FEBRUARY 2010 – ADI NEWS ALERT
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by
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This alert[1] could be entitled "Life Is Never Dull – or Simple." It reports on no fewer than three recent changes in the law: (1) recent developments concerning the January 25 amendment to Penal Code section 4019[2]; (2) a California Supreme Court case on the constitutionality of Proposition 83's 2006 changes to the SVP law; and (3) a Court of Appeal decision holding *Cunningham* retroactive to *Apprendi*.

Additionally, accompanying the alert are (1) an article by senior staff attorney Howard Cohen and me on arguing *Watson* error more effectively; (2) a synopsis by staff attorney Jamie Popper of the November 20, 2009, Pacific Juvenile Defender's Conference Roundtable; and (3) a summary of recent changes in the law, by Garrick Byers of the Fresno Public Defender. Note, too, the links in the cover e-mail that accompany this alert, referring to materials on ethical issues.

SBx3 18's modifications to Penal Code section 4019: Cooperation or litigation? Retroactive and if so to when?

As reported more fully in our February 2 alert, the January 25 amendment to Penal Code section 4019 enacted in SBx3 18 increases the allowable pre-sentence credits for many prisoners. This alert recounts some developments concerning that law.

We have been in contact with public defenders in our counties, asking them what their plans are, so that we can keep appellate attorneys informed. We urged them to pursue remedies at a local level and provided sample arguments. We were told that in San Diego, San Bernardino, Riverside, and Orange Counties some action in some cases would be taken, often in cooperation with the district attorney and superior court. We are uncertain about Imperial and Inyo.

For the most part, the position agreed on has been that the law applies to those whose judgments were not yet final for purposes of appellate review as of January 25, although local action may not cover all of those cases. Nevertheless, in a February 16

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[1]My usual 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 and http://www.adi-sandiego.com/news_newsletters.html.

[2]This amendment was enacted by SBx3 18, the subject of the February 2 alert: http://www.adi-sandiego.com/news_alerts.html .

news release,[3] Attorney General Brown announced his office is taking the position that the amendment to section 4019 is prospective only:

> District Attorneys and county counsel have differing views on whether the amendment is retroactive (i.e., applies to the time prisoners were confined before January 25) or prospective (i.e., applies only to the time prisoners are confined after January 25) . . . .
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> [The Attorney General's] position is that Penal Code section 4019 should be deemed prospective because there is no clear evidence that the Legislature intended it to be retroactive . . . .
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> Rather than simply reducing sentences, the amendment is designed to encourage good behavior on the part of prisoners by increasing the amount of work and good-time credits that they can earn . ". . . Reason dictates that it is impossible to influence behavior after it has occurred."

The Attorney General's position is puzzling on several levels:

- The news release dismisses as an aberration *People v. Doganiere* (1978) 86 Cal.App.3d 237, which held conduct credits retroactive, saying, "the holding is unpersuasive because the court failed to address the point that conduct credits are intended by their nature to influence future behavior." But the *Doganiere* opinion *does* in fact address that point: it finds that the legislative intent was to recognize and reward good behavior retroactively. (*Id.* at 239-240.) Its holding was followed in *People v. Smith* (1979) 98 Cal.App.3d 793, 799. In addition, the Attorney General's argument fails to acknowledge *People v. Sage* (1980) 26 Cal.3d 498, 509-510, footnote 7, which on equal protection grounds made retroactive its decision giving pre-sentence conduct credits to detainees in jail ultimately sentenced as felons.

- The Attorney General's position does not take account of section 59 of SBx3 18, which requires CDCR to implement the changes and anticipates delays.[4] If the

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[3] http://ag.ca.gov/newsalerts/release.php?id=1861.

[4] Section 59 provides in part: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act."

changes were merely prospective, i.e., applicable only to time spent on or after January 25, CDCR would have little to do other than adjust the formula used in the future. It would not have to compute "the amount of *additional* time to be credited" against sentences (SBx3 18, § 59, emphasis added), since it would have awarded the correct credits to begin with. As to section 4019 credits, likewise, CDCR would have nothing to do, since trial courts presumably would have applied the new law in awarding credits.[5]

• The Attorney General's argument is based on a counterfactual premise. The explicit legislative purpose behind the amendment was not improving the behavior of those in custody (though it might have that effect), but rather, as stated in its concluding section, alleviating overcrowding and reducing the costs of the prison system to address the state fiscal emergency. (SBx3 18, § 62.[6]) Prospective application will reduce prison population only in the relatively distant future, and the case-by-case litigation made necessary by the Attorney General's position will hardly save money.

It is too early to tell what effect the Attorney General's position will have on the arrangements already worked out in the various counties. Because the situation is so fluid, we can only emphasize the usual refrain: contact trial counsel before making any decision. If trial counsel is going to act, appellate counsel need only take the role of a monitor. If trial counsel is not, appellate counsel should follow the guidance offered in the February 2 alert. As mentioned there, a motion under Penal Code section 1237.1 in the trial court may well be appropriate.[7]

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[5]In *People v. Brown*, C056510, an SBx3 18 case the Third District is expediting, the court has issued an order for supplemental briefing on the question: "Whether section 59 of Senate Bill 18 (Stats. 2009-2010, 3rd Ex. Sess., Ch. 28 (Sen. Bill 18)) suggests a legislative intent that the changes to Penal Code section 4019 be applied retroactively to those whose judgment was not final as of January 25, 2010, as well as those whose judgment was final as of January 25, 2010." The Fifth District is also expediting *People v. Rodriguez*, F057533, on the retroactivity of SBx3 18's amendment to section 4019.

