

**SUFFICIENCY OF THE EVIDENCE**  
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**SUFFICIENCY OF THE EVIDENCE**

People v. Roger Allen (H025374)  
Panel attorney: Charles Bonneau  
Date: April 13, 2004

Appellant was convicted and the court found true that he suffered six prior strike convictions. One of the prior strikes was an Oregon conviction for second degree manslaughter. This can include involuntary manslaughter in California, so the fact of the conviction alone was not enough to make it a strike. Four of the prior convictions were for second degree kidnapping which can include false imprisonment. The strikes were proven at trial by reports of the crimes, but trial counsel did not object to the inadmissible hearsay contained in the reports. The court of appeal found trial counsel was ineffective for failing to object which led to five of the six strikes being found true. (Staff attorney Jonathan Grossman)

In re Leanna W. (H026222)  
Panel attorney: Gerald Clausen  
Date: July 13, 2004

17 year-old Leanna was staying with her grandmother. One evening, when the adults were gone, appellant threw a party in the grandmother's house. Alcohol was served, things were trashed, and items were found missing. The juvenile court found appellant committed residential burglary and vandalism. The theory for the burglary was that she must have gone in and out of the house many times and at one point entered the house with the intent to serve some of the grandmother's alcohol or to use the utilities during the party. The court of appeal reversed, finding insufficient evidence. There was no evidence of appellant leaving the house or entering the house with the intent to take anything, to serve grandmother's alcohol, or to use utilities more than she had permission to. Further, there was insufficient evidence she was criminally culpable for any of the damage merely because she threw the party. (Staff attorney Vicki Firstman)

In re Daniel M. (H026332)  
Panel attorney: James Duffy  
Date: September 14, 2004

Appellant was raising a ruckus at the juvenile hall portion of the county jail where there were about a dozen other wards. In a contested jurisdictional hearing, the court found he

violated Penal Code section 415, disturbing the peace in a public place, among other offenses. The court of appeal found there was insufficient evidence. Juvenile hall is not a public place. (Staff attorney Jonathan Grossman)

### **PRETRIAL AND POSTTRIAL MOTIONS**

People v. Kexa Thephavongsa (H025462)

Panel attorney: Margaret Marr

Date: March 4, 2004

The case started when the police were looking for two Asian males in a white Toyota RAV4 that was believed to be involved in a residential burglary. The registered owner lived at a certain address in San Jose. Police went to the address and saw one of the suspects talk to a neighbor and then drive away in the RAV4; he was eventually arrested. A few hours later, police saw several people stand in front of the house. The officer contacted appellant, his mother, his sister, and a friend. No one matched the description of the remaining burglary suspect. Appellant explained his mother owned the house and he did not live there, though he had a room, received mail, and had clothing there. His brother lived in the house. The officer asked appellant to bring his brother outside. Appellant agreed and went into the house but did not return. The officer walked along the side of the house to the backyard where he saw appellant throw methamphetamine over the back fence. The trial court denied a motion to suppress. The court of appeal reversed. It held appellant had a reasonable expectation of privacy. The officers could not enter the backyard without probable cause and exigent circumstances, and there were neither. There was insufficient evidence appellant or his brother were suspects of the burglary, and appellant failing to return with his brother was not an exigent circumstance. (Staff attorney William Robinson)

People v. Fernando Gallardo (H026292)

Panel attorney: Alan Stern

Date: March 25, 2004

An officer learned from a confidential informant that appellant was selling drugs. Appellant was on probation and there was a warrant for his arrest. The officer learned he was staying at a certain motel. The officer arrived at the motel, obtained a pass key from the manager, and used it to enter the room. The court of appeal held that the knock notice requirement applied to probation searches and to executing an arrest warrant. The court ruled the officer failed to comply with the knock notice requirement, and the denial of the suppression motion was reversed. (Staff attorney Bill Robinson)

People v. Juan Sanchez-Martinez (H025745)

Panel attorney: David Morse

Date: April 2, 2004

Appellant was stopped possessing 30 boxes of pseudoephedrine. He pled guilty of possession with intent to manufacture methamphetamine and was sentenced to serve four years in prison. He had moved to withdraw his plea. He explained that he paid his attorney \$20,000. The attorney made several court appearances, and each time pressured appellant for more money. When appellant said he had no more money, the attorney explained to him that there was no choice but to plead guilty, but he would receive probation. Appellant said his attorney never discussed the elements of the case or specific defenses or the immigration consequences. In fact, appellant was unaware what the pseudoephedrine was for, did not know it would be used to manufacture methamphetamine, and was not going to profit from his duties. Appellant's testimony was corroborated by his wife who accompanied him in his discussions with his attorney. He had no record and was unfamiliar with the law. Trial counsel testified that he discussed the crime reports but could not remember if he discussed the specific elements or defenses. He did not remember if he discussed immigration consequences. The court of appeal reversed the denial of the motion to withdraw plea. It noted that appellant had a viable defense which was never explored. (Staff attorney Lori Quick)

People v. Francisco Hernandez (H026258)  
Panel attorney: Julie Schumer  
Date: May 14, 2004

The victim was shot dead, and a witness identified appellant as the shooter. There was evidence that the crime could have been committed by a third person, Orozco. At trial, the witness again identified appellant as the culprit, and she said she did not know Orozco. After the trial, the witness attempted to receive welfare. In order to qualify, she had to disclose who the father of her children was. She told a deputy district attorney that Orozco was the father of her daughter. Appellant moved for a new trial which was denied. The court of appeal reversed. It was undisputed this was legitimately newly discovered evidence. The court of appeal held it was material and required a new trial. (Staff attorney Bill Robinson)

People v. Lanard Watts (H025834)  
Panel attorney: Charles Holzhauer  
Date: May 21, 2004

Appellant was detained because he matched the description of a robbery suspect. A witness arrived for a show-up but did not identify him as the culprit. Nevertheless, the detention continued, and the officer began to notice appellant's speech was garbled. He noticed appellant had a rock-like substance in his mouth, which the officer suspected was cocaine. Eventually, cocaine was seized from appellant. The court of appeal reversed the denial of the motion to suppress evidence. Although the initial detention was justified, it was unreasonably prolonged after the witness failed to identify him. (Staff attorney Lori Quick)

People v. Mark Youtsey (H026199)  
Panel attorney: David Martin  
Date: June 10, 2004

Appellant pled no contest to petty theft with a prior and admitted he had a prior strike conviction. As part of the plea bargain, the court would send him to CRC, but he would serve 5 years in prison if he were unable to complete the program. CRC immediately sent him back, stating he did not qualify even for consideration. Appellant sought to withdraw his plea, stating that the promise for CRC was illusory because he never qualified for the program. The court of appeal agreed and reversed the trial court's denial of the motion. (Staff attorney Vicki Firstman)

People v. Andrew DeLeon (H021985)  
Panel attorney: Catherine White  
Date: July 15, 2004

Appellant was convicted of seven counts arising from some auto burglaries. The evidence against appellant was obtained from a traffic stop in which he was a passenger. During the stop, appellant tried to leave, but the officer would not allow it. The trial court found appellant was illegally detained. Upon reconsideration of the suppression motion, the court found appellant's detention and the officers subsequent searches were legal because the officers subsequently learned he was on probation. The court of appeal reversed, holding that the illegal detention of appellant merely because he was on probation, a fact then unknown to the officers, was illegal. (*People v. Saunders* (2003) 31 Cal.4th 318.)

