

**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. Rios (H036461)  
Panel attorney: Thomas Singman  
Date: February 16, 2012

Appellant was charged with multiple sex crimes. However, there was no evidence that he committed an act during a period specified in count 21. The conviction 21 was reversed. (Vikci Firstman)

**PRETRIAL AND POSTTRIAL MOTIONS**

People v. Wilson (H037600)  
Panel attorney: Morgan Taylor  
Date: December 21, 2012

Appellant entered into a plea bargain. He then moved to withdraw his plea. The motion was supported by a declaration prepared by a therapist who had seen appellant. The declaration stated that he was overwhelmed by the information concerning his case, including last minute changes in the state of the evidence and the offers; he lacked the capacity to make a rational decision. The trial court assumed the information in the declaration was correct but decided this was not grounds for withdrawing the plea. The court of appeal reversed, stating there was asserted a prima facie case that the plea was involuntary. (Staff attorney William Robinson)

People v. Sean Kellum (H037676)  
Panel attorney: Alfons Wagner  
Date: December 18, 2012

Appellant pled and was sentenced to probation on condition, among other things, that he serve a period in the jail. Just before he was to be released, the court suspended criminal proceedings and eventually committed him for being incompetent under Penal Code section 1368. This was unauthorized. Criminal proceedings can be suspended only if there is a pending trial, hearing, or sentencing hearing. (Staff attorney Jonathan Grossman)

People v. Everett Walker (H037287)

Panel attorney: Rachel Sue Sussman  
Date: October 18, 2012

A sexual battery occurred at a light rail station in San Jose. The suspect was vaguely described as a young black male of a certain height and weight. A week later, an officer stopped appellant at the station, who was a young black male of a similar height and weight, and asked for proof he paid for a ticket. Appellant asked why he was being singled out. The officer said he resembled a suspected of an earlier sexual battery. The officer demanded to see identification and ordered appellant to sit. Other officers arrived. The identification he produced proved to be false. He was arrested on the false identification, and a search incident to arrest uncovered drugs. The motion to suppress was denied. The court of appeal decided in a published decision that there was not reasonable suspicion to stop him based on such a vague description a week after the incident. (Staff attorney Lori Quick)

People v. Washington (H036756)  
Panel attorney: Scott Handleman  
Date: August 20, 2012

Appellant entered a plea bargain where he pled to forcible lewd conduct with a minor under the age of 14 years. Before sentencing, he moved to withdraw his plea because trial counsel erroneously told him he was not eligible to be committed as a sexually violent predator. The court denied the motion because he probably would have been convicted had he gone to trial. The court of appeal remanded the matter because this was the wrong standard of prejudice. (Staff attorney William Robinson)

People v. Craig Werner (H037156)  
Panel attorney: Maggie Shrout  
Date: July 20, 2012

Appellant was arrested in front of his apartment the late afternoon for an alleged domestic violence incident occurring in the morning. The alleged victim was not at the scene. Appellant's roommate offered to retrieve some items from the apartment. Before entering, the officers pat searched him and found nothing. The officers then accompanied him into the apartment where they found some evidence of drug production and sales. They searched some more and found more evidence. They then obtained a warrant and searched the garage and found more evidence. In a published decision, the court of appeal agreed that the superior court's denial of the suppression motion was error. The officers' entry was not justified as a protective sweep because there was not reasonable suspicion they would be in danger. Thus, items they found in plain view and not in plain view should be suppressed. The record did not contain the affidavit for the warrant that led to the search of the garage, so the matter was remanded for a further hearing. (Staff attorneys Michael Kresser and Jonathan Grossman).

People v. June Morellon (H036900)  
Panel attorney: David Mishook  
Date: May 21, 2012

The police learned appellant was released in another drug case on her own recognizance. The officer conveyed to her that she could be searched as a condition of her O.R., so he asked if he could search her. She agreed. In fact, there was not a search condition of her O.R. The court of appeal agreed that her consent was not voluntary because it was based on the officer's incorrect assertion she had a search condition. The court also agreed there was insufficient evidence of an ability to pay \$100 in attorney fees. (Staff attorney Paul Couenhoven)

People v. Irena Gonzalez (H037268)  
Panel attorney: Edward Mahler  
Date: February 28, 2012

The defendant was placed on probation. After sentencing she petitioned the court to permit the use of medical marijuana. The court declined the request but then added gang conditions of probation. The court erred in modifying probation without any new evidence to support the modification. (Staff attorney Lori Quick)

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

People v. Shazier (H035423)  
Panel attorney: Jill Fordyce  
Date: December 27, 2012

Appellant's commitment under the SVP Act was reversed in a published decision because of prosecutorial misconduct. In the jury trial, the prosecutor asked the defense expert witness about other cases he testified in, including egregious facts concerning the defendants' background in those cases, which served no proper purpose in the current trial. The prosecutor asked argumentative questions with another defense expert. In closing argument, he asked jurors how they would explain it to their friends if they permitted a sex offender go free, referred to schools in the neighborhood he might live in if he were released, told them he would not be on parole, implied appellant might have committed other crimes for which there was no evidence, impugned defense counsel, and said that if they were inclined to vote not to commit appellant it was a result of them being manipulated and groomed by him in the same way he reportedly groomed his victims. The misconduct was prejudicial this was the third trial; the first trial ended in a hung jury, and the misconduct occurred throughout the trial. (Staff attorney Jonathan Grossman)

People v. Galen Fisher (H036947)  
Panel attorney: Robert Durham  
Date: September 24, 2012

The prosecution relied on three or four different incidents to charge appellant with two counts of making criminal threats. The court of appeal held the failure to give a unanimity instruction required reversal. (Staff attorney Dallas Sacher)

People v. William Olsen (H036654)  
Panel attorney: Elisa Brandes  
Date: September 11, 2012

The indeterminate term for an SVP commitment might violate the equal protection clause, depending on the outcome in *People v. McKee* (2010) 47 Cal.4th 1172. (Staff attorney Jonathan Grossman.)

