

VICTORIES

Statute Of Limitations

People v. Woody, A103381 (Div. 3, 8/16/04)

Panel Attorney: Richard Moller

Misdemeanors: Although the three charged misdemeanors allegedly were committed in May, 2001, the complaint was not filed until July, 2002. According to Penal Code § 802, the prosecution of a misdemeanor such as those charged here “shall be commenced within one year after commission of the offense.” The court of appeal therefore dismissed the charges.
FDAP Attorney: Fran Ternus

Self-Representation

People v. Harris, A102600 (Div. 1, 5/1/03)

Panel Attorney: Irma Castillo

Revocation Of Pro Per Status: The court of appeal reversed appellant’s conviction because the trial court revoked his *pro per* status following the preliminary hearing without good cause.

FDAP Attorney: Mark Shenfield

Competency

People v. Ary, A095433 (Div. 2, 3/11/04)

Panel Attorney: Kyle Gee

Failure to Order Competency Hearing: The trial court had before it substantial evidence that appellant, who was mentally retarded, was not competent to assist in his defense, but failed to order a competency hearing. The Court of Appeal remanded the matter for a retrospective competency hearing.

FDAP Attorney: Fran Ternus

People v. Henderson, A102290 (Div. 5, 10/27/03)

FDAP Attorney: Fran Ternus

Commitment To Mental Hospital: The trial court committed appellant to a mental hospital for 5 years after finding her incompetent to stand trial pursuant to Penal Code §1368. The court of appeal reversed in part, ordering the trial court to modify its order to the statutorily-

defined maximum of three years.

Due Process

People v. McCardle, A104195 (Div. 3, 8/31/04)

Panel Attorney: Charles Holzhauer

Terms Of Probation: The court of appeal reversed the revocation of appellant's probation and the imposition of a six-year prison sentence. The term of his probation required him to *attend* sex offender treatment. Consequently, the trial court's revocation of probation for failing to *complete* sex offender treatment was unauthorized and constituted a violation of due process.

FDAP Attorney: Richard Braucher

Pleas And Admissions

People v. Copeland, A100420 (Div. 3, 8/31/04)

Panel Attorney: Bruce Wiener

Admissions: The trial court did not fully advise appellant of his constitutional rights and the direct penal consequences of the charged prison prior enhancements before accepting his admissions prior to jury trial. The court of appeal reversed, concluding that the admissions were not knowing and intelligent under the totality of the circumstances.

FDAP Attorney: Mark Shenfield

People v. Minto, A102611 (Div. 2, 7/14/04)

Panel Attorney: Lance Russell

Admissions: The information charged that appellant had suffered three prior convictions and that he had not remained free of prison custody for a period of 5 years after serving "said term." Appellant admitted that he had suffered three prior *convictions*. The trial court subsequently imposed 2 *prior prison term* enhancements. The court of appeal reversed: in light of the confused state of the record, it was unclear precisely what he was charged with and precisely what he admitted.

FDAP Attorney: Mark Shenfield

Plea Bargains

People v. McLaughlin, A104763 (Div. 3, 6/22/04)

Panel Attorney: Attorney: Carolyn Fershtman

Withdrawal Of Plea: The trial court withdrew its approval of a plea bargain calling for a probationary sentence, but did not give the defendant an opportunity to withdraw his no contest plea. The court of appeal remanded with directions to permit the defendant to withdraw his plea.

FDAP Attorney: Kathryn Seligman

Confrontation Clause

People v. Watson, A098183 (Div. 3, 12/10/03)

FDAP Attorneys: Renee Torres (brief), Bradley O'Connell (argued)

Videotape of Non-Testifying Witness: The court reversed two theft convictions because the videotaped interview of the non-testifying victim was erroneously admitted pursuant to Evid. Code § 1380. The out-of-court statement did not satisfy the criteria of that provision because the circumstances of the interview lacked any “particularized guarantees of trustworthiness.” For the same reason, the admission of that evidence violated the Confrontation Clause.

In re Ella C., A104403 (Div. 1, 3/12/04)

Panel Attorney: Scott Drexel

Access to juvenile court records: Petitioner, a defendant in a criminal proceeding, sought access to the alleged victim's juvenile court records (Welf. & Inst. Code, § 827, subd. (a)(1)(M)), requesting specific information from the file and articulating the purpose of obtaining such documents, but the juvenile court summarily denied the request. The appellate court ruled: “Given the constitutional protection afforded a defendant’s right of confrontation, it was an abuse of discretion for the juvenile court to deny petitioner’s application summarily.” It vacated the juvenile court’s summary denial of the petition and remanded for a hearing on it.

