WINS 2000

Neil Morse scored a victory in the California Supreme Court in *People v. Sengpadychith* (2001) 26 Cal.4th 316. The client was convicted of attempted, premeditated murder at a jury trial. A gang enhancement was found true. In reversing the Court of Appeal's affirmance of the gang enhancement, the Supreme Court promulgated two new rules: (1) the primary activities element of the gang enhancement statute requires proof that the gang has "consistently and repeatedly" committed the crimes specified in the statute; and (2) if the effect of a true finding on an enhancement is to increase the defendant's sentence beyond the maximum for the underlying conviction, an instructional error regarding the enhancement constitutes federal constitutional error.

Jill Lansing obtained a hard earned triumph in *In re Bobby H.*, H019459. The client was at a party when gunshots were fired. Some people at the party told officers that the client shot the gun. On the advice of counsel, the client pled no contest. In a habeas petition, claims of newly discovered evidence and ineffective assistance of counsel were raised. It was shown that several witnesses identified the client out of fear that the gang of the real gunman would retaliate. Numerous witnesses were available who would have testified that they were with the client and he did not possess or shoot a gun. Other witnesses were available to testify that the client was not involved in gangs, did not possess a gun and would not commit the charged crimes. Defense counsel was unprepared to present these witnesses. The Court of Appeal summarily denied the writ petition. After a petition for review was filed, the Attorney General conceded that the petition stated a prima facie case for relief. The Supreme Court issued an OSC. Back in the trial court, the habeas petition was granted and the charges were later dismissed.

In *People v. Richard Carrasco*, H018722, appellant was convicted of murder, eight counts of forcible rape, and two counts of first degree robbery, among other things. He was sentenced to serve 136 years to life. **Kyle Gee** convinced the court to reverse the conviction for failure to grant appellant's motion for continuance one month after his *Faretta* motion was granted. In July 1994, the prosecution filed a 30-count indictment against appellant. The public defender was granted numerous continuances and eventually declared a conflict. A new attorney was appointed for appellant, and there were further continuances. None of the continuances appeared to be the fault of appellant himself. Trial counsel's file was described as voluminous. On August 26, 1997, at a readiness conference, appellant moved to represent himself, which was granted, but his motion for a one month continuance of the jury trial was denied pending a written motion. On September 15, the day of jury trial, the court denied appellant's written motion for a two month continuance. Appellant described the voluminous and complex issues, and told the court that he was given the file only two weeks earlier. Appellant eventually agreed to reappointment of counsel. After several more months of delays, the trial began. The Court of Appeal ruled appellant did not waive the issue by acquiescing to representation; it was his only option. The failure to grant a continuance deprived appellant of his due process right to adequately prepare a defense.

In *People v. William Terry Lawrence*, H017840, the client was convicted of two felony counts and one misdemeanor count of child molest (Pen. Code, § 647.6, subds. (a) and (c)(1)). He successfully moved to represent himself but later requested counsel be appointed to represent him.

The court refused and the client lost the jury trial. The Attorney General argued the client was being manipulative as indicated by the continuances he requested. **Alex Green** successfully argued the continuances were granted because the client expressed inability to adequately prepare for trial while in custody which was also why he repeatedly requested reappointment of counsel. The request for counsel was timely, even though the request was made only five days before the scheduled jury trial, because the court granted the client's request for a continuance. The misuse of expert testimony in a child molest trial led to a reversal in *People v. Felix Pelayo*, H019200. Defendant was convicted of violating Penal Code section 288.5. His 14 year old daughter accused him of molesting her for a year. Her story was corroborated by her brother and two friends. Later, it was revealed that the daughter and her brother fabricated the story to get rid of the defendant because they resented his strict disciplining. The two friends also admitted they lied at the daughter's request. Faced with four recanting witnesses, the prosecution presented an expert witness on child sex abuse accommodation syndrome. CSAAS evidence is admissible only to show why victims of molest often behave in certain counter-intuitive ways. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 391.) However, the defense never attacked the daughter for behaving in a manner inconsistent with that of a molest victim. Instead, the expert testified that victims of molestation often act out which would result in frequent disciplining and 99.7% of all molest allegations are true. CSAAS evidence is inadmissible as a predictor of child molest. **Eric Weaver** argued the misuse of the expert witness so prejudiced the case that retrial was required. The Court of Appeal agreed.