People v. Jorge Rubio (H036678)  
Panel attorney: Gordon Scott  
Date: July 20, 2012

The indeterminate term for an SVP commitment might violate the equal protection clause, depending on the outcome in *People v. McKee* (2010) 47 Cal.4th 1172. (Staff attorney Jonathan Grossman)

People v. Norberto Vargas (H037096)  
Panel attorney: Ozro Childs  
Date: July 20, 2012

The indeterminate term for an SVP commitment might violate the equal protection clause, depending on the outcome in *People v. McKee* (2010) 47 Cal.4th 1172. (Staff attorney Jonathan Grossman)

People v. Jayubo (H035996)  
Panel attorney: Jonathan Berger  
Date: June 6, 2012

The trial court trial gave conflicting instructions on criminal negligence and failed to provide instructions on the element of child abuse which makes it a felony. The court of appeal determined this was prejudicial error. Further, Penal Code section 654 prohibited separate punishments for criminal threats and felony assaults when appellant said he was going to kill the victim and then strangled her. Finally, the trial court must recalculate presentence credits and the restitution fine. (Staff attorney William Robinson)

People v. Raymond Lopez (H035015)  
Panel attorney: Joseph Shipp  
Date: March 16, 2012

Appellant was charged with attempting or actually dissuading a witness (Pen. Code § 136.1) and a gang enhancement (Pen. Code, § 186.22, subd. (b)(4)). Subdivision (b)(4) provides a greater punishment than subdivision (b)(1) when the defendant threatens the person in an effort to dissuade the witness. The court of appeal found the instruction on the gang enhancement was deficient for not mentioning this element and reversal of the enhancement for one of the counts was required. (Staff attorney Lori Quick)

People v. Michael Starrett (H036110)  
Staff attorney: Bart Scott  
Date: January 10, 2012

An indeterminate term for an SVP commitment might violate the equal protection clause. (Staff attorney Jonathan Grossman)

#### **SENTENCING**

People v. Arturo Nava (H037683)  
Panel attorney: Jasmine Patel  
Date: December 28, 2012

Conditions of probation were modified to avoid problems with vagueness and overbreadth. (Panel attorney Paul Couenhoven)

People v. Daren Wright (H037808)  
Panel attorney: Randy Kravis  
Date: December 26, 2012

The court agreed that the abstract of judgment needed to be corrected. (Staff attorney Dallas Sacher)

People v. Eddie Bara (H037394)  
Panel attorney: Jonathan Gettleman  
Date: December 21, 2012

The abstract of judgment was amended to reflect that appellant was entitled to 50 additional days of presentence credits that was omitted by clerical error. (Staff attorney Vicki Firstman)

Gonzalo Ruiz (H037653)  
Staff attorney: William Robinson  
Date: December 21, 2012

Appellant pled no contest to possession of a concealed firearm. He did not admit the additional allegation which would make it a felony, but the court imposed a felony sentence which involved a commitment at the jail without probation. The court of appeal remanded the matter to determine if the conviction is a felony. It also determined that the punishment for possession of a firearm as a gang member should be stayed under Penal Code section 654 in light of the punishment for the gang crime. Further, the court erred in imposing a second restitution fine.

People v. Jarvis Adams (H037475)  
Panel attorney: Arthur Wong  
Date: December 20, 2012

The court erred in not awarding a day of presentence credits for a partial day he was in custody. (Staff attorney Lori Quick)

People v. Richard Dominguez (H037601)  
Panel attorney: Ozro Childs  
Date: December 19, 2012

Appellant was placed on probation after getting in a dispute with a manager of a shopping center. The court ordered as a condition of probation that he stay away from the shopping center. The court of appeal reversed the order, deciding the condition was overbroad. (Staff attorney Vicki Firstman)

People v. Angel Torres (H038162)  
Panel attorney: J. Cortney Shevelson  
Date: December 19, 2012

The superior court erred in imposing a full lower term to be served consecutively for possession of a weapon. The court should have imposed one-third the middle term. (Staff attorney Paul Couenhoven)

People v. Nicolas Harris (H036908)  
Panel attorney: Robert Angres  
Date: December 13, 2012

A federal court reversed one of appellant's convictions. When he returned to the superior

court, he wanted to do a *Romero* motion and have a new sentencing hearing. The superior court decided it was simply going to restructure the sentence without the reversed count. The court of appeal reversed, holding that the court should have held a new sentencing hearing. (Staff attorney Jonathan Grossman, Michael Kresser)

In re J.H. (H038096)  
Panel attorney: Carlo Rolando  
Date: December 13, 2012

The court of appeal remanded the matter so that the juvenile court can decide if the wobbler offense was a misdemeanor or felony. (Staff attorney Paul Couenhoven)

In re D.E. (H038060)  
Panel attorney: Olga Mikheeva  
Date: November 30, 2012

Conditions of probation were modified to avoid problems with overbreadth and vagueness. (Staff attorney Lori Quick)

People v. Reyes Bejarno  
Staff attorney: Lori Quick  
Date: November 29, 2012

The court lacked the authority to impose a no contact order to the prisoner.

