NOVEMBER 2008 – ADI NEWS ALERTS

By

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This alert contains several topics of importance to members of the Fourth Appellate District panel.[1]

Issue to be preserved in pending appeals: sex offender registration requirement with concomitant residency restrictions is subject to *Apprendi*, ex post facto, and notice provisions

We congratulate panel attorney Allison Ting for her important victory in *People v. Mosley* (2008) ___ Cal.App.4th ___ (Nov. 19, 2008, G038379) [2008 WL 4926928]. That case held the November 8, 2006, amendments to the sex offender registration laws (Jessica's Law) are "punitive" because they include a potentially onerous provision restricting registered sex offenders from residing within 2,000 feet of a school or park where children gather. (Pen. Code, § 3003.5.) Since the provision increases the penalty for the underlying offense, any facts necessary to impose it must be found by a jury beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) *Mosley* disagrees with *People v. Presley* (2007) 156 Cal.App.4th 1027, which found the residency requirement to be regulatory, not punitive, and rejected an *Apprendi-Blakely-Cunningham* contention.

In *Mosley*, a discretionary registration case where the defendant was convicted only of simple assault, not a sex offense listed in Penal Code section 290, the additional fact is that the offense was committed "as a result of sexual compulsion or for purposes of sexual gratification." (Pen. Code, § 290.006.) An *Apprendi* issue is applicable only to discretionary registration cases; in mandatory cases, the mere conviction of a listed sex offense in section 290 creates a registration requirement, and no additional fact-finding is needed.

A related issue is pending in the California Supreme Court: whether imposing the residency requirement for acts committed before the law's enactment violates

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[1]As a reminder: Counsel are responsible for all matters covered in e-mail alerts, newsletters, and other information made available to the panel. Past alerts and newsletters are at http://www.adi-sandiego.com/news_alerts.html and http://www.adi-sandiego.com/news_newsletters.html.

constitutional prohibitions against ex post facto laws. (*In re J. (E.) on Habeas Corpus*, S156933.) The court website describes the case as follows:[2]

> The court issued an order to show cause why the petitioner is not entitled to relief from the residency restrictions imposed by Penal Code section 3003.5 on persons required to register as sex offenders, on the ground the statute violates the ex post facto clauses of the state and federal Constitutions, has been impermissibly retroactively applied, constitutes an unreasonable parole condition, impinges on the petitioner's substantive due process rights, and is unconstitutionally vague.

The ex post facto argument applies to both mandatory and discretionary registration cases.

Still another issue would be that the facts necessary to order registration must be alleged in the information, so that the defendant is on notice of the need to defend against the charge before the jury. This issue arises only in discretionary registration cases.

Decisions creating or discovering a new right impose special obligations on counsel to help their clients take advantage of the change. ADI's memo on procedures for raising new issues at various stages and on principles of retroactivity has been updated and can be found at the link provided in the cover e-mail.

Until *J. (E.)* is decided, *Apprendi*, ex post facto, and notice issues should be preserved in all applicable registration cases not yet final on appeal. This is true even if the opening brief has been filed and even if the Supreme Court grants review in *Mosley*. Whether to take action on cases already final may depend on the circumstances; consult ADI. If *J. (E.)* is decided favorably, we will provide further guidance.

ADI will try to find or develop sample arguments and make them available. Please consult the assigned ADI staff attorney.

2008 Paul Bell Fellowship recipients: Niccol Kording and Liana Serobian

I am delighted to announce that ADI and its board of directors have selected panel attorneys Niccol Kording and Liana Serobian as the co-recipients of the 2008 Paul Bell Fellowship. The fellowships are awarded in memory of Paul Bell, beloved assistant director of ADI until his untimely death in July 1997. It recognizes his dedication to

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[2] http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=493941&doc_no=S156933.

indigent appellate defense and his deep concern for the development of promising attorneys by sending the recipients – in general, less experienced panel attorneys – to the National Legal Aid and Defender Association Appellate Training Seminar. This year it will be in New Orleans.

Niccol joined the panel about three years ago, and Liana joined in early 2008. Both are on our dependency panel. Last year's recipients, Neale Gold and Allison Simkin, have been invited to attend, as well, because the 2007 program was canceled.

Juvenile law changes held not retroactive

ADI has alerted attorneys to significant changes in the juvenile delinquency laws and posted staff attorney Jamie Popper's memo on the topic.[3]

Several Court of Appeal decisions have denied retroactive application of the amendments to Welfare and Institutions Code sections 731 and 733 providing that a juvenile court can commit a ward to the Division of Juvenile Facilities (formerly the California Youth Authority) only if the petition is for certain enumerated offenses. The courts held those provisions apply only to cases with a disposition on or after September 1, 2007. (*In re N.D.* (2008) 167 Cal.App.4th 885; *In re Brandon G.* (2008) 160 Cal.App.4th 1076; *In re Carl N.* (2008) 160 Cal.App.4th 423.) The California Supreme Court has not yet spoken on the retroactivity issue.

