**SUFFICIENCY OF THE EVIDENCE**

In re Troy S. (H023729)
Staff attorney: Lori Quick
Date: February 27, 2003

Appellant was a student in a continuation school. He was in a classroom with about 15 other students who, like him, had been expelled from their original school. Appellant had a history of making threats and being disruptive in class. On one particular day, he was disciplined for being disruptive. Appellant said to a group of classmates that he would kick the teacher's ass. The teacher overheard the comment. Appellant was charged with making a criminal threat and threatening a teacher under Penal Code sections 422 and 71. The Court of Appeal held there was sufficient evidence of a criminal threat but insufficient evidence of violating section 71, because that section requires the threat to be communicated directly to the victim.

People v. Davilla (H024237)
Panel attorney: Marylou Hillberg
Date: Mach 27, 2003

Appellant used a false contractor's license number to secure a job to do a home improvement project. He was forwarded $750 and did no work. He was convicted of using a false contractor's license number and grand theft on the theory he embezzled the money. There was insufficient evidence he embezzled the money because he never held the $750 in trust. (Staff attorney Dallas Sacher)

In re Paul S. (H02400)
Panel attorney: R. Bruce Finch
Date: March 27, 2003

Appellant was a minor found in violation of his juvenile probation and committed to "the Ranch" for a minimum of five months. Specifically, he possessed gang insignia. At the hearing, trial counsel and the court were under the impression that appellant was ordered not to possess gang paraphernalia. In fact, the court ordered him only not to use or possess graffiti material or associate with known gang members. The Court of Appeal reversed for insufficient evidence of

violating the conditions of probation. (Staff attorney Paul Couenhoven)

In re Alejandro R. (H024622)
Panel attorney: Jill Fordyce
Date: April 16, 2003

The juvenile court found appellant had committed a kidnapping. On Valentine's Day, a 14 year old girl was playing near her home. She heard someone call her name, and she noticed her friend, appellant, sitting in the back of a two-door car. The engine was off and the right passenger door was open. She leaned in and spoke with appellant. Suddenly, she was pulled into the car, though appellant did not pull her in. The door closed, and the car sped off. She hit the driver in the head which resulted in the car being driven off the road. She escaped and ran home. She had known appellant, 15 years old, for six years and he has never been mean to her. The driver, age 20, was the former boyfriend of her sister and the father of the sister's baby. He had attempted to force himself on her on many occasions; once he locked her in her bedroom and attempted to take off her clothes. The juvenile court found appellant aided and abetted in the kidnapping, stating that he certainly did nothing to help her. The Court of Appeal held there was insufficient evidence appellant knew of the driver's criminal design when he called her name or if he did anything to assist him. (Staff attorney William Robinson)

In re Gildardo M. (H024566)
Panel attorney: Gordon Scott
Date: April 22, 2003

Appellant was found to have committed a felony sexual battery, among other things. Appellant was attracted to a high school classmate, and it appeared she was attracted to him. One day while they were at school, he led her to walk across a field and behind some bushes. Appellant unzipped his pants and showed his penis. He asked her to perform oral sex three times, but she refused. He accepted her refusal. He unzipped her sweatshirt and fondled her as he kissed her. She did not indicate she was unwilling, but she later claimed she did not consent. The Court of Appeal held there was insufficient evidence. Her refusal to perform oral sex did not show she was unwilling to engage in any sexual activity. (Staff attorney Paul Couenhoven)

People v. Richard Everly
Panel attorney: Demarris Evans
Date: September 23, 2003

Appellant and Tate committed a residential burglary while Brown waited in the car. Appellant and Tate had walkie-talkies so that they can communicate during the crime. The resident came home and caught appellant with his walkie-talkie. A jury convicted him of residential burglary, receiving stolen property, and possession of burglary tools. The court of

appeal reversed the conviction for possession of burglary tools. Relying on *People v. Gordon* (2001) 90 Cal.App.4th 1409, the court held that walkie-talkies were not the type of burglary tools described in Penal Code section 466. (Staff attorney Vicki Firstman)

People v. Richard Stevens (H022866)
Panel attorney: Arthur Dudley
Date: October 10, 2003

Appellant was convicted of three counts of kidnapping, among other things. The victims worked at an indoor shooting range and gun retail store. Appellant entered the shop and rented a handgun. After some target practice, he returned to the shop and pointed the gun at the victims, threatening to kill them, and he fired two shots which missed. He ordered them to the front of the store and he made a telephone call to his mother. After completing the call, he ordered them to the back wall. He then left the store, but ordered that they remain in the store. Moments later, he returned and ordered them out of the front of the store and into the parking lot. As they neared an alley, about 17 feet from the store, one of the victims pulled out a gun and shot the defendant. The court of appeal held there was insufficient asportation to support the kidnapping convictions. The distance was not substantial and there was no greater risk of harm in or out of the store or in the parking lot. The court of appeal rejected respondent's request to reduce the convictions to attempted kidnapping because there was a lack of evidence of specific intent. (Staff attorney Dallas Sacher)

**PRETRIAL AND POSTTRIAL MOTIONS**
People v. Jairo Rodriguez (H023941)
Panel attorney: Daniel Byrne
Date: February 28, 2003

Police officers sought to execute an arrest warrant on a Fernando Vargas. Officers waited at an apartment where they believed they would find Vargas. Appellant parked in front of the apartment and walked in the building. Although appellant was also an Hispanic male of similar height, weight, and age, he was different in several distinctive manners. Appellant had his name tattooed on his arm, while Vargas had "RIP," "Silent," and "Mt. View" tattooed on his arms. Appellant was detained, although the officer testified at the suppression hearing he never checked the tattoos. During the detention, the officer conducted a pat search, though there was no reasonable cause to believe he was armed. Also during the detention, the officer ran a warrant check to verify his identity, but a warrant check would not have served this purpose. It was during the search that the officer found drugs on appellant. The Court of Appeal held the motion to suppress evidence should have been granted because the detention was unreasonable. (Staff attorney Paul Couenhoven)

People v. Fredruc Gotfried (H021456)

Panel attorney: Jeanine Strong
Date: March 21, 2003

Police heard from an informant that appellant was growing marijuana at his property in rural Monterey county and selling it in Santa Cruz. One night, undercover officers walked around the perimeter of appellant's property until appellant told them to go away. They confirmed his address and that he owned the two cars, which were registered in Santa Cruz. Based on this, the officers sought a search warrant to conduct an infared imaging scan. Based on the infared imaging scan, which revealed a suspected marijuana farm, officers sought a second search warrant to physically enter and search his residence and seize the evidence. In a published opinion, the Court of Appeal held the evidence should have suppressed because the infared scan constituted a search and there was not probable cause for the first search warrant. The officers only confirmed appellant lived at a certain location and owned two cars. It was not probative that he was selling drugs in Santa Cruz merely because his cars were registered there. It was not probative that he told the officers, appearing as prowlers at night, to go away. Further, the good faith exception did not save the search. A reasonable officer would have realized there was not probable cause to search the house which is why they sought permission for only an infered scan in the first search. A reasonable officer would not believe he or she could conduct an infered scan with less than probable cause. (Staff attorney Jonathan Grossman)

People v. Alfredo Ramirez (H023961)
Panel attorney: Diana Teran
Date: August 5, 2003

Defendant pled guilty to residential burglary and received probation on condition that he serve 180 days in jail. Subsequently, he violated probation and was sentenced to serve two years in prison. Defendant was not a United States citizen. Because he was sentenced to serve at least a year for residential burglary, the offense qualifies as an "aggravated felony" for immigration purposes. He moved to withdraw his plea because trial counsel failed to properly advise him of his immigration consequences. Former trial counsel declared that he did not advise defendant of the immigration consequences because he did not know defendant was not a United States citizen. He later submitting a declaration that he did not specifically recall advising defendant of immigration consequences but it was his practice to do so. The trial court denied the motion, and he appealed. The Court of Appeal reversed. Although the trial court properly characterized the prosecution case as "strong," the amount stolen from the attached garage was small and the chances of receiving a greater sentence had he gone to trial was minimal. Thus, defendant's declaration that he would not have pled had he been properly advised was credible and there was a chance that a defense attorney could have negotiated a settlement that did not involve an offense which could become an aggravated felony. (Staff attorney Vicki Firstman)

People v. Joel Tobias (H024254)
Staff attorney: Dallas Sacher

Date: August 12, 2003

One of the first summary reversals following *Stogner v. California* (2003) 123 S.Ct. 2446 because appellant's convictions were barred by the ex post facto clause.

