FEBRUARY 2012 – ADI NEWS ALERT

BY
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This news alert[1] covers:

- Mandatory e-service of briefs on ADI is almost here; wait for notification.
- Recycled parts of petition for review must be specified.
- New California Supreme Court decisions: *Maultsby* on certificates of probable cause, *Nelson* on juveniles' invocation of the right to counsel or silence during an interrogation, *Mil* on omission of elements of crime in jury instructions, *Johnson* on the test for competence of a mentally ill person to represent himself or herself at trial.

Mandatory E-service of All Documents on ADI Is Coming

We have completed the voluntary pilot project for e-service on ADI and will soon be requiring that service on **ADI** of all documents be done by e-mail, rather than hard copy. Beginning March 1, 2012, we will be adding panel attorneys in groups of 50. Lynelle Hee will contact you when the requirement becomes applicable to you. Hopefully this measure will save printing and delivery costs now incurred by hard copy service on ADI. It is a step toward full e-service and e-filing and the very substantial savings in time and costs those entail.

Service by e-mail does not apply to service on the Attorney General, County Counsel, courts, or other counsel, unless you have already gone through the pilot project and been approved for such service. We are working with those offices to expand the pilot program. (See the ADI pages on the **e-service** and **e-filing** programs. These were summarized in the **April 2011 alert**.) Meanwhile, e-service on ADI will be a good way for panel attorneys to go through the learning curve, get practice at e-service, and work out any bugs.

This program does not require additional software. Your current word processing program should be able to convert the document to a PDF format,[2] and the document will be attached to an e-mail (we already require every panel attorney have an e-mail account).

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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]See **Converting Documents** on the ADI website. We can give individualized assistance, as well.

The documents need to be a single, text-searchable PDF file that is a duplicate of the paper copy. At this time we are not requiring attorneys new to e-service to use the standardized Gmail account required for the pilot project.

If you have any questions, technical or otherwise, please contact Lynelle Hee at lkh@adi-sandiego.com or (619) 696-0282, ext. 29.

Recycled Parts of Petition for Review Must Be Specified

It has long been an AIDOAC requirement that panel attorneys declare reuse of prior briefing in a petition for review. (See **Compensation Claim Manual**, RECYCLING OF MATERIALS.) Specifying the extent of recycling is also required. The claims manual says, under PETITION FOR REVIEW, "Counsel *must* disclose this information, pointing out all original material, including the statement of reasons why review should be granted, analysis of the Court of Appeal opinion, new cases cited and analyzed, etc." (Emphasis original.) The recycling form itself (**Use of Previous Briefing form**) states: "[B]riefly describe for each . . . issue what material you used and what new work you performed."

Yet, many claims come in with no declaration as to a petition for review obviously copied in large part from the briefs. And many of those that state there was such recycling do not say how much. This forces the staff attorney to go through the briefs and petition paragraph by paragraph, trying to identify what is new.

We are unable to spend this kind of laborious and unnecessary effort any more. It is much more efficient for the panel attorney, who was "in at the creation" so to speak, to do it than the staff attorney. The panel attorney often can tell off the top of the head what was new or can rapidly do a computerized document comparison. You do not need to be exacting or detailed; simply note, "about a dozen paragraphs" or "about 10%" is new; or "the statement of the case and facts and the basic issues were reused, but the petition added a Necessity for Review section and discussion of the Court of Appeal opinion [at pp. ___]"; "new case [specify name] researched and added"; or something like that.

If there is evidence of recycling from the briefs in the petition for review (which happens the vast majority of the time) and the Use of Previous Briefing form fails to identify what or approximately how much was reused, or if the information on the form is inaccurate, the staff attorney will have to contact you. This will probably delay the claim. As with other information necessary to the evaluation of the claim, routinely including it upfront will grease the claims machinery and help keep the process running as fast as possible.

New Decisions

The California Supreme Court kept us busy in the first month of 2012. Four recent decisions (interestingly, all unanimous) that answer formerly unresolved questions and affect a fair number of our cases include:

People v. Maultsby (2012) 53 Cal.4th 296

A certificate of probable cause is not required to challenge an admitted prior conviction when the defendant went to trial and did not plead guilty. In other words, the CPC requirement applies to substantive counts, not enhancements.

- *Practice note for appellate counsel:* This decision makes life easier by allowing such challenges without concern for the lack of a CPC.

