Appellate Defenders Issues

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Notes From The Director

by Elaine Alexander

Dependency seminar

On October 3-5 ADI offered three full-day presentations devoted to numerous aspects of dependency law and practice on appeal. The program, like earlier ones in Northern California and Los Angeles, was sponsored by the Judicial Council of California, the governing body for the state's courts, and its Appellate Indigent Defense Oversight Advisory Committee.

About 15 panel attorneys attended the first day, which was for the newer members of the dependency panel, and 50-60 attended the last two days, which were for dependency practitioners of all levels of experience. Those in attendance expressed deep appreciation for the quality of the presentations, the written materials, the hospitality they received, and the chance to network with others in the same field. [*Editor's note: The written materials will be posted on the AOC website. ADI will have a link to those materials in our website's dependency section.*]

We consider dependency cases to be extremely important, and we have tried to show this in our publications, our dependency hotline, our monthly brown bag lunches and roundtables for dependency attorneys, and other programs designed to help. These appeals are about a quarter of our caseload now, and probably more than any other type of case have a direct, immediate, and often permanent effect on the lives of the people involved. Great skill, learning, and dedication are required to handle them, and they can be quite stressful, presenting such challenges as short and unyielding deadlines, difficult facts and law, and emotionally charged situations. We hope the seminar and other outreach programs will help attorneys handle them more effectively.

Trigger claims

As of October 1, certain unusually high claims ("trigger" cases) will no longer be sent to the court for approval. Instead, they will be subject to special audit procedures by AIDOAC. This change will mean substantially less delay in payment of trigger claims and also eliminate the burden on courts of having to review claims.

Reply briefs

I have been discussing various aspects of appellate advocacy in this column. Topics have included the overall concept and vital importance of vigorous advocacy, as well as

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specific tools of advocacy, such as petitions for rehearing. In this issue I would like to discuss the use of the reply brief.

Probably the most important thing I can say is to urge you to file reply briefs regularly. It is a rare case indeed when the appellant's opening brief and respondent's brief have said everything so completely there is really nothing to add that would further the client's interests. Filing a reply brief gives you an opportunity to respond to the opponent's points and avoids the possibility the court might construe silence as a concession, and it also communicates confidence in your case. It is a chance to have the last word – at least in written form – and to leave a final impression on the court. *We expect you to make use of this chance absent strong justification for not doing so.*

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The reply brief is primarily a vehicle for addressing the points and authorities made in the respondent's brief. It allows you to show why the cases the respondent relies on do not compel a conclusion unfavorable to your client and how the respondent's arguments are legally or logically flawed. It gives you a chance to negate attempts to raise procedural obstacles such as waiver or invited error and rebut claims of harmless error. In a reply brief you may take account of new legal developments, arguments by the respondent not anticipated when you filed the opening brief, and other "surprises." You can also retake the offensive and show why, despite the respondent's efforts to salvage the case, relief for your client is compelled.

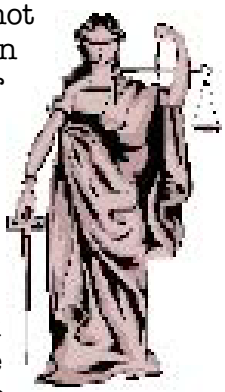
Although a reply brief may be used to beef up or reshape moderately the approaches taken in the opening brief in light of the respondent's positions, it is not the place to raise truly new issues. If you think of a new contention after filing the AOB, you should submit a supplemental opening brief, along with a request under California Rules of Court, rule 14(a) for permission to file it. If you simply try to insert the new issue into the reply brief, you run a high risk the court will refuse to consider it. Obviously, submit the supplemental opening brief at the earliest opportunity; waiting until a late stage in the case vastly increases the odds of rejection. But even at a very late stage, it is better to try to file the brief than to do nothing if the new issue is critical.

How should you approach writing a reply brief? A common first reaction to getting a respondent's brief is to feel daunted. You had persuaded yourself with the opening brief that this is a strong case, and now the respondent is throwing cold water all over your points and raising some objections you hadn't even considered. The natural temptation is to put the brief away and tell yourself you'll think about it tomorrow. This may be okay for an initial reaction, but remember that you have only 20 days to file the reply under rule 37(a). (See also dependency rules 39.1A(g), 39.2(f), 39.2A(f).) So at some point (preferably earlier rather than later) you have to reopen the respondent's brief and really think about it. More often than not, you are pleasantly surprised. Those confident assertions by the respondent can actually be answered, the allegedly unfavorable cases are not quite so unequivocal as the respondent has painted them, and you can show your client really was prejudiced by the errors at trial. You can recapture the sense of being on the road to a (possible) win. And if *you* are once more persuaded, maybe you can lead the court there, too.

The reply brief should be concise. Although you may want to summarize your basic argument in order to put the reply in context, there is no need to rehash the opening brief – indeed, doing so at length may prompt the court to stop reading your reply. You are trying to rebut the respondent's positions and to explain succinctly the reasons the court needs to grant the relief you have requested, not to reargue the whole case from scratch.

If the respondent has not answered some of your basic points, note that in the reply. It is a common tactic to ignore a position difficult to refute or convert it into something much weaker. You can turn this to your advantage by noting the respondent's failure to refute your real argument.