People v. Charles Glasper (H023404)
Panel attorney: Alan Siraco
Date: October 31, 2003

Appellant was convicted after jury trial of transporting cocaine base, and possessing it. Appellant subpoenaed the jail records of a key prosecution witness. The county jail successfully quashed the subpoena on the grounds the information was private under Penal Code section 13300. However, the statute permits disclosure of the information to a criminal defendant upon a showing of good cause. The court of appeal ordered the matter remanded for reconsideration of the motion and a possible new trial. (Staff attorney Lori Quick)

People v. Antonio Fonseca (H025215)
Panel attorney: Tutti Hacking
Date: November 6, 2003

An officer saw appellant drive out of a gas station parking lot onto oncoming traffic without yielding. Appellant was stopped. He acted nervous, and the officer suspected he might be under the influence. He had appellant do some field sobriety tests, which he passed; there was no odor of alcohol. The officer then asked if there were any weapons in the car, and appellant said no. The officer asked if he could search the car, and appellant said go ahead. The officer found methamphetamine. Appellant admitted it was drugs. The court of appeal reversed. It said there was sufficient evidence to stop appellant and detain him for suspicion of driving under the influence. After it was determined that he was not under the influence, there was no longer cause to detain him. Appellant's consent to search the car was the result of an illegal detention. (Staff attorney Lori Quick)

People v. Noe Rodriguez (H023863)
Panel attorney: Michael Satris
Date: November 14, 2003

The convictions were reversed because the revival of the statute of limitations violated the ex post fact clause. (*Stogner v. California* (2003) 123 S.Ct. 2446.

**ERROR AT TRIAL OR HEARING**
People v. Sidney Harris (H023414)

Panel attorney: Jan Stiglitz
Date: January 10, 2003

Appellant was convicted of armed robbery and false imprisonment stemming from the robbery of a restaurant. Among other things, appellant argued the court erred in not providing an instruction on a lesser included offense of attempted false imprisonment. Appellant fired a gun at the ceiling and commanded an employee to come toward him. When appellant turned around, the employee ran and hid behind a Dumpster. The Court of Appeal decided the trial court erred in not giving the instruction on the lesser included offense because there was insufficient evidence of false imprisonment since the employee went where he wanted to go, not where appellant wanted him to go. (Staff attorney Dallas Sacher)

People v. Roman Vara (H022686)
Panel attorney: Gerald Clausen
Date: February 26, 2003

The Court of Appeal reversed the conviction because he was not allowed to question the prosecution witness about being in custody and whether he was hopeful of more lenient treatment in exchange for testifying favorably to the prosecution. (Staff attorney Vicki Firstman)

People v. James Murphy (H021790)
Panel attorney: Walter Pyle
Date: April 15, 2003

Appellant was convicted of forcible oral copulation and false imprisonment. The complaining witness was having difficulty testifying at trial, so the prosecution requested placing a glass screen between the witness and the defendant. The screen permitted appellant to see the witness, but the witness could not see appellant. Over appellant's objection, the court approved the procedure. In a published opinion, the Court of Appeal reversed. Included in the right to confrontation is that the witness and the defendant see each other during testimony. The right to confrontation can be curbed when necessary if the witness would be traumatized from seeing the defendant. Here, however, the trial court failed to hold an evidentiary hearing, and there was no showing that seeing the defendant was the cause of the complaining witness's difficulties. (Staff attorney Jonathan Grossman)

People v. David Varela (H022985)
Staff attorney: Jonathan Grossman
Date: April 25, 2003

Appellant had a jury trial in which he was charged with committing a series of robberies. During deliberations, one of the jurors became the lone holdout. The other jurors reported to the

court that she had improperly interjected race into the discussion, was relying on her own experiences, and dominated deliberations. The court urged the jury to continue deliberating. Later, the court stopped deliberations on its own when it overheard the jurors arguing loudly. It questioned the jurors and permitted the attorneys to question the jurors as well. Over defense objection, the court removed the holdout juror. Once the alternate was in place, the jury returned verdicts of guilty on most of the counts. The Court of Appeal reversed. There was nota showing of demonstrable reality that the holdout juror failed to deliberate. Since some of the identifications were cross-racial in nature, consideration of race was proper. It was not improper for jurors to rely on life experiences. The court did not have authority to stop deliberations on its own based on the information it possessed, and it did not have the authority to permit the attorneys to question the jurors.

People v. Son Nguyen (H023433)
Panel attorney: Gary Dubcoff
Date: May 13, 2003

Appellant was tried for making criminal threats, among other things. Allegedly, he called a witness and threatened him over the phone. When the prosecution witness testified, the defense was not allowed to question him that he was on probation. The Court of Appeal held that whether the witness was on probation concerned his motive to lie and exclusion of the evidence was error. Since the criminal threat charge depended on the credibility of the witness, the error required reversal of that count. The court, however, found error harmless as to the other convictions because there were other evidence of guilt. (Staff attorney Dallas Sacher)

In re Francine C. (H025265)
Staff attorney: Michael Kresser
Date: May 23, 2003

Appellant was found to have committed robbery and false imprisonment. She demanded that the victim remove a red shirt and red shoe laces because they were in Sureno territory. Because there was insufficient evidence the victim was detained for any length of time, there was insufficient evidence of a false imprisonment.

People v. John Hernandez (H024139)
Panel attorney: Lynda Romero
Date: May 23, 2003

In the middle of trial, appellant moved to hold a *Miranda* hearing. The trial court denied the request, stating the motion must be made before trial. The Court of Appeal remanded for a new *Miranda* hearing. In this case, trial counsel explained why the motion could not be made earlier. Evidence Code section 402 permits the motion be made in limine or during trial. (Staff

attorney Lori Quick)

People v. Roman Lopez (H024492)
Panel attorney: Beth Cohen
Date: June 27, 2003

Appellant was convicted of assault with force likely to cause great bodily injury in count one and assault by a prisoner in count two. Because count two was a lesser included offense as charged, it must be dismissed. (Staff attorney Dallas Sacher)

People v. Clifford Jackson
Panel attorney: Karen W. Riley
Date: June 27, 2003

Appellant was convicted of failing to register a second address. His defense was that he was never told to register a second residence. The Court of Appeal reversed in a published decision because the jury was never properly instructed on knowledge being a prerequisite for willful failure to register. (Staff attorney Michael Kresser)

People v. Sergio Sanchez (H023531)
Panel attorney: Susan Stackhouse
Date: August 21, 2003

After a preliminary examination, appellant was held to answer. He then waived his right to a jury trial and submitted on the transcripts of the preliminary examination. The trial court understood this procedure to be a "slow plea " or "*Bunnell* plea." It advised appellant of certain constitutional rights which he then waived. He was never advised, however, that his submission on the transcripts was tantamount to pleading guilty. The court of appeal reversed, finding there was insufficient evidence in the record appellant understood the consequences of the slow plea. (Staff attorney Dallas Sacher)

People v. Mario Oliveira (H024673)
Panel attorney: Lora Martin
Date: August 22, 2003