People v. Brian Hoeninghaus (H025621)  
Panel attorney: Tutti Hacking  
Date: July 26, 2004

In a published decision, the court held that a probation search is not valid when the police officer did not know anyone was on probation. (Staff attorney Dallas Sacher)

People v. David Fickes (H024898)  
Panel attorney: Catherine White  
Date: September 1, 2004

Appellant was tried for attempted residential burglary and misdemeanor child molestation, involving two separate incidents. He was convicted of the felony and misdemeanor peeping, and he was sentenced to 30 years to life under the Three Strikes Law. The only evidence of identity for the felony was that he was in the area when the attempted burglary occurred. Appellant argued that the trial court erred in denying the motion to sever the counts. The court of appeal agreed that there were insufficient grounds for joinder under Penal Code

section 954, and the prejudice from the misdemeanor case affected the outcome on the felony case which was otherwise very weak. The judgment was reversed. (Staff attorney Lori Quick)

People v. Adrian Rivers (H026593)

Panel attorney: Daniel Kritz

Date: November 22, 2004

An informant told police appellant was selling drugs from his motel room. The police knocked on appellant's door at 2 a.m. and told him that he was suspected of selling drugs. Based on this information, they convinced appellant to step out of his room where he was questioned and his license was checked through dispatch. Officers eventually determined he was under the influence of drugs and arrested him. The court of appeal reversed the denial of the motion to suppress evidence. Appellant was detained when he was told to step out of his motel room because he was suspected of selling drugs. It was not a consensual encounter because a reasonable person would not believe he was free to disregard the officer's demands when told he is accused of committing a crime. The unverified tip from an informant was insufficient evidence to amount to reasonable suspicion. (Staff attorney Bill Robinson).

#### **ERROR AT TRIAL OR HEARING**

People v. Oscar Cortez (H025693)

Staff attorney: Jonathan Grossman

Date: January 2, 2004

Appellant had a court trial and submitted on the transcript of the preliminary hearing transcript. The court of appeal agreed this was a slow plea. Since appellant was not advised of his rights to a jury trial nor did he waive his rights, the conviction was reversed.

People v. Joseph Ramirez (H024606)

Panel attorney: Steven Schorr

Date: January 6, 2004

Appellant was convicted of sexual battery by restraining the victim and penetration by duress against a teenage girl who lived in the same home. Because he was also convicted of molesting another girl, he was sentenced to serve 45 years to life under the One Strike Law, Penal Code section 667.61 for committing an enumerated offense against two or more victims. The acts against the teenage girl consisted of appellant inappropriately touching the girl as they lay on her bed which was the top bunk. The prosecutor argued that he was twice as big, the only male adult in the home, and she was effectively cornered on the top bunk. The court of appeal disagreed, holding there was insufficient evidence of duress or restraint. As a consequence, the One Strike Law no longer applied, and appellant was entitled to a new sentencing hearing. (Staff attorney Dallas Sacher)

People v. Lloyd Taylor (H024303)  
Panel attorney: Robert Bryzman  
Date: January 21, 2004

Appellant was convicted in a court trial of failing to register. Appellant testified he did register and tried to comply with the law but he did not understand additional registration requirements. In rendering the verdict, the trial court stated appellant's actions qualified as willful as defined in CALJIC. The court of appeal reversed, holding that the evidence must show the defendant understood his obligation to register to be guilty of knowingly failing to register. (Staff attorney Dallas Sacher)

People v. Sean Sarik (H024870)  
Panel attorney: Patricia Bell  
Date: January 23, 2004

The court held that the group beating instruction (CALJIC No. 17.20) is erroneous because the defendant could be found to commit the enhancement without personally inflicting great bodily injury. (Staff attorney Lori Quick)

People v. James Westfall (H025500)  
Panel attorney: Gerald Clausen  
Date: January 29, 2004

A jury convicted appellant of DUI(a) but acquitted him of DUI(b). The offense was a felony because he suffered three prior DUIs within seven years. One of the two officers present during the arrest testified. The defense argued the failure to call the second officer showed the jury should not trust the testifying officer. The prosecutor argued in rebuttal that the other officer would have testified the same. The court of appeal held this is misconduct because the prosecutor was arguing facts not in evidence and asking the jury to draw unreasonable inferences as to what the non-testifying officer would have said. During deliberations, the jury suggested it might be deadlocked. The judge recessed for the day and told the jurors to "mull the case over" the evening and consider the evidence that was presented. The court of appeal agreed that this instruction conflicted with the jurors' legal duty not to deliberate after they separated. The court found the two errors to be prejudicial. (Staff attorney William Robinson)

People v. Nhan Chi (H024508)  
Panel attorney: Ozro Childs  
Date: February 5, 2004

The court of appeal reversed another finding of personally inflicting great bodily injury because the jury was instructed it could find it true based on a "group beating" theory. (Staff

attorney Lori Quick)

People v. Deric Little (H024757)

Panel attorney: Elaine Forrester

Date: February 9, 2004

Defendant was on trial for child endangerment and a misdemeanor count of being under the influence. During the trial, trial counsel stipulated he was guilty of being under the influence. In a published decision, the court of appeal reversed, holding that when trial counsel stipulates that the defendant is guilty of a charge, the defendant must be advised he is waiving his rights as if it were a slow plea or a guilty plea. (Staff attorney Michael Kresser)

People v. Michael Rhines (H025664)

Panel attorney: Robert Derham

Date: February 10, 2004

In a court trial, appellant was convicted of committing domestic violence and assault with a deadly weapon. Under the Three Strikes Law, he was sentenced to serve 25 years to life in prison. He never personally waived his right to a jury. Under the California Constitution, waiver of the right to jury is valid only if the court obtains a personal waiver from the defendant. The judgment was reversed. (Staff attorney Paul Couenhoven)

People v. Tuyen Tran, et al. (H025355)

Panel attorneys: Paul Carroll and Julie Schumer

Date: March 12, 2004

A jury found the appellants guilty of attempted murder by using a firearm causing great bodily injury in furtherance of a gang. They were sentenced to serve life in prison. During a break in deliberations, the mother of one of the defendants approached a juror about the trial when she was in the restroom. The juror had disclosed the incident to the foreperson and said she was concerned for her safety because this was a gang case. The trial court conducted a limited investigation and concluded there was insufficient cause for removing her. Soon after the incident, the jury returned a verdict of guilty and found the enhancements to be true. The court of appeal reversed because the trial court failed to conduct an adequate investigation. (Staff attorney Dallas Sacher).

People v. Darcus Butler (H025033)

Panel attorney: Thomas Singman

Date: April 6, 2004

A jury convicted Butler of participating in a home invasion robbery which led to a murder. He was sentenced to serve life in prison. The evidence that Butler was at the crime was weak. He also presented an alibi defense. In limine, Butler's trial counsel successfully moved to exclude evidence that he was on parole, and the court directed the prosecutor to admonish the witnesses not to mention this fact. When one of the officers testified, he was asked on direct examination whether appellant's hair style had changed. The officer's response was, "I spoke to his parole officer." Appellant immediately moved for a mistrial on the ground that the evidence was already ruled to be excluded and the officer's answer was nonresponsive; he also argued that an admonition would not cure the prejudice. During closing argument, the prosecutor argued how the officer spoke to the parole agent about appellant's hair style which was met with an admonition from the court. The court of appeal reversed. The evidence was gratuitous, inadmissible, and unduly prejudicial even with an admonition. Since the evidence against Butler was weak, reversal was required. (Staff attorney Michael Kresser)

People v. Miguel Zarazua (H025472)

Panel attorney: Peter Estern

Date: April 20, 2004

Appellant was charged with domestic violence and rape of his girlfriend. The prosecution was unable to subpoena the alleged victim for trial. Consequently, a videotape of her interview with the police was admitted pursuant to Evidence Code section 1370 over appellant's confrontation objection. The court of appeal reversed. Under the newly decided case of *Crawford v. Washington* (2004) 124 S.Ct. 1354, the videotaped interview violated the confrontation clause because it was testimonial hearsay without providing the defendant an opportunity to cross-examine the declarant. (Staff attorney Vicki Firstman)

People v. Fernando Dominguez (H022727)

Staff attorney: Dallas Sacher

Date: May 12, 2004/December 14, 2004

Appellant and a codefendant were charged with rape, kidnapping, and first degree murder. It appeared from the facts that the codefendant killed the victim, but the instructions on felony murder did not describe when appellant could be found guilty of felony murder based on the codefendant killing the victim. Instead, the instruction told the jury appellant could be guilty whenever the victim is killed during the commission of a certain felony. This was not the state of the law. Consequently, the court of appeal reversed in a published decision. The Supreme Court granted review and remanded it to the court of appeal. The court of appeal again reversed the convictions for felony murder and kidnapping in a published decision.