Occasionally it may be necessary to concede a particular point raised in the AOB because the respondent has shown conclusively it is invalid. In a such a case, do so forthrightly. It will enhance your credibility and make your arguments on the remaining issues all the more persuasive, because you will have shown you exercise critical judgment in the course of advocacy.



Sometimes a respondent's attorney can be dismissive, scornful, and disrespectful, not only of your arguments, but also of you. Don't take the bait and get personal in return. Keep a professional tone. The court will notice the difference between your approach and your opponent's, and you and your client will come out the better.

In reading the briefs and preparing the reply, try to put yourself in the mind of the court as much as possible. What did the respondent say that is most likely to persuade the court? Focus on rebutting or neutralizing that. What are the weakest points in the respondent's case? Make sure the court sees the flaws. Don't point out every trivial error in the respondent's brief, because that can make you look petty and bury the good points among the inconsequential. Strive to make the reply brief say, in effect, "There is no way around it; relief is required." That is the goal of all your advocacy, and the reply brief can be an especially effective means of getting there.

Appellate Practice Pointers

FILING DEADLINES FOR A FEDERAL PETITION FOR WRIT OF HABEAS CORPUS ATTACKING A STATE COURT JUDGMENT UNDER TITLE 28 UNITED STATES CODE SECTION 2254

by Cindi Mishkin, Staff Attorney

If there are federal constitutional issues in your client's case, but you have not been able, in the state court system, to secure relief for your client based on those issues, do not give up all hope. Those issues, assuming they are exhausted,[1] can be renewed and raised in federal court through a petition for writ of habeas corpus under title 28 United States Code section 2254.[2] While your state court appointment does not encompass the work necessary to raise these issues in federal court, you can advise your client how to prepare the appropriate forms (available from the ADI web site) to present the issues in federal court.

This article and the following spreadsheet are meant to be tools for you to consult when advising your client how to pursue his/her federal constitutional issues in federal court after the direct appeal is over. This area of law is continually evolving, so be sure to check the viability of the points made here before advising your client.

Pertinent to this topic is title 28 United States Code section 2244(d), which provides:

"(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

This statute sets forth a one-year deadline from the final state judgment within which a federal petition for writ of habeas corpus attacking the state judgment must be filed.[3] This article and spreadsheet will address the application of this deadline only as it relates to title 28 United States Code sections 2244(d)(1)(A): that is, the date the judgment becomes final; and 2244(d)(2): that is, the tolling of this one year statute of limitations.

The bottom line: if certiorari is not sought, the one year period in which a federal petition for writ of habeas corpus case can be filed from a final state judgment begins 90 days after the petition for review is denied.

Under the statute, the date of finality is defined as the date of completion or denial of certiorari proceedings in the United States Supreme Court or, if certiorari is not sought, the expiration of the time allotted for filing a petition for certiorari. (*Williams v. Artuz* (2nd Cir. 2001) 237 F.3d 147, 150-151; *Bowen v. Roe* (9th Cir. 1999) 188 F.3d 1157, 1158; *Smith v. Bowersox* (8th Cir. 1998) 159 F.3d 345, 348.) An example of the application of this rule in California is helpful. In California cases in which review is denied by the California Supreme Court, appellant has 90 days in which to file a petition for writ of certiorari in the United States Supreme Court. (28 U.S.C. § 2102; U.S. Supreme Ct. Rules, rule 13.) If certiorari is not sought, the application of this rule would set the date of finality of the judgment to occur 90 days after the denial of review by the California Supreme Court. So, the one year statute of limitations in which a federal writ of habeas corpus can be filed begins 90 days after the California Supreme Court denied review of the judgment.

This statute of limitations period can be tolled while appellant seeks collateral review of the judgment in state[4] court. (28 U.S.C. § 2244(d)(2).) Collateral review is often appropriate to exhaust federal constitutional claims which were not raised in the direct appeal so that all federal constitutional claims arising out of the judgment can be raised in a single federal petition for writ of habeas corpus. Therefore, the one year period is tolled while appellant attacks his judgment through state petition for writ of habeas corpus proceedings even if these proceedings do not include a claim later asserted in the federal habeas corpus petition. (*Tillema v. Long* (9th Cir. 2001) 253 F.3d 494.)

The tolling is appropriate only when the application for the collateral review is "properly filed." (*Artuz v. Bennett* (2000) 531 U.S. 4 [121 S.CT. 361, 148 L.Ed.2d 213] [proper filing means when delivery to the court officer for filing and acceptance for filing are in compliance with the applicable laws and rules governing filings].) Also, the tolling occurs for the entire period in which appellant appropriately pursues and exhausts state post-conviction remedies. (*Nino v. Galaza* (9th Cir. 1999) 183 F.3d 1003; *Bunney v. Mitchell* (9th Cir. 2001) 262 F.3d 973.) But note that the United States Supreme Court is considering this point in *Saffold v. Newland* (9th Cir. 2001) 250 F.3d 1262, cert. granted Oct. 15, 2001, No. 01-301, sub nom. *Newland v. Saffold* ___ U.S. ___ [2001 D.A.R. 10258]. So, if appellant begins the collateral attack of his conviction with a petition for writ of habeas corpus filed in the state superior court and then proceeds to renew the attack in the Court of Appeal and Supreme Court after the lower courts deny the requested relief, the statute of limitations is tolled for this entire period. It is important to note, however, that the tolling only occurs during the time the post-conviction relief is sought in state court. Although a petition for writ of certiorari could be filed after the state post-conviction relief is denied, the time in which the certiorari petition could be filed under this procedural posture does not count toward the period the statute of limitations is tolled. (*Gutierrez v. Schomig* (7th Cir. 2000) 233 F.3d 490; *Isham v. Randle* (6th Cir. 2000) 226 F.3d 691; *Coates v. Byrd* (11th Cir. 2000) 211 F.3d 1225.)

