

WINS 2002

Mark Muszynski (H021243) was in his apartment with his infant. In a suicide attempt, he cut the gas line. Unexpectedly, his wife came home. She lit a cigarette, and the explosion and fire damaged six separate apartments. Among other things, he was convicted of aggravated arson (Pen Code, § 451.5, subd. (a)(3)) for burning more than five inhabited structures. **Frank McCabe** argued there was insufficient evidence of aggravated arson because each apartment did not qualify as a separate “inhabited structure.” The Court of Appeal agreed in a published decision and reduced the conviction to simple arson causing great bodily injury. (*People v. Muszynski* (2002) 100 Cal.App.4th 672.) (Staff attorney Dallas Sacher)

Only one Life to Give to CDC

SDAP panel attorneys won several cases which saved the defendant from life in prison under the Three Strikes Law when there was insufficient evidence to support a finding that a prior conviction for violating Penal Code section 245, subdivision (a)(1) was a strike. **Tamara Holland** and **Lyn Woodward** convinced the Court of Appeal there was insufficient evidence that Rudy Navarro (H022879) and Javier Navarro (H022136) personally used a weapon. (Staff attorney Michael Kresser). **Sara Theiss** obtained an order to show cause for Pablo Flores (H024107) who admitted that he had a strike; trial counsel was allegedly ineffective because, although inadmissible hearsay evidence in the probation report suggested he personally used a weapon, there was no competent evidence that would have proved it (Staff attorney William Robinson). In the Clayton Clark case (H022864), appeal handled by **Lisa Bassis**, the prosecution unsuccessfully argued that an amendment by Proposition 21 to the Three Strikes Law made all convictions for violating Penal Code section 245 a strike (staff attorney Dallas Sacher).

David Anzaldua (H022568) found himself facing life in prison for driving under the influence with two prior strike convictions. At sentencing, the trial court dismissed one of the strikes, but the prosecution appealed. **Meredith Watts** convinced the court that the trial court’s dismissal of the prior strike conviction was not an abuse of discretion (Staff attorney Dallas Sacher). **Brian Pori** represented a defendant in case H021920 who was facing life in prison under the Three Strikes Law after pleading guilty to possessing methamphetamine. Judge Ball dismissed all but one of the prior strikes; the prosecution sought a writ of mandate, and the Court of Appeal issued it. On remand, the prosecution disqualified Judge Ball pursuant to Code of Civil Procedure section 170.6, and the new judge sentenced appellant to serve life in prison. In a published decision, the Court of Appeal reversed, holding the maneuver violated the defendant’s right to be sentenced under *People v. Arbuckle* (1978) 22 Cal.3d 749 by the same judge who took the guilty plea. (*People v. Letteer* (2002) 103 Cal.App.4th 1308.) (Staff attorney Dallas Sacher). On remand, Judge Ball reduced the conviction to a misdemeanor and the defendant was set free.

Sex Crime Reversals

A life sentence was reversed due to the hard work of **Joseph Shipp** because jury instructions did not explain that the burglary provision of the One Strike statute required that the defendant,

Michael Miller (H022349), intend sex crimes when he entered a residence (Staff attorney Paul Couenhoven). A One Strike sentence of 25 years to life was reduced to 15 years to life for Samuel Ortega (H023370). The sex crime, occurring before 1997, was enhanced to a life term due to a finding that he used a knife and he kidnapped the victim. **Charles Bonneau** showed there was insufficient evidence of a kidnapping under the law that existed at the time of the offense. The victim was dragged 35 to 40 feet, which under *People v. Caudillo* (1978) 21 Cal.3d 562 was insufficient to meet the requirement that the victim be asported a significant distance. (Staff attorney Paul Couenhoven)

Robert Williams was convicted for violating Penal Code section 269 due to conduct from 1991 to 1996. **Richard Rubin** obtained a reversal on ex post facto grounds because section 269 was not enacted until 1994 and it was not clear from the evidence that Williams was convicted for conduct after 1994 (H021407, staff attorney Lori Quick).

A couple of cases concerned convictions for both Penal Code sections 288 and 288.5. A defendant can be convicted of one or the other, but not both for the same period. Thus, **Alex Green** was able to have Robert Guzman's (H022627) six convictions of lewd conduct dismissed (Staff attorney Vicki Firstman). Atik Pathan's case (H022600) was remanded for the trial court to determine which charges to dismiss; the appellate attorney was **Jan Stiglitz** (Staff attorney William Robinson).

