

Victories Through March 2003

Search and Seizure

People v. Pullman, A097245 (Div. 2, 10/7/02)

Panel Attorney: Carl Gonser

Prolonged Vehicle Stop: The Court of Appeal affirmed the trial court's judgment granting a motion to suppress evidence in this People's appeal, agreeing that defendant's car was illegally searched during an unlawfully prolonged detention following a traffic stop. Although the initial traffic stop for an unreadable registrations sticker and an object dangling from the rear-view mirror was lawful, police had no reason to conduct a full traffic detention. As soon as he approached the vehicle, he could see it had proper registration stickers and that the dangling object did not obstruct the driver's view. The officer should have merely warned defendant that the registration sticker was hard to read and asked him to remove the dangling object. Instead, he unlawfully prolonged the detention for 15 minutes; fact that defendant's hands were shaking as he retrieved his license and that officer smelled air freshener and a faint whiff of marijuana inside the vehicle was not sufficient to justify the prolonged detention. The officer prolonged the detention so that the air freshener would dissipate, and then claimed probable cause to search when the marijuana odor strengthened. (FDAP Attorney: Kathryn Seligman)

People v. Hollingsworth, A092597 (Div. 2, 1/31/02)

Panel Attorney: Hilda Scheib

Scope of Search Warrant: The court of appeal holds that police, armed with a search warrant authorizing them to seize evidence relating to auto theft offense, exceeded its scope by seizing a concrete drill.

(FDAP Attorney: Brad O'Connell)

In re Al B., A097601 (Div. 5, 8/29/02)

Panel Attorney: Frank Moore

Unlawful Detention: The AG conceded in this case that the minor had standing to challenge his detention as the passenger of a car stopped for a traffic violation. After drugs were found in the car, appellant told police the drugs were his. The court of appeal reversed, concluding the detention and search were unlawful.

(FDAP Attorney: Paula Rudman)

People v. McNeil, A093287 (Div. 3, 3/21/01)

Staff Attorney: Kathleen Kahn

Arrest Based on Invalid City Ordinances: Defendant was arrested pursuant to an Oakland ordinance which prohibits standing in the street "if such action interferes with the lawful movement of traffic." The trial court granted her motion to suppress, since identical ordinances in other cities had been invalidated over forty years ago in a series of decisions finding that they were preempted by V.C. 21954. The court of appeal affirmed in this People's appeal. The question is not, it concluded, whether the individual officer acted in good faith in enforcing an ordinance he believed to be lawful (Michigan v. DeFillippo; Illinois v. Krull), "but the good faith of the law enforcement agency of which he or she is a part. . . . 40 years was enough time for responsible officials of the Oakland Police Department to learn and to educate their officers in the field that the ordinance in question was preempted by state law."

People v. White, A094900 (Div 5, 4/17/02)

Panel Attorney: Judith Kahn

Traffic Stop: Police lacked reasonable suspicion to initiate a traffic stop of the car in which defendant rode as a passenger. The CHP Officer stopped the car for two alleged Vehicle Code violations: an air freshener tree was hanging from the car's rearview mirror and the car had only a back Arizona licence plate. The appellate court found that the prosecution did not establish that it was reasonable for the officer to believe that the object he observed obstructed or reduced the driver's clear view, as required for a hanging object to violate the Vehicle Code. Moreover, since Arizona only requires one license plate, the officer's belief that the lack of a front plate constituted a violation was a mistake of law and a suspicion founded on a mistake of law cannot constitute a reasonable basis for a lawful traffic stop. (FDAP Attorney: Kathryn Seligman)

Equal Protection

In re Anita C., A097695 (Div. 5, 7/3/02)

Panel Attorney: Parker Kelly

Disparate Facilities for Minors: Petitioner claimed that Contra Costa County failed to maintain an intermediate level, secured facility in the county for girls, as it does for boys, thereby violating equal protection. The court of appeal issued an order to show cause, returnable to the Contra Costa County Superior Court. (FDAP Attorney: Kimberly Fitzgerald)

Due Process

In re Rory J., A097190 (Div. 5, 10/23/02 and 1/6/03)

Panel Attorney: Stephen Lubliner

Amendment of Charge; Double Jeopardy: After presentation of evidence and argument, the juvenile court invited an amendment of the burglary charge to a conspiracy to commit burglary charge. The court of appeal, holding the amendment violated due process and was structural error requiring reversal, initially remanded for retrial. On a petition for rehearing, however, it issued a new opinion holding that the amendment constituted an implied acquittal of the original charge, thus barring retrial.

(FDAP Attorney: Jonathon Soglin)

Confessions

In re Kerry N., A097769 (Div. 4, 10/8/02)

Panel Attorney: Jeffrey Glick

Involuntariness: The 12-year old minor confessed to a burglary after the cops kept him for 4 hours without calling his parents, woke him up to interview him at 2 a.m., and did not give him anything to eat. Under the totality of the circumstance, especially the failure to call the parents despite W & I section 627, the minor's age, and the fact that he should have been in bed asleep, the court of appeal concluded the confession was not voluntary.

