WINS 2001

Wins, wins, wins! We have seen an unprecedented number of victories on appeal during the past nine months. Appellate counsel starved for some positive from the Sixth District news can take hope.

Given the large number of recent wins, we are using a new format. Wins are divided into six categories. Within each category, wins are listed in alphabetical order with reference to the victorious attorney's last name (which makes it easier to find your name in print). Also, after the panel attorney's name we have included the initials of the staff attorney involved with the case. If you interested in an issue and cannot reach the panel attorney, you can call the SDAP staff attorney to get copies of briefs or to discuss an issue.

Due to the sheer volume of recent wins, we have exercised some discretion. Victories deemed minimal (e.g., two extra days of CTS; a reduction in a restitution fine) are not all listed. However, our system is not perfect. If your significant victory during the past nine months is not included, please write to Paul Couenhoven at SDAP. We will include it in the next newsletter.

Sufficiency of the evidence

Timothy Cronin (LQ) knocked out one count of Penal Code section 4573.6 in *People v. West* (H021408). West was discovered possessing two types of drugs in prison, and was convicted of two counts of section 4573.6. The Court of Appeal ruled that the evidence was sufficient to support only one count when different drugs covered by the statute were simultaneously possessed.

In *In re Michael T.* (H021512) **Gary Dubcoff** (DS) persuaded the DCA the minor could not be convicted of alternative rape and oral copulation charges involving the same act. Michael was convicted of statutory rape, rape of an intoxicated person, oral copulation with a minor and oral copulation with an intoxicated person, all based on having sex with his drunk girlfriend. There was only one act of sexual intercourse and one act of oral copulation. The DCA agreed one conviction for each act had to be reversed pursuant to *People v. Craig* (1941) 17 Cal.2d 453.

In *In re Brian G.* (H023079), the Court of Appeal reversed a Juvenile Court finding of a violation of the criminal threat statute, in a case handled by Executive Director **Michael Kresser**. The 17-year-old minor was working in the stereo department of a department store with an 18-year-old coworker. The minor and the coworker got into a dispute over the coworker's poor work habits. The dispute escalated to name calling, with the coworker insulting the minor's girlfriend. Later, the minor told the coworker he was waiting for the coworker to get off work, that the coworker was going to "get yours," and that if the coworker contacted store security, he would kill the coworker. Given the lack of prior violence between the two, the conditional nature of the threat to kill, and the coworker's later admission that neither of the two had meant what they said, the Court of Appeal found the threat did not satisfy the requirements of Penal Code section 422.

In *People v. Sampson, et al.* (H021288), **Joseph Shipp** (MK) won reversal of counts of

possession of a firearm and possession of ammunition by an ex felon due to insufficient evidence the defendant was a felon. During jury instruction, the court told the jury that the prior felony conviction had been established by stipulation. The court then asked counsel if the stipulation had been stated on the record. Defense counsel said he was not sure, and the prosecutor said that it had. In fact, no stipulation had been placed on the record. The Court of Appeal rejected the AG's argument that defense counsel's "I'm not sure" remark was tantamount to a stipulation.

In *People v. Duran* (H021112) 94 Cal.App.4th 923, **John Staley** (LQ) obtained reversal of a 10 year drug quantity enhancement under Health and Safety Code section 11379.8, which had been applied to a count of conspiracy to manufacture methamphetamine. The Court of Appeal found that there was no evidence that appellant was substantially involved in the direction or supervision, or in a significant portion of the financing of, the underlying manufacturing of drugs, as required by the enhancement. The Court of Appeal indicated that CALJIC No. 17.21, which permitted the finding on the enhancement if the defendant was substantially involved in either the planning or execution of the manufacturing, was inconsistent with the express language of the enhancement.

In *People v. Martinez* (H021773) 93 Cal.App.4th 481, review granted, the Court of Appeal ruled that appellant's act of offering a minor money to commit a lewd act upon him did not constitute sufficient evidence to sustain a conviction of solicitation to commit a violation of section 288, as proscribed by section 653f, subdivision (c). **Jan Stiglitz** (MK) persuaded the court that the evidence did not satisfy the statutory element that another must be solicited to commit the crime themselves. Since the minor was not asked to commit a lewd act upon herself, the evidence did not prove a violation of the solicitation statute.

In *In re Ingmar C.* (H022106), **Don Tickle** (MK) obtained a reversal of a Juvenile Court finding that a minor had made a criminal threat. Appellant drew pictures and scribbled notes in his notebook in a high school class. One of these drawings was a cannon aimed at a figure with his teacher's name, with another human figure labeled "The Frau" being shot out of it toward the teacher figure. Another drawing had a human figure labeled "me" standing behind a cannon from which a cannonball had issued at a figure labeled "teacher." Appellant was required to turn in the notebook, and the teacher felt threatened by the drawings. The DCA found that the surrounding circumstances were insufficient to prove that appellant had turned in the binder with the specific intent that it be taken as a threat.