People v. Gaytan (H037919)  
Staff attorney: Paul Couenhoven  
Date: November 29, 2012

The court erred in imposing an AIDS education fine for convictions that do not require it.

People v. Augustus Mosley (H037310)  
Panel attorney: Victoria Stafford  
Date: November 20, 2012

The court sentenced appellant to serve 25 years to life and said it was required to set the restitution fine according to the formula under subdivision (b) of Penal Code section 1202.4 at \$10,000. The restitution fine order was reversed because the court failed to exercise its discretion. (Staff attorney Dallas Sacher)

People v. Jimmy Hogue (H035635)  
Panel attorney: Heather McKay  
Date: November 20, 2002

The court stayed a conduct enhancement. This was error. It was requires to impose it or strike it. Further, the court incorrectly identified an attempted residential burglary with an occupant present as a violent felony. (Staff attorney Vicky Firstman)

People v. Jennifer Doreck (H037594)  
Panel attorney: Jennifer Marinovich  
Date: November 15, 2012

Appellant pled no contest to theft from an elder. She was placed on probation and ordered to comply with domestic violence conditions of probation under Penal Code section 1203.097. The court held that theft did not meet the statutory definition of domestic abuse. (Staff attorney Lori Quick)

People v. Gardner (H037574)  
Staff attorney: Jonathan Grossman  
Date: November 14, 2012

The court of appeal remanded the matter to determine how superior court calculated fines and penalty assessments. It also held there was insufficient evidence of an ability to pay probation fees and payment of fees could not be made a condition of probation.

In re J.A. (H037839)  
Staff attorney: Lori Quick  
Date: November 8, 2011

Appellant could not be found to have received stolen property when he was also found to have stolen it. Further, certain conditions of probation needed to be modified to avoid problems with vagueness and overbreadth.

People v. Todd Arcoleo (H037707)  
Panel attorney: Steven Schorr  
Date: October 25, 2012

Penal Code section 1202.5 requiring a \$10 fine for theft-related offenses does not apply to a conviction for attempted theft. (Staff attorney Paul Couenhoven)



People v. Antonio Brandao (H037871)

Panel attorney: John Dodd

Date: October 24, 2012

Appellant pled no contest to possessing methamphetamine. There was no evidence in the record he had a history with gangs. Nonetheless, the court ordered as a condition of probation that he not associate with gang members over his objection. In a published decision, the court of appeal held the condition was unreasonable. (Staff attorney Vicki Firstman)

In re E.A. (H037642)

Panel attorney: Ronald Dehoff

Date: October 24, 2012

Probation conditions were modified to avoid problems with overbreadth and vagueness. (Staff attorney Dallas Sacher)

People v. Villebaldo Garcia (H037518)

Staff attorney: William Robinson

Date: October 15, 2012

The court could not increase the restitution fine upon a revocation of probation.

People v. Adolfo Huerta (H037455)

Panel attorney: Solomon Wollack

Date: October 15, 2012

Certain conditions of probation were modified to avoid problems with overbreadth and vagueness. (Staff attorney William Robinson)

People v. Somnang Kim (H037765)

Staff attorney: Dallas Sacher

Date: October 11, 2012

Appellant could not be punished for both a gun enhancement and a gang enhancement under Penal Code section 186.22, subdivision (b)(1)(C).

People v. Warren Jordan (H037100)

Panel attorney: Catherine White

Date: October 3, 2012

The abstract of judgment must be amended to accurately reflect the court's sentence. (Staff attorney Vicki Firstman)

People v. Robert Harvey (H037007, H037817)

Staff attorney: Dallas Sacher

Date: October 2, 2012

The court ordered a \$200 drug program fine and a \$200 drug lab fine. The drug program fine must be stricken because there was insufficient evidence of an ability to pay. The matter was remanded to the superior court to determine the drug lab fine, which is statutorily \$50, because it was not clear how the penalty assessments were calculated.

People v. Sergio Carrillo (H037621)

Staff attorney: Paul Couenhoven

Date: October 2, 2012

Conditions of probation were amended to require knowledge.

People v. Victoria Betts (H037576)

Panel attorney: Edward Mahler

Date: September 27, 2012

The court of appeal agreed there was insufficient evidence of appellant's ability to pay a booking fee. (Staff attorney Jonathan Grossman)

People v. Mazariego (H037216)

Staff attorney: Paul Couenhoven

Date: September 20, 2012

Appellant was convicted of kidnapping to commit rape, sexual assault, simple kidnapping (punishment for this count was stayed), felony assault, and false imprisonment. The court of appeal agreed that the punishment for felony assault and false imprisonment must be stayed under Penal Code section 654.