N.D. and *Carl N.* rejected arguments based on the "*Estrada*"principle – namely, that ameliorative changes in the law apply retroactively to cases not yet final. (*In re Estrada* (1965) 63 Cal.2d 740; see also *People v. Rossi* (1976) 18 Cal.3d 295.) They held the changes in sections 731 and 733 relate to the *place* of confinement, not the length of confinement, and so are not changes ameliorating penalty. This reasoning can be challenged for failing to account for years of judicial decisions finding a Youth Authority commitment to be the most "drastic" and harshest of the dispositions available to the juvenile court. (*In re Arthur N.* (1976) 16 Cal.3d 226, 237-238 ["Commitment to the Youth Authority in particular, brings about a drastic change in the status of the ward which not only has *penal overtones*, including institutional confinement with adult offenders, but also removes the ward from the direct supervision of the juvenile court" (emphasis added)], superseded by statute on other grounds as noted by *In re Eddie M.* (2003) 31 Cal.4th 480, 485; *In re Aline D.* (1975) 14 Cal.3d 557, 564 [Youth Authority placement is one of "last resort"].) It is not just one choice among equivalent placements. Eliminating the possibility of such a disposition for many types of offenses is a beneficial change in *penalty* and so is subject to the *Estrada* principle.

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[3] http://www.adi-sandiego.com/PDFs/djjalertfinal.pdf.

Another rationale for denying retroactivity was articulated in *Brandon G.* and *Carl N.*, which found that the recall provision of Welfare and Institutions Code section 731.1 [4] is essentially a "nonretroactivity clause," which made recall the exclusive remedy and also made it optional. *N.D.* disagreed with this conclusion. (*In re N.D.*, *supra*, 167 Cal.App.4th at pp. 522-523 ["We do not think section 731.1,[] which sets forth a procedure by which DJF [Division of Juvenile Facilities] commitments made under the old law can be recalled, expresses any clear intention about whether the new law applies to dispositions not yet final when the new law took effect"].) This rationale is subject to challenge, first, on the ground recall is not mutually exclusive with appeal; in the criminal law, the availability of recall under Penal Code section 1170, subdivision (d) has not prevented appellate courts from applying favorable changes in the law to cases before them. Further, the fact recall is "optional" reflects the fact many cases are final when recall occurs. If those cases were final before the favorable new law became effective, the defendants are not entitled to the benefit of the new law; that limitation is part of *Estrada* itself. Nothing in section 731.1 demonstrates the Legislature intended to withhold the benefits of the amendments from non-final cases under the normal principles governing ameliorative changes. *N.D.* supports this argument.

Attorneys of course should show awareness of these opinions in handling their cases, but should challenge them if their client would benefit from the new law. We will try to find or develop sample briefing and make it available. Please consult the assigned ADI staff attorney.

Division Two – envelopes needed with mailed extension requests

Some panel attorneys are neglecting to include a self-addressed, stamped envelope with their extension requests. (Cal. Rules of Court, rule 8.50(c).) Although not required for faxed requests, the envelopes are still required when the panel attorney is mailing the

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[4]Welfare and Institutions Code section 731.1 provides in part: "Notwithstanding any other law, the court committing a ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, upon the recommendation of the chief probation officer of the county, may recall that commitment in the case of any ward whose commitment offense was not an offense listed in subdivision (b) of Section 707, unless the offense was a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code, and who remains confined in an institution operated by the division on or after September 1, 2007. Upon recall of the ward, the court shall set and convene a recall disposition hearing for the purpose of ordering an alternative disposition for the ward that is appropriate under all of the circumstances prevailing in the case."

extension request to the court. There is a risk the court may refuse to file the request if the envelopes are not included.

Division Three – waiving reply brief and oral argument and agreeing to immediate issuance of opinion when Attorney General concedes appeal

When the Attorney General concedes an appeal, the court would request that appellant's counsel immediately consider whether it is appropriate to waive the reply brief and oral argument to permit immediate issuance of the opinion. For the most part, this would be appropriate only if the Attorney General concedes all issues in full. Generally there should be no downside.

Counsel should keep in mind that the court need not accept the concession. If the is a substantial weakness in the argument that the Attorney General has overlooked, the court may find it. Please consult with ADI if you encounter such a dilemma.

Obviously it would be in the client's interest to expedite the case if there is a possible dead time problem, and counsel should factor that into the decision. (Other ways of addressing dead time, such as release on bail or recognizance and immediate issuance of the remittitur, can be considered. See ADI Criminal Appellate Practice Manual,[5] § 1.30 et seq. and § 3.37 et seq.)

Briefs must state sentence imposed

The Supreme Court has told the Courts of Appeal that their opinions should indicate the sentence imposed. In turn, counsel should ensure their briefs state the sentence. This is good practice, anyway: counsel should indicate the total sentence and normally should also spell out its component parts and credits. (An exception could be if the trial court imposed an unauthorized sentence in the defendant's favor, the defendant elected to forward with the appeal, and detail about the sentence might call attention to the error.) First, it helps identify time-sensitive cases with short sentences, which may need to be expedited. Second, ADI, the Attorney General, or the court may spot sentencing errors counsel overlooked. (In one fairly recent case, the Attorney General found two sentencing issues counsel had missed and saved the client two years.)

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

Compensation claims: put only client and trial counsel communication on line 1; family and other communication on line 23

The Administrative Office of the Courts has asked us to remind panel attorneys that it is tracking different kinds of communications and a few months ago announced a policy that line 1 of the compensation claim form is to be reserved for communication with the client and trial counsel. Other communications (with the court, co-counsel, opposing counsel, family when necessary, etc.) are to be claimed on line 23. Line 24 is for services other than those related to communication.

Exceptions and clarifications:

- When communication with the *client* uses a family member or other person as a translator or conduit for that communication, the time should be claimed on line 1.

- Communications that are part of a habeas corpus investigation (even if with the client or trial counsel) should be placed under "other communications," line 23.

- If an interim claim was filed before the new policy was announced and included "other" communication on line 1 instead of line 23, or entered other communication on line 24 or non-communication services on line 23, the final should be consistent with the interim and use the same lines.

Thank you for your cooperation.

ADI wishes all of you a wonderful Thanksgiving!