Tolling has also been found appropriate in extraordinary circumstances when external forces, rather than a petitioner's lack of dilligence, account for the failure to file a timely claim. (*Compare Miles v. Prunty* (9th Cir. 1999) 187 F.3d 1104; *Calderon v. United States* (9th Cir. 1997) 128 F.3d 1283, overruled on other

grounds by *Calderon v. United States* (9th Cir. 1998) 163 F.3d 530 with *Frye v. Hickman* (9th Cir. 2001) 258 F.3d 1036 [equitable relief is not appropriate to remedy retained counsel's failure to file a timely federal petition for writ of habeas corpus in a non-capital case].)

The bottom line: if certiorari is not sought, the one year period in which a federal petition for writ of habeas corpus case can be filed from a final state judgment begins 90 days after the petition for review is denied. It is important to file one federal petition for writ of habeas corpus raising all exhausted federal constitutional issues that are presented by the judgment. This one year period is tolled while appellant makes any collateral attack on the judgment through the state court system, but the statute of limitations begins to run again when the collateral attack in the state court system is over.

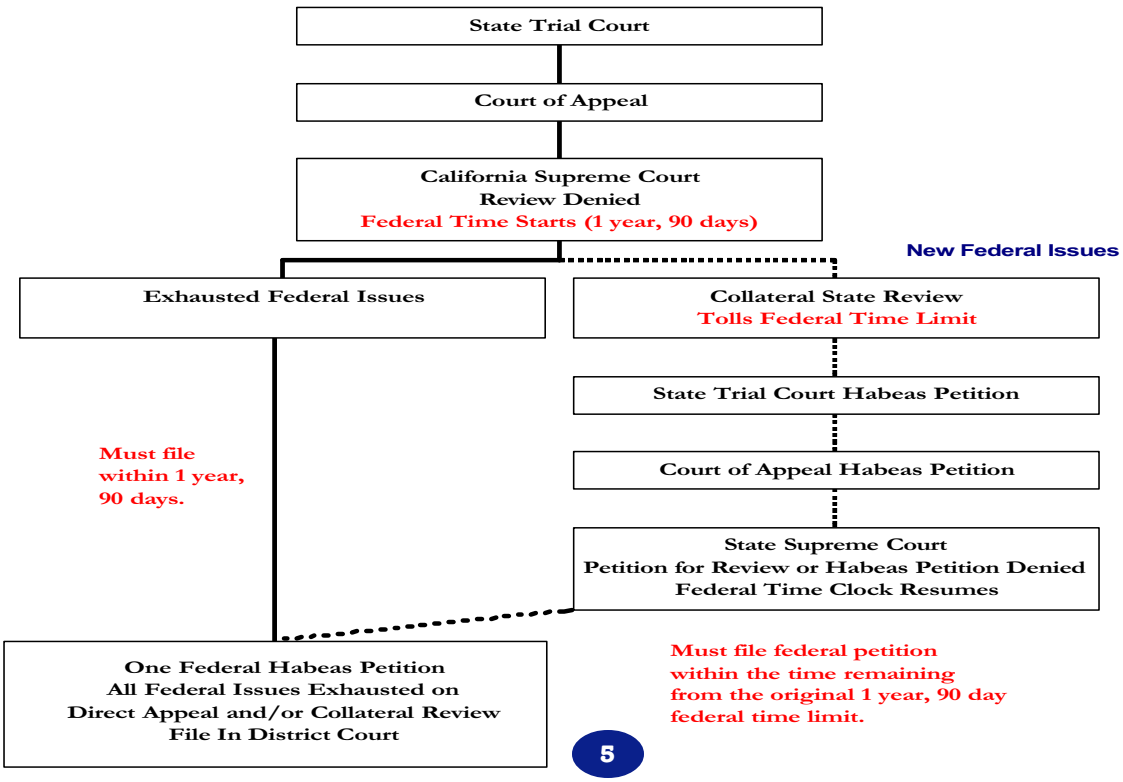
[1] In order to survive procedural default, the issues must be exhausted through the highest court of the state, even if review in that high court is only discretionary. (28 U.S.C. § 2254, subd. (b)(1); *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1]; see *Rose v. Lundy* (1982) 455 U.S. 509 [102 S.Ct. 1198, 71 L.Ed.2d 379].)

[2] A Fourth Amendment claim cannot be litigated in the federal lower courts through a petition for writ of habeas corpus where the state has provided an opportunity for full and fair litigation of that claim in the trial court and on direct appeal (except if it is presented through the ineffective assistance of counsel rubric (*Kimmelman v. Morrison* (1986) 477 U.S. 365 [106 S.Ct. 2574, 91 L.Ed.2d 305])). To be litigated in federal court, the Fourth Amendment claim that has been provided a full and fair opportunity for litigation and that has been exhausted through the state court system must be presented to the United States Supreme Court by a petition for writ of certiorari. (*Stone v. Powell* (1976) 428 U.S. 465, 494 [96 S.Ct. 3037, 49 L.Ed.2d 1067].)

