

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

SUFFICIENCY OF THE EVIDENCE

In re B.S. (H033528)

Staff attorney: Jonathan Grossman

Date: November 4, 2009

Appellant and his friend were target shooting with a pellet gun behind some trees when a group of teenage girls walked by with their gym teacher. Appellant's friend shot the teacher with a pellet. The juvenile court found appellant was culpable of felony assault as an aider and abettor. The court of appeal held there was insufficient evidence. There was no evidence he knew of his friend's plan to shoot at the group, assisted him in doing so, or intended to assist him.

People v. Galvan (H032927)

Panel attorney: Maureen Fox

Date: October 29, 2009

Appellant was convicted of various sex offenses, including lewd conduct on a minor by force or fear. The court of appeal agreed there was insufficient evidence of force or fear and ordered that a conviction for a lesser included offense be entered. (Staff attorney Vicki Firstman)

People v. Rivers (H032016)

Staff attorney: Paul Carroll

Date: September 22, 2009

Appellant was sentenced to serve 285 years to life after the jury convicted him of several sex offenses. There was insufficient evidence of force or duress for five of the counts of sodomy and oral copulation when the force applied was the minimal necessary to commit the acts. (Staff attorney Loti Quick)

People v. Pagan (H032340)

Panel attorney: Randy Baker

Date: April 14, 2009

Appellant was convicted of an unrelated burglary and a rape with a One Strike provision he

kidnapped the victim because he moved her no more than 65 feet. The crime occurred in 1998. At the time, the law was that a kidnapping required a substantial movement of at least 75 feet. Thus, there was insufficient evidence to support the enhancement. As a result, the life sentence must be reduced to no more than ten years determinate. (Staff attorney Jonathan Grossman)

People v. Chacon (H031725)
Panel attorney: Danalynn Pritz
Date: February 10, 2009

Appellant was convicted of many counts of molesting several victims. The court agreed there was insufficient evidence for one of the convictions which was based on the vague testimony of one of the victims. Further, there was insufficient evidence of force, fear, or duress for one of the counts. The court of appeal struck a \$70 AIDS fund fine because it was not authorized for the crimes of which appellant was convicted. (Staff attorney Dallas Sacher)

PRETRIAL AND POSTTRIAL MOTIONS

People v. Luis Castro (H032505)
Panel attorney: Carlo Andreani
Date: September 30, 2009

The trial court revoked appellant's right to represent himself when it learned he could not read or write in English. The court of appeal reversed, holding that not understanding English was a factor in determining whether a defendant is competent to represent himself. (Staff attorney Vicki Firstman)

Drake v. Superior Court (033614)
Panel attorney: Patricia Lai
Date: July 27, 2009

Appellant filed a notice of appeal from a plea and later filed a request for a certificate of probable cause though within 60 days of the sentencing hearing. The trial court deemed the request to be untimely. The court of appeal granted a writ of mandate in a published decision. As long as the request is filed within 60 days of the order being appealed from, it need not be filed at the same time as the notice of appeal. (Staff attorney Vicki Firstman)

People v. Francisco Puga
Panel attorney: John Dwyer
Date: July 18, 2009

Appellant pled with the agreement that he would receive probation, but if he were to violate

probation, he could be subject to a six year prison sentence. After violating probation, the court imposed a six year prison sentence. The court of appeal agreed the sentence violated the terms of the plea bargain and reversed. (Staff attorney Vicki Firstman)

People v. Paul Garza (H031612)
Panel attorney: Arthur Wong
Date: June 23, 2009

After appellant pled to certain charges, he moved to withdraw his plea. According to a defense psychologist, he was developmentally disabled with an IQ of 67, and he lacked sufficient understand when he pled. (Staff attorney Dallas Sacher)

People v. Pence (H032264)
Panel attorney: Demarris Evans
Date: May 26, 2009

Pursuant to a plea bargain, appellant pled no contest in one case and admitted a violation of probation in another case based on the conviction on the new case. The court of appeal agreed the plea must be set aside because there was nothing in the record to indicate there was a factual basis for the plea. The violation of probation must be reversed in light of the conviction in the new case being reversed. (Staff attorney Dallas Sacher)

People v. Gardea (H033050)
Panel attorney: Jonathan Berger
Date: April 22, 2009

Gardea was stopped for driving without a front license plate. He had no passenger, but a second police car arrived. He produced a driver's license and denied he was on probation or parole. The officer took the driver's license and checked with dispatch. Within about two minutes, dispatch confirmed the driver's license was valid and he was not on probation or parole, but he was required to register as a sex offender and as a narcotic offender. The officer walked back to Gardea but did not return the driver's license. He asked where Gardea came from, and he replied from the nearby Motel 6. The officer knew the motel to be a place of drug trafficking. He asked Gardea if he had anything illegal. He looked back in his car and then replied he had a pipe. This exchange took about a minute. He consented to a search. The officer found a crank pipe and a small amount of methamphetamine. The superior court granted a motion to suppress, ruling that once the dispatcher confirmed the driver's license was valid and Gardea was not on probation or parole, the officer's remaining duty was to write a citation; the subsequent questioning unduly prolonged the detention. The evidence was suppressed and the charges dismissed. The prosecution appealed. The court of appeal affirmed the dismissal. The search was unduly prolonged without probable cause. (Staff attorney Lori Quick)

People v. Earle (H031525)
Panel attorney: Fred Schnider
Date: March 19, 2009

Two separate cases were filed against appellant. In one case, he was charged with misdemeanor indecent exposure, where the evidence against him was strong. In the other, he was charged with felony sexual assault where a rational jury could have found him not guilty. In a published decision, the court of appeal held the failure to sever the charges deprived him of a fair trial. (Staff attorney Dallas Sacher)

People v. Johnson (H031765)
Staff attorney: Jonathan Grossman
Date: January 20, 2009

Appellant was an SVP patient who did not have a trial on his petitions for about four years. There were delays to accommodate the government's motions to consolidate the petitions, for new evaluations (once the evaluators unanimously determined he did not qualify for commitment), and to schedule around the busy schedule of government witnesses, the court, and the deputy district attorneys. This was a companion case to *People v. Litmon* (2008) 162 Cal.App.4th 383. The court of appeal held appellant was deprived of a speedy trial and ordered that his petitions must be dismissed.

