ' 10851. (I)

Christopher Blake, 1) P. v. Perdomo, #E023603, Defendant was awarded one additional day of credit despite AG's contention that the issue was waived by failure to raise it in the trial court. (I) 2) P. v. Hale, #D028915, Defendant awarded 33 additional days of pre-sentence custody credits. (I) 3) P. v. Eulenfeld, #E022446, Murder defendant held entitled to conduct credit against term of imprisonment. Penal Code section 2933.1, which limits conduct credits as against the term of imprisonment imposed upon persons convicted of violent felonies, does not apply to sentences pursuant to Penal Code section 190. As an initiative measure, the statute cannot be amended by legislative enactment without voter approval. Thus, the limitation on credits does not apply. (I)

Jill Bojarski, P. v. Salazar, #E023849, Separate punishment for burglary and robbery against one victim violated PC ' 654 because appellant formed intent to steal before committing the burglary. The impropriety under ' 654 of punishment for robbery committed against another victim was conceded by AG. Also, imposition of parole revocation fine (PC ' 1202.45) was improper because appellant was given life without possibility of parole. (I)

Randall Bookout, 1) P. v. Vargas, #E024604, PC ' 1202.45 fine stricken on ex post facto grounds. 2) P. v. Rogers, #D032573, Several probation conditions stricken in statutory rape case, including over broad condition defendant "Follow such course of conduct as the probation officer may prescribe." (ADI)

Randall Bookout/Panteha Ebrahimi, P. v. Johnson, #D030489, Knock notice violation not excused where police knew defendant owned firearms but had no reason to believe defendant would use them against police if given the opportunity. (ADI)

Robert Boyce, P. v. Chiprez, #E022619, Ten year sentence enhancement imposed pursuant to PC ' 12022.5(a) reduced to five years because when crime was committed in 1994 the maximum punishment that could have been imposed for enhancement was five years. (I)

Julie Braden, In re Leann G., #D033593, Court approved a stipulation for reversal of a judgment terminating reunification services where the parent was not noticed of the hearing. (I)

Martin Nebrida Buchanan, P. v. Owens, #D032114, Reversal of all four counts of second-degree burglary in a Three Strikes case (100 years to life sentence) based on the insufficient evidence of entry with intent to commit a felony. The court ruled it was error to admit other crimes evidence under EC ' 1101, rendering the remaining evidence insufficient to support the convictions. (The court also noted that the evidence was insufficient even with the prior crimes evidence.) Appellant was charged for being in several women's restrooms, and the prosecution adduced evidence of two 1984 burglaries where appellant went into the women's bathroom, then sexually assaulted the victims. (I)

Dacia Burz, P. v. Robinson, #D032357, Conviction of possessing a completed check stricken because it is a necessarily included offense of the forgery conviction. (A)

Irma Castillo, P. v. Estep, #D031452, Appellant's placing of the gun under the driver's seat after brandishing it did not constitute corroborative evidence, in addition to the mere possession of stolen property, to support a conviction of receiving stolen property. Also, possession of the gun without attendant paperwork in his possession similarly did not support an inference of guilty knowledge. (A)

Dennis Cava, P. v. Pruitt, #E023749, Because the infliction of serious bodily injury is an element of torture, the GBI enhancement attached to the robbery count had to be stayed. In addition, the false imprisonment term had to be stayed, as there was no objective or intent independent of accomplishing the burglary or robbery or torture when the false imprisonment occurred. Appellant's sentence reduced 3 years, 8 months. (I)

Kate Chandler for Mother, Konrad Lee for Father, In re Amber B., #E024007, Reversal of jurisdictional findings that the child was at risk of sexual abuse under W&I ' 300, subd. (d) for insufficiency of evidence. (A/I)

Howard Cohen, P. v. Valenzuela, #D031323, Certified for publication: Denial of PC ' 1538.5 motion, reversed. Detective, who was surveilling a bar believed by him to be the locale of drug trafficking, saw a patron exit and hail a cab. Very shortly thereafter, detective stopped the taxi purportedly to conduct an administrative inspection of the taxi pursuant to local ordinance, without, however, inspecting the taxi per se. Detective engaged the passenger in conversation and gained consent to search and found drugs. Court of Appeal held that the taxi inspection stop was a pretext for criminal investigation, and that in administrative search context, a pretext is impermissible. The invalid detention tainted the consent. (ADI)

Mark Christiansen, P. v. Jackson, #E021188, Defendants contended on appeal that the trial court imposed an excessive restitution fine by imposing both a restitution fine and direct victim restitution. "The People's rather anemic response is that defendants waived these contentions by failing to object at sentencing." Noting that restitution issues must be carefully defined with respect to which version of ' 1202.4 governs the case, the court reduced the restitution fine to $10,000, but declined to offset that amount by the victim restitution. The court also rejected the notion that ordering each appellant to pay full victim restitution resulted in unjust enrichment, although it did order the abstract modified to note victim restitution was "joint and several." The court dismissed the waiver argument, stating it applies only to discretionary sentencing choices, not excessive restitution. (I)

Michael Dashjian, P. v. Loritz, #D025736, Count of assault with a firearm reversed because it is an LIO of assault with a semiautomatic firearm, of which defendant was also convicted. (I)

Karen DiDonna, 1) P. v. Breer, #D030656, Assault and battery convictions reversed where CALJIC No. 2.50.01 permitted jury to infer guilt based on an inference defendant had disposition to commit instant offense based on finding by a preponderance of the evidence that he committed a prior act of domestic violence (following Watts and Acosta.) (A) 2) P. v. Rodarte, #G021879, Abstract of judgment amended to reflect additional custody credits. (A)

John Dodd, P. v. Sanchez, #G022705, Insufficient evidence to support first degree murder conviction; reversed and conviction reduced to involuntary manslaughter. A dead baby was found in dumpster. DNA testing showed defendant was 112 times more likely to be mother. Defendant denied she was the mother, but said she had carried a fetus two months until a miscarriage. This not sufficient to show defendant killed baby with malice, but is sufficient to support involuntary manslaughter. (I)