In re S.Q. (H037649)

Panel attorney: Maggie Shrout

Date: September 14, 2012

The probation condition not to be adjacent to a school campus was modified on appeal because it was vague and overbroad. (Staff attorney Lori Quick)

People v. Kennedy (H037668)  
Staff attorney: Jonathan Grossman  
Date: September 14, 2012

Appellant was denied presentence credits because he also had a parole violation. Although the original basis for the parole violation included allegations that were not the same as the new criminal charges, in the end parole was revoked for the same reasons. He was thus entitled to dual credits.

People v. Raymond Campos (H0335756)  
Panel attorney: Joseph Shipp  
Date: September 11, 2012

Appellant received a three year enhancement for personally inflicting great bodily injury (gbi) and a ten year enhancement for committing a violent felony (due to the gbi enhancement) for the benefit of a gang. Since he could receive only one of the enhancements, the three year term was stricken. The court also erred in imposing the same drug trafficking enhancement for two different drug convictions. Finally, a drug program fine and drug lab fine for a stayed count must also be stayed. (Staff attorney Vicki Firstman)

People v. Gerardo Gomes (H036452)  
Staff attorney: Dallas Sacher  
Date: August 31, 2012

The abstract of judgment must be corrected to reflect the defendant's true sentence.

In re R.S. (H037470)  
Panel attorney: Olga Mikeeva  
Date: August 27, 2012

The court modified conditions of probation to avoid problems with vagueness and overbreadth. (Staff attorney Vicki Firstman)

People v. Ellis Jones (H036831)  
Panel attorney: Janice Lagerlof  
Date: August 17, 2012

The jury convicted appellant of four counts of robbery, one count of attempted robbery, four counts of assault with a stun gun, and one count of false imprisonment as a lesser included offense to kidnapping for robbery. The court of appeal determined that the punishment for false imprisonment must be stayed pursuant to Penal Code section 654. The court also determined that appellant would not be required to pay restitution for a stolen cell phone that was recovered if it were not damaged. (Staff attorney Dallas Sacher)

People v. Jesus Martinez (H037011)  
Panel attorney: Morgan Taylor  
Date: August 16, 2012

The court imposed \$200 fee pursuant to Health and Safety Code sections 11372.5 and 11372.7. The minute order stated there were two \$200 fines. The court of appeal concluded the court imposed a total of \$200: a \$50 lab fee under section 11372.5 and a \$150 drug program fee under section 11372.7. The court of appeal also agreed that the minute order needed to be amended to reflect the sentencing court ordered a \$600 restitution fine, not \$800. (Staff attorney Dallas Sacher)

People v. Juan Molina (H037416)  
Panel attorney: Joseph Shipp  
Date: August 7, 2012

The abstract of judgment incorrectly stated appellant's birthdate, that he was supposed to have no contact with the victim, and that he should pay attorney fees. The court of appeal agreed the abstract of judgment must be amended to reflect what the court actually ordered at sentencing. (Staff attorney Paul Couenhoven)

People v. Frederick Ruiz (H036183)  
Panel attorney: Danalynn Pritz  
Date: August 3, 2012

The court erred in imposing a parole violation restitution fine when appellant was sentenced to serve life in prison without parole. (Staff attorney William Robinson)

People v. Nehls (H037256)  
Attorney: Robert Joseph Beles  
Date: August 3, 2012

The court did not order appellant to register under Penal Code section 290, but it did require him to register as a condition of probation. The condition of probation was unauthorized. (SDAP

was not involved in this appeal)

People v. Nico Habecker (H037027)

Panel attorney: Alex Coolman

Date: August 2, 2012

The abstract of judgment must be amended to reflect the correct amount of fees imposed by the court at the sentencing hearing. (Staff attorney Paul Couenhoven)

People v. Daniel Martinez (H036939)

Panel attorney: Elaine Forrester

Date: July 31, 2012

Appellant was placed on Proposition 36 probation for 18 months. About seven months later, the court terminated Prop. 36 probation and placed him on standard probation under the same terms and conditions. Two and half years after first being placed on probation, the court revoked probation and sentenced him to prison. Appellant argued the court lacked jurisdiction because probation had expired. The court believed that when it placed him on standard probation, it was for three years. The court of appeal reversed. There was no order extending probation to be three years long. Because probation had expired, the superior court lacked jurisdiction to revoke probation. (Staff attorney Jonathan Grossman)

People v. Ignacio Ramirez (H037799)

Staff attorney: Lori Quick

Date: July 24, 2012

The court failed to recognize five days of presentence credits that appellant was entitled to.

