

**SUFFICIENCY OF THE EVIDENCE
PRETRIAL AND POSTTRIAL MOTIONS
ERROR AT TRIAL OR HEARING
SENTENCING.
DEPENDENCY CASES
HABEAS PROCEEDINGS
MISCELLANEOUS**

SUFFICIENCY OF THE EVIDENCE

In re Rodrigo E. (H031719)

Staff attorney: Lori Quick

Date: December 21, 2007

The court of appeal reduced the juvenile court's finding that appellant committed a robbery to attempted robbery because the victim retained possession of the property.

People v. Roger White

Panel attorney: Heather McKay

Date: August 23, 2007

The superior court made an order not to contact certain witnesses. There was no showing of need. Appellant subsequently had contact with them, and he was charged with contempt. The court of appeal found the conviction for contempt must be reversed because of a failure to meet the statutory requirement of showing need. The court also reversed the sentence on the principle term for imposing the upper term. Finally, the court found insufficient evidence for the imposition of attorney fees. (Staff attorney William Robinson)

People v. Armstrong (H029397)

Panel attorney: Jill Fordyce

Date: August 28, 2007

Appellant had videotaped a girl in various stages of undress in the bathroom of the house. She was not aware she was being videotaped. He was convicted of having a minor model for pornography. The court of appeal found there was insufficient evidence because the minor was unaware she was being recorded. (Staff attorney Dallas Sacher)

People v. Thomas Medeiros (H028934)

Panel attorney; Elisa Brandes

Date: August 1, 2007

Appellant was a member of a three-person team charged with cleaning a vat of grease at

a site. Instead of placing the grease in their truck, the grease was flushed through the sewer system. This was illegal because in such large quantities it is a toxic waste. The procedure damaged the sewage system. While it was clear that the main operator committed the crime, there was insufficient evidence appellant was guilty of the crime. There was no evidence he actually committed the act or aided in it. (Staff attorney Paul Couenhoven)

People v. Ronald Williams (H029942)

Staff attorney: Lori Quick

Date: July 27, 2007

After a jury convicted appellant of various felonies, the court found he committed a prior strike based on a probation report and preliminary hearing transcript that he committed great bodily injury. The relevant portions of the preliminary hearing transcript was hearsay and the probation report was inadmissible to show he personally used great bodily injury.

People v. Carl Landry (H0277550)

Panel attorney: Victoria Stafford

Date: July 17, 2007

Appellant was charged with aiding and abetting in a robbery of a hotel. The only evidence was the statements by some of the participants that he was there. He was not inside committing the crimes because the video showed the other three committing the crimes. (Staff attorney William Robinson)

People v. Alfredo Abanico and Vincent Lopez (H029034)

Panel attorney: Candace Hale and Emry Allen

Date: July 6, 2007

The court of appeal decided there was insufficient evidence to support a gang enhancement when the two defendants committed their crimes. One of them was a gang member, another associated with gang members. But the crimes had no apparent connection to a gang, just two people with one of them who happened to be a gang member committing crimes. The gang expert's opinion that the crimes increased the reputation of the gang in the community was insufficient. (Staff member Dallas Sacher)

People v. Eddie Eustice (H030093)

Staff attorney: Dallas Sacher

Date: May 10, 2007

Appellant was convicted of violating Penal Code section 1320.5, among other things, which makes it a crime to fail to appear when on bail on a felony. The evidence showed

appellant was on OR at the time. The conviction was reversed because of insufficient evidence.

People v. Arturo Albino (H038693)

Panel attorney: Ozro Childs

Date: January 19, 2007

Appellant lured his wife into his car and then instructed her drive while holding a knife at her. She tried to grab the knife, resulting in cutting her hand which required stitches. When the car stopped, she grabbed the knife and tried to flee. Appellant grabbed her, and she threw the knife back in the car. He started choking her. After she lost consciousness, police arrived. He was convicted of attempted premeditated murder, attempted kidnapping, domestic violence, and aggravated assault with an enhancement for personally using a knife. The court of appeal agreed there was insufficient evidence to support the enhancement for attempted murder. (Staff attorney Lori Quick)

In re Ernesto H. (H029814)

Staff attorney: Michael Kresser

Date: January 12, 2007

Appellant and his companions attacked a man wearing a gray-blue sweatshirt with a 49ers logo. Appellant had blamed the victim for attacking his cousin earlier. The prosecution gang expert said appellant was a member of the SVL Norteno gang, as he had associated with numerous gang members in the past. The expert opined the SVL gang benefitted from appellant's assault because the violence added prestige for the gang and the attackers wore red clothing. The juvenile court found appellant committed attempted premeditated murder that he acted for the benefit of a criminal street gang. The court of appeal held there was insufficient evidence to sustain the gang enhancement. There was no evidence that appellant's companions were gang members or that the victim was seen as a rival gang member, as he wore a 49ers sweatshirt which is often worn by Nortenos. Appellant's mere membership in a gang was insufficient reason to conclude that every crime he committed was for the benefit of a gang.

PRETRIAL AND POSTTRIAL MOTIONS

People v. Jermaine Pina (H030819)

Panel attorney: R. Charles Johnson

Date: October 29, 2007

Appellant moved for discovery of the police officers' personnel files. The custodian told the court, not under oath, that nothing relevant to the request was in the files. Based on this, the court denied the motion. The court of appeal agreed that the court must make an independent assessment based on facts in evidence. (Staff attorney Jonathan Grossman)

People v. Charles Fordjour (H030466)
Staff attorney: Paul Couenhoven
Date: October 3, 2007

The court of appeal had reversed the matter for a proper *Marsden* hearing. On remand, the superior court held what the appellate court later described to be closer to a court conducted cross-examination of the defendant. Nonetheless, the court of appeal found the hearing was adequate. But it reversed the judgment because the trial court failed to explore appellant's request to represent himself.

People v. Robert Mays (H030505)
Panel attorney: J. Frank McCabe
Date: September 25, 2007

Appellant was charged with first degree murder and conspiracy as well as an enhancement for personal use of a gun. As the trial began, he and trial counsel reached a strong disagreement over trial counsel's failure to remove a juror at voir dire whom he knew and appeared to be biased against him. Appellant chose to plead guilty and admit the enhancement. He then moved to withdraw his plea, explaining that his plea was involuntary based on his desire to avoid being tried by the acquaintance. The court denied his motion to withdraw his plea and sentenced him to serve 50 years to life in prison. The court of appeal reversed. While a defendant cannot blackmail counsel to do what he wishes or else he would plea, the plea must nonetheless be free and voluntary. Here, appellant pled because it was the only method he knew of to avoid being tried by the juror. (Staff attorney William Robinson)

People v. Timphony Walker (H029685)
Panel attorney: Catherine White
Date: September 25, 2007

Appellant was charged with robbery with two prior strikes. He pled not guilty by reason of insanity. Trial counsel moved to continue the trial. She was moving from the public defender's office to the alternative public defender's office. Since she was between jobs, she had no clerical staff to assist her. There was a recent death in her family and a funeral had not yet been scheduled. Consequently, she was not adequately prepared to go to trial. Most importantly, she was playing phone tag with her expert witness and recently learned he would not be available for two weeks. The court denied the continuance, and appellant was convicted and sentenced to serve life in prison. The court of appeal held that there was good cause, as trial counsel exercised due diligence. The failure to grant the continuance prejudiced appellant, requiring reversal. (Staff attorney Jonathan Grossman)

People v. Joel Castillo (H030338)

Staff attorney: William Robinson
Date: September 20, 007

Appellant pled guilty to shooting into an occupied vehicle and attempted murder. He submitted to the court whether the attempted murder was premeditated. He then disappeared for nine years. Upon his return, he orally moved to withdraw his plea. The court said it was too late for that. Because he had not been sentenced, the motion was timely. The court erred in refusing to consider his motion.

