

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

SUFFICIENCY OF THE EVIDENCE

People v. Luis Gonzalez (H032193)

Panel attorney: Maribeth Halloran

Date: December 19, 2008

A jury convicted appellant of illegally possessing ammunition, among other things, under Penal Code section 12316, subdivision (b). The statute prohibits anyone who was convicted of a felony listed in Penal Code section 12021.1 of possessing ammunition. Appellant's prior felony conviction was for false impersonation, Penal Code section 529, which is not a crime listed in section 12021.1. Thus, there was insufficient evidence for the conviction. (Staff attorney Paul Couenhoven)

People v. Robert Villareal (H030465)

Panel attorney: Frederick Schnider

Date: December 16, 2008

The court agreed there was insufficient evidence that appellant's 1982 conviction for second degree burglary was a strike. In 1982, a second degree burglary could be an inhabited residence. The charging document alleged he burgled a house, but did not indicate if the residence was inhabited. The minute order of his plea indicated only that he admitted committing a burglary. No other documents indicated he burgled an inhabited residence. (Staff attorney William Robinson)

People v. Adio Clayton (H031165)

Panel attorney: Danalynn Pritz

Date: October 30, 2008

Appellant was convicted of two counts of false imprisonment, among other things, when he pulled her out of a car, took her up an elevator to their apartment, pulled her into the bedroom and beat her. He then dragged her to the bathroom and tied her to the shower door. When she untied herself and tried to escape, he retied her to the door. Because false imprisonment is a continuing crime, all of this conduct constituted one crime. (Staff attorney William Robinson)

People v. Jimmie Wilkins (H030882)

Panel attorney: Laura Pedicini
Date: August 28, 2008

Appellant deposited a bogus check. The bank did not honor the check. It wanted to charge him \$8.50 for a rejected check, but there was no money in the account. The court of appeal agreed there was insufficient evidence of theft from the transaction because appellant never possessed any money and the bank was not actually missing any money. (Staff attorney Dallas Sacher)

People v. Salee Mohammed (H030980)
Panel attorney: Jill Fordyce
Date: May 2, 2008

Appellant was released on her own recognizance on a felony, but the court failed to have her sign the proper paperwork required by Penal Code section 1318. When she failed to appear, she was charged with felony failure to appear, though the underlying felony was dismissed. In a published decision, the court of appeal held that because she did not sign the statutory required promise to appear, there was insufficient evidence to convict her of failing to appear. (Staff attorney Michael Kresser)

People v. Samuel Banderos (H031242)
Panel attorney: Syra Kosofsky
Date: April 30, 2008

There was insufficient evidence of domestic violence when the victim's injury consisted of a sore back with no bruising or abrasions. (Staff attorney Lori Quick)

People v. Rudolfo Bergara (H030747)
Panel attorney: Danalynn Pritz
Date: March 20, 2008

Appellant was tried for distributing Ecstacy. He stipulated he knew what methamphetamine was, but there was otherwise no evidence he knew what Ecstacy was. Since an element of the offense was that the defendant know the nature of the substance, there was insufficient evidence to convict him of distributing Ecstacy. (Staff attorney William Robinson)

People v. Mario Trujillo (H030321)
Staff attorney: Jonathan Grossman
Date: January 17, 2008

A gun was found in appellant's bedroom. The serial number was obliterated. He was

charged with obliterating the serial number, but there was no evidence he had a role in obliterating the serial number. He was convicted after the jury was instructed that it may presume that if he possessed the gun, he obliterated the serial number. The Attorney General's Office conceded the instruction created an improper mandatory presumption and there was insufficient evidence to support the conviction.

PRETRIAL AND POSTTRIAL MOTIONS

People v. Douglas Peters (H030838)

Panel attorney: John Dwyer

Date: June 20, 2008

A *Pitchess* hearing was held in camera. Appellate asked the court of appeal to review the sealed record to determine if the trial court abused its discretion in denying discovery. The sealed record included the reporter's transcript of the in camera hearing but not the material the court reviewed. The court remanded the matter for the court to hold an in camera hearing, specify what records were reviewed, and make copies of the records for appellate review. (Staff attorney Paul Couenhoven)

People v. David Ortiz (H031493)

Panel attorney: Trina Chatterjee

Date: June 5, 2008

The court of appeal reviewed the in camera record of a *Pitchess* hearing and reversed for a new hearing. (Staff attorney Vicki Firstman)

People v. Jessie Herrera (H032172)

Staff attorney: Paul Couenhoven

Date: April 9, 2008

Appellant pled to a robbery for five years. After he pled but before sentencing he requested a *Marsden* hearing. The court of appeal held the failure to hold the hearing was error and remanded the matter for the hearing.

People v. Raul Leal (H031174)

Panel attorney: Jonathan Berger

Date: February 28, 2008

Police came to appellant's house to serve a misdemeanor arrest warrant. They had learned allegations that he was involved with gangs and possessed a gun and drugs. After officers announced their presence, it took them about 45 minutes to get appellant to open the front door.

When he did, he stood at the threshold until the officers convinced him to step outside. Once outside, he was arrested and placed in the back of a police car. Police made a quick “sweep” of the home and ascertained no one was inside. They then searched the area around the threshold where appellant was standing just before he was arrested. They found under some clothing a loaded handgun with the serial number obliterated. The superior court denied the motion to suppress, relying on some federal cases that permitted such an arrest incident to arrest. In a published decision, the court of appeal disagreed. With no one else present in the home and appellant secured in the back of the police car for several minutes, the police search of the area where he was before he was arrested was not incident to the arrest. Review was granted. (Staff attorney Dallas Sacher)

ERROR AT TRIAL OR HEARING

People v. Lorenzo Arteaga (H031585)

Date: December 30, 2008

Panel attorney: Rudy Kraft

The district attorney failed to file an MDO recommitment petition before the older commitment expired. The court of appeal agreed the trial court lacked jurisdiction and reversed the judgment of recommitment. (Staff attorney Jonathan Grossman)

People v. Pedro Gomez (H031770)

Panel attorney: Joy Maulitz

Date: November 12, 2008

Appellant was charged with solicitation to dissuade a witness with force or violence. The jury was instructed on solicitation and the target offense of dissuading a witness. It was not instructed on the target offense of dissuading a witness with force or violence. Because there was a serious question of fact whether there was a solicitation to use force or violence in the solicitation to dissuade a witness, the conviction was reversed. (Staff attorney Jonathan Grossman)

People v. Brandon Shawhan (H032127)

Panel attorney: Patricia Lai

Date: October 21, 2008

Appellant was convicted at trial of damaging shopping carts and tarps that covered them at night, among other things. A witness testified that she received a quote that it would cost \$1000 to replace the tarp, despite a hearsay objection. The court agreed the quote was hearsay and without the testimony there was insufficient evidence of the amount of the damage to convict appellant of felony vandalism. (Staff attorney Paul Couenhoven)

People v. Shane Walton (H032332)

Staff attorney: William Robinson

Date: September 30, 2008

Appellant was on probation and was found to be carrying a kubaton. A kubaton is a small, hollow, metal cylinder typically used to conceal a weapon. In this case, a three inch blade is revealed if one unscrews the top to the kubaton. He said he used it for landscaping, not as a weapon. He was accused of violating probation for possessing a concealed dirk or dagger. After being found in violation, he was sentenced to serve three years in prison. On appeal, the attorney general conceded appellant did not possess a dirk or dagger which is defined as a stabbing instrument available for ready use. Because the blade to the kubaton can be revealed only after manipulating the kubaton and unscrewing the top, it was not available for ready use. The court of appeal decided that, although his probation was also violated for other reasons, the court focused on the kubaton for revoking probation. Therefore, he was entitled to a new sentencing hearing.