Pretrial and posttrial motions

In *People v. Eduardo Herrera* (H022906), litigated by **Said Arjomand** (JG), the DCA found the trial court erred in denying a suppression motion. An officer initiated a vehicle stop for expired registration. The driver had baggy clothes and kept putting his hands in his coat pockets. The officer could see an object which had the shape and size of a marker pen in the driver's pants pocket. He was concerned it might be a zip gun or a Yamara martial arts stick, although he admitted these were rare. The officer pat searched the driver and discovered the object was drug paraphernalia which was found to contain methamphetamine. The court of appeal held the pat search was unlawful in the context of a minor traffic violation, and the fear he might be carrying an exotic

weapon was not reasonable.

Alexandria D'Italia (LQ) persuaded the DCA to reverse the denial of a suppression motion in *People v. David Rabago* (H021663.) When police responded to a disturbance call they noticed Rabago, with a hand in his baggy pants pocket, speaking on a telephone in a telephone booth. When the officers tried to get his attention he initially ignored them but eventually put the telephone down as requested. The officer had a policy of searching anyone with baggy pants. He pat-searched Rabago and found a butterfly knife and a small amount of methamphetamine. The DCA held the pat search was unreasonable since there was no reasonable suspicion Rabago was armed. The DCA noted that putting one's hand in a pocket is not a furtive gesture.

In *In re Red R.* (H022394) **Elaine Forrester** (JG) prevailed in an appeal from the denial of a suppression motion. A police officer approached two youths in the early afternoon to find out why they were not in school. They said school was out for the day. The youths were nervous, and Red placed his hands in his pockets. The officer searched Red and found methamphetamine, which he opined was possessed for sale. The DCA found there was no basis for a pat search as there was no reasonable suspicion Red was armed. Furthermore, the youth's nervousness combined with his putting his hands in his pockets did not create probable cause to search him.

J.J. Hamlyn (VF) convinced the court to reverse the denial of a motion to withdraw a plea in *People v. Miguel Chavez* (H022163). Chavez sought to withdraw his plea to first degree burglary because he was not properly advised about immigration consequences under PC section 1016.5. The trial court denied the motion. Even though the required advisements were not given, the court ruled Chavez had to know about the immigration consequences because he had been given proper advisements in a prior case. The DCA reversed. Under *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, Chavez only had to show it was reasonably probable he would not have pled had he been properly advised in this case. The trial court erred in finding advisements in a prior case were dispositive of this issue.

In *People v. Santos Burnias and Antonio Guillen* (H021625), **James Haworth** and **Cynthia Thomas** (DS) persuaded the DCA the trial court had erred in denying a post-plea continuance motion. After their guilty pleas to murder, both defendants said they wanted to withdraw their pleas on the grounds the plea bargain had been breached. Their attorneys refused to make the motion. The court then denied a request made by defendants for a continuance to research the issues. The DCA reversed. No certificate of probable cause was needed since the appeal was from the denial of a motion for a continuance, which did not in itself challenge the validity of the plea. Defendants had the right to have counsel present a meritorious motion to withdraw their pleas, and the denial of a continuance deprived them of that opportunity.

Lark Ritson (LQ) won a reversal of a suppression motion denial in *People v. Jesse Lopez* (H021917). Lopez parked on the wrong side of the street. As an officer approached he looked startled and placed something on the vehicle seat. The item turned out to be a coat. The officer searched the area of the vehicle seat and found drug paraphernalia under the coat. A further search turned up methamphetamine. The DCA held an infraction for a parking violation did not justify a

search of the vehicle, and a furtive gesture was not enough to provide probable cause to search the vehicle. The DCA also rejected an inevitable discovery argument based on expired registration, as there was no evidence the officer would have necessarily towed the vehicle.

Staff Attorney **Lori Quick** successfully represented respondent in *People v. Richard Vucenic* (H021566), a People's appeal from the dismissal of fraud and grand theft charges. Vucenic had already been convicted in federal court for wire fraud involving the same conduct. He successfully moved to dismiss the state charges on the basis that it violated a state statutory prohibition of being placed twice in jeopardy. (Pen. Code, §§ 656, 793.) The DCA affirmed the dismissal because both the state and federal cases were based on the same "act or omission."