Can't Punish him for That

Don Tickle successfully argued that section 654 required staying the punishment for false imprisonment when defendant Jakim Davis (H022223) was convicted of rape and false imprisonment of two females on separate occasions; the false imprisonment was part of the same objective as the rapes (Staff attorney William Robinson).

Similarly, Troy Avilla (H023479) pled guilty to possession of ammunition by a felon and possession of a destructive device. There was no agreed upon sentence. Staff attorney **Lori Quick** contended the two counts were based on the same objective and one should be stayed pursuant to Penal Code section 654. The Court of Appeal found there was no waiver of the issue, despite the holding in *People v. Hester* (2000) 22 Cal.4th 290, 295, because there was no plea bargain for a specified sentence. The Court held there was no evidence of a separate objective and the two counts should have been stayed. Appellant further claimed that counsel was ineffective for not demanding the court state its reasons for imposing the upper term and for imposing a consecutive term for possession of methamphetamine. The Court of Appeal agreed, stating there were two interrelated factors in aggravation and that it was reasonably probable the trial court would not have been able to justify both an upper term and a consecutive term if properly challenged.

Ubaldo Munoz (H025311) was convicted of felony drunk driving with three convictions within seven years of the current offense. He had two prior convictions within seven years before the current offense and another conviction within seven years after the current offense, about eight years after the first prior conviction. A conviction after the current offense may count as a "prior"

DUI conviction. **Carl Gonser** argued, however, that the three convictions and the current offense all must occur within a seven year period. In a published opinion, the Court of Appeal agreed. (*People v. Munoz* (2002) 102 Cal.App.4th 12.) (Staff attorney Jonathan Grossman)

Not Enough Sexual Conduct

There was insufficient evidence of a sex crime in an appeal handled by **Demarris Evans**. The juvenile court found true that Andrew R. (H023322) committed a sexual battery, among other things. Appellant and the victim had been boyfriend and girlfriend. During a school field trip to a park, appellant followed his friend into the women's bathroom and insisted that she kiss him. He pushed her into a stall and blocked her escape. He reached for her waist to pull her toward him. In reaching for her, he accidentally touched her breast over her clothing. The Court of Appeal held this was insufficient evidence to sustain a finding of sexual battery. First, it was undisputed he touched her breast by accident; sexual battery is a specific intent crime. Second, sexual battery requires skin-to-skin contact, but this was contact over clothing. (Staff attorney Paul Couenhoven)

There was insufficient evidence of indecent exposure in the case of Daniel Johnson (H022447), handled by **Andrew Cappelli**. Defendant wore nothing but a thong and exposed most of his buttocks. He was convicted of indecent exposure which, because of priors, was a felony. The Court of Appeal held there was insufficient evidence because he had not exposed his penis (Staff attorney Jonathan Grossman).

Then there is the case of making the same mistake twice. John Parker (H022196) was convicted of rape and committing lewd conduct with a child. The court admitted evidence of prior sexual offenses and instructed the jury pursuant to the pre-1999 version of CALJIC No. 2.50.01, which was later revised after the decision in *People v. Falsetta* (1999) 21 Cal.4th 903, 923-924. The Court of Appeal found the instruction inadequate and reversed the conviction. Upon remand, Parker was tried again and convicted. **Sharon Fleming** noticed that the same evidence was admitted and the court gave the same jury instruction. The Court of Appeal reversed again. Further, the trial court erred in excluding expert testimony that the defendant did not fit the profile of a child molester (see *People v. Stoll* (1989) 49 Cal.3d 1136). (Staff attorney Dallas Sacher).

Nine years ago, Kurton Cooper (H022959) pled guilty to statutory rape. When he was 18 years old, he dated a girl. At first, she said she was 19 years old, then she said she was 18 years old, then she said she was 17 years old. In fact, she was 12. When he learned she had gonorrhea, he slapped her. She later alleged he forced her to have sex; he said it was consensual and he believed she was at least 17 years old. The probation officer wrote in the presentence report that the girl's allegation of forcible sex lacked credibility. Appellant was placed on probation. He successfully completed the conditions of probation, obtained a bachelor's degree in psychology, was married with three children, was a deacon studying to be a minister, expected to obtain a master's degree in theology, and sought to become a teacher. He moved to reduce the conviction to a misdemeanor. The prosecution opposed the motion on the grounds the girl was 12 years old and the case involved violence. The judge, not the one who sentenced appellant, denied the motion. **Allen Schwartz** convinced the Court of Appeal to reverse on the ground the superior court relied on an erroneous

factual assumption, and failed to take into account appellant's rehabilitation (Staff attorney Paul Couenhoven).