People v. Ocie Houston (H031162)

Panel attorney: David Mann

Date: September 30, 2008

Appellant was convicted of felony assault and misdemeanor assault. The misdemeanor assault convictions must be dismissed because they are lesser included offenses. (Staff attorney Lori Quick)

People v. Francisco Dominguez (H031795)

Panel attorney: Patricia Lai

Date: September 10, 2008

Appellant was charged with one count of auto theft on or about and between October 16 and 18, 2006. According to the preliminary hearing testimony, appellant was working on a certain Toyota and returned it to the owner. Later, the owner found his Toyota missing, and appellant was arrested two days later driving the car. At trial, the owner also testified that appellant drove the car on October 9, 2006 without permission and returned it later that day. The court granted the prosecution's motion, over appellant's objection, to amend the information to include October 9. The jury convicted appellant. The court of appeal agreed in a published opinion that court lacked authority to amend the information to add an incident that was not supported by the preliminary hearing transcript. It found that trial without adequate notice of the charges required reversal. (Staff attorney Dallas Sacher)

People v. Soto (H03075)

Panel attorney: Heather McKay

Date: September 9, 2008

Appellant was charged with lewd conduct on a minor under the age of 14 years by force, violence, duress, menace, or fear. The court instructed the jury that consent is not a defense. Since consent is relevant to whether there was force or duress, and this was a central issue at trial, the

instruction constituted prejudicial error. Further, the prosecutor conducted misconduct when she was told not to mention appellant's admissions in opening statement because the court was considering whether to exclude them (and later decided to exclude them), but the prosecutor mentioned the admissions nonetheless. (Staff attorney William Robinson)

People v. Jeffrey Herberger (H031835)

Panel attorney: Michael Thorman

Date: August 21, 2008

A police officer was following a car and asked for a registration check. He learned the car was not reported stolen, and it was registered to a person with a Vietnamese name. The driver (appellant) pulled over and parked on his own, and the officer noticed appellant to be Caucasian. The officer stopped, stepped out of his car, and approached appellant who had already stepped out of his car. The officer asked for appellant's identification which he supplied. The officer ran a warrant check and learned there was a warrant for appellant's arrest. He was arrested; the identification was never returned. The officer later learned the steering wheel was punched, and appellant was charged with auto theft and driving with a suspended license. He moved to suppress the evidence, and the superior court granted the motion. After the charges were dismissed, the prosecution appealed. The court of appeal affirmed the granting of the suppression motion. It held there was a consensual encounter when the officer walked up to appellant, but there was a detention when the officer took his driver's license and would not return it. There was no reasonable cause to believe appellant might have committed crime merely because he was Caucasian and the car was registered to someone with a Vietnamese name. (Staff attorney Michael Kresser)

People v. Salvador Alvarado (H030684)

Panel attorney: Spencer Davis

Date: August 1, 2008

Appellant was convicted of burglary. The information was filed more than three years after the incident, but it was possible an arrest warrant was issued before the statute of limitations expired. The court of appeal reversed the conviction for purposes of holding a hearing to determine if the information was filed within the statute of limitations. (Staff attorney Lori Quick)

People v. Robinson (H031874), People v. Stephens (H031890), People v. Longhorne (H031887),

People v. Norris (H031918), People v. Robledo (H031879)

Panel attorney: Jean Matulis

Date: August 14, 2008

The retroactive imposition of an indeterminate commitment under the Sexually Violent Predators Act without trial was unlawful. (Staff attorney Jonathan Grossman)

People v. Burgess (H031870), People v. Rotroff (H031851), People v. Sanchez (H031856), People v. Vasquez (H031864)

Panel attorney: Gordon Scott

Date: July 10, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. (Staff attorney Jonathan Grossman)

In re Randy L. (H032450)

Panel attorney: Julie Schumer

Date: July 7, 2008

Appellant admitted brandishing a firearm. When the court took his admission, it failed to advise him of his right to confront witnesses and to compel the attendance of witnesses. The court of appeal reversed the judgment, holding that the failure to properly advise him of his rights to a trial was prejudicial error in this case. (Staff attorney Lori Quick)

People v. Terry Troglin (H031861), Christopher Hubbart (H031896), Dean Pacini (H031873)

Panel attorney: Jennifer Mannix

Date: June 25, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. (Staff attorney Jonathan Grossman)

Bruce Gordon (H031837)

Panel attorney: Jennifer Mannix

Date: June 24, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. (Staff attorney Jonathan Grossman)

People v. Ronald Rose (H031855)

Panel attorney: Danalynn Pritz

Date: June 13, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. (Staff attorney Jonathan Grossman)

People v. Fraser; People v. Lopez; People v. Starrett; People v. Wallace

(H031842, H031867, H031860, H031868)

Staff attorney: Jennifer Mannix

Date: June 11, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. (Staff attorney Jonathan Grossman)

People v. Francisco Torres (H031998)

Staff attorney: Paul Couenhoven

Date: June 10, 2008

Appellant's probation officer participated in a search of appellant's home. The officer asked appellant's brother which room was his, and the brother pointed to a particular room where drugs were found. Appellant's probation was revoked based solely on the testimony of the probation officer. The court of appeal reversed because the brother's indication of which room was appellant's was hearsay and there was not good cause for not presenting him as a witness at the violation of probation hearing.

People v. Martinez (H032281)

Panel attorney: Alfons Wagner

Date: June 6, 2008

As the Monterey County District Attorney's Office conceded on appeal, the superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. (Staff attorney Jonathan Grossman)

People v. Robert Segura (H031871)

Panel attorney: Jean Matulis

Date: June 5, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful. This was especially true in this case where the initial judgment of commitment was recently reversed. (Staff attorney Jonathan Grossman)

People v. Magana (H030453)

Panel attorneys: Carlo Andreani and Matthew Wilson

Date: June 3, 2008

Luis Magana was beat up by Garcia and told his son, Richard Magana, about it. Richard went to Garcia and a confrontation started resulting in Richard stabbing Garcia. The prosecution

theory was that Richard was guilty of first degree murder and Luis was also guilty as an aider and abettor. The defense alleged defense of others. The jury convicted Richard of voluntary manslaughter and Luis of aggravated assault. The jury asked if antecedent threats against the father could justify a quicker response by Richard. The answer is yes, but the court read the same confusing form instruction instead. The error required reversal. (Staff attorney Dallas Sacher)

People v. Michael Marchese (H031994)

Panel attorney: Rudolph Kraft

Date: May 29, 2008

Appellant was found not guilty by reason of insanity. The government petitioned to extend his commitment which appellant opposed. Midway through the jury trial on the extension petition, defense counsel, over appellant's objection, waived jury and requested that the commitment be extended. The court obliged. Appellant argued on appeal the loss of the contested hearing violated due process, which the government conceded. The court of appeal agreed. (Staff attorney Michael Kresser)

People v. Howard; People v. Soque (H031609, H031651)

Staff attorney: Jonathan Grossman

Date: May 29, 2008

The superior court's order retroactively modifying a two year commitment under the SVP Act to be an indeterminate term was unlawful.

