MARCH 2011 – ADI NEWS ALERT

BY

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This news alert[1] covers:

- Concern about frequency of supplemental briefs, especially those filed at late stage of the process, raising issues that should have been raised in opening brief.

- Need to ensure Court of Appeal has necessary record for *Pitchess* or other issue involving in-camera hearing.

- Division Three requesting all parties to provide electronic briefs.

- Developing law updates:

  * Sex offender registration requirement: review granted in third Division Three case dealing with the right to a jury trial on the factual findings necessary to impose registration.

  * Custody credits under Penal Code sections 2933 and 4019 – summary of issues; sample briefing sought.

- Dependency Quick Guide ("DogBook") almost ready for distribution.

Supplemental briefing to include issues that could have been raised in the opening brief

Division One and the Attorney General have complained to us that they perceive an increase in the number of supplemental briefs raising issues that were available when the opening brief was filed. Their complaints do not concern situations in which the issue is based on a development beyond counsel's control, such as a post-AOB case or statute; in those cases, the necessity for further action is perfectly understandable and the reasonableness of taking it is unquestioned. Rather, the situation under discussion here is inadequate *initial* briefing – the need to raise or rewrite an issue because of previous oversight, misjudgment, or carelessness in drafting. The court and AG are especially concerned about those filed after the respondent's brief or even later.

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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.

Late filings disrupt the normal processing of cases for other counsel and the court and cause delays or "drop everything" emergencies. As officers of the court, we have a responsibility to present our cases in an orderly manner and help the system operate properly.

Obviously, we have a supreme responsibility to our clients, too. If we have made a mistake and overlooked an issue that really needs to be raised, we should not and *must* not be deterred in taking corrective action by the fact a supplemental brief can cause hassles for the court or opposing counsel. Avoiding ineffective assistance of appellate counsel is a rock-bottom necessity for all of us. I have told this to the court and Attorney General, and they do not disagree. We in turn agree that the need to invoke such an excuse for belated filings should be minimized – and I imagine panel attorneys feel the same way.

The most constructive way of meeting the responsibility to both the system and the client is to make every effort to produce adequate briefing to begin with. This requires a thorough investigation of available issues sooner rather than later and making appropriate decisions *before* filing about what should or should not be raised. Tips:

• *Keep up with the law:* Make use of our website and e-mail alerts,[2] those of other projects[3] and California Appellate Defense Counsel,[4] recent and pending cases lists,[5] free case summaries and/or texts,[6] etc. ADI's California Criminal Appellate Practice Manual, chapter 4, "On the Hunt: Issue Spotting and Selection," offers guidance on this matter. § 4.6 et seq. lists some common resources for keeping informed. If a case involves law in a state of flux, repeatedly research what has happened recently and what we are recommending be done, so that your filed brief accurately reflects current law. An important aid is to "getting it right the first time" is to maintain and continually update a checklist of issues. § 4.122

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[2] http://www.adi-sandiego.com: e.g., http://www.adi-sandiego.com/news_alerts.html; http://www.adi-sandiego.com/legal_research.html

[3] http://www.adi-sandiego.com/legal_project.html

[4] http://www.cadc.net/

[5] E.g., http://www.adi-sandiego.com/changes_in_the_law.html; http://www.adi-sandiego.com/news_issues_review.html. ____

[6] E.g., CCAP: http://www.capcentral.org/recentvictories/summaries.aspx ; Findlaw: http://newsletters.findlaw.com/?DCMP=NWL-pro_calapp.

of the Manual has a list of common issues counsel can use as a starting point for developing their own.[7]

• *Right away, get what you need to spot issues properly:* Read the record systematically and thoroughly; promptly complete it by augmentation or correction if necessary; consult the client and trial counsel. Chapter 4 of the Manual spells out some of the necessary aspects of reliable issue selection; see also Chapter Three, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal,"§ 3.1 et seq., offering guidance on record completion.