(FDAP Attorney: Kathryn Seligman)

Statute of Limitations

In re Franklin C., A095415 (Div. 3, 7/29/02)

Panel Attorney: J. Wilder Lee

Sexual Battery: The AG conceded reversible error (statute of limitations and sufficiency of the evidence) on eight of nine counts of misdemeanor and felony sexual battery. The court of appeal remanded for a new dispositional hearing; the minor had been committed to CYA. The sufficiency issue concerned whether there had been a skin-to-skin touching.

(FDAP Attorney: Paula Rudman)

Trial Counsel

People v. Beard, A095443 (Div. 4, 9/5/02)

Panel Attorney: Bill Capriola

Dismissal of Retained Counsel: The trial court erred in holding a Marsden hearing when defendant sought to discharge his retained attorney. Such a request is governed by People v. Ortiz (1990) 51 Cal.3d 975, which holds that a criminal defendant may discharge his retained attorney with or without cause.

(FDAP Attorney: Jonathan Soglin)

People v. Somersall, A092700 (Div. 4, 8/22/02)

Panel Attorney: Stephen Bedrick

Ineffective Assistance: In this third appeal (following a remand for resentencing), the court of appeal held that trial counsel was ineffective in failing to challenge instructional error regarding GBI and voluntary intoxication, and that the errors affected the trial court's decision on resentencing. It therefore reversed in part and remanded for a new resentencing hearing.

(FDAP Attorney: Paula Rudman)

People v. McLemore, No. A089085 (Div. 1, 12/3/01)

Panel Attorney: Gary Dubcoff

Ineffective Assistance: Defendant pleaded no contest to failing to update his sex-offender registration on his birthday on May 22, 1997 (the year is important), after he had registered on April 18, 1997, and was sentenced to 25 years to life under Three Strikes. The court of appeal granted a writ of habeas corpus and vacated the judgment because it was not clear in 1997 that a registrant had to update his registration in the same year in which he had registered (legislation passed that year eliminated the ambiguity), that under the rule of lenity he was entitled to the more lenient interpretation of the law, and therefore the updating provision could not be enforced against him. Although the habeas petition was based on IAC in advising defendant to plead guilty when he had a complete defense, the opinion says nothing about IAC. (On remand, the DA dropped the charges and defendant walked home.

(FDAP Attorney: Richard Such)

People v. Armstrong, A096210 (Div. 5, 5/21/02)

Panel Attorney: Laureen Bethards

Marsden Error: After trial counsel and appellant declared a conflict, the court continued the case for the appointment of new counsel. However, it reappointed counsel after he later declared that there was no conflict, without adequately inquiring into its existence. The court of appeal held this was Marsden error and remanded for appointment of new counsel.

(FDAP Attorney: Paula Rudman)

Admissions and Pleas

In re Laray N., A096307 (Div. 4, 6/21/02)

Panel Attorney: Jennifer Mannix

Involuntary Admission: Based on the totality of the circumstances, the record affirmatively established that appellant's admission was not voluntary or intelligent. (People v. Howard (1992) 1 Cal.4th 1132, 1175.) Defense counsel, the prosecutor, and the juvenile court all mistakenly believed appellant was admitting one strike offense when he actually admitted two strike offenses. The appellate court reversed and remanded the matter to the juvenile court for that court to vacate both pleas if appellant elects to do so by means of filing a petition for writ of error coram nobis in the juvenile court.

(FDAP Attorney: Kimberly Fitzgerald)

People v. Craig, A093993 (Div. 4, 5/23/02)

Panel Attorney: Juliana Drous

Breach of Plea Bargain: Defendant pled guilty in one case and agreed to probation reinstatement in two older cases in return for a suspended 14-year sentence in the new case and a promise that the terms in the other two cases would be concurrent in the event of any probation revocation. Years later, his probation in all three cases was revoked due to a new conviction in another county; the sentencing court imposed consecutive terms on the three probation revocation cases, for a total sentence of 16 years. The court of appeal remanded for resentencing consistently with the original plea agreement, limiting the terms in those three cases to 14 years.

(FDAP Attorney: Paula Rudman)

People v. Billings, A098468 (Div. 5, 3/26/03)

Panel Attorney: Hilda Scheib

Guilty Plea Withdrawal: The defendant was led to believe probation was likely, but probation in fact was statutorily disfavored. The trial court must disclose to the defendant this statutory limitation before accepting a plea. (People v. Spears (1984) 153 Cal.App.3d 79.)

(FDAP Attorney: Kimberly Fitzgerald)

People v. Jones, A096294 and A099157 (Div. 1, 4/19/02)

Panel Attorney: Aaron Williams

Scope of Admissions: Following defendant's conviction, the trial court imposed an aggregate 5 year, 8 month sentence, suspended its execution, and granted probation; the sentence included a consecutive 3-year enhancement pursuant to P.C. 12022(a)(2). The trial court subsequently ordered the execution of the previously imposed sentence when defendant violated probation.

