

## **Victories Through March 2002**

### **Search and Seizure**

#### **People v. Jay Groth, A090490 (Div. 2, 10/29/01)**

**Panel Attorney: Roberta Simon**

***Car Search:*** The court of appeals rejects both asserted grounds for the search of defendant's car after his arrest on outstanding warrant for driving without a license. (1)The Belton incident-to-arrest doctrine is inapplicable due to an insufficient "nexus" between vehicle and arrest: defendant had already parked his car on private property prior to detention (which occurred across the street); upon arrest, he was handcuffed and placed in back of patrol car. Because defendant was "neither in the vehicle, nor in the vehicle's Chimel immediately surrounding area," he didn't qualify as "recent occupant" for Belton purposes. (2) An inventory justification fails as well due to the absence of authority for impounding vehicle in first place. The situation did not come within Veh. Code sec.22651 because the car was parked on private property (apparently with the owner's permission) rather than on highway. Also, although the county had a policy governing inventory searches of impounded vehicles, there was no set policy governing officer's discretion regarding initial decision to tow.

(FDAP Attorney: Brad O'Connell)

#### **People v. Jesse James, A094708 (Div. 3, 1/31/02)**

**Panel Attorney: Rodney Jones**

***Unlawful Detention:*** Judgment reversed due to the trial court's error in denying appellant's motion to suppress based on an illegal detention. Appellant was sitting in a parked car with another person in an empty parking lot at 10 pm (all the shops were closed). An officer approached appellant and asked for identification. Appellant did not have any, but told the officer his name and the address listed on his driver's license. The officer ordered appellant out of the car and conducted a pat search for weapons. However, nothing was turned up in that search. Then the officer decided to call in appellant's name to dispatch to check for outstanding warrants. Appellant had an outstanding warrant, the officer arrested appellant, and searched the immediate passenger area of the car where appellant was sitting and found drugs. The appellate court, however, determined the pat search and the further detention of calling in appellant's name to dispatch were illegal since the officer did not have any reasonable suspicion that criminal activity was occurring (i.e., the officer's statement that several burglaries and robberies had occurred in that area, without any evidence that appellant was intending to commit the same was insufficient).

(FDAP Attorney: Kimberly Fitzgerald)

**People v. Kevin Hendrix, A094936 (Div. 1, 12/20/01)**  
**Panel Attorney: Charles Johnson**

***Prolonged Detention; Suspicion of Burglary:*** Police lawfully detained defendant on suspicion of being a residential burglar. However, the detention should have come to an end after defendant gave a satisfactory explanation for his presence in the area late at night, where a prowler had just been reported.  
(Panel Attorney: Kathy Kahn)

### **Due Process**

**People v. Thomas Riseley, A092802 (Div. 5, 12/7/01)**  
**Panel Attorney: Michael McPartland**

***Counsel--Faretta error:*** The court of appeal reversed this sex offense case (with an 80-to-life sentence) because the trial court erroneously denied defendant's Faretta motion for self-representation (Faretta v. California (1975) 422 U.S. 806). It found insufficient support for the trial court's conclusion that defendant would be disruptive. The record did not support the prosecutor's characterization of his conduct in the current proceedings as disruptive, and his alleged disruptive conduct in a San Diego trial 12 years earlier was not a sufficient basis for concluding that he would be unwilling to abide by courtroom rules in the current case.  
FDAP staff attorney: Brad O'Connell

### **Jury Trial**

**People v. Collins, 26 Cal.4th 297 (2001)**  
**Panel Attorney: Randy Baker**

***Inducements to Waive Jury Trial:*** The California Supreme Court finds structural error where the trial court offered benefits to defendant on the condition he waive jury trial.  
(FDAP Attorney: Renee Torres)

### **Statute of Limitations**

**People v. Mary Steiner, et. al., A088431 (Div. 3, 1/3/02)**  
**Panel Attorneys: Thomas Schaaf, Linda Buchser, Gail Harper, William Goodman,  
Chris Redburn, Susan Shors**

***Statute of Limitations; Elder Theft:*** The trial court dismissed conspiracy and elder-theft counts as barred by the statute of limitations in the "Gypsy Foxglove" elder-theft case and the People appealed.

The court of appeal concludes that, while the conspiracy counts were timely, the elder theft charges were properly dismissed.

