

## **FEBRUARY 2009 – ADI NEWS ALERTS**

**By**

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This alert covers several topics of importance to members of the Fourth Appellate District appointed counsel panel:<sup>1</sup> state budget and claim payments; *In re Gomez*, which may call for action by attorneys in now-final cases with *Blakely-Cunningham* issues; appellate rule changes effective January 1, 2009; court notices; reminders to panel attorneys; upcoming events; and special kudos to panel attorney Rich Pfeiffer for an impressive string of parole release victories. Some of the matters are amplified in separate memos accompanying this alert.

### **Payments of claims transmitted to AOC on or after January 27 to be held and not paid for at least 30 days**

The Administrative Office of the Courts has asked us to transmit the accompanying message. Basically, it states that claims the projects transmitted to the AOC on or after January 27 will be held in the Controller's office and not paid for at least 30 days. Panel attorneys are automatically notified, either through the e-claims system or by ADI, when a claim is transmitted. Any attorney who has a question as to when a particular claim was transmitted may call ADI.

On a person-to-person note, all of us at ADI understand this is going to mean hardship to many panel attorneys and want to express our solidarity with you. I hope that the forewarning about the situation offered some chance to prepare. I do know that claims came in at a record rate in January, and we in turn devoted much of our time and attention to processing them as expeditiously as possible, in order to ensure that maximum compensation was paid while the state had the resources. Another step to take: panel attorneys should continue to submit claims as usual, so that they can be ready for immediate payment when the state resumes issuance of checks and deposits.

### ***In re Gomez*: Habeas corpus available to raise *Blakely-Cunningham* issues in cases final after *Blakely* but before *Cunningham***

In the case of *In re Gomez*, decided February 2, 2009, the California Supreme Court held that defendants whose cases became final after *Blakely v. Washington* (2004) 542 U.S. 296 but before *Cunningham v. California* (2007) 549 U.S. 270 are entitled to

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<sup>1</sup>As a reminder: Counsel are responsible for all matters covered in e-mail alerts, newsletters, and other information made available to the panel. Past alerts and newsletters are at [http://www.adi-sandiego.com/news\\_alerts.html](http://www.adi-sandiego.com/news_alerts.html) and [http://www.adi-sandiego.com/news\\_newsletters.html](http://www.adi-sandiego.com/news_newsletters.html).

assert rights under those cases on habeas corpus.<sup>2</sup> The court found that *Cunningham* merely applied *Blakely* to the California DSL and did not announce “new law”; thus nothing in the principles of *Teague v. Lane* (1989) 489 U.S. 288 would bar retroactive application of that case. The accompanying memorandum provides guidance to attorneys whose former clients may be in that category. (Parenthetically, ADI filed an amicus curiae brief in the case.<sup>3</sup> The result was highly gratifying and hopefully, with the follow-up efforts of appointed counsel, will benefit a number of our clients.)

### **Amendments to California Rules of Court effective January 1, 2009**

Accompanying this alert is a chart setting forth the important relevant changes in the California Rules of Court as they affect appointed appellate counsel. Some of the highlights include:

- New requirements for judicial notice (rule 8.252).
- Rules for finality in criminal, habeas corpus, and mandate proceedings no longer in rule 8.264, but now in rules 8.366, 8.387, and 8.430, respectively.
- Certificate of interested parties now required in criminal appeals where defendant is a corporation or other entity. (New rule 8.361.)
- Habeas corpus rules reorganized and coverage of procedures greatly expanded: now cover not just petitions filed by defendants in pro per (new rule 8.380) and attorneys (new 8.384), informal responses (new 8.385(b)), and remittiturs (new 8.387(f)), but also orders to show cause (new 8.385(c)), returns (new 8.386(b)), traverses (new 8.386(d)), evidentiary hearings (new 8.386(f)), and filing and finality of decisions (new 8.387), as well as other topics.
- Former rule 8.490 on writs of mandate, prohibition, and certiorari now broken into several shorter rules, covering petitions (new 8.486),

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<sup>2</sup>Finality is defined as the date a petition for certiorari in the United States Supreme Court was denied or the time for petitioning for certiorari to the United States Supreme Court expired (90 days from the time a petition for review was denied by the California Supreme Court).