People v. Jorge Rubio (H033178)
Panel attorney: Bart Scott
Date: January 14, 2009

Appellant's SVP commitment was retroactively modified to be an indeterminate term. Respondent agreed to a stipulated reversal. (Staff attorney Jonathan Grossman)

ERROR AT TRIAL OR HEARING

People v. Dennis Curtis (H034102)
Staff attorney: Paul Couenhoven
Date: December 29, 2009

Appellant pled to two wobblers charged as felonies. The plea agreement was complicated and somewhat ambiguous. Before he pled, he asked the court for confirmation that if the court agreed he should receive local time, the charges would be reduced to misdemeanors, and the court confirmed this. Neither attorneys contradicted this statement. At sentencing, the court placed him on probation but did not reduce the charges to misdemeanors. The court of appeal agreed this was a violation of the plea bargain and he was entitled to specific performance.

People v. Bruce Mello (H033864)
Panel attorney: Richard Boire
Date: December 21, 2009

Appellant was convicted of cultivating marijuana after the jury rejected his medical marijuana defense. He argued on appeal the court prejudicially erred in instructing the jury that the defense only permitted six mature or 12 immature plants. The Attorney General agreed, and the court of appeal reversed. (Staff attorney Dallas Sacher)

People v. Romesh Kanda (H031532)
Staff attorney: Paul Couenhoven
Date: November 30, 2009

Appellant was convicted of second degree murder. During the trial, the jury was instructed that provocation for voluntary manslaughter depends on how a reasonable person would react in the same situation. Voluntary manslaughter however only requires the defendant to act rashly from objectively reasonable provocation; it does not require an average person to react in a homicidal manner. The court found the instruction was ambiguous and that the jury would understand it incorrectly based on the prosecutor arguing that there is no voluntary provocation unless an reasonable person would react in a homicidal manner. The judgment was reversed, and the prosecution was given the option of electing to reduce the conviction to voluntary manslaughter if it chose not to retry appellant.

People v. Jacob Hernandez (H031992)
Attorney: Marc Zilversmit
Date: November 9, 2009

Appellant was charged with premeditated attempted murder based on a gang shooting. Two of the confederates pled and agreed to testify against appellant. As part of their plea agreements, they signs declarations. The court ordered that the declarations be released to defense counsel and that the contents could not be shared with their clients, even as the witnesses were testifying. In a published decision, the court of appeal held there was an insufficient showing for keeping their statements confidential. (SDAP did not participate in the appeal)

People v. Clifford Jackson (H032539)
Panel attorney: David Martin
Date: October 22, 2009

A jury convicted appellant of attempted criminal threats. In a published decision, the court of appeal agreed that merely adding a standard attempt instruction to the criminal threats instruction

was not a correct statement of law for the crime. (Staff attorney Jonathan Grossman)

People v. Rivers (H032016)

Staff attorney: Paul Carroll

Date: September 22, 2009

Appellant was sentenced to serve 285 years to life after the jury convicted him of several sex offenses. During deliberations, one of the jurors was removed purportedly for failing to deliberate. The juror said he was willing to listen to others' points of view but he did not find the prosecution witnesses credible. The court of appeal held it was error to remove the juror, and a new trial was required. (Staff attorney Loti Quick)

People v. N.Z. (H030760)

Panel attorney: Stephen Bedrick

Date: September 15, 2009

Defense counsel retained a psychologist to examine the defendant. The psychologist wrote a report which included information obtained from the defendant. Trial counsel handed the unredacted report to the prosecution, though he decided not to have the psychologist or defendant testify. The prosecution sought to introduce some of the information in the report. The defense objected on the ground the information was attorney-client and psychotherapist-patient privilege. The trial court overruled the objection and admitted the evidence. The court of appeal reversed, finding trial counsel was ineffective for providing the information when there was no duty to or advantage for doing so. (Staff attorney Lori Quick)

People v. Guerra (H032881)

Panel attorney: Robert Derham

Date: July 31, 2009

The court found appellant guilty of various sex crimes against two victims but found the one strike enhancement of multiple victims not true. The court instructed the jury to reconsider and that it "should" find the enhancement true if the predicate facts were true, so the jury did. The court of appeal reversed the verdict for the enhancement. (Staff attorney Lori Quick)

People v. Thomas Miller (H032249)

Staff attorney: William Robinson

Date: July 15, 2009

Appellant was convicted of assault with a deadly weapon by a person serving a life term and attempted murder stemming from a shanking while appellant was a prisoner. Respondent conceded

there was insufficient evidence appellant was serving a life term. In a published decision, the court of appeal also reversed because the trial court abused its discretion in denying appellant's motion not to be shackled during the trial.

People v. Tony Civitillo (H033315)
Panel attorney: Ozro Childs
Date: July 13, 2009

Appellant was tried and acquitted of various charges based on him allegedly shooting a firearm from a car on March 2, 2008. But the jury convicted him of possession of a firearm on the previous day based on appellant's testimony at trial that he had shot at bottles on that date. The court of appeal reversed. There was no evidence at the preliminary hearing supported a charge of possession of a firearm on March 1. Although trial counsel did not object, trial counsel was ineffective for failing to object to amending the information to allege an incident that was not supported by evidence presented at the preliminary hearing. Because there was insufficient evidence to convict appellant of the event originally charged, the court ordered the case be dismissed. (Staff attorney Jonathan Grossman)

People v. Daniel Lopez (H032986)
Panel attorney: J. Wilder Lee
Date: June 23, 2009

In a bifurcated trial, the jury found true that appellant suffered prior strike convictions. However, the jury was not instructed on the burden of proof for finding the prior true. The court of appeal reversed the finding. (Staff attorney Lori Quick)

People v. James Lopez (H032003)
Panel attorney: George Schraer
Date: March 26, 2009