[6]Section 62 provides: "This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution."

[7]We have replaced the sample Penal Code section 1237.1 trial court motion attached to our last alert with a more generic version that includes additional authorities. (New sample at http://www.adi-sandiego.com/news_alerts.html.) It includes a cite to *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8: "If a case is pending on appeal, section 1237.1 vests the trial court with the power to rule on a request for additional credits." Hopefully this will prevent those foreseeable denials based, incorrectly, on lack

And finally, as if these complications weren't enough, we have concluded it is arguable, on equal protection and/or legislative intent grounds, that the law is fully retroactive and applies even to cases final before January 25.[8] If in one or more test cases an appellate court finds the law fully retroactive, there may well be an administrative remedy that would make case-by-case litigation unnecessary. Thus, as we said in the February 2 alert, we remain in a wait-and-see mode as to these cases. To receive compensation, counsel *must* consult with ADI before taking action in any closed case.

McKee and the SVPA

On January 28, 2010, the California Supreme Court issued *People v. McKee* (2010) 47 Cal.4th 1172, on the constitutionality of the 2006 amendment to the Sexually Violent Predator Act enacted in Proposition 83, making an SVP commitment indeterminate and placing the burden of proof on the person confined to prove by a preponderance of the evidence that he is no longer an SVP. (Welf. & Inst. Code, § 6600 et seq.) The decision rejected due process and ex post facto challenges to the law. As to an equal protection challenge, however, it found the state had not carried its burden of justifying the differences in treatment between those committed under the SVPA and those committed under other civil commitment schemes, such as the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.). It remanded the case to the trial court to make findings on whether there are constitutionally sufficient reasons for the differences. A petition for rehearing is pending.

McKee creates considerable procedural uncertainties. Under the decision a lower court cannot simply apply the SVPA as written, but rather must conduct hearings on whether the law's differential treatment of SVP's is factually justified. Because the Supreme Court did not retain jurisdiction, but instead gave the case back to the trial court, the decision on remand will not be binding on any other court. Presumably *each* SVP proceeding in the state will require a hearing on the equal protection issue until some kind of definitive appellate resolution is reached.

A petition for rehearing is pending in *McKee*, and the court has the extended the time for deciding it to April 28. Meanwhile, in any given case both trial and appellate counsel of course must argue for the result they judge most likely to benefit the individual client. Appeals in cases where a *McKee*-type hearing was not held, for example, can seek

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of jurisdiction.

[8]E.g., *People v. Sage*, *supra*, 26 Cal.3d 498, 509, fn. 7 [conduct credits], and *In re Kapperman* (1974) 11 Cal.3d 542, 544-546 [actual custody credits], both based on equal protection; see also *In re Chavez* (2004) 114 Cal.App.4th 989 and *Way v. Superior Court* (1977) 74 Cal.App.3d 165 [change from indeterminate to determinate sentencing], both based on legislative intent.

a remand for such a hearing. We encourage panel attorneys with an SVP appeal to consult with the ADI staff attorney.

_____ *In re Watson* and the retroactivity of *Cunningham*

In the recent decision of *In re Watson* (Feb. 2, 2010, D055404) ___ Cal.App.4th ___ [2010 WL 348400], Division One of our district held that the U.S. Supreme Court's decision in *Cunningham*, finding the former California Determinate Sentencing Law to violate its *Apprendi-Blakely* jurisprudence,[9] is retroactively applicable to cases not yet final for purposes of appellate review when *Apprendi* was decided, June 26, 2000. *Watson* determined the decision in *Cunningham* was dictated by the rule of *Apprendi* and did not create new law. This ruling extended the holding of the California Supreme Court last year in *In re Gomez* (2009) 45 Cal.4th 650,[10] which found *Cunningham* retroactively applicable to cases final after *Blakely* but had no occasion to address retroactivity to *Apprendi*. (See also *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624.)

The Attorney General is likely to file a petition for review. At this point we recommend no action, except to review cases for possible urgency or later action if the ruling in *Watson* holds up. If immediate action is required, please let the ADI staff attorney know.

_____ Attached articles

Please review the articles accompanying this alert:

(1) Senior staff attorney Howard Cohen and I have prepared a memo on arguing prejudicial error effectively under the test of *People v. Watson* (1956) 46 Cal.2d 818. That is the test applicable to most kinds of state errors – the most common, and the most difficult for appellants, among the standard prejudice tests. Our memo, *Some Tips for Arguing Watson Prejudice More Persuasively*, may help attorneys maximize their chances for success under this standard.

(2) Staff attorney Jamie Popper attended the November 20, 2009, Pacific Juvenile Defender's Conference Roundtable. Her attached report notes the topics most likely to be relevant to appellate practice, including mental health issues and issues related to the Division of Juvenile Justice (formerly California Youth Authority).

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[9]*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

[10]See my article on *Gomez*: http://www.adi-sandiego.com/news_alerts.html, February 2009.

(3) Garrick Byers, Senior Defense Attorney for the Fresno County Public Defender and a member of the Legislative Committee of the California Public Defenders Association, has prepared *New Laws for 2010 for Criminal Law Practitioners*, a very useful summary of new law for 2010, including legislation, rules,[11] and forms. It is attached here with his permission. We will consider which of these changes might give rise to appellate issues.

[11]The ADI news alert of January 12, 2010, summarizes the rules changes most relevant to our practice. http://www.adi-sandiego.com/news_alerts.html.