Not Enough Proof

Darryl Allen was convicted of threatening a witness for having providing assistance to law enforcement. (Pen. Code, § 140.) As **Edward Mahler** pointed out, the witness was threatened, but before she provided any assistance to law enforcement, as required by the statute. Thus, the conviction on this count was reversed because of insufficient evidence. (Staff attorney William Robinson)

R. Charles Johnson convinced the Court of Appeal that there was insufficient evidence of Jeffrey Harper (H023108) personally inflicting great bodily injury under a group beating theory. True, the defendant held the victim as his confederates hit the victim in the head with a rock. Then they took the victim to an ATM to take his money. After that, the defendant held the victim so that others could beat him again. The Court of Appeal held that holding the victim for others to beat him does not qualify for personally inflicting great bodily injury (Staff attorney Jonathan Grossman).

An order to show cause was issued in a case handled by **James Duffy**. The juvenile court sustained a juvenile petition alleging Rene O. (H023439) committed battery, resisted arrest, and trespassed on school grounds, all with gang enhancements. The gang expert testified at trial that appellant belongs to a Norteno gang and the gang qualifies as an illegal street gang. To prove the group participated in "a pattern criminal behavior," the gang expert relied on hearsay information without objection. The Court of Appeal issued an order to show cause on a habeas petition alleging ineffective assistance of counsel. Although hearsay evidence can form the basis of the expert's opinion, admissible evidence must still be introduced to prove the enhancement. (Staff attorney Dallas Sacher)

Staff attorney **Paul Couenhoven** obtained an order to show cause for Pedro Garcia (H023535) who pled no contest to various charges and admitted he possessed more than 44 pounds of methamphetamine. His exposure was 25 years 8 months. Under the plea bargain, he agreed to a sentence of no less than 21 years and there were no promises that a federal prosecution would be dismissed. In a habeas petition, he alleged his counsel was ineffective to stipulating to the 15 year enhancement that he possessed at least 44 pounds of meth; the police reports only mentioned 6 pounds. The Court of Appeal agreed there appeared to be no basis for admitting the 44 pound enhancement.

In a habeas corpus petition filed in a dependency case by **Mary Williams**, a mother had two teenage children, Ross and Cody. (H023382) They were removed and reunification services were offered. Mother completed the case plan. The court had ordered visitation but permitted the children to veto visitation. Ross started visiting and eventually returned home. Cody continued to refuse to visit, and eventually the court adopted a plan of guardianship. Mother never objected; she explained her attorney told her the law permits the child to veto visitation. Trial counsel confirmed she understood this was the law and so advised the mother. The court granted a writ of habeas

corpus based on ineffective assistance of counsel and reversed all previous court orders. It directed the court to return Cody unless it finds detriment, and to consider offering reasonable services if he is not returned (Staff attorney Jonathan Grossman).

Can't Look There

There were three search and seizure wins. In the case of Joaquin Moreno (H022952), the appellant lived in a motor home. As arranged with his employer, he parked his motor home at night within the premises of the business. The business was surrounded by a fence and a locked gate. Police received an anonymous tip that appellant was cooking methamphetamine at night on the premises. The officers observed one night the motor home on the property, surrounded by a fence and locked gate. The lights in the motor home were on, and the curtains were closed. Two vents on the roof were open. A hose from the business was connected to the motor home. A liquid was dripping from the motor home and forming a puddle on the ground. The officers did not observe any containers of chemicals, smell any chemicals, or see any fumes that would be associated with cooking methamphetamine. They climbed the fence and entered the property. **Elisa Brandes** navigated through a course of procedural pitfalls and obtained a reversal. First, appellant had standing as a tenant who lived on the property. Second, the officers were not entitled to climb the fence on the theory the land qualified as an "open field;" appellant had a reasonable expectation of privacy. Third, the officers lacked probable cause to enter the fenced property based on information from an anonymous informant with only non-incriminating "pedestrian" facts being corroborated (Staff attorney William Robinson).