People v. Uribe (H030630)

Panel attorney: David Martin

Date: April 24, 2008

Appellant was convicted of raping his teenage granddaughter, though the granddaughter later retracted her allegations. The physician assistant who performed the SART examination, Mary Ritter, testified that apparent injuries to the victim's hymen showed penetrating trauma. Three photographs from the examination had been disclosed to the defense. Based on examining the photographs, a defense expert said there was no evidence of penetrating trauma. A second prosecution expert testified that some of the photographs were consistent with penetration while the quality of the other made it impossible to draw any conclusion. It was later learned that the examination had been videotaped. According to the defense expert, the videotape more clearly showed a lack of penetrating trauma. The prosecution argued in the trial court that the videotape was not exculpatory because the defense expert was not credible, it was not suppressed by the prosecution because the SART examiners are not part of the prosecution team, and the evidence was not material. The court of appeal disagreed. Among other things, the SART exams are done exclusively for law enforcement purposes, not treatment, and are regulated by statutes in the Penal

Code. (Staff attorney Vicki Firstman)

People v. Litmon (H031348)

Panel attorney: Alfons Wagner

Date: April 23, 2008

Appellant was committed as a sexually violent predator for a two year term in 2000. In 2002, a petition was filed to extend the commitment two more years. Due to delays, it was consolidated with another petition in 2004. The court of appeal later decided in a published decision that delaying trial on the first extension petition to consolidate it with the second one was error. On remand, he had a trial on the first petition in 2005 and was found to qualify for a commitment until 2004. The second petition was consolidated with a third petition filed in 2006. Trial was held which ended with a hung jury. In April 2006, the court scheduled retrial for January 2007 because of heavy case loads by the court and counsel; further, there were problems in arranging the attendance of government witnesses. Appellant moved to dismiss for lack of a speedy trial in violation of due process. The motion was denied. Before he can have a new trial, the SVP Act was amended to make commitments last for life instead of two years. The government argued the amendment made the existing commitment indeterminate without the need of a new trial. The court agreed. The court of appeal reversed in a published decision. It held the amendments to the SVP Act did not apply retroactively, and the denial of a speedy trial violated due process and required dismissal of the petitions. (Staff attorneys William Robinson, Jonathan Grossman)

People v. J.B. (H031260)

Panel attorney: Danalynn Pritz

Date: March 28, 2008

Appellant was convicted of posing a minor for pornography based on several photographs, some of which were taken when the minor was unconscious. The court of appeal concluded that Penal Code section 311.4, subdivision (c) requires the minor's active participation, disagreeing with People v. Hobbs (2007) 152 Cal.App.4th 1. Since the prosecution relied on an invalid legal theory, the conviction must be reversed. (Staff attorney William Robinson)

People v. Robert Segura (H030416)

Panel attorney: Jean Matulis

Date: March 14, 2008

In an SVP proceeding, defense counsel provided discovery on its expert witness a few days after the statutory deadline. The prosecution moved to exclude the defense expert for the late discovery, though there was no showing of prejudice. The prosecution also was late in presenting its discovery on the government experts, but it argued the discovery statute did not apply to the prosecution because the witnesses belonged to the government, not necessarily the prosecution. The

superior court granted the prosecution's arguments. The court of appeal reversed. The discovery statute did require the government to provide timely information on the government witnesses, and it violated due process to exclude the defense case without a showing of prejudice while permitting the government witnesses to testify without compliance with the discovery rules. (Staff attorney Dallas Sacher)

People v. George Whaley (H031647)

Staff attorney: Jonathan Grossman

Date: March 3, 2008

Appellant was committed under the Sexually Violent Predator law in 1999 for a two year term. He was recommitted in 2001 and 2003. A petition was filed in 2005 to recommit him again. While the petition was pending, the SVP Act was amended in 2006 to state that an SVP commitment should be an indeterminate term. The District Attorney's Office moved that the court apply the amendment retroactively and declare that appellant's 1999 initial commitment has been automatically committed to be an indeterminate term. The court granted the motion. In a published decision, the court of appeal reversed. It concluded that the statutory language and legislative history did not support a conclusion that the amendment was intended to be applied retroactively.

People v. William Olsen (H031692)

Panel attorney: R. Charles Johnson

Date: March 3, 2008

Consistent with the holding in *People v. Whaley*, the court reversed the decision of the superior court retroactively modifying appellant's initial SVP commitment to be an indeterminate term. (Panel attorney Paul Couenhoven)

People v. Greg McDaniel (H029860)

Panel attorney: Edward Mahler

Date: January 31, 2008

Appellant was accused of assault by a prisoner on a non-prisoner. He was shackled at the jury trial without a showing of individual need. In a published decision, the court of appeal reversed. (Staff attorney William Robinson)

People v. Gary Story (H030020)

Panel attorney: J. Frank McCabe

Date: January 15, 2008

Betty Vickers was raped and murdered on October 22, 1976. Appellant was charged in 2005 with the murder. At trial, the prosecution relied on evidence of other sexual conduct under Evidence Code sections 1101 and 1108. The court of appeal reversed, holding section 1108 did not apply to non-sex crimes, even if there was a rape felony murder theory. Further, the evidence was not admissible under Evidence Code section 1101 or 352. Review was granted. (Staff attorney Vicki Firstman)

People v. Benny Perez (H031212)

Panel attorney: Peter Meadow

Date: January 10, 2008

The court of appeal reversed because appellant admitted he suffered prior drug trafficking convictions without a *Boykin-Tahl* advisement. (Staff attorney Paul Couenhoven)

SENTENCING

People v. Jennifer Logan (H032531)

Panel attorney: Ann White

Date: December 31, 2008

After appellant's motion to suppress evidence was denied, she pled no contest to possessing methamphetamine. She was placed on probation on condition, among other things, that she pay a drug program fee and other fines. She was also ordered to pay \$300 in attorney fees. The court of appeal affirmed the denial of the motion to suppress evidence, but it agreed there was insufficient evidence appellant had the ability to pay the drug program fee and attorney fees. It also agreed that the penalty assessments were excessive. (Staff attorney Lori Quick)

People v. Arlene Kong (H032298)

Date: December 30, 2008

Panel attorney: Julia Freis

The court ordered as a condition of probation that appellant take all prescribed medication. The court of appeal concluded there was sufficient evidence that she suffered from mental illness to justify the order, but agreed the order was overbroad and vague because, on the face of it, the order required her to take prescribed medication wholly unrelated to mental illness. It narrowed the order to pertain only to the treatment of mental illness. (Staff attorney Jonathan Grossman)

People v. Anthony Detro (H032871)

Panel attorney: Syda Kosofsky

Date: December 23, 2008

A jury convicted appellant of various charges, including a serious felony, and found true he had a prior serious felony conviction, a prior strike conviction, and a prior prison commitment, all based on the same prior conviction. The court doubled the sentence under the Three Strikes Law, added five years for the serious felony prior and stayed the prison prior. The court erred in imposing an enhancement for a prison prior (which was stayed) and a serious felony prior based on the same conviction. The correct remedy was to dismiss the prison prior. (Staff attorney Lori Quick)

People v. Anthony Anderson (H032954)

Panel attorney: Jennifer Sheetz

Date: December 19, 2008

Appellant was convicted of felony driving under the influence and felony driving with a blood alcohol level of more than .08 percent. The court imposed two concurrent two year prison terms and set the restitution fine at \$800 based on the statutory formula. The court of appeal agreed that one of the counts should have been stayed under Penal Code section 654, and the restitution fine therefore must be reduced by \$400. (Staff attorney Dallas Sacher)

People v. Frank Beech (H032406)

Staff attorney: Dallas Sacher

Date: December 17, 2008

Appellant was convicted of a new crime. He also suffered a parole violation for one year which he served at the county jail. The parole violation was also for absconding, so he was not entitled to presentence credits for the time he spent on the parole violation. The court of appeal agreed, however, that appellant would receive two days credit for every four days served at the jail on the parole violation. Therefore, appellant was entitled to an additional 122 days of presentence credit.