FDAP Attorney: Kimberly Fitzgerald

Search and Seizure

People v. Jaco, A100824 (Div. 2, 11/7/03)

Panel Attorney: Diana Teran

Detention And Pat Search: The trial court erroneously denied the defendant’s motion to suppress evidence for two reasons. First, the consensual encounter turned into an illegal

detention without reasonable suspicion of criminal activity. Second, the subsequent pat search for weapons was conducted without any reasonable suspicion that the defendant had a weapon and, moreover, the search went beyond the scope allowed for a pat search. Notably, the officer's description that he felt a soft object the size of a golf ball that made a crunching sound in defendant's pocket was insufficient to make it immediately apparent that it was a narcotic and therefore seizing the object from the defendant's pocket went beyond the scope of a pat search for weapons.

FDAP Attorney: Kimberly Fitzgerald

People v. Buyrounas, A103130 (Div. 4, 3/5/04)

Panel Attorney: Robert Valencia

Proof Of Search Conditions: Although the searching officer testified that appellant “had a search and seizure clause on him” when his home was searched, the prosecution did not introduce any documentation of it. The court of appeal concluded that the “evidence here simply does not rise to a level consistent with a finding of voluntary relinquishment of a constitutional right, nor does it adequately demonstrate the scope of the waiver.”

People v. Bowers (2004) 117 Cal.App.4th 1261

FDAP Attorney: Kathleen Kahn

Probation Search: In light of *People v. Sanders* (2003) 31 Cal.4th 318, the court of appeal decides that a defendant’s probation search condition does not justify his detention or a search of his person if police were not aware of his status at the time.

People v. Keel, A105908 (Div. 4, 12/21/04)

Panel Attorney: George Benton

Prolonged Detention: The court of appeal reversed the denial of defendant’s motion to suppress, finding that the officer unjustifiably prolonged detention because he was unaware that a vehicle operated under a temporary permit need not have front license plate. The momentary activation of appellant's car alarm did not provide additional support for the detention, nor did the presence in the car of a person who had previously resisted arrest, where that person was well-behaved during the detention.

FDAP Attorney: Paula Rudman

People v. Martinez, A104523 (Div. 3, 10/4/04)

Panel Attorney: Gordon Brownell

Parole Search: Defendant's pockets were searched based on his parole status. It was unclear whether the magistrate had denied his suppression motion because he found that the officer knew about the parole status before searching or whether he believed *People v. Sanders* was

distinguishable. The court of appeal made it clear that *Sanders* does apply to a personal (as well as a residential) search under *People v. Bowers* (2004) 117 Cal.App.4th 1261, and therefore reversed and remanded for the magistrate to find some facts.

FDAP Attorney: Kathy Kahn

People v. Belperio, A103620 (Div. 2, 9/1/04)

Panel Attorney: Nora Wellman

Parole Search: The court of appeal holds that the presence in appellant's home of a visitor subject to a parole search condition did not justify a warrantless search.

FDAP Attorney: Paula Rudman

People v. Valenzuela, A98726 (Div. 5, 3/10/03)

Panel Attorney: Mikol Benjacob

Third Party Consent: The court of appeal holds that a landlord cannot consent to a search of a tenant's dwelling. Further, the search in this case could not be justified by any exigent circumstances.

FDAP Attorney: Mark Shenfield

People v. Steward (2003) 113 Cal.App.4th 242

FDAP Attorney: Donald Lipmanson

Standing: Although he lived in a trailer, appellant regularly visited and used the house on the same property to watch television, do laundry, cook, and socialize with the residents. Reversing the trial court and remanding for further proceedings, the court of appeal determined that he had standing to challenge the search of the house even though he had no possessory interest in it and was not an overnight guest at the time it was searched.

FDAP Attorney: Mark Shenfield

People v. Morton (2003) 114 Cal.App.4th 1039

FDAP Attorney: Richard Ingram

Community Caretaker Exception To Warrant Requirement: Police went to investigate a neighbor's report that there may have been a drug theft next door, where marijuana was being cultivated. One of the occupants in the house came outside to talk to the officers, who testified that they were initially concerned that the grower or growers may have been hurt during the theft. There was no evidence presented that the person who came out to talk to the officers appeared to be hurt or distressed. However, when the other occupants reported to be in the house failed to also come out, the officers briefly entered, observed marijuana being cultivated, and subsequently obtained a warrant. The court of appeal concluded that there was insufficient evidence justifying the initial entry under the community caretaker

exception to the warrant requirement. Since the subsequently obtained warrant was based on what they observed during that entry, the court held that the warrant was invalid and reversed the cultivation conviction.