### **Jury Instructions**

**People v. Darold Richcreek, A092784 (Div. 5, 12/31/01)**

**Panel Attorney: Bob Bryzman**

***Unanimity Instructions:*** The trial court erred by failing to instruct sua sponte on CALJIC 17.01 where there was evidence of possession of different drugs at different places.

(Staff Attorney: Jonathon Soglin)

**People v. Ignacio Hernandez, A093641 (Div. 4, 11/5/01)**

**Panel Attorney: Victor Blumenkrantz**

***Aiding and Abetting:*** The court of appeals reverses an assault conviction with a great bodily injury enhancement because the jury was erroneously instructed, in response to a question during deliberations, that the defendant could be convicted of aiding and abetting the assault by assisting the other man fleeing the scene after the completion of the assault.

(FDAP attorney: Michael Ginther)

**People v. Guadalupe Torres, A089886 (Div. 2, 10/15/01)**

**Staff Attorney: Brad O'Connell**

***Jury Instructions--Lasko error:*** Defendant's second-degree murder conviction is reversed and conditionally reduced to voluntary manslaughter for Lasko error—old CALJIC instructions erroneously required specific intent to kill as an element of voluntary manslaughter, contrary to the intervening opinion in People v. Lasko (2000) 23 Cal.4th 101. In contrast to Lasko itself, the error was prejudicial because (1) the jurors specifically focused on the erroneous specific intent requirement and the judge reiterated that requirement in response to the juror query; (2) the jury rejected intent to kill in its other findings (convicting Torres of assault with a deadly weapon rather than attempted murder on a related count); and (3) there was substantial evidence of provocation. The court ordered the murder conviction reduced to voluntary manslaughter, unless the DA affirmatively acted to retry the murder count within a specified time. (This was the 2nd murder reversal in this case. In 1998, the court reversed a *1st-degree* murder conviction for cumulative instructional and other errors, and Torres received this 2nd degree verdict in the retrial. Following this Lasko error reversal, the DA acquiesced in the reduction to voluntary manslaughter rather than try the case a third time.)

## Sufficiency of the Evidence

### **People v. Eric Carter, A094943 (Div.1, 2/13/02)**

**Panel Attorney: Corinne Shulman**

***Insufficient Evidence -- Criminal Threat:*** The superior court dismissed the information, pursuant to Penal Code section 995, charging defendant with making a criminal threat against a correctional officer (Pen.Code, sec. 422). The People appealed. The court of appeal affirmed, finding defendant's "threat" lacked the gravity of purpose and sufficient immediacy to satisfy section 422. Defendant, while confined in a holding cell, told the officer he would be out of prison in 4 or 5 months and would "come down" and "get" him -- get his "big fat white ass." Defendant also challenged the officer to "open the cage right now and [he] would beat [the officer's] ass." The court distinguished In re Ricky T. (2001) 87 Cal.App.4th 1132, People v. Butler (2000) 85 Cal.App.4th 745 and People v. Martinez (1997) 53 Cal.App.4th 1212. (FDAP Attorney: Michael Ginther)

### **People v. Fernando Bravo, A092582 (Div. 4, 2/26/02)**

**Staff Attorney: Renee E. Torres**

***Proof of Priors-- Insufficiency of Evidence:*** The record showed that defendant's trial attorney intended him to admit priors pursuant to Health & Safety Code, § 11370.2 and Pen. Code, § 667.5(b), but no admissions were ever made and no trial on the priors was held. The court of appeals holds that the evidence of defendant's prior crimes introduced at trial for Evid. Code. § 1101(b) purposes (see People v. Elmore (1990)225 Cal.App.3d 953, 957) did not satisfy the prosecution's burden of proof as to the § 667.5(b) elements and one of the Health and Safety Code violations and, as to remaining Health and Safety Code violation, although defense counsel's stipulation proved it, since stipulation was tantamount to a full admission, it was not valid absent defendant's waiver of his Boykin-Tahl rights. (People v. Adams (1993) 6 Cal.4th 570, 580.)