People v. Delano Tolden (H024538)

Panel attorney: Victoria Stafford



Date: May 27, 2004

Appellant was convicted after a court trial of failing to register. Evidence showed he was developmentally disabled. In finding appellant guilty, the trial court said that appellant's intent was irrelevant; he failed to register. The court of appeal reversed because the failure to register must be willful. (Staff attorney Lori Quick)

People v. Rozmin Pirwani (H025395)

Panel attorney: Brian Pori

Date: June 21, 2004

An elderly woman accused appellant of embezzling a large amount of her money just before she died. At trial, her statement to a social worker and her videotaped statement to a police officer was admitted under Evidence Code section 1380. The jury convicted. In a published opinion, the court of appeal agreed the statements were inadmissible testimonial hearsay in violation of the confrontation clause under *Crawford v. Washington* (2004) 124 S.Ct. 1354. The conviction was reversed. (Staff attorney Lori Quick)

People v. Dean Landon (H026011)

Staff attorney: Lori Quick

Date: July 6, 2004

Appellant was convicted of grand theft from an elder in count one, grand theft in counts two and three, and grand theft auto in count four. Counts one and two concerned the same theft. The court of appeal agreed that he could not be convicted of count two because count one is a more specific offense.

People v. Joaquin Espinoza (H026266)

Panel attorney: Lori Klein

Date: July 13, 2004

Appellant was sentenced to serve 75 years to life in prison after jury trial. The primary evidence against him was statements made by the complaining witness to the police; she did not testify at trial. The court of appeal reversed in light of *Crawford v. Washington* (2004) 541 U.S. \_\_\_, 124 S.Ct. 1354. (Staff attorney Paul Couenhoven)

People v. Jaime Jasso et al. (H025464)

Panel attorneys: Ruth McVeigh and Irma Castillo

Date: July 16, 2004

Appellants were charged with conspiracy. In instructing the jury, the court failed to instruct the jury on the target offense. This required reversal. (Staff attorney Lori Quick)

People v. Carlos Lazalde (H022775)

Panel attorney: Richard Krech

Date: July 19, 2004

Appellant was searched based on a warrant that appears to have been invalid and because he was on probation, though the officers were unaware of this fact during the search. The court did not address the invalid warrant but found the search was a lawful probation search. Subsequently, the California Supreme Court decided *People v. Sanders* (2003) 31 Cal.4th 318. In light of this, the court of appeal reversed in a published decision. The matter was remanded for the superior court to consider whether the warrant was valid. (Staff attorney Lori Quick)

People v. Loren Herzog (H023906)

Panel attorney: Eric Multhaup

Date: August 18, 2004

Appellant was charged with five counts of murder. The jury convicted him of three of them and found him not guilty of the remaining two. Each of the murders were actually committed by his long-time friend, but appellant was allegedly culpable as an aider and abettor. Appellant was subject to seven custodial interrogations spanning six days. The trial court ruled that appellant invoked his right to silence in the earlier interrogations, even though the officers continued to question him. The trial court suppressed his statements after the invocations. The trial court admitted statements from the last three interrogations which occurred on the final two days. Appellant argued the statements should have been suppressed because they were involuntary as a result of the officers continuing to question him after he invoked his right to silence during the earlier interrogations. The court of appeal agreed. Although it is not categorically forbidden to reinterrogate after a break a suspect who had invoked the right to silence, in this case it was concluded that under the totality of the circumstances the statements were coerced. The police had disregarded previous invocations, interrogated him over a prolonged period of time, delayed arraignment to continue interrogations before the inevitable appointment of counsel, denigrated the usefulness of defense counsel when he asked about being assisted with counsel, falsely told him that the codefendant had implicated him, and implied that if he confessed the consequences would be less serious. The court decided the error was prejudicial. There was no other evidence of him being culpable of two of the murders. Although there was some evidence implicating him in the third murder, it could not be said his statements did not have a powerful effect in the jury returning its verdict. The judgment was reversed in its entirety. (Staff attorney Dallas Sacher)

People v. Kelsie Banks

Panel attorney: Douglas Kane  
Date: September 9, 2004

Appellant was charged with possessing a shank in prison. On the day of trial, he requested a continuance. The motion was denied. He then pled guilty with the promise that he could appeal the denial of the continuance. This was an illusory promise because the denial of a continuance cannot be contested on appeal after a plea. The court of appeal reversed the judgment. (Staff attorney Jonathan Grossman)

People v. Truong Nguyen (H025988)  
Panel attorney: Alex Green  
Date: September 13, 2004

A jury convicted appellant of residential burglary. At trial, the prosecution rejected an offer by the defense to stipulate that the break-in was committed with the requisite specific intent. Instead, the prosecution introduced uncharged prior burglary to show intent. The court of appeal reversed, holding that under the circumstances of the case, the trial court should have compelled the prosecution to accept the stipulation. Accordingly, the evidence of the other crime was irrelevant and highly prejudicial. (Staff attorney Vicki Firstman)

People v. Fidel Hernandez (H025946)  
Panel attorney: Katarzyna Kozik  
Date: October 22, 2004

A jury convicted appellant of murder. At trial, it was learned appellant and the victim were selling drugs, and they stored the drugs and money in a public storage locker. Although they generally got along, they were heard having a heated argument just before Christmas 2001. A few weeks later, they met near the locker, and appellant killed the victim. He claimed he acted in self-defense. In instructing on imperfect self-defense, the court modified CALJIC No. 5.17 to state that the defense was unavailable when the defendant's "wrongful conduct" created the actual but unreasonable belief in the need to defend himself. The court of appeal decided the modified instruction was erroneous because the correct law would require withdrawal of the defense only if the defendant's illegal conduct led to the circumstances requiring the perceived need to defend himself. The court of appeal also decided the trial court erred in not instructing on a provocation theory for voluntary manslaughter. (Staff attorney Bill Robinson)

People v. Sterling Brown (H026138)  
Panel attorney: Mark Farbman  
Date: October 26, 2004

When appellant was arrested, police questioned him without advising him of his *Miranda*

rights. Midway through the interrogation, he was advised of his *Miranda* rights which he waived, and he repeated the same answers. The court of appeal reversed, holding the interrogation should have been suppressed under *Missouri v. Seibert* (2004) 124 S.Ct. 2601. (Staff attorney Bill Robinson)

People v. Jayson Hughes, et al. (H025863)

Panel attorneys: Lora Martin

Gary Crooks

Date: October 29, 2004

Appellants were charged with assault with a firearm (Pen. Code, § 245, subd. (b).) After a court trial, the court found them guilty of assault with a deadly weapon, not a firearm (Pen. Code, § 245, subd. (a)(1).) The court of appeal decided that assault with a deadly weapon was not a lesser included offense, and the court lacked the authority to reduce the charge to a lesser related offense. Since the court acquitted them of assault with a firearm, the court of appeal reduced the convictions to misdemeanor assault. (Staff attorney Jonathan Grossman)

People v. Charles Woodridge (H026445)

Panel attorney: Paul Demeester

Date: November 22, 2004

After a court trial, appellant was convicted of appropriating lost property and grand theft based on appellant taking money that was mistakenly forwarded to his account at E\*Trade. The court of appeal held appellant could be convicted on only one of the counts because they both described the same act and merely described alternative theories of culpability. (Staff attorney Paul Couenhoven)

People v. Hilario Catano (H026631)

Staff attorney: Williams Robinson\

Date: December 6, 2004

After accepting a plea bargain, appellant moved at the sentencing hearing to “fire” retained counsel and have another attorney, perhaps an appointed attorney, to represent him. After holding an in camera hearing pursuant *People v. Marsden* (1970) 2 Cal.3d 118, the court denied the motion. The court of appeal reversed, holding that a defendant has an absolute right to fire retained counsel upon making a timely motion, and the standards for replacing appointed counsel under *Marsden* did not apply.