The court of appeal reversed the conviction for first degree murder with an enhancement for use of a firearm in a gang-related crime. The instructions stated he could be found guilty of murder if he aided and abetted in an assault with a deadly weapon or simple assault, and the murder was the natural and probable consequences of the assault with a deadly weapon or simple assault. Reversal was required because the instruction could be interpreted to mean the jury may find defendant guilty as an aider and abettor if the natural and probable consequences of an assault was the homicide. (Staff attorney William Robinson)

SENTENCING

People v. Donald Murphy (H033934)
Panel attorney: Richard Rubin

Date: December 30, 2009

The court placed appellant on probation on condition, among other things, that he not consume or possess alcohol. Because there was insufficient evidence he abused alcohol, or even used any, it was not reasonably related to his criminal behavior or potential future criminal behavior. (Staff attorney Vicki Firstman)

People v. Palmeno (H033601)

Panel attorney: Jeffrey Glick

Date: December 29, 2009

Appellant was convicted of violating section 288, subdivision (a) for an incident occurring in 2006 which involved only touching over her clothing. The court of appeal agreed there was not probable cause to authorize an AIDS fine. Further, the fine under Penal Code section 290.3 must be reduced to \$200 which was the amount authorized at the time of the offense. (Staff attorney Vicki Firstman)

People v. Sean Hammond

Panel attorney: Gretchen Franklin

Date: December 28, 2009

The court of appeal agreed that the restitution fine must be reduced because the trial court's calculation included a count for which the punishment had been stayed under Penal Code section 654. (Staff attorney Paul Couenhoven)

In re Jesse A. (H033855)

Panel attorney: Ronald Dehoff

Date: December 22, 2009

The court of appeal agreed that gang conditions of probation must be modified so that they are not unconstitutionally vague or overbroad. (Staff attorney Vicki Firstman)

People v. Luis Flores (H033851)

Staff attorney: Jonathan Grossman

Date: December 18, 2009

The court modified conditions of probation to require knowledge and otherwise prevent vagueness and overbreadth. It also ordered stricken an entry in the minute order that appellant register as a gang member since the trial court did not actually order this.

People v. Diaz (H033796)
Panel attorney: Victoria Stafford
Date: December 15, 2009

The trial court did not impose certain fines because appellant was indigent, but it did impose a \$70 AIDS fine, a \$200 sex registration fine, and a booking fee under Government Code section 29550.2, stating they were mandatory. The court of appeal agreed they were not and struck the fines. Further, a conviction for Penal Code section 285 was a violent felony. (Staff attorney Dallas Sacher)

People v. Leonardo Ramirez (H033558)
Panel attorney: Naresh Rajan
Date: December 17, 2009

The court of appeal modified a condition of probation to require knowledge and ordered the minute order be amended to reflect what the trial court actually ordered. (Staff attorney Vicki Firstman)

People v. Gabriel Negron (H033719)
Panel attorney: Jonathan Berger
Date: December 15, 2009

The court agreed appellant was entitled to additional presentence credits. (Staff attorney Paul Couenhoven)

In re K.R. (H034121)
Panel attorney: Geoff Jones
Date: December 15, 2009

A condition of probation was modified to require knowledge. (Staff attorney Jonathan Grossman)

In re J.G. (H034061)
Panel attorney: Julie Dunger
Date: December 15, 2009

The court struck the condition that the minor not frequent a gang-related area and modified a condition that he not be where there is a weapon to require knowledge. (Staff attorney William Robinson)

People v. Jairo Bravopedroza (H033678)
Panel attorney: Robert Angres
Date: December 7, 2009

Appellant was convicted of attempted burglary. He was assessed a \$10 fine under Penal Code section 1202.5, and his conduct credits were limited to 15 percent of his sentence because the offense was a violent felony. Respondent conceded that section 1202.5 does not apply to attempted theft offenses and attempted burglary is not a violent felony. (Staff attorney William Robinson)

People v. Michael Flinders (H032968)
Panel attorney: Randy Baker
Date: December 4, 2009

Appellant was convicted of selling cocaine base in count one and transporting cocaine base in count two, among other things. He was sentenced to prison. The court of appeal agreed that the punishment for one of them must be stayed pursuant to Penal Code section 654, and the restitution fine must be decreased accordingly. Further, there was insufficient evidence he had the ability to pay the \$200 in attorney fees imposed by the court. (Staff attorney William Robinson)

People v. Tashna Rabalais (H033843)
Staff attorney: Lori Quick
Date: November 30, 2009

The court orally pronounced a \$600 restitution fine, but the clerk wrote in the minute order and abstract of judgment that it was \$1200. The court of appeal reduced it to the \$600 actually ordered by the court.

People v. Salinder Singh (H033265)
Panel attorney: Arthur Wong
Date: November 30, 2009

The court struck the prison prior because it was the same conviction used to impose a serious felony prior. (Staff attorney Lori Quick)

People v. Richard Settle (H033649)
Staff attorney: William Robinson
Date: November 25, 2009

The court orally pronounced a \$200 restitution fine, but the clerk wrote in the minute order and abstract of judgment that it was \$800. The court of appeal reduced it to the \$200 actually

ordered by the court.

In re A.D. (H033722)
Panel attorney: Erik Bruce
Date: November 23, 2009

The minor was found to have driven under the influence causing injury. The court suspended her license for three years. The court of appeal agreed the matter must be remanded for the juvenile court to determine if the offense were a felony or misdemeanor. Further, her license could not be suspended for three years, only two years. (Staff attorney Vicki Firstman)

People v. Carlos Lopez (H033509)
Panel attorney: Geoff Jones
Date: November 20, 2009

The matter was remanded because the court orally pronounced several different amounts for the restitution fine and miscalculated the amount of presentence credits. (Staff attorney Lori Quick)

People v. John Vallejo (H032698)
Panel attorney: Alex Coolman
Date: November 19, 2009

The court agreed there was insufficient evidence to support the order for attorney fees. (Staff attorney Lori Quick)

People v. Gus Laverriere (H033706)
Panel attorney: Elisa Nadeau
Date: November 16, 2009