People v. Hutcherson (H030270)
Panel attorney: Robert Derham
Date: August 31, 2007

Appellant was walking across the street at 1:30 a.m. when an officer asked appellant to talk with him. Appellant's hand was clenched, and the officers repeatedly asked to see what was in his hand. They eventually searched his hand and found crack cocaine. After the motion to suppress was denied, he was convicted and sentenced to serve life in prison under the Three Strikes Law. The court of appeal reversed the denial of the suppression motion. It held that an officer "asking" to talk to an individual in the street late at night was a show of authority. Even if there were initially a consensual encounter, it became a detention when officers demanded to search him. There was no reasonable cause for the stop, so the evidence should have been suppressed. (Staff attorney Michael Kresser)

People v. Delray Rawls (H030501)
Panel attorney: Hilda Scheib
Date: August 16, 2007

Represented by retained counsel, appellant pled no contest to a set of crimes. Before sentencing, he moved to discharge counsel and have a public defender appointed in order to bring a motion to withdraw plea. The court held a *Marsden* hearing and determined there was not grounds for substituting counsel or to withdraw plea. trial. The court of appeal reversed. Absent a disruption in court proceedings, a defendant has an absolute right to discharge retained counsel. The matter must be remanded for him to have an opportunity to obtain new counsel and bring a motion to withdraw plea. (Staff attorney Lori Quick)

People v. David Lara (H028895)
Panel attorney: Laoretta Oravitz-Komlos
Date: July 17, 2007

Appellant was found not guilty by reason of insanity. The government filed a petition to extend the commitment about a month before his commitment was to expire; this was five

months after the statutory deadline. The trial court denied his motion to dismiss the petition. On appeal, the court decided the delay deprived him of due process and required dismissal. (Staff attorney Lori Quick)

People v. Cain Beltran (H029887)
Staff attorney: Jonathan Grossman
Date: June 29, 2007

Appellant retained counsel. At sentencing he wanted to remove counsel because he refused to file a motion to withdraw his plea. The court held a *Marsden* hearing. The court of appeal reversed for a new hearing, holding that appellant did not need to show cause to discharged retained counsel.

People v. Bobby Gonzalez (H030100)
Panel attorney: David Martin
Date: June 25, 2007

The trial court's refusal to permit appellant to discharge counsel and to grant a continuance to obtain new counsel at sentencing so that he could prepare a motion to withdraw plea was an abuse of discretion. The court also erred in imposing an enhancement as the base term consecutive to an indeterminate term. (Staff attorney Williams Robinson)

People v. Hernandez (H029725)
Panel attorney: Carlo Andreani
Date: June 22, 2007

A girl accused appellant of molesting her and described a star-shaped tattoo on his penis, though he had no such tattoo. He waived the right to a jury in exchange of a sentence of no more than ten years if he is convicted by the court. At sentencing, appellant himself complained about trial counsel's lack of preparation. The court deemed it a *Marsden* motion, though there was never a closed hearing, and denied it. Acknowledging it was a close case, it nonetheless sentenced appellant to prison. The court of appeal reversed, stating the trial court should have held a formal *Marsden* hearing. Further, the imposition of the upper term violated *Cunningham*. (Staff attorney Vicki Firstman)

People v. Joe Rubio (H028213)
Panel attorney: Robert Derham
Date: June 11, 2007

During the trial an elderly juror was unable to hear portions of the trial but failed to tell the court this until the end of trial. The juror especially had difficulty hearing defense counsel.

The trial court denied appellant's new trial motion, deciding that the juror did not commit misconduct because it appeared she did not miss significant portions of the trial. The court of appeal reversed. Whether a juror committed misconduct is reviewed for substantial evidence. Since the juror was instructed to alert the court whenever she did hear the proceeding, her failure to do so was misconduct. Whether there was prejudice is reviewed independently, and there is a presumption of prejudice. The court determined the presumption was not rebutted and reversed the judgment. (Staff attorney Lori Quick)

People v. John Heard (H030407)

Panel attorney: Julie Schumer

Date: June 1, 2007

Appellant had claimed on appeal that the trial court erred in not holding a *Marsden* motion at the sentencing hearing. The court of appeal decided the record was ambiguous as to whether such a motion was made. It ordered the trial court to hold a hearing to determine if a *Marsden* motion was made; and, if so, the court would then be required to hold the hearing. On remand, defense counsel and the prosecutor were present, but not appellant. The court determined a *Marsden* motion was not made. On the second appeal, the court of appeal held that holding the hearing without appellant present violated due process and reversed again. (Staff attorney Dallas Sacher)

People v. Bobby Chung (H029551)

Panel attorney: Joan Isserlis

Date: May 18, 2007

A jury convicted appellant of three counts of commercial burglary, three counts of writing checks with insufficient funds, one count of robbery, one count of assault, and two counts of possessing drug paraphernalia. Before trial, the court denied appellant's motion to sever the drug charges. On appeal, the judgment was reversed for failing to sever the charges. Error was prejudicial because it permitted the jury to make the improper inference that he was guilty of the theft-related offenses in order to support a drug habit. (Staff attorney Lori Quick)

People v. Madayag (H029906)

Panel attorney: Julie Schumer

Date: April 27, 2007

Responding to a *Pitchess* motion, the custodian of records said there were no documents responsive to the request. Potentially relevant documents were not lodged at the court, leaving no record to review on appeal. The court of appeal remanded the matter for a new *Pitchess* hearing. (Staff attorney Vicki Firstman)

People v. Carlos DeLeon (H029563)
Panel attorney: Silas Geneson
Date: April 2, 2007

Appellant was stopped for a traffic violation. After checking appellant's driver's license and registration and learning that there were no warrants for him, the officer asked him to step out of his car and requested permission to search his car. Appellant told the officer to search, and they found drugs. The court of appeal agreed the stop was unlawfully prolonged. Once the officer confirmed he had a valid license and registration and no wants, the detention should have ended. Appellant's 'consent' to step out of the car and have it searched was acquiescence to authority. (Dallas Sacher)

People v. Connie Castro (H030121)
Panel attorney: Kathleen Novoa
Date: April 10, 2007

The court of appeal agreed that conditions of probation not to associate with gang members or people on probation or parole, or to be in a car which was stolen or which contained firearms or illegal weapons be modified to require knowledge. (Staff attorney Vicki Firstman)

People v. Richard Jaramillo (H030089)
Staff attorney: Lori Quick
Date: April 4, 2007

Appellant was convicted of receiving stolen property. The property he received was described as Banana Republic clothing. At sentencing, the court ordered he pay restitution to the one who had the items stolen, including the Banana Republic Clothing and a pair of Oakley sunglasses. The court of appeal agreed that appellant was not convicted of receiving the sunglasses or the burglary of the victim, so he could not be ordered to pay for the loss of the sunglasses. Further, the court could not make payment of probation supervision costs a condition of probation.

People v. Jose Hernandez (H029509)
Panel attorney: Victoria Stafford
Date: January 29, 2007

A jury convicted appellant of attempted murder in count one and attempted murder of a peace officer in count two. The court of appeal reversed the conviction for count one because it was a lesser included offense of count two. (Dallas Sacher)

People v. Peter Flores (H029150)

Panel attorney: Ruth McVeigh
Date: January 5, 2007

Appellant stopped his car at a bus stop to talk to a pedestrian; thus impeding traffic. The officer pulled him over. Appellant did not have a driver's license. He followed the officer's directions to step out of the car. He wore a red belt, which concerned the officer. He pat searched appellant for safety reasons and to learn if he had identification. During the search, appellant began to resist. Eventually, the officers found methamphetamine. It was later determined that appellant had provided a false name and he was on parole. The court denied the motion to suppress evidence. On appeal, the prosecution argued the contraband would have inevitably been found even if there were no a pat search without reasonable suspicion that he was armed. The court of appeal of appeal reversed, holding that justifying the search on appellant's parole status, which was unknown to the officer at the time, could not justify the search. The court, however, remanded the matter to litigate the new theory of inevitable discovery. (Staff attorney Paul Couenhoven)

ERROR AT TRIAL OR HEARING

People v. Johnny Viet Le (H030808)
Panel attorney: Kyle Gee
Date: December 27, 2007

In reaction to appellant's wife having an affair, he killed her boyfriend. His defense at trial was heat of passion. During deliberations, the jury asked whether mere words, in this case taunting, could constitute heat of passion. The court read a self-defense instruction that mere words is insufficient to permit a battery. In a published decision, the court of appeal reversed. While mere words are insufficient for self-defense, it can be sufficient for a heat of passion defense. (Staff attorney William Robinson)

People v. Miguel Barajas (H030602)
Panel attorney: J. Wilder Lee
Date: December 20, 2007

The day of sentencing, appellant wanted to withdraw his plea. The court agreed to substitute counsel but denied a continuance for new counsel to prepare a motion to withdraw a plea. It then increased the sentence greater than that permitted by the plea bargain on the ground that appellant failed to appear earlier for sentencing and there had been a *Cruz* waiver. The court of appeal reversed, stating counsel could not have adequately represented appellant when he was substituted in that day and given no opportunity to investigate whether to withdraw plea or what sentencing issues might arise. It noted there was never a valid *Cruz* waiver. Further, one of the counts should have been stayed pursuant to Penal Code section 654. (Staff attorney Lori Quick)

People v. John Romayor (H030702)
Panel attorney: Jean Matulis
Date: December 20, 2007

Appellant was developmentally disabled and receiving services from a regional center. He had a history of not doing well on probation. At one hearing, the court decided that he should be ordered to live in a 24 hour care facility ran by the local regional center. There was no petition to violate probation, notice of the recommendation, or an opportunity for appellant to speak in opposition to the decision. The court of appeal reversed due to lack of notice. (Staff attorney Jonathan Grossman)

People v. George Cabrera (H031485)
Staff attorney: Jonathan Grossman
Date: December 5, 2007

Appellant was on Proposition 36 probation in San Benito County when he committed a felony in Sacramento County. After being sentenced to prison on the latter case, he wrote to the San Benito County Probation Office and informed his probation officer that he was in prison on another felony, though he asked his probation not be violated. After he was released from prison, he violated parole, and a violation of probation was finally filed. Upon completing his term for the parole violation, he was arraigned in San Benito County for a violation of probation. He moved to dismiss the VOP because jurisdiction terminated pursuant to Penal Code section 1203.2a. The court denied the motion and sentenced him to prison on the VOP. The court of appeal reversed. The information sent to the probation officer of his imprisonment on another felony triggered a mandatory duty on the officer to notify the court. Its undisputed failure to do so terminated the court's jurisdiction.