People v. Roderick Norman

Panel attorney: Ann Vandepol

Date: December 15, 2004

Among other things, appellant was charged with resisting arrest. The court instructed the jury that a “peace officer is engaged in the lawful performance of his duties when he attempts to detain a person who flees from police without provocation in area known for heavy narcotics trafficking.” The court of appeal reversed the conviction, holding that the instruction created an illegal mandatory presumption. (Staff attorney Dallas Sacher)

People v. John Lara (H026893)  
Panel attorney: Gordon Brownell  
Date: December 17, 2004

Appellant was convicted of 23 crimes and sentenced to serve 195 years to life consecutive to 16 years 8 months (if he were sentenced when Thomas Jefferson was inaugurated, then today he would still have six more years to serve before he would be eligible for parole). The trial court failed to instruct the jury on count 21, though it did properly instruct the jury on related offenses. The court of appeal held the complete failure to instruct on the elements of the offense automatically required reversal. (Staff attorney Bill Robinson)

People v. Jaime Hernandez (H026408)  
Panel attorney: Joseph Shipp  
Date: December 22, 2004

Appellant was found guilty of three counts of murder with a gang enhancement. The trial court imposed an additional ten years for the gang enhancement. The court of appeal held that subdivision (b) of Penal Code section 186.22 required that appellant not be eligible for parole for 15 years and the additional ten year term was unauthorized. Further, appellant should receive an additional four days of presentence credits. (Staff attorney Bill Robinson)

## **SENTENCING**

In re Cheryl Chavez, et al. (H025709)  
Panel attorney: Steve DeFilippis and Keith Wattley  
Date: January 5, 2004

Cheryl and Gilbert Chavez were convicted in 1998 of filing a false state tax return. At the time, the penalty for the crime was “not more than three years” in prison. In *In re Hagen* (2001) 88 Cal.App.4th 378, the court held the statutory language meant it the indeterminate sentencing law applied. Effective January 1, 2002, the statute was changed to make the punishment fall within the determinate sentencing law. The defendants were originally sentenced under the indeterminate sentencing law. They filed petitions for writ of habeas corpus in the superior court claiming the statutory amendment applied retroactively to them. The superior court agreed, and

the prosecution appealed. In a published decision, the court of appeal agreed that the amendment applied retroactively. (Staff attorney Michael Kresser)

People v. Steven Palmer (H025653)  
Staff attorney: Jonathan Grossman  
Date: January 15, 2004

Appellant was convicted of selling bunk drugs (Health & Saf. Code, § 11355) in count one and the possession or manufacture of bunk drugs for sale (Health & Saf. Code, § 109575) in count two. The court sentenced him to prison and ordered him to pay \$5000 in attorney fees and a drug lab fee and drug program fee for both counts. The court of appeal struck the attorney fees because there was insufficient evidence of an ability to pay. The court struck the fines for count two because they do not apply to a violation of section 109575. Finally, the restitution fines were reduced to reflect the actual amount imposed by the court at sentencing.

People v. Jesse Yates (H025463)  
Staff attorney: Lori Quick  
Date: January 15, 2004

Appellant pled no contest to commercial burglary and petty theft with a prior based on an incident where he entered a store and stole an item. The Attorney General conceded on appeal that the two counts should have been stayed pursuant to Penal Code section 666.

People v. Enrique Tantaruna (H025986)  
Staff attorney: Jonathan Grossman  
Date: January 16, 2004

Appellant was arrested for committing some drug crimes in 1989, and then he disappeared for 13 years. In 2002 he was caught and he eventually pled no contest to the charges. Two of the four counts were stayed pursuant to Penal Code section 654. The court of appeal agreed that the fines for the two counts that were stayed also must be stayed. The ex post facto clause prohibited imposing a parole revocation restitution fine because section 1202.45 did not exist when the crimes were committed. Finally, the penalty assessments must be reduced to \$6 for every \$10 of the remaining fine because the ex post facto clause prohibited increasing the assessments after the crimes were committed.

In re Christopher F. (H026060)  
Panel attorney: Daniel Kritz  
Date: January 16, 2004

The minor was placed on probation after committing an auto theft and receiving stolen property. As a condition of probation, he was ordered to have no contact with the victim or any member of her family and to stay 100 yards away from the victim's residence, vehicle, school, and place of employment. Appellant claimed trial counsel was ineffective for not objecting to the probation condition as vague. The court of appeal agreed that there was no evidence the minor knew the victim or members of her family. Since he has no knowledge of their identities, he was not on notice whom he was ordered to stay away from. Additionally, the matter was remanded for the juvenile court to declare if the offenses were felonies or misdemeanors. (Staff attorney Lori Quick)

People v. Nathan Rios (H026315)  
Staff attorney: Lori Quick  
Date: January 29, 2004

Appellant pled no contest to four felonies and two misdemeanors for a sentence of three years. At sentencing, the court said it was imposing the "statutory minimum" restitution fine of \$800. Of course, the statutory minimum restitution fine is \$200. The court of appeal held trial counsel was ineffective for not objecting and remanded the matter for a new hearing on the restitution fine.

People v. Saul Cardenas (H026015)  
Panel attorney: Steven Schorr  
Date: January 27, 2004

A jury found appellant guilty of two felonies punishable under Penal Code section 667.61, among other charges. He also had five prior strike convictions. The court sentenced him to serve 150 years to life, finding that the two of the felonies were not committed on a "single occasion" under subdivision (g) of section 667.61. The court of appeal found in a previous appeal that the trial court used the wrong standard for determining a "single occasion" and remanded for a new sentencing hearing. Before the remittitur issued, the trial court held another sentencing hearing and again imposed a sentence of 150 years to life. The court of appeal reversed. The trial court lacked jurisdiction to resentence appellant before the remittitur issued. (Staff attorney Dallas Sacher)

People v. Manuel Garay (H026194)  
Staff attorney: William Robinson  
Date: January 27, 2004

Appellant was placed on probation and the court imposed a restitution fine of \$200. Later, appellant's probation was revoked, and he was sentenced to prison. The court imposed a restitution fine of \$800. The increase in the restitution fine was unauthorized.

People v. Michael Miller (H025668)

Panel attorney: Joseph Shipp

Date: February 23, 2004

Appellant was originally sentenced to serve 100 years to life consecutive to 33 years 8 months. In a previous appeal, the court of appeal reversed the finding the One Strike Law applied because of an instructional error and found that one of the life terms must be stayed pursuant to Penal Code section 654. On remand, the district attorney declined to retry appellant on the One Strike Law. The court sentenced him to serve 57 years to life consecutive to 32 years 4 months. The court of appeal agreed the sentencing court erred in imposing a new term for a prison prior and for increasing the restitution fine. (Staff attorney Paul Couenhoven)

People v. Timothy Orabuena (H025987)

Panel attorney: Kate Novoa

Date: February 25, 2004

Appellant was convicted of possessing drugs and driving with a suspended license. Because he was convicted of a non-drug misdemeanor in the same proceeding, he was not eligible for Proposition 36 probation. The trial court refused to dismiss the suspended license conviction pursuant to Penal Code section 1385 in order to place him on drug probation, believing it did not have the discretion to do so. In a published decision, the court of appeal reversed, holding the trial court does have the discretion. (Staff attorney Vicki Firstman)