[3] Rule 6(a) of the Federal Rules of Civil Procedure controls calculation of this time.

[4] The collateral review must be in state court for it to toll the statute of limitations. A federal habeas corpus petition is not an "application for State post-conviction or other collateral review" which would toll this statute of limitations. (*Duncan v. Walker* (2001) 533 U.S. ___ [121 S.Ct. 2120, 150 L.Ed.2d 251].)

LIKELY SCENARIO WHERE DEFENDANT SEEKS TO RAISE IN A FEDERAL HABEAS PETITION NON-FOURTH AMENDMENT CONSTITUTIONAL ISSUES THAT WERE EXHAUSTED ON APPEAL AND THOSE THAT WERE NOT



FEDERALIZE THAT *BATSON/WHEELER* ISSUE

by Leslie Rose, Staff Attorney

For those of you who missed July's Brown Bag Presentation, here is a quick re-cap on the issues and cases du jour in the jury selection area. The Brown Bag presentation and the following article are substantially based upon Brad Bristol's presentation at the 2000 Appellate College.

As you all know, there is a three-step approach in making a *Batson/Wheeler* objection (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258): (1) the objecting party makes a prima facie case of group discrimination; (2) the burden shifts to the other party to come forward and rebut the showing by offering a non-discriminatory basis for the exclusion; and, (3) once the explanation is offered, the trial court must then decide whether the objecting party has proved purposeful group discrimination. (*Purkett v. Elm* (1995) 514 U.S. 765.)

In making the prima facie case, the attorney must (1) object and make as complete a record of the circumstances as is feasible, (2) show that the persons excluded are members of a cognizable group, and finally, (3) demonstrate by a "reasonable inference" (federal courts)/ "strong likelihood" (state courts) that the persons are being challenged because of their group association rather than because of a specific bias. (*Batson, supra,* at pp. 93-94; *Wheeler, supra,* at pp. 280-281.) It is at the third step in the prima facie case analysis where we find the state courts diverging from the federal courts.

Wheeler used conflicting standards in determining whether a prima facie case had been established. In one portion of the opinion, the *Wheeler* court indicates that the moving party must establish a "strong likelihood" of group bias (22 Cal.3d at p. 280), while in another portion of the case, the court indicates that only a "reasonable inference" of such bias need be shown (22 Cal.3d at p. 281). Recent California cases have used the "strong likelihood" language. (See, e.g., *People v. Ervin* (2000) 22 Cal.4th 48 [cert. den. 10/2/2000]; *People v. Welch* (1999) 20 Cal.4th 701, 745; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200.)

Batson, which followed *Wheeler* by several years, adopted the "reasonable inference" language of *Wheeler* and did not adopt or even mention the "strong likelihood" language. (*Batson v. Kentucky*, *supra*, 476, U.S. at pp. 96-97.) Then recently in *Wade v. Terhune* (9th Cir. 2000) 202 Fed.3d 1190) the Ninth Circuit Court of Appeals confronted California courts and found the "strong likelihood" analysis was impermissibly stringent when compared to the "inference" test of *Batson*. *Wade* held those California courts relying on the "strong likelihood" language were not applying the correct standard for a prima facie case under *Batson*.

Six months after *Wade* was decided, the California Supreme Court issued its opinion in *People v. Box* (2000) 23 Cal.4th 1153.) In a short footnote, the court basically stated that "strong likelihood" and "reasonable inference" meant the same thing, that the California courts all knew this, and hence had been applying the correct test all along. Prior to *Box*, the California Supreme Court made no effort to clarify the ambiguities in *Wheeler* - nor has it done so since *Box*.

In *People v. Johnson* (2001) 88 Cal.App.4th 318, review granted July 18, 2001, S09760, the First District Court of Appeal noted *Wade* strongly rebutted this line of thinking. In a 2-1 decision, the majority stated it did not believe that California courts have always treated the two phrases as meaning the same thing which, the court stated, would be as novel a proposition as the idea that "clear and convincing evidence" has always meant a "preponderance of the evidence." (*People v. Johnson*, *supra*, 88 Cal.App. 4th at p. 326.) We must now await the disposition by the California Supreme Court.

The Ninth Circuit came back with *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042). In *Cooperwood*, the court declared that "regardless of the California Supreme Court's 'clarification' [in *Box*] of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the 'strong likelihood' standard."

So, the moral is, FEDERALIZE the issue because, while your case may not obtain relief in state court, your client could very well obtain a reversal in the federal courts.

Another "current" issue in the *Batson/Wheeler* area is whether the invited error doctrine applies to *Batson/Wheeler* motions. In the past, Court of Appeal decisions have held that the invited error doctrine does not apply to *Batson/Wheeler* motions (*e.g., People v. Tapia* (1994) 25 Cal.App.4th 984, 1028-1029) and, regardless which party violated *Wheeler*, the only remedy is to quash the venire or seat an improperly challenged juror.

But this principle may be under scrutiny. In *People v. Willis* (2001) 87 Cal.App.4th 162, review granted June 13, 2001, S096349, defense counsel used seven of his 11 peremptory challenges to exclude white males. The trial court found *Wheeler* violation and told defense counsel not to violate *Wheeler* again or otherwise the court would impose monetary sanctions. Defense counsel then moved for a new trial, claiming the process was depriving his client of a fair trial and that he was entitled to a new venire. The motion was denied. Defense counsel went on to use eight of his next nine challenges to strike white males. The court sanctioned defense counsel, but then stayed the punishment and it was eventually lifted. Again, the court did not reseat any of the improperly challenged jurors or quash the venire.

