

PANEL NEWS ALERT - MARCH 2006

Grant of Certiorari in *Cunningham v. California*

As undoubtedly all panel attorneys are aware, the United States Supreme Court has granted certiorari to review the question whether choice of the upper term under the California sentencing scheme falls within the scope of *Blakely v. Washington* (2004) 542 U.S. 296.

ADI continues to adhere to its previous advice in *Blakely After Black*, which can be found here. Please study the guidance closely; it is very important to protecting clients' rights.

Blakely held a state may impose a sentence on the basis of specified facts, other than prior convictions, only if they have been admitted by the defendant, or if a jury (or another trier, if the defendant has waived jury) has found them true beyond a reasonable doubt. In *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held *Blakely* does not invalidate the California sentencing scheme as to the choice of an upper term or consecutive sentencing. The case in which the United States Supreme Court has granted certiorari is *People v. Cunningham* (2005, unpublished, No. A103501) 2005 Cal.App.Unpub. Lexis 3383, cert. granted sub nom. *Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___ U.S. ___ [2006 U.S. Lexis 1136].) *Cunningham* involves only imposition of the upper term.

The grant of certiorari in *Cunningham* does not affect *Black*'s validity as binding authority on California courts unless and until the United States Supreme Court disagrees with it on the merits. At this time *Black* remains the law in California. We summarize the main points made in our *Blakely After Black* memo:

- (1) Until the United States Supreme Court definitely rules on the California sentencing scheme, counsel should preserve *Blakely* issues (explicitly acknowledging, however, that *Black* is binding law in California). To do so, they must raise them properly in Court of Appeal opening brief and must petition for review to the California Supreme Court.
- (2) If the United States Supreme Court holds *Blakely* invalidates the sentencing scheme as to choice of the upper term, all cases not yet final on direct appeal when *Blakely* was decided (June 24, 2004) will be covered by *Cunningham*. A case is "final on direct appeal" when the time for petitioning for certiorari has expired – normally, 90 days after denial of review by the California Supreme Court.

(3) It is not necessary to petition for certiorari in the United States Supreme Court in order to preserve the issue for later relief in either federal or state courts. Cunningham does not change that. If in a particular case counsel believes such a petition is important to protecting the client – or if counsel has any doubt about the matter – he or she should contact the assigned ADI staff attorney. This is especially important if the case is getting close to the certiorari deadline (as stated above, normally 90 days after denial of review by the California Supreme Court).

(4) For post-remittitur cases to which Blakely applies (i.e., those not yet final on direct appeal when Blakely was decided), no immediate action is necessary in most cases. Until Cunningham is decided, seeking state habeas corpus or recall of the remittitur would be futile – and potentially risky to the client because of the successive petitions rule. Counsel should, however, keep a close eye on the one-year statute of limitations for federal habeas corpus. In most situations the one-year clock starts running 90 days after denial of review by the California Supreme Court. Counsel should contact ADI for cases close to that deadline. We have considerable materials on the subject and can provide forms for federal habeas corpus petitions, which the client would normally file in pro per.

(5) Keep in mind the pointers we gave about “Blakely in Real Life” in our Blakely After Black memo. Counsel should weigh the practical effects on their clients of the various courses this sojourn might take, so that they can make decisions that are not only legally correct, but also wise, and give clients a realistic view of what might happen to them. We are aware that attorneys have received somewhat differing advice from various appellate projects on certain procedural aspects. Please do not hesitate to contact the assigned ADI staff attorney if you think any of your clients will need procedures other than those outlined here and in Blakely After Black. I surely understand attorneys’ confusion and uncertainty when they try to keep their footing on the ever-shifting landscape of sentencing jurisprudence. I hope the guidance here and the much more extensive discussion in Blakely After Black will provide the background for counsel to think through the issues in a clear, correct, and commonsense way.

New Voluntary Fax Filing Pilot Program in Division One

Division One of the Fourth Appellate District has approved a new pilot program allowing attorneys voluntarily to file specified documents by fax rather than mail. For more information on this program, [click here](#).