People v. Jensen (H029971)
Panel attorney: J. Courtney Shevelson
Date: November 27, 2007

Appellant had been convicted and sentenced to serve 25 years to life consecutive to three years and a \$500 restitution fine. The conviction had been reversed on appeal because of instructional error at trial. On remand, the court allowed the prosecution to amend the information to add eight new counts. The prosecution argued there was no prejudice from the amendment because the underlying facts were contained in the preliminary hearing transcript. Upon conviction, the court sentenced appellant to serve 25 years consecutive to five years four months in prison, and the court imposed a \$10,000 restitution fine. In the new appeal, the court agreed trial counsel was ineffective for not objecting to the amendment as vindictive and the court of appeal ordered that the convictions for the new charges be stricken. It further found that the increased time in prison and the increased fine from the previous conviction violated California's double jeopardy clause. (Staff attorney William Robinson)

People v. Frederick Ruiz (H030223)
Panel attorney: Danalynn Pritz
Date: November 16, 2007

Appellant was convicted of committing murder while a prisoner in Soledad and sentenced to serve life in prison without parole. The conviction was reversed because he was shackled during the trial without a showing of good cause. (Staff attorney William Robinson)

People v. James Wood (H029297)
Panel attorney: Jill Fordyce
Date: October 29, 2007

Appellant suffered from schizophrenia. An elderly woman saw from her house appellant walk up in an expression-less manner wielding a knife. He broke into her home and slashed toward her face. She suffered mostly defensive wounds to her arms. Appellant was charged with attempted murder with premeditation and aggravated mayhem which requires the specific intent to maim. The court rejected a defense requested instruction that the specific intent to maim cannot be inferred solely from the injuries. The court of appeal reversed the conviction for aggravated mayhem, holding the instruction in this case would have addressed the main issue in dispute on the charge. (Staff attorney Vicki Firstman)

People v. Leonard Ross (H030005)
Staff attorney: David McNeil Morse
Date: September 28, 2007

Appellant and his girlfriend were in a verbal argument. She slapped him, and he punched her, breaking her cheekbone. He claimed self-defense. The court instructed the jury that the right to self-defense is not available if one engaged in "mutual combat." The jury requested a definition of mutual combat, but none was provided. In a published opinion, the court of appeal held that mutual combat required a pre-arranged fight, an implied or expressed agreement to fight, or consent to a fight. Since the jury could have found there was not a mutual combat in this case if it were properly instructed, reversal was required. (Paul Couenhoven)

People v. Jose Ramirez (H030739)
Panel attorney: Tara Morrissey
Date: August 28, 2007

Appellant was improperly convicted of both theft and receiving the same property. (Staff attorney Paul Couenhoven)

People v. Sammy Reynaga (H029542)
Panel attorney: Eileen Kotler
Date: August 15, 2007

Appellant was charged with about a dozen counts. In a break during voir dire, a potential juror overheard that appellant offered to enter a plea bargain. The potential juror disclosed this to the rest of the jurors during voir dire. Appellant's motion for a mistrial was denied. After his conviction, the court of appeal reversed. It held that the information was inherently prejudicial and deprived him of a fair jury. (Staff attorney Paul Couenhoven)

People v. Carlos Aguilar (H030743)
Panel attorney: Julie Schumer
Date: July 27, 2007

Appellant pled guilty of possession of illegal weapons, and the gang enhancement was dismissed. The court nonetheless ordered that he register as a gang member. On appeal, the court agreed there was insufficient evidence to impose the gang registration requirement when the only evidence was that he possessed the weapons alone. (Staff attorney William Robinson)

People v. Ralph Aceves (H030246)
Staff attorney: Lori Quick
Date: July 25, 2007

Appellant pled to some charges and then asked if he could have a new attorney, apparently to file a motion to withdraw plea. The court summarily denied the request and sentenced him. The court of appeal reversed. Appellant's request amounted to a *Marsden* motion which required the court to hold a hearing. The issue was cognizable on appeal because it occurred after the plea. Although the purpose of the *Marsden* motion was to move to withdraw the plea, the issue on appeal did not attack the validity of the plea but instead the denial of a *Marsden* hearing, so it did not require a certificate of probable cause.

People v. Dennis Sierra (H029790)
Panel attorney: George Schraer
Date: July 17, 2007

Appellant killed his grandfather. He entered a plea of not guilty by reason of insanity. He had asked for an audiotape of his statements to the police soon after the incident, but the tape was not handed over until after the trial. He claimed the tape was exculpatory Brady material. The government countered that appellant was able to present evidence of his delusional state at the time of the murder and there were some incriminating statements in the tape, so it was not exculpatory or material. The court of appeal disagreed. Actually hearing how incoherent he was

at the time of the incident was devastating evidence of insanity. The fact that he admitted committing the killing, an issue not in dispute, did not make the tape any less exculpatory. (Staff attorney Dallas Sacher)

People v. Robert Baker (H030012)

Panel attorney: Han Tran

Date: July 16, 2007

Appellant pled not guilty to misdemeanor possession of a firearm and possession of an illegal weapon. He rejected an offer of probation with six months in jail and went to trial. After trial, he was found guilty of possessing the firearm but not the illegal weapon. The court placed him on probation on condition that he serve nine months jail. At arriving at nine months jail, the court said additional time from the original offer was warranted for not taking responsibility for his crimes. The court of appeal reversed because he was punished for exercising his constitutional right to a jury trial. (Staff attorney Paul Couenhoven)

People v. Nathaniel Dixon (H030558)

Panel attorney: Rudy Kraft

Date: July 13, 2007

Appellant pled guilty and not guilty by reason of insanity. He later agreed to change the not guilty plea in exchange for a sentence of no more than two years. Without conducting a sanity trial, the court sentenced him to prison. As the Attorney General conceded, and the court agreed, the order was illegal. The matter was remanded for a sanity trial. (Staff attorney William Robinson)

People v. Tam Vo (H029339)

Panel attorney: Danalynn Pritz

Date: June 13, 2007

The court of appeal agreed that two prior robbery convictions in Minnesota qualified as prior serious felonies because that state's statute did not require specific intent. Further, the court erred in imposing a prison prior for a punishment that had been stayed pursuant to Penal Code section 654. (Staff attorney William Robinson)

People v. Albert Sanchez (H029254)

Panel attorney: Paul Kleven

Date: June 12, 2007

Conviction was reversed because of ineffective assistance of counsel. Trial counsel

successfully moved to exclude appellant's prior conviction for possessing methamphetamine. However, trial counsel did not seek to redact from the dispatch tape which was admitted into evidence that appellant was a "narco reg," or the officer's testimony that this indicated he suffered a prior drug conviction. Further, she permitted to have introduced into evidence appellant's statement that he was not willing to return to prison. The evidence should have been excluded and prejudiced his trial. (Staff attorney Michael Kresser)

People v. Homero Villalobos (H028703)

Panel attorneys: Mark Farbman (Villalobos) and Solomon Wollack (Maltos)

Date: May 24, 2007

A jury convicted appellants of four counts of attempted murder, as well as shooting into an occupied vehicle. It found true weapon and gang enhancements, and both were sentenced to serve 125 years to life in prison. The court of appeal held the trial court prejudicially erred in excluding evidence proffered by Maltos that Villalobos admitted to his brother he was the shooter and Maltos was simply present and not necessary aware of Villalobos's intentions. Further, the gang enhancement was reversed due to lack of evidence of members of the gang engaging in a pattern of criminal activity. This resulted in an enhancement under Penal Code section 12022.53, subdivision (e) to be reversed as to Villalobos. (Staff attorney William Robinson)

People v. Sammuel Reynaga (H029542)