Amanda Doerrer, 1) P. v. Jones, #E023738, Restitution fine imposed pursuant to PC ' 1202.45 was ordered stricken because appellant had been placed upon probation and thus was not subject to a period of parole. 2) P. v. Radtke, #E024866, $400 restitution fine imposed pursuant to PC ' 1202.45 following probation revocation stricken as violative of the prohibition against ex post facto laws. Additionally the Court struck a $400 fine imposed pursuant to PC ' 1202.4(b). Since the trial court had imposed a $200 fine when it originally granted appellant probation, the $400 restitution fine imposed following appellant's revocation was an unauthorized sentence. (Note: (Continued on Page 20)

Because the ' 1202.4(b) fine amounted to an unauthorized sentence, no objection by trial counsel was required to preserve the issue on appeal.) (ADI)

Amanda Doerrer/Cindi Miskin, P. v. Peterson, #E023229, Trial court failed to comply with PC ' 1192.5 by failing to make an independent inquiry to determine whether a factual basis for the guilty plea existed. Bare stipulation of counsel that factual basis existed was insufficient for the court to discharge its duty. (ADI)

Brett Duxbury, P. v. Lee, #E021734, Cocaine possession conviction, resulting in 25 years to life Three Strike sentence, reversed on Fourth Amendment grounds: Officer improperly reached into carjacking suspect's pocket and extracted a small rock of cocaine, rather than doing a permissible weapons frisk. (I)

John Edwards, P. v. Meadows, #E021634, Gang enhancement reversed due to insufficient evidence where evidence showed appellant was a criminal street gang member but no evidence connected his gun possession to his membership in the gang. (A)

Glenn Durfee, P. v. Jendrock, #E022446, Murder defendant held entitled to conduct credit against term of imprisonment. Penal Code section 2933.1, which limits conduct credits as against the term of imprisonment imposed upon persons convicted of violent felonies, does not apply to sentences pursuant to PC ' 190. As an initiative measure, the statute cannot be amended by legislative enactment without voter approval. Thus, the limitation on credits does not apply. (I)

Brett Duxbury, P. v. Cruz, et al., #G021861, Two burglary convictions reversed for insufficient evidence. One robbery conviction reversed because multiple robberies cannot arise from theft against one victim in single incident even though multiple items were taken. (I)

Tracy Emblem, P. v. Tran, #D032727, Second degree burglary and other associated convictions reversed because trial court abused its discretion by allowing prior act evidence. (A)

Suzanne Evans, In re Stephanie C., #D032001, The ' 366.26 judgment was reversed and remanded for the lower court to hold a ' 388 hearing. On the day of the ' 366.26 hearing, mother filed a ' 388 petition using the Judicial Council Form stating changed circumstances (mother was in drug program and had given birth to a subsequent drug free baby). The lower court denied mother a hearing on the ' 388 petition because the petition did not set forth a prima facie case on how the minor's best interest would be promoted by the desired modification (minor had been removed at birth). The Court of Appeal found the Judicial Council form lacking because it does not provide space for stating the minor's best interest and therefore, mother did not have reasonable notice of any such requirement. (I)

Linda Fabian, 1) In re Robert K., #D033106, There is insufficient evidence the agency showed, by clear and convincing evidence, that it would be detrimental to return child to father where agency failed to investigate father as a placement resource despite the fact that at the detention hearing the court had ordered relatives' homes be evaluated and despite father's longstanding desire to assume custody. (I) 2) In re Christopher R., #D031841, Juvenile dependency court's order terminating a probate guardianship by granting DSS's ' 388 petition bypassed due process requirements, requiring reversal. (I) 3) In re Shaleeya B., #D033663, Order denying visitation and contact reversed because no evidence supported such an order. Superior court ordered to hold hearing on question of defacto parent visitation. (I)

Maureen Fox, In re Ralph V., #E024563, Juvenile court finding minor violated probation reversed because of insufficient evidence of violation. (A)

Cliff Gardner, P. v. Williams, #D031198, Thirty-six robberies and one vehicle theft reversed because trial court erroneously denied appellant's Faretta request where appellant made request five days before trial, did not ask for a continuance, and was found competent. Twenty-three of the robbery counts reversed for insufficient evidence where one store employee was not present at the store and other twenty-two were not in actual or constructive possession of property taken. (I)

Jacquelyn Gentry, In re Chelsea B., #G024878, Reversal of jurisdictional findings in dependency case where the mother was angry and frustrated with her rebellious teenaged daughter and whose parenting style was flawed, but whose conduct did not rise to the level of serious risk of harm nor did it cause the child's emotional problems. (A)

Jacquelyn Gentry and Jennifer Mack for Fathers, In re Kendra K., #E024559, The dispositional order which "placed" the two children with their respective fathers on an "extended visit" was reversed and remanded for the court to consider and make proper findings under W&I ' 361.2, subd. (a). (A/I)

Stephen Gilbert, 1) P. v. Loder, #E021598, Second degree murder conviction reversed because evidence was insufficient to show defendant knew manufacturing meth was dangerous or that he had a conscious disregard for the danger it posed. (I) 2) P. v. Herrick, #G023837, In an interesting Prop. 215 case, appellant's convictions for sale of marijuana were reversed for prosecutorial misconduct. During argument the DA had claimed there was exculpatory evidence the defense could have introduced. However, the DA knew the court had excluded the evidence. The misconduct was not harmless under Chapman because the court's failure to sustain defendant's objections left the jury with three false impressions: That the prosecutor's statement was true; that defense counsel was disingenuous for having failed to introduce exculpatory evidence; and that the burden had shifted to the defense to disprove guilt. (I)