## Sentencing

### **People v. Brandon Groves, A090570 (Div. 4, 10/29/01)**

**Panel Attorney: Cliff Gardner**

***One Strike Law; Single Occasion:*** Imposition of two consecutive 25-year to life sentences under "one-strike" law (sec. 667.61) was error under People v. Jones (2001) 25 Cal.4th 98, because the sex offenses were committed on a "single occasions." Remand for resentencing. (FDAP Attorney: Brad O'Connell)

**People v. Richard Gomez, A092713 (Div. 1, 10/3/01):**  
**Panel Attorney: Carlo Andreani**

**Section 654; Counsel Fees:** The court of appeal found three sentence/disposition-related errors in this case: (1) At the time of sentencing on this case, the trial court also revoked probation and ordered it terminated unsuccessfully in another case. The "unsuccessful termination" was in excess of its jurisdiction because the probationary period in the older case had already expired. (2) The trial court committed section 654 error in imposing a *concurrent*, rather than a stayed term, for possession of firearm *ammunition* by a felon; the ammunition offense was incident to the same objective as the possession of firearm itself, on which defendant was already being sentenced. (3) The trial court improperly ordered defendant to reimburse defense costs (\$500); there was a lack of evidence he had any present ability to pay: he was unemployed, had no assets, and was facing 2-year prison term. (FDAP Attorney: Brad O'Connell)

**People v. Terry Hill, A093835 (Div. 5, 10/12/01)**  
**Panel Attorney: John Steinberg**

**Restitution Fines:** The trial court imposed a \$200 restitution fines at the time it granted probation, but increased the fine to \$600 when probation was later revoked. The court of appeal found this unauthorized. (FDAP Attorney: Jonathon Soglin)

**People v. Salvador Clavel, A092114 (Div. 2, 11/20/01)**  
**Panel Attorney: David Stanley**

**One Strike Law; Single Occasion:** The court of appeal reverses consecutive 25-to-life terms imposed under the "one strike" law (sec. 667.61) because the rape and sodomy were closely connected in time and occurred on a "single occasion" within the meaning of the Supreme Court's intervening opinion in People v. Jones (2001) 25 Cal.4th 98. (FDAP Attorney: Brad O'Connell)

**People v. Freda Herbert, A093575 (Div. 5, 10/4/01)**  
**Panel Attorney: Tara Mulay**

**Imposition of Restitution Fines.** At the time of her plea, the trial court imposed a \$100 restitution fine. When it revoked probation and imposed a prison sentence, the trial court raised the fine to \$800. The court of appeals held the later fine to be an unauthorized sentence. (FDAP Attorney: Renee Torres)

**People v. Pablo E. Bonilla Asprilla, A091896 (Div. 2, 11/20/01)**

**Panel Attorney: David Macher**  
**Decision Date: 11/20/01**

**Calculation of Credits:** The court of appeals awarded 18 days of conduct credits which the trial court had left to CDC to calculate: a trial court must calculate credits and include them in abstract of judgment. This would normally have gone back to the trial court for correction (People v. Fares (1993) 16 Cal.App.4th 954), but it was more efficient for the court of appeals to do it here where appellant raised other issues on appeal. (People v. Guillen (1994) 25 Cal.App.4th 756.)  
(FDAP Attorney: Michael Ginther)

### **Juveniles**

**People v. James D., A091290 (Div. 1, 4/4/01)**  
**Staff Attorney: Kimberly B. Fitzgerald**

**Section 654:** The juvenile court stayed a false imprisonment conviction, but did not stay the escape by force or violence conviction. The court of appeals held that the escape offense should have been stayed pursuant to Penal Code section 654 since appellant's intent was singular -- to escape from juvenile hall.

**In re Samuel J. (2001) 93 Cal.App 4<sup>th</sup> 130**  
**Panel Attorney: Tom Singman**

**Prop. 21; Hearsay:** A section 777 finding under the new Prop. 21 procedures is reversed because the prosecution's entire case was hearsay statements by percipient witnesses. This is not the kind of "reliable hearsay" contemplated by Prop. 21, which allows only the kind of hearsay that would be permitted in adult probation revocation proceedings (documentary hearsay, etc.).  
(FDAP Attorney: Paula Rudman)

**In re Ryan N. (2001) 92 Cal.App.4th 1359**  
**Panel Attorney: John Schuck**

**Assisting an Unsuccessful Suicide:** Although one can't be convicted of assisting an unsuccessful suicide, there was sufficient evidence to find appellant guilty of attempting to assist a suicide by supplying the "victim" with Nytol.  
(FDAP Attorney: Paula Rudman)