FDAP Attorney: Mark Shenfield

Admission of Evidence

People v. Pantoja (2004) 122 Cal.App.4th 1

Panel Attorney: Frank McCabe

Trustworthiness Of Written Declaration: The court of appeal reversed appellant's first-degree murder conviction based on the erroneous admission (under Evid. Code § 1370) of the decedent's declaration alleging that defendant had previously threatened to kill her. The declaration had been filed several days before the homicide as part of an application for a restraining order. The appellate court discusses *Crawford v. Washington*, but ultimately resolves the case on state law, rather than confrontation grounds. The declaration did not meet section 1370's requirement of indicia of "trustworthiness" because there was "a complete absence of foundational information necessary to determine the reliability of the statement" about the alleged threat, it was prepared in connection with litigation, the declarant spoke almost no English and there was no evidence as to who drafted the declaration, whether it was translated for the declarant, or the "proficiency" of the translator. Also, because the declaration narrated events spanning a period of several months, it was doubtful whether it met the requirement that the statement be made near the time of the threat. The error was prejudicial because the alleged threat was significant to premeditation and other mens rea issues.

Sufficiency of the Evidence

People v. Stith, A102767 (Div. 4, 12/19/03)

Panel Attorney: Janice Brickley

Prior Conviction As A Strike Or Serious Felony: The court of appeal found the evidence insufficient to support the trial court's finding that appellant's prior conviction for grossly negligent discharge of a firearm (Pen. Code, § 246.3) was a serious felony (Pen. Code, § 667) or constituted a strike (Pen. Code, § 1170.12). The true finding as to that prior conviction was reversed and remanded for a retrial.

Staff Attorney: Kimberly Fitzgerald

People v. Prasad, A102299 (Div. 2, 7/14/04)

FDAP Attorney: Kathy Kahn

Terrorist Threat / Sustained Fear: Defendant made lots of phone calls to his girlfriend the weekend after she left following a fight, alternately begging and threatening her to come back. The DA charged five of the calls as “terrorist threats” and got five convictions. The girlfriend, however, did not pick up her messages over the weekend and listened to all of them during one sitting on Monday. The court of appeal agreed that there was consequently only one period of “sustained fear” -- which is an element of Penal Code § 422 -- and therefore reduced four of the five counts to attempts.

Jurors

People v. Peraza-Williams, A098922 (Div. 2, 8/12/04)

Panel Attorney: James Johnson

Discharge Of Juror: The trial court discharged a juror during deliberations for “failure to deliberate.” Thereafter, the jury, which had been deadlocked, returned a verdict of conviction on two counts of perjury. The court of appeal reversed, finding that the trial court erred under the standard set in *People v. Cleveland* (2001) 25 Cal. 4th 466.

FDAP Attorney: Kathryn Seligman

Jury Instructions

People v. Moreno, A100773 (Div. 5, 3/25/04)

Panel Attorney: Anthony Dain

Unanimity: The failure to instruct the jury on unanimity (CALJIC No. 17.01) in this lewd act case was not harmless (even under *Watson*), warranting reversal.

FDAP Attorney: Richard Such

People v. Bell (2004) 118 Cal.App.4th 249

FDAP Attorney: Richard Braucher

Late Disclosure Of Statement: The court of appeal reversed appellant’s LWOP sentence in this murder-robbery case because the trial court committed prejudicial error when it gave

CALJIC No. 2.28 regarding the late disclosure of statements given by alibi witnesses.

People v. Ajib, A099615 (Div. 2, 7/26/02)

Panel Attorney Martin Velez

Failure To Instruct Sua Sponte On Theory Of Defense: The trial court instructed on a “citizen's arrest” defense to the charge of false imprisonment, but not as to the separate charge of assault. (Both charges were based on the same incident: defendant was either beating up his ex or trying to get back the \$20,000 she had just stolen from him.) The jury convicted defendant only of misdemeanor assault. Although trial counsel had requested the “citizen’s arrest” instruction as to the false imprisonment charge only, the court of appeal reversed. The instruction applied to both counts and the error was neither invited nor waived. The *sua sponte* duty to instruct arose because it was clear that trial counsel was relying solely on this defense as to all charges.

FDAP Attorney: Kathy Kahn

People v. Robichaud, A100930 (Div. 5, 4/27/04)

Panel Attorney: Randi Covin

Tax Evasion/Mental Element: Tax evasion requires proof of a voluntary and intentional violation of a known legal duty. CALJIC 1.20 misdescribes the willfulness element of tax evasion.

FDAP Attorney: Jonathan Soglin

People v. Gardner, A101801 (Div. 4, 1/14/04)

Panel Attorney: Grace Suarez

Unanimity Instruction: The trial court prejudicially erred in failing to *sua sponte* instruct on the necessity of unanimity (CALJIC No. 17.01) in this multiple offense molestation case; the fact that the jury acquitted appellant of one offense demonstrated they did not believe all acts occurred.

FDAP Attorney: Richard Braucher

People v. King, A104219 (Div. 5, 9/3/04)

Panel Attorney: Hilda Scheib

Scienter Requirement: The court of appeal reversed defendant’s conviction for possessing a short-barreled rifle (Pen. Code, § 12022, subd.(a)(1)), because the trial court failed to instruct on the scienter element of possession, noting that “a jury could have found

that appellant did not know the contraband characteristics of the rifle.”