Leslie Greenbaum, P. v. Kent, #E022446, Murder defendant held entitled to conduct credit against term of imprisonment. Penal Code section 2933.1, which limits conduct credits as against the term of imprisonment imposed upon persons convicted of violent felonies, does not apply to sentences pursuant to Penal Code section 190. As an initiative measure, the statute cannot be amended by legislative enactment without voter approval. Thus, the limitation on credits does not apply. (I)

Carl Hancock, P. v. Ewing, #D031878, Stalking conviction reversed for insufficient evidence defendant's conduct caused substantial emotional distress. (I)

Marianne Harguindeguy, 1) P. v. Rivera, #D030373, Personal infliction of great bodily injury enhancement reversed because there was no testimony presented as to who inflicted two of three blows. The first blow was by the co-defendant. (I) 2) P. v. Mendoza, #E023002, Denial of ' 1538.5 motion reversed because of prolonged detention. (I)

Robison Harley, P. v. Smyth, #E022648, Conviction of possession of methamphetamine for sale, reversed. Trial court erred in allowing police officer to give "expert testimony" as to which of several persons possessed the methamphetamine where all the necessary facts were before the jury, the issue was one of credibility, and no expert testimony was required. (I)

Mark Hart, P. v. Figgers, #E022973, Trial court erred in failing to inquire of defendant or counsel during Marsden hearing as to the circumstances giving rise to defendant's allegations. Remanded for trial court to fully inquire into defendant's reasons and then to exercise its discretion; if trial court finds defendant has presented colorable claim of ineffective assistance, then trial court must appoint new counsel for motion for new trial. AG had argued that error was harmless because trial counsel was not ineffective at trial. (I)

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Louis Hiken and Allen Hopper, In re Michael P. Robles (related appeal #G022978), Superior Court Judge Nancy Stock granted appellant's habeas writ which alleged IAC for failure to fully advise defendant about a legal defense in a case where defendant ultimately received Three Strikes life term for attempting to purchase cocaine (substance was really a macadamia nut) from undercover officer. Counsel's failure to advise caused defendant to reject a 9-year plea offer because he thought he had a viable defense to the evidence, (i.e., the evidence lacked required corroboration since undercover cops were accomplices subject to prosecution under PC ' 1111). Counsel failed to research the theory or she would have known it had been the opposite in California for 30 years. The court found that less than 30 minutes of routine research would have revealed the theory to be invalid as a matter of law. Remedy was not specific performance of the original 9-year deal but reversal and retrial. At resentencing, defendant (who originally was sentenced to 25 years to life) was sentenced to 5 years. (I)

Michon Hinz, In re Humberto B. , #D032115, Vehicle tampering count reversed because it is a LIO of vehicular burglary. (A)

Marvin Hendrix, P. v. Gewarges, #D030963, One count of forgery reversed for insufficient evidence. (A)

Patrick Hennessey, 1) P. v. Baca, #E021093, First degree murder conviction reversed because trial counsel was ineffective. During direct testimony of defendant trial attorney questioned the defendant about nine convictions for an offense which was inadmissible to impeach. Also questioned defendant re arrests, which were also inadmissible. In addition, trial counsel made similar error during cross of main defense witness, when he allowed the DA to impeach the witness's credibility with inadmissible evidence. The ineffective assistance was prejudicial because it damaged defendant's credibility in a case where the evidence of guilt was not overwhelming. (I) 2) P. v. Hernandez, #E022127, Restitution fine imposed pursuant to PC ' 1202.45 for crimes committed prior to the section's enactment date ordered stricken as ex post facto law. (I) 3) P. v. Martinez, #E023302, Concurrent terms for misdemeanor prowling and peeking ordered stayed under PC ' 654 where the offenses were the basis for a conviction of stalking, for which defendant was separately sentenced. (I) 4) P. v. Johnson, #D030956, Trial court erred in sentencing defendant to two consecutive life terms under PC ' 667.61 because both sex offenses were committed against a single victim on a single occasion within the meaning of ' 667.61, subd. (g). (I)

Julie Sullwold Hernandez, P. v. Sandles, #E021857, Evidence of appellant's mere presence on the floor of a minor's bedroom was insufficient for conviction of attempted lewd and lascivious conduct. (I)

Donal Hill, 1) P. v. Miller, #D032294, Reversal ' 1538.5. Patdown search not saved by government arguing for first time on appeal that patdown was a search incident to an arrest. Inevitable discovery doctrine also not available because although defendant was committing a misdemeanor, no evidence that cops would have arrested her (and then patdown and discovery of drugs) rather than "cite and release." (I) 2) P. v. McGinley, #E023165, Court of Appeal ordered premeditated attempted murder reduced to attempted murder without premeditation. (I)

Handy Horiye, 1) P. v. Sowell, #E023070, Because murders were not committed for the benefit of, at the direction of, or in association with any criminal street gang, there was insufficient evidence for the gang enhancements. (I) 2) P. v. Meza, #E021992, The court held the evidence was insufficient to sustain a murder conviction based on a provocative-act murder theory and reversed count II. The court issued a modified opinion after a petition for rehearing was filed based on the Supreme Court's recent decision in Birkett. The court modified the direct victim restitution and ordered the full amount to the direct victim rather

than a portion to the direct victim and a portion to Workman's Comp. (I)

Robert Howell, 1) P. v. Cain, #D029719, The court abused its discretion under EC ' 352 in admitting the totality of the violence evidence "presented with virtually no restriction on its scope". The danger of undue prejudice from the "cumulative parade of horrible acts and attitudes attributed to defendant by the prosecution witnesses was more than substantial; it was overwhelming." Reversed and remanded for new trial. (I) 2) P. v. Watkins, #E021903, Multi-count conviction of lewd act with a minor, resulting in 22-year prison term, reversed in full for trial attorney's IAC in failing to object to testimony of prosecution expert on Child Sexual Abuse Accommodation Syndrome that exceeded the proper bounds of expert testimony. (I) 3) P. v. Catlin, #D026743, Convictions for conspiracy to commit murder and attempted murder reversed for insufficient evidence. Evidence defendant knew the perpetrators, that defendant was a cohort of two men who attacked a different victim, plus the presentation of false alibi testimony, was insufficient evidence defendant was involved in the conspiracy to murder or attempt to murder the wife of one of the co-defendants. (I) 4) P. v. Orosco, #E021919, Direct victim restitution order reduced to eliminate $352 for meals and $750 for mileage incurred by victim's mother to attend trial as these were not direct economic losses caused by defendant's criminal conduct within the meaning of the statute. (I)