In re Anthony P. (H032784)

Panel attorney: Kelly Duncan

Date: December 15, 2008

The court remanded the matter for the juvenile court to determine if the offense was a felony or a misdemeanor pursuant to *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204). (Staff attorney Lori Quick)

People v. Ly Nguyen (H031215)

Panel attorney: Heather McKay

Date: December 5, 2008

The order for \$5000 in attorney fees was reversed because of insufficient evidence of an ability to pay. (Staff attorney William Robinson)

People v. Ricardo Morales (H032574)

Attorney: Paul Starrett

Date: December 2, 2008

Appellant was convicted of possession of a concealed gun with gang enhancements. As a condition of probation, he was ordered not to be at a courthouse except for his own case. The court held the condition was unconstitutionally overbroad and modified the condition to not permit him to be in a criminal courthouse or courtroom without the probation officer's approval. A dissenting justice stated the modification was too overbroad. (Staff attorney Dallas Sacher)

People v. Gabriel Colin (H032202)

Panel attorney: James Duffy

Date: November 12, 2008

The court imposed an \$1800 restitution fine, but it failed to warn the defendant before he pled that a restitution fine would be imposed. The court held that failure to advise the defendant of this consequence of the plea required the court to impose only the statutory minimum fine of \$200. (Staff attorney Lori Quick)

People v. Christopher Hall (H032623)

Staff attorney: William Robinson

Date: October 31, 2008

Appellant was placed on probation on condition he serve six months in jail; he was also ordered to pay an unspecified amount of attorney fees. The clerk's transcript specifies \$300. The court of appeal agreed there was insufficient evidence he had an ability to pay the fee.

People v. Matthew Rael (H032509)

Panel attorney: David Martin

Date: October 30, 2008

Appellant was placed on probation on condition he serve ten months in jail; he was also ordered to pay attorney fees. The court of appeal agreed there was insufficient evidence he had an ability to pay the fee. (Staff attorney William Robinson)

People v. Sanchez (H032318)

Staff attorney: Paul Couenhoven
Date: October 24, 2008

The court should have stayed the punishment for domestic violence when appellant was also convicted of violating Penal Code section 220 for the same conduct.

People v. April Jackson-Reynolds (H032834)

Panel attorney: Jeffrey Glick
Date: October 23, 2008

Appellant was convicted of gross vehicular manslaughter in count one and driving with a suspended license in count two. The court sentenced her to serve ten years for count one and one year for count two. The court awarded 339 actual days and 139 conduct days of presentence credit. Since there was no evidence appellant suffered a prior conviction for driving with a suspended license, the maximum punishment for count two was six months. Further, the court miscalculated the conduct credits, which should have been 168 days. (Staff attorney Dallas Sacher)

People v. Jon Anderson (H032611)

Panel attorney: Benjamin Owens
Date: October 21, 2008

Appellant was ordered to stay 100 yards away from the victim, the victim's residence vehicle or place of employment as a condition of probation. The condition was modified to require knowledge. (Staff attorney Vicki Firstman)

People v. Jaime Plascencia (H029862)

Staff attorney: Dallas Sacher
Date: October 21, 2008

The court erred in imposing the upper term based on factors not admitted or presented to a jury.

People v. Hiren Patel (H031617)

Staff attorney: Lori Quick
Date: October 3, 2008

The court erred in requiring the payment of probation fees as a condition of probation.

People v. Sheri Schmier (H031991)

Panel attorney: Han Tran
Date: October 3, 2008

The court erred in requiring the payment of probation fees as a condition of probation. (Staff attorney Lori Quick)

People v. Leon Martinez (H031805)

Panel attorney: Thomas Singman
Date: September 26, 2008

The court imposed punishment for attempted murder with a gang enhancement and a firearms enhancement from a fellow gang member firing a gun (Pen. Code, § 12022.53). The court of appeal agreed the gang enhancement must be dismissed in lieu of the vicarious firearms enhancement. (Staff attorney William Robinson)

In re Eva P. (H032854)
Staff attorney: Lori Quick
Date: September 26, 2008

Appellant was placed on probation and placed in a group home. The court of appeal agreed the juvenile court was required to set the maximum confinement time.

People v. Rene Gilbert (H032221)
Panel attorney: Julia Spikes
Date: August 28, 2008

Appellant was convicted of two felonies and sentenced to serve seven years in prison. The court stayed the punishment for one of the felonies and calculated the restitution fine according to the statutory formula to be \$2800. The court of appeal agreed that because the punishment for one of the counts was stayed, it should not have been included in the calculation, and the total restitution fine should be \$1400. (Staff attorney Paul Couenhoven)

People v. Humberto Calderon (H032457)
Staff attorney: Paul Couenhoven
Date: August 14, 2008

The court orally pronounced a restitution fine of \$600, but the abstract of judgment stated \$1200. The court of appeal ordered the abstract of judgment be corrected.

In re K.F. (H032410)
Panel attorney: Alex Coolman
Date: August 13, 2008

Appellant was found to have committed assault with force likely to cause great bodily injury with a great bodily injury enhancement in count one and serious bodily injury in count two. He was placed in a ranch program. The court of appeal agreed that count two should have been stayed under Penal Code section 654 in setting the maximum confinement time. (Staff attorney Jonathan Grossman)

People v. Sary Lour (H030770)
Panel attorney: Maureen Fox
Date: August 13, 2008

A jury convicted appellant of some charges, and acquitted him of others. He was sentenced to prison. The court of appeal agreed that the court erred in ordering victim restitution for the counts of which he was acquitted. (Staff attorney Dallas Sacher)

People v. Alfred Tanog (H032399)
Staff attorney: Lori Quick
Date: August 15, 2008

The court imposed excessive penalty assessments, and it should be reduced.

People v. Stephen Braga (H031732)
Panel attorney: Victoria Stafford
Date: July 29, 2008

Appellant pled to six counts, but the punishment for one of the counts was stayed pursuant to Penal Code section 654. In calculating the restitution fine, the court used the stayed count. The court of appeal held this was error. (Staff attorney Jonathan Grossman)

People v. Soto (H027820)
Panel attorney: David Martin
Date: July 23, 2008

Imposition of the upper term violated the Sixth Amendment. Imposition of a parole revocation restitution fine for a crime committed in 1993 violated the ex post facto clause. (Staff attorney William Robinson)

People v. George Olmos (H031807)
Panel attorney: Rudolph Kraft
Date: July 21, 2008

There was insufficient evidence the defendant had the ability to pay attorney fees imposed by the court. (Staff attorney Dallas Sacher)

People v. Anastacio Guerrero (H030876)
Staff attorney: Paul Couenhoven
Date: July 16, 2008

Appellant was convicted of, among other things, robbery and false imprisonment stemming from the same incident. The court of appeal agreed that the punishment for false imprisonment should have been stayed pursuant to Penal Code section 654.

