MAY 2012 – ADI NEWS ALERT

BY

ELAINE A. ALEXANDER, EXECUTIVE DIRECTOR

This news alert covers:[1]

- Standards of review: The burden of proof is not re-applied directly on appeal, but neither does it "disappear." Insist the Court of Appeal use the right test in deciding a sufficiency issue. (This issue is especially salient in dependency cases.)

- New practice articles: Anna Jauregui-Law's guide to motion practice in the Fourth Appellate District and Jamie Popper's updated memo on Division of Juvenile Justice commitments.

- Although the original and each copy of a petition for review filed in the *Supreme Court* must include a copy of the opinion, *service* copies need not.

Substantial Evidence and the Burden of Proof at Trial

We have repeatedly urged attorneys to keep in mind the standards an appellate court must follow in reviewing trial court decisions.[2] That is the framework within which decisions are made, and proper advocacy requires counsel not only to state them, but to use them effectively.

I recently learned of language in a number of Court of Appeal dependency opinions that could be read as misstating the standard of review for sufficiency of the evidence, to clients' disadvantage. As discussed here and in the accompanying memo, counsel should persist in articulating, and pressing for use of, the correct test.

Does the burden of proof "disappear" on appeal*?*

A number of appellate court opinions – especially dependency ones – have included language to the effect that the trial burden of proof "disappears" on appeal,

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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]E.g., To Brief or Not To Brief: Marginal Issues, April 2008; ADI Criminal Appellate Practice Manual, chapter 4, § 4.45, chapter 5, § 5.28 et seq.; May 3, 2012, program sponsored by San Diego County Bar Association, *Winning at the Threshold: Understanding and Using Standards of Review*.

giving way to the "substantial evidence" rule. This statement would be unobjectionable if it merely meant the appellate court has a different function from the trier of fact: it does not reweigh the evidence or make factual findings and must defer to the trier's choice among several reasonable alternatives. But it *is* objectionable if understood to mean sufficiency of the evidence is a homogeneous standard for all appeals, unrelated to the trial-level burden of proof. Reducing all appellate standards to the lowest common denominator deprives criminal and dependency clients of any continuing benefit from the higher burdens of proof protecting them at trial. That is emphatically not the law.

Attached is *Sufficiency of the Evidence: Does the Burden of Proof "Disappear" on Appeal?* It disputes the theory that on appeal the burden of proof at trial is irrelevant to the question of substantial evidence. The memo argues United States and California Supreme Court authority, as well as logic, require that, in deciding a sufficiency of the evidence issue, the appellate court must decide whether the trier reasonably applied the burden of proof. The evidence is "substantial" only if the trier could reasonably find the burden was met.

Thus, in a criminal appeal, evidence is sufficient to sustain a conviction only if a reasonable trier of fact could find guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557.) In a dependency appeal from a decision governed by a clear and convincing standard, evidence is sufficient only if "a reasonable trier of fact could [make that decision] based on clear and convincing evidence." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423; *In re Angelia P.* (1981) 28 Cal.3d 908, 924.) In an appeal from a decision governed by the preponderance of the evidence standard (as is true of some dependency decisions and some criminal decisions other than guilt), the issue on appeal is the reasonableness of the trier's decision that standard was met.

Counsel should ensure correct standard is used on appeal

Counsel should actively head off application of a standard lower than that to which the client is entitled. Some suggestions:

• *Cite Supreme Court authority:* First, the opening brief should cite Supreme Court authority for the proposition that the evidence must be sufficient to satisfy a reasonable trier of fact under the applicable burden of proof.[3] It is especially important to cite

[3]Counsel must adapt the argument to the applicable trial burden of proof.

Jasmon O. and *Angelia P.* in dependency cases,[4] because of the apparent split in Court of Appeal cases on this point, as analyzed in the memo. Initial briefing, I'd recommend, should be simple and assertive: This is what the Supreme Court says the test on appeal is. Period. Opposing counsel or the Court of Appeal will be unlikely to deny that is the test if their attention is directed from the start toward binding Supreme Court law requiring it.

> *NOTE:* At the opening brief stage counsel need not and probably should not even mention the "disappearing burden" theory or go through the extended analysis offered in the accompanying memo. Doing so would introduce unnecessary confusion and appear defensive, signaling doubt about the correctness and force of the Supreme Court authority. The memo's extended analysis is primarily for counsel's benefit in understanding what the debate is about and for use later if it becomes an issue. Hopefully, the initial citation of Supreme Court authority will preempt any invocation of the "disappearing burden" theory – and ultimately make the theory itself "disappear."