On appeal, the appellant argued the *Wheeler/Batson* violations necessitated reversal. Respondent argued the court should affirm because appellant invited the error. The two-justice majority held the invited error doctrine did not apply to *Batson/Wheeler* violations and reversed the case because the trial court failed to quash the venire. The dissent argued appellant should be estopped from raising the error because of his own role in creating the problem. Againg, we must await the California Supreme Court's opinion.

IS CRIMINAL INVESTIGATION SUBTERFUGE STILL A VIABLE ARGUMENT TO MAKE IN CHALLENGING WARRANTLESS SEARCHES OF PROBATIONERS AND PAROLEES?

by Bea Tillman, Staff Attorney

Currently, there is a conflict between California law and the Ninth Circuit, on the issue of alleged parole and probation searches which may be "subterfuges" for criminal investigations. The legality of a search under the Fourth Amendment is ultimately a question of federal law. (*United States v. Ooley* (9th Cir. 1997) 116 F.3d 370, 372; *United States v. Davis* (9th Cir. 1991) 932 F.2d 752, 758.) Pursuant to California Constitution, article I, section 28, subdivision (d) challenges to admissibility of evidence obtained by police searches and seizures are reviewed under federal constitutional standards. (*People v. Robles* (2000) 23 Cal.4th 789, 794.)

The California Supreme Court in *People v. Woods* (1999) 21 Cal.4th 668, 678-681, held that in evaluating the legality of a search conducted pursuant to a defendant's Fourth Amendment waiver as a condition of probation, the officers' subjective motivations did not invalidate the warrantless search of the probationer's house if the circumstances, viewed objectively, justified the officers' actions. In reaching its conclusion, the Court in *Woods* relied on the analysis in *Whren v. United States* (1996) 517 U.S. 806 [116 S.Ct. 1769, 135 L.Ed.2d 89]. In *Whren*, the high court rejected the defendants' pretext argument and reaffirmed that an objective test should be used in evaluating whether probable cause existed to make a traffic stop. (*Id.* at pp. 809-819.) In *Woods*, the Court concluded that "*Whren's* analysis logically extends, *at the very least,* to a search where, as here, the circumstances, viewed objectively, show a possible probation violation that justifies a search of the probationer's house pursuant to a search condition." (*People v. Woods, supra,* 21 Cal.4th at pp. 678-679, emphasis in original.) Thus, *Woods* established that an objective standard in the context of probation searches

of a probationer's residence comports with federal constitutional law.

Contrary to California law, the Ninth Circuit has consistently upheld the notion that the legality of a warrantless search of a probationer depends upon a showing that the search was a true probation search and not an investigation search. (*United States v. Ooley, supra,* 116 F.3d 370, 372 [see cases cited for that proposition]; *United States v. Harper* (9th Cir. 1991) 928 F.2d 894, 897 [police may not use parole or probation officer as a "stalking horse" to evade the Fourth Amendment's warrant requirement]; *United States v. Merchant* (9th Cir. 1985) 760 F.2d 963, 969 [condemning the practice of using a probation search condition as a broad tool for law enforcement to avoid Fourth Amendment requirements].)

The Ninth Circuit's interpretation, however, is currently being reviewed by the United States Supreme Court in *United States v. Knights* (9th Cir. 2000) 219 F.3d 1138, cert. granted May 14, 2001, No. 001260, ___ U.S. ___ [121 S.Ct. 1955, 149 L.Ed.2d 7521]. The defendant in *United States v. Knights* was convicted of a misdemeanor drug offense in California and placed on three years' summary probation on terms and conditions which included a waiver of the defendant's Fourth Amendment rights. (*Id.* at pp. 1140-1141.) An investigation by local authorities revealed the defendant may have been involved in committing numerous acts of vandalism against a utility company. (*Id.* at pp. 1139-1140.) When authorities learned of the defendant's Fourth Amendment waiver, they decided to conduct a warrantless probation search of his home. (*Id.* at p. 1140.) During the course of the search, officers found evidence connecting the defendant to the acts of vandalism. (*Id.* at p. 1141.)

The district court granted the defendant's motion to suppress the evidence seized during the search, finding the search was a "subterfuge for an investigative search." (*United States v. Knights*, *supra,* 219 F.3d at p.1141.) The Ninth Circuit upheld the decision of the district court. The court relied on its prior decisions concerning probation searches and distinguished *Whren*. (*Id.* at p. 1143.) The court recognized that in *People v. Woods*, *supra,* 21 Cal.4th at pp. 677-681, the California Supreme Court disagreed with the Ninth Circuit's analysis of probation cases. The court, however, stated that the California Supreme Court did not control its reading of federal constitutional law and found *Woods'* analysis unpersuasive. (*United States v. Knights*, *supra,* 219 F.3d at pp.1143-1144.)