People v. Paulina Gamble (H031427)
Panel attorney: Tutti Hacking
Date: July 11, 2008

Although the punishment for an escape under Penal Code section 4532, subdivision (c) must be served consecutively, the court had the discretion to impose a concurrent term for a violation of subdivision (a) of the statute. (Staff attorney William Robinson)

People v. Hector Chairez (H032777)
Panel attorney: John Dwyer
Date: July 11, 2008

Appellant was convicted of being an ex-felon in possession of a firearm and in possession of ammunition. The court of appeal agreed that the punishment for possession of the ammunition should have been stayed pursuant to Penal Code section 654. Consequently, the restitution fines, calculated by using the formula in Penal Code section 1202.4, must be reduced. (Staff attorney Lori Quick)

People v. Christopher Castillo (H030594)
Panel attorney: R. Shanti Brien
Date: July 9, 2008

Appellant was convicted of battery on a noninmate (Pen. Code, § 4131.5) and assault on a custodial officer (Pen. Code, § 241.1), stemming from the same attack. The trial court erred in not staying the punishment for one of the counts pursuant to Penal Code section 654. (Staff attorney

Lori Quick)

People v. Javier Leal (H0303415)

Panel attorney: Steven Lubliner

Date: July 8, 2008

Appellant and two other assailants attacked a victim. One of them had a knife, the other had a bottle, and a third had a bat or stick. Appellant was convicted of three counts of assault with a deadly weapon. The court of appeal agreed that he could be punished for only one of the counts, and the other two counts must be stayed pursuant to Penal Code section 654. (Staff attorney Paul Couenhoven)

People v. Alejandro Sanchez (H031570)

Panel attorney: Rudy Kraft

Date: June 25, 2008

There was insufficient evidence appellant had the ability to pay attorney fees, and the court erred in making payment of probation fees a condition of probation. (Staff attorney Jonathan Grossman)

People v. Raymond Quinonez (H032002)

Panel attorney: Katarzyna Kozik

Date: June 24, 2008

Appellant and his companions planted pipe bombs without fuses. They called the police to report the bombs. While the police responded en masse to the pipe bombs, appellant and his companions attempted to commit a robbery in another part of town. The court of appeal agreed that Penal Code section 654 precluded separate punishment for the robbery and the bomb-related crimes. (Staff attorney William Robinson)

People v. Donna Olsen (H031660)

Panel attorney: John Schuck and Maureen Fox

Date: June 17, 2008

Appellants were convicted of two counts of assault with a deadly weapon and sentenced to prison. The court ordered they have no contact with the victims for an unspecified period of time. The stay away order was unauthorized. The court could not make such an order under Penal Code section 136.2 because this provision applies only until the trial is completed. The court could not have ordered a protective restraining order under the Code of Civil Procedure section 527.6 because there was no evidence the victims were afraid of the defendants and the civil provision did not

provide for an order of an undetermined length of time. (Staff attorney Vicki Firstman)

People v. Daniel Ornelas (H030853)

Panel attorney: Danalynn Pritz

Date: June 11, 2008

The penalty assessments on a fine were too much, and the court of appeal ordered that it be reduced. (Staff attorney William Robinson)

People v. Juan Vasquez (H031781)

Panel attorney: Danalynn Pritz

Date: May 30, 2008

The court erroneously imposed a \$70 AIDS fine for a crime which does not carry the fine. (Staff attorney Dallas Sacher)

People v. Marcos Soria (H031237)

Panel attorney: Jeffrey Glick

Date: May 23, 2008

Appellant pled to the charges in three different cases. He waived his right to appeal the sentence. The trial court imposed a \$10,000 restitution fine on one case and additional restitution fines on the other cases. In a published decision, the court of appeal concluded the waiver of appeal did not encompass the restitution fines. Nor did appellant agree to the restitution fines when he was advised in each case when he pled that he could receive a restitution fine of up to \$10,000. The court held that the imposition of restitution fines totaling more than \$10,000 in one prison commitment was unauthorized. Review was granted. (Staff attorney Vicki Firstman)

People v. Wardell (H031285)

Panel attorney: Gene Vorobyov

Date: May 20, 2008

Appellant was convicted of certain crimes and the court imposed a \$200 restitution fine, among other things. He appealed, and the judgment was reversed. Upon retrial, he was convicted, and the court imposed a \$10,000 restitution fine. The court of appeal agreed that the amount of the fine could not increase after a successful appeal. (Staff attorney William Robinson)

People v. Michael Shephard (H030646)

Panel attorney: Danalynn Pritz

Date: May 16, 2008

The imposition of the upper term violated *People v. Black II* (2007) 41 Cal.4th 799, 818-819, and the matter was remanded for a new sentencing hearing under *People v. Sandoval* (2007) 41 Cal.4th 825.

People v. Frederick Mendiola (H031839)

Panel attorney: Cliff Gardner

Date: May 16, 2008

Appellant was sentenced to serve six years in prison and ordered to pay \$300 in attorney fees. The court of appeal agreed there was insufficient evidence he had the ability to pay.

People v. Freddie Guzman (H031390)

Panel attorney: Judyanne Valladao

Date: May 9, 2008

The court imposed fines but it could not be determined how much of the amount was the substantive fine and how much consisted of penalty assessments. The matter was remanded for the court to specify the amounts. (Staff attorney Lori Quick)

People v. Jesus Estrada (H031979)

Panel attorney: Paul Carroll

Date: May 8, 2008

Appellant was placed on probation and the court set a \$200 restitution fine. When probation was revoked, the restitution fine increased to \$600. This was error. Also, the court failed to award a day of presentence credits and a day of conduct credit. (Staff attorney Lori Quick)

People v. Joseph Johnson (H032006)

Staff attorney: Lori Quick

Date: April 25, 2008

There was insufficient evidence appellant had the ability to pay attorney and probation fees.

People v. Gonzales (H030466)

Panel attorney: Richard Rubin

Date: April 25, 2008

The court erred in imposing a full consecutive term for a violation of Penal Code section 220. At the time of the offense, Penal Code section 667.6, subdivision (d) did not permit a full consecutive term for the conviction unless the defendant suffered certain prior convictions which did not apply in this case. (Staff attorney Paul Couenhoven)

People v. Leo Tubera (H031568)

Panel attorney: Alan Stern

Date: April 25, 2008

Appellant was placed on probation on condition that he serve nine months in jail. There was insufficient evidence he could pay \$300 in attorney fees. (Staff attorney Vicki Firstman)

People v. Dragos (H031023)

Panel attorney: David Martin

Date: April 17, 2008

Appellant was convicted of several sex counts. The court indicated that consecutive sentences were required when it had discretion to impose concurrent sentences. The court of appeal remanded the matter for resentencing. (Staff attorney Dallas Sacher)

People v. Louie Bucao (H031455)

Panel attorney: Jeffrey Glick

Date: April 10, 2008

The matter was remanded to the trial court to correct the victim restitution order. The reporter's transcript of the sentencing, the minute order of the hearing, and the judgment of restitution all reflected different information and amounts. (Staff attorney William Robinson)

People v. Neil Prudente (H031989)

Staff attorney: Lori Quick

Date: April 4, 2008

The court of appeal modified the judgment to make clear that payment of probation fees cannot be a condition of probation.

People v. Darryl Hutchinson (H031935)

Staff attorney: Lori Quick

Date: April 4, 2008

Appellant was convicted of possessing drugs, among other things. The court imposed an AIDS education fund and drug program fee, plus penalty assessments. The court of appeal agreed that the superior court failed to properly calculate the penalty assessments.