People v. Quyen Nguyen (H025122)

Panel attorney: Gordon Scott

Date: February 25, 2004

Appellant pled guilty to loan sharking, attempted extortion, and sale of crack cocaine. He was placed on probation and suffered several violations of probation for not seeking employment, not doing community service, not staying away from a gambling establishment, and not paying his fines. Appellant was homeless. The court revoked probation and sentenced him to serve two years in prison. The court of appeal agreed he was never told to seek employment as a condition of probation. Although other grounds for revoking probation was sound, it was not clear on what basis the court revoked probation and sentenced him to prison. The matter was reversed for a new violation of probation hearing. (Staff attorney Dallas Sacher)

People v. Leo Quintos (H025916)

Panel attorney: John Schuck

Date: March 1, 2004

Appellant pled no contest to first degree murder and a gang enhancement. The court



sentenced him to serve 25 years to life for the murder and ten years for the gang enhancement. The court of appeal held that with an indeterminate sentence, the statute requires appellant not to be paroled for at least 15 years and the ten year term was unauthorized. (Staff attorney Dallas Sacher)

In re Martin M. (H025631)  
Staff attorney: Paul Couenhoven  
Date: March 1, 2004

The minor admitted committing felony oral copulation with a minor and misdemeanor statutory rape. The acts involved his girlfriend and were consensual. Appellant claimed that making oral copulation a felony when statutory rape was a misdemeanor violated the equal protection clause. The court of appeal agreed. It held the strict scrutiny test applied and there was no compelling state interest to permit the disparate treatment.

In re David T. (H026043)  
Panel attorney: Ann Vandepol  
Date: March 16, 2004

The minor was on probation and placed in a CYA alternative program. The judge told him that if he failed the program, he would be placed in CYA. A violation of probation was alleged for fighting at the program. At the jurisdictional hearing, the petition was amended to alleged he failed to follow staff directions and possessed contraband (adult pornography and \$80 in cash) which he admitted. At the dispositional hearing, the minor testified that when he started the program, it had been operating for only six months. He was constantly threatened by gang members, including his roommate, and he was told he would be killed if he were ever sent to CYA. Twice sheriffs had to be called because of rioting. He had been attacked by gang members several times. One day his roommate took from him \$14. Appellant confronted him, but he denied it. Appellant hit him twice. The roommate ran down the hall, and appellant chased him. In front of staff, the roommate handed over the \$14 dollars and then swung at appellant several times. The program staff told him he failed the program, and he was going to be transported. Once appellant was placed in a van, he tried to escape. He explained he believed he was being transported directly to CYA, and he believed he would be killed there. Appellant did earn a number of certificates showing he successfully completed various programs. The court stated it wished the minor be placed in a CYA alternative, but there were not any programs available and CYA was the only alternative. The court of appeal reversed, stating the record had not shown that CYA was the appropriate placement. (Staff attorney Vicki Firstman)

People v. Tracey Durban (H025851)  
Staff attorney: Lori Quick  
Date: March 18, 2004

Appellant was convicted of DUI with injury after he rear ended the victim. The victim's 1994 BMW was totaled. Later, the victim learned he was going to receive a 2 percent raise instead of a 7 percent raise. The BMW was worth \$17,000, but the victim purchased a new BMW worth \$51,000. The trial court ordered restitution to include the entire price of the new car and the difference in the salary increase between what the victim received and what he expected. The court of appeal struck the restitution orders as to the two items. The loss to the victim caused by appellant was the value of the old car. There was also a lack of evidence appellant caused the lesser salary increase. Further, since the victim's employer laid him off due to economic problems, there was no actual loss of salary caused by appellant.

In re Alvaro Z. (H026028)  
Panel attorney: Jeanine Strong  
Date: March 18, 2004

The minor was placed on probation and ordered "not to be with anyone who is using or possessing any illegal intoxicants, narcotics, or drugs." The court of appeal modified the condition to require the defendant to not be with anyone he "knows" to be using illegal intoxicants, narcotics, or drugs. (Staff attorney Dallas Sacher)

People v. Floriberto Perez (H025944)  
Panel attorney: David Stanley  
Date: March 22, 2004

Appellant was convicted of four counts. He received an indeterminate sentence for counts one and two and a determinate sentence for counts three and four. The court limited presentence credits only to count one. The court of appeal reversed. Such a limit was unauthorized. (Staff attorney Paul Couenhoven)

Pedro Hernandez (H026017)  
Panel attorney: Jill Lansing  
Date: March 26, 2004

The trial court imposed a life sentence and ten years for a gang enhancement. The court of appeal found this was error. When the defendant receives a life sentence, the proper punishment for a gang enhancement is the provision that he would not be eligible for parole for 15 years. (Staff attorney Bill Robinson)

People v, Anthony Smith (H025582)  
Panel attorney: Andrew Janecki  
Date: March 29, 2004

Appellant had a prior conviction for a violation of Penal Code 417.3 which involves exhibiting a firearm to a person in a motor vehicle. No facts of the prior conviction were available. Because it was impossible to determine from the face of the conviction if appellant personally used a weapon or was an aider and abettor, there was insufficient evidence of the prior strike conviction. (Bill Robinson)

People v. Vincent Hofsheier (H026217)  
Staff attorney: Paul Couenhoven  
Date: April 1, 2004

Appellant, 22 years old, engaged in consensual oral copulation with a 16 year old girl. He pleaded guilty to felony oral copulation with a minor. The court ordered him to register as a sex offender. In a published decision, the court of appeal reversed. It violated the equal protection clause to require registration for oral copulation when actual sexual intercourse between the two would not.

People v. Haibi Abdi (H025461)  
Panel attorney: Ozro Childs (H025461)  
Date: April 8, 2004

Appellant was placed on probation for selling crack cocaine. He was then arrested for robbery. After finding he violated the conditions of probation, the court imposed the upper term based on his conduct after probation was granted. This was error, and the court of appeal reversed. (Staff attorney Vicki Firstman)

People v. Gilbert Macias (H026218)  
Staff attorney: Dallas Sacher  
Date: April 5, 2004

At sentencing, the trial court imposed what it described as the “mandatory minimum restitution fine” of \$400. Trial counsel was ineffective for not objecting, because the mandatory minimum restitution fine was \$200. The court of appeal ordered that the restitution fine be reduced to \$200.

People v. Hector Sanchez (H026039)  
Panel attorney: Joseph Shipp  
Date: April 8, 2004

Appellant entered into a plea bargain where he would receive no more than ten years for weapons enhancements. At sentencing, he received 12 years for the enhancements. The court of

appeal held he was entitled to enforce the plea bargain and reduced the time for the weapons enhancements to 10 years. It also agreed that two counts should have been stayed pursuant to Penal Code section 654. (Staff attorney Paul Couenhoven)

People v. Matthew Perry  
Panel attorney: Mark Greenberg  
Date: April 16, 2004

Appellant was convicted of violating Penal Code sections 470a and 475. The superior court imposed a \$10 fine pursuant to Penal Code section 1202.5 and \$750 in attorney fees. The court of appeal reversed the \$10 fine because section 1202.5 does not list section 470a or 475 as a crime permitting the imposition of the fine. The court also reversed the attorney fees because of a lack of evidence he was on notice the fee might be imposed as sentencing, as required by statute. Although the probation report stated attorney fees should be imposed if appropriate, the report was file stamped the day of the hearing and there was no evidence defense counsel had an opportunity to review the report with appellant. (Staff attorney Dallas Sacher)

People v. Armando Fernandez (H026307)  
Staff attorney: Lori Quick  
Date: April 19, 2004

Appellant entered a plea bargain, and he was not advised of a restitution fine or that he could withdraw his plea if the sentencing court failed to impose the plea bargain. At sentencing, he was ordered to pay a \$1000 restitution fine. The court of appeal reduced the amount to \$200, pursuant to *People v. Walker* (1991) 54 Cal.3d 1013.