The court of appeal vacated the sentence and remanded for resentencing, agreeing that a review of defendant's original plea demonstrated that the court and both parties clearly understood that he was admitting an armed with a firearm (PC 12022(a)(1)) enhancement, not an armed with an assault weapon (PC 12022(a)(2)) enhancement. The trial court simply misspoke at the plea hearing, and the clerk recorded the wrong subdivision as a result.

In chambers and without notice to defendant, the trial court subsequently issued an amended abstract that corrected the sentence on the enhancement. At the same time, however, it aggravated the base sentence from the midterm to the upper term. The court of appeal granted a petition for writ of habeas corpus, vacated the trial court's "purported resentencing," and remanded with orders to follow proper sentencing procedures. (FDAP attorney: Michael Ginther)

Jurors

People v. Allen, 100 Cal.App.4th 263 (Div. 3, 8/16/02)

Panel Attorney: Thomas Singman

Wheeler Error: The trial court committed Wheeler error when it failed to adequately inquire into the prosecutor's reasons for excusing a black venirewoman, after finding a prima facie case. The venirewoman was otherwise apparently a good prosecution juror, and the prosecutor's explanations that he had challenged her because of her "demeanor", how she dressed, sat, etc., did not afford the appellate court an adequate basis for review. (FDAP Attorney: Paula Rudman)

People v. Alas, A092852 (Div. 4, 7/17/02)

Panel Attorney: Hilda Scheib

Removal of Jurors -- Juror Misconduct: The court of appeal found that trial court erred in removing a juror for misconduct where the record failed to establish the misconduct as a

"demonstrable reality", as required by People v. Cleveland (2001) 25 Cal.4th 466. Here, when questioned by the judge, the juror revealed little or nothing suggesting that he was either unable or unwilling to deliberate. The appellate court surmised that the reason the other jurors were unhappy was that they voted to convict and the other juror had not. (FDAP Attorney: Fran Ternus)

Prosecutorial Misconduct

People v. Parham, A094510 (Div. 5, 8/26/02)

Panel Attorney: Colleen Rohan

Improper Cross-Examination, Reference to Hearsay: The court of appeal reverses flight-causing-injury (V.C. 2800.3) and auto theft (V.C.10851) convictions, based on the cumulative prejudicial impact of: (1) improper prosecutorial cross-examination of a defense witness about defendant's prior acts of bad conduct; (2) prosecutorial misconduct during argument by referring to facts purportedly underlying prior convictions; and (3) further prosecutorial misconduct by referring to unproven hearsay allegations contained in probation and medical reports that had been reviewed but not relied upon by a defense expert.

(FDAP Attorney: Brad O'Connell)

Evidence

People v. Olson, A094440 (Div. 3, 6/20/02)

Panel Attorney: Alex Green

Prior Convictions: Trial court should have let defendant stipulate to knowledge element of possession charge instead of admitting evidence of her prior conviction for possession of methamphetamine.

(FDAP Attorney: Renee Torres)

People v. Patten, A096549 (Div. 5, 4/25/02)

Panel Attorney: James Johnson

Other Crimes Evidence: The court of appeal reversed a burglary conviction, finding error in the admission of other crimes evidence under Evid. Code section 1101(b).

(FDAP Attorney: Paula Rudman)

Jury Instructions

People v. Edgar, 104 Cal.App.4th 210 (Div. One, 11/12/02)

Staff Attorney: Richard Such

Sex Offender Registration Offense: Defendant was convicted of failing to register as a sex offender because he failed to inform City 1 that he had moved to City 2. The trial court failed to instruct as to the knowledge element of the offense and also gave an "ignorance of the law is no excuse" instruction. The court of appeal reversed, finding the failure to instruct prejudicial because there was evidence that appellant actually lived in both cities (he was homeless, staying sometimes with a girlfriend in City 1 and sometimes with a girlfriend in City 2, as well as shelters) and there was no evidence that he was given notice or had knowledge of the duty to report multiple residences. The trial court's instruction as to that duty, without a knowledge instruction, removed that element from the jury's consideration.

People v. Briscoe, A089003 (Div. 1, 11/26/2002)

Panel Attorney: Peter Dodd

Medical Marijuana, Compassionate Use Defense: The court of appeal initially affirmed the cultivation of marijuana, possession for sale, and "maintaining a place" convictions, but the Supreme Court "granted and held" the case and later remanded it for reconsideration in light of intervening opinion in People v. Mower (2002) 28 Cal.4th 457. On remand, the court held that trial court misinstructed on Proposition 215 defense by placing the burden on appellant to establish the defense by a preponderance of the evidence. In light of Mower, the Prop 215 defense "is so closely related to the elements of the offenses that the defendant need only raise a reasonable doubt." For similar reasons, the federal Chapman standard applies. Here, the erroneous allocation of burden of proof was not harmless where Briscoe presented evidence of physician's recommendation and there was conflicting evidence whether quantity seized was consistent with personal use.

