FEBRUARY 2011 – ADI NEWS ALERT

BY

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This news alert[1] covers:

• Sex offender registration requirement: Review granted in two Division Three cases dealing with the right to a jury trial on the factual findings necessary to impose registration; important to preserve issue while review pending.

• Custody credits under Penal Code sections 2933 and 4019; important to preserve applicable issues while law is sorted out; memos attached.

• Timing of augmentation requests - misc. order by Division One; notice to be sent by ADI attached.

• Old bugaboo popping up with more frequency: lumping multiple record citations together at end of paragraph.

• Legal education opportunities: CADC conference on March 18-19; ADI webinars.

• Additional volunteers solicited for pilot project on serving briefs by e-mail.

Sex offender registration and *Blakely-Apprendi*: review granted

The California Supreme Court has granted review in *People v. Mosley*,[2] a Division Three case, which held that a discretionary lifetime sex offender registration requirement (Pen. Code, § 290.006) with residency restrictions under Jessica's Law (Pen. Code, § 3003.5, subd. (b)) cannot be imposed unless the defendant had an opportunity for a jury trial and findings beyond a reasonable doubt under *Blakely-Apprendi*.[3] The Court of Appeal struck the registration requirement, holding the residency restrictions were not severable from the general registration law.

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[1]As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

[2]Formerly 188 Cal.App.4th 1090, superseded by grant of review, S187965.

[3]*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

The court has also granted review in *In re S.W.*,[4] an unpublished juvenile case from Division Three rejecting an argument that a registration requirement under Penal Code section 290.008 is "punishment"and cannot be imposed unless the juvenile had an opportunity for a jury trial on the underlying offense. The Supreme Court is expediting the petition for review process in *In re J.L.* (2010) 190 Cal.App.4th 1395 (S189721), a decision later than *S.W.* and issued by a different panel of Division Three. *J.L.* reached the opposite conclusion and stayed enforcement of the residency requirement.

Mosley and *J.L.* were discussed in the January 2011 news alert[5] and Cindi Mishkin's article on recent changes in the law.[6]

Retroactivity of enhanced Penal Code section 4019 credits

As we all know, an amendment to Penal Code section 4019 went into effect on January 25, 2010, increasing pre-sentence credits for a number of prisoners.[7] The retroactivity of that amendment continues to generate litigation on a variety of different theories. Note that the theories are not mutually exclusive; attorneys may consistently make any combination or all of them, if applicable. In the absence of contrary strategic considerations, counsel should preserve whatever theories apply to each individual case until matters get sorted out. Clients should be positioned to take advantage of a favorable ruling on one or more theories, if it is forthcoming; counsel should not forfeit a potential remedy by inaction.

ADI staff attorneys have sample briefing available for the different theories. These include:

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[4]S187897, G042321, unpublished [2010 WL 3760256].

[5]http://www.adi-sandiego.com/PDFs/JANUARY%202011%20NEWS%20ALERT.pdf

[6]http://www.adi-sandiego.com/PDFs/January%202011%20Changes%20memo.pdf

[7]Effective September 28, 2010, Penal Code sections 4019 and 2933 were amended in SB 76. The enhanced pre-sentence credits for persons sent to state prison are now in section 2933, subdivision (e). Most cases being litigated at the appellate stage at the time of this alert involve the earlier provisions of section 4019. SB 76 is attached to this alert, along with a memo by Cindi Mishkin analyzing it.

A. Retroactive applicability to cases not yet final on January 25, 2010 (*Estrada*)

Most of the early litigation involved retroactivity under *In re Estrada* (1965) 63 Cal.2d 740, which held that ordinarily the Legislature is presumed to intend an ameliorative change in a statute to apply to all cases not yet final as of the date of its enactment. The review-granted case of *People v. Brown*, S181963, on the question, "Does Penal Code section 4019, as amended to increase presentence custody credits for certain offenders, apply retroactively?" involves an *Estrada* issue. The case is now fully briefed – stay tuned.

B. Full retroactivity (equal protection theory)

The Third District has granted a habeas corpus petition in *In re Kemp* (2011) ___ Cal.App.4th ___ (Jan. 27, 2011, No. C064821),[8] holding that the increased credits are available even to prisoners whose judgments became final before January 25, 2010. The court found that principles of equal protection require the amendments be applied retroactively to all who are eligible under the terms of the statute.

We advise counsel to raise the equal protection issue in their cases that are not yet final. A number of the grant and hold cases behind *Brown*, and to some extent *Brown* itself, raise an equal protection argument, and so the Supreme Court may well be deciding the issue sooner rather than later.

For post-remittitur cases, counsel should just take a "wait and see" position, at least until *Kemp* becomes final. Any post-remittitur action must be cleared with ADI in order to seek compensation.