Error at trial or other hearing

Carlo Andreani (JG) won a reversal based on instructional error and insufficient evidence in *People v. David Garcia* (H021418). Garcia was convicted of two counts of assault and felony petty theft with a prior. With one strike prior, Garcia was sentenced to 25 years and 4 months. The trial court denied a request for self-defense instructions where the evidence involved a confusing melee between rival gang factions. In closing argument the prosecutor emphasized the lack of any defense. The DCA reversed, finding there was evidence to support a self-defense theory and that the error was prejudicial. The Attorney General conceded there was no actual theft, so the petty theft with a prior was reduced to a misdemeanor attempted theft.

In *People v. Santiago Savedra* (H021014), **Irma Castillo** (DS) persuaded the DCA to reverse a count because the trial court advised a deadlocked jury that in her extensive career as a judge she had never had a hung jury except in one case. The DCA held this comment amounted to an improper *Allen* charge which wrongly pressured minority jurors to join the majority.

In *People v. Cornelius Robinson* (H021657) **Jennifer Gieseler** (WR) won a reversal of a conviction after a court trial because there was no record of a jury trial waiver. According to the transcripts, Robinson pled guilty to one count and then commenced a court trial on a second count. He argued on appeal the second count had to be reversed because there was no jury trial waiver in open court. Respondent argued a waiver must have occurred in chambers. The DCA reversed, holding there must be a waiver in open court.

In *In re David S.* (H021864), **Brian Hong** (JG) obtained the reversal of a finding the minor possessed a weapon at school. The minor's defense was that he had forgotten he had a folding knife in his backpack. The court refused to consider this evidence, stating that the crime was a "strict liability" offense. The DCA reversed because criminal possession of a weapon requires knowledge of its presence.

In *In re Timothy W.* (H021108) **Edward Mahler** (LQ) obtained the reversal of three counts of lewd and lascivious conduct with a child under the age of 14 based on a violation of the minor's constitutional right to confrontation. These three convictions were based solely on evidence contained in a videotaped statement to police officers, which was admitted over objection under

Evidence Code section 1360. The victim was found unavailable because a therapist wrote a letter stating it would be traumatic for the victim to testify in court. The DCA found the letter was insufficient to establish unavailability and reversed the three counts which were based on the videotaped statement.

Kieran Manjarrez (DS) won a reversal on grounds of an improper jury trial waiver in *People v. John Heard* (H021565). Heard tried to continue his jury trial, complaining his attorney had not secured the attendance of defense witnesses. The court denied the motion. Heard waived his right to a jury trial after the court told him that a court trial would be more flexible in accommodating defense witnesses. On appeal after conviction, the DCA agreed the jury trial waiver was not knowing and intelligent because the court gave implied promises if he agreed to a court trial.

In *People v. Phillip Kemp* (H018453), **David Martin** (MK) obtained a reversal of a conviction for failing to register as a sex offender. Kemp was a homeless man with severe mental problems. He was convicted at a court trial of failing to register when he "moved" from one shelter to another and was sentenced to 25 years to life as a third-striker. The DCA reversed under *People v. Garcia* (2001) 25 Cal.4th 744, because at the court trial the judge refused to consider whether Kemp had actual knowledge he had to register when he moved from one temporary shelter to another. After remand, **David Martin** appeared with Kemp and objected when the court attempted to allow the prosecutor to reopen the evidence, contrary to the remand directions. Based on the evidence in the record, the court had to acquit Kemp for lack of evidence of the knowledge element.

In *People v. Giam Vu* (H022334), handled by **Alan Siraco** (LQ), the DCA held it was prejudicial error to fail to instruct on felony sexual battery as a lesser included offense of penetration with a foreign object. The trial court had a sua sponte duty to instruct on the lesser offense when the victim gave inconsistent testimony concerning whether Vu rubbed her vaginal area with his finger or actually inserted his finger into her vagina.

Catherine White (WR) persuaded the DCA to reverse based on ineffective assistance of counsel on direct appeal in *People v. Jose Guerrero* (H021409). Counsel had unsuccessfully sought, on 352 grounds, to exclude the testimony of a child abuse accommodation syndrome expert. During trial the expert's testimony included the behavior of a typical child molester, which is impermissible profile evidence. The "profile" matched Guerrero. Counsel did not object. The DCA agreed counsel was ineffective for not objecting to the inadmissible profile evidence. The evidence was inadmissible and prejudicial and there was no possible tactical reason for not objecting to the improper profile evidence when counsel had tried to exclude the expert's testimony on 352 grounds.

Sentencing

In *People v. Marshall* (H020841), **Patricia Bell** (VF) successfully argued that a prior conviction that resulted in CRC commitment did not qualify for a one year enhancement under section 667.5, subdivision (b).