Appellant was convicted of being under the influence while possessing a loaded firearm (Health & Saf. Code, § 11550, subd. (e), among other things. Because the only evidence indicated the firearm was not loaded, there was insufficient evidence. The court of appeal reduced the conviction to simply being under the influence. (Staff attorney Vicki Firstman)

In re Alex N. (H025309)
Panel attorney: Laura Pedicini
Date: August 29, 2003

At a contested jurisdictional hearing, the court found appellant committed residential burglary. He was later committed to the California Youth Authority. At the jurisdictional hearing, the court relied on the fact appellant had escaped from placement when the incident occurred, though no such evidence was admitted at the jurisdictional hearing. The court of appeal reversed. (Staff attorney Dallas Sacher)

People v. Caezariane Donelson (H023886)
Panel attorney: Arthur Wong
Date: September 5, 2003

Appellant was charged with murder. As part of a plea bargain, appellant pled guilty to voluntary manslaughter in exchange for a sentence of 12 years 8 months stayed. During the entry of the plea and the sentencing, Judge Ahern made it clear that he was going to retain jurisdiction to review any alleged violations of probation. Subsequently, appellant allegedly violated probation by using marijuana. Although Judge Ahern found the allegation to be true, he reinstated probation. Later, appellant was accused of transporting and possessing for sale crack cocaine. A different judge revoked probation and executed the sentence. Appellant claimed that under the terms of the plea bargain, only Judge Ahern could consider the violation of probation. The court of appeal agreed that Judge Ahern's statement could be construed as a condition of the plea bargain. Further, since appellant was never advised pursuant to Penal Code section 1192.5, the issue was not waived without an objection. The court reversed with directions that Judge Ahern consider the alleged violation of probation. (Staff attorney Lori Quick)

People v. Ricky Deal (H023960)
Panel attorney: Alison McElravey
Date: September 9, 2003

Appellant was accused of petty theft with a prior conviction. According to the store, appellant tried to "exchange" a new product for an item he never purchased. Appellant claims he was returning a ceiling fan that did not fit the space to which it would be installed. During the trial, the prosecutor asked the loss prevention officer, over objection, what percentage of its shoplifters were African American. The prosecutor then argued race in closing, again over objection. The Court of Appeal reversed. Since identity was not an issue, race was irrelevant and prejudicial. (Staff attorney Lori Quick)

People v. Virgil Lee (H024169)
Panel attorney: Irma Castillo

Date: September 11, 2003

Appellant was convicted of auto theft and resisting arrest. His sentence was enhanced due to a prior strike conviction and for committing a felony while released on OR. Identity was the issue at trial. The case concerned a pickup truck which was stolen from East Palo Alto. Police chased the culprit across the Dumbarton Bridge into Newark. There, the driver ran from the truck and away from pursuing officers. An hour later, appellant was found in the area; he matched a description of the driver, and he was arrested. No fingerprints in the truck matched appellant's. The Newark Police Department, however, provided description of the driver when he fled on foot which did not match appellant's appearance. This description was never disclosed before or during trial. The Court of Appeal reversed, finding the prosecution failed to disclose material exculpatory evidence. (Dallas Sacher)

People v. Carlos Ugarte (H022521)
Panel attorney: Susan Stackhouse
Date: October 23, 2003

Appellant lived with his parents but also spent several nights a week at a friend's house. He was convicted of failing to register his friend's house. Appellant claimed he did not know he was required to. The court instructed the jury that ignorance of the law was no excuse. The court of appeal reversed, holding that the instruction precluded a legitimate defense of knowingly failing to register. (Staff attorney William Robinson)

In re Thomas F. (H024767)
Panel attorney: J. Hamlyn
Date: November 4, 2003

A preteen girl first alleged her mother molested her several days a week for about 16 months. She later accused appellant of also molesting her several times a week over the same period. All of the molestations occurred in a similar fashion and occurred when she was alone with the perpetrator. She also accused a third person of molesting her. Appellant was charged with violating Penal Code section 288.5. At the contested jurisdictional hearing, appellant sought to introduce the testimony of four witnesses, three of whom would refute the claim that the victim was alone with appellant where the molestations allegedly occurred. The court excluded the testimony because defense counsel failed to disclose the information pursuant to Penal Code section 1054.3. The court of appeal reversed, following several cases which hold that reciprocal discovery requirements do not apply in juvenile cases (which was news to defense counsel). Since there was no order from the juvenile court for disclosure, defense counsel was under no obligation to disclose the information. The denial of the right to present a defense was prejudicial error. (Staff attorney Dallas Sacher)

People v. Lang Le (H024792)
Panel attorney: Marta Stanton
Date: November 3, 2003

The court of appeal reversed the finding of great bodily injury when the court instructed the jury on the "group beating" theory. (Staff attorney Lori Quick)

People v. Clarence Hamel (H025177)
Panel attorney: Thomas Schaaf
Date: November 25, 2003

A jury convicted appellant of petty theft with a prior conviction and forgery. Before the trial began, he moved to bifurcate adjudication of his alleged prior strike conviction. The court denied the motion, and appellant admitted the prior rather than have it introduced at trial. The court of appeal held that the trial court erred in not bifurcating the prior, so the admission was invalid. The matter was remanded for a new trial on the prior conviction. (Staff attorney Paul Couenhoven)

People v. Martin Jensen (H024077)
Panel attorney: J. Courtney Shevelson
Date: December 11, 2003

Appellant was convicted by jury of distributing pornography to a minor through the Internet with the intent or purpose of seducing the minor in violation of Penal Code section 288.2, subdivision (b). The court rejected a proposed defense instruction defining "seducing" to mean attempting to persuade the other into a sexual intercourse. Instead, the court defined "seducing" as attempting to participate in sexual conduct which could include masturbation and exhibitionism. In a published decision, the court of appeal reversed, stating the defense definition of the term was correct and the erroneous definition of the term in this case was not harmless. Further, the court of appeal noted that Penal Code section 313 is a lesser included offense of section 288.2. (Staff attorney William Robinson)

People v. Sean Petznick (H023768)
Panel attorney: Stephen Greenberg
Date: December 18, 2003

Appellant and three confederates broke into the victim's home, killed him, and took some property. He was convicted by jury of conspiracy to commit murder, burglary and robbery, murder with special circumstances, burglary, and residential robbery in concert. The court instructed the jury that conspiracy requires two or more people to enter into an agreement and two or more people have the specific intent to commit the target offense. During deliberations,

the jury asked if all four participant needed to have specific intent to commit the target offense. The court responded it does not. In a published decision, the court of appeal agreed with appellant that the instruction and the court's response to the jury's question made it possible for appellant to be convicted of conspiracy even if he did not form the specific intent to commit a crime, so long as two of the conspirators had the requisite intent. The court of appeal also reversed the murder-torture special circumstance because the trial court instructed the jury that the allegation can be found true only if *a defendant* formed the specific intent to torture, instead of stating *the defendant* must form the requisite intent. Finally, the imposition of a parole revocation fine was unauthorized when the defendant receives a sentence of life without parole. (Staff attorney Paul Couenhoven)

**SENTENCING**

People v. Augustine Holquin (H024020)
Panel attorney: William Parks
Date: January 9, 2002

According to the reporter's transcript, when the court sentenced appellant, it failed to impose a restitution fine or parole revocation restitution fine. According to the minute order of the sentencing hearing and the abstract of judgment, the court imposed a $1600 restitution fine and an equal parole revocation restitution fine. Appellant claimed the fines were added after the sentencing hearing, depriving appellant of the due process right to be present when the court renders the sentence. Although the Attorney General's Office conceded the matter must be remanded for a new sentencing hearing, the Court of Appeal engaged in a long discussion that error cannot always be presumed when there is a conflict between the clerk's transcript and the reporter's transcript unless appellant first attempts to settle the record. Nonetheless, the Court remanded the matter for a new sentencing hearing concerning the fines. (Staff attorney Lori Quick)