Panel attorney: Eileen Kotler

Date: May 9, 2007

The conviction was reversed because a jury mentioned to the other jurors at voir dire that appellant attempted to accept before trial a plea deal. The court of appeal held the information of appellant admitting guilt was prejudicial and his mistrial motion should have been granted. (Staff attorney Paul Couenhoven)

People v. Carlin (H028513)

Panel attorney: J. Wilder Lee

Date: April 26, 2007

The court of appeal reversed an SVP commitment in a published decision. To prove substantial sexual conduct, the government introduced statements from one of the complaining witnesses made to a witness years after the incident. The court of appeal held the admission of the evidence violated due process because there was no indicia of reliability. (Staff attorney Jonathan Grossman)

People v. Joseph Horne (H028478)
Panel attorney: Stephen Bredrick
Date: April 13, 2007

A jury convicted appellant of making a criminal threat, among other things. The conviction was reversed because the jury was not instructed that when the defendant makes a threat to a third party, there is no crime unless the defendant intended the threat to be conveyed to the subject of the threat. Further, the jury was not given a unanimity instruction when the evidence showed two separate acts on different occasions could have been the basis of the conviction. (Staff attorney Paul Couenhoven)

People v. Gary Fox (H028937)
Panel attorney: Hilda Scheib
Date: March 15, 2007

Appellant was serving a prison sentence when he was interrogated about a new case. He was placed in a more restrictive setting but not told his *Miranda* rights. The trial court overruled appellant's objection in admitting his statements. When the jury was deliberated, the court provided it a written response to a question. Mixed in the answer was documentation of his prior convictions which had been excluded from trial. The trial court overruled appellant's mistrial motion. A divided court of appeal reversed, holding the statements from the interrogation was inadmissible and the error required reversal. (Staff attorney Jonathan Grossman)

People v. Timothy Lewis (H0027950)
Panel attorney: David Morse
Date: March 5, 2007

Appellant was charged with fraud and check forgery. Appellant's alleged accomplice spoke with the deputy district attorney before the preliminary hearing and made some incriminating statements. At the preliminary hearing, she testified and made only exculpatory statements. She was unavailable to testify at trial. The court admitted her statements to the district attorney and at the preliminary hearing. The court of appeal reversed. Since her statements at the preliminary hearing were exculpatory, appellant had no meaningful opportunity to cross-examine her. Admission of the statements violated the Confrontation Clause. (Staff attorney Vicki Firstman)

SENTENCING.

People v. Leroy Etienne (H030421)
Staff attorney: Williams Robinson
Date: December 28, 2007

Using the formula provided in Penal Code section 1202.4, the court assessed a restitution fine of \$1600. This was accomplished by multiplying the length of the sentence and the number of convictions by \$200. However, the punishment for one of the counts was stayed pursuant to Penal Code section 654. A stayed count should not be used in the calculation. Thus, the court of appeal reduced the fine to \$1000.

People v. Alejandro Villacana (H030779)
Panel attorney: James Duffy
Date: December 28, 2007

Appellant pled guilty to some charges in 2001. At the time, the court imposed a \$200 restitution fine, \$1400 in victim restitution, and no court security fee. In 2006, he was sentenced on a violation of probation. The court imposed a \$1400 restitution fine and a \$20 court security fee. The court of appeal reduced the restitution fine to \$200 and eliminated the court security fee because this was what was imposed at the original sentencing hearing. (Staff attorney Dallas Sacher)

People v. Billy Auyon (H027660)
Panel attorney: Julie Schumer
Date: December 21, 2007

Appellant received the upper term because he could have received a consecutive term, the crime indicated planning, a prior sustained juvenile adjudication leading to a commitment to CYA, appellant was on CYA parole at the time of the offense, and his performance on parole was unsatisfactory. The court of appeal reversed because the first factor was untrue, the second factor required a finding of the jury, and there was insufficient evidence to support the remaining factors. (Staff attorney William Robinson)

People v. Luis DeHaro (H031224)
Panel attorney: Kathleen Novoa
Date: December 21, 2007

The court placed appellant on probation and imposed a number “gang conditions” including that appellant shall not be in court for any reason other than his own case. The court of appeal modified the condition to permit him to attend civil cases. (Staff attorney Paul Couenhoven)

People v. Arthur Hernandez (H031135)
Panel attorney: Gloria Cohen
Date: December 17, 2007

When the court sentenced appellant, it did not orally pronounce a restitution fine. The minute order, however, reflected a \$10,000 restitution fine and other fines. The court of appeal struck the fines and reduced the restitution fine to the statutory minimum of \$200 because they were not part of the oral pronouncement of judgment. (Staff attorney Paul Couenhoven)

People v. Jose Chavez (H031415)
Staff attorney: Paul Couenhoven
Date: December 17, 2007

Appellant was sentenced to prison on several cases. Because he had a large amount of presentence credits, his sentence would have been shorter if the sentences were served consecutively instead of concurrently. Nonetheless, trial counsel failed to realize this and argued for concurrent sentences after the court indicated it would impose a consecutive sentence. The court of appeal reversed, finding ineffective assistance of counsel.

People v. Joseph Bassaly (H031613)
Panel attorney: John Schuck
Date: December 14, 2007

The court sentenced appellant to prison and ordered he have no contact with the victim or her family. The court of appeal reversed the order because there was no statutory authorization for the order. Further, the abstract was ordered to be amended to reflect accurately the amount of presentence credits. (Staff attorney Vicki Firstman)

People v. Steven Medellin (H031780)
Staff attorney: Lori Quick
Date: November 29, 2007

The trial court's imposition of penalty assessments were too high, and the court of appeal reduced the assessments by \$118.

People v. Rodney Torres (H027516)
Panel attorney: Matthew Wilson
Date: November 21, 2007

The court erred in imposing the upper term after *Black II* and *Sandoval*. (Staff attorney Jonathan Grossman)

People v. Edward Hulton (H029635)

Panel attorney: Rita Swenor
Date: November 16, 2007

The court erred in imposing the upper term after *Black II* and *Sandoval*. (Staff attorney Jonathan Grossman)

People v. James Stamos (H031047)
Panel attorney: Claire Cunningham
Date: November 14, 2007

The court erred in calculating the restitution fines pursuant to the formula in Penal Code section 1202.4 based in part on a conviction for which the punishment was stayed pursuant to Penal Code section 654. (Paul Couenhoven)

People v. Samuel Saldana (H027313)
Panel attorney: Joseph Shipp
Date: November 13, 2007

The court erred in imposing the upper term after *Black II* and *Sandoval*. (Staff attorney Vicki Firstman)

In re Cody F. (H031029)
Panel attorney: Lyn Woodward
Date: November 9, 2007

The matter was remanded for the juvenile court to declare whether the offense committed was a misdemeanor or a felony under *In re Manzy W.* (1997) 14 Cal.4th 1199. (Staff attorney Lori Quick)

People v. Derrick Mitchell (H030979)
Panel attorney: Jeffrey Glick
Date: October 30, 2007

The court reversed the assessment of a \$10,000 restitution fine which was never orally made by the judge at sentencing. (Staff attorney Jonathan Grossman)

People v. Thomas Napolitan (H030963)
Panel attorney: Trina Chatterjee
Date: October 22, 2007

Appellant, who was homeless, was convicted of auto theft, driving with a suspended license, and being under the influence. The court imposed a \$100 drug lab fee, but he was convicted of only one drug offense. The court of appeal agreed this should be reduced to \$50. The court also imposed \$200 in attorney fees, which the court of appeal reversed because there was insufficient evidence of an ability to pay. (Staff attorney Lori Quick)

People v. Herrera (H031036)
Panel attorney: J.J. Hamlyn
Date: October 19, 2007

19 year-old appellant was convicted of statutory rape and oral copulation with a minor against his 15 year-old girlfriend, and he automatically was required to register. The court of appeal agreed that under *People v. Hofsheier* (2006) 37 Cal.4th 1185, the equal protection clause requires the court to exercise discretion whether appellant should be required to register. (Staff attorney Paul Couenhoven)

People v. Marquez (H029431)
Panel attorney: Danalynn Pritz
Date: October 19, 2007

Appellant raped and hit his girlfriend and another occasion committed corporal injury, false imprisonment, battery, and aggravated assault on the same victim. The court of appeal agreed that the punishment for four of the counts should be stayed pursuant to Penal Code section 654 because they arose out of the same course of conduct with the same objective as the other two counts. (Staff attorney William Robinson)

People v. Kelvin Williams (H030831)
Panel attorney: John Schuck
Date: October 2, 2007

The court agreed to amend the abstract of judgment to reflect the correct amount of the fines. (Panel attorney William Robinson)