People v. Nelson (2012) 53 Cal.4th 367

A juvenile in custodial interrogation must unequivocally invoke his or her right to silence or counsel in order for the *Miranda*[3] prohibition against continued interrogation to apply. The test for juveniles is the same as the test for adults articulated in *Davis v. United States* (1994) 512 U.S. 452: whether a reasonable officer would understand the statement to be an invocation of the defendant's rights. The court rejected the subjective test – what the defendant actually intended – applied by the Court of Appeal.

However, the *Nelson* court also acknowledged *J.D.B. v. North Carolina* (2011) ___U.S.___ [131 S.Ct. 2394, 180 L.Ed.2d 310], which held the defendant's youth must be considered in evaluating the "custody" question, which is whether a reasonable defendant would feel free to terminate police questioning and leave. It said: "*J.D.B.*'s analysis generally supports the view that a juvenile suspect's known or objectively apparent age is a factor to consider in an invocation determination." (Fn. 7.) Nevertheless in this case factoring the Nelson's age into the reasonable officer test would not change the result. (*Ibid*.)

Practice notes for appellate counsel:

- The *Nelson* decision forecloses, for California court purposes, reliance on a subjective test. Counsel may nevertheless consider preserving the issue

[3]*Miranda v. Arizona* (1966) 384 U.S. 436.

for federal purposes. Because *Nelson* was an ADI case, we have analyzed this question in some depth and ask counsel to consult us when it arises.

• *Nelson* agrees that under *J.D.B.* the defendant's age may factor into the *Davis* reasonable officer test. (Fn. 7.) Thus the question becomes: Would a reasonable officer construe the defendant's statement as an invocation of *Miranda* rights, taking into account the defendant's young age and the limitations on the ability to express or assert oneself that accompany it? Although adapting the *Davis* test in that fashion did not affect the result in *Nelson*, counsel should evaluate the circumstances of their own cases with this factor in mind.

• *Nelson* does not address whether there should be a requirement that officers ask clarifying questions when an ambiguous statement by a juvenile might be an invocation of rights. *Davis* rejected such a requirement in the adult context and adhered to the strict "clear and unambiguous invocation" test, although it permitted clarifying questions. But Justice Ginsburg in concurrence in *Davis* advocated such an approach, and Justice Kennedy, while in the majority in *Davis*, also agreed with a different approach for juveniles in *J.D.B.* This potentially viable issue should be considered in juvenile interrogation cases.

People v. Mil (Jan. 23, 2012, S184665) Cal.4th [2012 WL 171471]

Omission of two or more elements of an offense in a jury instruction does not automatically make the error reversible per se. Such mistakes can be susceptible to a harmless error analysis (*Neder v. United States* (1999) 527 U.S. 1). It is the nature and overall effect of the omissions, not their sheer number, that is decisive.

• *Practice note for appellate counsel*: In many cases, it may be advisable both (a) to argue for a reversible per se standard because of the critical nature of the omission or omissions and (b) to analyze the issue for prejudice under *Chapman v. California* (1967) 386 U.S. 18.

People v. Johnson (Jan. 30, 2012, S188619) Cal.4th [2012 WL 254856]

California courts may deny self-representation to a mentally ill defendant who has been found competent to stand trial but is unable to present a basic defense if permitted by *Faretta v. California* (1975) 422 U.S. 806, as construed in *Indiana v. Edwards* (2008) 554 U.S. 164. *Edwards* held a state law may deny self-representation to a mentally ill defendant competent to stand trial but not able to present a coherent defense, even though the federal Constitution does not require a higher standard (*Godinez v. Moran* (1993) 509

U.S. 389). In *Johnson*, the court declared California law is that courts may deny self-representation to such a defendant to the extent permitted by the federal Constitution. The standard to be applied is "whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel."

The court cautioned the decision does not permit routine denial of self-representation: "Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it."

Practice notes for appellate counsel:

• *Edwards* and *Johnson* together foreclose an argument that denying self-representation to a California defendant found competent to stand trial in and of itself violates *Faretta* or California law. Counsel must analyze the trial court's decision for abuse of discretion under the standard announced in *Johnson* and consider whether the denial infringed on *Faretta* rights by unreasonably finding the defendant incapable of self-representation.

• If the trial court permitted self-representation to a defendant arguably incapable of presenting a basic defense, a potential issue would be abuse of discretion in violation of California law. If the court did so in the erroneous belief it had no discretion to do otherwise, counsel may argue the court failed to exercise its discretion in accordance with the *Johnson* test. (Cf. *People v. Taylor* (2009) 47 Cal.4th 850.)