In re Serapio M. (H024469)
Panel attorney: Alan Stern
Date: January 30, 2003

The minor was made a ward of the court and ordered to not be on anyone's property at night. The Court of Appeal held the condition of probation was overbroad and struck the provision. (Staff attorney Lori Quick)

People v. Mark Rodriguez (H024400)
Panel attorney: Martin Buchanan
Date: January 10, 2003

Appellant pled no contest to felony hit and run with injury. Although he was charged

with suffering two prior strike convictions, he never admitted them. Nonetheless, the court sentenced him to serve 25 years to life. The Court of Appeal reversed. Appellant claimed there was an implied acquittal, but the Court held appellant could be tried on the prior convictions upon remand. (Staff attorney Dallas Sacher)

People v. Santiago Reyes (H024086)
Panel attorney: Charles Holzhauer
Date: January 14, 2003

The court imposed $400 in attorney fees without holding a hearing to determine appellant's ability to pay as required by Penal Code section 987.8. The Court of Appeal reversed. (Staff attorney Jonathan Grossman)

People v. Michael Sanchez (H023635)
Panel Attorney: Kathleen Novoa
Date: February 3, 2003

In a published decision, the Court of Appeal held that a court order pursuant to the gang registration statute was vague in requiring appellant to disclose to the police the areas he frequented. (Staff attorney Jonathan Grossman)

People v. Basilio Guzman (H022726)
Panel Attorney: Deborah Wald
Date: February 3, 2003

Appellant pled guilty to violating Penal Code section 114, using a false document to conceal his citizenship. The penalty for violating section 114 is five years in prison. He showed a fake California driver's license to obtain his car from the tow company. Though he was an immigrant, he had been in the United States for years and was married to a citizen of the United States. Appellant expressed remorse for his actions; he otherwise had no criminal record. Under the terms of the plea bargain, it was agreed he would be placed on probation and be sentenced to jail for no more than six months. At sentencing, the court stated it hoped appellant could remain in the country, it imposed five years prison stayed on condition he complete probation including one month in jail. Because the court stayed a prison sentence, instead of suspending imposition of sentence, the INS considered the conviction to be an aggravated felony. Appellant contended that section 114 is unconstitutional, five years was cruel and unusual punishment, the sentence violated the plea bargain, the court abused discretion in staying the prison sentence, and counsel was ineffective for not objecting to the stayed sentence. The court of appeal reversed. Presiding Justice Conrad Rushing and Justice Nathan Mihara held the sentencing court lacked discretion to stay a prison sentence which made him deportable when the court's intention was to impose a sentence that avoided immigration consequences. In a concurring opinion, Rushing also stated

five years prison constituted cruel and unusual punishment in this case. Justice Patricia Bamattre-Manoukian dissenting, stating she would have issued an order to show cause on the habeas claim that counsel was ineffective. (Staff attorney Jonathan Grossman)

People v. Teddy Dreher (H024569)
Panel Attorney: Jennifer Mannix
Date: February 5, 2003

The trial court permitted appellant to discharge retained counsel at the sentencing hearing. Appellant requested appointed counsel and a continuance, so that he could prepare a motion to withdraw his plea. The trial court refused and sentenced appellant. The Court of Appeal reversed. Appellant was entitled to be represented by counsel and he never waived his right to counsel. If the trial court permits him to discharge retained counsel, it must give him an opportunity to get a new lawyer. (Staff attorney Michael Kresser)

People v. John Ryan (H024260)
Panel attorney: Irma Castillo
Date: February 5, 2003

Appellant was on probation when he was arrested for a new offense. In a negotiated settlement, he agreed to plead guilty to one the new crime with the understanding the violation of probation would be found true and other charges would be dismissed. After pleading guilty, appellant asked to be released for three days to get his affairs in order. The court agreed, but stated if he failed to return, he would be guaranteeing himself a prison sentence. He failed to return, and the court imposed the maximum sentence permitted. It also imposed a $1000 restitution fine for the case he was on probation, though he had been assessed $200 when he was originally placed on probation. Appellant's motion to withdraw his plea was denied. The Court of Appeal held that when the defendant enters a plea bargain, he must be given the opportunity to withdraw his plea if the court decides the change the terms of the agreement. Here, the court changed the sentence to a guaranteed prison sentence. This required the case to be remanded to give appellant the opportunity to withdraw his plea. Further, the sentencing court cannot increase the restitution fine upon a revocation of probation. (Staff attorney Jonathan Grossman)

People v. Ricardo Partida (H023800)
Panel Attorney: Carl Gonser
Date: February 18, 2003

In a plea bargain, the appellant pled no contest to three counts and admitted he suffered a prior strike conviction; eight charges, including the charge of hit and run, were dismissed. Nonetheless, the court sentenced appellant to a consecutive term of 16 months for the dismissed hit and run charge. The Court of Appeal modified the sentence by deleting the 16 month term so

that the judgment complied with the plea bargain. (Staff attorney William Robinson)

People v. Johnny Garcia (H024507)
Staff attorney: Paul Couenhoven
Date: February 20, 2003

Appellant entered a plea bargain but was not advised that if the court disagreed with the agreement then appellant would have an opportunity to withdraw his plea. When he pled, he was not advised he would owe a restitution fine. At sentencing, the court imposed an $800 restitution fine and an $800 parole revocation restitution fine. The Court of Appeal reduced the fines to the statutory minimum of $200. (*People v. Walker* (1991) 54 Cal.3d 1013, 1030.)

People v. Jose Mendez (H023973)
Panel attorney: Paul Kleven
Date: February 20, 2003

Appellant entered a plea bargain but was not advised that if the court disagreed with the agreement then appellant would have an opportunity to withdraw his plea. When he pled, he was not advised he would owe a restitution fine. At sentencing, the court imposed a $600 restitution fine and a $600 parole revocation restitution fine. The Court of Appeal reduced the fines to the statutory minimum of $200. (*People v. Walker* (1991) 54 Cal.3d 1013, 1030.) (Staff attorney Jonathan Grossman)

People v. Rogelio Avalos (H023011)
Panel attorney: Alfons Wagner
Date: February 20, 2003

After appellant's probation was revoked, the court imposed the upper term based, in part, on his conduct after being placed on probation. The Court of Appeal reversed, since the court cannot rely on events after granting probation as an aggravating circumstance. (Staff attorney William Robinson)

People v. Stephen Stapleton
Panel attorney: Charles Holzhauer
Date: February 27, 2003

Appellant was convicted of embezzling computer equipment from his former employer. He contested the restitution amount. At the restitution hearing, the attorney for the former employer called and questioned witnesses and otherwise litigated the issue. The prosecutor excused himself and was absent during a large portion of the hearing. Appellant contended the

hearing was void because it was conducted by the victim and not a government prosecutor. Respondent conceded that a portion of the prosecution of the case cannot be delegated to a private victim. The Court of Appeal reversed the restitution order. (Staff attorney Jonathan Grossman)

People v. Jaime Carrillo (H024779)
Staff attorney: William Robinson
Date: March 7, 2003

The trial court placed appellant on probation and imposed a $200 restitution fine. When it revoked probation, it imposed a second $200 restitution fine in addition to an equal parole revocation restitution fine. The second restitution fine was unauthorized. Further, the trial court failed to award six days of presentence credits.