People v. Anna Ayala (H030471)
Panel attorney: Robert Durham
Date: September 21, 2007

Appellant pled guilty to insurance fraud, attempted grand theft, and grand theft. The case arose from the "Wendy's finger case," where she claimed to have found a severed finger in a bowl of chile and requested compensation. The sentencing court imposed the upper term for count one. In a published decision, the court of appeal held the amount of victim restitution was

proper, but it also held the imposition of the upper term violated *Cunningham* in light of *Black II* and *Sandoval*. (Staff attorney Dallas Sacher)

People v. Clifford Jackson (H030810)

Panel attorney: David Martin

Date: September 17, 2007

Appellant was sentenced to serve 25 years to life under the Three Strikes Law. The court of appeal agreed he was entitled to presentence conduct credits. (Staff attorney Michael Kresser)

People v. Carlos Harris (H030677)

Panel attorney: John Schuck

Date: September 14, 2007

The court of appeal held that the imposition of the upper term based on facts of the offense which were not found true by the jury violated *Cunningham* and resentencing was required. (Staff attorney Dallas Sacher)

People v. Carlos Salazar (H030200)

Panel attorney: Joseph Bochner

Date: August 30, 2007

The court of appeal agreed that certain gang conditions of probation were unconstitutionally vague without requiring an element of knowledge. (Staff attorney Jonathan Grossman)

People v. Frederick Jefferson

Staff attorney: Dallas Sacher

Date: August 23, 2007

Appellant was on Proposition 36 drug probation. After a contested violation of probation hearing, the court revoked probation and sentenced him to prison for two years. The court of appeal agreed that because he had not suffered three separate probation violations as required by Proposition 36, he could not be sentenced to prison.

People v. Horton (H030232)

Panel attorney: Thomas Singman

Date: August 22, 2007

The court reversed for a new sentencing hearing to determine if the different counts

occurred on a “single occasion.” (Staff attorney Dallas Sacher)

People v. Ray Levell (H031142)

Staff attorney: Dallas Sacher

Date: August 21, 2007

Although appellant suffered a parole revocation, the court of appeal agreed that he was entitled to increased presentence credits because it was shown that the time spent on the parole revocation was attributed only to the new criminal case.

People v. Louis Schotl (H030237)

Panel attorney: Alfons Wagner

Date: August 3, 2007

Attorney moved to withdraw his plea. Trial counsel was called to testify by the prosecution and consequently there was virtually no cross-examination. The court of appeal reversed the denial of the motion to withdraw plea. because trial counsel operated with a conflict of interest. (Staff attorney Lori Quick)

People v. Steven Feigley (H029178)

Panel attorney: Heather McKay

Date: August 2, 2007

On appeal, the court agreed to strike a no contact order from the minute order of the sentencing because the trial court never actually ordered it, struck the \$20 court security fee because it was imposed retroactively to a crime committed before the statute was enacted, and corrected the abstract of judgment to reflect the correct sentence and presentence credits. With a habeas corpus petition filed concurrently, the court issued an order to show cause. Feigley claimed trial counsel provided ineffective assistance of counsel for failing to object to an involuntary confession, failing to investigate his borderline retardation in support of the motion to exclude his extrajudicial statements and in support of his claim of imperfect self-defense and lack of mens rea for murder or the gang enhancement. (Staff attorney William Robinson)

People v. David Robles (H030519)

Panel attorney: Kathleen Novoa

Date: July 18, 2007

Appellant was placed on probation with certain conditions. The court of appeal agreed that certain conditions were unconstitutionally vague and the judgment was modified to make the conditions more specific. (Staff attorney Vicki Firstman)

People v. Billy Auyon (H027660)
Panel attorney: Julie Schumer
Date: July 6, 2007

The court modified a sentence to reduce the upper term to the middle term under *Cunningham*. (Staff attorney William Robinson)

People v. Steven Ristau (H025445)
Panel attorney: Thomas Singman
Date: July 6, 2007

The imposition of the upper term violated *Cunningham*. (Dallas Sacher)

People v. Jermaine Brown (H025981)
Panel attorney: Kim Macheski
Date: July 5, 2007

The imposition of the upper term violated *Cunningham*. (Staff attorney William Robinson)

People v. Ricardo Landecho (H029323)
Panel attorney: Alex Green
Date: July 5, 2007

The imposition of the upper term violated *Cunningham*. (Staff attorney William Robinson)

People v. Arturo Tarango (H027847)
Panel attorney: Rita Swenor
Date: June 28, 2007

Upon remand from the United States Supreme Court, the court of appeal decided that imposition of the upper term violated *Cunningham v. California*. (Staff attorney Dallas Sacher)

People v. Antonio Lopez (H029737)
Panel attorney: Kathleen Novoa
Date: June 27, 2007

Imposition of the upper term violated *Cunningham v. California*. (Staff attorney Paul Couenhoven)

People v. David Bradford (H027528)
Panel attorney: Heather McKay
Date: June 27, 2007

Upon remand from the United States Supreme Court, the court of appeal decided that imposition of the upper term violated *Cunningham v. California*. The court also decided that appellant could not be convicted of two counts of violating Penal Code section 136.1 because it describes a continuing course of conduct. (Staff attorney Michael Kresser)

People v. Jaime Chavez (H030014)
Panel attorney: Alex Green
Date: June 26, 2007

Appellant was convicted of conspiracy, possession of methamphetamine for sale, and sale of methamphetamine. The court of appeal concluded that two of the counts needed to be stayed pursuant to Penal Code section 654. Further, the restitution fine, which was calculated according to the formula according to Penal Code section 1202.4, needed to be reduced. (Staff attorney Jonathan Grossman)

People v. Yolanda Espinoza (H030264)
Panel attorney: Jennifer Boitano
Date: June 13, 2007

The court of appeal reversed the award for attorney fees from appellant, was sentenced to prison, because there was insufficient evidence of an ability to pay. (Staff attorney Paul Couenhoven)

People v. Soto (H027820)
Panel attorney: David Martin
Date: June 7, 2007

Appellant was sentenced to serve the upper term on four counts, fully consecutive to each other, and he was ordered to pay a parole revocation restitution fine (stayed unless he violated parole), though the statute concerning the fine was enacted after the crimes were committed. The court held that imposing the upper term violated *Cunningham*, and imposition of the fine violated ex post facto. (Staff attorney William Robinson)

People v. Joseph Ramirez (H027409)
Panel attorney: Steven Schorr
Date: June 1, 2007

Imposition of the upper term violated *Cunningham*. (Staff attorney Dallas Sacher)

People v. Samuel Saldana (H027313)
Panel attorney: Joseph Shipp
Date: May 31, 2007

The imposition of the upper term violated *Cunningham*. (Staff attorney Vicki Firstman)

People v. James Evans (H029616)
Panel attorney: Audrey Chavez
Date: May 30, 2007

The court of appeal held that there was *Cunningham* error in imposing the upper term, though one of the four factors in aggravation was that the defendant was on probation. (Staff attorney Paul Couenhoven)

People v. Armando Garcia (H028514)
Panel attorney: Steven Lubliner
Date: May 15, 2007

Appellant was tried on various charges, including felony assault. A jury returned a verdict of simple assault but also found the great bodily injury enhancement true. The court of appeal agreed that the gbi enhancement could not attach to the misdemeanor conviction. Further, the punishment for assault should have been stayed in lieu of his punishment for felony battery from the same incident. Finally, the court agreed to order the abstract of judgment be amended to reflect a prison prior, not a prior serious felony. (Staff attorney William Robinson)

People v. Romundo Johnson (H028782)
Panel attorney: Jeffrey Glick
Date: May 22, 2007

Appellant was convicted of a new crime and his probation was revoked based on the new crime. At sentencing, the court did not award him presentence credit on the new crime for the time in custody on the violation of probation. The court of appeal held in a published decision that appellant was entitled to presentence credit on the new crime when the violation of probation was based exclusively on the new crime. (Staff attorney Vicki Firstman)

People v. Rodney Torres (H027516)
Panel attorney: Matthew Wilson
Date: May 18, 2007

Imposition of the upper term violated *Cunningham*. (Staff attorney Jonathan Grossman)

People v. Darryl Cravin (H029758)
Panel attorney: Thea Greenhaulgh
Date: May 17, 2007

There was insufficient evidence the defendant, sentenced to prison, had the ability to pay attorney fees. (Staff attorney Jonathan Grossman)

People v. Gregory Wilks (H030033)
Panel attorney: Eileen Kotler
Date: April 30, 2007

Appellant was sentenced to serve life in prison and assessed a \$5400 restitution fine. On appeal, the court had reversed the judgment. On remand, he was convicted again and sentenced to serve life in prison and assessed a \$10,000 restitution fine. On appeal this time, the court of appeal held that imposition of a greater restitution fine after remand violated the state's double jeopardy clause under *People v. Hanson* (2000) 23 Cal.4th 355. Further, the imposition of a full consecutive determinate term to another determinate term was unauthorized. (Staff attorney Lori Quick)

In re Trevor H. (H030650)
Panel attorney: Kelly Duncan
Date: April 25, 2005

The juvenile matter was remanded for the court to determine if the wobbler offenses were misdemeanors or felonies. (Staff attorney Lori Quick)

People v. Michael Guess (H029808)
Panel attorney: Jeffrey Glick
Date: April 24, 2007

In a published decision, the court of appeal held that imposition of the upper term because the defendant was on parole and other reasons violated *Cunningham*. (Staff attorney Dallas Sacher)

People v. Jeffery Rynhard (H030009)
Staff attorney: Lori Quick
Date: April 20, 2007

The court of appeal struck a fine and penalty assessment because it did not apply to the crime for which appellant was convicted.