People v. Yolanda Rosales (H036838)

Panel attorneys: Elaine Forrester and Benjamin Owens

Date: July 20, 2012

The probation condition not to be adjacent to a school was unconstitutionally vague. There was insufficient evidence for ordering appellants pay probation fees. And the probation revocation restitution fine must be \$200 to match the amount of the restitution fine. (Staff attorney Jonathan Grossman)

In re D.H. (H037485)

Panel attorney: Joseph Escobosa

Date: July 13, 2012

Appellant was ordered to stay away from his neighbor. The court of appeal held this order was too vague and overbroad and remanded the matter to the superior court to modify the condition. (Staff attorney Lori Quick)

People v. Marvin Foster (H036323)

Panel attorney: Alan Siraco

Date: July 20, 2012

There was insufficient evidence to support a restitution order based on the prosecutor's statement of the loss. Further, a no contact order after conviction was not authorized by Penal Code section 136.2. (Staff attorney Lori Quick)

People v. Jeannette LaPerriere (H036572)

Panel attorney: Michael Breismeister

Date: July 20, 2012

The probation condition not to use drugs or alcohol was modified to require knowledge. (Staff attorney Paul Couenhoven)

People v. Jose Ayala (H037382)

Panel attorney: Alex Green

Date: June 29, 2012

The court held there was insufficient evidence of appellant's ability to pay a booking fee to the county. (Staff attorney William Robinson)

People v. Andre Scott (H035845)

Panel attorney: Victoria Stafford

Date: June 20, 2012

The court of appeal agreed that a juvenile adjudication could not qualify as a prior serious felony conviction. (Staff attorney Dallas Sacher)

In re Hector G. (H037269)

Staff attorney: Lori Quick

Date: June 8, 2012

The juvenile court lacked the authority to impose a stay away condition of probation for a minor committed to DJJ.

People v. Jamie Perkins (H036518)  
Panel attorney: Maggie Shrout  
Date: June 8, 2012

The court of appeal corrected the minute order and abstract of judgment to reflect the correct award of conduct credits. (Staff attorney William Robinson)

People v. Juan Coronado (H037153)  
Panel attorney: Ross Green  
Date: June 6, 2012

Appellant was convicted of a wobbler. The superior court issued an order terminating formal probation. By operation of law, this reduced the crime to a misdemeanor. The court later purported to correct the minute order nunc pro tunc to revive the case as a felony. The court of appeal reversed, holding that this was not a clerical order which can be corrected with a nunc pro tunc order.

People v. Carlos Cruz (H037223)  
Staff attorney: Jonathan Grossman  
Date: June 6, 2012

Appellant pled, but at sentencing the court announced it was exercising its discretion to order that he register as a gang member. Because he was not advised of this when he pled, the matter must be remanded to the superior court where the requirement must be stricken or appellant be given the opportunity to withdraw his plea. Further, the superior court could not order appellant stay away from prison when he was sentenced to prison.

People v. Karl Allen (H037301)  
Panel attorney: Alan Siraco  
Date: May 29, 2012

Appellant pled no contest and received a sentence of 79 days with credit for 79 days. The court also imposed a \$100 fine. The court of appeal agreed he was entitled to 38 days of conduct credits. He was thus entitled to have some of the excess presentence credits applied to his fine, rendering payment of the fine satisfied. (Staff attorney Vicki Firstman)

People v. Laurel (H036416)  
Panel attorney: Jonathan Berger  
Date: May 25, 2012

Appellant was convicted of assault, rape, kidnapping and making criminal threats, among other things. The court of appeal agreed that the punishment for assault in connection with the rape and kidnapping must be stayed pursuant to Penal Code section 654. (Staff attorney William Robinson)

People v. Mario Gabriel (H037227)  
Staff attorney: William Robinson  
Date: May 22, 2012

The court purported to set the restitution fine, using some but not all of the language of the formula found in Penal Code section 1202.4, subdivision (b)(2). Appellant argued he was entitled to an amount of the formula described by the court, not the formula actually found in the Code, as reflected in the minute order. The court of appeal found the trial court's comments to be ambiguous and remanded the matter.

People v. Artemio Romero (H036511)  
Panel attorney: Junelle Harris  
Date: May 21, 2012

Appellant needed to be resentenced because the court made a shorter term the principal term, failed to reduce conduct enhancements of consecutive terms to be one-third the normal term, stayed some enhancements instead of striking them, and punished appellant for both robbery and assault in committing the robberies. (Staff attorney William Robinson)

People v. David Hall (H037318)  
Panel attorney: Ozro Childs  
Date: April 23, 2012

Appellant was denied one-for-one credits under amended Penal Code section 4019 because he suffered a prior strike conviction. However, it did not qualify as a prior serious felony conviction because the strike was from a juvenile adjudication. (Staff attorney Jonathan Grossman)

People v. Anthony Riley (H036748)  
Staff attorney: William Robinson  
Date: April 17, 2012



Appellant was convicted of domestic violence and making criminal threats; he suffered one prior strike conviction. The court indicated it wished to impose the statutory minimum sentence. The prosecutor said that would be 17 years 4 months, which defense counsel did not dispute. The court imposed this sentence. The court of appeal decided trial counsel was ineffective for not arguing that the punishment for two crimes could have been imposed concurrently because they arose from the same set of operative facts; thus the statutory minimum sentence was less than what the court imposed.

People v. Jose Leon (H036972)  
Staff attorney: William Robinson  
Date: April 17, 2012

Appellant was sentenced on three cases. In one case he was sentenced to serve 365 days with credit of 846 days. He received no presentence credits in the other cases. The court of appeal agreed that he should receive only 365 days of presentence credits for the first case and the remaining credits must be allocated to the other cases.