People v. Fredrick Guidotti (H031825)

Panel attorney: Syda Kosfosky

Date: April 4, 2008

Appellant was convicted of one count of possession for sale. The court imposed a \$180 drug program fee and \$440 drug lab fee. Since the statute limits the fines to \$150 and \$50, respectively, the larger assessments were unauthorized.

People v. D.R. (H030576)

Panel attorney: Danalynn Pritz

Date: March 28, 2008

The court of appeal modified the sentence to specify that payment of probation costs cannot be a condition of probation. (Staff attorney William Robinson)

People v. Le Hung (H031603)

Panel attorney: Jennifer Sheetz

Date: March 18, 2008

Appellant was convicted of grand theft, petty theft with a prior, and commercial burglary from the same shoplifting incident. The court of appeal reversed the conviction for petty theft with a prior because it was a lesser included offense to grand theft. It stayed the punishment for commercial burglary. Because he was convicted of only two offenses, the court security fee was reduced to \$40. (Staff attorney Dallas Sacher)

People v. Keith Derby (H030606)

Panel attorney: Silas Geneson

Date: March 25, 2008

There was insufficient evidence appellant had the ability to pay attorney fees. (Staff attorney William Robinson)

People v. Anthony Baldwin (H031470)

Panel attorney: David Burnett

Date: March 4, 2008

The court of appeal agreed appellant was entitled to an additional day of presentence credit for the day he was arrested. (Staff attorney Dallas Sacher)

People v. David Fickes (H030187)

Panel attorney: Catherine White

Date: March 3, 2008

The court imposed the upper term because of appellant's prior conviction; it also imposed an enhancement based on the prior conviction. The law prohibits dual use of a prior to enhance a sentence and to impose the upper term. Further, there was insufficient evidence of an ability to pay attorney fees. The court of appeal remanded the matter for a new sentencing hearing. (Staff attorney Lori Quick)

People v. Sebastian Mejia Chun (H030461)

Panel attorney: Ozro Childs

Date: February 28, 2008

The court sentenced appellant to nine years in prison and imposed attorney fees of \$2000. The court of appeal agreed that there was insufficient evidence he had the ability to pay the fees. (Staff attorney Jonathan Grossman)

People v. Garth Hattan (H031644)

Staff attorney: Lori Quick

Date: February 27, 2008

The court imposed a \$440 drug lab fee. The matter was remanded because the court of appeal, appellant, and respondent were unable to determine how the court arrived at the figure.

People v. Gary Sumrall (H031467)

Panel attorney: Benjamin Owens

Date: February 25, 2008

The court erred in making payment of the probation supervision fee a condition of probation. (Staff attorney Lori Quick)

People v. Felix Reyes (H031256)

Panel attorney: Emry Allen

Date: February 19, 2007

Appellant admitted violating probation for wearing gang clothes and testing positive. In

determining whether to reinstate probation or sentence him to prison, the court relied on information that he “blew off” 28 days of the jail work program in lieu of his previous jail term. In fact, the record showed appellant did not blow off the jail program. Because the court's exercise of discretion was dependent upon erroneous facts, a new sentencing hearing was required. (Staff attorney Jonathan Grossman)

People v. M. M. (H030704)

Panel attorney: R. Bart Scott

Date: February 13, 2008

Appellant was convicted of lewd conduct (Pen. Code, § 288, subd (a)) and oral copulation of a minor (Pen. Code, § 288a, subd. (c)(1)). The court imposed the middle term of six years for each count, fully consecutive to each other without giving a reason. Under subdivision (d) of section 667.6, full consecutive sentences are mandatory if the defendant commits two or more enumerated offenses. But at the time the offenses were committed, oral copulation of a minor was not an enumerated offense. The court had discretion to impose fully consecutive terms under subdivision (c) of section 667.6, but it requires the court to give its reasons. The court of appeal remanded the matter for a new sentencing hearing. (Staff attorney Dallas Sacher)

People v. Luis Garcia (H031771)

Panel attorney: J. Wilder Lee

Date: January 29, 2008

Appellant pled guilty of two counts of receiving a stolen vehicle. At the sentencing hearing, the court suspended appellant's driver's license under Vehicle Code section 13350. The statute permits the court to suspend a license for “use” of a vehicle in the commission of a felony. The court of appeal held that receiving the car is not using it to commit a felony. (Staff attorney Lori Quick)

In re Keith C. (H031656)

Panel attorney: Ozro Childs

Date: January 16, 2008

The minor attacked the victims with a rock in taking an iPod and other property. The juvenile court found he committed assault with a deadly weapon and two counts of robbery with enhancements for personally using a weapon. The court of appeal concluded the weapons enhancement cannot attach to assault with a deadly weapon, and the punishment for the assault must be stayed pursuant to Penal Code section 645. (Staff attorney Jonathan Grossman)

People v. Andrew Silva (H029863)

Panel attorney: John Dwyer
Date: January 16, 2008

The court found that imposing the upper term for various factors, none of which concerned recidivism, violated *Cunningham v. California* (2007) 127 U.S. 856. (Staff attorney William Robinson)

People v. Keith Rudolph (H030675)
Panel attorney: Deborah Hawkins
Date: January 15, 2008

Appellant was convicted of domestic violence and force likely to cause great bodily injury. Believing he was convicted of a violent felony, the trial court erroneously limited presentence conduct credits to 15 percent of the sentence. (Staff attorney Lori Quick)

People v. Elijah Blanton (H031245)
Panel attorney: Alex Green
Date: January 11, 2008

Appellant was convicted of commercial burglary and vandalism for entering a store at night and breaking items inside. The court of appeal agreed the punishment for the vandalism must be stayed pursuant to Penal Code section 654. (Staff attorney Vicki Firstman)

DEPENDENCY CASES

In re C.B. (H032859)
Panel attorney: Carole Greeley
Date: December 10, 2008

The matter was remanded for better notice required by ICWA. (Staff attorney Vicki Firstman)

In re J.E. (H032827)
Panel attorney: James Haworth
Date: October 14, 2008

The court failed to comply with the notice requirements of ICWA. (Staff attorney Vicki Firstman)

In re Arista S. (H032137)

Panel attorney: Caroline Todd
Date: April 22, 2008

After the minors' parents separated, they lived with their father and his new wife. When the father was arrested and sentenced to prison, they stayed with their step-mother. When the step-mother was arrested on drug charges, CPS intervened. The court placed the children in foster care, though the step-mother was eventually released from custody. The father appealed. He contended the court erred in not considering whether he could make adequate arrangements for the care of the minors, even if that meant they would stay with the step-mother. CPS conceded, and the court of appeal reversed. (Staff attorney Jonathan Grossman)

In re Mary H. (H032360)
Panel attorney: Julie Braden
Date: April 11, 2008

The government conceded the matter should be reversed for failure to comply with the ICWA. (Staff attorney Vicki Firstman)

In re Alice M. (H031794)
Panel attorney: Julie Braden
Date: April 9, 2008

The mother appealed from the juvenile court's order terminating parental rights. The court reversed for failure to provide proper notice under ICWA. The matter was remanded, and the juvenile court found new notice was proper and again terminated parental rights. In a published decision, the court of appeal reversed again. Disagreeing with some other decisions, the court held that failure of trial counsel to object at remand cannot waive the rights of the tribe or parent to proper notice. This was especially true in this case where the problem was not inadequate content of the notices but also failure to send the notices to the proper people and the proper addresses. The court also rejected the government's argument that recent amendments to the Welfare and Institutions Code and Rules of Court relaxed the requirements to send notice to the tribes. Finally, it was error for the Department to rely on a state database of addresses of tribes, which was outdated, instead of the addresses listed in the Federal Register, and sending notice to the Bureau of Indian Affairs was not an adequate substitute. (Staff attorney Jonathan Grossman)