A reversal in a three strikes case was obtained by **Victoria H. Stafford** in *People v. Frederick Antonio Brown*, H018501. After jury trial, the client was convicted of receiving stolen property (Pen. Code, § 496) and it was found true he suffered four prior strike convictions (Pen. Code, § 1170.12) and a prior prison commitment (Pen. Code, § 667.5, subd. (b)). He was sentenced to 26 years to life in prison. A red pickup was parked in a public lot for as long as a year. It was very dirty, covered with bird droppings, and had many dents on it. The client believed the pickup was abandoned. He arranged to have it towed to a different location, where he installed new parts and got it running again. In fact the pickup belonged to a local business. The keys were lost, so it just sat there. Appellant requested an instruction on mistake of fact and a special instruction that a defendant who reasonably and honestly believes property is abandoned lacks felonious intent. (*People v. Navarro* (1979) 99 Cal.App.3d Supp. 1.) The court refused the instructions. During deliberations, the jury asked what if the property was stolen but the defendant believed it to be abandoned. Over objection, the court instructed the jury pursuant to Penal Code section 485, theft of lost property. The Court of Appeal reversed. The requested instructions were a correct statement of the law and there was sufficient evidence to support the instructions. Given the jury's question, the absence of the omitted instructions was prejudicial. On retrial, the defendant was acquitted.

In *People v. Claude Miller*, H018095, the defendant was convicted in a three strikes case and sentenced to 43 years to life. On appeal, **Cliff Gardner** successfully argued there was insufficient evidence that two out-of-state priors qualified as strikes or as 667(a) five year enhancements. On remand, the client was sentenced to a determinate term of 20 years, 8 months.

In *People v. Scott Place*, H016818, the defendant was sentenced to prison for 25 years to life for a conviction of felony DUI with two prior strikes. In a habeas petition, **Jonathan Soglin**

convinced the court that trial counsel was ineffective for not objecting to multiple levels of hearsay in the probation report used to prove one of the alleged strikes involved personal use of a weapon. Upon resentencing, appellant received a six year sentence.

Kyle Gee also won a reversal in a murder conviction. In *People v. Cranke*, H018245, the defendant was convicted of second degree murder. Reversal was required because the court committed *People v. Ireland* (1969) 70 Cal.2d 522 error by instructing on felony murder when the client was charged with second degree murder and assault with a deadly weapon and there was no other felony to serve as a predicate crime.

In the published case of *In re Jose H.* (2000) 77 Cal.App.4th 1090, argued by **Edward Mahler**, the court ruled a juvenile court cannot commit a minor to county jail.

Staff attorney **Vicki Firstman** won an appeal allowing the defendant to withdraw from a plea bargain based on the grounds that he was erroneously advised that his conviction would not qualify as a strike. In *People v. Trinidad Ontiveros*, H019856, appellant pled no contest to two counts of violating Penal Code section 245 and a personal weapon use enhancement as to count two. The agreement was that appellant would suffer only one strike from the plea. However, the record supported a finding that both counts constituted strikes. Appellant was allowed to withdraw his plea.

Executive Director **Michael Kresser** was victorious in *People v. Flores*, H020078. The defendant was convicted of ADW with a GBI enhancement stemming from a melee. Two prior strike convictions were found true. Defendant moved for a new trial, demonstrating due diligence in trying to obtain an eyewitness to the melee. The witness was not located until after the trial, and the witness would have presented testimony exonerating defendant. The court granted a new trial and the prosecution appealed. The Court of Appeal ruled in favor of the defendant, stating that the trial court did not abuse its discretion in ordering a new trial based on significant new exculpatory evidence.

Staff attorney **William Robinson** won the appeal of *People v. Roderick McGhee*, H020408. Appellant pled no contest to charges arising from the use of a counterfeit credit card at a department store. The understanding was that appellant would be sentenced to four years and eight months in prison. After entering the plea, the court allowed appellant to remain out of custody until sentencing but warned him that if he did not appear for sentencing, he could face a maximum sentence of 12 years. Appellant agreed to the court's condition. Appellant failed to appear for sentencing. When he did appear, the court sentenced appellant to 12 years and 8 months. The court denied appellant's motion to withdraw his plea. The Court of Appeal reversed. The motion to withdraw the plea was cognizable without a certificate of probable cause because appellant was attempting to enforce a plea bargain, not attack the validity of the bargain. The trial court should have allowed appellant to withdraw his plea if it was not willing to sentence him to the agreed upon sentence.