• <u>*Use*</u> *the standard of review in the argument:* Second, in applying the test to the facts at hand, counsel should argue explicitly why no reasonable trier of fact could have made the findings below by the applicable burden of proof. Note how high a burden "beyond a reasonable doubt" or "clear and convincing" or even "preponderance" is, then show why it would be unreasonable for *any* trier to find it was met under the facts of the case. That analysis is the one the Court of Appeal will use to decide the issue, and counsel must lead the way, giving the court the tools to reach the conclusion being urged through application of the standard of review.

• <u>*Reconcile*</u> *– explain why apparently adverse cases can be seen as restatements of the traditional limitations of appellate review:* Third, if the respondent invokes the "disappearing burden" test, counsel should consider arguing (by reply brief or oral argument) that it merely means the appellate court does not re-decide matters of fact from scratch. The test does not mean the burden of proof is irrelevant on appeal, and Supreme Court cases foreclose such an interpretation. The accompanying memo elaborates on this point.

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[4]The memo emphasizes dependency cases because the tendency to get it wrong is less in criminal cases. Long ago *Jackson v. Virginia* and *People v. Johnson* clarified the law. Of course, *Angelia P.* is of about the same vintage as those cases, and *Jasmon O.* is 18 years old itself. But, as noted in the memo, at some point Witkin muddied the waters by introducing the "disappear" language, which some Court of Appeal opinions have picked up on and repeated – with no other authority than Witkin and one other and without apparent awareness of the Supreme Court holdings.

• *Persist – and, if necessary, take it upstairs:* Fourth, if the Court of Appeal decision applies the "disappearing burden" test, despite counsel's arguments, and it arguably makes a difference in the case, counsel should consider a petition for rehearing (unless the issue has already been briefed adequately and addressed on the merits in the opinion). The next step would be a petition for Supreme Court review. The apparent split in the Court of Appeal cases over the test on appeal is a ground for review under California Rules of Court, rule 8.500(b), and in fact the court often grants review because of just such a conflict.

This is not an issue on which counsel should give up. For understandable reasons, on recurring issues opinions have a occasional tendency to repeat boilerplate language (which may be wrong) time after time, without critical analysis. But the standard of review is important and occasionally critical on appeal. Applying the "disappearing burden" test, rather than the "reasonable application of the burden of proof" test, can be outcome-determinative in some cases. Counsel must make every effort to ensure the standard for sufficiency of the evidence is both stated and used properly.

New Appellate Practice Articles

Guide to Motion Practice

Staff attorney Anna Jauregui-Law has prepared a new guide, *Motion Practice in the Fourth Appellate District Pertaining to Criminal and Juvenile Cases.* The guide accompanies this news alert.

Motion Practice offers a comprehensive overview of the various motions, applications, requests, notices, and some petitions frequently used in appellate defense practice, including habeas corpus proceedings, in the Fourth Appellate District. It covers pre-briefing, briefing, and post-briefing stages, as well as filing and service. It points to useful resources and offers practical tips. The guide serves as a checklist, as well, setting forth the governing rules, policies, and practices.

Division of Juvenile Justice Commitments

Staff attorney Jamie Popper has updated her memo on *Division of Juvenile Justice Commitments*. It reviews eligibility for commitments to the DJJ after the 2007 statutory amendments, which substantially restricted such commitments in favor of local custody.

The revision takes account of recent changes. Among other things, it discusses *In re C.H.* (2011) 53 Cal.4th 94 and the legislative reaction to that decision in AB 324.

(This topic was discussed in the April 10, 2012 news alert.) It points out issues for counsel to consider, including the rather complex question of what law governs a particular disposition, in light of the various changes since 2007.

Service Copies of Petition for Review Need Not Include Opinion

Although rule 8.504(b)(4) requires the Court of Appeal opinion be attached to a petition for review *filed in the Supreme Court* if the petition seeks review of the opinion, it is silent as to service copies. (See rule 8.500(e), (f).) The Court of Appeal, of course, already has the opinion; and Attorney General or County Counsel, ADI, superior court, and counsel for other parties have received it, as well. For this reason, service copies do not need to include the opinion. (See Filing and Service chart on ADI website; ADI Manual, §§ 1.154 and 7.5.) We have just now confirmed this position again with all three divisions.

For paper copies, omitting the opinion saves copying and delivery costs for appointed counsel and saves recipients the cost of storing duplicate opinions.

For e-filing with the Court of Appeal[5] and e-service on ADI,[6] counsel need not do the additional work of combining the petition and opinion into a single PDF document.

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[5]Divisions One and Two currently permit service copies of a petition for review to be e-filed. http://www.courts.ca.gov/17376.htm. Division Three is preparing to do the same thing.

[6]As announced in the second April alert, e-service on ADI is mandatory for all documents.