(FDAP Attorney: Brad O'Connell)

People v. Bongard, A089581; People v. Neitz, A089582; People v. Rath, A089726;

People v. Schwind, A090502 (Div. 1, 11/25/2002)

Attorneys: Janice Brickley (Panel), Landra Rosenthal (Panel), Brad O'Connell (Staff), Dennis Riordan (retained)

Cumulative Instructional and Other Error: The court of appeal reversed the second-degree murder convictions of all four defendants, based on the cumulative effect of multiple

instructional, evidentiary, and discovery errors which frustrated "individualized assessment by the jury of each appellant's particular culpability" for the homicide and "thoroughly impaired a primary assignment of the jury to accurately determine the guilt of each appellant on an individual basis."

The trial court erroneously denied discovery of the adult and juvenile criminal history of key eyewitness (Brady error) and, during trial, barred cross-examination on his probation status. Multiple errors in instructions on theories of murder liability and lesser offense grounds, including: felony murder instructions allowing predicate offense of assault with force likely to cause great bodily injury (Ireland error); defective instructions on "natural and probable consequences"/aiding and abetting theory (Pettyman error); misinstruction on intent element of voluntary manslaughter (Lasko error); and failure to define the possible predicate misdemeanor offenses (simple assault & battery) for "unlawful act" theory of involuntary manslaughter.

People v. Denard, A097159 (Div. 1, 6/14/02)
Panel Attorney: David Stanley

Ireland Error: The appellate court reversed a second degree murder conviction for Ireland error (People v. Ireland (1969) 70 cal.2d 522). Erroneously given CALJIC 8.10, the jury could have found defendant guilty of 2nd degree murder either on a finding of malice or felony murder (the felony being assault with a deadly weapon). The appellate court discussed the Green rule, but reversed on basis of Chapman.
(FDAP Attorney: Renee Torres)

People v. Turecki, A094397 (Div. 1, 11/26/02)
Panel Attorney: Kim Malcheski

Ireland Error: The trial court prejudicially failed to instruct that second-degree felony murder may be based on ADW, as required by People v. Ireland (1969) 70 Cal.2d 522 (error to instruct).
(FDAP Attorney: Paula Rudman)

Sufficiency of the Evidence

In re David W., A097990 (Div. 3, 12/27/02)
Panel Attorney: Mikol Benjacob

Robbery: In a robbery case, there was insufficient evidence of an intent to permanently deprive where appellant took a chain from another boy and passed it around to his friends, but then returned it to the owner when the latter left to report the incident.
(FDAP Attorney: Paula Rudman)

In re Kara T., A097191 (Div. 1, 11/21/02)
Staff Attorney: Kimberly Fitzgerald

Disorderly Conduct: The evidence was insufficient to sustain the misdemeanor disorderly conduct offense (P.C. 647, subd. (f)) because the minor was not "found" in a public place. All witnesses observed the minor inside a private residence and although there was circumstantial evidence that she was in a public place while walking from one home to another, no one "found" her in public as required by the statute.

People v. Alfonso, A096454 (Div. 5, 8/21/02)
Panel Attorney: Leslie Prince.

Loaded Firearm: The court of appeal reversed a conviction for possession of loaded firearm while in possession of methamphetamine (H&S 11370.1 (a)) because the evidence was insufficient to prove that the firearm was "loaded and operable."
(FDAP Attorney: Brad O'Connell)

In re Brian L., A097837 (Div. 2, 3/11/03)
Panel Attorney: Carl Gonser

Sexual Battery: The juvenile court erred by sustaining a sexual battery offense under Penal Code section 243.4, subdivision (a), as that section requires a touching of the victim's skin. Since the evidence was insufficient on that element, the offense was reduced to a misdemeanor sexual battery under Penal Code section 243.4, subdivision (e), where the touching can be accomplished through the victim's clothing.
(FDAP Attorney: Kimberly Fitzgerald)

People v. Alldredge, A091638 (Div. 2, 12/27/2002)
Panel Attorney: Colleen Rohan

Stalking: The AG conceded that the evidence to support stalking conviction under section

646.9 was insufficient.
(FDAP Attorney: Richard Such)

People v. Ferrel, A095869 (Div. 2, 12/12/2002)
Panel Attorney: Robert Vallandigham

Perjury: The court of appeal reduced four perjury convictions to attempted perjury because the evidence on those counts did not satisfy the “delivery” element for perjury during a deposition: defendant never signed the deposition transcript.
(FDAP Attorney: Brad O’Connell)