Daniel Byrne (JG) prevailed in a sentencing appeal in *People v. Lewis* (H021048). In

revoking probation in a statutory rape case, the sentencing judge imposed an aggravated term because of appellant's continued violation of the statute while on probation, and because the age of the victim (17) made her particularly vulnerable. The Court of Appeal remanded for resentencing because of the improper reliance upon events occurring after the grant of probation, and because an under 18-year-old victim is an element of the statute and cannot be used as an aggravating factor.

Several months of additional presentence credits were the result in *People v. Hughes* (H022733), handled by staff attorney **Paul Couenhoven**. Hughes was a parolee who was arrested while possessing crack cocaine, marijuana, a pager, a cell phone, an electronic scale and a large sum of cash. He was convicted of possession of crack for sale, possession of marijuana and being under the influence. His parole was revoked for those offenses and also for possession of the pager and cell phone. The trial court denied presentence credit for the parole revocation time because of the additional revocation charges related to the pager and cell phone. The Court of Appeal ruled that *People v. Brunner* (1995) 9 Cal.4th 1178 required the trial court to grant credits when parole is revoked for the same or related conduct as the new offenses. Here, the pager and cell phone were clearly related to the new offenses. **William Parks** (PC) won on a similar issue in *People v. Roy Shelton* (H022586). While on parole for a sexual offense Shelton committed sexual crimes against two minors. His parole was violated for the new crimes and for violating a parole condition that he not associate with minors. The trial court refused to award Shelton credits for the time he was serving his parole violation. The DCA reversed since associating with minors in violation of a parole condition involved the same conduct as the new charges.

In *People v. Thai* (H019717), **Peter Estern** (DS) gained a sentencing reversal on several grounds. His client had been sentenced to 13 years, 4 months on a number of charges, including threatening a witness by force. On that charge, the court imposed a full mitigated term consecutive, after the probation officer indicated that a full midterm consecutive term shall be imposed pursuant to PC section 1170.15. That section in fact states that a term for witness threats by force can be either concurrent or the full midterm consecutive, so the mitigated full term sentence was unauthorized. The Court of Appeal also agreed that section 654 barred separate punishment on assault and terrorist threat convictions, because appellant had simultaneously threatened to kill the victim while committing the assault by pointing a gun at the victim's head. The court also agreed that enhancements for both using a firearm (§ 12022.5) and carrying a firearm during a street gang crime (§ 12021.5) were not permissible. On remand, Thai was sentenced to 9 years.

In *People v. Miller* (H022072), **Cliff Gardner** (MK) obtained a second sentencing reversal for the client. In the first appeal, the Court of Appeal reversed two out-of-state strike prior findings and the 41 years to life sentence. On remand, appellant was sentenced as a second striker to 20 years, 8 months. The sentencing court imposed an eight month consecutive sentence on a terrorist threat conviction, on which a concurrent sentence had been originally imposed. The Court of Appeal agreed the sentence constituted a section 654 violation, as it occurred during a robbery for which appellant was also sentenced.

Steve Greenberg (MK) obtained a third sentence reduction for his client in *People v. Jorge Vargas* (H021894). In a first appeal the DCA agreed there was insufficient evidence of

premeditation and deliberation in an attempted murder prosecution, and reversed the life sentence for deliberate and premeditated attempted murder. In a second appeal after the imposition of a 15 year sentence, the DCA reversed because the court failed to order a supplemental probation report. On remand Vargas was sentenced to 14 years, as the court imposed consecutive sentences for three counts of recklessly shooting a gun and other charges. The trial court justified consecutive sentences on the basis that there were multiple victims, even though only one shot was fired into a group of people. In a third appeal the DCA reversed once again, holding that a single discharge of a gun into a group of people did not justify consecutive sentences on all three reckless discharge counts. It ordered Vargas's sentence reduced to 10 years 8 months.

In *People v. Pesce* (H021908), **Rachel Lederman** (WR) won a reduction in an order of restitution based on *Harvey* (*People v. Harvey* (1979) 25 Cal.3d 754) error. Pesce pled no contest to two counts of grand theft stemming from a string of thefts at the business where she was employed. During the plea there was no stipulation that the court could consider all the thefts or order restitution for all the thefts. At sentencing, the trial court ordered restitution for all the thefts. The DCA reduced the restitution order to the amount involved in the two counts to which Pesce pled.

Mitri Hanania (DS) was counsel in *People v. O'Keefe* (H021569), in which the Court of Appeal reversed a restitution order. At the restitution hearing, appellant was neither given an attorney nor asked to waive his right to one. The Court of Appeal reversed due to the absolute deprivation of counsel at a critical part of the sentencing process.