**In re Vincent C., A092520 (Div. 3, 11/8/01)**

**Panel Attorney: R. Charles Johnson**

**W&I 707(b) Findings:** The court of appeals reverses the juvenile court's finding that appellant's offense was one described in W & I, sec. 707(b) and remands for a new hearing on the issue of his personal use of a firearm during the course of a conspiracy to carjack. Appellant's presence was constitutionally required in a proceeding on that issue following a remand. Further, counsel's purported waiver of appellant's presence was ineffective, and since his presence was constitutionally required, the error was reviewed under Chapman/Bustamonte.  
(FDAP Attorney: Michael Ginther)

**In re Jessica B., A095048 (Div. 1, 1/31/02)**

**Panel Attorney: Sarah Pattison**

**Gang Conditions; Probation:** Appellant's "gang" related conditions of probation were modified on appeal. Specifically, all references to "gang" were to be defined by Penal Code section 186.22, subdivisions (e) and (f). A "knowledge" element was added to the condition requiring appellant not to wear any gang-related clothing/emblems so that appellant must have personal knowledge that the items are gang-related. Finally, appellant was allowed to keep any old tattoos (and not be required to get them physically removed) and the condition was changed to just prohibit obtaining new tattoos.  
(FDAP Attorney: Kimberly Fitzgerald)

**In re Daniel L., A095875 (Div. 3, 2/27/02)**

**Panel Attorney: William Hancock**

**Insufficiency of the Evidence:** The juvenile court erred as a matter of law in finding that appellant embezzled Ashley's pager. Appellant borrowed the pager from Ashley and failed to return it upon Ashley's request. The evidence was insufficient because it failed to show a fiduciary relationship between appellant and Ashley, a necessary element of embezzlement. The judgment was reversed.  
(FDAP Attorney: Kimberly Fitzgerald)

**In re Ashley G., A095082 (Div. 1, 3/11/02)**

**Panel Attorney: Arthur Wong**

**Restitution; Credits:** (1) Remand to juvenile court for hearing on amount of victim restitution. Court had neglected to address restitution during disposition hearing, but then tacked a \$994 victim restitution onto the written order. Although the amount of victim's losses wasn't disputed, appellant was entitled to hearing (in her presence) because the statute also allows court to award less than full restitution for "compelling and extraordinary reasons); (2) Also custody credits corrected to award additional 2 days.

(FDAP Staff Atty: Brad O'Connell)

**In re Jason S., A093147 (Div. 3, 1/31/02)**

**Panel Attorney: Rita Swenor**

***CYA Commitment Stayed - Abuse of Discretion.*** Because juvenile court made no findings that def. would probably benefit from a CYA commitment or that less restrictive placements would be ineffective or inappropriate, and because there was not evidence or argument to support implied findings, commitment to CYA was abuse of discretion. Moreover, the error was not cured by the fact that trial court stayed the commitment order because the post- Prop 21, current version of Welfare and Institutions Code § 777 eliminates most of the safeguards of prior law and now makes it substantially easier to lift the stay and impose the CYA commitment.

(FDAP Attorney: Renee Torres)

**Mental Health And Mentally Disordered Offenders**

**People v. Allyn Hopkins, A093455 & A095674 (Div. 1, 1/14/02)**

**Panel Attorney: Larry Dixon**

***Mental Health Commitments--NGI Maximum Term of Commitment; Enhancements:*** Div. 1 grants habeas relief reducing "maximum term of commitment" in an NGI case. The current appeal (A093455) was from the denial of Hopkins' petition for restoration to sanity (Pen. Code sec. 1026.2).

But habeas investigation revealed that the court had miscalculated the "maximum term of commitment" in the previous NGI proceedings. The "maximum term" of 18 years included 5 years each for *two* section 667(a) "serious felony" priors, both arising from San Bernadino County in 1988. San Bernadino court records revealed that the 2 prior convictions had *not* been "brought and tried separately" and consequently could support only one 5-year enhancement (*In re Harris* (1989) 49 Cal.3d 131). Because the second enhancement was "unauthorized" and "in excess of jurisdiction," the error was subject to habeas corpus relief.

(FDAP staff attorney: Brad O'Connell)

**Parental Rights**

**In re Kayla M., A094233 (Div. 3, 10/9/01)**

**Panel Attorney: Jan Saalfield**

***Notice; Due Process:*** Insufficient notice to the mother of a dispositional hearing resulted in a denial of due process. The claim was cognizable on appeal, despite her failure to file for a writ following the dispositional hearing at which a section 366.26 hearing was set, because the mother did not receive notice of the writ requirement.

(FDAP Attorney: Jonathon Soglin)