FDAP Attorney: Richard Braucher

People v. Lipscomb, A104023 (Div. 4, 6/17/04)

Panel Attorney: Carolyn Fershtman

Unanimity Instruction: The court of appeal reversed two burglary convictions resulting from six entries into two different stores to pass bad checks. The court found that the continuous course of conduct exception to the unanimity requirement did not apply here because the entries were separate. Thus, failure to give the instruction prejudicial.

FDAP Attorney: Fran Ternus

People v. Butler, A101809 (Div. 2, 6/10/04)

Panel Attorney: Barry Karl

Unanimity Instruction: After the court of appeal reversed appellant’s conviction for possessing stolen property (also reported in this issue), panel attorney Barry Karl successfully petitioned for rehearing and obtained a second reversal. This time, the court reversed a theft with a prior (Pen. Code, § 666) conviction for failure to give a unanimity instruction (CALJIC No. 17.01).

FDAP Attorney: Michael Ginther

Lesser Included Offenses

People v. Wells, A102621 (Div. 4, 5/20/04)

Panel Attorney: Jennifer Mannix

Attempted Robbery / Petty Theft: Appellant was convicted of attempted robbery and petty theft. The court reversed the petty theft with a prior because it is a lesser included offense of attempted robbery. (*People v. Estes* (1983) 147 Cal.App.3d 23, 28 [“A defendant cannot be convicted of both the greater offense and the lesser included offense.”])

FDAP Attorney: Renee Torres

People v. Gray, A101032 (Div. 4, 4/12/04)

Panel Attorney: Bill Capriola

Aggravated Sexual Assault: The court of appeal vacated convictions for rape and foreign object penetration because they were lesser included offenses of convictions for aggravated

sexual assault of child.

FDAP Attorney: Jonathan Soglin

Enhancements

People v. Ruiz, A097648 (Div. 3, 4/19/04)

Panel Attorney: Landra Rosenthal

Gang Enhancement: The trial court imposed a three year gang enhancement (Penal Code § 186.22) to run consecutively to appellant's 25 years to life sentence. The court of appeal struck this enhancement, agreeing with the reasoning of *People v. Harper* (2003) 109 Cal.App.4th 520, that the enhancement may not be imposed under "the clear and unambiguous language of the statute" if the defendant is sentenced to state prison to life.

FDAP Attorney: Fran Ternus

People v. Heglin, A100482 (Div. 2, 1/2/04)

FDAP Attorney: Richard Braucher

On-Bail Enhancement: In a post-plea sentencing hearing, the trial court erroneously believed it did not have authority under Penal Code § 1385 to strike an on-bail enhancement. The court of appeal remanded to permit the trial court the opportunity to exercise discretion under *People v. Meloney* (2003) 30 Cal.4th 1145. It also noted that no certificate of probable cause was required under *People v. Buttram* (2003) 30 Cal.4th 773.

People v. Kennedy, A102400, Div. 5 (8/11/04)

Panel Attorney: David Krueger

Prior Prison Term: The court of appeal reversal one Penal Code § 667.5, subd. (b) prior prison term enhancement because, as the AG conceded, it was not separate but had been served concurrently with the term underlying another enhancement.

FDAP Attorney: Brad O'Connell

People v. Hunter, A101906 (Div. 5, 6/24/04)

Panel Attorney: Meredith Watts

Prior Prison Term: The AG concedes that two of appellant's prior convictions were not "brought and tried separately" and thus could not form the basis of separate Penal Code § 667, subd.(a), enhancements.

FDAP Attorney: Paula Rudman

People v. Emery, A101494 (Div. 5, 8/11/04)

Panel Attorney: Robert Bryzman

Gang Enhancement / Firearm Use Enhancement: The trial court imposed both a gang and a (vicarious) firearm use enhancement on appellant. The court of appeal reverses the gang enhancement, concluding that when a firearm use enhancement is imposed under Penal Code § 12022.53, subd.(e), an enhancement for participation in a street gang cannot also be imposed unless the defendant personally used or discharged a firearm in the commission of the offense.

FDAP Attorney: Mark Shenfield

People v. Davis, A098177 (Div. 5, 4/14/04)

Panel Attorney: Sandy Uribe

Consecutive Sentences: Trial court erred in failing to state reasons for imposing consecutive sentences. The issue was not waived because there was no meaningful opportunity to object.

FDAP Attorney: Richard Braucher

People v. Moore, A099849 (Div. 5, 5/14/04)

Panel Attorney: Patricia Cooney

Double Counting: The trial court erroneously relied on defendant's on-bail status to impose both a Penal Code §12022.1 on-bail enhancement and to impose consecutive sentences. The court of appeal also held that § 654 barred multiple punishment for counts relating to possession of various stolen items and that only one conviction for possession of unfinished checks (§ 475, subd.(b)) is permitted for each incident.

