

FALL 2007 – ADI NEWS ALERTS

by

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Changes in Law on Commitments to Division of Juvenile Justice

A highly significant change in the law on eligibility for commitments to the Division of Juvenile Justice (formerly California Youth Authority) took place on September 1. New Welfare and Institutions Code section 733 considerably restricts the availability of a DJJ commitment. Very likely these changes are retroactive. All counsel handling delinquency cases need to be aware of the changes and to take action if it applies to their client. Please note that the action will be *urgent* if the client is currently in DJJ custody.

Attached is a memo from ADI staff attorney Jamie Popper, discussing the changes and the available remedies.

MCLE Series

Attorneys in Group 3 (N-Z) have a compliance deadline of February 1, 2008. Since February 1, 2005, attorneys in that group must have logged 25 hours of MCLE, of which at least 12.5 hours must be participatory (not self-study). The 25-hour total must include for hours of ethics, one hour of elimination of bias, and one hour of substance abuse.

ADI will be hosting a series of six free lunch-time video seminars on Tuesdays in December 2007 and January 2008. Presentations start promptly at noon in ADI's Paul Bell Library. ADI will provide beverages. No RSVP needed. Further details are on the ADI website calendar.

12/4: *Substance Abuse* (1.0 hour substance abuse credit), by former attorney Michael Brady and UCLA professor Richard Rawson (This is an updated version of the video we showed last year. It is excellent.)

12/11: *Ethics of Supervising Your Case* (1.5 hours ethics credit), by Charles Sevilla.

12/18: *Resolving Competing Ethical Interests* (1.5 hours ethics credit), by Garrick Byers and Bart Sheela.

1/8: *Eliminating Bias in the Legal Profession* (1.0 hour elimination of bias credit), by San Francisco Public Defender Jeff Adachi, David Epps, and Aronda Hurst. (Topic is elimination of bias against criminal defense attorneys.)

1/15: *Getting Comfortable with CALCRIM* (1.0 general credit), by Al Menaster.

1/22: *Preserving and Presenting CALCRIM Issues on Appeal* (1.0 hour general credit), by FDAP's Brad O'Connell and Jonathan Soglin.

Updated Forms and Sample Motions

We have updated the forms and sample motions provided on the ADI website, to reflect the renumbered Rules of Court and other changes.

We also have substantially revised the ADI notice of appeal forms. There are now uniform instructions on the use and completion of the forms and updated addresses for filing. The notices cover Fourth Appellate District appeals in criminal, delinquency, dependency, Family Code section 7800, LPS, extended detention commitments (MDO, SVP, and juvenile), and NGI cases. These are available on the ADI website at http://www.adi-sandiego.com/practice_forms_motion.html. Please use these forms if you have occasion to file a notice of appeal and also encourage trial counsel to use them. They will help avoid common errors that delay or even imperil an appeal.

Recent Grants of Review

Two cases affecting a number of our cases are now in the California Supreme Court under grants of review:

In re Phoenix H., S155556

This case raises the issue of a client's right to file a pro per brief after appointed counsel files a *Sade C.* brief. (*In re Sade C.* (1996) 13 Cal.4th 952.) The Court of Appeal, Fourth Appellate District, Division One, had decided there was no such right. (*In re Phoenix H.* (2007) 152 Cal.App.4th 1576, review granted Oct. 10, 2007.)

In April I prepared a memo on "Procedures in Cases with No Arguable Issues: New Developments," suggesting counsel argue for the right to file a pro per brief, at least when the client wants to file one, on the theory it is necessary to preserve the basic due

process right of access to the appellate court.¹ Counsel should continue to do until *Phoenix H.* is resolved. We can offer sample argument.

Another issue, not involved in *Phoenix H.* but applicable to no-issue appeals and addressed in my memo, is the duty of the appellate court to address any issues raised in a pro brief in a written opinion with reasons stated. (*People v. Kelly* (2006) 40 Cal.4th 106.) If the client files a pro per brief in a *Sade C.* or other non-criminal case, counsel should argue that an opinion is required.

In re Gomez, S155425

At issue in this case is whether the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] announced “new law” or was merely a straightforward application of *Blakely v. Washington* (2004) 542 U.S. 296. *Cunningham*, of course, held that the California Determinate Sentencing Law violates *Blakely* by permitting imposition of the upper term on the basis of facts not found by a jury beyond a reasonable doubt. The Court of Appeal in *Gomez* held *Cunningham* was “new law” because judges had disagreed on the question and there were three dissents in that case. (*In re Gomez* (2007) 153 Cal.App.4th 1516, review granted October 24, 2007.) For that reason, it may not be raised on habeas corpus in cases that had become final before *Cunningham*.

I filed an amicus curiae letter in support of the petition for review in *Gomez* and am now preparing an amicus brief. My letter will be made available very soon to the panel as part of a memo entitled “The Life and Times of the California Determinate Sentencing System: *Cunningham* and Family.” It is a primer on the history of *Cunningham* and its predecessors and an analysis of issues remaining after the decisions of the California Supreme Court in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825.

Cases that became final after *Blakely* (June 24, 2004) but before *Cunningham* (January 22, 2007) are affected by *Gomez*. Unless a case is urgent, it would be advisable not to seek habeas corpus until it is resolved. Contact ADI if your case requires earlier action.

¹<http://www.adi-sandiego.com/Articles/PROCEDURES%20IN%20CASES%20WITH%20NO%20ARGUABLE%20ISSUES.pdf>