In the case of Alfonso Cisneros (H022772), a police officer stopped her patrol car at an intersection one night when she heard a whistle. The only people around were two people in a car driving slowly through the intersection. The passenger window was down, and the passenger held his palms out. The officer thought they may have been requesting assistance. She turned, followed the two, and then activated her overhead lights. The two people in the car pulled into the driveway of a parking lot. Once the officer talked with the occupants, she smelled burnt marijuana. After searching the car, she found a gun, an illegal folding knife, and some marijuana. **Gloria Cohen** argued there was no evidence of illegal activity to justify a detention. The officer believed at one point that there was a request for help, based on hearing a whistle and the passenger holding his palms out. But the occupants in the car did not appear to seek assistance and this did not justify detaining them. There was no evidence of an exigent circumstance to justify stopping them. The Court of Appeal agreed and ruled the suppression motion should have been granted (Staff attorney Dallas Sacher).

Tutti Hacking obtained relief for Destiny Bosquez (H022563). The police were investigating a report of male suspects fighting and destroying property. Officers stopped two men. Two women walked toward the officers and the two detained men. Appellant, one of the women, was walking in circles and her eyes were droopy, indicating to the officer she might be under the influence or intoxicated. When the officer asked her some questions, she seemed confused or disoriented. Appellant wore baggie clothing, had a tattoo indicating allegiance to Nortenos, and wore a jersey which was worn by a particular gang. The officer was concerned she could be armed.

The officer asked appellant if she were armed, and she said no. The officer asked if she minded if he checked, and she mumbled something he could not decipher. Her demeanor indicated she did not want to talk with the officer. Though she made no actions to suggest she was armed, the officer pat searched her. When he began the pat search, she moved her left hand under her shirt. He grabbed her hand, but she resisted. She was handcuffed and arrested. Officers found PCP. The officers involved conceded they did not perform a field sobriety test, did not arrest her for being under the influence, and did not complete a form concerning someone who may be under the influence when arrested. The superior court found the pat search was unjustified because appellant was not detained and there was insufficient cause to believe she was armed. The superior court, however, found that the evidence should not be suppressed because of the doctrine of inevitable discovery: because she was apparently under the influence, she would have been arrested anyway. The Court of Appeal reversed. It agreed there was insufficient cause for a pat down. It rejected the claim she would have been arrested anyway for being under the influence. Though possible, inevitable discovery operates only when certain police action would be inevitable, not merely possible (Staff attorney Vicki Firstman).

Finally, **Barbara Michel** obtained an order to show cause when trial counsel for Bertha Ruiz (H024417) failed to move to suppress evidence. Police officers were searching a neighbor's house when they observed someone walking from the neighbor's house to Ruiz's house. Police searched Ruiz's house and uncovered drugs, guns, and other evidence leading to Ruiz's conviction. She had signed a form purporting to give officers consent to search her home, but she testified at trial she signed the form an hour after the officers had started to search her home. Further, she was told if she did not sign the form, the officers would search the place anyway. (Staff attorney Dallas Sacher)

Don't Pay That

Elias Chaghouri was convicted of various charges concerning a failure to pay state taxes (H023690). He stipulated he owed the back taxes plus interest and penalties. The prosecution alleged the defendant owed restitution to the State Board of Equalization for the cost of investigating his failure to fully pay his taxes. The trial court denied the request, and the prosecution appealed. **Peter Goldscheider** convinced the Court of Appeal to rule in favor of the defendant, holding that a state agency which investigates violations of law does not qualify as a "direct victim" under Penal Code section 1202.4, even if the defendant effectively stole money from the government (Staff attorney Lori Quick). (*People v. Chaghouri* (2002) 103 Cal.App.4th 464, opn. depub.)

The trial court ordered Norman Ramil (H021716) to pay \$1000 in attorney fees without making a finding that he had the ability to pay. **Patricia Bell** pointed out this was in violation of Penal Code section 987.8. Because the court lacked the authority to impose the fee without making the requisite finding, the fee was stricken (Staff attorney Dallas Sacher).

Trial Judge Was Right

Leonard Escobar (H022631) was convicted of committing a petty theft with a prior and possessing less than an ounce of marijuana. He was placed on probation with a 3 year prison

sentence stayed. He violated the conditions of probation by committing a new petty theft with a prior conviction. After revoking probation, the court imposed the three year sentence that was stayed. The prosecution stated it wished to set for trial the new petty theft case. Instead, the court decided to dismiss the new charge pursuant to Penal Code section 1385. The prosecution appealed, claiming it lacked notice of the court's intent to dismiss the new charge and the court abused its discretion. Staff attorney **Michael Kresser** obtained a decision in favor of the defendant. A divided court held that even if the prosecution lacked notice, the issue was waived for failing to make a proper objection in the superior court. It also held that the court acted within its discretion when the defendant was sentenced to serve three years in prison on a probation revocation based on the same factual allegations as the new case.