Appellant was convicted of attempted carjacking. The court limited conduct credits to 15 percent of the sentence. Although carjacking is a violent felony for which conduct credits is limited to 15 percent, attempted carjacking is not. The court of appeal agreed to award additional presentence conduct credits. (Staff attorney Lori Quick)

People v. Kimberly Duggs (H033426)
Panel attorney: Randall Conner
Date: November 13, 2009

The court modified the condition of probation not to possess a deadly weapon to require knowledge. (Staff attorney Vicki Firstman)

People v. Luis Velez (H033018)
Panel attorney: Patricia Watkins
Date: October 26, 2009

The court agreed that the punishments for false imprisonment and corporal injury on a spouse should have been stayed in lieu of the punishment for assault with force likely to cause great bodily injury which arose from the same incident. (Staff attorney Vicki Firstman)

People v. Milan Pakes (H032734)
Staff attorney: Dallas Sacher
Date: October 16, 2009

Appellant was convicted of recklessly evading an officer and child endangerment for getting in a police chase with a child in the car. The court of appeal that the punishment for child endangerment should have been stayed under Penal Code section 654.

In re Cesar S. (H034097)
Staff attorney: Dallas Sacher
Date: September 29, 2009

The juvenile court failed to award five days of precommitment credit.

People v. Stacy Hall (H032356)
Panel attorney: Silas Geneson
Date: September 29, 2009

The restitution fine needed to be reduced in half to \$600 because the court used the statutory formula with the understanding that appellant was convicted of two felonies. However, the punishment for one of the felonies was stayed pursuant to Penal Code section 654, so the fine should have been only \$600 under the formula. (Staff attorney Paul Couenhoven)

People v. Jesus Rojas (H033186)
Panel attorney: Ron Boyer
Date: September 29, 2009

Appellant was convicted of vandalism. Vehicle Code section 13202.6, subdivision (a)(1) permits the court to suspend his driver's license for up to two years. The court purported to suspend his license for the term prescribed by law. Because it failed to exercise its discretion, the matter was remanded. (Staff attorney William Robinson)

In re F.G. (H033786)
Panel attorney: Julie Dunger
Date: September 25, 2009

The minor was found to have committed premeditated attempted murder with a gang enhancement. In calculating the maximum confinement time, the court imposed an indeterminate term for the attempted murder, plus ten years for the gang enhancement. The statute, however, require the imposition of no additional time if the gang provision applied to an indeterminate term. Instead, the minimum period of parole eligibility must be at least 15 years. While this had no practical effect for a juvenile, the court did not have the authority to add ten years to the maximum confinement time. (Staff attorney Jonathan Grossman)

People v. Saul Nevarez (H032860)
Panel attorney: Martin Velez
Date: September 10, 2009

Appellant pled to manufacturing methamphetamine and possession for sale. When he pled, the court indicated everyone agreed the punishment for possession would be stayed pursuant to Penal Code section 654. At sentencing, however, the court imposed a concurrent term. The court of appeal agreed that the punishment needed to be stayed. (Staff attorney Dallas Sacher)

In re M.R. (H033832)
Panel attorney: Karli Sager
Date: September 9, 2009

The minor was found to possess MDMA in violation of Health and Safety Code section 11377. The court ordered as a condition of probation that the minor not own or possess or be where there is a deadly weapon. The court modified the condition to require knowledge. Further, the court remanded the matter for the juvenile court to declare whether the offense was a misdemeanor or felony. (Staff attorney William Robinson)

People v. Mark Crenshaw (H033622)
Panel attorney: Danalynn Pritz
Date: September 2, 2009

Appellant pled to certain charges and was told fines and fees would be assessed based on his ability to pay. At sentencing, the court imposed a booking fee of \$129.50 which statutorily did not depend on the defendant's ability to pay. Nonetheless, since the plea advisement was that the fee would be imposed based on his ability to pay and there was no evidence of such an ability, the fee was stricken. (Staff attorney Williams Robinson)

People v. Joe Ramirez (H033187)
Panel attorney: Ronald Dehoff
Date: August 17, 2009

The court ordered victim restitution in the amount the Victims Compensation and Government Claims Board paid the victim. Because the amount determined by the Board creates only a rebuttable presumption of the amount of restitution, the matter was remanded to the trial court for a proper determination. (Staff attorney Lori Quick)

People v. Anna Ayala (H033444)
Panel attorney: Robert Derham
Date: August 17, 2009

The trial court used the statutory formula in setting the restitution fine, but it used a stayed count in the calculation. This was error, and trial counsel was ineffective for not objecting. (Staff attorney Dallas Sacher)

People v. Javier Mercado (H033362)
Staff attorney William Robinson
Date: August 11, 2009

Penal Code section 654 prohibited imposing concurrent sentences for two counts of possessing the same shotgun and two counts of brandishing the same shotgun. Since the punishment for two counts should have been stayed and the court calculated the restitution fine based on the statutory formula, the restitution fine must be reduced.

People v. Anthony Frausto (H032535)
Panel attorney: Mark Farbman
Date: July 21, 2009

Appellant was entitled to two additional days of presentence credit. (Staff attorney Dallas Sacher)

In re H.C. (H033669)
Panel attorney: Marsanne Weese
Date: July 14, 2009

The minor was placed on juvenile probation that had 35 conditions. Among them was the order to not frequent areas of gang related activity. In a published decision, the court held this condition unconstitutionally vague and overbroad because it was not clear what an area of gang

activity was or what frequent meant. Further the condition that he not associate with one on probation, parole, or in a gang was amended to require knowledge. (Staff attorney Paul Couenhoven)

In re M.G. (H033449)

Panel attorney: Jonathan Berger

Date: July 2, 2009

Due to errors in calculating the maximum confinement time, the matter was remanded for a recalculation. (Staff attorney Lori Quick)

People v. Timothy Armstrong

Staff attorney: Lori Quick

Date: June 30, 2009

The court struck the order that appellant pay attorney fees because there was insufficient evidence of an ability to pay.