People v. Glen Ramirez (H024432)  
Panel attorney: Mark Greenberg  
Date: April 21, 2004

Appellant was convicted of spousal rape in count one and forcible oral copulation in count two. He received a life sentence for both counts under Penal Code section 667.61. A life term for count two was error because the offenses occurred on a single occasion. (Staff attorney Bill Robinson)

In re Rene G. (H026378)  
Panel attorney: Danalynn Pritz  
Date: May 7, 2004

Appellant was placed on juvenile probation. One of his conditions was to not possess

any paging device or portable communication equipment. The court of appeal agreed the probation condition was overbroad in violation of the First Amendment. In today's age, a minor can own a pager or cell phone without having to convince the probation officer of a particular need. (Staff attorney Bill Robinson)

People v. Cesar Lopez (H025998)  
Panel attorney: Robert Bryzman  
Date: May 13, 2004

Appellant was found guilty after court trial of two counts of assault with a deadly weapon and one count of brandishing a weapon. The court of appeal agreed that the punishment for the brandishing conviction should be stayed pursuant to Penal Code section 654. (Staff attorney Lori Quick)

People v. Arturo Cruz (H026503)  
Panel attorney: Lark Ritson  
Date: May 14, 2004

At trial, appellant was found guilty of grand theft. The court indicated it would place him on probation and have him spend a year in jail. The prosecution said it did not object to this. Consequently, appellant waived his right to a presentence report. At sentencing, appellant moved to substitute appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118. The court denied the motion and sentenced him to serve two years in prison. Trial counsel voiced no objection. The court of appeal found ineffective assistance of counsel on the face of the record. The trial court was increasing appellant's sentence for exercising his right to protest about his representation. Had trial counsel voiced an objection at sentencing, appellant should have received a one year sentence. The court of appeal also reversed the assessment of \$500 in attorney fees. (Staff attorney Dallas Sacher)

People v. Cesar Lopez (H025998)  
Panel attorney: Robert Bryzman  
Date: May 13, 2004

Appellant was found guilty after court trial of two counts of assault with a deadly weapon and one count of brandishing a weapon. The court of appeal agreed that the punishment for the brandishing conviction should be stayed pursuant to Penal Code section 654. (Staff attorney Lori Quick)

People v. Edward Vejar (H025908)  
Panel attorney: Janice Lagerlof

Date: May 27, 2004

Appellant was convicted of kidnapping and kidnapping for carjacking, among other things. The conviction for kidnapping must be reversed because it was a lesser included offense to kidnapping for carjacking. (Staff attorney Lori Quick)

People v. Pedro Garcia (H026449)  
Staff attorney: Paul Couenhoven  
Date: May 27, 2004

Appellant was sentenced to serve 15 years to life consecutive to 16 years. Further, the court ordered him to pay \$500 in attorney fees. The court of appeal reversed the order for attorney fees because there was insufficient evidence of an ability to pay.

People v. Craig Harward (H026754)  
Panel attorney: Maureen Fox  
Date: June 10, 2004

Appellant contended there was insufficient evidence to order an AIDS test. The court of appeal agreed and remanded the matter for a hearing to determine if there were probable cause to justify the test. (Staff attorney Bill Robinson)

People v. Maurice Chaires, et al. (H025694)  
Panel attorneys: R. Charles Johnson and Eric Weaver  
Date: June 10, 2004

Appellants contended there was insufficient evidence to order AIDS testing. The court of appeal agreed and deleted the tests as part of the sentence. (Staff attorney Lori Quick)

People v. Steven Mondini (H026157)  
Panel attorney: Mark Farbman  
Date: June 10, 2004

Appellant was ordered to pay \$600 restitution fines which was beyond the scope of the plea bargain. The court of appeal reduced the fines to the statutory minimum of \$200. (Staff attorney Bill Robinson)

People v. Aaron Juarez (H026469)  
Panel attorney; Alex Green

Date: June 15, 2004

When appellant was placed on probation, the court imposed a \$200 restitution fine. When appellant violated probation, the court sentenced him to prison and imposed a \$600 restitution fine and stayed a second \$600 parole revocation restitution fine. The court lacked the authority to impose the restitution fine twice, so the amounts were reduced to \$200. (Staff attorney Vicki Firstman)

People v. Phong Tran (H026338)  
Staff attorney: Jonathan Grossman  
Date: June 17, 2004

Appellant pled no contest to seven counts of false impersonation in order to obtain credit cards and five counts of fraudulently using the credit cards. He was given a second strike sentence of 17 years 4 months which consisted of the low term for one of the counts and a consecutive sentence for the remaining 11 counts. The court of appeal agreed that under Penal Code section 654 he could not be punished for both fraudulently obtaining a credit card and fraudulently using it.

People v. Nathan Madani  
Panel attorney: Barry Morris  
Date: June 21, 2004

Appellant was convicted of arson. He was ordered to pay more than \$10,000 in restitution to repay the fire department for responding to the fires and investigating the cause. The court of appeal agreed the Penal Code did not authorize ordering restitution for government time spent investigating a possible crime. (Staff attorney Lori Quick)

People v. Alberto Rodriguez (H025696)  
Panel attorney: Diana Teran  
Date: June 23, 2004

Appellant was ordered as a condition of probation not to associate with members the probation department deems to be a gang member. The court of appeal modified the order to comply with constitutional requirements that he “not associate with individuals that he knows to be members of a criminal street gang.” (Staff attorney Paul Couenhoven)

People v. Lex Perez (H026644)  
Staff attorney: William Robinson  
Date: July 1, 2004

Appellant entered into a plea bargain that did not include a restitution fine. Nonetheless, he was assessed a \$600 restitution fine at sentencing. The court of appeal reduced the fine to \$200. (*People v. Walker* (1991) 54 Cal.3d 1013.)

People v. Charles Monk (H026387)  
Panel attorney: George Benton  
Date: July 13, 2004

Appellant was convicted of second degree burglary. The court found three prior strike convictions to be true. It struck two of the strikes and imposed a second strike sentence. On appeal, it was claimed there was insufficient evidence the remaining prior qualified as a strike. The Attorney General conceded there was insufficient evidence (it was a robbery under Connecticut law), but argued appellant is estopped from complaining about it because the other two strikes were dismissed. The court of appeal held appellant was not estopped. It remanded the matter for a new trial on the prior and a new sentencing hearing. (Staff attorney Lori Quick)

In re Irbin V. (H026878)  
Staff attorney: Dallas Sacher  
Date: July 12, 2004

The juvenile court erred in imposing a full consecutive term for a misdemeanor offense. In juvenile cases, the court can impose only one-third the term for a misdemeanor imposed consecutively.

People v. Jeffrey Hayes (H025691)  
Panel attorney: J. Frank McCabe  
Date: July 16, 2004

Appellant was convicted of mayhem with a great bodily injury enhancement. The enhancement had to be stricken because it was an element of the offense. (Staff attorney Dallas Sacher)

People v. Eduardo Acevedo (H026442)  
Staff attorney: Lori Quick  
Date: July 27, 2004

Appellant was convicted of conspiracy to commit arson. He was ordered to pay more than \$10,000 in restitution to repay the fire department for responding to the fires and investigating the cause. The court of appeal agreed the Penal Code did not authorize ordering



restitution for government time spent investigating a possible crime.