People v. Gilbert Grijalva (H036811)  
Panel attorney: Anne Gordon  
Date: April 17, 2012

Appellant pled guilty to attempted robbery and assault with a deadly weapon. He admitted he suffered three prior strike convictions, but the court dismissed two of the strikes because of his extensive mental health history. The district attorney appealed, arguing dismissal of the strikes was an abuse of discretion. The court of appeal disagreed with the prosecution and affirmed. (Staff attorney William Robinson)

People v. John Kenney  
Panel attorney: Kyle Gee  
Date: April 17, 2012

Appellant was sentenced to serve life without parole. The court imposed a \$10,000 restitution fine which was suspended unless he violated parole. This fine was unauthorized. (Staff attorney William Robinson)

People v. Deshawn Campbell (H034690)  
Panel attorney: Gary Dubcoff  
Date: April 10, 2012

Appellant was convicted of residential burglary and was sentenced with 483 days of

presentence credits. He was subsequently convicted of murder. In resentencing him, the court failed to award the 483 days of presentence credits. The court of appeal agreed to restore the credits to the burglary conviction. (Staff attorney Dallas Sacher)

In re Gerardo M. (H036279)  
Staff attorney: Vicki Firstman  
Date: April 6, 2012

The court modified numerous conditions of probation to avoid problems with vagueness and overbreadth.

People v. Carlos Arellano (H036949)  
Staff attorney: J. Courtney Shevelson  
Date: April 6, 2012

The court modified numerous conditions of probation to avoid problems with vagueness and overbreadth. It also modified the order to pay probation fees to be dependent on appellant's ability to pay. (Staff attorney Vicki Firstman)

People v. Kevin Russo  
Staff attorney: Dallas Sacher  
Date: April 6, 2012

The court ordered appellant to receive day-for-day presentence conduct credits, according to the statute in effect when he was in custody.

People v. Camillo Rice (H037123)  
Panel attorney: Eileen Rice  
Date: April 6, 2012

Appellant was convicted of making criminal threats and false imprisonment occurring on one day, and he was convicted of making criminal threats and carjacking occurring on another day. Because the threats facilitated the false imprisonment and the carjacking, the punishments for the threats must be stayed pursuant to Penal Code section 654. (Staff attorney Jonathan Grossman)

People v. William Bito (H036375)  
Staff attorney: Vicki Firstman  
Date: April 5, 2012

The court modified numerous conditions of probation to avoid problems with vagueness and overbreadth.

People v. Arciniega (H036215)  
Panel attorney: Robert Angres  
Date: March 23, 2012

The court found insufficient evidence for an order for an AIDS test. (Staff attorney Lori Quick)

People v. Ceballos (H035340)  
Panel attorney: John Dwyer  
Date: March 20, 2012

The court ordered restitution for a sexual assault examination under Penal Code section 1203.1h without holding a hearing on the defendant's ability to pay. Because such an order must be dependent upon a finding of an ability to pay, the order was reversed. Further the amount of the restitution fine was reduced to the statutory maximum of \$10,000. (Staff attorney William Robinson)

People v. Ruben Maciel (H037083)  
Staff attorney; William Robinson  
Date: March 16, 2012

Written conditions of probation were modified to reflect the court's oral pronouncement.

People v. Alejo Alegre (H036329)  
Panel attorney: J. Frank McCabe  
Date: March 16, 2012

The court security fee was reduced to \$30 per count to reflect the amount in effect when the defendant was convicted. (Staff attorney Dallas Sacher)

People v. Mario Ramirez (H037015)  
Staff attorney: Paul Couenhoven  
Date: March 14, 2012

Conditions of probation were modified to avoid problems with vagueness and overbreadth.

People v. Michael Reulman (H036443)  
Panel attorney: Alfons Wagner  
Date: March 9, 2012

There was insufficient evidence of an ability to pay a booking fee and probation fees. (Staff attorney Vicki Firstman)

People v. Christi Schoenbachler (H035242)  
Panel attorney: Elisa Nadeau  
Date: February 29, 2012

Appellant embezzled money from her grandmother and placed her in a senior home which she did not like. Appellant then had her grandmother cash an annuity to get her out, but appellant used the money for her own purposes. She was convicted of grand theft, theft from an elder, and emotional abuse of an elder. The court agreed the punishment for emotional abuse stemming from the theft must be stayed pursuant to Penal Code section 654. (Staff attorney Jonathan Grossman)

People v. Scott (H034764)  
Staff attorney: Vicki Firstman  
Date: February 28, 2012

Penal Code section 1202.05 prohibits visitation between a child molester and his or her minor victims. In a published decision, the court of appeal held that the trial court lacks authority to prohibit an adult child victim of the defendant from visitation.

People v. Yolanda Nevarez (H036727)  
Staff attorney: Lori Quick  
Date: February 21, 2012

Appellant was entitled to increased presentence credits for time in custody after January 25, 2010.

People v. Mayito Guzman (H036560)  
Panel attorney: Eileen Rice  
Date: January 23, 2012

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

People v. Sergio Zamudio (H036489)  
Staff attorney: Paul Couenhoven  
Date: January 20, 2012

The court ordered appellant to pay a \$200 restitution fine, but the abstract of judgment stated it was \$800. The court of appeal agreed to correct it.