FDAP Attorney: Jonathan Soglin

People v. Butler, A101809 (Div. 2, 3/17/04)

Panel Attorney: Barry Karl

Double Punishment: Appellant improperly convicted of both theft with a prior (Pen. Code, § 666) and possession of stolen property (Pen. Code, § 296) under *People v. Jaramillo* (1976) 16 Cal.3d 752. Possession of stolen property conviction reversed.

FDAP Attorney: Michael Ginther

People v. Martinez (2004) 116 Cal.App.4th 753

Panel Attorney: Christine Dubois

Gang Registration: The court of appeal struck a gang offender registration requirement where the requirement was imposed solely based upon the defendant's criminal history: “a crime may not be found gang related within the meaning of section 186.30 based solely upon the defendant's criminal history and gang affiliations. The crime itself must have some connection with the activities of a gang”

FDAP Attorney: Jonathan Soglin

People v. Tanuz, A103091 (Div. 4, 01/28/04)

Panel Attorney: Joseph Shipp

No Contact Order: The trial court's no-contact order between defendant and minor sex-offense victim was unauthorized. Although a no-contact order may be imposed as a condition of probation under Penal Code § 1203.1, subd.(I)(2) or (j), there is no like provision that applies when the defendant is sent to state prison.

FDAP Attorney: Jonathan Soglin

People v. Orozco, A103409 (Div. 5, 10/18/04)

Panel Attorney: Colleen Rohan

Multiple Sentencing Errors: The court of appeal reduced appellant’s 67 year sentence to 50 years because he agreed to waive jury on the condition that he would not received a term greater than 50 years. The court also found that the consecutive determinate term, pursuant to Penal Code section 1170.1, must run concurrently to the indeterminate life term and that only one of the three on-bail enhancements could be imposed pursuant to *People v. McNeely* (1994) 28 Cal.App.4th 739, 743.

FDAP Attorney: Fran Ternus

People v. Heller, A102566 (Div. 1, 10/18/04)

Panel Attorney: Linda Buchser

Multiple Convictions: Where appellant had already been convicted of a lewd act (Pen. Code, § 288) as a lesser included offense of continuous sexual abuse (Pen. Code, § 288.5), the appellate court reversed another conviction of an additional lesser attempted lewd act (Pen. Code, § 288), following the rule of *People v. Pearson* (1986) 42 Cal.3d 351, 355 that “multiple convictions may not be based on necessarily included offenses.”

FDAP Attorney: Richard Braucher

People v. Cota, A102608 (Div. 4, 5/24/2004)

Panel Attorney: Rex Williams

Old “5-Year” Rule: The court of appeal reduced appellant’s 10-year sentence for multiple grand thefts to 9-years under old “5-year” rule. The original sentence included 6 years of subordinate consecutive terms for 9 grand thefts (9 x 8 mos. each). However, because the underlying offenses occurred in 1996-1997, the aggregate sentence was subject to the “5-year” rule of former Penal Code §1170.1, subd. (a), under which the subordinate consecutive terms for non-violent felonies could not exceed 5-years. (That limitation was abolished in 1998.)

FDAP Attorney: Brad O’Connell

People v. Villegas, A104208 (Div 5, 8/11/04)

Panel Attorney: Laretta Marie Oravitz-Komlos

Sex Registration: The court of appeal strikes a sex offender registration requirement from the minutes of sentencing because it was not mandated by statute in this statutory rape case nor orally ordered by the court when it revoked probation and sent appellant to prison. While noting that “the court’s oral pronouncement does not invariably control over contrary statements contained in the clerk’s transcript,” the appellate court corrected the evident clerical error in this case. It also noted that the prosecution indicated it would not request a registration requirement as part of the plea bargain.

FDAP Attorney: Kathryn Seligman

People v. Sloan, A100481 (Div. 4, 6/23/04)

Panel Attorney: Stephen Bedrick

Murder By Means Of Drive-By Shooting: The court of appeal reduced defendant’s 20 years-to-life sentence for 2nd degree murder by means of drive-by shooting (Penal Code § 190, subd.(d)) to a standard 15 years-to-life standard sentence for 2nd degree murder because the jury never actually returned a drive-by shooting finding and did not make any other findings supporting the enhanced penalty.

FDAP Attorney: Jonathan Soglin

People v. Campbell (2004) 119 Cal.App.4th 1279

Panel Attorney: Carolyn Fershtman

Proposition 36: The defendant pled guilty to possession of methamphetamine and was placed on probation and ordered to participate in drug treatment pursuant to Proposition 36. After his second drug-related probation violation, the trial court permitted him to enter

outpatient (rather than residential) treatment if he would stipulate that he would go to prison for the three year upper term if he had any further probation violations. He then had a non-drug-related probation violation and was sent to prison for the upper term per the stipulation; the trial court gave no other reasons for imposing the upper term. The court of appeal held that the sentence following the second revocation was unauthorized, reasoning that the trial court erred in permitting the defendant to select outpatient treatment in exchange for agreeing to a three-year upper term upon subsequent violations. Because this was against public policy, the appellate court refused to enforce it or to hold that the defendant was estopped from challenging its enforcement. The case was remanded for resentencing so that the trial court could properly exercise its sentencing discretion in compliance with the procedures outlined in Proposition 36 and the rest of the Penal Code.