• *Consult with ADI[8] about issues on which you have questions before filing opening brief:* If you are in doubt whether to raise or how to frame an issue, you should discuss it with the staff attorney *before* filing the brief. That will help you make sound choices among issues to raise and give you confidence you have made appropriate decisions. See the Manual, § 4.33 et seq., for help in assessing and selecting issues.

• *Consult with ADI about filing supplemental brief:* If you become aware of a missed issue or other reason for possible supplemental briefing, *immediately discuss with the staff attorney* the importance and advisability of filing it. Getting a second opinion is critical.

• *File supplemental brief early:* When a supplemental brief (or new, combined opening brief[9]) is determined necessary, prepare it as soon as possible. If filed before the respondent's brief, the supplementation is *much* less of a problem than when it is filed afterward. The court reports that it has received some supplemental briefs even after submission of the cause, based not on a new and unexpected development, but something that was apparent on the face of the record all along. Waiting so long is bad advocacy: the court is likely to be more annoyed than persuaded by your argument and may even refuse to file the brief altogether (after all, under Cal. Rules of Court, rule 8.204(a)(4), supplemental briefs require permission of the presiding justice).

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[7] http://www.adi-sandiego.com/manual.html.

[8] A reasonable amount of consultation with the project is compensable and strongly recommended. See my April 1997 newsletter discussion of "To call or not to call" – encouraging project attorney consultation. (http://www.adi-sandiego.com/newsletters/1997_april.pdf, p. 3.)

[9] See the June 22, 2010, news alert for guidance on which courts prefer separate or combined briefs. http://www.adi-sandiego.com/PDFs/June_22_NewsAlert.pdf

• *Manage your time:* I know it is easier said than done, given the uncertainties of appellate practice, but it is critical that you exercise sufficient control over time management to prepare briefs in an orderly and thoughtful way and avoid such desperation measures as filing an incomplete, last-minute opening brief with the expectation of filling issue gaps in a supplemental brief. Haste produces deficient work, which in turn requires corrective action, which in turn disrupts the process and runs the risk the corrective action will not be adequate or even permitted at all. No one – not your client certainly, nor especially you – will benefit from that situation.

Again, neither we nor the court is suggesting supplemental briefs are to be avoided at all costs. To the contrary, it is counsel's *duty* to file one when necessary to raise an issue important to the case. But it is also counsel's duty to make every effort to present their cases in a way that facilitates the handling of cases for all participants in the system. They should make it a goal to minimize the need for supplemental briefing by reviewing their cases thoroughly to begin with, resolving doubts at an early stage, and filing complete briefs at the usual designated stages.

Appellant's responsibility to obtain *Pitchess* and other confidential records from superior court

An opinion has reminded appellant's counsel of their responsibility to ensure records reviewed by the trial court in deciding a *Pitchess*[10] motion are brought before the Court of Appeal. We further remind them that other confidential proceedings, as well, require counsel's active effort to bring the records to the Court of Appeal – e.g., those involving disclosure of a confidential informant or review of a motion for defense expert funds.

The opinion, *People v. Rodriguez* (Mar. 7, 2011, D055704) ___ Cal.App.4th ___ [2011 WL 768967], says in full on that point:

> *Appellate counsel has a responsibility to ensure that the record is perfected in cases in which a Pitchess claim is raised*
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> The sealed transcript of a *Pitchess* hearing and any personnel documents that the trial court reviewed pursuant to a *Pitchess* motion are not part of the normal appellate record. (Cal. Rules of Court, rule 8.320.) Therefore, to the

[10] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531: on a showing of good cause, a criminal defendant is entitled to discovery of relevant information in the confidential personnel records of a peace officer accused of misconduct against the defendant.

> extent that an appellant's claim is dependent upon appellate review of the sealed transcript and the confidential personnel documents, appellate counsel is required to apply to the superior court for an order that the record include such materials, pursuant to California Rules of Court, rule 8.328(c). In the absence of such an application, the record on appeal will not contain the *Pitchess* materials, making it impossible for this court to review an appellant's *Pitchess* claim.
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> This court has exercised its discretion in this case – as it has had to do in many other cases – to augment the record to include the relevant *Pitchess* materials, in order to be able to address the issue. However, the failure of counsel to perfect the record delays the processing of cases and wastes judicial resources. Accordingly, we urge appellate counsel to ensure that the record is properly perfected in cases in which a *Pitchess* claim is raised.