Direct Deposit Option

Very good news for panel attorneys: As you may already have been notified, the Administrative Office of the Courts will give attorneys the option of having their compensation claim payments directly deposited to their accounts, thus saving transmission time and the need for a physical deposit on the attorney's end. The AOC e-mail says:

We are pleased to announce that direct deposit of CAC compensation is now available to all CAC panel attorneys. This payment option will allow CAC panel attorneys access to their funds two or three days sooner than under the current payment system. This is a voluntary payment program where participants must complete and submit an enrollment authorization form.

Following are the documents sent to the CAC panel attorneys announcing the direct deposit program:

Direct Deposit Memo (.pdf)

Direct Deposit FAQ (.pdf)

Enrollment Authorization Form (.doc)

Panel News Alert - September, 2005

Special Panel Rate for Lexis Users

ADI has negotiated a special rate with Lexis for attorneys on the panel. Please contact Jay Nelson at (619) 278-8835 for packages and pricing.

Blakely After Black

Click [here](#) for a memo from ADI's director offering guidance on handling Blakey cases in the aftermath of *People v. Black* (June 20, 2005) 35 Cal.4th 1238. It covers cases on direct appeal, post-appeal cases, and the future. Attorneys are encouraged to call ADI if they have questions.

Division Three Mail Filings Division Three requires attorneys to inform the clerk's office by telephone when they are relying on rule 40.1(b)(3)(A) of the California Rules of Court for filing an opening brief. That rule provides a brief is deemed timely filed if the time had not expired when it was mailed by priority or express mail, as shown by the postmark or postal receipt. If the attorney does not call and the brief does not arrive before time

runs, the clerk's office will issue a rule 17 notice. (If there has already been a rule 17 notice, the court will not issue a second, but will contact ADI about dismissing the appeal or, alternatively, relieving counsel without compensation and appointing another attorney.)

Addressing briefs to trial counsel or the superior court judge by name When serving a brief on trial counsel in a public defender's office or district attorney's office or on the superior court, be sure to include the name of the individual attorney or judge involved in the trial. It is a time-consuming job for the clerks in those organizations to go back through closed records and try to identify the attorney or judge. Appellate counsel has the information right on the transcript and can do so much more efficiently. Please include this information on the proof of service, as well. ADI is helping those organizations resolve this problem.

Sade C. briefs in Division One – seeking time for a client who wants to file a pro per brief Division One dismisses the appeal after receiving County Counsel's motion to dismiss a Sade C. case. It does not ordinarily allow time for the client to file a pro per brief (unlike Divisions Two and Three). If the client actually has said he or she intends to file a pro per brief, counsel should advise the court of that when filing the Sade C. brief and request time for filing it. The request should not be made routinely, but only when the client has expressed an actual and credible intention of filing it. "Routine" requests, without a specific statement about the client's intent, will be denied.

New Rule Changes & Revised Judicial Council Forms - July, 2005

New and amended rules to the California Rules of Court and updated Judicial Council forms are now available online. The new rules and forms were effective July 1.

California Supreme Court Ruling

In *People v. Howard* (January 27, 2005) 34 Cal.4th 1129 The California Supreme Court recently held violation of Vehicle Code section 2800.2 [driving with a willful or wanton disregard for the safety of persons or property while fleeing from a pursuing police officer] is not inherently dangerous for purposes of second degree felony murder. This decision should of course be brought up where applicable in any active case. Because it affects the definition of the offense, it also should be fully retroactive, at least to crimes committed after the 1998 amendment to section 2800.2 that added subdivision (b). Please go to the Howard Resource Page under Appellate Practice Articles to review a more detailed memo from Elaine A. Alexander and additional resources prepared by ADI and FDAP.

