JUNE 2010 – ADI NEWS ALERTS

By
Elaine A. Alexander, Executive Director

This alert[1] covers these topics:

• Developments in the recent Penal Code section 4019 amendment: Supreme Court will decide retroactivity and Legislature moves to repeal new credits.

• San Diego County juvenile court representation: the Dependency Legal Group of San Diego chosen to take over from Public Defender and Alternate Public Defender.

• Supplemental briefs and errata letters: Fourth District divisions split on whether to file separate supplemental or new combined brief; Division Two wants a new, corrected brief and not just an errata letter.

• Division Two procedures re: screening dependency transcripts for proper notification that notice of appeal was filed, correction of omissions from normal record, and motion for judicial notice.

• Rule changes effective July 1: expansion of prison delivery rule to all documents and revision and renumbering of juvenile appellate rules.

• Noted here but not below: Juvenile Defenders in Orange County has a new address – 1 City Boulevard West, Suite 800, Orange, CA 92868-3601.

• *Cunningham*: depublication of case finding it retroactive to *Apprendi*.

• U.S. Supreme Court decision in *Graham v. Florida*: possible Eighth Amendment issue for very long non-life sentences for crimes committed by juvenile.

Penal Code section 4019 credits: grant of review and legislation to repeal changes

The Supreme Court will be considering the retroactivity of the January 25 amendment to Penal Code section 4019 giving additional pre-sentence conduct credits to many classes of prisoners. (SBx3 18.) It granted review in *People v. Brown*, S181963, which had held the amendment applicable to those who cases were not yet final as of January 25 under the principles of *In re Estrada* (1965) 63 Cal.2d 740. It also granted

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

review and deferred briefing in *People v. Rodriguez*, S181808, which had found the amendment not retroactive. A number of courts later issued published opinions on the matter, splitting virtually down the middle on both sides of the question.[2]

Meanwhile, bills are moving through the Legislature to repeal the change.[3] The Senate unanimously passed SB 1487 on April 29, and the bill is scheduled for a vote in the Assembly Public Safety committee on June 22. A mirror bill, AB 1395, is in committee. Both are written as urgency legislation. We have not yet sorted out the potential effect of the new legislation, if it is signed into law, but will be analyzing the matter.

Counsel should continue to raise the issue when applicable. As a general proposition, they should first consult trial counsel, because some are seeking and obtaining relief in the trial court or appealing from the denial of relief. If he or she will not be doing anything, appellate counsel should file a motion in the trial court under Penal Code section 1237.1, at least if the credits issue is the only one. If that is unsuccessful, counsel should raise the issue on appeal. If that is unsuccessful,[4] a petition for review is called for, at least until we see how the Supreme Court is treating cases behind the lead one. More complete advice is in our February news alerts.

Dependency Legal Group of San Diego takes over dependency representation in San Diego juvenile court

In May the Administrative Office of the Courts awarded the contract for dependency representation in the San Diego County juvenile court to the Dependency Legal Group, a nonprofit corporation. It will replace the Public Defender and Alternate Public Defender on July 1. It will represent both parents and children. Candi Mayes is the executive director. The supervising attorneys are:

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[2]We have been collecting these at http://www.adi-sandiego.com/PDFs/4019%20cases_June15.pdf.

[3]Under the bills, the revision would provide that, for each six-day period in which a prisoner is confined, one day work credit and one day conduct credit will be deducted from the period of confinement unless the person has not worked or acted satisfactorily.

[4]As of the date of this alert, Division Two has found the amendment non-retroactive. (*People v. Otubuah* (2010) 184 Cal.App.4th 422.) Division Three has held it retroactive, but in an unpublished case that cannot be cited. Division One has not entered the fray, perhaps because the trial courts have been granting relief with the concurrence of the district attorney.

Supervising Attorneys

Robert Gulemi, Senior Supervising Attorney – Conflict Parent Office
Tilisha Martin, Supervising Attorney – Minors Counsel Office
Kevin Lemieux, Supervising Attorney – Primary Parent Office
Cristina Sanchez, Supervising Attorney – Conflict Counsel Office

Assistant Supervising Attorneys
Jennifer Turner, Assistant Supervising Attorney – Conflict Parent Office
Carolyn Levenberg, Assistant Supervising Attorney – Minors Counsel Office
Rommel Cruz, Assistant Supervising Attorney – Primary Parent Office
Marianne Barongan, Assistant Supervising Attorney – Conflict Parent Office.

The DLG jobs website is at http://dlgsd-jobs.info/index.php.

Supplemental briefs: separate filing vs. new combined brief; Division Two errata letters

The Fourth Appellate District divisions are split on whether counsel seeking to raise a new issue or issues after filing the opening brief may do so in a supplemental opening brief or must move to strike the former brief and file a new combined opening brief that includes the older and new issues:

Division One has normally accepted a separate supplemental brief, but *prefers* the combined form.

Division Two's policy prefers a supplemental brief adding one or more new issues, because it's more convenient and less expensive for the attorneys. ▸ However, if a panel attorney has corrections to make to an existing brief, especially if on multiple pages, the court would like a new brief along with a motion for permission to file it, explaining what changes are made, rather than a simple *errata letter*.