In re D.B. (H032207)
Panel attorney: Jesse Rodriguez
Date: March 12, 2008

County counsel conceded reversal was required for failure to provide adequate notice under ICWA. (Staff attorney Vicki Firstman)

HABEAS PROCEEDINGS

In re Mark Grunau

Staff attorney: Paul Couenhoven

Date: December 30, 2008

Grunneau was convicted in 1996 and sentenced to serve life in prison under the Three Strikes Law. He appealed and retained Dan J. Foley to prosecute his appeal. A timely notice of appeal was filed in the superior court. On January 24, 1997, the appeal was dismissed because no opening brief was filed. The remittitur was issued on April 4, 1997. Because Foley was not writing to Grunau, he was relying on his father to communicate with Foley. Between 1996 and 2004, Grunau's father was calling Foley monthly, sometimes weekly. Foley never said the appeal was dismissed. On the contrary, he consistently assured him that the appeal was proceeding and provided plausible reasons for the delays. At one point, he said the opening brief was filed but there was a delay because he was requesting oral argument. At another point, he said the case was being delayed while the Supreme Court considered a Three Strikes case. Foley resigned from the State Bar in 2001 while facing multiple pending disciplinary actions, but he did not disclose this. The father tried to confirm Foley's assurances with the superior court, but he was not told until August 2004 that the appeal had been dismissed. He went to the law library to research possible solutions. Finding none, he called the court in November 2004, and the clerk suggested calling SDAP, which he did. In March 2005, SDAP filed a motion to recall the remittitur which the court of appeal initially denied because of the long passage of time. SDAP filed a habeas corpus petition in the supreme court. It issued an OSC returnable to the court of appeal. The court of appeal issued a published opinion granting relief. Foley had taken money for representation and abandoned the appeal without authorization. He intentionally misled the family about the progress of the appeal. Although a defendant himself should be more active in an appeal, it was not unreasonable for Grunau to rely on his father, and his father was diligent.

In re Jose Cruz Lopez (H032511)

Staff attorney: Dallas Sacher

Date: November 12, 2008

The police received a tip that Jose Lopez is dealing drugs. They reviewed the superior court computerized case information and learned that Jose Hernandez Lopez is on probation. They reviewed another data base and ascertained his address. They arrived at the address to conduct a probation search. Petitioner Jose Cruz Lopez answered the door and confirmed his name was Jose Lopez. The police found drugs. He filed a motion to exclude evidence on the ground that he was not the same Jose Lopez the police were looking for, and he was not on probation. A printout of the superior court date file that showed Jose Hernandez Lopez was on probation also showed he was arrested weeks before the police reviewed the file and had remained in custody on a probation violation. However, trial counsel failed to argue this point in the trial court. The superior court denied the motion. The court of appeal affirmed and denied the petition for writ of habeas corpus based on ineffective assistance of counsel. On a petition for review, the supreme court directed that

an order to show cause be issued, returnable to the court of appeal.

In re Johnny Lira (H031227)
Panel attorney: Steve DeFilippis
Date: July 30, 2008

The government appealed the superior court granting relief on habeas corpus for a prisoner seeking release on parole. The court of appeal agreed with the superior court that there was not some evidence to deny parole. (Staff attorney Michael Kresser)

In re Anthony Orozco (H031452)
Staff attorney: Michael Kresser
Date: July 18, 2008

In a habeas proceeding filed in the court of appeal, it was determined that a new parole hearing was required when the Parole Board relied on facts of the underlying crime that was unsupported by the record.

In re Thomas (H030573)
Panel attorney: David Martin
Date: July 16, 2008

Defendant was convicted of burglary to commit rape and sentenced to life in prison. He claimed in a habeas petition he received ineffective assistance of counsel. Although there was evidence that his severe mental illness interfered with an ability to form the specific intent to commit the felony when he entered the residence, this information was not investigated or presented at trial. Trial counsel stated he believed that an insanity plea would not be successful, but he failed to consider an attack on the ability to form the specific intent. The court of appeal issued an order to show cause. (Staff attorney Lori Quick)

In re Stephen Samble (Santa Clara Super. Ct. No. 75735)
Staff attorney: Jonathan Grossman
Date: July 16, 2008

Samble was denied parole in 2003. He filed a habeas corpus petition, and the superior court found there was not some evidence to deny parole. The government appealed, and the court of appeal affirmed. On remand, the Parole Board again denied parole based on the same record. The courts again found there was not some evidence to deny parole. Litigation dragged on until the Board finally released him on parole in 2008. He then filed a habeas corpus petition claiming the time he had been in custody after the unlawful denial of parole should be credited to his time on

parole. The court agreed and granted relief.

In re David Vigil (H032786)

Staff attorney: Dallas Sacher

Date: June 9, 2008

Defendant pled guilty to making criminal threats and admitted he had at least two prior strike convictions. The victim told the police defendant had knife during the incident. She told the public defender investigator that she did not see what he was holding. Defense counsel never presents this evidence. At sentencing, the judge denied the *Romero* motion, stating the victim must have been very afraid because of the knife, the defendant showed no remorse because he denied he had a knife, and one of his prior strikes involved use of a knife. The court of appeal granted an order to show cause in the habeas corpus petition alleging ineffective assistance of counsel for not presenting the evidence disputing the existence of the knife.

In re Byron Mills (H031434)

Panel attorney: Keith Wattley

Date: May 28, 2008

The court of appeal affirmed the superior court's order for relief on habeas corpus. Mills was convicted 27 years ago for second degree murder. There was not some evidence to justify the decision by the Parole Board to find him unsuitable for parole. (Staff attorney Dallas Sacher)

In re Nam Van Huynh (H031395)

Panel attorney: Keith Wattley

Date: April 16, 2008

Huynh was convicted in 1989 of second degree murder. In 2002, the Board of Prison Terms determined he was suitable for parole, but the governor vetoed the decision. The superior court granted Huynh's petition for relief on habeas corpus because there was not some evidence to support the governor's decision. The government appealed, and the court of appeal mostly agreed with the superior court but remanded the matter for the governor to reconsider. The governor again vetoed the finding of suitability. The governor again vetoed the Board's decision. After the superior court granted relief on habeas corpus, the government appealed. Meanwhile, the Board found him suitable again in 2005. The governor vetoed the decision, the superior court granted relief, and the government appealed. The court of appeal agreed there was not some evidence to support the governor's decisions. The murder of his wife occurred during a period of depression which was now over. He was otherwise a model inmate. There was insufficient grounds for concluding the commitment offense continued to make him unsuitable for parole. The court reversed and found it unnecessary to remand the matter for reconsideration. (Staff attorney Michael Kresser)

MISCELLANEOUS

Lewis v. Superior Court (H032621)
Staff attorney: Paul Couenhoven
Date: December 15, 2008

In 1986, 22 year-old Lewis was convicted of oral copulation with a minor, his 17 year-old girlfriend. He was placed on probation and ordered to register as a sex offender. Twenty years later, he filed a motion in the superior court to relieve him of his duty to register in light of *People v. Hofsheier* (2006) 37 Cal.4th 1115. In a published opinion, the court of appeal held court had jurisdiction to consider a petition for writ of mandate, Lewis's motion would be considered such a petition, and the court acted in excess of its discretion in denying the relief requested.