In re K.Z. (H033060)

Panel attorney: Michael Allen

Date: June 29, 2009

The minor was placed on juvenile probation for a gang-related crime. He was ordered to not frequent any areas of gang related activity, participate in gang activity, and not remain in any building or vehicle where dangerous weapons exist. The court amended the conditions to require knowledge and to avoid areas as directed by the probation officer. (Staff attorney William Robinson)

People v. Gonzalez (H032942)

Panel attorney: John Steinberg

Date: June 15, 2009

The court erred in not staying the punishment for sexual battery and assault with a deadly weapon when appellant was punished for rape from the same transaction. (Staff attorney Paul Couenhoven)

In re J.J. (H033774)

Staff attorney: Dallas Sacher

Date: June 15, 2009

The court modified a probation condition to require knowledge when appellant was ordered to stay away from the victim as a condition of probation.

In re H.D. (H033462)
Staff attorney: Paul Couenhoven
Date: June 3, 2009

In a published decision, the court of appeal disagreed with *In re Joseph M.* (2007) 150 Cal.App.4th 889 and held that the determinate sentencing law is not a factor in determining the maximum period of physical confinement at DJJ under Welfare and Institutions Code section 731.

People v. Jesse Adams (H033573)
Panel attorney: Maribeth Halloran
Date: May 28, 2009

The sentencing court stayed the punishment for two counts but did not stay the conduct enhancements that attached to them. The court of appeal held the attached enhancements must be stayed as well. (Staff attorney Dallas Sacher)

In re Brandon H. (H033300)
Panel attorney: Silas Geneson
Date: May 27, 2009

The juvenile court committed the minor to DJJ. It set the period of maximum physical confinement to be no more than three years. It awarded precommitment credits for the maximum confinement time but not the maximum physical confinement period. The court of appeal agreed precommitment credits must be awarded to both. (Staff attorney Jonathan Grossman)

People v. Daniel Ngo (H032728)
Panel attorney: Paul Carroll
Date: May 21, 2009

Appellant pled no contest to assault with a deadly weapon, a flashlight, and the charge of dissuading a witness was dismissed. The court placed him on probation on condition that he not possess any deadly weapons, including "every type of knife." The court of appeal agreed the prohibition of possessing any kind of knife was overly broad and not reasonably related to his rehabilitation. (Staff attorney Lori Quick)

People v. Enrique Gonzales
Panel attorney: Ozro Childs

Date: May 8, 2009

Appellant was convicted of domestic violence. Although alcohol was not involved, the court ordered that he consume no alcohol or be in a place where alcohol was sold. The court of appeal agreed there was insufficient grounds for imposing this condition. Further, the sentencing court struck a recommended condition of probation concerning reporting if he were deported, but the written order retained this provision. The court of appeal struck the condition of probation the trial court never imposed. (Staff attorney William Robinson)

People v. Mario Garcia (H032585)

Panel attorney: Kathleen Novoa

Date: May 4, 2009

The superior court imposed various gang conditions of probation. The court of appeal modified the conditions to require knowledge. (Staff attorney William Robinson)

In re K.F. (H032977)

Panel attorney: Alex Coolman

Date: April 29, 2009

In a published decision, the court of appeal held there was insufficient evidence to order restitution for medical expenses that included ambulance services when there was no evidence the victim was billed for it. Further, restitution could not be ordered for benefits the victim received from the state disability fund. Finally, the written order must conform with the court's oral decision. (Staff attorney Jonathan Grossman)

People v. Martin Alonzo (H033345)

Staff attorney: Paul Couenhoven

Date: April 28, 2009

The defendant was a suspected Norteno. The court imposed gang conditions of probation, including that the defendant not wear red or blue. The court of appeal held the condition was overbroad, as there was no evidence a Norteno wearing blue would further criminal behavior.

People v. Tomasi Lautaha (H033581)

Staff attorney: Jonathan Grossman

Date: April 28, 2009

The court ordered that probation fees not be a condition of probation.

People v. Jacob Esau (H032571)
Panel attorney: John Dwyer
Date: April 28, 2009

The court of appeal agreed that an order of restitution to child protective services for foster care of the defendant's child was unauthorized because it was not a direct victim. (Staff attorney Jonathan Grossman)

People v. Phan Le (H032903)
Panel attorney: Richard Boire
Date: April 24, 2009

Appellant was convicted of theft and check forgery. The punishment for check forgery should have been stayed pursuant to Penal Code section 654. Further, since the punishment was stayed and the court used the statutory formula for setting victim restitution, the amount of restitution was wrong. (Staff attorney Jonathan Grossman)

People v. Antonio Hernandez (H032308)
Panel attorney: J. Courtney Shevelson
Date: April 23, 2009

In count four, appellant was convicted of shooting into an occupied vehicle with a gang enhancement. The court imposed a sentence of 30 years to life which reflected a firearms enhancement under Penal Code section 12022.53(d). Although the jury found the firearms enhancement applied to counts one through three, it made no such finding for count four. Thus, the proper sentence for count four was 15 years to life. The abstract of judgment was also corrected to reflect the court imposed a concurrent sentence of two years for count five, not 25 years to life. (Staff attorney Williams Robinson)

People v. John Luu (H032837)
Staff attorney: Jonathan Grossman
Date: April 2, 2009

Appellant pled to a series of robberies. At sentencing he complained about counsel's performance and said he wanted to withdraw his plea, but the attorney did not bring the motion. The court denied appellant's oral motion brought by himself and did not hold a Marsden hearing. The court of appeal held that the court erred in not holding a Marsden hearing. It also held that the total restitution fines for several cases handled together could not exceed \$10,000.

People v. Edwin Romua (H033377)

Panel attorney: Solomon Wollack
Date: March 30, 2009

Appellant pled no contest to attempted murder. The court imposed a term of seven years to life consecutive to a three year sentence for personally inflicting great bodily injury. It also imposed a criminal justice administration fee. The correct sentence is simply life. Therefore, the abstract of judgment needed to be amended to simply say it was a life sentence. The court also failed to state the statutory grounds for imposing the criminal justice administration fee. (Staff attorney Lori Quick)

People v. Joel Castillo (H033203)
Staff attorney: William Robinson
Date: March 13, 2009

After reversal on appeal, appellant was convicted again and sentenced. In the second sentence, his restitution fine was greater than it originally was. The court of appeal agreed this was forbidden, as state law does not permit increasing punishment after prevailing on appeal.