Ultimately, the United States Supreme Court will decide what test should be used in evaluating the constitutionality of a warrantless probation search of a residence. Until then, California courts are bound by the decision in *People v. Woods*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

AN UNWAIVABLE AND WINNING ISSUE IN JUVENILE PROBATION APPEALS

by Cindi Mishkin, Staff Attorney

In juvenile cases wherein the court orders the minor to be on probation, the courts are imposing a common term which is ripe for attack. Most often, the court orders the minor not to associate with anyone who was not approved by his parents or by the court. Sometimes the court is more expansive, ordering the minor not to have direct or indirect contact with anyone not approved of by his parents, guardian, or probation officer. Regardless of the specifics of the term, the gist is the same: the minor cannot associate with anyone except those people who have been pre-approved by a designated party.

Even if the minor does not object to this term, an argument can be constructed based on *In re Kacy S.*(1998) 68 Cal.App.4th 704, 712, that the condition is overbroad, unreasonable, and not specifically tailored to meet the rehabilitative goals of the minor. (See also *In re Tanya B.* (1996) 43 Cal.App.4th 1, 5 [waiver principles within the judgment context do not apply to juvenile cases]; contra *In re Josue S.* (1999) 72 Cal.App.4th 168, 171-173; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 536-537; *In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 970-971.)

Although the juvenile court has discretion broader than that of an adult court to set the conditions of probation (see *In re Tyrell*

J. (1994) 8 Cal.4th 68, 81-82; *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941), the conditions affecting the minor's constitutional rights must be narrowly tailored to meet the needs of the minor (*Tyrell J., supra,* at p. 82; *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373) and the needs of public safety and rehabilitation (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084).

The argument can be made that this condition fails to meet these requirements, because everyone with whom the minor interacts would have to have prior approval by the minor's parents, the probation officer, or the court before any interaction takes place. (Compare *In re Frank V.* (1991) 233 Cal.App.3d 1232 [probation condition prohibiting the minor from associating with persons disapproved of by probation officer is constitutional].)

In the recent cases raising this argument, respondent has conceded the improper nature of this condition and has advocated modification of the term so that it complies with constitutional requirements.

Dependency Notes

PRACTICE POINTER FOR MINORS'ATTORNEYS WHO WANT TO PRESENT NEW EVIDENCE TO THE COURT

by Dave Rankin, Staff Attorney

Until June 22, 2001, the practices of minors' attorneys on appeal in presenting additional evidence, or in explaining the current circumstances to the court, were pretty straightforward. Then, on that day, Division Three of our court, published *In re Zeth S.* (June 22, 2001, G027568) ___ Cal.App.4th ___ [2001 D.A.R. 6411] and what always seemed so basic now seems so confusing. Adding potential confusion to the situation, on October 10, 2001, the California Supreme Court accepted *Zeth S.* for review, S099557. This grant of review means that *Zeth S.* can't be cited; however, the procedures the Court of Appeal laid out in its opinion for presenting additional evidence on appeal are the same as those Appellate Defenders has recommended all along in our guidelines for representing minors. And those procedures are based on California Rules of Court, rules 23 and 41, and the California Code of Civil Procedure, section 909. So there is no need for confusion because the rules for presenting additional evidence on appeal are the same now as they were before *Zeth S.* was decided.

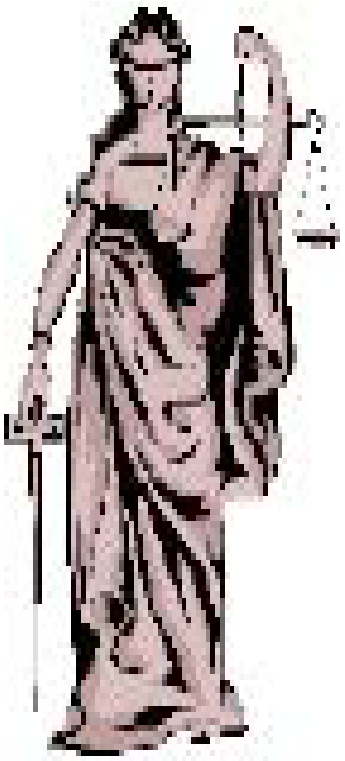
The rules suggest a pretty straightforward procedure. If minor's counsel has acquired evidence of current circumstances to present to the court, she should submit it in the form of a declaration or other evidence attached to a motion. This should be a *separate* document filed in the court along with whatever formal brief on the merits or letter brief is filed. The brief can refer to the facts presented in the motion for additional evidence, but the brief should not itself be the vehicle for presenting the facts to the court. The proper vehicle for that is the motion. This provides all the parties in the appeal with an opportunity to respond to the evidence.

All of this seems simple and straightforward. But what should counsel do when she has visited the minor and discovered no new developments because the minor is in the same home as he was when the appeal began? In other words, what should be done when the current circumstances are just a continuation of the circumstances in the appellate record?

The temptation is to present the facts to the court in the body of the letter brief or formal brief, especially where the facts seem innocuous. This temptation should be avoided. First, what may seem to be innocuous facts to minor's counsel may not seem so benign to appellant's counsel. Even a statement that the current circumstances remain unchanged is most likely information appellant, who is trying to overturn the decision below, will not find helpful. After

all, if the court below found that the circumstances then were best for the minor, it doesn't help appellant for the Court of Appeal to be told those beneficial circumstances still exist. Appellant's counsel will be tempted to move to strike the brief for improperly referring to information outside the appellate record. Presenting the evidence in the proper motion helps to innoculate the minor's brief from such a motion to strike. Second, as explained above, presenting the evidence in a motion gives all parties the opportunity to respond. Third, although it's possible that no opposing party will move to strike the brief and the court will review the additional evidence without complaint, it's bad appellate practice to file a hybrid brief in violation of the rules.