Supreme Court Expands Web Site Information in Pending Cases On Wednesday, the California Supreme Court announced a new Internet service that offers links to the complete published Court of Appeal opinions in cases that the high court has accepted for review. (<http://www.courtinfo.ca.gov/opinions/revgranted.htm>) The state's high court accepts appeals in more than 5,000 Court of Appeal cases each year. Although the opinions in those cases are already on the Internet, they have not been linked to the Supreme Court's weekly actions to accept cases for review until now. "We believe that the new service will be a helpful, expedited way for appellate practitioners, and even trial or transaction attorneys, to assess what issues are under review by the Supreme Court," said Frederick "Fritz" Ohlrich, Clerk of the Court. To access the new feature, viewers should go to the Opinions section of the California Courts Web site at <http://www.courtinfo.ca.gov/opinions/>. The next step is to click on "Review Granted Published Opinions," the last choice on the left-hand navigation bar. The new service was suggested by San Francisco appellate lawyer Paul D. Fogel, a member of the Supreme Court's Advisory Committee on Appellate Practice. The California Supreme Court offers these other online information services:

- A case information system with complete docket information about all pending Supreme Court cases and with e-mail notification of key actions in each case:
<http://appellatecases.courtinfo.ca.gov>.
- All state appellate court opinions published in the California Official Reports since 1850, in a fully searchable database:
<http://www.courtinfo.ca.gov/opinions/continue.htm>.
- Notice of forthcoming court opinions and current calendars, minutes, and a list of actions taken at the court's weekly conferences:
<http://www.courtinfo.ca.gov/courts/supreme>.
- All Supreme Court and Court of Appeal published opinions issued in the past 120 days. Supreme Court opinions are made available precisely at the time of filing, with filing times announced in advance for the convenience of litigants, the public, and the press:
<http://www.courtinfo.ca.gov/opinions>.
- The Internal Operating Practices and Procedures of the court, part of a 57-page booklet that provides an overview of the court's work, membership, and history:
<http://www.courtinfo.ca.gov/courts/supreme/iopp.htm>.
- Biographies and photographs of the court's seven justices:
<http://www.courtinfo.ca.gov/courts/supreme/justices.htm>.
- Detailed information and applications for court-appointed counsel in death penalty appeals: <http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm>

COURT PERMISSION REQUIRED TO APPEAR FOR ATTORNEY OF RECORD Our court has asked that the court's permission be obtained before counsel who is not attorney of record appears or makes a filing on behalf of appointed counsel. Permission is not required to associate counsel to assist on a case if associated counsel will not be

appearing or making a filing. The court recognizes that the need occasionally arises for an attorney to "pinch hit" for another. But the court's obligation to appoint counsel for indigent litigants entails not only the initial appointment, but approval of subsequent counsel appearing on the client's behalf. ADI expects strict compliance with this requirement. Extension of Time Requests The court is tightening up on extension requests and has asked us to pass on some reminders. All extension requests should be specific about the reasons for the request and the progress on the case to date. A request for fewer than 30 days, especially in dependency cases or in cases with prior extensions, might be more successful than a "routine" 30-day one.

In criminal cases, extension requests should include the following information:

- Total pages of record.

- Number of volumes of record.

- Client's sentence.

* Use of the form on ADI's Web site is helpful In dependency cases, counsel should include all of the information on ADI's extension request form as provided in the Juvenile Appeals section of our site.

Updating boilerplate and forms to include current rule references

As of January 1, 2004, the criminal rules of the California Rules of Court were revised and renumbered. Following the revisions, we noted that many attorneys nevertheless continued to use boilerplate statements of appealability and other procedural passages referring to the rule numbers and provisions as they were before January 2004. For example, many statements of appealability still refer to "rule 31," the former rule dealing with notices of appeal, rather rule 30, the current one. Attorneys of course should make sure their standard language referring to rules, and indeed any other references to rules in their pleadings, are accurate. The ADI Web site has a chart comparing the former and current rule provisions: http://www.adi-sandiego.com/ADI_News/RulesChanges.htm

Assistance from Innocence Projects on Cases Potentially Involving a Factual Innocence Investigation:

Whenever a case may involve, in your judgment, a factually innocent client, consult ADI and consider referring the case to the law school innocence project in the region. In the Fourth Appellate District and other Southern California areas, that would be: California Innocence Project

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<http://www.cwsl.edu> Northern California cases should be referred to the Northern California Innocence Project, <http://www.ncip.scu.edu>. ADI can help you determine whether the innocence investigation is within the scope of the appellate appointment. If it

is, the innocence project may be able to give you valuable guidance; if it is not, the project may be able to take over the investigation.