George Hunlock, Jr., P. v. Blount, #D031944, Where defendant convicted of both robbery and petty theft with a prior, the latter conviction, which is a LIO of the first, was reversed. The Court of Appeal also ordered the trial court to strike the prison prior enhancement rather than imposing & staying the 1 year term. (A)

Anna Jauregui, 1) P. v. Moreau, #E025279, Petition for Writ of Habeas Corpus sought, in lieu of AOB process due to time urgency, and granted. COA held trial court was without jurisdiction to revoke petitioner's probation the day after probation ended. The question was when does probation end. Cases have been unclear. Here, probation began on December 7, 1995 to run for three years. COA held it expired at the end of the day of December 6, 1998. 2) In re Nicholas E., #D032408, Maximum confinement order is reversed and matter remanded for the trial court to declare the offense to be a misdemeanor or felony per W&I ' 702. 3) In re David A., #E024637, Case remanded for juvenile court to exercise its discretion to declare the unlawful taking & driving offense to be either a felony or misdemeanor pursuant to W&I ' 702. (ADI)

Susan Joehnk, P. v. Reyna, #E023382, Judgment reversed. The court found insufficient evidence to convict appellant of manufacturing meth. Appellant was in the warehouse about 5 minutes before police arrived and was under the influence. Appellant was a visitor on the premises and mere presence and being under the influence is insufficient to support that she aided and abetted the manufacturing. (A)

Rebecca Jones, P. v. Samoyoa, #G023709, Assault conviction based on same course of conduct as burglary conviction, and thus should be stayed pursuant to PC ' 654. (A)

Sharon Jones, P. v. Hatmaker, #G021861, One of two robbery convictions reversed because multiple convictions cannot arise from theft against one victim in single incident even though multiple items were taken. (I)

Ivy Kessel, P. v. Acosta, #E024275, Correction of calculation of presentence custody credits: 226 days added. (I)

Nancy King, P. v. Lopez, #D031148, Sentence vacated and case remanded to trial court because of invalid juvenile strike prior. (I)

Daniel Koryn, P. v. Amico, #D029111, Nineteen counts ordered stayed rather than served

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concurrently pursuant to PC ' 654. (A)

David Lampkin, P. v. Foster, #E023319, Trial court erred in imposing concurrent terms for possession of cocaine base for sale and possession of the same cocaine base in jail; the latter was ordered stayed pursuant to PC ' 654. Trial court also erred in imposing a full, consecutive term in another case as well as imposing three prison priors in both cases. Court of Appeal ordered the consecutive term reduced to one-third midterm and struck the duplicative priors. (A)

Michael Linfield, P. v. Hinojos, #G023988, Reversing GBI enhancement (PC ' 12202.7) on grounds of insufficient evidence of personal infliction. Appellant and co-defendant carjacked victim, who testified he was dragged to ground and kicked or hit once in the head. The court distinguished "group pummeling" exception from People v. Corona (1989) 213 Cal.App.3d 589, noting no evidence that more than two people dragged victim to the ground and no evidence that more than one inflicted the blow. Credits consequently modified from ' 2933.1 credits to ' 4019 credits. (I)

Sally Lorang, P. v. Davidson, #D030655, Trial court erred in ordering concurrent terms for petty theft with a prior and attempted auto burglary. Judgment modified ordering a stay. (A)

Gideon Margolis, 1) P. v. Payne, #D031729, Presentence credit award corrected to add 37 days. Where the trial court never responded to counsel's request to correct the credit award, the matter was properly raised in the appellate briefing. (I) 2) P. v. Campbell, #D032071, One strike prior and two prison priors reversed for failure to advise defendant of constitutional rights under Yurko; remanded for retrial on priors. (I) 3) P. v. Esquivel, et al., #D031588, One-year weapon use enhancement (PC ' 12022, subd. (b)) stricken because defendant's knife use was an element of defendant's substantive offense: assault with a deadly weapon. (I)

Marilee Marshall, 1) P. v. Brinkman, #E023086, Matter remanded to allow defendant to admit or deny one of his prior strikes and prison prior. (I) 2) P. v. Tripp, #E023521, Three prison priors stricken because prior terms not separately served sentences. (I)

Ellen Matsumoto, P. v. Hyun, #G024340, Published. Reversal of carrying a concealed dirk or dagger (PC ' 12020, subd. (a)) based on defendant's possession of a bayonet. Court held the offense required intent to use the item as a stabbing weapon, and failure to instruct jurors on this intent element was prejudicial. (A)

Martha McGill, 1) In re Marcus H., #D032545, Reversal of restitution order. Trial court erred in ordering restitution for economic losses not directly related to the offense for which the minor was continued as a ward. A Harvey waiver of the dismissed counts to which restitution would be relevant does not allow the court to order restitution in excess of its statutory authority. (I) 2) P. v. Gonzalez, #D033003: During pending appeal, motion to trial court granted, reducing restitution from $800 to mandatory minimum of $200 where the court at sentencing had actually imposed no restitution. (I)