In *In re William Q.*, H019165, **Tutti Hacking** successfully argued that a condition of

juvenile probation that "[y]our associates are to be approved by your Probation Officer and your parent(s)/guardian" and "[y]ou shall not possess, wear, use or display any item prohibited by the Probation Officer" amounted to an illegal delegation of authority to the probation officer to determine appellant's associates, articles of clothing, and possessions.

Don Tickle convinced the court to reverse the denial of a suppression motion. In *People v. Daniel Villalobos*, H018911, the defendant was stopped for driving a car with a tinted rear window. After the officer could not verify defendant's identity, he searched the car and found methamphetamine. However, not all window tinting is illegal. (See Veh. Code, section 26708.5.) Without more, merely observing tinted windows is not enough to stop a car. (*People v. Butler* (1988) 202 Cal.App.3d 602, 607.) The court further ruled that the tinting of the rear middle brake light is not enough for a detention. The conviction was reversed.

In the dependency case of *In re Jeremiah R.*, H020431 and H020656, the juvenile court removed the minor from the mother, who was not living with or married to the biological father. The biological father filed a Welfare and Institutions Code section 388 petition to establish paternity. The court refused to consider the petition and eventually terminated parental rights. In a consolidated appeal, the Sixth District reversed, ruling the juvenile court erred in refusing to consider the father's petition. The mother successfully joined in the father's argument. **Mara Carman** represented the father and **Janet Sherwood** represented the mother

Congratulations to **Maureen Keaney** for a victory in a dependency case. In *In re Madison M.*, H019591, a 3 year old minor was in the midst of an informal custody dispute between the maternal grandparents and the stepfather. The maternal grandparents alleged the minor was molested. The minor was questioned by a social worker and she reportedly said she was touched in the pee-pee by the stepfather. The minor never made these allegations before or after. The Court of Appeal ruled that because the minor was incompetent as a witness, her hearsay statements were admissible under the child dependency hearsay exception if there were specific findings of corroboration. (Welf. & Inst. Code, 355; *In re Lucero L.* (2000) 22 Cal.4th 1227.) Because the juvenile court failed to make specific findings of corroboration, the finding of jurisdiction was reversed. Upon remand, the juvenile court was ordered to consider whether the hearsay statement contained sufficient indicia of reliability.

In *People v. Augustin*, H019189, a jury returned a verdict of guilty on 13 counts of lewd conduct, including anal intercourse, with a minor. (Pen. Code, § 288, subd. (a).) Defendant had retained an expert witness to testify that the source of injuries to the minor's anus could have been from irritable bowel syndrome, an ailment from which the minor undisputedly suffered. The expert witness testified at a pretrial hearing to verify she was qualified to testify. However, she refused to testify at trial. The reasons were unclear. The witness claimed she was provided additional medical records after the trial began which would have ruled out irritable bowel syndrome as the source of the minor's injuries. There was also evidence the witness had been upset over late payment of fees. After some continuances, defendant was forced to close the defense case without the expert witness testifying. Defendant moved for a new trial on the non-statutory grounds that due to events beyond his control he was deprived of a fair trial. The trial court agreed and granted a new trial. The

prosecution appealed. After determining the standard of review was abuse of discretion, a matter in contention on appeal, the Court of Appeal ruled the trial court did not abuse its discretion. There was a problem in that the witness was never subpoenaed until after it was clear she would not testify, but **Joseph Shipp** pointed out the defendant correctly believed a subpoena was not necessary.

In a published decision, the Court of Appeal held that a razor blade does not qualify as "a razor with an unguarded blade" under Penal Code section 626.10. (*In re Do Kyung K.* (2001) 88 Cal.App.4th 583.) The court also held that a juvenile court order declaring informal probation is an appealable order under Welfare and Institutions Code section 800. **Gloria Cohen** represented the minor.