The best procedure, then, whenever minor's counsel wants to present *any* additional facts to the court, is to file the motion and declaration required by rules 23 and 41. We have always considered the presentation of current circumstances to the court to be an important task of minor's counsel on appeal. That is why we have encouraged counsel to visit their minor clients. All *Zeth S.* did was to underscore the importance of current circumstances and to emphasize the proper procedure for presenting evidence of them. As a practical matter, this means that a minor's attorney ought to file two documents in every case. One document is the motion and supporting declarations presenting the current circumstances. The other document is the brief. Following this practice will help ensure that minors receive the best representation possible in dependency appeals.



In The News

Unpublished Opinions Now Available!

The unpublished opinions of the state Court of Appeal are now available to the public. The opinions are posted on the official Web site of the California courts, <http://www.courtinfo.ca.gov/opinions/nonpub.htm> and can be reached through a link on the ADI Web site. The postings are prospective, starting with unpublished opinions filed on October 1, 2001, and will remain on the Judicial Council Web site for only 60 days.

The goal of posting the unpublished opinions is to improve access to the work of the California appellate courts. While California Rules of Court, rule 997 generally prevents the citation of unpulished opinions, the availablity of the unpublished opinions will afford the public and the legal community with an important information resource.

ADI'S SOCIAL CORNER

In the spirit of fostering new and enhancing current relationships and friendships, ADI will be hosting several social functions. The first of these functions is the ADI Holiday Lunch.

The holiday lunch will be held at a local Italian restaurant in Little Italy. All members of the panel, as well as attorneys from other appellate projects, the defense bar, appellate justices, and other attorneys wishing to get to know ADI better are invited.

Date: Thursday, November 29, 2001.
Time: 11:30 a.m.
Cost: $10 per person
Menu: A variety of tasty pizzas, antipasto salad, and soda.
(Vegetarians will be accommodated.)

Space is limited, so please RSVP early by sending your check (made payable to Appellate Defenders, Inc.) to Anna M. Jauregui at 555 W. Beech Street, Suite 300, San Diego, CA 92101. RSVP deadline: Friday, November 23, 2001.

To confirm your reservation and to obtain the restaurant location, please E-mail Anna at amj@adi-sandiego.com. Hope to see you there!

ADI APPELLATE TRAINING COLLEGE: OUR BROWN BAG LUNCH SERIES CONTINUES

Have you attended one of ADI's brown-bag MCLE lunches?? If not, you are missing out on receiving quality, free MCLE credits designed to increase your skills as an appellate practitioner. The lectures are based on courses offered at the Appellate Training College held last spring in San Francisco. The monthly seminars have been a great success and attending attorneys have enjoyed the free MCLE credit and free Appellate Specialization credit. ADI offers a new seminar each month on the second Tuesday at noon in the Paul E. Bell Law Library at Appellate Defenders, Inc. Upcoming seminar date confirmations are posted on the ADI Web site and sent via E-mail to panel attorneys.

UPCOMING LECTURE TOPICS

November 13, 2001: *Oral argument*: Cynthia Sorman

December 11, 2001: *Petitions for rehearing, review, and certiorari*: Joyce Meisner

January 2002: *Writs*: Preparation of petitions for writ of habeas corpus, coram nobis/vobis, mandate, etc.; and raising ineffective assistance of counsel issues: Carmela Simoncini

February 2002: *Project/Panel Relations*: Elaine Alexander

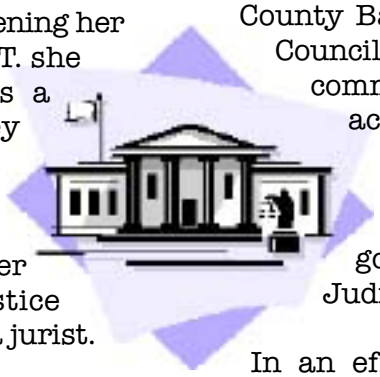
If you have any questions concerning the Brown Bag Lunch Series, or if you would like to order a video tape of past lectures, please call Patrick DuNah or Joyce Meisner at (619) 696-0282.

4TH APPELLATE DISTRICT COURT NEWS

Meet The Newest Associate Justice: Justice Judith McConnell.

On October 3, 2001, Justice Judith McConnell became the newest associate justice appointed to the Court of Appeal, Fourth Appellate District, Division One. While Justice McConnell may be a new appointee to the Court of Appeal, she has extensive experience as a jurist, a strong background for appellate work, and a demonstrated dedication to community involvement.

After receiving her law degree from Boalt Hall at the University of California in Berkeley in 1969, she worked for several years at the California Department of Transportation before opening her own private practice. While at the C.D.T. she took a year's sabbatical to work as a research attorney with the New Jersey Supreme Court. Perhaps her work at the New Jersey Supreme Court sparked a desire to become a jurist, because after only a two-year tenure as a partner at Reed, McConnell & Sullivan, Justice McConnell embarked on her career as a jurist.