<sup>3</sup><http://www.adi-sandiego.com/PDFs/ADI%20amicus%20brief%20in%20Gomez.pdf> .

oppositions (new 8.487), certificates of interested parties (new 8.488), notice to trial court (new 8.489), decisions (new 8.490), sanctions (new 8.492), and costs (new 8.493).

- Copy of any Court of Appeal order on which Supreme Court review is sought required to be appended to petition for review. (Rule 8.504(b)(5).)
- Permissible length of reply brief on merits in Supreme Court expanded from 4,200 to 8,400 words. (Rule 8.520(d).)
- Amicus briefs required to disclose fact a party wrote or funded all or part of it and other sources of funding for the brief. (Rules 8.520(f).)

### **Court reminders**

*Judicial notice motions must be separately bound:* The court reminds us that requests for judicial notice must be separately bound motions, not part of a brief. (Rules 8.252(a)(1), 8.366(a), 8.470, 8.520(g).) Recently improperly filed requests have increased, delaying cases.

*Division Two: record correction requests must be sent to main courthouse, not branch:* Requests to correct omissions in the normal record under rule 8.340(b) are still being sent to the branch court, rather than the appellate department of the main courthouse. This causes a delay in obtaining the omitted record because the branch courts do not handle the requests. A copy should also be sent to the Court of Appeal.

### **ADI reminders**

*Always check for credits issues before requesting ADI Wende review:* Before requesting that an ADI staff attorney review the record for issues, the panel attorney must check the award of custody credits. In some cases we've found the attorney either had not checked the credits at all or had checked only for simple mathematical errors, but not for legal issues. In a guilty plea case, where the credits amount is shown in the written plea bargain, do not assume they are correct or that you are precluded from having them corrected because they are a negotiated part of the bargain; in some circumstances they *can* be corrected, as has been our experience.

*When e-mailing ADI about a case, include case number in title:* If you are communicating with a staff attorney about a case via e-mail, it is important to include the case number in the title of the e-mail (the same goes for phone messages or snail mail, for that matter). That information will help the staff attorney, and especially anyone covering in that person's absence, immediately to identify the case and locate our records about it.

## **Upcoming events**

*2009 CADC Annual Conference and Seminar:* The conference will be March 27 and 28, 2009, at the Bahia Resort Hotel, San Diego, CA. Further information is at [http://www.cadc.net/assets/lightwindow/2009\\_annualseminar.html](http://www.cadc.net/assets/lightwindow/2009_annualseminar.html).

*2009 Defender Dinner:* The annual dinner sponsored by ADI and Federal Defenders of San Diego, Inc., will be April 24, 2009, at the Westin San Diego, 400 West Broadway, San Diego, CA. Details will be forthcoming.

## **Rich Pfeiffer, slayer of barriers to parole**

Normally we offer kudos to our panel attorneys in a dedicated forum, rather than a news alert.<sup>4</sup> However, a very impressive string of recent victories by Rich Pfeiffer before the Board of Parole Hearings and in court challenging denial of parole to life prisoners calls for exceptional recognition. Staff attorney Cheryl Geyerman has written an account of his successes and his great commitment to clients in the accompanying tribute. And I have appended a postscript – a note from one of those clients, describing what his release has meant to him and his family.

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<sup>4</sup>See [http://www.adi-sandiego.com/recent\\_victories.html](http://www.adi-sandiego.com/recent_victories.html) on the ADI website. By the way, we suggest you visit that page often. Reviewing issues the court has agreed with gives you insight into possible approaches toward your own cases and hones your issue-spotting skills. And when you may want to take advantage of the opportunity to drop a note of congratulations to a victorious attorney. Positive reinforcement is highly valued in our area of endeavor, which, statistically speaking, all too often ends in defeat.