FDAP Attorney: Kathryn Seligman

People v. Davey (2004), previously published at 122 Cal.App.4th 1548

Panel Attorney: Alex Green

Indecent Exposure / Section 654: The defendant pleaded guilty among other things to four counts of indecent exposure. In a case of first impression, the court of appeal held that pursuant to Penal Code § 654, a single incident of indecent exposure constitutes only one offense for purposes of sentencing, regardless of how many people witnessed it. The Supreme Court has granted review.

FDAP Attorney: Richard Such

People v. Butler (2004), previously published at 122 Cal.App.4th 910

FDAP Attorney: Louisa Havstad

Blakely Applies To California DSL: Division Two held, in this now depublished opinion pending Supreme Court review, that the United States Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403, 124 S.Ct. 2531] applies to California's determinate sentencing laws.

People v. Guevara, A101011 (Div. 2, 11/5/04)

FDAP Attorney: Richard Such

Failure To State Reasons: The court of appeal concludes that the trial court erred in failing to state reasons for imposing the upper term on a number of offenses, and that trial counsel was ineffective for failing to object because it appears that the trial court may have imposed a lesser aggregate sentence if there had been an objection.

People v. Rosales, A103004 (Div. 5, 11/17/04)

Panel Attorney: Christine Levin

Failure To State Reasons: The trial court failed to state its reasons for running two terms consecutively. The court of appeal reversed, and noted that it could reach the issue despite trial counsel's failure to object because there was no meaningful opportunity to do so within the meaning of *People v. Scott (1994) 9 Cal.4th 331, 352-353*, and *People v. Gonzales(2003) 31 Cal.4th 742, 752*.

FDAP Attorney: Mark Shenfield

People v. Franklin, A102719 (Div. 5, 11/17/04)

Panel Attorney: Robert Bryzman

Professionalism: The trial court imposed the upper term for the manufacture of methamphetamine based in part on its belief that the offense showed sophistication or professionalism. The court of appeal found the evidence insufficient to support that factor and reversed, concluding that even though the trial court gave two other reasons for the upper term, there was a reasonable possibility it may have imposed a more favorable sentence in the absence of its error.

FDAP Attorney: Mark Shenfield

Presentence Credits

People v. Susoeff, A102963 (Div. 4, 2/29/04)

Panel Attorney: Steven Lubliner

Residential Treatment Program: The trial court revoked probation and sentenced appellant to prison after he absconded from a residential treatment program. It refused, however, to grant presentence credit for the time spent in the program. The court of appeal reversed, concluding that appellant had not waived his right to the credits.

FDAP Attorney: Mark Shenfield

Restitution, Fines, And Fees

People v. Buitrago, A103172 (Div. 4, 5/20/04)

Panel Attorney: Wilder Lee

Law Enforcement Agencies: The trial court ordered appellant, convicted of selling methamphetamine, to pay \$12,000 restitution to San Mateo County Narcotics Task Force for money used to purchase methamphetamine from him, which was never recovered. Following its earlier decision in *People v. Torres* (1997) 59 Cal.App.4th 1, the court of appeal held this was error as the Legislature did not intend a law enforcement agency to be a “direct victim” under Penal Code section 1204.4.

FDAP Attorney: Richard Braucher

People v. Hanson, A102471 (Div. 1, 1/30/04)

FDAP Attorney: Kathy Kahn

Law Enforcement Agencies: The trial court awarded restitution for CHP's costs of responding to defendant's false bomb threats (Pen. Code, § 148.1.) The CHP is not, however, a “direct victim” under these facts, nor is it the kind of economic loss for which a government agency may recover. Rather, it is the cost of prosecution and investigation, which is not reimbursable under *People v. Baker* (1974) 39 Cal.App.3d 550. Further, the award may be reviewed in spite of a failure to object below because it is unauthorized.

People V. Slagle, A103232 (Div. 5, 7/10/03)

Panel Attorney: David Krueger

Parole Revocation Fine: The People conceded on appeal that the trial court erred in imposing a higher parole revocation fine than the restitution fine. Because this is an unauthorized sentence under Penal Code § 1202.45, it may be raised for the first time on appeal.

People v. Wynn, A105163 (Div. 4, 9/29/04)

Panel Attorney: Charles Johnson

Improper Assessment: The court of appeal reduced appellant's \$7200 restitution fine to \$1600 because the trial court, in using the statutory formula recommended by Penal Code § 1202.4, subd.(b)(2), erroneously assessed appellant for a previously imposed restitution fine.