In re Tory L., A096674 (Div. 2, 9/18/02)
Panel Attorney: Thomas Singman

Criminal Threats: The court of appeal reverses true findings of two counts of violating section 422 because there was insufficient evidence of one of the required elements -- that appellant's statements caused the victims to be in “sustained fear” for their safety. Neither of the victim’s used the word “fear” or any of its synonyms to describe their own or each other’s reactions. (See People v. Mirmirani (1982) 30 Cal.3d 375; People v. Solis (2001) 90 Cal.App.4th 1002; People v. Thornton (1992) 3 Cal.App.4th 419.)
(FDAP attorney: Michael Ginther)

People v. Taylor, (2002) 103 Cal.App.4th 1275
Panel Attorney: Joseph Shipp

Fetal Homicide: Appellant was convicted of the murder of a woman and the fetus she was carrying. The court of appeal held that although appellant committed an act that endangered the fetus, there were no facts supporting an inference of implied malice sufficient to sustain a second degree fetal murder conviction: “[t]here is not an iota of evidence that appellant knew his conduct endangered fetal life and acted with disregard of that fetal life.”
(FDAP Attorney: Richard Braucher)

Enhancements

People v. Wellman, A094700 (Div.2, 4/9/02)
Panel Attorney: Audree Wong

GBI Enhancements: The court of appeal reversed a GBI enhancement (P.C.12022.7) attached to a DUI felony conviction where the victim wasn't struck by defendant's car, but was injured in secondary collision with a car that spun out after being struck by defendant. Although defendant proximately caused the bodily injury, he did not directly and personally inflict the injury as required by the enhancement statute.
(FDAP Attorney: Brad O'Connell)

People v. Schoof, A097895 (Div. 3, 12/11/02)

Panel Attorney: Sandra Uribe

On Bail Enhancements: The trial court erroneously imposed a consecutive two-year sentence for an on bail enhancement (P.C. 12022.1). Pursuant subd. (d) of the provision, if a defendant is convicted of a secondary offense before sentence is imposed for the primary offense, the enhancement must be stayed "pending imposition of the sentence for the primary offense." When the defendant is sentenced on the primary offense, the stay is lifted, or if the defendant is acquitted of the primary offense, then the enhancement is permanently stayed. Here, the defendant's primary offense was dismissed, so the trial court erred by not permanently staying the on bail enhancement. (See In re Ramey (1999) 70 Cal.App.4th 508.)
(FDAP Attorney: Kimberly Fitzgerald)

People v. Bruce, A096701 (Div. 2, 10/31/2002)

Panel Attorney: Janice Brickley

Weapon Use: The court of appeal held that a one-year weapon use enhancement (P.C.12022, subd.(b)) was unauthorized where the underlying count is assault with a deadly weapon.
(FDAP Attorney: Brad O'Connell)

People v. Bishop, A096503 (Div. 4, 8/23/02)

Panel Attorney: John Schuck

On Bail Enhancements: The court of appeal stayed an on bail enhancement (P.C.12022.1) due to lack of proof that defendant was convicted in case underlying bail status.
(FDAP Attorney: Brad O'Connell)

Sentencing

People v. Birkley, A089217 (Div. 3, 12/28/01)

Panel Attorney: Carol Strickman

Nondisclosure of Favorable Evidence: The trial court failed to disclose the existence of information, filed in a co-defendant's sealed new trial motion, relevant to the defendant's sentencing. The court of appeal remanded for a new sentencing hearing. It also vacated a restitution order, agreeing that restitution to HAZMAT to clean a meth lab was improper because restitution may not be used to compensate for the costs of prosecution.
(FDAP Attorney: Jonathan Soglin)

People v. Birkley, A098859 (Div. 3, 3/20/2003)

Panel Attorney: Carol Strickman

Scope of Remand/New Sentencing Judge: After remand of previous case cited, the sentencing court erred in interpreting court of appeal's instructions and only vacated the restitution order. The court of appeal reversed a second time, granting appellant's request for resentencing before a new judge.
(FDAP Attorney: Jonathan Soglin)

People v. Schick, A093760 (Div. 4, 11/13/02)

Panel Attorney: Gary Nelson

Sex Crimes: Defendant was convicted of multiple sex offenses and sentenced to 171 years to life under the Three Strikes law. One of the counts was a "continuous child sexual abuse" under P.C. 288.5; another count, charged under P.C. 288/667.61, occurred during the same period. The trial court imposed the middle (12 year term, tripled to 36 years) for the P.C. 288.5 violation and a 15 years to life term (tripled to 45 years to life) for the P.C. 288/667.61.

The parties agreed that, under People v. Johnson (2002) 28 Cal.4th 240, defendant should not have been prosecuted under both sections, but disagreed over the remedy. The People said that the 288.5 with the shorter term should be reversed, while defendant argued that the life term should be reversed. The court agreed with defendant: under the language of P.C. 288.5 (defendant cannot be prosecuted for another offense occurring during the same period), the P.C. 288 should be reversed, even though it was the longer term.