People v. Paul Boulerice (H032516)
Panel attorney: Patricia Lai
Date: March 13, 2009

Appellant was convicted of resisting arrest and battery on an officer. The court agreed the punishment for the battery count must be stayed pursuant to Penal Code section 654. Further, the matter must be remanded for a new *Pitchess* hearing because the court failed to retain the material from the first hearing. (Staff attorney Jonathan Grossman)

People v. Esteban Neri (H032072)
Panel attorney: Irma Castillo
Date: March 9, 2009

The court ordered appellant to pay victim restitution for lost wages for a family member of the victim when she did not work for three days to attend court. She was not a witness or assisting the prosecution. The court of appeal agreed that restitution for such a purpose was not authorized. (Staff attorney Dallas Sacher)

People v. Martin Jensen (H033101)
Panel attorney: J. Courtney Shevelson
Date: February 26, 2009

Appellant's conviction was reversed on appeal. On remand, he was convicted again and given the same sentence, except his fines increased by \$300. The Attorney General conceded this was error. (Staff attorney William Robinson)

People v. Angelina Murillo (H032409)

Staff attorney: Jonathan Grossman

Date: February 18, 2009

Appellant had been diagnosed in the past with attention deficit and hyperactivity disorder, bipolar disorder, and asthma. Except for an inhaler for the asthma, she was not receiving treatment. There was no evidence the conditions contributed to her current crime or any past criminal behavior. The court ordered as a condition of probation that she take all prescribed medication. The court of appeal reversed in a published decision. It held the condition was unconstitutionally vague and overbroad, and it cautioned that a trial court should carefully weigh the probationer's privacy interest to refuse medical treatment with evidence of the state's interest in imposing such a requirement.

People v. Juan Torres (H032441)

Panel attorney: Mark Farbman

Date: February 18, 2009

The court of appeal struck one of the prior serious felony convictions because it was not brought and tried separately. Further, in this case, appellant was sentenced on two cases at the same time and received a total restitution fine in excess of \$10,000. The court of appeal modified the amount to \$10,000. (Staff attorney William Robinson)

People v. Zuniga (H031876)

Panel attorney: Walter Pyle

Date: January 29, 2009

Before appellant pled, he was advised the court would impose a restitution fine between \$200 and \$10,000, depending on his ability to pay. At sentencing, the court imposed a \$10,000 restitution fine, though there was no evidence of an ability to pay. The court held this was a violation of the plea bargain, but the remedy was to give the defendant an opportunity to withdraw his plea. (Staff attorney William Robinson)

People v. Ibanez (H032230)

Panel attorney: Jeffrey Glick

Date: January 28, 2009

The court imposed \$1080 in fines pursuant to Penal Code section 290.3, but the fine at the

time of the offense was only \$200. (Staff attorney Paul Couenhoven)

In re U.A. (H033078)
Staff attorney: Paul Couenhoven
Date: January 28, 2009

The probation condition that he not exhibit gang insignia was modified to require knowledge.

People v. Angel Garibay (H032235)
Staff attorney: Jonathan Grossman
Date: January 27, 2009

Appellant was placed on probation on condition, among other things, that he “not associate with persons whose behavior might lead to criminal activities.” The court agreed the condition was fatally vague and overbroad, and it struck the condition.

People v. Arnulfo Rivera (H032823)
Panel attorney: Elaine Forrester
Date: January 22, 2009

When the court placed appellant on probation, it assessed a \$200 restitution fine. When it revoked probation, it increased the restitution fine to \$1200. The court of appeal agreed this was unauthorized. (Staff attorney Jonathan Grossman)

People v. Joseph Ramirez (H032477)
Panel attorney: Steven Schorr
Date: January 21, 2009

Appellant was in custody for three different periods. In calculating presentence credits, the court determined the amount of time he was in custody and the amount of conduct credits he would receive for each period separately. Because of rounding down, this deprived him of a few days of presentence credits. This was error. The court was required to add all actual days and then determine the conduct credits. (Staff attorney Dallas Sacher)

In re Rudy A. (H032507)
Panel attorney: Julia Freis
Date: January 14, 2009

The matter was remanded for the court to determine if the crime was a felony or a

misdemeanor under *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204. (Staff attorney Vicki Firstman)

People v. Paul Zapata (H030016)

Panel attorney: Heather McKay

Date: January 13, 2009.

The court sentenced appellant to prison and ordered he have no contact with the victim or the victim's family and that he pay \$700 in attorney fees. The court of appeal agreed there was insufficient evidence he had the ability to pay the attorney fees and the stay away order was unlawful when he was not placed on probation. (Staff attorney William Robinson)

People v. Roberto Acuna (H032292)

Panel attorney: Peter Goldscheider

Date: January 9, 2009

The court imposed a \$200 fine and various penalty assessments. The court of appeal agreed that penalty assessments imposed pursuant to Government Code section 76104.7, subdivision (a) (a second DNA penalty assessment of \$20) and Government Code section 76000.5 (an emergency services penalty assessment of \$40) cannot be imposed on a case where the crime was committed before the statutes were enacted. Such an attempt would violate the ex post facto clause. Further, the imposition of probation costs as a condition of probation was unlawful. (Staff attorney Lori Quick)

DEPENDENCY CASES

In re L.A. (H034276)

Panel attorney: Lee Gulliver

Date: December 18, 2009

The appellant was the father in a dependency matter. When CPS became involved, the children were removed from the father and placed with the paternal grandparents. At the dispositional hearing, the father and the children wanted the grandparents to become guardians. The court believed it needed the approval of the mother, who was not the custodial parent, as well. In a published decision, the court of appeal agreed with the appellant's argument that the juvenile court can order a guardianship at the dispositional hearing without the approval of the noncustodial parent. (Staff attorney Vicki Firstman)

In re L.M. (H033915)

Panel attorney: Benjamin Owens

Date: July 30, 2009

Reversal was ordered for failure to comply with the notice of requirement of ICWA. (Staff attorney Vicki Firstman)