In *People v. Tommy Fryman* (H020743) 97 Cal.App.4th 1315, rev. granted, the court agreed with **Marylou Hillberg** (VF) in a published opinion that Fryman was entitled to Prop.36 treatment even though he was sentenced before the date the proposition became effective. Even though the initiative was by its terms prospective only, the court found prospective only application violated the equal protection rights of individuals who had been sentenced but whose cases were not yet final because they had a pending appeal. The Supreme Court has granted review with a hold, pending its decision in *People v. Floyd* (S0105225)(does Prop 36 apply to person who was sentenced before effective date but whose case is still pending on appeal as of effective date?).

In *People v. Aras-Maldonado* (H022783), the court agreed with **Karen Kelly** (LQ) that the $5,000 restitution fine was a breach of the plea bargain since no mention was made of a restitution fine at the time of the plea. (See *People v. Walker* (1991) 54 Cal.3d 1013.) The DCA also found that the ordered HIV test was improper since there was no probable cause to believe there was an exchange of bodily fluids. Other cases involving this winning issue are too numerous to list.

David Martin (VF) successfully argued ineffective assistance of counsel at sentencing in the direct appeal in *People v. Kim* (H021012). His client had been convicted of theft from an elder by a caretaker. The probation department recommended probation. However, trial counsel informed the court at time of sentencing that the client preferred a mitigated prison sentence because she could be immediately paroled to Oregon, and could avoid extension of probation if she failed to pay restitution. Trial counsel also did not ask for a hearing when the court set restitution at $14,000, a

figure which did not include an offset for money spent on reasonable household expenses and reasonable salary for appellant's caretaker duties. The Court of Appeal found ineffective assistance of counsel on the record, because Penal Code section 11177.2 specifically provides that no parolee may be paroled to another state if the parolee has not fully paid any court awarded restitution or restitution fine. Thus, the client's choice of a prison sentence was based on faulty advice about the availability of out of state parole. The Court of Appeal also found counsel ineffective for failing to demand a hearing on the amount of restitution.

David Martin (VF) also prevailed in *People v. B.R.* (H022624), a People's appeal. The trial court had agreed not to require defendant to register as a sex offender after she was found guilty of simple kidnapping. The DCA dismissed the appeal because Penal Code section 1238 does not authorize the prosecution to appeal such an order.

Kathleen Novoa (DS) won the reversal of a gang registration order pursuant to Penal Code section 186.30 in *In re Michael R.* (H021738). The juvenile court found the minor had committed three misdemeanors: falsely identifying himself to police, alcohol possession in public and uttering provocative words in public. The juvenile court then found the offenses were "gang-related" and ordered the minor to register. The DCA reversed because there was insufficient evidence the minor committed the crimes in relation to a criminal street gang.

In *People v. Glaros* (H021383), **Ruth McVeigh** (DS) prevailed on her argument that a juvenile adjudication for the crime of assault with a deadly weapon did not constitute a strike prior because that offense was not listed in W & I Code section 707(b). The Court of Appeal rejected the AG's argument that the trial court could consider facts in the record of the adjudication that showed the offense involved an assault with force likely to produce great bodily injury, an offense which is listed in section 707(b).

Steven Schorr (DS) obtained the reversal of a great bodily injury enhancement in *People v. Jesus Barajas* (H022320). The trial court had imposed enhancements for GBI with a gun (§ 12022.53(d)) and for GBI (§ 12022.7) on the same count. The DCA reversed the GBI enhancement because by statute only one GBI enhancement can be imposed.

Reversal of two consecutive "One Strike" sentences were obtained by **George Schraer** and **Alan Yockelson** (DS) in *People v. Betencourt, et al.* (H020999). The trial court had held that because consecutive sentences were mandatory under the similar language of section 667.6, subdivision (d), they were mandatory under the One Strike Law. The DCA reversed since the Supreme Court held to the contrary in *People v. Jones* (2001) 25 Cal.4th 98, 107. **Frank McCabe** and **Neal Morse** (WR) won sentence reversals on the same issue in *People v. Jose Garcia, et al*. (H022000). **Julie Shumer** (WR) won a sentence reversal on the same ground in *People v. Rustico Sadsad* (H022907). **A. M. Weisman** (MK) won on the same issue in *People v. Hatchett* (H021458), where the DCA reversed a sentence of 255 years to life for five counts of sexual assault against a prison cell mate over a period of about 90 minutes. On remand, the sentence was reduced to 55 years to life.

Lori Quick obtained a reversal in *People v. Ambrose Sogbandi* (H022558). After a probation violation, the judge sentenced Sogbandi to five years, the maximum possible term. However, when Sogbandi had pled, the judge had advised him that if he violated the terms of probation he could be committed to state prison for "that maximum term of three years." In an initial appeal, the DCA had stated the condition of the plea included placement on probation with a suspended three-year prison term. Even if the judge had mispoken, the prosecutor made no objection and no petition for rehearing was filed when the DCA summarized the deal in the first appeal. The DCA "reluctantly agree[d]" that the sentence had to be reduced to three years.