Lynne McGinnis, 1) P. v. Swenson, #G021934, Defendant could not be convicted under both subdivisions (a) and (c) of PC ' 442.75. The true finding on ' 422.75(a) enhancement stricken. (A) 2) P. v. Richard A., #E022914, Finding under ' 1192.7(c)(23) that minor personally used a deadly or dangerous weapon reversed for insufficient evidence. (A) 3) P. v. Gaylord, #E023382, Trial court erred in imposing concurrent terms for manufacturing meth (count one) and possession of precursor chemicals with the intent of manufacturing (count three). Court ordered abstract of judgment amended to stay count 3. (I)

David McKinney, P. v. Simonton, #D031727, Three assault with a firearm convictions

from a drive-by shooting reversed because CALJIC

Richard Miggins, P. v. Martinez, #E023675, Remand for proper determination of sentencing credits under Honea and Chew. (I)

Cindi Mishkin, P. v. Gillespie, #G022479, Two counts of PC ' 422 [terrorist threat] stayed, as these counts arose from the single statement uttered by appellant and did not constitute "acts of violence" against multiple victims. (ADI)

Elizabeth Missakian, 1) P. v. Freese, #D031628, Dissent by Justice McDonald, disagreeing there was substantial evidence defendant violated probation conditions by possessing methamphetamine. This follows a mistrial on the possession charge where jury deadlocked 10 to 2 in favor of acquittal. (I) 2) P. v. Ancrum, #D032360, Reversed and remanded for opportunity to move to withdraw the guilty plea with new counsel. After pleading guilty, appellant desired to move to withdraw his plea based on alleged misrepresentations of the public defender at the time of the plea. Because a conflict of interest thereby arose and because counsel declined to move to withdraw the plea, new counsel was required to investigate and, if necessary, bring the proper motion. (I)

David Morse, P. v. Williams, #E023648, Robbery conviction stayed where defendant also convicted of kidnapping for purpose of robbery. (I)

Daniel Mrotek, P. v. Leon, #G022194, Conviction reversed where trial court permitted introduction of co-defendant's Tahl (guilty plea) form into evidence and where co-defendant did not testify at trial. (A)

Eric Multhaup, P. v. Fletcher, #D029019, Trial court erred in (1) imposing $10,000 fine (PC ' 1202.4(b)) rather than $5,000 (GC ' 13697) which was imposed in first trial; (2) imposing direct restitution and (3) ordering suspended parole fines where neither fine was imposed after first trial. (I)

9.00 allows conviction based on negligence. (I)

Gary Nelson, P. v. Miller, #D032074, 25 years to life strikes sentence remanded because of invalid juvenile prior robbery that appellant committed before he was 16 years of age. (I)

Diane Nichols, 1) P. v. Ariola, #E024032, Six year sentence affirmed in People's appeal alleging trial court abused its discretion in not sentencing defendant to 25 years to life. 2) P. v. Green, #E023699, Concurrent two year sentence stayed per PC ' 654. 3) P. v. McGowan, #E024596, Concurrent sentence on transportation stayed where defendant convicted of and sentenced on possession. (ADI)

Kenneth Noel, In re Juan Z., #D032623, Conviction of PC ' 415.5 subd. (a)(3) reversed on the basis it did not apply to appellant because at the time of the offense he was a registered student at the school. (I)

Shawn O'Laughlin, P. v. Romero, #D032678, Reversed for new trial. Trial court erred by construing appellant's motion to discharge his retained counsel as a Marsden motion. Court of Appeal concluded there was some basis in fact to demonstrate that appellant's concerns about his counsel's ability to provide competent representation were genuine and that discharge would not have interfered with the orderly process of justice. Reversal therefore automatic. Showing of prejudice not required. (I)

Peggy O'Neill, Conservatorship of Barbara G., #D032588, Stipulated reversal of sterilization order issued pursuant to Probate Code section 1958 where parties agreed the petition for sterilization should have been sought under ' 2357 as part of recommended medical treatment, which does not involve an automatic appeal, rather than under ' 1958 as an exercise of conservatee's fundamental right to procreative choice, which requires an automatic appeal (' 1962(b)). 2) P. v. Jackson, #D033615, Administrative error by Department of Corrections in calculation of PC '

1203.2a credits (probation revocation) corrected to reflect trial court's order that sentence run concurrently with sentence on subsequent offense (total of 398 days

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credited). Appeal dismissed upon obtaining administrative relief. 3) P. v. Amon, #D030972, Appellant's conviction for voluntary manslaughter as an aider and abettor reversed. The evidence failed to support the trial court's premise that appellant belonged to a gang and thus, a weapon would likely be involved. Death was not a natural and probable consequence of co-defendant's fistfight with the victim. (ADI)

Sylvia Paoli, In re Megan C., #G024005, Two teenage children with behavioral problems were removed from the mother, but not placed with their non-offending father because they did not like his house rules and did not want to live with him. The father appealed because he wanted his children placed with him rather than in group homes. The Court of Appeal reversed and remanded with directions to place the children with their father. The court reasoned that an adolescent veto because a minor does not like a parent's house rules is not clear and convincing evidence of detriment. (I)

Sung Park, P. v. George P., #G023675, Where an 11 year old was pulled out of class by an officer in full uniform, taken to the police station, and told he was neither free to terminate the interview nor free to leave, officers were required to give a Miranda warning, though he was not informed he was under arrest but was told he was a witness. (A)

Benjamin Pavone, P. v. Mejia, #G023179, Possession of a gun while possessing a controlled substance count stayed per ' 654 because gun enhancement also imposed on a different count. (A)

Scott Rand, P. v. Martinez, #D032175, Appellant was convicted after a jury trial of both possession for sale of methamphetamine and possession of methamphetamine. At sentencing the trial court imposed sentences on both counts but stayed execution on count two per ' 654. Counsel argued appellant's conviction on count two should be reversed because it is a LIO to count one. AG conceded and COA ordered the conviction for count two stricken. (A)

Megan Richard, P. v. Schaeffer, #D032455, Receiving stolen property count stricken where appellant convicted of burglary regarding this same property. (A)