Justice McConnell has been an active jurist in San Diego for over 20 years. She is perhaps best known for her recent rulings on San Diego's new baseball stadium, her rulings on the re-use of El Toro Naval Air Station, and her controversial child custody ruling approximately ten years ago where she awarded custody of a child to the child's gay father rather than the child's mother, a Christian fundamentalist accused of kidnapping the child.

Justice McConnell's experience on the bench started in 1978, when she became a municipal court judge. She was elevated to the San Diego County Superior Court in 1980 and, in 1983 she served a term as an Associate Justice pro tempore at the Fourth Appellate District Court of Appeal, Division One. In 1985, Justice McConnell became the presiding judge of the Superior Court Appellate Department, and in 1990 she became the presiding judge of the San Diego County Superior Court.

Apart from her duties on the bench, Justice McConnell is dedicated to improving access to justice. In recognition for her efforts, Justice McConnell was awarded the Benjamin Aranda Access to Justice Award by the state Judicial Council, the California Judges Association and the State Bar of California. This past year, Justice McConnell was again honored by the Judicial Council when they named her Jurist of the Year.

Her committee and legal association involvement is extensive. It includes serving as president on many committees and associations, acting as a delegate to the California State Bar's Conference of Delegates (1974-1977) for the San Diego County Bar, membership in the Judicial Council (1991-1993), serving on many committees committed to increasing access and fairness in the courts, election to membership in American Law Institute (1997), and membership on the governing board of California Judicial Education and Research.

In an effort to give back to the legal community, Justice McConnell has been a frequent lecturer for various legal and judicial educational programs sponsored by CJA, the National Association Of Women Judges, and other organizations. She served as an adjunct Professor of Law, University of San Diego Law School, taught at the California Continuing Judicial Studies Program in 1997, 1996, 1991, 1990, and 1981, and instructed at the California Judicial College in Berkeley, California in 1988 and 1987.

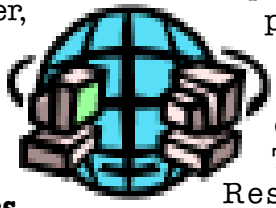
Originally from Lincoln, Nebraska, Justice McConnell operates her court by a golden rule: Be courteous and respectful to all persons in the courtroom. Attorneys practicing in the Fourth Appellate District look forward to appearing before Justice McConnell and experiencing the impact she will undoubtedly make on the court.

Links In The Law

ADI's Web Site News

What's New At ADI's Web Site?

Each quarter we like to update you on the recent developments at ADI's Web site. During the last quarter we greatly expanded the Dependency section of the site, giving it its own button on the upper navigation bar, updated the "Opinions" page under "Attorney Resources" to include links to unpublished opinions, and increased our commitment to continuing to post timely news updates. Each month ADI provides updates on upcoming MCLE seminars, profiles a new on-line resource, updates the Kudos section, and relays news from the Judicial Council. This quarter, in the following article, we focus on how to find statistical information on the Internet to support your appellate arguments.



Bolster Your Arguments With Statistics

by Amanda Doerrer, Staff Attorney

Do you want to show the court the long reaching effects of your legal argument? Or perhaps you want to demonstrate the economic impact of a statute. The use of statistics can help bolster your legal argument and serve as a reminder to the court that your argument extends far beyond the particular circumstances of your case.

The Internet is virtual warehouse of such information. Federal and California criminal justice and law enforcement Web sites offer easy to access statistics. Links to each of the Web sites mentioned in this article can be found on ADI's Web site on the "Research Links" section.

Two great starting places are the United States Department of Justice Web site, <www.ojp.usoj.gov/bjs> and California's Attorney General's Criminal Justice Statistic Center, <http://caag.state.ca.us/cjsc/index.htm>. The USDJ site contains a wealth of information on crime, violence, drugs, offenders, law enforcement, courts, sentencing, corrections, and sentencing. A key area to explore is the Crime and Justice Electronic Data Abstracts, <www.ojp.usdoj.gov/bjs/dtdata.htm>, where you can obtain crime and justice information from a wide variety of published sources such as the FBI, Bureau of the Census, and BJS's own data. The information is presented in a spreadsheet format which makes it easy to use in legal arguments. The California Attorney General's Criminal Justice Statistic Center (CJSC) has more than 5,000 statistical tables, 59 reports, 29 publications, links to federal, state and local agency statistics, and links to other criminal statistics services. The site is searchable by key word or by title. You can also request custom statistical reports from CJSC and sign up for free E-mail notification of newly published statistical information.

Looking for statistical information on specific events and outcomes? Then the Federal Justice Statistics Resource Center, <http://fjsrc.urban.org> is a great place to visit. Here you can obtain comprehensive information on defendants in each stage of the federal criminal justice system. The FJSRC pulls information from a variety of federal resources, and the data goes back to 1944.

How about information to support your cruel and unusual punishment argument? A visit to the United States Sentencing Commission, <www.ussc.gov> is in order. Here, you can obtain a copy of the Sentencing Guidelines Manual and have access to a library of research and reports on sentencing.

Other sites worth a click are: the National Archive of Criminal Justice Data, <www.icpsr.umich.edu/NACJD/home.html>, with over 550 searchable data collections relating to criminal justice; Fedstats, <www.fedstats.com>, providing statistical information from over 100 federal agencies; and the National Criminal Justice Reference Center, <http://www.ncjrs.org>, a federally sponsored information clearinghouse on criminal and juvenile justice and drug control. The NCJRC offers free E-mail newsletters and the databases are searchable.