FDAP Attorney: Fran Ternus

People v. Sprankle, A103850 (Div. 2, 10/7/04)

Panel Attorney: Allison Ting

Sufficiency Of Evidence: Defendant, convicted of receiving stolen property -- some, but not all of the property stolen in an earlier burglary of an individual's “storefront residence” --

was ordered to pay restitution for all of the stolen and damaged property taken in the burglary, for the resident's time off from work, and for the installation of a security system. The appellate court strikes the victim restitution order as all of these losses did not result from defendant's conduct; there was no evidence that he committed the burglary, and only some -- but not all - of the stolen property was found in his possession. Also, there was no showing that his conduct deprived the victim of piece of mind and security in his own home, thus causing him to install the security system. Finally, the court noted that on remand, the trial court might order defendant to pay restitution for the specific property found in his possession but not recovered by the victim.

FDAP Attorney: Kathryn Seligman

People v. Naranjo, A102038 (Div. 5, 6/10/2004)

Panel Attorney: David Krueger

Sufficiency Of Evidence: The court of appeal significantly reduced victim restitution in this software piracy case (from \$147,264 to \$25,944), finding that several aspects of the victim company's estimates of lost profits were “pure speculation” and not supported by substantial evidence.

FDAP Attorney: Brad O’Connell

People v. Pacheco, A103507 (Div. 5, 5/24/04)

Panel Attorney: Andrew Cappelli

Additional Fine After Revocation Of Probation: At the time it granted probation, the trial court imposed a \$600 restitution fine. When it later revoked probation, it imposed another restitution fine of \$400. Since there had already been a restitution fine imposed, the court of appeal struck the second restitution order as unauthorized.

FDAP Attorney: Brad O’Connell

People v. Lewis, A102515 (Div. 1, 2/24/04)

FDAP Attorney: Mark Shenfield

Attorney’s Fees: The trial court ordered appellant to reimburse the county for the cost of her defense. The court of appeal reversed because the trial court failed to hold a hearing as mandated by Penal Code §987.8, subd.(b). It also reduced a drug program fee because it exceeded the maximum permitted by Health & Saf. Code § 11372.7, subd.(a)).

People v. Ibarra, A102348 (Div. 5, 3/16/04)

Panel Attorney: Paul DeMeester

Additional Fine After Revocation Of Probation: The trial court imposed a \$200 restitution fine when it granted probation, but increased it to \$600 when it later revoked probation. The court of appeal struck the latter, and also held that the issue could be raised for the first time on appeal because the second fine was unauthorized.

FDAP Attorney: Mark Shenfield

People v. Solomon, A103134 (Div. 5, 4/9/04)

Panel Attorney: Ross Thomas

Consolidated Cases: The trial court imposed two restitution fines for two cases, which had been consolidated for trial. The court of appeal struck one of them, citing *People v. Ferris* (2000) 82 Cal.App.4th 1272.

FDAP Attorney: Mark Shenfield

Parole

In re Scott (2004) 119 Cal.App.4th 871

Panel Attorney: Michael Sattris

Substantial Evidence: The court of appeal held that the parole board 's decision that this second-degree murderer was unsuitable for release was unsupported by substantial evidence.

Juveniles

In re Cristina M., A103251 (Div. 1, 4/19/04)

Panel Attorney: Jacques LeBoeuf

Manzy. W.: The appellate court found that the juvenile court committed error by failing to declare whether the present offenses were misdemeanors or felonies.

FDAP Attorney: Jonathon Soglin

In re Colleen S., 115 Cal.App.4th 471

FDAP Attorneys: Renee Torres and Kathy Kahn

Suspension Of Driver's Licence: Under Vehicle Code § 13203, a juvenile court (or any other court, for that matter) cannot suspend a driver's license for a longer period than could the DMV. The court of appeal therefore vacated the trial court's order suspending the

juvenile's license for the duration of her wardship following an adjudication for a misdemeanor, manslaughter, based on a car accident. Moreover, the appellate court could reach the issue even though there was no objection below because it "presented . . . a pure question of law and implicates an explicit legislative directive nullifying the order that has been entered, . . ."

In re Monique O., A104447 (Div. 2, 11/16/04)

Panel Attorney: Donna Hall

Double Punishment: The trial court sustained allegations that appellant committed violations of Vehicle Code § 10851(a) (unlawful driving and taking of a vehicle) and Penal Code § 496 (receiving stolen property -- i.e. the same vehicle). The court of appeal reversed the receiving stolen property finding because it found a "virtual certainty" that the unlawful taking section 10851(a) allegation was sustained based on a finding that the minor stole the vehicle, and one cannot be convicted of receiving and stealing the same property.