C. Applicability to cases with sentencing date on or after January 25, 2010, regardless of date custody was served (in cases with "hybrid" sentencing)

Some trial courts have been granting "hybrid" pre-sentence credits under Penal Code section 4019: credits under former version of 4019 for custody served before January 25, 2010, and under amended 4019 for custody served on or after that date. As mentioned in the most recent alert, counsel have succeeded in arguing (albeit in unpublished cases[9]) that the increased credits made available under SBx3 18 should be applied to all pre-sentence custody when the *sentencing took place on or after January 25,*

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[8] http://www.courtinfo.ca.gov/opinions/documents/C064821.PDF.

[9] E.g., *People v. Brock* (E050996) 2010 WL 5382566; *Tate v. Superior Court* (D057427) 2010 WL 2725387; *People v. Jones* (E050882) 2010 WL 4160558. These cases can be considered for their reasoning but of course cannot be cited to the court.

2010, regardless of when the offense was committed or the custody was served. The basic premise is that the law on the date of sentencing governs in determining custody credits.[10] Jamie Popper's article on this theory is attached.

We think it is very important to make this argument if a client was sentenced on or after January 25 and given such "hybrid" credits. Even if the court rejects *Estrada* and equal protection theories, the argument on "law on the date of sentencing controls" may prevail – and *has* prevailed in both Divisions One and Two.

Augmentation requests: timing

In our January 2011 newsletter, I advised counsel that ADI will be expecting counsel to file any requests for augmentation or correction of the record within 40 days of getting the record for criminal and delinquency cases and within 15 days for dependency cases under rule 8.416 (all dependency cases in Divisions One and Three and termination of parental rights cases in Division Two). We are undertaking this effort at the request of the court.

Division One has decided to issue an official notice or order to that effect, saying the augmentation request must be within the specified time from the filing of the record or the appointment, whichever is later. (In practical terms, this means the time starts approximately when counsel originally gets the record.) ADI will enclose a reminder of the policy in all Division One cases when it sends its usual post-appointment notice.

The point is not to deprive clients of necessary records, but to encourage timeliness in securing those records. Thus late requests will be considered on the merits. If the request is late, counsel should show good cause why it could not have been filed earlier or, if there is no good cause, should apologize and endeavor to avoid repetition.

Citations to record

The court has complained that counsel are more frequently reverting to the bad habit of saving citations to the record for the end of a long paragraph, then citing a broad range of pages, rather than providing pinpoint citations for individual points. The ADI Manual (http://www.adi-sandiego.com/manual.html) says, at § 5.17:

> Citations . . . must be . . . sufficiently frequent to pinpoint for the reader precisely where the information can be located. It is unhelpful and improper

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[10]This premise assumes the change is ameliorative. If it *reduces* credits, ex post facto considerations arise.

to offer a long narrative followed by a sweeping citation – e.g., "II C.T. pp. 2-135."

Please take heed. This is basic good practice. Counsel do not want to call attention to their briefs for the wrong reasons.

Seminars

The annual conference presented by California Appellate Defense Counsel will be on March 18-19 in Glendale. A number of distinguished judges, professors and lawyers are on the faculty, and the project directors will be present for a roundtable Q&A. There will be breakout sessions for criminal and dependency practitioners, as well as general presentations. More information is here. http://cadc.net/annualconference/ .

ADI is starting an experimental pilot program to permit remote attendance at its monthly brownbag MCLE seminars via the Internet (webinars). We will start with the third-Wednesday criminal seminars, probably with a small test in February and then a broader offering in March. Once those are running smoothly, we will try to adapt our monthly first-Wednesday dependency seminars to the format. The plan is to present the programs in audio, with written materials and power point available on attendees' computer screens. Attendees will be able to submit questions or comments via e-mail during the program. We have contacted the State Bar to ensure we comply with MCLE requirements.

We continue to invite attorneys who can attend in person to do so. It offers an opportunity for more interaction and "face time" with staff and panel attorneys and speakers. The programs will be more valuable for all if there is the dynamic of in-person, give-and-take discussion.

E-service training

We have trained several groups of panel attorneys on the process of serving briefs by e-mail. The training begins by having the panel attorney serve ADI's copy by e-mail. The attorney will eventually be approved for service on and from opposing counsel. The Attorney General and San Diego County Counsel have experimental pilots with ADI and some panel attorneys trained earlier.

We are now seeking further volunteers for training. Please contact staff attorney Lynelle Hee at lkh@adi-sandiego.com. Further information was provided in our November 19, 2010, invitation. http://www.adi-sandiego.com/news_alerts.html. Eventually e-service will be mandatory, and attorneys are advised to stay ahead of the curve by getting into the practice now.