Megan Richmond, In re Michael S., #G023205, Arson true finding reversed because accomplice statements violated minor's Sixth Amendment confrontation right under Lilly and Virginia. (A)

JoAnne Roake, 1) P. v. Diaz, #E023795, 22-year sentence in guilty plea case vacated and remanded because strikes were never admitted and thus sentence was unauthorized. (I) 2) P. v. Ackles, #D032553, The serious/violent felon prior conviction enhancement stricken per People v. Garcia (1999) 21 Cal.4th 1 and case remanded for resentencing for determinate portion of sentence. (I)

Michelle Rogers, 1) P. v. Hernandez, #D032772, Two strikes sentence vacated and remanded for resentencing in light of People v. Garcia, where prior strike was a juvenile unarmed robbery. 2) P. v. Slemmer, #E024650, Abstract of judgment corrected to reflect a dismissal, rather than a stay, of the three prior prison term findings (' 667(b)(2)) and restitution fine of $1,600 reduced to statutory minimum because sentencing court did not orally pronounce the fine. (ADI)

Lynda Romero, P. v. Mondeck, #D029104, Remanded and trial court ordered to stay the sentence on either count one (attempted voluntary manslaughter) or count four (assault with a semiautomatic firearm) since both convictions stem from the same conduct. (I)

William Roth/Sharon Jones (for minor), In re Tori J., #E023573, In a case in which a child was placed with the previously noncustodial parent under family maintenance services and the other parent received reunification services, it was error at the 6-month hearing to terminate supervision and award custody to the noncustodial parent without a custody hearing. (I)

Michael Satris, 1) P. v. Palmer, #E022373, Consecutive life term for attempted murder ordered stayed under PC ' 654 where defendant was separately sentenced for conspiracy to commit murder. Abstract corrected to reflect three terms improperly listed as life without possibility of parole were actually life with possibility of parole. (I) 2) P. v. Shipley, #D033139, When review of records pursuant to Pitchess v. Superior Court shows records have been destroyed in conformance with police standard practice, the trial court has a duty to pursue reasonable inquiry into the nature of this information by asking the officer to testify as to his or her recollection. (I)

Steven Schorr, 1) P. v. Brown, #E022739, Conviction for vehicle theft reversed because the trial court failed to give the requested jury instruction on mistake of fact. Dual conviction of burglary and receipt of stolen property was improper, resulting in reversal of RSP conviction. (I) 2) P. v. Alcala, #D031073, Convictions for kidnapping, robbery, false imprisonment reversed as LIO's of kidnapping for robbery. Kidnapping for robbery reversed for insufficiency of the evidence, since movement was merely incidental to the robbery. (I)

Wilson Schooley, In re Will S., #D032189, True findings that minor committed battery on peace officer reversed because of insufficient evidence. Remanded for trial court to enter findings that minor committed only simple battery. (A)

George Schraer, P. v. Moord, #D029019, Trial court erred by (1) increasing defendant's sentence by one year after a successful appeal; (2) imposing $10,000 fine (PC ' 1202.4(b)) rather than $5,000 (GC ' 13697) which was imposed after first trial; (3) imposing direct restitution when none was imposed in first trial, and (4) ordering suspended parole fines when none imposed before. (I)

Richard Schwartzberg, P. v. Cooper, #E023583, 25 years to life Three Strikes conviction for theft reversed because trial court improperly excluded defense evidence which would have impeached prosecution witnesses and corroborated the defense. (I)

Patricia Scott, P. v. Danowski, #E020701, In published opinion court stays under PC ' 654 consecutive attempted robbery and enhancements totalling 35 years to life off 80 years to life Three Strikes sentence. (I)

Terrence Scott, 1) P. v. Christopher, #E022935, Convictions reversed where the trial court improperly refused to consider defendant's motion for a new trial under the mistaken belief IAC is not a proper ground for a new trial. (I) 2) P. v. Cardinal, #E023196, 28 years to life Three Strikes judgment remanded for Marsden hearing where trial court erred by not fully inquiring as to defendant's reasons for seeking new counsel. (I)

Steven Seick, P. v. Younes, #D031556, ADW conviction reversed following guilty plea because of trial court's failure to commence competency proceedings under PC ' 1368; remanded for proceedings under PC ' 1368. (I)

Alisa Shorago, People v. McKinon, #E021412, Court held sentence for a weapon use enhancement was unauthorized, remanding for admission or denial of the enhancement, where the transcript revealed appellant did not admit the enhancement in open court. (ADI)

Athena Shudde, 1) P. v. Moreno, #D031876, Petition for writ of habeas corpus granted and

defendant's sentence reduced one year because trial counsel was ineffective for failing to ascertain that two prior prison term allegations constituted a single sentence and for allowing defendant to admit each as a

Corinne Shulman, 1) P. v. Wilson, #E022922, Three pre-Martinez kidnapping convictions reversed for insufficiency of asportation element (60 feet). (I) 2) P. v. Baldenegro, #E023746, Sentence reversed based on trial court's failure to reach appellant's attack on his prior based on Boykin/Tahl ground. Trial court erred based on Supreme Court's opinion in People v. Allen (1999) 21 Cal.4th 424. (I)

Stuart Skelton, 1) P. v. Lara, #E021964, Remanded for resentencing under Deloza because the offenses - drug possession, under the influence, and attempted burglary - were committed on the same occasion; one-year prison prior stricken under Jones because five-year prior was imposed on same conviction. (I) 2) P. v. Pierson, #E023503, Remanded under Deloza as to possession of stolen property and possession of a controlled substance because there was no evidence from which the trial court could determine whether the offenses were committed on the same occasion or arose from the same set of operative facts. Trial court directed to allow parties to present additional evidence as to when appellant came into possession of the stamps and methamphetamine. (Follows People v. Hall (1998) 67 Cal.App.4th 128.) (I)