In re I.O. (H033809)
Panel attorney: Valerie Sopher
Date: June 16, 2009

The matter was remanded to comply with the notice requirements of the Indian Child Welfare Act. (Staff attorney Vicki Firstman)

V.M. v. Superior Court (H033829)
Panel attorney: James Haworth (for the minor)
Date: May 7, 2009

After providing notice as required under ICWA, and Indian tribe said it wished to intervene and assume jurisdiction. The court issued an order that was facially contradictory. At one point, it stated jurisdiction was transferred. At another point, it stated jurisdiction was transferred pending acceptance by the tribe. When the tribe decided not to accept the transfer, the juvenile court set the matter for a section 366.26 hearing. The father filed a writ petition. The minor argued the first part of the order was a clerical error. From the context of the hearing and the remainder of the order, it was clear the court intended to transfer jurisdiction only if the tribe accepted the transfer. The court of appeal agreed with the minor and denied relief. (Staff attorney Jonathan Grossman)

In re S.R. (H033202)
Panel attorney: Julie Braden
Date: April 24, 2009

The matter was remanded for proper notice under ICWA. (Staff attorney Jonathan Grossman)

In re R.B. (H032978)
Panel attorney: Catherine Lundy
Date: April 21, 2009

The father was in custody when the minor was removed from the mother. Although he sought legal custody so that he could have a relative care for the minor, the juvenile court denied him reunification services on the grounds that he did not seek custody. The court of appeal agreed the juvenile court abused its discretion. Since the father did seek placement, denying him services as the non-custodial parent was incorrect. Although the court could have denied services because he was in custody, it did not make a required finding of detriment. The matter was remanded for a new dispositional hearing. (Staff attorney Vicki Firstman)

HABEAS PROCEEDINGS

In re Ryen Aisetewa (Santa Clara Co. Super. Ct. no. 206478)

Staff attorney: Dallas Sacher

Date: December 24, 2009

Petitioner was convicted of molestation based largely on the expert testimony of Mary Ritter, the local SART nurse. The superior court granted an order to show cause based, among other things, failure by the prosecution to provide the videotape of the SART exam which contradicted some of Ritter's testimony, new evidence that she was not credible, and trial counsel was ineffective for not bringing expert testimony concerning the suggestive nature of the interview with the complaining witness.

In re Stan Newton (H032219)

Staff attorney: William Robinson

Date: November 17, 2009

The court granted an order to show cause in a habeas proceeding concerning an allegation of ineffective assistance of counsel. Newton admitted to suffering a prior strike conviction in that he was convicted of vehicular manslaughter. Manslaughter is a strike because there is an infliction of great bodily injury. But the infliction of great bodily injury is a strike if the victim is not an accomplice. There was insufficient evidence from the record of conviction that the deceased was not an accomplice.

In re Jackson (Santa Clara County No. CC251632)

Attorneys: Cliff Gardner, Larry Gibbs, and Edward W. Swanson

Date: October 29, 2009

The defendant was convicted of sex crimes which he said never occurred. The prosecution expert, Mary Ritter, testified at trial that from her medical examination she found evidence of sexual trauma. It was later discovered that the examination was videotaped. According to the defense expert on appeal, the videotape did not support Ritter's findings. The court of appeal issued an order to show cause, returnable in the superior court. The superior court granted relief on habeas corpus based on newly discovered evidence. (Staff attorney Dallas Sacher)

People v. Milan Pakes (H033604)

Staff attorney: Dallas Sacher

Date: October 16, 2009

Appellant was convicted of recklessly evading an officer and child endangerment for

getting in a police chase with a child in the car. The court of appeal issued an order to show cause why trial counsel was not ineffective for stipulating he was evading the officers because he reasonably believed that he would be sent to state prison if captured.

In re A. O. (H033815)
Panel attorney: Jonathan Berger
Date: June 15, 2009

Trial counsel filed a notice of appeal but mistakenly did so on the 61st day. A habeas corpus petition was filed in the court of appeal. The court granted relief and permitted a late appeal. (Staff attorney William Robison)

In re Jose Cruz Lopez (H032511)
Staff attorney: Dallas Sacher
Date: June 10, 2009

The police learned that a person named Jose Lopez was selling drugs. Officers made observations that corroborated the allegation. One officer looked for a file of a Jose Lopez who lived at the address in question and learned that a person with that name did live there who was on probation with a condition that he be subject to searches. Police conducted a probation search and found drugs. Appellant was charged with the crimes. After his search motion was denied, he was convicted. On habeas corpus, it was alleged that trial counsel was ineffective because the same two-page document the police relied on, which indicated Jose Hernandez Lopez, was on probation, indicated that he had been arrested days later and was serving a jail term with his probation terminated weeks before the search. The court of appeal summarily denied the habeas corpus petition. The supreme court granted his petition for review and transferred the matter back to the court of appeal with directions to issue an order to show cause. The court of appeal did so. After briefing and oral argument, it granted relief.

In re Ut Chi Vo (H033220)
Panel attorney: Keith Wattley
Date: March 9, 2009

Vo was convicted of second degree murder. The Board denied parole based on the commitment offense and his purported lack of insight. The court of appeal granted his petition for writ of habeas corpus. The commitment offense did not justify denial of parole given his record of rehabilitation. Further, the it was not a reasonable interpretation to conclude the prison psychological report stated he still posed a danger to society. (Staff attorney Michael Kresser)

MISCELLANEOUS

In re Larry Jones (H032985)

Panel attorney: Barbara Fargo
Date: October 9, 2009

The Board decided to release Jones on parole, but the governor vetoed the decision. Jones filed a petition for writ of habeas corpus in the superior court which granted relief. The government appealed. The court of appeal affirmed, holding that even under *In re Lawrence* (2008) 44 Cal.4th 1181, there was not some evidence to support a decision to deny parole. The court reinstated the Board's decision. (Staff attorney Michael Kresser)

In re Ermias Below (H003986)
Panel attorney: Keith Wattle
Date: October 1, 2009

The court of appeal affirmed the granting of relief on habeas corpus, finding that there was not some evidence to deny parole. The court, however, remanded the matter to the Board to reconsider its decision in light of *In re Lawrence* (2008) 44 Cal.4th 1181. (Staff attorney Michael Kresser)

In re Dean Anchor (H033724)
Attorney: Roger Hanson
Date: September 29, 2009

The superior court found there was not some evidence to deny parole. The government appealed. The court of appeal affirmed, though it modified the order to permit the Board to rehear the matter. (SDAP did not participate in this appeal).