But They Promised

Ambrose Sogbandi (H022558) pled guilty to domestic violence and a weapons enhancement, and he was placed on probation. Although his exposure was five years, the court explained when he entered his plea that if he violated the conditions of probation, he could be sent to prison for three years. When he in fact violated probation, the court sentenced him to serve five years in prison. Staff attorney **Lori Quick** successfully argued that the sentence needed to be reduced to three years to comply with the terms of the plea bargain.

Staff attorney **William Robinson** restored presentence credits for Kim Ford (H023421). He was placed on three years probation on February 26, 1999. On March 10, 2000, probation was modified and "extended" to August 30, 2000. Two subsequent minute orders indicated probation was to expire on August 30, 2000. On August 11, 2000, probation was extended to November 30, 2000. It was again extended on November 17, 2000 to January 20, 2001. On February 1, 2001, the trial court purported to extend defendant's probation "nunc pro tunc" to June 1, 2001. Subsequently, his probation was revoked. The Court of Appeal agreed that appellant's probation expired on January 20, 2001, and an order February 1, 2001 attempting to revive probation was void. The Court also rejected respondent's argument that probation should have lasted three years. When an order modifying probation set an earlier deadline, notwithstanding language that probation was being "extended," the order was binding.

Staff attorney **Michael Kresser** convinced the Court of Appeal to award a defendant presentence credits he purportedly waived. Alfonso Diaz (H024165) was on probation for committing robbery. He violated the conditions of probation by testing positive for drugs. He admitted he violated probation. The court stated it was willing to place him back on probation if he waived custody credits. The court erroneously explained, he was not entitled to the credits anyway, so he agreed to waive them. The Court of Appeal found the waiver invalid because it was based on the court telling him that he was not giving up anything to which he was entitled.

Christopher Hite restored 27 days of precommitment credits for Marcos V. (H024511) which the juvenile court neglected to award. The Court of Appeal held the issue can be raised in a juvenile case without first seeking to remedy the matter in the superior court (Staff attorney Dallas Sacher).

Finally, there is the case of Michael G. (H023977) who was an 18 year-old delinquent ordered by the juvenile court to jail for violating the conditions of probation. Staff attorney **William Robinson** won a reversal because the Welfare and Institutions Code prohibits the juvenile court from placing wards in the jail until they are at least 19 years old.

A Dependency Win

In a previous appeal, the jurisdictional findings of the dependency court were reversed because it permitted the introduction of hearsay evidence from a minor, who was too young to be competent, without finding the circumstances of the minor's statements were reliable. (See *In re Lucero L.* (2000) 22 Cal.4th 1227.) The matter was remanded for the juvenile court to determine if the circumstances of the minor's statements were sufficiently reliable. The juvenile court found they were reliable and again found the court had jurisdiction over the minor. The minor's accusations were not spontaneous but the product of an interview in which the interviewer was heavily involved. The trial court relied on the expertise of the interviewer to distinguish between truthful statements and fabrications. In this appeal, *In re Madison N.* (H023501), **Maureen Keaney** argued the expertise of the interviewer was not sufficient to make the statements reliable. The Court of Appeal agreed and reversed (Staff attorney Dallas Sacher).

Never Giving Up

In a murder case, the Court of Appeal decided the diary of a deceased wife was properly admitted over hearsay objections, the erroneous restriction of expert testimony concerning defendant's mental state was harmless, and the erroneous preclusion of evidence concerning the wife's anger toward the defendant was also harmless. **Martin Buchanan** filed a habeas corpus petition in federal court. The petition was granted. The court held that the admission of the diary violated Timothy Parle's right to confrontation, that this error alone was prejudicial, and that the errors cumulatively were prejudicial. (*Parle v. Runnles*, 2002 U.S. Dist LEXIS 16236)

In an appeal after the denial of a pro per motion for custody credits, staff attorney **Paul Couenhoven** returned to superior court and showed that Cynthia Miller (H025013), who was serving a prison sentence in Washington State, was stymied in her efforts to return to California to be sentenced in a pending case because the Santa Clara County Sheriff's Office had not entered a warrant for failing to appear at sentencing in the national warrants system. The delay in sentencing appellant violated her right to speedy trial and deprived her of the opportunity to serve a larger portion of her sentence concurrently. The superior court ordered prison officials to recalculate her custody credits on the basis that she was constructively punished five months earlier than the actual sentencing date.