Carmela Simoncini, 1) In re Emilio H., #D031698, Gun use enhancements for subordinate second degree robbery counts stricken from juvenile court's calculation of maximum term of commitment to CYA. 2) In re Victor M., #D032674, Termination of parental rights of father reversed where juvenile court failed to give him notice of dependency proceedings nor opportunity to be heard. Although a paternity judgment had been entered declaring father's paternity, and despite his non-offending status, he was not provided notice of the dependency petition, not offered services, not notified of the continued date of the

John Steinberg, P. v. Glenn, #E023990, Convictions for grand theft (PC ' 487, subd. (a)) and prior prison term. (I) 2) Three-year violent felony prison prior stricken because both instant offense and prior offense were not violent. (I)

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366.26 hearing, and not represented by counsel at any point prior to termination of parental rights. 3) P. v. Lucero, #E024681, Defendant was convicted of gross vehicular manslaughter and admitted having suffered two prior drunk driving convictions, as well as causing death or injury to more than one victim. The trial court observed he was eligible for credits - unlimited by PC ' 2933.1 - pursuant to People v. Heusen (1997) 57 Cal.App.4th 1380. However, the D.O.C. calculated the defendant's release date applying the 15% limitations and informal attempts to correct the improper limitation were unsuccessful. On appeal, the AG reluctantly agreed and the court directed that the custody credits be recomputed. Section 2933.1 applies only to offenses which themselves carry a life sentence, not those which carry a life sentence only because of the defendant's prior convictions. (ADI)

Laurel Nelson Smith, P. v. Samperio, #E022590, PC ' 12022.1 enhancement stricken as the only primary offense for which defendant was found guilty was simple possession of methamphetamine, a misdemeanor. (I)

Howard Specter, P. v. Nola, #E023316, AG conceded that punishment on Count IV, illegal disposal of hazardous waste at an unauthorized point and facility, had to be stayed pursuant to PC ' 654 because it involved the same hazardous waste in Count III. (I)

David Stanley, P. v. Duke, #E021252, One-year term for the PC ' 667.5(b) enhancement stricken because defendant did not admit, nor was there any proof, that he served a prison term. However, People may elect to retry the allegation based on Monge. Presentence credits ordered corrected to award additional conduct credit. (I)

theft by caretaker from an elder (PC ' 368, subd. (e)), reversed. Trial court abused its discretion by refusing

to permit bank teller to testify that when defendant came into bank to cash checks drawn on victim's account, teller told defendant she would have to call victim, defendant waited while she did so, and victim okayed transaction. Teller's statements were not hearsay because they were offered to show defendant heard that the teller was going to call the victim, but did not leave the bank. Defendant's state of mind and ensuing conduct relevant to support defense he did not intend to defraud victim and to rebut victim's testimony she did not consent to transaction. (I)

Jan Stiglitz, P. v. Mitleider, #D026743, Conviction for solicitation to commit murder reversed where trial court failed to require unanimity by instructing jury with CALJIC No. 17.01. Since the prosecution's theory was that defendant committed three separate solicitations, the jury was required to agree that defendant committed the specific solicitation in order to support the conviction. (I)

Jeffrey Stuetz/Waldemar Halka, P. v. Lewis, #E021985, Sentence modified to reduce five one-year prison enhancements to three and a 16 month arming enhancement to one year. (I)

Roberta Thyfault, 1) P. v. Morales, #E022127, Restitution fine imposed pursuant to PC ' 1202.45 for crimes committed prior to the section's enactment date ordered stricken as ex post facto law. (I) 2) P. v. O'Neal, #D031942, Parole revocation fine imposed pursuant to PC ' 1202.45 was stricken where appellant was sentenced to serve a term of life without possibility of parole. The AG conceded error per People v. Oganesyan (1999) 70 Cal.App.4th 1178. (I) 3) P. v. Blackburn, et al., #E021188, Defendants contended on appeal that the trial court imposed an excessive restitution fine by imposing both a restitution fine and direct victim restitution. "The People's rather anemic response is that defendants waived these contentions by failing to object at sentencing." Noting that restitution issues must be carefully defined with respect to which version of ' 1202.4 governs the case, the court reduced the restitution fine to $10,000, but declined to offset that amount by the victim restitution. The court also rejected the notion that ordering each appellant to pay full victim restitution resulted in unjust enrichment, although it did order the abstract modified to note victim restitution was "joint and several." The court dismissed the waiver argument, stating it applies only to discretionary sentencing choices, not excessive restitution. (I)

Steven Torres, 1) P. v. Owen, #E022205, Reversal due to insufficient evidence of aiding and abetting manufacture of methamphetamine. The court found while defendant knew meth was being manufactured, there was no evidence establishing defendant intended to facilitate or encourage manufacturing of the drug. (I) 2) P. v. Slayton, #E023001, Published affirmance. People's appeal. Court of Appeal affirmed the lower court's dismissal of the charges because appellant's Sixth Amendment right to counsel was violated when a police officer interviewed appellant regarding a burglary in San Bernardino county while appellant was in jail, following arraignment and appointment of counsel, on a car-theft charge in Riverside. The key to the stolen car was taken in the burglary and the offenses were "inextricably intertwined." Appellant's confession to the burglary was inadmissible and without defendant's confession there was insufficient evidence to proceed on the charges. Dissent by Justice Ramirez. (I)

Chris Truax, 1) P. v. Cancino, #E023758, People's appeal from an order reducing a felony to a misdemeanor pursuant to PC ' 17 was dismissed. The Court of Appeal rejected the government's assertion the appeal was authorized by PC ' 1238, which permits appeal from an order setting aside the accusatory pleading because an order reducing the felony to a misdemeanor was not such an order. The court also rejected assertion the appeal was from an order affecting judgment per ' 1238(a)(4), from an order after judgment affecting substantial rights of the People (PC ' 1238(a)(5)), or from an order modifying the verdict or finding, or from a judgment dismissing or terminating the action before the defendant had been placed in jeopardy. Since none of the grounds authorizing an appeal by the government applied, the

appeal had to be dismissed. (I) 2) P. v. McCollum, #D030537, Defendant improperly convicted of both the greater offense of possession of a controlled substance for sale and the LIO of simple possession; the LIO was