People v. Reuben Washington (H024579)
Panel Attorney: Daniel Byrne
Date: March 11, 2003

The court found appellant's prison prior to be true. However, appellant had been out of custody for at least five years since the prison commitment, so the finding was reversed. (Staff attorney Paul Couenhoven)

People v. Karrie Chestnut (H024005)
Panel attorney: Gloria Cohen
Date: March 24, 2003

Appellant was tried for welfare fraud. One of the jurors revealed in voir dire that her mother worked for a welfare agency and discussed with her extensively about enforcement of welfare laws. Although the juror originally expressed a belief she could be fair, she asserted midway through the trial that she was having great difficulty setting aside her earlier experiences. Upon questioning by the judge and the attorneys, she said she would try to be fair. The trial court refused to remove her. The Court of Appeal reversed. The evidence unequivocally showed she was biased. Although she stated she would try to be fair, she never stated she could be fair. (Staff attorney Lori Quick)

People v. Edgar Johnson (H023872)
Panel Attorney: J. Frank McCabe
Date: March 28, 2003

Appellant was convicted of 14 counts of violating Penal Code section 269 with one prior

strike conviction. The court sentenced him to serve 14 consecutive terms of 30 years to life, amounting to at least 420 years. [If he started his term when the Massachusetts Bay Colony was founded, he would still be in custody today]. The court mistakenly believed it was required to run some of the terms consecutive. In a novel approach to avoid remand, the Court of Appeal observed that appellant's minimum sentence was now 240 years to life. Since it made no practical difference whether appellant was sentenced to serve at least 240 years or 420 years, the Court of Appeal ordered that appellant's sentence be modified to only 240 years to life unless the prosecution elected for a new sentencing hearing. (Staff attorney William Robinson)

People v. Charles Sullivan (H023175)
Panel attorney: Steven Bedrick
Date: April 3, 2003

Appellant was convicted of six counts of violating Penal Code section 269 and one count of violating section 288, subdivision (b)(1). The court imposed the terms for each count consecutive to each other without stating a reason. The Court of Appeal remanded the matter for the court to state the reasons or to resentence him. (Staff attorney William Robinson)

People v. Vincent Ajagu (H023143)
Panel attorney: Jeffrey Glick
Date: April 30, 2003

Appellant purchased airline tickets under a false name, and after the flights were completed, he filed false claims for damages. He pled no contest to grand theft, false impersonation, forgery, and conspiracy. He pled open; there was no plea agreement. He was placed on probation, but after he violated probation, the court sentenced him to serve three years in prison for grand theft and false impersonation, concurrent to each other. The other counts were stayed pursuant to Penal Code section 654. The Court of Appeal agreed that the false impersonation conviction also should have been stayed and the trial court miscalculated presentence credits. (Staff attorney Lori Quick)

In re Joseph C. (H024509)
Panel attorney: Gerald Clausen
Date: May 2, 2003

Appellant was found to be a ward of the court for felony assault which he gang motivated. Among the conditions of his probation, he was ordered not to knowingly be in the are known to him to be an area of gang related activity and not to be in possession of a paging device or other portable communication equipment. Appellant argued the stay away order was unconstitutionally vague because it did not provide sufficient notice what "gang related" activity would mean. Further, in today's society, cell phones and pagers have become so ubiquitous that

a minor may legitimately possess one and the condition impermissibly infringed on his First Amendment rights. The Court of Appeal agreed to a certain extent and remanded the matter for the court to make the probation conditions more clear and more narrow. (Staff attorney Dallas Sacher)

People v. Mario Ornelas (H024694)
Staff attorney: Paul Couenhoven
Date: May 16, 2003

Appellant entered a plea bargain. He was advised of the possibility of receiving a restitution fine, but he was never told it could be from $200 to $10,000. At sentencing, the court imposed a restitution fine of $2400 and an equal parole revocation restitution fine. The Court of Appeal reversed. Pursuant to *People v. Walker* (1991) 54 Cal.3d 1013, under certain circumstances, where a defendant enters a plea bargain and is not adequately advised of a restitution fine which is later imposed, the fine must be reduced to the statutory minimum of $200.

People v. Hoa Hoang (H024402)
Panel attorney: Paul Demeester
Date: May 16, 2003

Appellant was convicted of petty theft with a prior theft conviction. At sentencing, it was undisputed appellant suffered from a "horrible substance abuse problem." Yet the court refused to consider a commitment to the California Rehabilitation Center. The Court of Appeal reversed. (Staff attorney Dallas Sacher)

People v. Dean Foster (H024229)
Panel attorney: Alfons Wagner
Date: May 22, 2003

The Court of Appeal agreed that appellant could not be convicted of both grand theft and embezzlement for a single act. Further, appellant could not be convicted of petty theft with a prior because it was a lesser included offense to grand theft. (Staff attorney Paul Couenhoven)

People v. John Hernandez (H024139)
Panel attorney: Lynda Romero
Date: May 23, 2003

The sentencing court stated it agreed with appellant's argument and the probation report that appellant's possession of a firearm by a felon (count six) and possession of ammunition

(count seven) were part of one course of conduct. The court, however, refused to stay one of the counts pursuant to Penal Code section 654. The Court of Appeal held that the finding of the trial court required staying one of the counts. (Staff attorney Lori Quick)

People v. Christopher Rubiales (H023471)
Staff attorney: Jonathan Grossman
Date: June 2, 2003

Appellant was sentenced to serve 61 years to life under the Three Strikes Law after being convicted of robbery and residential burglary. The robbery was an attempted theft of five cheap watches from Rite-Aid in which he shoved a sales clerk. The burglary consisted of taking some odd items from the office of a board and care home where he used to live. He suffered a long history of severe mental and physical illness which contributed to his persistent drug use and criminal behavior. In a large number of mental health reports over the last ten years, it was concluded he suffered from schizophrenia-type mental illness, depression, drug abuse, and seizures. At one point he was found incompetent. He was functional when medicated and the staff at Atascadero also diagnosed him with malingering. Other psychiatrists found he sometimes feigned symptoms of mental illness. The sentencing court denied appellant's Romero motion on the grounds that it was not convinced he suffered from mental illness or that it contributed to his criminal behavior. The Court of Appeal reversed, holding that the sentencing court's findings were not supported by the evidence.

In re Angel B. (H025040)
Staff attorney: Lori Quick
Date: June 10, 2003

Appellant was made a ward of the court. After a violation of probation, he was committed to the "ranch." The Court of Appeal reversed the dispositional order becasue the juvenile court miscalculated appellant's custody crdits.

In re Reyna G. (H024563)
Panel attorney: Gloria Cohen
Date: June 27,. 2003

Appellant was placed on probation and told not to "engage in gang activity", wear "gang clothing" or obtain "new gang tattoos." She contended on appeal the condition was unconstitutionally overbroad and vague. The Court of Appeal modified the gang condition to specify that the word gang shall mean a criminal street gang as defined by Penal Code section 186.22, subdivisions (e) and (f). (Staff attorney Michael Kresser)

People v. Darryl Pugh (H022984)
Panel Attorney: Solomon Wollack
Date: July 23, 2003

Appellant was convicted in count one of possession of crack cocaine for sale and in count two of possession of cocaine. Under the Three Strikes Law, the court imposed two concurrent sentences of 25 years to life. Because count two was a lesser included offense, it needed to be dismissed. (Staff attorney Dallas Sacher)

People v. Ted Iniguez (H023405)
Panel Attorney: Robert Howell
Date: July 24, 2003

Appellant was convicted of threatening a witnesses (Pen. Code, § 136.1, subd. (c)(1)) and auto theft with a prior (Pen. Code, § 666.5), among other counts. The court imposed a consecutive sentence under the belief it was required by Penal Code section 1170.15. The statute does not require consecutive sentences, only that if a consecutive is imposed for dissuading a witness, it must be a full middle term. The court of appeal reversed for a new sentencing hearing. It also found that a sentence could not be imposed on auto theft with a prior when there was no finding that the prior auto theft was true. Although the failure to render a verdict is normally an implied acquittal, the court of appeal held that there was no double jeopardy bar to retrying the allegation that appellant suffered the prior conviction. (Staff attorney Williams Robinson)