In *People v. David Anzaldua* (H022568), **Meridith Watts** (DS) prevailed in a people's appeal challenging the trial court's decision to strike a prior and sentence Anzaldua to 10 years instead of 25 years to life. The trial court struck the prior due to its relative age, the relatively less serious nature of the current offense (DUI), and because Anzaldua had done well on parole prior to this arrest, finding a job and staying out of trouble for 18 months. The DCA held the decision was within the trial court's discretion.

Dependency cases

Stephanie Davis (VF) obtained a reversal of a dispositional order in *In re Samuel P.* (H023361), 99 Cal.App.4th 1259. In a published opinion, the DCA reversed the dispositional order because of failure to comply with the notice requirements of the Indian Child Welfare Act (ICWA). Although CPS sent notice to the tribe, it failed to give sufficient information about the dependency proceedings, thereby depriving the tribe of its right to exercise its right to intervene in the proceedings. Also, notice was provided as to only one of the three children involved. Finally, the department failed to provide the juvenile court with a copy of the notice and thus the juvenile court did not have a sufficient record from which it could determine whether there had been compliance with ICWA.

In *In re Susan S.* (H021703) **Frank Dougherty** (VF) successfully defended a juvenile court's ruling in favor of a father. In this dependency case, CPS sought to bypass based on the father's mental incapacity. Three psychologists testified that they believed the father could not benefit from services within the time limits. However, cross-examination revealed that CPS had provided the psychologists with insufficient and inaccurate background information. The juvenile court found the experts unpersuasive and ordered services provided to the father. On a CPS appeal the DCA affirmed. Despite the contrary conclusions by all expert witnesses, there was substantial evidence the mother could benefit from the services.

Carole Greeley (representing mother) and **Catherine Czar** (representing children) (JG) obtained the reversal of a termination of parental rights and a finding of adoptability of three minor children in *In re Alethea J.* (H023020). The minor children had been removed from the mother's custody. After reunification efforts failed, they were placed with relatives in Oregon. CPS acknowledged that placement for adoption would be difficult since the children were older and should not be separated since they were closely bonded. Nonetheless, the children were found adoptable because the Oregon relatives were committed to adopting all three. Parental rights were

terminated. On appeal, minor's counsel moved the DCA to accept additional evidence pursuant to CCP section 909 because the placement had failed. The DCA denied the motion and minor's counsel sought review. The DCA then reversed its earlier order and allowed additional evidence to be presented. The evidence showed that the children were now in three different placements. CPS maintained the youngest was still adoptable and that the middle child was also adoptable, even though that child opposed adoption. The DCA held the new evidence was significant and reversed since the original finding of adoptability was no longer valid.

Linda Harvey (LQ) persuaded the DCA to reverse an adoption order in *In re Stephanie W.* (H022766). A guardian ad litem was appointed to represent Stephanie without her consent and without a hearing. Stephanie was opposed to an adoption but the guardian-ad-litem did not contest it. The DCA reversed because the guardian-ad-litem is not authorized to waive the fundamental rights of the client without any clear benefit or purpose.

James Haworth (VF) prevailed in *In re Stephanie M.* (H022946), where the DCA reversed jurisdictional and dispositional orders on confrontation grounds. Appellant subpoenaed the minor to question her about alleged abuse. The court quashed the subpoena based on a report it would be detrimental. The DCA held there was an insufficient showing of harm to overcome appellant's right to confrontation.

In *In re Cynthia R.* (H022457) **Ann Jory** (for mother) and **Michael Saleh** (for father) (JG) persuaded the DCA to reverse an order terminating the father's parental rights because of the juvenile court's failure in serving the parents with notice of the hearings. While there was also evidence of inadequate notice involving prior hearings, the court refused to reverse prior orders because no timely appeal had been filed from the previous orders.

Habeas orders to show cause

In *In re Anthony Mizner* (H023553), handled by **Randy Baker** (WR), the DCA issued an OSC because trial counsel failed to advise Mizner of the probable consequences of rejecting a plea offer. Mizner was accused of two felonies with six prior strikes. His attorney conveyed a plea offer of eight years, but gave no advice on the likelihood of conviction or a likely sentence after trial. Mizner rejected the plea offer, lost at trial and was sentenced to 50 years to life. The DCA issued an OSC on a claim of IAC since Mizner declared he would have accepted the deal if given proper advice.