People v. Julian Lowe (H029623)
Panel attorney: Maureen Fox
Date: March 29, 2007

Appellant robbed a victim, forced him to his car, and took more items from him. Appellant was convicted of robbery and kidnapping, among other things. The court of appeal agreed that the concurrent punishment for the robbery must be stayed under Penal Code section 654 in lieu of the punishment for the kidnapping. (Staff attorney Dallas Sacher)

People v. Curtis (H030243)
Panel attorney: Joseph Shipp
Date: March 23, 2007

Appellant was convicted of several counts of failing to register, one for failing to register his old address, and one for failing to register his new address when he moved. The court of appeal of appeal agreed that one of the punishments needed to be stayed under Penal Code section 654. (Staff attorney Lori Quick)

People v. Francisco Duran (H029588)
Panel attorney: Alan Siraco
Date: March 16, 2007

A jury convicted appellant of two counts of dissuading a witness by force, one count of assault with a deadly weapon and of possession of meth for sale. The two counts of dissuading a witness consisted of appellant calling one witness and calling the witness and another witness a snitch. Since there was only one act with one objective, the punishment for the second count should have been stayed pursuant to Penal Code section 654. (Staff attorney Vicki Firstman)

People v. Adam Villareal (H029090)
Panel attorney: Stacy Saetta
Date: March 16, 2007

Appellant was convicted of three counts of arson, among other things, when he set fire to

a house and outdoor objects. The court of appeal agreed that he acted with a single intent in setting fire to the residence at multiple places, so he could be punished for only one count of arson. (Staff attorney Vicki Firstman)

People v. Tamara Gomez (H029858)
Panel attorney: Gloria Cohen
Date: March 7, 2007

There was insufficient evidence of the defendant's ability to pay attorney fees. (Staff attorney Jonathan Grossman)

People v. Setha Keo (H030506)
Staff attorney: Lori Quick
Date: March 7, 2007

There was insufficient evidence of the defendant's ability to pay attorney fees.

People v. Ruben Lopez (H029724)
Panel attorney: Peggy Headley
Date: February 28, 2007

Appellant was convicted of felony recklessly evading an officer and misdemeanor DUI. The punishment for DUI was imposed concurrently. Because it was for part of the same conduct as the evading, it should have been stayed under Penal Code section 654. (Staff attorney Dallas Sacher)

People v. S. D. (H028838)
Panel attorney: Jeanine Strong
Date: February 27, 2007

Appellant was convicted of oral copulation by an adult on a minor more than five years younger. The court ordered he register as a sex offender. It did not consider exercising discretion to not order the requirement under *People v. Hofsheier* (2006) 37 Cal.4th 1185. The matter was remanded for the court to exercise its discretion. (Staff attorney Paul Couenhoven)

People v. Michael Costa (H029681)
Staff attorney: Dallas Sacher
Date: February 21, 2007

The court of appeal reversed the imposition of the upper term under *Cunningham v. California* (2007) 549 U.S. [127 S.Ct. 856].) The court rejected arguments that the claim was waived by appellant's plea of no contest, and a "waiver" of his *Blakely* rights. The court concluded that this waiver did not include finding factors in aggravation by a preponderance of evidence. Further, the defendant's prior conviction did not make the error harmless.

People v. Anthony Garcia (H029019)
Panel attorney: Arthur Wong
Date: February 16, 2007

Appellant was placed on probation and assessed a \$200 restitution fine. When probation was revoked, the court increased the restitution fine to \$1000. This was unlawful, and the court of appeal reduced it back to \$200. (Staff attorney Jonathan Grossman)

People v. Paul Rosillo (H0303049)
Panel attorney: Janice Lagerlof
Date: February 14, 2007

The court struck the order for attorney fees because there was insufficient evidence appellant had the ability to pay. (Staff attorney Jonathan Grossman)

People v. Carla Reed (H030135)
Staff attorney: Jonathan Grossman
Date: February 13, 2007

Appellant was placed on probation on condition, among other things, that not associate with people who traffic in or use drugs. The condition was modified to require knowledge.

People v. Jose Alvarado (H030800)
Panel attorney: Rachel Lederman
Date: February 5, 2007

Appellant was ordered to pay victim restitution in the amount of \$300,000, mostly consisting of medical bills. Respondent conceded that about \$50,000 of it was duplicative medical bills. The restitution amount was reduced. (William Robinson)

In re David L. (H030081)
Staff attorney: Lori Quick
Date: January 23, 2007

Appellant was found to have committed vandalism by placing graffiti on a retaining wall. The city painted the wall twice because people did not like the first color. The court of appeal agreed that appellant should not have been required to pay for the second painting as part of victim restitution.

People v. Luis Alvarado (H030079)
Panel attorney: Carl Gonser
Date: January 23, 2007

The trial court erred in ordering victim restitution to compensate an insurance company's coverage of a loss. (Staff attorney Paul Couenhoven)

DEPENDENCY CASES

In re Riesa M. (H031948)
Panel attorney: Roland Simoncini
Date: December 28, 2007

Respondent agreed to a stipulated reversal for failure to properly comply with the notice requirement of the Indian Child Welfare Act. (Staff attorney Jonathan Grossman)

Adolfina R. v. Superior Court (H031884)
Panel attorney: James Haworth
Date: November 2, 2007

Appellant's 11 year-old daughter was removed. She was personally served with notice that the matter would be heard on June 7, 2007 to set the matter for a jurisdictional hearing. She attended on June 7, and a Spanish interpreter assisted her. The jurisdictional hearing was set for June 28. On June 28, the jurisdictional hearing was moved to a different courtroom, and appellant was not present. The matter was continued to July 12, as there was no evidence appellant was told of the different courtroom. On July 9, CPS sent by mail a notice which is usually used for dependent review hearings. On the notice, which was in English, a box marked "other" was checked, and "No change in orders, services, placement, custody or status" was marked. CPS also sent a copy of the jurisdictional and dispositional report which contained a case plan in English and Spanish but also recommended that no services be offered for appellant and that the matter be set for a section 366.26 hearing. Appellant did not appear on July 12. Her counsel requested a continuance. The court denied the continuance and followed the Department's recommendations. There was no evidence appellant timely received proper notice of the requirement to file a writ petition to challenge the court's decision. The court of appeal permitted her to file a late dependency writ and appointed SDAP to assist her. The court then issued a peremptory writ and vacated the jurisdictional and dispositional orders. It concluded that notice was inadequate. (Staff attorney Vicki Firstman)

In re Tiffany Q. (H031072)

Panel attorneys: Maureen Keaney and Lee Gulliver

Date: October 25, 2007

The order terminating parental rights was reversed for failure to provide proper notice as required under ICWA. (Staff attorney Vicki Firstman)

In re Shawna D. (H031217)

Panel attorney: Mary Williams

Date: October 16, 2007

The minor might have some Cherokee ancestry. A dependency writ was filed after reunification services were terminated but failed to argue failure to give proper notice under ICWA. In the meantime, the grandmother made attempts to register with one of the Cherokee tribes, apparently unaware that there were other Cherokee tribes. The court of appeal held that trial counsel's failure to raise the issue in the dependency writ did not waive the issue on appeal from the termination of parental rights, especially where much of the evidence occurred after the termination of services. Second, the family's effort to register with one particular tribe did not relieve CPS of the burden of notifying all potential tribes. Since notice to the other tribes were insufficient, the judgment was reversed. (Staff attorney Vicki Firstman)

In re James J. (H031324)

Panel attorney: Sheri Cohen

Date: September 28, 2007

At the contested jurisdictional hearing, trial counsel told the court that appellant wanted to represent herself. The court relieved counsel without further inquiry. The court of appeal reversed, stating there was insufficient evidence appellant made a knowing and intelligent waiver of the right to counsel. (Staff attorney Vicki Firstman)

In re Skyler B. (H031280)

Panel attorney: Lee Gulliver

Date: August 28, 2007

The order terminating parental rights was reversed for failure to provide proper notice under ICWA. (Staff attorney Vicki Firstman)

Panel attorney: Linda Harvey (mother)

Staff attorney: Jonathan Grossman (father)

Date: June 26, 2007

The court of appeal reversed because of failure to provide proper notice under ICWA.