People v. Sergio DeLeon, et al. (H024645)
Panel attorneys: Jill M. Bojarski and Rudolph Kraft
Date: July 30, 2003

The two appellants were convicted of attempted carjacking, robbery, and misdemeanor assault among other things. The court ran the sentence for assault (which occurred during the attempting carjacking) concurrent with the sentence for attempted carjacking. The court of appeal agreed that the sentence should have been stayed. (Staff attorney Lori Quick)

People v. Gregory Guzman (H024003)
Attorney: Seth Flagsberg
Date: August 8, 2003

Appellant was on probation for domestic violence when he committed a drug offense. He was sentenced to prison The Court of Appeal concluded Proposition 36 did not apply to him. Proposition 36 would have applied if the defendant were sent to prison on the domestic violence conviction and committed the drug offense while on parole. In a published decision,

the Court of Appeal concluded it violated equal protection not to apply probationers when it applied to parolees. (Santa Clara Public Defender's Office)

People v. Stephen Myint (H023781)
Panel attorney: Kathleen Novoa
Date: August 19, 2003

Appellant was pled no contest to assault with a stun gun and attempted kidnapping. The Court of Appeal agreed that appellant was not given sufficient notice of the amount of victim restitution ordered and the court erred in not staying one of the counts pursuant to Penal Code section 654. Although appellant pled no contest, there was no bargain for a specific sentence, so *People v. Hester* (2000) 22 Cal.4th 290 did not bar review. (Staff attorney William Robinson)

People v. Jonathon Bernal (H024843)
Panel attorney: Julie Schumer
Date: September 10, 2003

Appellant entered a plea bargain concerning two cases. He was not advised of a restitution fine nor was he advised that he could withdraw his plea if his sentence differed from the bargain. (Pen. Code, § 1192.5.) The court imposed a restitution fines totaling $11,200 and stayed a parole revocation restitution fine of an equal amount. Because the fines departed from the plea bargain, the restitution fine must be reduced to $200. (Staff attorney Dallas Sacher)

People v. Daniel Medina (H024965)
Panel attorney: Geri Green
Date: September 12, 2003

The Court of Appeal remanded because the trial court miscalculate presentence credits. (Staff attorney Lori Quick)

People v. Sean Henderson (H024071)
Panel attorney: Paul Kleven
Date: September 16, 2003

Appellant was placed on probation. Although the court did not require it when it listed the conditions of probation, the probation officer directed appellant to be gainfully employed or in school. Subsequently, the probation office accused appellant of violating probation for failing to be gainfully employed or in school. The court found the violation true and extended probation one more year. The Court of Appeal reversed because his probation cannot be revoked when appellant complied with all of the conditions ordered by the court. (Staff attorney William

Robinson)

People v. Craig Chan (H025144)
Staff attorney: Jonathan Grossman
Date: September 19, 2003

Appellant pled guilty and sentenced to serve 16 years in prison. At sentencing, he was assessed attorney fees of $500. Because there was no evidence he had any income or assets and there was a statutory presumption that a prisoner lacked the ability to pay attorney fees, there was insufficient evidence to support the court's order.

People v. Richardo Landecho (H025016)
Panel attorney: Alex Green
Date: September 19, 2003

Appellant lost his wallet containing $2322. When a person found the wallet and reported it to the police, officers were suspicious, as appellant was on parole. Officers called appellant and told him they found his wallet. When he drove to the police, officers conducted a parole search. In the right front passenger seat was appellant's 13 year-old daughter. She was clutching a bag which contained cocaine and methamphetamine. After being convicted, he received consecutive sentences for using a minor to transport methamphetamine and using a minor to transport cocaine. The court of appeal held that under the facts of the case, Penal Code section 654 prohibited dual punishment for the same act of using his daughter to transport drugs. (Staff attorney William Robinson)

People v. Jonathan Castaline (H023789)
Panel attorney: Charles Bonneau
Date: September 23, 2003

Appellant was convicted of various crimes and conduct credits were limited to 15 percent pursuant to Penal Code section 2933.1. The problem was that appellant was not convicted of a violent felony. The court of appeal reversed the limitation of presentence credits. (William Robinson)

People v. Carlos Garza (H024041)
Panel attorney: Alan Siraco
Date: October 9, 2003

Appellant was found by police in a car that had been stolen from his employer for a week. A jury found him guilty of auto theft and receiving or retaining stolen property, among

other things. Appellant argued he court not be convicted of both theft and possessing the same stolen property. Penal Code section 496, as amended in 1992, states no person can be convicted of violating that statute and of theft of the same property. The court of appeal observed that in common law, one could be convicted of theft and possessing the same property only if there was a "complete divorcement" by withholding the property beyond what was expected from merely taking it. There is a conflict of authority in deciding whether the common law rule survived the amendment to the statute. In a published decision, the court of appeal held the common law rule did not survive the amendment, and appellant could not be convicted of both crimes. The court also found the trial court miscalculated presentence credits. (Staff attorney Michael Kresser)

People v. Carlos Lugo et al. (H023308)
Panel attorneys: Randy Baker (Lugo)
David Stanley (Antonio Leyba)
Date: October 21, 2003

Leyba was convicted of first degree murder with a gang enhancement, among other things. He received a life term for murder plus ten years for the gang enhancement. The court of appeal reversed the sentence, deciding that the penalty provision of no parole in less than 15 years applied to gang crimes with indeterminate sentences. Further, when the jury found the enhancement under subdivisions (c) and (d) of Penal Code section 12022.53, the court must strike the lesser enhancement, not stay it, under subdivision (f) of the statute. Finally, a restitution fine imposed on Lugo of $11,400 was error because the statutory maximum is $10,000. (Staff attorney Paul Couenhoven)

People v. Saul Aldana (H024365)
Panel attorney: Timothy Cronin
Date: October 22, 2003

Appellant was convicted of making a criminal threat and attempted voluntary manslaughter, among other charges. He received a consecutive sentence. Appellant had chased the victim with a knife, threatening to kill her. The court of appeal held that the sentence for making a criminal threat should have been stayed pursuant to Penal Code section 654. (Staff attorney Lori Quick)

People v. Raul Uvalles
Staff attorney: Lori Quick
Date: October 28, 2003

Appellant was found guilty of murder and robbery. The murder was committed during the robbery. The court imposed a concurrent term for the robbery which was error under Penal

Code section 654.

People v. Adrian Melgoza (H012125)
Panel attorney: David Carico
Date: November 14, 2003

Appellant was convicted of murder with a gang enhancement, among other things. He was sentenced to serve life for the murder and two years for the gang enhancement. The court of appeal agreed that section 186.22 prohibits imposing a gang enhancement to an indeterminate sentence; instead, appellant cannot be paroled for 15 years. (Staff attorney Paul Couenhoven)

In re Adam H. (H025862)
Staff attorney: Dallas Sacher
Date: November 20, 2003

When the minor was placed on probation, the court ordered that he "no own, use, or possess any dangerous or deadly weapons and not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist." The court of appeal agreed to modify the condition to require the minor to not remain where he knows weapons to exist.