(FDAP Attorney: Richard Such)

People v. Chiu, A093023 (Div. 2, 9/10/02)

Panel Attorney: Joseph Shipp

Section 654: False imprisonment and assault counts should have been stayed under P.C. 654 as incidental to rape, the court of appeal concluded. In addition, it held, an LWOP prisoner is not subject to a parole revocation fine under P.C.1202.45.

(FDAP Attorney: Paula Rudman)

People v. Bailey, A096700 (Div. 1, 6/26/02)

Panel Attorney: Randy Baker

Section 654: Consecutive sentences violated section 654's ban on double punishment where evidence was sufficient to show distinct offenses and sentencing judge failed to state reasons for consecutive sentences on section 236 and 244 charges. The case is remanded for a new sentencing hearing.

(FDAP Attorney: Renee Torres)

People v. Walls, A096685 (Div. 4, 9/10/2002)

Panel Attorney: Judith Kahn

Proposition 36: Although defendant committed the drug possession offense before Proposition 36 was adopted, he was entitled to its offense before initiative, but sentenced after entitled to Prop 36 probation

(FDAP Attorney: Mark Shenfield)

People v. Ramirez, A096389 (Div. 1, 5/30/02)

Panel Attorney: David Thompson

Proposition 36: The trial court erred by declining defendant's request for probation in accordance with the terms of Proposition 36. The Court of Appeal remanded the matter for resentencing consistent with the provisions of P.C.1210.1.

(FDAP Attorney: Kimberly Fitzgerald)

People v. Montoya, A096079 (Div. 1, 11/20/02)

Panel Attorney: Jeffrey Schafer

Section 654: Citing People v. Curtain (1994) 22 Cal.App.4th 528, the court modified the

judgment to stay a sentence for forgery pursuant to P. C. 654 where appellant was convicted of commercial burglary, forgery and possessing a check with intent to defraud. All three crimes, the court concluded, were committed with the single intent of getting cash from the target liquor store. (Note: the trial court had already stayed the sentence on the check possession.) The court also awarded 12 additional days pre-sentence credit.
(FDAP Attorney: Michael Ginther)

People v. Lunghi, A093972 (Div. 1, 2/12/02)

Panel Attorney: John Steinberg

Section 654: Concurrent sentences for being armed with a firearm and being a felon in possession of a firearm barred by section 654 where both committed during an indivisible course of conduct.

(FDAP Attorney: Richard Such)

People v. Smith, A094984 (Div. 3, 5/17/02)

Panel Attorney: Jeffrey Glick

Assault with Deadly Weapon: State concedes that defendant improperly convicted of ADW because that offense is a lesser included offense of ADW by a life prisoner.

(FDAP Attorney: Renee Torres)

In re Black (2002) 101 Cal.App.4th 1026

Staff Attorney: Richard Braucher

Limitations on Credit: The court of appeal, in a habeas corpus proceeding, held that the 15 percent post-sentence credit limitation (P.C. 2933.1(a)) for persons convicted of a violent felony under P.C. 667.5 does not apply to the term imposed for a nonviolent offense which has been charged and proven in a separate case.

People v. Ressler, A097228 (Div. 4, 9/5/02)

Panel Attorney: Ronald Sweet

Sentence modification: The court of appeal modified the judgment to add 44 days of pre-sentence custody credits. Following an earlier revocation, the trial court reinstated probation with modifications, including appellant's valid waiver of custody credits. Despite the waiver, the trial court erroneously awarded 44 days of credits and the People did not object.

When probation was revoked a second time, and sentence imposed, the trial court denied those 44 days of credits. The court of appeal held that even though the credits were initially awarded erroneously, appellant was entitled to them since the People did not object. (See People v. Jackson (1981) 117 Cal.App.3d 654; People v. Wilson (1978) 83 Cal.App.3d 982.) (FDAP Attorney: Michael Ginther)

People v. Irias, A095796 (Div. 1, 5/22/02)

Panel Attorney: Randi Covin

Lack of Remorse: Where there was conflicting evidence of guilt and appellant maintained his innocence, the trial court erred in using lack of remorse as an aggravating factor. (FDAP Attorney: Paula Rudman)

People v. Maxwell, A098173 (Div. 1, 11/14/02)

Staff Attorney: Renee Torres

Fines: The trial court improperly imposed two \$600 fines; the appellate court reduced them to \$200.