In re L.D. (H030430)
Panel attorney: Carole Greeley
Date: June 12, 2007

A reversal in a dependency case for failure to comply with ICWA. (Staff attorney Jonathan Grossman)

In re Paul W. (H029866)
Panel attorney: Carolyn Todd
Date: May 23, 2007

The parents were involved in a bitter divorce proceeding. The mother alleged the father molested their daughter. CPS intervened, and the court assumed jurisdiction. After about a year of services, the minors were reunited with the mother and the matter was dismissed with her obtaining full custody. In the meantime, the father filed a habeas corpus petition, alleging ineffective assistance of counsel. Specifically, he claimed that trial counsel failed to adequately investigate the matter, and with proper investigation the court would have learned that key evidence of molestation was erroneous and the daughter's allegations were the result of coaching from the mother. After an evidentiary hearing, the superior court reversed the jurisdictional orders. CPS decided it could not proceed and the dependency was dismissed in favor of family court orders made before the juvenile court intervened. The mother appealed, though she did not participate in the habeas proceeding. In a published decision, the court of appeal held that her failure to intervene in the habeas proceeding acted as forfeiture for asserting a claim on appeal. Further, she was not a party aggrieved. (Staff attorney Vicki Firstman)

In re Justin S. (H030732)
Panel attorney: Carol Koenig
Date: May 21, 2007

Previously, the court of appeal reversed the order terminating parental rights for the limited purpose of sending proper notice under ICWA. On remand, CPS sent notice but no one notified the parents of the proceeding. Ex parte, the court found new notice was proper and terminated parental rights. The mother appealed. In a published decision, the court of appeal reversed, stating she had the right to be present, be represented by counsel, and be heard on remand. (Staff attorney Vicki Firstman)

In re Vincent M. (H030258)
Panel attorneys: Janet Sherwood, Carol Koenig
Date: May 17, 2007

The court of appeal reversed in 2004 for failure to provide proper notice pursuant to ICWA. After notice to the tribes was sent, a tribe determined the minor was a member of the tribe and qualified as an Indian child. Though there was evidence of the child's involvement in a tribe before the dependency, the juvenile court denied the tribe's attempt to intervene and terminated parental rights. In a published decision, the court of appeal reversed. The majority held that the Existing Indian Child Doctrine does not apply in California. The entire panel agreed that there substantive provisions of ICWA were not complied with and reversed. (Staff attorney Jonathan Grossman)

In re Christopher H. (H030197)
Panel attorney: Sheri Cohen
Date: March 2, 2007

The mother appeared, requested the appointment of counsel and said she wished to contest jurisdiction. She was told to appear the next day for the appearance of counsel. When she failed to appear on time, the court assumed jurisdiction in her absence. The court of appeal held the holding the hearing in her absence without appointing counsel violated due process. (Staff attorney Vicki Firstman)

HABEAS PROCEEDINGS

In re Allen (H031021)
Panel attorney: David Martin
Date: August 28, 2007

The court issued an order to show cause after the complaining witness contacted appellate counsel and retracted the allegations. (Staff attorney William Robinson)

In re Genesis Shellock (H030924)
Panel attorney: Tutti Hacking
Date: June 29, 2007

The defendant pled to receiving a stolen car and transporting methamphetamine with two prior strikes. He was sentenced to serve 25 years to life in prison. The court of appeal issued an order to show cause on allegations of ineffective assistance of counsel. He claimed trial counsel told him that the denial of the section 995 motion was appealable after plea and that there was a reasonable chance a *Romero* motion would be granted in full and he would receive drug treatment. Further, he pled to assist the codefendant who claimed to be pregnant and not a legal immigrant. Trial counsel refused to file a motion to withdraw plea. (Staff attorney William Robinson)

In re Hernandez (H031247)

Panel attorney: Carlo Andreani
Date: June 22, 2007

A girl accused defendant of molesting her and described a star-shaped tattoo on his penis, though he had no such tattoo. The complaining witness said she was forced into a garage while her cousin looked, but the cousin denied this to the police. The complaining witness reported injuries from the molestation causing bleeding and blood being left in her pants, but her mother reported never seeing blood. In a videotaped interview with an investigator, the victim nodded no when asked if she ever saw the defendant naked. None of this evidence was presented by defense counsel. The court also issued an order to show cause in the habeas corpus petition, alleging ineffective assistance of counsel. (Staff attorney Vicki Firstman)

Parkes v. Yates (N.D. Cal. C04-5294)
Staff attorney: Dallas Sacher
Date: June 7, 2007

Parkes was charged with reckless evasion (Veh. Code, § 2800.2) and felony child endangerment (Pen. Code, § 273a) with at least two prior strikes. The incident arose when an officer in an unmarked car was chasing appellant who had a child in the car. Trial counsel convinced Parkes to plead to the reckless evasion count so that the other count can be dismissed. The court sentenced him to serve 25 years to life in prison. The United States District Court found Parkes granted relief on a federal habeas petition because he received ineffective assistance of counsel. It found trial counsel failed to advise him that he had a defense to the reckless evasion charge (he was not chased by a marked police car), that his maximum potential sentence was 25 years to life anyway (not 50 years to life) because Penal Code section 654 would have barred double punishment for the same conduct, and he had a defense to the felony child endangerment in that there was a lack of evidence the conduct was likely to cause great bodily injury. Finally, pleading made little sense because there was little chance in this case the court was going to grant the *Romero* motion. Had Parke been properly advised, he would not have pled.

People v. Jose Ureno (H031340)
Panel attorney: Katarzyna Kozik
Date: May 30, 2007

The court issued an order to show cause because the court's sentencing decision was based on unreliable information and the prosecution allegedly withheld exonerating evidence. The court of appeal also held on appeal that he could not be deprived of presentence conduct credit simply because he was in lockdown at the county jail since it was not shown that the lockdown was attributed to his behavior. (Staff attorney Paul Couenhoven)

In re Toscano (H030988)

Panel attorney: Phil Brooks
Date: March 29, 2007

A jury convicted defendant of forcibly molestation. The complaining witness said he forced to her have intercourse on a couch. Trial counsel failed to present evidence that she was subsequently examined and her hymen was intact. While it was possible to have intercourse and still have the hymen intact, it was unlikely. Further, trial counsel failed to present evidence that the defendant was wearing metal braces on his arms and legs. This would have made the acts described very difficult or impossible. Further, one would have expected the complaining witness to describe them in the attack. The court of appeal issued an order to show cause on the claim of ineffective assistance of counsel. (Staff attorney Jonathan Grossman)

MISCELLANEOUS

In re John Dannenberg (H030031)
Attorney: Steve Defilippis
Date: November 16, 2007

Dannenberg previously had his parole denied, which was upheld in *In re Dannenberg* (2005) 34 Cal.4th 1061. In his latest hearing, the Board found him eligible for parole, but the governor reversed the decision. He filed a habeas corpus petition in the superior court which was denied. He filed a new petition in the court of appeal. In a published decision, the court granted relief. It found that there was insufficient reason to believe the commitment offense continued to make him ineligible for release.

Chioino v. Kernan (N.D. Cal. No. 06-932 MHP)
Pro per
Date: October 23, 2007

Chioino pled guilty in 2004 to robbery, and he admitted he was personally armed with a firearm and that he suffered a prior strike conviction. The court imposed the upper term of six years, which was doubled, plus ten years for the gun enhancement for a total term of 22 years. Chioino claimed the imposition of the upper term violated *Blakely v. Washington*. The court held the sentencing judge could not rely on the prior strike conviction or him possessing a firearm during the commission of the crime for imposing the upper term because it was used to enhance his sentence and Penal Code section 1170, subdivision (b) prohibited dual use of a factor as an enhancement and for imposing the upper term. The court ordered that a new sentencing hearing be held. (Former staff attorney Dallas Sacher)

Parle v. Runnels (9th Cir. No. 06-16780)
Attorney: Martin Buchanan
Date: October 10, 2007

Parle was convicted of the murder of his wife during an argument. On appeal, the Sixth District Court of Appeal found the trial court erred (1) in finding the attorney-client privilege had been waived and permitting the admission of damaging evidence, (2) excluding defense rebuttal evidence about the effects of a bipolar patient being in a manic episode, (3) excluding evidence of people who would have described Parle's manic behavior just before the incident, (4) excluding evidence of the victim's propensity for violence, (5) admitting evidence of Parle's character for violence. The court of appeal, however, found all of the errors to be harmless. A federal district court had granted relief on a petition for writ of habeas corpus on the ground that admission of the wife's diary violated the right to confrontation under *Ohio v. Roberts*. This decision was reversed on appeal after the decision of *Crawford v. Washington* because the material was not testimonial. On remand, the district court again granted relief, finding the cumulative errors on the remaining issues deprived Parle of a fair trial. The Ninth Circuit affirmed.