Jesse Amaya v. Superior Court (H032732)
Attorney: Seth Flagsberg
Date: November 14, 2008

Amaya and the prosecution entered into a plea agreement where he would plead no contest to misdemeanor vandalism and a gang allegation (Pen. Code, § 186.22, subd. (d)) in exchange for a sentence of 180 days in jail with all but 45 days of it suspended. After the court accepted the agreement but before sentencing, the prosecution moved to vacate the plea on the ground that the agreed sentence was illegal. The court granted the motion, and Amaya filed a petition for writ of mandate to enforce the agreement. The prosecution argued that the gang enhancement required a felony sentence. But the statute states that one who is culpable under the enhancement may be punished by six months to a year in jail or by prison. Since the statute makes otherwise misdemeanor gang crimes a wobbler, the court had authority to impose a misdemeanor sentence of six months in jail. Because the agreed upon sentence was lawful, the court did not have discretion to grant the prosecution's motion to withdraw the plea. (SDAP was not involved in the case.)

Hernandez v. Superior Court (H032743)
Panel attorney: J. Courtney Shevelson
Date: November 14, 2008

Hernandez was driving his car and stopped near two teenage girls. He asked for directions. The girls provided directions, but he appeared confused and starting talking in a low voice which forced the girls to come closer to the car. Eventually the girls ended the conversation; he asked which school they went to, but they refused to answer. He drove off but then returned to ask them for directions again. The second time, he did not speak in a low voice. The girls did not cooperate. They found his picture on the Web as a sex offender. He was arrested and charged with felony child molestation and attempted kidnapping. After being held to answer, he filed a motion to dismiss pursuant to section 995. The court denied the motion. He filed a pro per petition for writ of prohibition or mandate. The court of appeal appointed SDAP for purposes of oral argument. The court granted relief. Attempt requires an unequivocal to carry out the crime. Here, he never opened

the door, tried to get the girls to come in the car, or otherwise try to abduct them. While his behavior was suspicious, it was insufficient for a charge of attempted kidnapping. (Staff attorney Michael Kresser)

Frank Lazos v. Mitchell (N.D. Cal. No. C07-01736CW)

Staff attorney: Paul Couenhoven

Date: October 21, 2008

Lazos was convicted by jury of robbery. He instructed trial counsel to file a notice of appeal. She left the public defender's office a week later, but she told her supervisor to make sure a notice of appeal is filed. No appeal was started. SDAP filed in the court of appeal a motion for relief from default which was denied. It then filed a petition for writ of habeas corpus with declarations from Lazos and trial counsel. The petition was summarily denied. The federal court granted relief on habeas corpus and directed the state to commence an appeal.

Steven Friday v. Superior Court (H033085)

Panel attorney: Maureen Fox

Date: September 8, 2008

Appellant pled no contest and admitted he suffered a prior strike conviction. Appellant then moved to withdraw his plea, which the court denied. After sentencing, he filed a notice of appeal with a request for a certificate of probable cause. The request was denied. The court of appeal issued a writ of mandate requiring the issuance of a certificate of probable cause. (Staff attorney William Robinson)

People v. Rick Kase (H032266)

Attorney: Jamie Harmon

Date: June 23, 2008

The police stopped a car for having an insufficient tire tread. The passenger, appellant, was found with an illegal cane sword. The court denied the motion to suppress evidence. The court of appeal reversed. When the officer testified he was uncertain if the tire had sufficient tread. Saying it was iffy, he indicated he was acting on a hunch. This did not amount to reasonable suspicion. (SDAP was not involved in the appeal.)

People v. Ramirez (H031469)

Attorney: Curtis V. Rodriguez

Date: April 11, 12008

Appellant was convicted of lewd conduct with a six-year old by duress. She entered his

room one night where he then proceeded to molest her. The court of appeal agreed there was insufficient evidence of duress. The conviction was reduced to non-forcible lewd conduct. (SDAP was not involved in the appeal.)

P.M. v. Superior Court (H032500)

Attorneys: Donna Chirco, Associate Dependency Attorneys
Evguenia Vatchkova, Dependency Legal Services

Date: April 3, 2008

Previously, the court of appeal held that it was error for the juvenile court to fail to consider a tribe's petition to intervene in a dependency case. On remand, the juvenile court denied the tribe's petition to transfer the matter to a tribal court. The court set the matter for a section 366.26 hearing. Trial counsel for the parents filed a writ petition on the ground that the request came too late in the proceeding. The court of appeal granted relief. The statute requires transfer unless the court finds sufficient reason not to do so. Here, there was insufficient evidence to deny the transfer request. The delay in the request to transfer was a result of CPS's repeated failure to provide proper notice. When proper notice was provided, the tribe promptly requested transfer. The court of appeal ordered that the transfer request be granted. (SDAP was not involved in the matter.)

Dung Pham v. Terhune (N.D. No. C02-1348 PJH)

Attorney: Cliff Gardner
Date: March 20, 2008

Two people chased down and shot dead the victim. It was undisputed that one of the shooters was Tien Ha, who was never apprehended. The prosecution claimed Pham was the other shooter. Pham claimed a third person, Tuan Hoang was the other gunman. The police did stop Hoang immediately after the incident and did a gunshot residue test. According to the expert at the Santa Clara County District Attorney's Crime Lab, the test was inconclusive. The expert explained that a gunshot residue would contain traces of lead, antimony, and barium. The sample tested, however, contained only antimony and titanium which would be inconsistent with gunshot residue. Pham was convicted of murder and the Sixth District Court of Appeal affirmed. He filed a federal habeas corpus petition, claiming *Brady* violation for not disclosing the expert's lab notes. The federal court ordered the disclosure of the notes and this led to Pham being allowed to retest the sample. The new test revealed the presence of lead, antimony, and barium which indicated that Hoang, not Pham, was the other gunman. The district court granted relief on habeas corpus. (SDAP was not involved in the matter.)

People v. DeShawn Campbell (H032068)

Attorney: Edward Sousa and Stuart Kirchick
Date: January 30, 2008

The defendant is charged with capital murder. In a hearing to determine if he is developmentally disabled and thus ineligible for the death penalty, a prosecution witness testified that he mentored the defendant for a year at a program for at-risk youth and the defendant showed no signs of being mentally disabled. He was capable and goal-oriented and gave the impression of being of average intelligence. The superior court concluded he was not disabled, relying in part on the testimony of the mentor. It later came to light that witness was recalling a different DeShawn, not the defendant. He filed a pretrial petition for extraordinary relief based in part on the prosecution witness giving false testimony. In a published decision, the court of appeal reversed the finding and remanded the matter for a new hearing. (SDAP was not involved in the appeal.)

In re Nilesh Singh (Santa Clara Super Ct. Nos. BB302593, BB302101)

Attorney: Michael Mehr

Date: January 4, 2008

Appellant pled no contest to possession for sale. He later faced deportation because the conviction qualified as an aggravated felony. The superior court granted his writ of habeas corpus because trial counsel failed to try to “plead up” the charge to transporting or selling drugs, which does not lead automatically to deportation. (See *People v. Bautista* (2004) 115 Cal.App.4th 229.) (SDAP was not involved in the matter.)