People v. Niiakwi Allotey (H025225)
Panel attorney: Victoria Stafford
Date: November21, 2003

Appellant pled guilty to possession of crack cocaine for sale, possession of methamphetamine for sale, and possession of ammunition by a felon. He was placed on probation, but it was alleged he violated probation. After appellant rejected a negotiated settlement of three years in prison, the court held a contested hearing and found him in violation. In imposing a four year prison term, the court commented that appellant rejected an offer of three years, "so I see no reason not to impose the midterm of four years." The court of appeal remanded for a new sentencing hearing, ruling that it appeared from the sentencing court's comments that appellant was being punished for exercising his constitutional right to a contested hearing. (Staff attorney Paul Couenhoven)

People v. Daniel Pantoja (H024476)
Panel attorney: Jennifer Mannix
Date: December 3, 2003

In holding appellant to answer for auto theft and receiving stolen property, the magistrate stated, and the prosecutor agreed, that the receiving stolen property charge was alleged in the

alternative. Appellant later pled no contest to both charges. At sentencing, the court stayed the punishment for receiving stolen property pursuant to Penal Code section 654. He appealed and filed a habeas corpus petition alleging trial counsel was ineffective for having him plead to both counts since one cannot be convicted of receiving and stealing the same item. A divided court of appeal reversed on appeal. It also ruled as a preliminary matter that because the matter was a pure issue of law and an unauthorized sentence, it was not attacking the plea bargain. (Staff attorney Lori Quick)

People v. Stephen Myint (H023781)
Panel attorney: Kathleen Novoa
Date: December 8, 2003

Appellant was pled no contest to assault with a stun gun and attempted kidnapping. The Court of Appeal agreed that appellant was not given sufficient notice of the amount of victim restitution ordered and the court erred in not staying one of the counts pursuant to Penal Code section 654. Although appellant pled no contest, there was no bargain for a specific sentence, so *People v. Hester* (2000) 22 Cal.4th 290 did not bar review. (Staff attorney William Robinson)

In re Robert B. (H026018)
Staff attorney: Lori Quick
Date: December 10, 2003

Appellant was found to have violated Penal Code section 626.10, a wobbler, by bringing a locking blade knife to school. At the dispositional hearing, he moved to reduce the offense to a misdemeanor. The court never expressly ruled on the motion or declared the offense to be a felony or misdemeanor, although the minute order lists it as a felony. The matter was remanded for the juvenile court to make an expressed finding whether the offense was a felony or misdemeanor. (See *In re Manzy W.* (1997) 14 Cal.4th 1199, 1207-1208.)

People v. Jaime Gomez (H025367)
Panel attorney: Barbara Michel
Date: December 11, 2003

Appellant entered into a plea agreement in which he pled no contest to manufacturing and possessing methamphetamine in exchange for dismissing other charges and the low term of three years in prison. He agreed to pay restitution for the clean up of chemical waste, but he was not advised of a criminal fine or restitution fine. At sentencing, the court imposed a $5000 criminal fine and an $800 restitution fine. The court of appeal held that the fines cannot be imposed because they were not part of the bargain. Since the law requires a minimum restitution fine of $200 and a minimum criminal fine of $100 for manufacturing meth, the fines were reduced to those amounts. (Staff attorney Lori Quick)

People v. Salvador Manqueros (H025100)
Staff attorney: Jonathan Grossman
Date: December 17, 2003

Appellant entered into a plea bargain where he pled no contest to ten felony counts and admit he suffered two prior strike convictions with the agreement that he would receive one sentence of 25 years to life. When he pled, the court advised it could impose face a restitution fine of $10,000; he was not advised that if the court failed to comply with the plea bargain, he could withdraw his plea. At sentencing, the court imposed the agreed sentence and a $10,000 restitution fine without objection. The court of appeal reduced the restitution fine to the statutory minimum of $200 because the fine was not part of the plea bargain.

People v. Aras-Maldonado (H025522)
Panel attorney: Karen Kelly
Date: December 17, 2003

Last year, the court reversed the order that appellant undergo a test for HIV because the court failed to hold a hearing on the matter upon defendant's request. On remand, the superior court again ordered an HIV test. The court of appeal reversed, finding insufficient evidence of a transferring bodily fluids. (Staff attorney Lori Quick)

**DEPENDENCY CASES**
In re Desired D. (H024772)
Panel attorney: Mario de Solenni
Date: February 3, 2003

Appellant appealed from the termination of parental rights and contended CPS failed to provide proper notice as required by the Indian Child Welfare Act. CPS conceded. The Court of Appeal reversed. (Staff attorney Vicki Firstman)

In re Jessica H. (H024837)
Panel Attorney: Erlinda Castro
Date: March 3, 2003

Appellant had her parental rights terminated. On appeal, she contended that CPS did not comply with the notice requirement of the Indian Child Welfare Act. The social worker reported that the minor may have Indian ancestry but could not find the tribe listed as a federally recognized tribe, so notice was required. In fact, notice to the Bureau of Indian Affairs was required. This is because some tribes, such as the Iroquois, are not listed under Iroquois but under their band names. DFCS conceded error, and the Court of Appeal reversed. (Staff attorney Jonathan Grossman)

In re David G. (H024760)
Panel attorney: Michael Kluk
Date: March 3, 2003

The juvenile court ordered at the dispositional hearing and the six month review hearing that the mother shall have visitation, but the children shall not be forced to visit. Indeed, some children chose not to visit. A habeas petition was filed in the Court of Appeal contending counsel was ineffective for not objecting to an order permitting the children to veto visitation and to the juvenile court's finding there were reasonable services. The Court of Appeal issued an order to show cause. (Staff attorney Jonathan Grossman)

In re J.I. (H014059)
Panel attorney: Carol Koenig
Date: May 19, 2003

The court terminated appellant's parental rights of her three children. After the permanent plan hearing, one of the children were removed from the prospective adoptive family and no longer appeared adoptable. Based on the new evidence, the Court of Appeal reversed as to the one child in a published opinion. It remanded the matter for a new permanent plan hearing. (Staff attorney Vicki Firstman)

In re Steven G. (H024580)
Panel attorney: Carolyn Todd
Date: June 10, 2003

In a previous appeal, the Court of Appeal reversed for failure to comply with the Indian Child Welfare Act. CPS sent notice for the Indian tribe to the wrong address. While this appeal was pending, CPS sent new notices to the tribes and sought to have the Court of Appeal take judicial notice of the new efforts to notify the tribes. Appellant pointed out that the notices that were sent were defective for failing to include required information. The Court of Appeal reversed for the juvenile court to determine if ICWA has been complied with. (Staff attorney Jonathan Grossman)

In re Nicholas S. (H024913)
Panel attorneys: Catherine Campbell (mother)
Ann Jory (father)
Date: June 27, 2003

The parents opposed CPS's recommendation to terminate parental rights. On June 4, 2002, both parents were present and asked for a contested hearing. The court scheduled a settlement conference for June 25 and the contested permanent plan hearing for July 18. It told

the parents to attend both dates and advised them that their parental rights could be terminated at the July 18 hearing. On June 25, both parents failed to appear. The court asked for an offer of proof. When a satisfactory offer of proof could not be made, the court terminated parental rights and vacated the July 18 hearing. The Court of Appeal did not find error in the court requiring an offer of proof. But it held the parents did not receive adequate notice that their parental rights could be terminated at the June 25 hearing, and this required reversal of the order freeing the minor for adoption. (Staff attorney Jonathan Grossman)

In re Amber B. (H024812)
Panel attorney: Julie Ten Eyck
Date: June 30, 2003

The court assumed jurisdiction, removed the child, and offered reunification services. It scheduled visitation but provided the minor "shall not be forced to visit" appellant. The Court of Appeal struck this order as impermissibly permitting the minor to veto visitation. (Staff attorney Jonathan Grossman)

In re N.P. (H025024)
Panel attorneys: Maureen Keaney and Frank Free
Date: July 30, 2003

The mother had three children removed during this dependency, the two younger ones were the children of the father in this appeal. Although the court rejected claims the children were not adoptable, it reversed the termination of parental rights as to the oldest child based on new information provided by minors' counsel that the child's placement failed and she appeared to no longer be adoptable. The court of appeal also reversed for the juvenile court to give proper notice pursuant to ICWA. (Staff attorney Jonathan Grossman)

**HABEAS ORDERS TO SHOW CAUSE**
People v. Ronald Gezzi (H023875)
Panel attorney: Jill M. Bojarski
Date: January 3, 2003

Appellant was driving a white Jeep Cherokee when he was stopped by the police for matching the description of a person who robbed a 7-Eleven two weeks previously. The robber escaped in a white Jeep Cherokee. Witnesses identified appellant as the robber, but they were not certain. Appellant presented an alibi defense, claiming he was with his wife and she remembered the day because she had a doctor's appointment the next day. Appellant's attorney asked her what the appointment was for, but the prosecution objected that it was irrelevant.