People v. Vestyns, A096532 (Div. 1, 7/30/02)

Panel Attorney: Victoria Stafford

Proposition 36: The court of appeal reversed the trial court's failure to sentence appellant pursuant to Proposition 36 where the trial court erroneously found it applies only to those whose offense was committed after the date of enactment. (FDAP Attorney: Fran Ternus)

People v. Marquez, A094953 (Div. 1, 6/27/02)

Panel Attorney: Victoria Stafford

Consecutive Sentences: The trial court sentenced appellant to the upper base term of 16 years for a P.C. 288.5(a) violation, two consecutive mid-terms of two years each for violations of P.C. 289(I), and a consecutive 1/3 the mid-term (1 year) for a violation of P.C. 243.4. The court of appeal modified the sentence, agreeing that the two consecutive 2-year midterm sentences must be reduced to 8 months (1/3 the mid-term) each. (FDAP Attorney: Michael Ginther)

People v. Vargas, A094227 (Div. 3, 9/12/02)

Panel Attorney: Victoria Stafford

Decision Date: 9/12/02

Continuous Sexual Abuse: Defendant was convicted of both section 288 (lewd and lascivious conduct with child under 14) and section 288.5 (resident child molester) offenses. The State conceded that he could not properly be convicted of both continuous sexual abuse and individual sexual offenses occurring during the same period. (See People v. Johnson (2002) 28 Cal.4th 240.)

(FDAP Attorney: Michael Ginther)

People v. Suarez, A098784 (Div. 3, 9/24/02)

Panel Attorney: Eric Liberman

Credits: State concedes appellant was due credit for time served as a condition of probation after it was revoked.

(FDAP Attorney: Paula Rudman)

Probation

People v. Samifua, A098150 (Div. 2, 9/17/02)

Panel Attorney: Julie Schumer

Invalid Conditions: The court of appeal found that a condition of probation forbidding defendant from using, possessing, or transporting any nonprescribed drug was unconstitutionally overbroad. It responded to the AG's waiver argument (and appellant's IAC response) by exercising its discretion to reach the issue.

(FDAP Attorney: Paula Rudman)

People v. Strong, A093469 (Div. 3, 7/25/02)

Panel Attorney: Charles Dellario

Notice of Conditions: The court of appeal reversed the revocation of probation because the trial court revoked it for breaching a condition (failure to contact the probation officer) that was not included in the written notice given appellant upon an earlier reinstatement of probation. The appellate court directed the trial court to issue an order returning appellant to court, to set aside the trial court finding that he violated probation, to reinstate him on probation, and furnish him with the mandated written probation conditions.

(FDAP Attorney: Fran Ternus)

People v. McDonald, (A094709, 5/31/02)

Panel Attorney: Christine DuBois

Conditions: Defendant was convicted of a P.C. 288(a) violation (lewd acts on a child) and granted probation, conditioned among other things on no contact with a child under 18 unless in the presence of a responsible adult. Defendant subsequently moved in with a woman who had a 14 year-old daughter. Although the mother testified that defendant was never alone with her daughter, the trial court revoked probation, finding that a woman who would allow a convicted sex offender to live in the same house with her 14 year-old daughter was "not a responsible adult within the meaning of the probation order." The court of appeal reversed. Although the trial court had also found appellant in violation of another condition of probation, it found that since the trial court treated the "no contact as being far more important" than the second violation, the court could not rest an affirmance of the revocation on the second violation.

(FDAP attorney: Michael Ginther)

People v. White, A093022 (Div. 1, 11/15/00)

Panel Attorney: Tara Mulay

Insufficient Evidence: The court of appeal reversed the revocation of defendant's probation, concluding that the evidence was insufficient to establish a breach of its terms and conditions.

(FDAP Attorney: Renee Torres)

People v. Lendahl, A097876 (Div. 5, 1/24/03)

Staff Attorney: Kimberly Fitzgerald

Probation Condition: The trial court abused its discretion by ordering the defendant to pay a civil small claims judgment as a condition of probation when that judgment was wholly unrelated to the underlying criminal offense. Mere failure to pay a debt, absent fraud, is neither a crime nor a basis for imprisonment. (*People v. Williams* (1966) 247 Cal.App.2d 394, 397-398.)

Juveniles

In re Pierre R., A098545 (Div. 1, 12/23/02)

Panel Attorney: Andrew Cappelli

Maximum Time of Confinement: The juvenile court failed to specify the maximum term of confinement when it removed the minor from custody of his parents. (In re James A. (1980) 101 Cal.App.3d 332, 339.) The court of appeal therefore remanded to the juvenile court to determine the minor's maximum confinement time.
(FDAP Attorney: Kimberly Fitzgerald)

In re Joseph K., A095673 (Div. 4, 6/20/02)

Staff Attorney: Kimberly Fitzgerald

Designation of Wobbler Offense: The juvenile court failed to make an express declaration as to whether the sustained wobbler offense was a misdemeanor or felony as required by W&I 702. The matter was remanded to the juvenile court to decide that issue. (See In re Manzy W. (1997) 14 Cal.4th 1199.)

In re Dominique W., A093966 (Div. 4, 3/25/02)

Staff Attorney: Kimberly Fitzgerald

Section 654; Maximum Time of Confinement: The Court of Appeal remanded the matter to the juvenile court for its determination of the minor's maximum confinement time under W&I 726. If the juvenile court elects, within the meaning of that section, to aggregate the period of physical confinement on the carjacking, robbery, and auto theft counts, it shall also determine the applicability of P.C. 654.