Under rule 8.328(c) of the California Rules of Court, records of in-camera proceedings from which a party was excluded (other than those under *People v. Marsden* (1970) 2 Cal.3d 118[11]) are not automatically transmitted to the court, but must be requested by a party. *Pitchess* records are confidential by law and initially are examined only by the court in the absence of either party. (Pen. Code, §§ 832.7, 832.8; Evid. Code, § 1043; *People v. Gaines* (2009) 46 Cal.4th 172, 178-179.) In other confidential proceedings, excluded parties may be the defendant (e.g., informants under Evid. Code, § 1042) or the People (e.g., defense experts under Evid. Code, § 730 and *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 320, fn. 12).

An appellant's counsel has the responsibility to ensure a complete record, in order to permit identification of all arguable issues and provide the necessary factual foundation for the issues raised. (*People v. Barton* (1978) 21 Cal.3d 513, 518-520; *People v. Harris* (1993) 19 Cal.App.4th 709, 714; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394; Manual, § 3.1 et seq.)

Normally an appellant whose *Pitchess* or other in-camera motion was denied would want the Court of Appeal to review that decision. To obtain this review, appellate counsel must apply to the *superior* court for the record under rule 8.328(c). Counsel should do so promptly upon discovering that the motion was made and denied. Failure to obtain the record may result in forfeiting the issue. (The issue was not forfeited in *Rodriguez*, because the court augmented on its own motion when counsel requested it

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[11]Under rule 8.328(b), *Marsden* records are automatically sent to the Court of Appeal and the defendant's counsel. If a *Marsden* issue is raised, the respondent may ask for a copy of the record.

review the *Pitchess* record. But the opinion complained it had had to do that often. After such a warning, counsel should not count on being rescued indefinitely.)

Postscript: I am on the Appellate Advisory Committee of the Judicial Council, which drafts appellate rules, and am looking into ways confidential records can be transmitted automatically, without the need for counsel's request. Please feel free to send me any suggestions you might have on this matter and on other ways of improving the rules on confidential records – or any other rules, for that matter.[12]

Division Three requesting electronically sent PDF copy of briefs, petitions, and other filings

Division Three, like Division One, is requesting counsel file electronically a PDF copy of their briefs in addition to (not instead of) the usual number of paper copies. The request accompanies this alert. The provisions are similar to Division One's, except for one digit in the e-mail address to which the briefs are to be sent – 4d3ebrief@jud.ca.gov.[13] (Note: The request does not refer to an "electronic brief" in the sense of one that has hyperlinks to the record and to authorities cited. That is a separate program.[14]) Some points:

- The paper copy is still required, and its filing will be the *official* one for purposes of meeting deadlines and calculating due dates for responses.

- The e-mailed brief must be a searchable PDF document, no greater than 9 MB, free of potentially harmful codes and viruses.

- The subject line of the e-mail must include the appellate case name and number.

- The document must be named in this form: appellate case number followed by a code identifying the type of document, as specified in section I of the court's announcement. E.g., G012345AOB.pdf.

- We have clarified part III-f with the court. S*ervice* copies of briefs (to opposing and co-appellants' counsel) need not be e-mailed. Panel attorneys may send a brief

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[12] eaa@adi-sandiego.com.

[13] Division One's e-mail address is 4d1ebrief@jud.ca.gov. (Note that the third character is the numeral 1, not a lower case letter *l*.).

[14] http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv3/efiling.htm

by e-mail to the court without copying the e-mail to other parties, as long as they include the usual proof of service by regular mail or personal delivery.