FDAP Attorney: Kathryn Seligman

In re Corey P., A106780 (Div. 4, 10/25/04)

Panel Attorney: Gloria Cohen

Maximum Confinement Time: The juvenile court erred in failing to calculate the maximum term of confinement for the minor, who was removed from his parents home and committed to a juvenile camp. Because the minor sustained only one offense and the juvenile court had calculated credits for time served, the court of appeal calculated maximum confinement time and ordered that the dispositional order be so modified.

FDAP Attorney: Kathryn Seligman

Antoinette M. et al v. Oscar S., A101776 (Div. 1, 9/24/04)

Antoinette M. et al v. Gerardo M., A101931 (Div. 1, 9/24/04)

Panel Attorney: Scott Drexel (for Gerardo M.)

FDAP Attorney: Kathryn Seligman (for Oscar S.)

Confidentiality Of Juvenile Court Records: Plaintiffs in a civil lawsuit for damages against the Napa School District and two students, both wards of the juvenile court, sought access to the juveniles' confidential court records. They asserted that the two wards, while in middle school, had sexually harassed their daughter, a fellow middle school student. Although their daughter was not the victim of the crimes for which Oscar S. and Gerardo M. had been adjudicated wards, they still sought to review their records for evidence of "related" misconduct. The court of appeal affirmed the juvenile court's finding that the wards' interest

in confidentiality outweighed the civil plaintiffs' interest in gaining access to these records.

In re Eduardo R., A105422 (Div. 1, 8/26/04)

Panel Attorney: David Harrison

Gang-Related Conditions Of Probation: The trial court prohibited appellant from associating with known gang members as a condition of probation. The court of appeal directs the trial court to reconsider that condition because appellant's brother is a gang member.

FDAP Attorney: Paula Rudman

In re Ivan G., A104327 (Div. 1, 7/14/04)

Panel Attorney: Alan Stern

Vague Probation Conditions: As a condition of probation, the trial court ordered the juvenile not to possess “any weapons of any kind, no firearms or any other weapons or anything that even looks like a weapon or could be used as a weapon.” The court of appeal found this condition to be unconstitutionally vague and overbroad and remanded the case for modification of the condition in accordance with its opinion. It also refused to find a waiver of the issue due to the lack of objection below in light of the constitutional nature of the claim.

FDAP Attorney: Stephanie Clarke

In re Joseph C., A100526 (Div. 3, 3/19/04)

Panel Attorney: Arthur Wong

Deferred Entry Of Judgment: Although the prosecutor filed a declaration finding the minor eligible for participation in the deferred entry of judgment program, the juvenile court never considered it and the matter was eventually resolved by the entry of a plea. The court of appeal reversed. Although the juvenile court had discretion to deny deferred entry of judgment to an eligible minor, it abused its discretion by failing to consider that option.

FDAP Attorney: Mark Shenfield

Mental Health

In re (Kanuri) Qawi (2004) 32 Cal.4th 1

FDAP Attorney: Renee Torres

Psychotropic Drugs: The Supreme Court holds that a defendant committed as Mentally Disordered Offender (MDO) has a right to refuse the involuntary administration of psychotropic drugs unless there is a specific judicial determination that he is either (1) “incompetent or incapable of making decisions about his medical treatment” or (2) “dangerous within the meaning of Welfare and Institutions Code section 5300.” It points out that an ordinary MDO adjudication is not enough because it does not require any recent overt act or other proof of recent dangerousness. On remand to the court of appeal to determine whether the circumstances of the case met these criteria for involuntary administration of medications, the AG conceded that they were not and the appellate court issued a writ of habeas corpus barring such medications unless there was such a judicial finding of incompetence or dangerousness.

Conservatorship of Joan B., A103812 (Div. 5, 4/13/04)

Panel Attorney: Paul Bernstein

Sufficiency of the Evidence: The imposition of special disabilities (rights to drive, enter contracts, refuse treatment, possess weapon) on an LPS conservatee was reversed as not supported by record. The case was remanded for further proceedings.

Parental Rights

In re Kevin C., A102312 (Div. 2, 4/22/04)

Panel Attorney: Aida Aslanian

Reasonable Efforts To Avoid Removal From Parental Custody: Welfare and Institutions Code § 361, subd. (d), provides that no child be removed from parental custody without a finding that reasonable efforts were made to prevent or eliminate the need for removal. In this case, the department did virtually nothing to avoid the need for removal. However, since the child had already been returned to the custody of the parents, a remand for a new dispositional hearing was not necessary. But if child is removed again in the future, this period may not be considered in calculating the parents’ eligibility for future services.

FDAP Attorney: Fran Ternus

In re L.P., A102176 (Div. 4, 4/12/04)

Panel Attorney: Elysa Perry

Dependency /Visitation: The court of appeal held that the juvenile court had abused its discretion when it gave the legal guardian the unfettered discretion to decide whether the

mother could visit minor. The court reached the merits of this claim despite the lack of an objection in the juvenile court.

FDAP Attorney: Jonathan Soglin