Division Three for some time has required counsel to move to strike the original brief and file a combined brief.

Division Two procedures

On June 16 Don Davio, managing attorney, Paula Garcia, chief deputy clerk, and Ann Dee Smith, supervising clerk, visited us for a lunchtime presentation to the panel. Some of the salient points made:

Counsel should screen dependency cases for proper notification that notice of appeal was filed

The court is asking counsel to screen dependency cases early in the process to make sure that de facto parents, tribes, CASA's, etc., have received notice of the filing of a notice of appeal, as required by soon-to-be modified and renumbered 8.405(b) (see following section on rule changes to become effective July 1). Counsel's scrutiny will assist the court in ensuring that all parties, persons, and organizations potentially entitled to participate in the appeal have a chance to do so. A recent case was fully briefed before the court panel noticed that de facto parents had not been given notice of the notice of appeal; the court had to stop work on the case and send notice to the de facto parents, inviting them to participate if they so chose. Counsel for appellants typically are the first to read the record and so are in a position to alert the court of such procedural missteps at a stage when correcting the problem will cause little or no delay. We are working with the court to ensure that the relevant information will be in the transcripts.

Correction of omissions from the record: do it as early as possible; call the Court of Appeal first; send to the appeals sections of the superior court; and send a copy of the request to the Court of Appeal

Counsel should review the record for completeness as early as possible. When they notice some matter is missing, rather than immediately sending a rule 8.340(b) notice, they should call the Court of Appeal clerk's office first to see if they have that matter in their copy. The court gets the original, and sometimes that will include items missed in the copying of the record. They also may be able to expedite the correction. In the event a rule 8.340(b) notice is needed, send it to the appeals section, not to the trial department. And be sure to serve the Court of Appeal, so that it can help monitor the correction process.

A motion for judicial notice must be filed as a separate document, not put in a brief

A separate motion is required by rule 8.252(a). (See rules 8.366 (a), 8.470.) It is based on practical considerations: a motion in a brief is likely to be overlooked, and the justice who rules on the motion may not be on the merits panel.

Rule changes effective July 1, 2010

Prison delivery rule expanded

Effective July 1, rule 8.25 applies the prison delivery rule to all documents sent from a custodial institution. This rule provides that a document sent by an inmate or patient in a custodial institution is timely if the envelope shows it was mailed or delivered

to the responsible custodial official on or before the due date. The new rule expands the prison delivery rule from notices of appeal and intent in criminal and juvenile cases to all other documents in civil, criminal, or juvenile appeals. (See *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106 [civil complaint]; *In re Antilia* (2009) 176 Cal.App.4th 622 [challenge to denial of Pen. Code, § 1405 motion for DNA testing].)

Juvenile rules renumbered and revised

The Judicial Council adopted revisions to the juvenile appellate rules last year, to go into effect July 1, 2010. Mainly they were just moved and renumbered, but there were some substantive changes.[5] A navigational chart is attached.

A few highlights:

• Revised rule 5.585: One change that might affect some attorneys' practice is the deletion of the provisions on the right to appeal in this rule.[6] Some attorneys apparently have been citing this rule in their statement of appealability. They should use Welfare and Institutions Code section 395 or 800 instead. (See ADI Criminal Appellate Practice Manual, § 5.12 for sample statements.)

• New rule 8.405(b): This section replaces rule 8.400(h) on duties of the superior court clerk on the filing of a notice of appeal. It makes some changes in the list of who must be notified of the filing. This is relevant to Division Two's request (preceding section, first item) that counsel in dependency cases check to see if all entitled to notice received it.

• New rule 8.407(a)(12): A written motion or notice of motion, any opposition, and any written opinion are now part of the normal clerk's transcript.

• New rule 8.410(b)(2): If the trial court makes any change in the judgment or other order in the case after the notice of appeal is filed, the clerk must notify all who received copies of the record. The old rule simply incorporated rule 8.340(a), which provides the clerk must send any subsequent order as an automatic augmentation of the record on appeal. The theory behind the change is that in juvenile cases the trial court exercises continuing jurisdiction over the case pending appeal and may make a number of fairly minor orders that would not affect the appeal; notice gives the parties and reviewing court an opportunity to

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[5]The text is at http://www.courtinfo.ca.gov/rules/amendments/july2010.pdf and http://www.courtinfo.ca.gov/rules/amendments/jan2010-jan2011.pdf, p. 115 et seq.

[6]The right to appeal derives from statute, not rule.

augment if they want, but does not require transmitting documents that may be irrelevant.

• New rule 8.411: This rule fills a gap by providing a method of abandoning an appeal. Counsel for juvenile appellants should follow this rule rather than the criminal or civil ones.