In re Johnny O. (H026985)  
Panel attorney: Mikol Benjacob  
Date: August 19, 2004

Appellant was placed on juvenile probation. He claimed some probation requirements were unconstitutionally overbroad because it did not require him to have *knowingly* engage in forbidden conduct. The court of appeal amended the probation orders to require mens rea. (Staff attorney Dallas Sacher)

People v. Chu Tran (H026401)  
Panel attorney: Joseph Shipp  
Date: August 31, 2004

Appellant was convicted of possessing cocaine and sentenced under the Three Strikes Law to a term of 25 years to life. In denying the *Romero* motion, the superior court relied on, among other things, its belief that he committed two additional violent felonies in 1982. The court of appeal reversed for a new sentencing hearing because the superior court's exercises of discretion was based on facts not established by the evidence. Further, appellant was entitled to additional presentence credits because the superior court erroneously believed presentence conduct credit was not allowed in a Three Strikes case. (Staff attorney William Robinson)

People v. Rosario Meza (H026667)  
Panel attorney: Diana Teran  
Date: September 23, 2004

An informant arranged for appellant to sell some heroin. While appellant was driving to the agreed upon location he was stopped, and heroin was found. He was eventually convicted of possession of heroin for sale in count one and transporting it in count two. The court ordered count one to be served concurrently with count two. The court of appeal agreed that count one needed to pay stayed pursuant to Penal Code section 654. (Staff attorney Lori Quick)

People v. Chareese Bailey (H026591)  
Panel attorney: Randy Kravis  
Date: September 29, 2004

While appellant was being sentenced to prison, the court ordered that he pay \$2500 in attorney fees. The court of appeal agreed there was insufficient evidence appellant had the ability to pay and struck the order. (Staff attorney Vicki Firstman)

In re Abraham V. (H027432)  
Panel attorney: Patricia Watkins  
Date: September 30, 2004

Minor was adjudged a ward of the court and, among other things, assessed a \$20 court security fee pursuant to Penal Code section 1465.8. The court of appeal struck this order, as a court security fee does not apply to juvenile cases. (Staff attorney Lori Quick)

People v. Sammie Robinson (H026833)  
Panel attorney: Jill Kent  
Date: October 4, 2004

Appellant was sentenced to prison and ordered to pay \$2000 in attorney fees. The court of appeal agreed there was insufficient evidence appellant had an ability to pay the fees/ (Staff attorney Vicki Firstman)

People v. Teddy Baldwin (H027059)  
Panel attorney: Thomas Singman  
Date: October 4, 2004

Appellant was sentenced to serve 25 years to life under the Three Strikes Law. The court awarded no presentence conduct credit, as it was under the impression conduct credit was not available for an indeterminate three strikes sentence. The court of appeal held that *In re Cervera* (2001) 24 Cal.App.4th 1073 prohibited postsentence conduct credit but did not apply to presentence conduct credit. (Vicki Firstman)

People v. Charles Cook (H027028)  
Staff attorney: Jonathan Grossman  
Date: October 7, 2004

Appellant was a prisoner and was charged with conspiracy to import drugs in prison with a prior strike conviction. He agreed to admit the allegations for a four year sentence. The court never specified during the plea discussion or at the sentencing hearing whether the sentence would be concurrent or consecutive. Since it did not expressly state it was a consecutive sentence, appellant was serving a concurrent sentence by default. The Department of Corrections wrote to the court and alerted it that a concurrent sentence under the three strikes law was unauthorized. The court changed the sentence to a consecutive term without appellant or his attorney present. On appeal, he contended the modified sentence violated the terms of the plea bargain and that resentencing him in absentia violated due process. The court of appeal decided it was not clear what the plea bargain was and remanded the matter for a new sentencing

hearing with appellant and his attorney present.

People v. Gregory Oliver (H025444)  
Panel attorney: Victor Blumenkrantz  
Date: October 7, 2004

Appellant was convicted by a jury of committing forcible lewd conduct. Two prior strikes were found true and the court denied his request to dismiss a prior strike. The court of appeal held there was insufficient evidence of force and reduced the conviction to nonforcible lewd conduct. Since the decision whether to dismiss a prior strike depended on the nature of the current offense, a new Romero hearing was necessary. (Staff attorney Lori Quick)

People v. Matias Hernandez (H026853)  
Staff attorney: Paul Couenhoven  
Date: October 7, 2004

Appellant entered into a plea bargain. Although he was advised of a potential restitution fine of up to \$10,000, an amount was never part of the plea bargain. Nonetheless, a \$10,000 restitution fine was imposed at sentencing. The court of appeal reversed the order, stating the amount was a substantial departure from the agreed upon punishment.

In re Valerie M. (H027320)  
Panel attorney: Maria Morrison  
Date: October 7, 2004

The minor was placed on probation and ordered to not be in a place where there is a deadly or dangerous weapon. The court of appeal modified the order to require knowledge. (Staff attorney Jonathan Grossman)

People v. Thomas Morales (H026590)  
Panel attorney: Richard Holly  
Date: October 7, 2004

At sentencing, appellant asked the trial court to reduce a wobbler to a misdemeanor. The court was open to the idea, but it decided to defer its decision until after appellant served his prison sentence. By statute, the trial court would lose its jurisdiction to reduce the conviction to a misdemeanor after appellant served a prison sentence. The court of appeal remanded the matter so that the trial court could make an informed exercise of its discretion. (Staff attorney Paul Couenhoven)

People v. Richard Brown (H027038)  
Staff attorney: Jonathan Grossman  
Date: October 20, 2004

When appellant entered into a plea bargain, the trial court advised him that he would be assessed a \$200 restitution fine. At sentencing however, it imposed a \$600 restitution fine. The court of appeal held the increased fine violated the conditions of the plea bargain. Further, the court lacked authority to impose a \$70 AIDS fine for an offense not listed by the statute. Finally, the court erred in purporting to state appellant would be on parole for five years when the law permitted parole to be only three years.

People v. Frank Sanchez (H026365)  
Panel attorney: Paul Holzhauer  
Date: October 20, 2004

Appellant entered a plea bargain. At sentencing, appellant learned he was going to receive less presentence credits than he expected. He moved to withdraw his plea, but the court denied the motion without considering his arguments. The court of appeal reversed for a new hearing on the motion to withdraw plea. (Staff attorney Bill Robinson)

People v. Jose Madera (H027574)  
Staff attorney: Paul Couenhoven  
Date: October 21, 2004

Appellant pled guilty to forgery and grand theft with a prior strike conviction. He was sentenced to 32 months in prison for count one and a concurrent term of 32 months for count two. Both counts concerned the same property. The court of appeal agreed that Penal Code section 654 required staying one of the counts.

People v. Luz Ceja (H026780)  
Panel attorney: Matthew Madalo  
Date: October 22, 2004

Appellant was ordered by the court to not associate with gang members or frequent areas of gang related activity as a condition of probation. The court of appeal modified the order to require knowledge. (Staff attorney Paul Couenhoven)

People v. Manuel Trujillo  
Staff attorney: Michael Kresser  
Date: November 10, 2004

The court agreed to strike the order for attorney fees because there was insufficient evidence of an ability to pay in this case when appellant was sentenced to prison.

People v. Diego Legaspi (H027525)  
Staff attorney: Paul Couenhoven  
Date: November 30, 2004

Appellant was placed on probation and assessed a \$400 restitution fine. Two years later, probation was revoked, and the court assessed a \$1000 restitution fine. The court of appeal reversed the second fine. The trial court can impose only one restitution fine.