Randy Baker (WR) obtained an OSC from the trial court in *In re Mark Crawford* (Santa Clara No. 203932). The police raided Mr. Crawford's apartment and found drugs in a bag which also contained papers belonging to Richard Hara. At trial, the DA called a drug expert who testified that drug dealers often put false identification in bags with their drugs. In presenting this testimony, the DA failed to disclose that his office had just prosecuted and convicted Richard Hara of drug possession. The trial court issued an OSC on two grounds: (1) a violation of *Brady v. Maryland* (1963) 373 U.S. 83; and (2) IAC for failure to investigate Hara's background.

In *In re Antonio Jasso* (H022683) **Gerard Engelskirchen** (JG) persuaded the DCA to issue an order to show cause on a claim of ineffective assistance of counsel. A probation violation petition alleged that Jasso had violated his probation by demanding entry to his former girlfriend's house. On the day scheduled for the probation violation hearing, counsel unsuccessfully moved for a continuance because he had no witnesses to present on Jasso's behalf. As he had issued no subpoenas his motion was denied for lack of due diligence. **Gerard Engelskirchen** obtained declarations from potential witnesses which showed counsel failed to consult with appellant before the hearing, and failed to investigate the charge, where such investigation would have revealed that the former girlfriend frequently lied and that Jasso had a convincing alibi.

Sharon Fleming (WR) persuaded the DCA to issue on OSC in *In re Ochoa*, H024393. The police had stopped a vehicle for a broken tail light. When the driver had no identification, the police accompanied him to a nearby residence so he could obtain it. Entering the residence after midnight, the police conducted a "protective sweep" and woke up Ochoa and his girlfriend. Somehow they learned that Ochoa was on parole. The police conducted a parole/consent search of the bedroom and found methamphetamine. The DCA issued on OSC on the claim of IAC for failing to pursue a suppression motion on the grounds the parole search was unreasonable under *People v. Reyes* (1998) 19 Cal.4th 743, 753-754.

Maribeth Halloran (PC) persuaded the DCA to issue on OSC on a claim of IAC in *In re Samuel Valencia* (H023016). Valencia pled guilty to weapons possession charges and admitted a strike prior for assault with a firearm, which trial counsel advised him to admit even though he had not examined any documentation concerning the prior. Due to the strike, Valencia was sentenced to five years and four months at 80%. **Maribeth Halloran** obtained all relevant documents from the record of the prior and they showed there was no evidence Valencia had personally used a firearm in the prior case. To the contrary, the evidence suggested he was an aider and abettor. The DCA issued on OSC on the claim it was IAC to advise Valencia to admit the strike prior without investigating its validity. On remand, the prosecutor conceded the strike prior was invalid and Valencia was resentenced to two years eight months, which entitled him to immediate release.

In *In re David Walker* (H021600) **Barry Karl** (WR) also persuaded the DCA to issue an OSC where trial counsel advised Walker to admit strike priors without properly investigating whether the prior convictions were in fact serious or violent felonies.

In *In re Sunny Nguyen* (H021137), **Lori Klein** (LQ) obtained the issuance of an OSC on a claim of a *Miranda* violation. A critical part of the prosecution evidence in this murder case involved Nguyen's audiotaped confession, which was in Vietnamese. When Nguyen was asked whether he understood his rights, the translated transcript said his response was "inaudible." The beginning of the interrogating officer's reply was also "inaudible." The transcript then has the officer asking, "are you willing to talk with me?," and the defendant's affirmative reply. **Lori Klein** listened to the tape and determined that the inaudible portion of the tape involved both the defendant and the officer speaking with each other. She sent the tape to a Vietnamese translator, who enhanced the tape and determined that Nguyen's "inaudible" response was, "we should wait for the lawyer, or don't we need him?" The "inaudible" portion of the officer's reply was, "the only people

who can help you are these police officers."

In both *In re Ryan Riel* (H023174) and *In re Oregel* (H023173) **Alexander Lambrous** (DS) obtained an OSC on IAC and conflict of interest grounds. Riel and Oregel pled to violations of PC section 422 one week before the voters passed Prop. 21 which added section 422 to the strikes list. Both defendants moved to withdraw their pleas alleging their attorney, a public defender, had assured them the conviction would not be a strike. Another public defender who represented them at the motion to withdraw the pleas did not allege IAC as a basis for withdrawing the pleas. The DCA issued an OSC.

Jill Lansing (MK) persuaded the DCA to issue an OSC in *In re Michael Barrios* (H022047) on a claim of ineffective assistance of counsel. Declarations obtained by **Jill Lansing** established a prima facie case that trial counsel had refused to allow Barrios to testify despite knowing he wished to testify.