People v. Juan Arreola (H036509)  
Panel attorney: Maribeth Halloran  
Date: January 19, 2012

The court modified conditions of probation to avoid problems with vagueness and overbreadth. (Staff attorney Jonathan Grossman)

People v. Juan Pacheco (H036211)  
Staff attorney: Michael Flynn  
Date: January 13, 2012

A condition of probation to stay away from those appellant “suspects” to be gang members or drug users was unconstitutionally vague. (Staff attorney Dallas Sacher).

People v. Alejo Alegre (H036821)  
Panel attorney: Lara Anderson  
Date: December 28, 2011

The court revoked probation because it found appellant associate with a gang member or one who was suspected to be a gang member. The revocation was reversed because the second ground for violating probation was unauthorized and it was not clear if the court relied on the first ground. (Staff attorney Jonathan Grossman)

#### **DEPENDENCY CASES**

D.P. v. Superior Court (H038850)  
Attorney: Laura Underwood  
Date: December 21, 2012

The court of appeal granted the father's dependency petition from the order setting a section 366.26 hearing because the juvenile court failed to provide reasonable services to address mental health problems. (SDAP did not participate in this case)

In re K.C. (H037940)  
Panel attorney: Valerie Sopher  
Date: December 20, 2012

In an appeal terminating reunification services for the father, the court decided in a published decision there was not reasonable services provided to address mental health problems. (Staff attorney Vicki Firstman)

In re M.B. (H037873)  
Panel attorney: Catherine Czar for the minor  
Date: December 17, 2012

The mother and the paternal grandmother tried to change placement from foster home to the paternal grandmother through a modification petition. The minor opposed the petition in the juvenile court. The court denied the petition, and the minor sought to affirm the ruling on appeal. The court of appeal agreed with the minor. (Staff attorney Jonathan Grossman)

In re Daniel M. (H038657)  
Panel attorney: Jack Love  
Date: December 10, 2012

In a dependency case, the court ordered appellant to receive weekly visits, though she was actually visiting twice a week. At a hearing in which the court ordered legal guardianship, the department recommended monthly visits. The court said it was ordering that visits be increased in frequency but set the visits to occur one every two weeks. The court of appeal reversed, holding it did not appear the juvenile court properly exercised its discretion because it apparently misunderstood the older order concerning the frequency of visits. (Staff attorney Jonathan Grossman)

In re K.C. (H036896)  
Panel attorneys: Linda Harvie and Valerie Sopher  
Date: June 5, 2012

The minor was severely injured nonaccidentally. Though it was not clear, it appeared the injuries were inflicted on one occasion by the mother's boyfriend. The court of appeal agreed there was insufficient evidence the mother and father could be held responsible under Welfare and Institutions Code section 300(e) when they had no reason to believe the boyfriend would abuse the minor. There was also insufficient grounds for not placing the minor with the father at the dispositional hearing. Further, notice to Indian tribes were insufficient. (Staff attorney Vicki Firstman)

In re D.R. (H037186)  
Panel attorney: Catherine Lundy  
Date: May 23, 2012

The court of appeal concluded notice was insufficient under ICWA. (Staff attorney Jonathan Grossman)

### **HABEAS CORPUS**

In re Efrain Reyes (Santa Clara Cnty. No. 101413)  
Staff attorney: Lori Quick  
Date: October 25, 2012

A state prisoner applied to advance his parole consideration hearing pursuant to Penal Code section 3041.5. The Board denied the request without explanation. The prisoner filed a petition for writ of habeas corpus. The superior court ruled that the denial without an explanation did not comply with the due process because it cannot be determined if there was some evidence to support the decision.

People v. Ching an Chen (Santa Clara Cnty. No. BB835848)  
Attorneys: Patricia Lai and Eric Weaver  
Date: October 18, 2012

The defendant, who speaks Mandarin, was represented by the public defender's office and entered a plea bargain for a determinate term in exchange for dismissing a charge of aggravated mayhem. He then hired a private attorney who moved to withdraw the plea, which the prosecution did not oppose. On the day of trial, the private attorney convinced the defendant to plead to aggravated mayhem, resulting in a life term. Lai was appointed on appeal and filed a habeas corpus petition. An order to show cause was issued, and a hearing was scheduled in the superior court. Weaver was appointed to represent the defendant at the hearing. Relief was granted on the ground retained counsel failed to communicate adequately with the defendant and did not adequately prepare for trial or the sentencing hearing. The original plea bargain was reinstated. (Staff attorney Jonathan Grossman in the court of appeal; SDAP did not participate in the superior court)

In re Richard Sena (Santa Clara Cnty. No. 149169)  
Staff attorney: Jonathan Grossman  
Date: September 19, 2012

The Board of Parole Hearings granted parole, but the governor reversed the decision. Sena filed a habeas corpus petition in the superior court. The court agreed there was not some evidence for the governor to deny parole.

In re Epitacino Cortina (Santa Clara Cnty. No. 153261)  
Staff attorney: Jonathan Grossman  
Date: August 28, 2012

The Board of Parole Hearings granted parole, but the governor reversed the decision. Cortina filed a habeas corpus petition in the superior court. The court agreed there was not some evidence for the governor to deny parole.