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reversed. (I) 3) P. v. Hurtado, #D029586, Sexually Violent Predators Act held defective because trier of fact not required to find defendant likely to engage in "predatory" behavior, though error held harmless in this case. Published at 73 Cal.App.4th 1243. (I) 4) P. v. Thammavong, #D031386, S.V.P. commitment reversed per Hurtado. (I) 5) P. v. Kelley, #D030556, S.V.P. commitment reversed because the court failed to instruct the jury it was necessary to find defendant's behavior was "predatory." (I)

Patricia Ulibarri, P. v. Schlote, #D032847, Denial of motion to suppress, reversed. Officer stopped a car without a tail light. He had driver and passenger (appellant) get out. Because the driver was not licensed, the officer chose to impound the vehicle. He retrieved passenger's purse and conducted a purported inventory search, finding drugs. Because the purpose for an inventory search could have been achieved simply by giving appellant her purse, no inventory search was necessary, and the search was unlawful. (I)

Jerome Wallingford, P. v. Phaymany, #D029826, Two of three conspiracy counts involving assault with a firearm, assault with a semi-automatic and assault with force likely to inflict GBI reversed because the evidence established only one conspiracy. (I)

John Ward, 1) P. v. Dunagan, #E022730, Evading an officer count stayed pursuant to ' 654. (I) 2) P. v. Gavette, #D032888, Trial court erred in relegating the calculations of all credit spent in custody (first sentencing to resentencing) to DOC. Remanded for trial court to determine actual days of custody and to correct abstract. (I) 3) P. v. Cervantes, #G022185, Two year enhancement for PC ' 186.22, subd. (b)(1) improperly imposed consecutive to indeterminate life sentence ordered stricken. (I)

Paul Ward, 1) P. v. Obadike, #E022751, The defendant's conviction for felony sexual battery was reduced to misdemeanor sexual battery because of insufficient evidence that the victim's skin was touched. (I) 2) In re David C., #G024227, Case remanded so trial court could state on the record whether the offenses in this juvenile case are felonies or misdemeanors. (I)

Kyle Marie Wesendorf, P. v. Gordon, #D032142, Convictions for grand theft, petty theft and commercial burglary affirmed in part and reversed in part. Appellant shoplifted clothing from a department store. Court held that because petty theft is a LIO of grand theft, the petty theft conviction must be reversed. (I)

Jerry Whatley, 1) P. v. Langford, #G020819, Trial court erroneously found defendant committed a crime while released on bail, where defendant was on bail for a federal crime. Section 12022.1(b) is restricted to state crimes. Two year sentence vacated. (A) 2) P. v. Antillon, #G023988, Reversing GBI enhancement (PC ' 12202.7) on grounds of insufficient evidence of personal infliction. Appellant and co-defendant carjacked victim, who testified he was dragged to ground and kicked or hit once in the head. The court distinguished "group pummeling" exception from People v. Corona (1989) 213 Cal.App.3d 589, noting no evidence that more than two people dragged victim to the ground and no evidence that more than one inflicted the blow. Credits consequently modified from ' 2933.1 credits to ' 4019 credits. (I) 3) P. v. Arndt, #G021783, Published. Two one-year enhancements under VC ' 23182 [causing bodily injury to more than one victim

enhancement] stayed per 654 where PC ' 12022.7 [GBI enhancements] also imposed. (I)

Louis Wijsen, 1) P. v. Martinez, #G025645, Fares motion to trial court, granted. (I) 2) P. v. Luken, #D030395, Three Strikes sentence of 75 years to life reversed and remanded for trial court to decide whether to impose concurrent or consecutive sentences on two counts. (I) 3) P. v. Winters, #E022446, Murder defendant held entitled to conduct credit against term of imprisonment. Penal Code section 2933.1, which limits conduct credits as against the term of imprisonment

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Kudos (Continued from Page 30)

imposed upon persons convicted of violent felonies, does not apply to sentences pursuant to Penal Code section 190. As an initiative measure, the statute cannot be amended by legislative enactment without voter approval. Thus, the limitation on credits does not apply. (I)

Louis Wijsen, 1) P. v. Martinez, #G025645, Fares motion to trial court, granted. (I) 2) P. v. Luken, #D030395, Three Strikes sentence of 75 years to life reversed and remanded for trial court to decide whether to impose concurrent or consecutive sentences on two counts. (I) 3) P. v. Winters, #E022446, Murder defendant held entitled to conduct credit against term of imprisonment. Penal Code section 2933.1, which limits conduct credits as against the term of imprisonment imposed upon persons convicted of violent felonies, does not apply to sentences pursuant to Penal Code section 190. As an initiative measure, the statute cannot be amended by legislative enactment without voter approval. Thus, the limitation on credits does not apply. (I)

George Winkel, In re Shaman G., #E024661, The court found the drug-related conditions of probation unreasonably restrictive because the minor's offense had no connection with drug use and ordered the conditions stricken. (A)

Sharon Wrubel, 1) P. v. Thompson, #E022290, Trial court erred in imposing PC ' 1202.45 suspended restitution fine pending successful parole because that section was enacted after the commission of the defendant's crimes. (I) 2) P. v. Snow, #G022486, Appellant's admission that he suffered a strike was vacated based on Yurko error and the matter was remanded for trial on the prior and resentencing. (I) 3) P. v. Whitacre, #G023118, Assault with a deadly weapon stayed pursuant PC ' 654 because the assault was incidental to the attempted murder. (I)

Mary Woodward Wells, P. v. Lindon, #D032317, Order to pay presentence probation costs stricken where probation denied. (A)

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