In *In re Abelardo Vela* (H023547), **David Martin** (VF) obtained the issuance of an OSC on a claim of ineffective assistance of counsel for failing to file a suppression motion. Police parked across the street from a parole office and routinely stopped vehicles driven by parolees leaving the office. In Vela's case, the police stopped his car ostensibly because a tassel was hanging from a rear view mirror. Police also claimed a DMV check showed Vela's license was expired. A gun found in the car led to a life sentence for felon-in-possession-of-a-gun with prior strikes. **David Martin** produced declarations of auto passengers who would have sworn the tassel was hanging from the radio. **David Martin** also obtained a DMV printout which proved Vela's license was valid, and a declaration from Vela's parole officer that he did not authorize the detention or search and suspected the officers were on a fishing expedition. He persuaded the court of appeal there was a prima facie case of ineffective assistance of counsel for not investigating and filing a motion to suppress contending the parole search was arbitrary and for purposes of harassment.

In *In re Timothy Lowrey* (H021642), Assistant Director **Dallas Sacher** persuaded the DCA to issue an order to show cause on a claim of ineffective assistance of counsel. Lowrey was sentenced to 25 years to life under the Three Strikes Law for failing to register as a sex offender. During a vehicle stop a police dispatcher told the officer on the scene that Lowrey's license was valid, and that he was registered as a sex offender at the listed address. Despite this information, the officer asked Lowrey a series of questions about where he lived. The officer became suspicious when he saw camping gear in the vehicle. The officer went to the address and learned that Lowrey had moved out two months previously. Trial counsel filed a motion to suppress and the trial court agreed that Lowrey was subjected to an unlawful prolonged detention. However, trial counsel never sought the exclusion of all of the People's witnesses discovered as the fruit of the detention. **Dallas Sacher** convinced the DCA that there was a prima facie case of ineffective assistance of counsel for failing to seek the exclusion of all of the People's witnesses.

In *Hill v. Roe* (No. C01-2014838), Assistant Director **Dallas Sacher** obtained a grant of habeas relief from Federal District Court Judge Jeremy Fogel. Hill was convicted of several counts of forgery based on the passing of counterfeit traveler's checks at the Stanford Mall. Judge Fogel

found multiple instances of IAC: (1) the failure to move for the exclusion of false testimony from a government snitch; (2) the failure to request the jury instruction found in Penal Code section 1127a, subd. (b); (3) the failure to adduce evidence of the co-defendant's guilty pleas; and (4) the failure to oppose jury instructions which advised the jury to disregard the co-defendant's absence and not to consider whether she would be prosecuted. Judge Fogel found that these errors cumulatively prejudiced Mr. Hill.

John Schuck (LQ) obtained an OSC in a habeas petition which alleged ineffective assistance of counsel at sentencing. In *In re Marvalyon Gibson* (H022445), when the client pled to all five counts in the information he was advised by the trial judge his maximum sentence would be 28 years to life. Two of the charges he pled to named a victim who did not appear at prelim, and about whom no evidence was offered. He was sentenced to 50 years to life without objection from trial counsel. Trial counsel also failed to advise Gibson that imposition of a sentence in excess of the 28 years would constitute grounds to withdraw the plea. The Court of Appeal issued an OSC, instructing the superior court to determine whether appellant would have pled guilty if properly advised of the maximum possible sentence, and whether he would have sought to withdraw his plea had the discrepancy between the maximum sentence advised and the actual sentence imposed been pointed out to him by his attorney. The superior court was also directed to determine whether failure to move to dismiss the two counts on which no evidence had been produced was ineffective assistance.

In *In re Tryce Braninburg* (H023220) **Jill Thomas** (JG) persuaded the DCA to issue an OSC on a claim of IAC. Among other charges, Braninburg was convicted of auto theft. The auto owner testified that he and Braninburg were staying together, but he had not given Braninburg permission to drive his car. Braninburg complained at a *Marsden* hearing that his lawyer had failed to investigate witnesses who would testify they heard the car owner give Braninburg permission to drive the car. Counsel had promised to contact these witnesses but failed to do so. **Jill Thomas** obtained declarations from some of these witnesses and they stated the car owner had given Braninburg permission to drive the car.

In *In re Richelle Dasinger* (H024279), staff attorney **Lori Quick** obtained the issuance of an order to show cause. Dasinger was already on probation when Proposition 36 went into effect. After admitting her second violation of probation, Dasinger requested Proposition 36 treatment. The trial court denied the request because Dasinger had already been in prison and had left two treatment programs. The DCA issued the writ, agreeing that pursuant to Penal Code section 1210.1, subdivision (e)(3)(E), Dasinger was entitled to a hearing for the trial court to determine either that she is a danger to others or that she is not amenable to treatment. Absent such a determination, she must be sentenced pursuant to Proposition 36.