In re Wells (Santa Clara County No. CC454837)
Panel attorney: Victoria Stafford
Date: August 27, 2007

Mr. Wells's trial attorney advised him to plead nolo contendere to several charged sex offenses. Two counts carried life sentences under Penal Code section 667.61. Trial counsel assured him that the court had discretion to impose concurrent life sentences. In fact, the controlling case law required the court to impose consecutive life sentences. After Ms. Stafford filed a habeas petition in the superior court and an order to show cause issued, the district attorney conceded that relief was warranted. Mr. Wells was then permitted to withdraw his pleas of nolo contendere. (Former staff attorney Dallas Sacher)

In re Stephen Samble (H030843)
Staff attorney: Jonathan Grossman
Date: September 18, 2007

Samble was denied parole in 2003. He filed a petition for writ of habeas corpus in the superior court which found there was not some evidence to support the Board's findings. The court of appeal affirmed. On remand, a new hearing was held, though the evidence was essentially the same. The Board denied parole based on the commitment offense being inflicted "execution-style," a belief he failed to show adequate remorse, and a belief he failed to make adequate plans to attend NA/AA on release. The superior court again granted relief on habeas corpus. The prosecution appealed. The court of appeal affirmed. It compared the commitment offense with other crimes described as execution-style and concluded Samble's murder did not qualify as one. The court also concluded that there was an adequate showing of remorse and participation in NA/AA; there was insufficient evidence he was not unfit to be released on parole.

In re Mark Grunau (S148025)
Staff attorney: Paul Couenhoven
Date: August 15, 2007

Grunau retained private counsel to represent him on appeal. Counsel never filed an opening brief, and the appeal was dismissed. Counsel repeatedly assured Grunau that the appeal was proceeding, but it took time. After years of stalling, Grunau learned his appeal had long been dismissed. He sought the assistance of SDAP to revive his appeal. The court of appeal denied a motion to recall the remittitur. A petition for writ of habeas corpus was filed in the supreme court which issued an order to show cause.

In re Vincent Marquez (H029580)
Panel attorney: Arthur Dudley
Date: July 10, 2007

Marquez was placed in custody for a parole violation. CDCR failed to provide a timely parole hearing as it agreed to do when it entered into a consent decree in light of *Valdivia v. Davis* (E.D. Cal. 2002) 206 F.Supp.2d 1068. He filed a habeas corpus petition, and the superior court ordered his release, finding he was prejudiced from the delay. The government appealed. The court of appeal affirmed, holding a prisoner can enforce the consent decree with a state habeas corpus petition and there was substantial evidence to support the superior court's findings. (Michael Kresser)

Juan Valdez v. Castro (N.D. Cal. No. C-00-04733 MMC)
Staff attorney: William Robinson
Date: July 9, 2007

Based on an incident occurring in 1993, Valdez was charged with first degree murder, five counts of attempted murder with premeditation, and shooting into an occupied building. A jury convicted him of second degree murder, five counts of attempted murder without premeditation, and shooting into an occupied building, based on an aiding and abetting theory. He argued on appeal that the court failed to instruct on voluntary intoxication as a defense as a defense to the specific intent required for aiding and abetting. The court of appeal affirmed. The California Supreme Court held it was error to not give the instruction and remanded the matter to the court of appeal to determine if was a reasonably probability the error affected the verdict. . . ." (*People v. Mendoza* (1998) 18 Cal.4th 1114.) The court of appeal decided the error was harmless under the *Watson* standard. After exhausting the issue in state court, he filed a habeas corpus petition in 2000 in federal court. In 2003, the district court decided the failure to instruct on the intoxication defense clearly deprived him of due process, but the error was harmless under *Brecht* since the *Brecht* standard was similar to the *Watson* standard. The Ninth Circuit subsequently reversed, stating that the district court was required to conduct an independent review as to whether error was prejudicial. Now, on remand, the district court determined the

error was prejudicial.

Michael Hutchinson v. Hamlet (9th Cir. No. 06-16452)

Attorney: Larry Gibbs, Cliff Gardner

Date: July 3, 2007

Hutchinson was convicted of robbing a 7-Eleven. Although the robber was masked, three store employees reviewing the grainy video decided that appellant, a frequent customer, was the culprit. Trial counsel presented an alibi defense which consisted of appellant saying he was somewhere else but could not remember where. He said he was too injured to maneuver as the culprit in the video did, but no medical records were presented. Trial counsel did not try to obtain an expert to analyze the videotape because he believed Hutchinson was the robber and Hutchinson lacked funds to hire an expert. The court of appeal denied counsel's request for appointment of an expert and the state habeas petition was summarily denied. While Hutchinson's habeas petition was pending in federal court, the San Jose Mercury News hired an expert who determined that the person in the video committing the robbery was six inches shorter than Hutchinson. The district court granted relief, finding trial counsel was ineffective by making trial decisions based on insufficient information. Had trial counsel acted competently, it was reasonably probable Hutchinson would have been found not guilty. The government appealed, arguing the claim was not exhausted and trial counsel's deficient performance was not prejudicial. The Ninth Circuit affirmed.

People v. Vince Nguyen (H028798)

Attorney: Seth Flagsberg

Date: June 29, 2007

Disagreeing with other published cases in California and in the Sixth District, the court of appeal ruled in a published decision that a juvenile prior could not be used as a strike because there is no right to a jury trial. Initially, the court decided that since the minor admitted the allegation in juvenile court, he waived the right to a jury; so it can be used as a strike in this case. On rehearing, the court concluded that the juvenile adjudication could not be used as a strike even if he admitted the allegations in the juvenile court. (Amicus brief by Dallas Sacher)

People v. Whicker (H029315)

Attorney: Lorilee M. Gates, Angelyn Gates

Date: June 26, 2007

Appellant was convicted by jury of molesting two boys. The trial court admitted a jailhouse telephone conversation between appellant and his girlfriend, who was the chief defense witness, in which she describes a recently engaging in a menage a trois, the alleged victim's extrajudicial statements without complying with the requirements of Evidence Code section

1360 to determine the reliability of the statements, and the testimony of two adults who claimed appellant was touching girls inappropriately in plain view in a public swimming pool which the court of appeal concluded lacked reliability and probative value. The court of appeal decided the evidence should have been excluded. At one point, it stated that a “recurring pattern in the prosecution's arguments and the trial court's rulings was the supposition that evidence can be admitted, without otherwise articulating its relevance, just to avert some exculpatory supposition the jury might otherwise entertain.” On the other hand, the trial court excluded as self-serving statements given by appellant in a “pretext call” which would have provided the context for his allegedly incriminating statements that were admitted. There is no exception for self-serving statements. The court of appeal held the evidentiary errors cumulatively deprived appellant of a fair trial and required reversal.

In re Ernest Smith (H030201)
Panel attorney: Steve DeFilippis
Date: May 2, 2007

The parole board ordered Smith be paroled but the governor vetoed the decision. The court of appeal found there was not some evidence to support the decision. On remand, Smith was eventually released, but by then more than five years had past. Smith argued that the time in custody after he should have been released should be credited to his time on parole. Since parole was to last no more than five years, he must be released without parole. In a published decision, the court of appeal agreed. (Staff attorney Dallas Sacher) Rehearing was granted.

David Portee v. Superior Court
In Pro Per
Date: February 13, 2007

Portee attempted to file a request for appointment of counsel to investigate and prepare a motion for postconviction DNA testing under Penal Code section 1405. The superior court failed to file his motion and returned it to him. He filed a petition for writ of mandate in the court of appeal. The petition was granted.

People v. Jose Garcia (H030156)
Panel attorney: Jean Matulis
Date: February 7, 2007

Appellant pled guilty to some crimes with the agreement he would be sentenced to serve 2 years 4 months. Before sentencing, he was found to be incompetent. The court committed him for up to four years and ordered that he receive psychotropic medication. The court of appeal granted a petition for writ of mandate prohibiting the involuntary medication without a sufficient showing of need. It decided on appeal that the civil commitment could not be longer than 2

years 4 months. (Staff attorney William Robinson)