Law updates

Sex offender registration requirement

The Supreme Court has granted review in *In re J.L.*, formerly 190 Cal.App.4th 1395, now S189721, which held that imposition of a sex registration requirement in a juvenile delinquency case under Penal Code section 290.008, if including the residency restrictions of Jessica's Law, must comply with the requirements of *Blakely-Apprendi*, including a jury trial on the underlying offense.[15] This case and *In re S.W.*[16] are on grant and hold behind *People v. Mosley*.[17]

Custody and conduct credits: summary and request for sample briefing

We have refined the list of issues to be considered and raised under Penal Code sections 2933 and 4019, where applicable. Although fuller discussion of these matters was in the February 14 news alert, they are, in summary:

1. The January 25, 2010, amendments to Penal Code section 4019[18] are retroactively applicable to all cases not yet final as of that date, because that is the presumed legislative intent under *In re Estrada* (1965) 63 Cal.2d 740. This is the primary issue in *People v. Brown*, S181963, now fully briefed before the Supreme Court.

2. The January 25, 2010, amendments are retroactively applicable to all persons currently in custody, whether their cases are final or not, as a matter of equal protection. This argument prevailed in *In re Kemp* (2011) 192 Cal.App.4th 252, petition for review pending, applying *In re Kapperman* (1974) 11 Cal.3d 542.

3. If the defendant was awarded "hybrid" credits – using the pre-January 25, 2010, formula for custody before then and the amended formula for custody on or after

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

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

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

[18]Further amended and some provisions moved to Penal Code section 2933, subdivision (e), by SB 76, discussed in point 5.

that date – then he or she is entitled to additional credits for the earlier period, because the law on the date of sentencing is to be applied, and use of any other law is unauthorized. This point prevailed in *In re Zarate* (2011) 192 Cal.App.4th 939, decided February 14, 2011, and in several previous unpublished Fourth Appellate District cases.

4. A defendant with a prior serious or violent felony conviction is entitled to the benefit of the increased credits provided under the January 25, 2010, amendments if the prior was not pled and proven or else was stricken for purposes of credits calculations. This argument was accepted in *People v. Koontz* (Mar. 2, 2011, B224701, B224697) ___ Cal.App.4th ___ [2011 WL 711585]; see also *People v. Jones*, formerly at 188 Cal.App.4th 165, now in the Supreme Court on grant and hold (S187135) behind *Brown*.

5. SB 76, effective September 28, 2010, moved the custody credits provisions for persons with an *executed* prison sentence to Penal Code section 2933, subdivision (e), and altered some substantive provisions. The SB 76 amendments were the subject of the memo distributed with our February 14 news alert.[19] We urge consideration of the following arguments:

a. To the extent the substantive alterations are *beneficial* to the defendant, they are subject to arguments 1-4 above, as applicable in the individual case.

b. To the extent the substantive alterations in section 2933, subdivision (e), are *disadvantageous* to the defendant, they are applicable only to offenses committed on or after the effective date of the amendments, because retroactive application would violate the federal and state constitutional prohibitions against ex post facto laws.

c. The reduced credits provided in amended section 4019, subdivisions (b) and (c), for persons in local custody apply only to offenses committed on or after the effective date of the amendments, by the express terms of subdivision (g) of that section and by ex post facto law.

ADI is seeking sample briefing for each of these arguments, to make them available to the panel while the law is sorted out. Please contact the assigned staff attorney if you have a brief that might help others.

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[19]http://www.adi-sandiego.com/PDFs/SB_76_CHANGES_TO_PRESENTENCE_CREDITS.pdf

"DogBook": Dependency Quick Guide

The Center for Families, Children and the Courts is about ready to distribute the 2011 update of the Dependency Quick Guide (also known as the "DogBook").[20] The AOC would like to ensure it reaches appellate attorneys.

The 2011 update will be a new "insert" of the entire contents of the red binder distributed in 2007. CFCC is able to provide free updates to anyone who received that edition. A limited number of new binders will be available to attorneys who did not receive the first edition. If interested in receiving the 2011 update, contact Angela Duldulao at angela.duldulao@jud.ca.gov.

[20]Current version at http://www.courts.ca.gov/xbcr/cc/DQG070922pressCH.pdf.