Appellant's counsel said it was relevant but made no offer of proof. The court sustained the objection. As it turned out, the wife's appointment was to receive the results of tests which would indicate whether she had cancer and needed a hysterectomy. The gravity of the appointment was necessary to bolster her credibility as to why she would remember this day. This would have helped rebut the natural presumption by the jurors that her favorable testimony was because she was biased for her husband. Additionally, counsel failed to present medical records which would have corroborated her recollection of events, failed to get a hold of a witness who could have corroborated part of the alibi, failed to present evidence of appellant's income which would have demonstrated a lack of motive to commit the robbery, and failed to present an expert witness who would have established that white Jeep Cherokees were very common. The Court of Appeal issued an order to show cause on the claim that trial counsel was ineffective. (Staff attorney Jonathan Grossman)

People v. Bernie Demetrio Becerra (H025220)
Panel attorney: John Schuck
Date: March 27, 2003

Appellant was charged with 13 felonies and some conduct enhancements. It was also alleged he had three prior strike convictions. As charged, he could have been sentenced to serve 150 years to life. Upon the urging of trial counsel, appellant pled no contest to eight of the charges; the prosecution dismissed the other five because it believed there was insufficient evidence or because Penal Code section 654 prohibited imposing a sentence on the remaining charges. Appellant admitted he suffered three prior strike convictions. At the sentencing hearing, the prosecution stated that two of the three priors did not qualify as strikes. They were convictions for assault with a deadly weapon, but appellant did not personally use a weapon. The two strikes were dismissed and appellant was sentenced to 28 years 4 months. Trial counsel did not move to withdraw the plea. In a declaration attached to appellant's habeas petition, trial counsel stated he did not know that they did not qualify as strikes, and had he known he would not have recommended appellant enter the plea. The court of appeal issued an order to show cause. (Staff attorney Williams Robinson)

People v. Sunny Nguyen (H019770)
Panel attorney: Lori Klein
Date: May 8, 2003

A jury found appellant guilty of three counts of murder with special circumstances. One of the strongest pieces of evidence against appellant was his confession. Appellant, who speaks Vietnamese, insisted he asked for an attorney before questioning began. The transcript of the audiotaped interrogation has several entries labeled "(inaudible)." Appellate arranged for a Vietnamese interpreter to hear the tape. According to the interpreter, in one of the passages which was purportedly inaudible, appellant said the word "lawyer" in English and asked for an attorney, though the rest of the sentence was in Vietnamese. A petition for writ of habeas corpus

was filed. The Court of Appeal had issued an order to show cause. After an evidentiary hearing in the superior court, the referee found that Mr. Nguyen asked for a lawyer. The Court of Appeal adopted the finding. It also held that Mr. Nguyen's previous statement to the police was inadmissible because it was a custodial interrogation without advising him of his rights under *Miranda*. The conviction was reversed. (Staff attorney Lori Quick)

In re Minh Phan (H025407)
Attorney: Jill Lansing
Date: July 22, 2003

Defendant was convicted of felony assault with a great bodily injury enhancement. The victim was driving his van down a congested thoroughfare when he changed lanes. He was next to a car driven by the defendant who had a passenger. They were yelling something at the victim which he did not hear. A bottle was thrown at the victim's van. In response, the victim cut in front of defendant's car and parked on the median of the road. Defendant stopped behind the victim. A fight started which the victim lost. The court of appeal issued an order to show cause based on a claim of ineffective assistance of counsel. Trial counsel failed to present a witness which would have contradicted statements made by a prosecution witness. Trial counsel a;sp failed to introduce medical records which would have shown the victim did not suffer great bodily injury. (Staff attorney Lori Quick)

In re Ephrahim Sadeghy
Staff attorney: Dallas Sacher
Date: August 21, 2003

The superior court ordered relief on a petition for writ of habeas corpus after petitioner was denied parole. Petitioner was convicted of murder. He had no previous record, a classification score of zero, no disciplinary actions against him, and a good work history in prison. Two evaluator concluded he would pose no greater risk to public safety than the average person. He had a home and support to rely on if released on parole. Parole was denied simply because of the nature of the crime. The court found this reason alone was insufficient.

In re Dave Bautista (H026395)
Panel attorney: Meredith Fahn
Date: October 7, 2003

Bautista was charged with possessing for sale marijuana (Health & Saf. Code, § 11359.) He pled guilty in exchange to a 16 months prison sentence. He later learned the conviction was considered by the Immigration Service to be an aggravated felony. Had he pled guilty to transporting or selling marijuana (Health & Saf. Code, § 11360), this would not have been considered to be an aggravated felony. Trial counsel never considered negotiating for a more

serious charge in exchange to more favorable immigration consequences. The court of appeal issued an order to show cause returnable to the court of appeal. (Staff attorney Vicki Firstman)

In re Natalie Lozano (H025798)
Staff attorney: Dallas Sacher
Date: November 6, 2003

Lozano pled no contest to grand theft and petty theft with a prior conviction, based on the same incident. Lozano contended that trial counsel failed to advise him that he could not be convicted of petty theft and grand theft for the same item, and had he known this, he would not have pled to the petty theft. Trial counsel conceded he did not tell her she should not be convicted of both theft counts, but he did say she should not be punished for both. The court of appeal issued an order to show cause.

**OTHER**
People v, Melvin Dale (H024067)
Attorney: Seth Flagsberg
Date: January 21, 2003

Defendant had a court trial on the prior conviction. The court found insufficient evidence that his prior conviction for violating Penal Code section 245 was a strike. The prosecution appealed. The Court of Appeal dismissed, stating the order is not appealable under Penal Code section 1238. The opinion was published, but upon a petition for review, the Supreme Court ordered a grant and hold. (Santa Clara Public Defender's Office)

Roman Vara v. the People (H024928 et al.)
Panel attorney: Gerald Clausen
Date: October 28, 2003

A jury convicted Roman Vara of two counts of aggravated assault against a minor which was witnessed by a second minor. While the appeal was appending, appellate counsel sought to discover in the juvenile court whether there were any material information in the juvenile files of the minors which would have been relevant at trial. The People opposed the motion. The juvenile court denied the motion to disclose information from the juvenile files, ruling that they were not adjudicated for committing a crime under Welfare and Institutions Code section 707, and the court does not grant discovery motions unless there is an adjudication for a section 707 offense. Vara appealed. In the meantime, the court of appeal reversed the conviction on the first appeal, though he could be retried. In the appeal from the discovery motion, county counsel purported to represent the juvenile court and substituted in for the Attorney General's Office. The court of appeal held: (1) The juvenile court was not a party and could not be represented on appeal and county counsel did not properly substitute in as it did not comply with the rules of court for substitution of a party. Further, the brief submitted by county counsel should not be

considered as an amicus brief because the rules of court for filing an amicus brief were not followed; nonetheless, the court of appeal considered the brief so that respondent's view could be voiced. (2) The juvenile court abused its discretion in denying the discovery motion because a standard practice of denying discovery in all cases where there is not an adjudication for a section 707 offense was not a case-specific application of discretion. (3) The appeal was not moot because appellant could be retried. (Staff attorney Vicki Firstman)