In re Rudy Rodriguez (Santa Clara Cnty. No. 137206)  
Staff attorney: Paul Couenhoven  
Date: July 5, 2012

After the Board of Prison Terms denied parole, Rodriguez filed a petition for writ of habeas corpus in the superior court. The court agreed there was not some evidence for denying parole, as there was a lack of nexus between petitioner's behavior when he was a youth and his current suitability.

In re Johnny Lira (H036162)  
Panel attorney: Steve M. Defilippis  
Date: June 29, 2012

The Board denied Lira parole. He filed a habeas corpus petition. The court concluded there was not some evidence to deny parole and ordered a new hearing. The Board then granted parole, but the governor reversed the decision. Upon consideration of another habeas corpus petition, the court determined there was not some evidence to support the governor's reversal. In a new habeas corpus petition, Lira claimed he was entitled to have credited toward his time on parole the period from when he was illegally denied parole by the Board or at least from the governor's erroneous reversal of parole. In a published decision, the court of appeal decided that he was not entitled to credit from the time of the Board's denial of parole, but he was entitled to credit from the time of the governor's erroneous reversal. (Staff attorney Michael Kresser)

People v. Aisetewa (Santa Clara No. 206478)  
Staff attorney: Dallas Sacher  
Date: February 22, 2012

The defendant was convicted of violating Penal Code sections 286, subdivision (c), and 288, subdivision (b). A habeas corpus petition was filed alleging, among other things, a *Brady* violation because the sexual assault nurse videotaped the examination of the victim. The videotape would have contradicted the nurse's findings, but it was not disclosed to the defense in time. After an OSC issued, there was an agreement to grant the petition, and the defendant pled to child endangerment with great bodily injury. He had one strike instead of two and no longer had to register as a sex



offender.

People v. Witcraft (Santa Clara No. CC963746)  
Staff attorney: Dallas Sacher  
Date: February 15, 2012

Trial counsel brought a meritorious *Kellet* motion which was denied before the preliminary hearing. The motion was not renewed after the defendant was held to answer. A habeas corpus petition was filed, alleging ineffective assistance of counsel for not renewing the motion. The court of appeal issued an OSC. In the superior court, relief was granted and the conviction was reversed without the possibility of a retrial.

In re Alex Castro (H036045)  
Panel attorney: Thomas Singman  
Date: January 27, 2012

The defendant was charged with cruelty to animals with two prior strike convictions. A key piece of evidence against him was a letter purportedly written by him telling a witness not to testify. This was admitted to show consciousness of guilt. The defendant denied writing the letter and asked his public defender to obtain a handwriting expert. The public defender made an internal request for funds, but the office rejected the request. Defendant was convicted and sentenced to serve life in prison. The prosecution then charged him with making criminal threats. He was appointed a different lawyer who did obtain a handwriting expert. The expert testified the defendant did not write the letter, and he was acquitted. In the habeas petition filed in connection with the cruelty to animal conviction, the court of appeal granted relief on the ground he received ineffective assistance of counsel. (Staff attorney Dallas Sacher)

## **MISCELLANEOUS**

In re Coronel (H037166)  
Panel attorney: Traci Mason  
Date: November 6, 2012

Coronel had pled guilty of second degree murder. When parole was denied more than 20 years later, he filed a petition for writ of habeas corpus. The superior court granted relief, ruling there was not some evidence to deny parole. The government appealed, and the court of appeal affirmed in a published decision. (Staff attorney Dallas Sacher)

People v. Fabian Valenzuela (H037039)  
Panel attorney: Michael Mehr  
Date: July 31, 2012

Appellant pled to possession for sale controlled substances in 1992. In 2009, he applied for permanent resident status. Immigration officials requested additional information about the 1992 conviction. In 2010, his immigration lawyer referred him to another attorney for possible challenges to the conviction. In 2011, he filed for vacating the conviction pursuant to Penal Code section 1016.5 for the court's failure to properly advise him of immigration consequences. The superior court denied the request on the ground he failed to exercise due diligence. The court of appeal reversed. Since he was no record he was properly advised of the immigration consequences, he would not know of potential immigration problems until 2009. At that point, he exercised due diligence, and any delay was due to the court searching for the records of the conviction and his attorneys preparing the proper documents. (Staff attorney Vicki Firstman)

People v. Robin Bailey (S187020)  
Panel attorney: Jonathan Berger  
Date: July 12, 2012

Appellant was convicted of escape from a prison. The court of appeal found there was insufficient evidence of escape since he failed to leave the prison grounds. It also held that he could not be convicted of attempted escape instead because it was not a lesser included offense, as it is a specific intent crime. The supreme court granted review and agreed with the court of appeal. (Staff attorney William Robinson)

Averilla v. Lopez (N.D. Cal. No. C 10-03614)  
Attorney: Gabriel Bassan  
Date: March 23, 2012

The defendant was convicted of molesting his 13 year-old daughter. Although there was some evidence concerning her lack of credibility, the superior court limited cross-examination and excluded defense evidence of her untruthfulness. The court of appeal found error but said it was harmless because the evidence was cumulative. The California Supreme Court denied review. Gabriel Bassan continued to represent the defendant in federal court. Relief was granted on habeas corpus by the federal court. The conclusion the evidence was cumulative was an unreasonable application of controlling law. Because the entire prosecution case depended on her credibility, the error was not harmless. (Staff attorney in the state court of appeal Dallas Sacher)