Cunningham: depublication of case finding it retroactive to _Apprendi_

On May 12 the Supreme Court denied review in, but depublished, *People v. Watson*, formerly at 181 Cal.App.4th 956 (D055404, Feb. 2, 2010). *Watson* had held *Cunningham v. California* (2007) 549 U.S. 270 retroactive to *Apprendi v. New Jersey* (2000) 530 U.S. 466. The availability of habeas corpus to challenge sentences in cases that became final before *Blakely v. Washington* (2004) 542 U.S. 296 and after *Apprendi* thus remains undecided.[7]

Potential Eighth Amendment issue derived from *Graham v. Florida*

In *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011] the Supreme Court held it unconstitutional to sentence an offender to life without possibility of parole for a crime committed when he or she was a juvenile. The court reasoned that the Eighth Amendment does not permit a state to deprive a person of "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law." (130 S.Ct. at p. 2034)

This rationale opens up the possibility of arguments regarding extremely high non-LWOP sentences when, for a crime committed by a juvenile, the time before a defendant can be considered for parole is so long there is no realistic chance he or she will ever be released or have a chance to demonstrate fitness to rejoin society. Consult Justice Thomas' dissent at footnote 12 (130 S.Ct. at p. 2057) and Justice Alito's dissent on the permissibility of a lengthy but non-life sentence without possibility of parole (*Id*. at p. 2050).

[7]The California Supreme Court has held *Cunningham* retroactive to *Blakely* but has not considered retroactivity to earlier cases. (*In re Gomez* (2009) 45 Cal.4th 650.)

JUVENILE APPELLATE RULES EFFECTIVE JULY 1, 2010

New No.	Old No.	Topic	Substantive Changes
None	5.585(a) & (b)	Right to appeal in 300, 601, 602 cases	Deleted this topic because governed by statute (Welf. & Inst. Code, §§ 395, 800) and case law, not rule. See ADI Manual § 5.12 for suggested statement of appealability.
5.590(a)	5.585(d), 5.590	Advisement of appellate rights	No change. New comment, with case law.
5.590(b)	5.585(e)	Advisement of need for writ petition under Welf. & Inst. Code, § 366.26	Adds: Notice must include time for filing writ petition.
5.595	5.585(c)	Stay pending appeal	See also new rule 8.404.
8.400	8.400(a)	Applicability of rules in this chapter	No change.
8.401	8.400(b)	Confidentiality	No change.
8.403(a)	5.585(a)	Appointment of counsel - delinquency appeal	Child entitled to appointed counsel. If parents can afford counsel but have not retained one, counsel to be appointed at parent's expense.
8.403(b)(1)	5.585(b)	Writ petition as prerequisite to appeal	Based on Welf. & Inst. Code, § 366.26(l) and former rule 5.585(b). 8.403(b)(1)(B): statutory requirement the petition was summarily denied or otherwise not decided on merits added.
8.403(b)(2)	5.585(b)	Appointment of counsel - dependency appeal	Court may appoint counsel for indigent parent, child, or guardian.
8.403(b)(3)	None	Responsibilities of trial counsel under rule 5.661	New to this part of rules; based on Welf. & Inst. Code, § 395.
8.404	None	Stay pending appeal	New: Court may not stay proceedings unless proper provisions made for child. See also new rule 5.595.
8.405(a)	8.400(c)	Notice of appeal	New: Appeal by child must be authorized by client or guardian ad litem.
8.405(b)	8.400(h)	Superior court clerk's duties	Some changes in list of those who must be notified of the filing of the appeal.
8.406	8.400(d)-(g)	Time to appeal	No substantive change.
8.407(a)	8.404(a)	Normal clerk's transcript	Addition: (12) Any written motion or notice of motion, opposition, and written opinion.
8.407(b)	8.404(b)	Normal reporter's transcript	No substantive change.
8.407(c)	8.404(c)	Application in trial court for addition to normal record	Deletes written motion, etc., because now part of normal record under new rule 8.407(a)(12). Indian tribe may apply for addition to record only if it intervened in the proceedings.
8.407(d)	8.404(d)	Agreed or settled statement	No substantive change.
8.407(e)	8.404(e)	Form of record	No substantive change.
8.407(f)	8.404(f)	Transmitting exhibits	No substantive change.
8.408	8.406	Record in multiple appeals in same case	No substantive change.
8.409	8.408(a)-(d)	Preparing and sending record	Provisions on augmenting and correcting moved out of this rule to new 8.410.
8.410(a)	8.408(e)(1)	Omissions from normal record	Provisions spelled out instead of referring to rule 8.340.
8.410(b)(1)	8.408(e)(2)	Augmenting or correcting on order of reviewing court	No substantive change.
8.410(b)(2)	8.340(a), 8.408(e)(1)	Notification of order made in trial court after appeal filed	Trial court clerk must send notice of amendment to or recall of judgment or subsequent order to all who received record. Under rule 8.340(a), which formerly applied, record is automatically augmented to include such order.
8.411	None	Abandonment	Fills gap in providing how and where; authorization required; effects of abandoning; clerk's duties.
8.412	8.412	Briefs	Clarifying changes, not substantive.
8.416	8.416	Fast-track cases	Some clarifying changes. (a)(1)(B)(ii): Substantive change provides method for other courts to opt into fast-track by means of local rule.