Edgardo Garcia v. Superior Court (H033111)
Attorney: Michelle C. Wouden
Date: September 17, 2009

The defendant was held to answer for resisting arrest, among other charges. He filed a motion to set aside the holding order pursuant to Penal Code section 995 because there was no evidence he was ordered to stop. The prosecution conceded error but requested the case be remanded to the magistrate to correct the deficiency pursuant to section 995a, subdivision (b)(1). The court ordered a new hearing over defendant's objection. After an extensive hearing, he was held to answer again. He filed a petition for writ of mandate. In a published decision, the court of appeal reversed. While section 995a permits remand for minor problems in the preliminary hearing, the problem here was the complete failure to present evidence on one of the elements of one of the charges. This was not a minor problem contemplated by the statute. (SDAP did not participate in this case)

People v. Lewis (H033033)
Staff attorney Paul Couenhoven
Date: August 10, 2009

Defendant was accused of failing to register as a sex offender. He successfully argued the mandatory requirement to register should not apply to him under equal protection principles because of the nature of the crime. (See *People v. Hofsheier* (2006) 37 Cal.4th 1185.) The criminal case was dismissed. The court then purported to exercise its discretionary authority to order him to register. The court of appeal reversed. Once the criminal case was dismissed, there was no longer a cause before the court, and it lacked the authority to order appellant to register.

People v. Dylan Enders (H031941)
Attorney: Thomas Worthington
Date: August 3, 2009

Appellant was arrested because he was identified being in a car where contraband was found. He presented evidence of an alibi. The charges were later dismissed against appellant. He filed a motion for a finding of factual innocence which was denied. The court of appeal remanded the matter back to the trial court because it analyzed the issue incorrectly. Appellant met his initial burden of showing a prima facie case of factual innocence. The court then needed to determine from the totality of the record if he were factually innocent. (SDAP did not participate in this case).

In re Onesimo Haro (H033663)
Attorney: Marc Grossman
Date: June 30, 2009

The Parole Board denied Haro's request for parole because of the commitment offense. The superior court granted relief on habeas corpus. The government appealed. The court of appeal affirmed with minor modification, holding that the denial of parole is unlawful unless the Board could show how it showed current unsuitability to be released on parole. (SDAP did not participate in this appeal)

Douglas v. Superior Court (H033789)
Attorney: Barbara Joan Muller
Date: June 9, 2009

The defendant was involved in a car accident and charged with using the car as a weapon. The defense moved to inspect the other vehicle so that an expert can determine if the prosecution's theory of the case was correct or if the evidence showed the defendant did not use the car as a weapon. The prosecution opposed the motion in the superior court which denied the

motion. Upon the defense filing a petition for writ of mandate, the prosecution conceded, and the court granted the writ. (SDAP was not involved)

In re Emery Miller (H032858)
Panel attorney: Steve DeFilippis
Date: May 27, 2009

The superior court ruled there was not some evidence for the governor to deny parole. The court of appeal affirmed but remanded the matter for the governor to reconsider the matter in light of *In re Lawrence* (2008) 44 Cal.4th 1181.

In re Donald Lewis (H032463)
Panel attorney: Heather McKay
Date: May 21, 2009

The Board granted Lewis parole, but the governor reversed the decision. Lewis filed a habeas corpus petition in the superior court which granted relief. The government appealed. The court of appeal affirmed but modified the order for the governor to reconsider the record in light of *In re Lawrence* (2008) 44 Cal.4th 1241. (Staff attorney Michael Kresser)

In re Frank Bautista (H032616)
Panel attorney: Benjamin Ramos
Date: May 6, 2009

The court of appeal agreed there was not some evidence to support the denial of parole. It remanded the matter to the Parole Board to reconsider its decision in light of *In re Lawrence* (2008) 44 Cal.4th 1181. (Staff attorney Dallas Sacher)

People v. Arthur Criscione (H032680, H032426)
Panel attorney; Barbara Fargo
Date: April 17, 2009

In a published decision, the court held the parole board's denial of parole was based on the wrong analysis and remanded the matter for a new hearing. (Staff attorney Michael Kresser)

In re Ebrahim Sadeghy (Santa Clara Co. No. 107650)
Staff attorney: Dallas Sacher
Date: April 3, 2009

Petitioner was a life prisoner, and he was denied parole. The superior court granted relief on habeas corpus. Reliance on the commitment offense and lack of insight were insufficient grounds for denying parole because the Board failed to show how the factors made him currently unsuitable for parole.

In re Nam Van Huynh (H031395)

Panel attorney: Keith Wattlely

Date: January 28, 2009

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)

In re John Dannenberg (H030031)

Attorney: Steve Defilippis

Date: January 23, 2009

Dannenberg filed a habeas petition in pro per in the court of appeal seeking release on parole. (See *In re Dannenberg* (2005) 34 Cal.4th 1061.) The Board granted parole, but the governor vetoed the decision. The court of appeal agreed that there was insufficient evidence to support the governor's decision because there was no evidence he currently posed an unacceptable risk. The governor's continued reliance on the commitment offense, when there was no evidence it was probative to current dangerousness, was insufficient. (SDAP did not participate in the proceeding)

In re Jose Cobos (H032419)

Panel attorney: Keith Wattlely

Date: January 23, 2009

The Board granted parole, but the governor vetoed the decision. The superior court

granted relief on habeas corpus and ordered he be released. The government appealed. The court of appeal agreed the governor's review was flawed, but it remanded the matter for the governor for reconsideration in light of *In re Lawrence* (2008) 44 Cal.4th 1181. (Staff attorney Michael Kresser)