People v. Rodney Anderson  
Panel attorney: Erik Babcock  
Date: December 3, 2004

The court of appeal struck an enhancement for being personally armed with a firearm (Pen. Code, § 12022, subd. (c)) when the underlying charge was conspiracy to manufacture methamphetamine. The enhancement does not attach to conspiracy. (Staff attorney William Robinson)

People v. Jose Pascua (H025888)  
Panel attorney: Keiran Manjarrez  
Date: December 16, 2004

A jury acquitted appellant of one count of residential burglary but convicted him of receiving stolen property. He was also found guilty of a separate burglary. The court sentenced him to prison and ordered he pay victim restitution for the residential burglary on the ground that he was involved to the extent he possessed the stolen property. The court of appeal reversed the restitution order as to the residential burglary. The victim's loss was not due to appellant receiving the stolen property. Further, since he was sentenced to prison, a restitution order could not be justified as a rehabilitative condition of probation. (Staff attorney Dallas Sacher)

People v. Christopher Lake (H026924)  
Panel attorney: Dean Johnson  
Date: December 16, 2004

Appellant was convicted of growing marijuana and placed on probation. The court ordered that he “not possess or consume alcohol or drugs or go to places where the same are sold or used.” Appellant successfully claimed the probation condition was unconstitutionally vague and overbroad, as it would prevent him from going to the supermarket and could place him in

violation without knowledge. The probation condition was modified to require that he “not possess or consume alcohol or drugs and not go to places where he knows drugs are used or sold or alcohol is the major item of sale.” (Staff attorney Lori Quick)

People v. Mihn Tran (H027571)  
Staff attorney Lori Quick  
Date: December 17, 2004

The court sentenced appellant to prison and ordered that he pay \$1000 in attorney fees. The order for attorney fees was reversed because there was insufficient evidence he had the ability to pay.

People v. Robin Lammers (H036+89)  
Panel attorney: James Haworth  
Date: December 21, 2004

Appellant was convicted by jury in 1990 of fraud. He disappeared for 12 years, but he was eventually found and sentenced to prison. The court of appeal reversed the OR enhancement because there was insufficient evidence he was aware of his rights to a jury trial on the enhancement. Further, the court held that under Blakely, the trial court could not sentence him to the upper term. (Staff attorney Vicki Firstman)

People v. Jaime Hernandez (H026408)  
Panel attorney: Joseph Shipp  
Date: December 22, 2004

Appellant was found guilty of three counts of murder with a gang enhancement. The trial court imposed an additional ten years for the gang enhancement. The court of appeal held that subdivision (b) of Penal Code section 186.22 required that appellant not be eligible for parole for 15 years and the additional ten year term was unauthorized. Further, appellant should receive an additional four days of presentence credits. (Staff attorney Bill Robinson)

In re Leonel M. (H027351)  
Panel attorney: James Duffy  
Date: December 23, 2004

The court of appeal remanded the matter to the juvenile court to determine if six of the counts were felonies or misdemeanors and to require knowledge to the probation conditions. (Staff attorney Lori Quick)

People v. Terry Braley (H027352)  
Panel attorney: Robert Angres  
Date: December 28, 2004

The court of appeal modified certain conditions of probation to require knowledge and prevent problems with the conditions being unconstitutionally vague. (Staff attorney Jonathan Grossman)

People v. Antonio Borquez (H026847)  
Panel attorney: Rachel Lederman  
Date: December 29, 2004

The court of appeal struck the order for attorney fees because there was insufficient evidence appellant had the ability to pay. (Staff attorney Paul Couenhoven)

#### **DEPENDENCY CASES**

In re C.O. (H026783)  
Panel attorney: Catherine Czar  
Date: September 2, 2004

The juvenile court assumed jurisdiction over the 16 year old minor because she was being molested by her father. Over minor's objection, the court ordered reunification services, including visitation, with the father. The juvenile court did not believe the chances of reunification were great, but it believed there was insufficient evidence to deny services and that services could at least help restore the minor's relationship with the remainder of the family. The minor appealed. A divided court of appeal reversed, holding there was insufficient evidence to support the court's findings and rulings. (Staff attorney Jonathan Grossman)

In re William M. (H027377)  
Panel attorney: Deborah Dentler  
Date: December 7, 2004

Minor was three-fourths Indian. ICWA notice was not sent to several tribes and the notices that were sent did not provide enough information on how to intervene. Although the court of appeal did not believe the failure to provide information on intervening was prejudicial, it reversed so that notice could be sent to the remaining tribes. (Staff attorney Jonathan Grossman)

In re Alex D. (H027565)  
Panel attorney: Maureen Keaney  
Date: December 15, 2004

The court of appeal reversed the termination of parental rights because of inadequate notice as required under ICWA. The agency failed to provide information about the grandparents and failed to provide information about how the tribe could intervene. (Staff attorney Jonathan Grossman)

### **HABEAS ORDERS TO SHOW CAUSE**

In re Natalie Lozano (H025798)

Staff attorney: Dallas Sacher

Date: January 21, 2004

Defendant was represented by counsel when he pled no contest to grand theft and petty theft with a prior conviction based on the same act. She filed a petition for writ of habeas corpus, alleging that trial counsel was incompetent for permitting to plead to both counts when the petty theft was a lesser included offense of the grand theft. After the court of appeal issued an order to show cause, the Attorney General conceded.

In re Dave Bautista (H026395)

Panel attorney: Meredith Fahn

Date: January 27, 2004

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. (Staff attorney Vicki Firstman)

In re Edward Smith (H026733)

Panel attorney: Peter Goldsheider

Date: May 20, 2004

Smith was convicted at trial of offering to sell methamphetamine and possessing more than two ounces of methamphetamine for sale. He presented an entrapment defense. He filed a habeas petition alleging that he decided not to testify at trial because he was told that he would be impeached with prior misdemeanor convictions for statutory rape, drug possession, and being under the influence of drugs, as well as a pending misdemeanor charge of burglary. The court indicated the convictions would be admitted to prevent the jury from inferring appellant was a law abiding citizen. Trial counsel did not seek to exclude the evidence. In seeking relief, he alleged that the evidence was inadmissible because the propensity of the defendant is not an issue in presenting the entrapment defense in California and they were not crimes of moral



turpitude. (Staff attorney Paul Couenhoven)

John Pau v. Superior Court (H027121)

Staff attorney: Paul Couenhoven

Date: August 13, 2004

Pau filed a habeas corpus petition in the superior court. The court appointed counsel and issued an order to show cause. On November 10, 2003, the People conceded he was entitled to relief. On December 6, 2003, Pau wrote to the district attorney's office complaining that it had not complied with the court's order to show cause. On February 2, 2004, Pau wrote to the superior court, stating he has not received any relief and he had not been able to contact counsel since the appointment. On February 27, 2004, Pau filed a petition for writ of mandate in the court of appeal. On May 10, 2004, the court of appeal appointed counsel and issued an order to show cause. The People responded the issue was moot because all that remained was to execute the superior court order. Yet nothing has happened. The court of appeal granted the writ and directed the superior court to provide the appropriate relief on the habeas corpus petition.

Thomas Barrett (H026256)

Panel attorney: David Martin

Date: December 8, 2004

Barrett was charged with felony DUI with two prior strike convictions. He pled open with the promise that he could bring a Romero motion. The motion was denied, and he was eventually sentenced to serve 25 years to life in prison. He moved to withdraw his plea, claiming trial counsel promised him he would receive probation. Trial counsel denied the allegation. In the court of appeal, a habeas corpus petition was filed with evidence that trial counsel was found to make the same promise to other clients despite her initial denials. The court issued an order to show cause. (Staff attorney William Robinson)

In re Bardamiano Arreguin (H026516)

Panel attorney: Tutti Hacking

Date: December 17, 2004

Defendant was convicted of conspiracy to manufacture methamphetamine. Police paid an informant for information at the rate of \$400 per pound of methamphetamine seized. Based solely on information provided by the informant, the police seized from defendant's home eight pounds of a substance which presumptively tested positive for meth. Retained counsel had an expert witness who would have testified that the evidence was consistent with the defendant being set up by the informant. Trial counsel did not call the expert, however, because defendant ran out of funds to pay the witness fees. Trial counsel failed to ask the court for witness fees given the defendant's new status as indigent. Trial counsel also failed to call character witnesses

who would have said defendant did nothing wrong in his life and that the charges were inconsistent with his character. Further, trial counsel did not call a dentist in Mexico who would confirmed that defendant was receiving extensive dental care during the week the informant claims he was arranging to exchange the meth. The court of appeal issued an order to show cause. (Staff attorney Bill Robinson)