In re Dwayne T., A097770 (Div. 5, 11/25/02)

Rick Addicks

Probation Conditions: The minor was declared a ward and placed on probation for selling cocaine base. Among the conditions of probation, he was ordered not to leave Alameda County without the permission of his probation officer or grandmother (his guardian) and to stay away from the area of 61st Avenue. The court of appeal found the first condition to be unreasonable and unconstitutional because it had no relationship to the offense or to deterring future criminality. It also found the stay-away order to be overbroad and modified it to bar the minor only from the block where he committed the crime. The court found it had the discretion to resolve the challenges to these conditions, despite trial counsel's failure to

object, as the facts necessary to resolution were not in dispute.
(FDAP Attorney: Kathryn Seligman)

People v. Carlos R., A095635 (Div. 5, 4/8/02)

Panel Attorney: Carlo Andreani

Sex Offender Registration: The trial court committed appellant to the California Youth Authority, but stayed that commitment and recommended that he be placed in a residential facility. It also ordered the juvenile register as a sex offender under P.C. 290. The court of appeal agreed that the registration requirement did not apply because the juvenile had not been "discharged or paroled from the California Youth Authority," as the statute required, and therefore it was unauthorized.

(FDAP Attorney: Fran Ternus)

In re Eduardo E. , A095399 (Div. 4, 6/24/02)

Staff Attorney: Jonathan Soglin

Proposition 21, Supplemental Petitions: The DA and the probation department filed W&I 777 and 778 petitions seeking CYA commitment after 10 less restrictive facilities refused to accept the minor, who sat in juvenile hall for 10 months waiting for a placement. The juvenile court relied on W&I 778 to place him in CYA. The court of appeal reversed, holding that after Proposition 21, neither W&I 777 nor 778 can be used to impose a more restrictive placement absent a probation violation or new crime.

In re Brandon H., A094463 (Div. 3, 6/28/02)

Staff Attorney: Jonathan Soglin

Inter-county Transfers: After the jurisdictional hearing, the juvenile court transferred the case for disposition to the county where the minor resided. That county, however, refused to hear the minor's subsequent motion to withdraw his admissions, ruling that such a motion could only be heard in the county where the jurisdictional hearing took place. The court of appeal reversed, holding that there is no authority to transfer a case away from the county of residence and that that county must therefore consider the motion.

In re Kristina M., A097764 (Div 3, 12/27/02)

In re Nichelle R., A098846 (Div 5, 3/3/03)

Panel Attorney: Elizabeth Grayson

Applications for Rehearing: In each of these cases, the appellate court vacated the juvenile court's order denying the minor's application for rehearing of a referee's dispositional order. Both held that the juvenile court erred in failing to exercise its independent judgment (de novo review) in deciding whether to grant or deny rehearing; the Alameda County juvenile court had deferred to the referee in denying the request for rehearing of the dispositional order in each of these cases.

(FDAP Attorney: Kathryn Seligman)

In re Steven S., A096165 (Div. 2, 1/13/03)

Panel Attorney: Steven Lubliner

Inadmissible Hearsay; Probation Violation Hearing: Pursuant to Proposition 21's amendments to W & I Code section 777, the juvenile court erred in admitting testimonial hearsay evidence at a probation violation hearing without a showing that the declarant was unavailable or other good cause. The appellate court held that the rule of People v. Arreola (1994) 7 Cal. 4th 1144, and other principles that govern the admission of hearsay evidence at adult probation revocation hearings, apply to juvenile probation violation hearings. Here, the sole witness at the section 777 hearing was a probation officer who testified to a conversation he had with a staff member at the boy's ranch who told him that the minor had been terminated from the placement for fighting. The staff member's description of the fight and the minor's subsequent conduct (only some of which he witnessed) was inadmissible hearsay.

(FDAP Attorney: Kathryn Seligman)

In re Philip T., A095073 (Div. 2, 1/3/03)

Panel Attorney: Hilda Scheib

W & I section 707(b) Offenses: The juvenile court erred in designating an attempted robbery a WI 707(b) offense. Since it is not listed in that subdivision, no finding of amenability to juvenile court treatment is required for that offense. (Amenability finding itself was not invalid because such a finding was required with respect to the separate robbery charge.)

(FDAP Attorney: Jonathon Soglin)

Mentally Disordered Offenders

People v. Hayes (2002) 105 Cal.App.4th 1287

Panel Attorney: Rod Jones

Underlying Offenses: The court of appeal reversed the trial court's order committing appellant as an MDO because the underlying offense---recklessly causing a fire in violation of section 452---is not a qualifying offense.

(FDAP Attorney: Jonathon Soglin)

Parental Rights

In re Brittany H., 100 Cal.App.4th 293 (Div. 5, 6/28/02)

Panel Attorney: Sharon Rollo

Visitation: The court of appeal reversed an order, issued upon the termination of dependency proceedings, denying appellant visitation and restraining him from having any contact with the minor.

(FDAP Attorney: Jonathan Soglin)

