

## **JANUARY 2011 – ADI NEWS ALERT**

**by**

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We begin by offering best wishes from everyone at ADI to our many friends and colleagues. May your New Year be happy and prosperous! The first news alert of 2011 covers:

- Reminders from the court on augmentations and motions to settle the record.
- Potentially favorable changes in the law on which attorneys must act if applicable to their case and beneficial to their client – *Blakely-Apprendi*<sup>1</sup> and sex offender registration for adults and juveniles, cruel and unusual punishment of juveniles, grand theft and marijuana possession, and pre-sentence credits.
- Rules changes – word count exclusions and copies of motions.
- Events of interest to panel attorneys - seminar on client relations and annual Defender Dinner.

### **Reminders from the Court**

Motion to augment or correct record must be made within 15 days of receiving record for rule 8.416 dependency cases and no later than original AOB due date for other cases

The court has reminded ADI that counsel must file augmentation and record correction requests *early*. It perceives that some counsel are using a late record request as, in effect, an extension of time and indicates disapproval of this tactic. It is considering an explicit policy that a request must be filed within a designated period, such as 30 days after the record is filed in non-dependency cases.

Meanwhile, to ensure clients' rights to a complete record are not threatened by counsel's belated action and possible default, ADI will be monitoring timeliness and enforcing its own policy that requests to augment or complete the record should be filed promptly after receiving the record and determining that the additional material is needed. Specifically, this means:

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<sup>1</sup>*Blakely v. Washington* (2004) 542 U.S. 296 ; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

- As to criminal and delinquency cases and Division Two non-termination dependency cases, the request should be filed *before the original opening brief due date*. (See ADI Criminal Appellate Practice Manual, § 3.18.)
- As to rule 8.416 dependency cases, the request is due within *15 days after receiving the record*. (Cal. Rules of Court, rule 8.416(d)(2).) In the Fourth District, rule 8.416 covers all dependency cases in Divisions One and Three and termination of parental rights cases in Division Two.

ADI expects every augmentation or record completion request to comply with these rules or show good cause for failing to do so.

Motion to settle the record should include (1) the superior court judge’s name, (2) trial attorney’s name and address, and (3) copies of any pertinent record pages

Division Two reminds counsel that a motion to settle the record is handled most expeditiously if it contains relevant information upfront. It specifically requests the superior court judge’s name, trial counsel’s name and address, and copies of record pages helpful in identifying the matter to be settled.

Settled statements are covered in the ADI Criminal Appellate Practice Manual, chapter 3, § 3.30. (See also Cal. Rules of Court, rules 8.346, 8.407(d), 8.137.)

### **Changes in Law Potentially Favorable to Clients, on Which Attorneys Must Act When Applicable**

2011 presents attorneys with new opportunities – and obligations – in several important areas of the law. These offer clients potential benefits and must be acted on when applicable and beneficial. Cindi Mishkin’s memo on these changes accompanies this alert. ADI’s general guidance on *Potentially Favorable Changes in the Law* (“*Favorable Changes*”<sup>2</sup>) and should be followed when applicable to a given case. Please consult the assigned staff attorney for case-specific assistance.

#### **Sex offender registration and *Blakely-Apprendi***

Lifetime sex offender registration requirement carrying residency restrictions under Jessica’s Law (Pen. Code, § 3003.5, subd. (b)) cannot be imposed unless the defendant had an opportunity for a jury trial and findings beyond a reasonable doubt

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<sup>2</sup><http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf>

under *Blakely-Apprendi*.<sup>3</sup> (*People v. Mosley* (2010) 188 Cal.App.4th 1090 [discretionary registration under Pen. Code, § 290.006 stricken]; *In re J.L.* (2010) (Dec. 16, 2010, G040507) \_\_\_ Cal.App.4th \_\_\_ [2010 WL 5121652] [jury trial required in juvenile proceeding as to offenses qualifying minor for registration under Pen. Code, § 290.008 if residency restrictions apply].) Congratulations to appellate counsel Allison Ting, for Mosley, and Paul Ward, for J.L. While neither case is final and review may be granted in either one or both, these are fine achievements.

#### Cruel and unusual punishment for juveniles

Imposition of an 84-life sentence for a non-homicide committed by a juvenile is cruel and unusual punishment, as functional equivalent of life without the possibility of parole sentence, within the meaning of *Graham v. Florida* (2010) 560 U.S. \_\_\_ [130 S.Ct. 2011].) (*People v. Mendez* (2010) 188 Cal.App.4th 47.)

#### Ameliorative statutory changes – grand theft and marijuana possession

The threshold amount raising petty theft to grand theft has increased to \$950. (Pen. Code, § 487, subd. (a); Stats. 2010, ch. 693 (AB 2372).) A number of felonies may be reduced to misdemeanors as a result.

Meanwhile, simple possession of up to 28.5 grams of marijuana under Health and Safety Code section 11357 has been changed to an infraction rather than a misdemeanor. (Health & Saf. Code, § 11357; Stats. 2010, ch. 708 (SB 1449).)

Arguably, under *In re Estrada* (1965) 63 Cal.2d 740, these changes would apply retroactively to cases not yet final on the statute's effective date of January 1, 2011.

#### Applicability of enhanced Penal Code section 4019 credits

Counsel have succeeded in arguing (albeit in unpublished cases<sup>4</sup>) that the increased credits made available under SBx3 18 should be applied to all pre-sentence custody when the sentencing took place on or after January 25, 2010, regardless of when the offense was committed or the custody was served. Counsel should include that argument when

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<sup>3</sup>*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

<sup>4</sup>E.g., *People v. Brock* (E050996) 2010 WL 5382566; *Tate v. Superior Court* (D057427) 2010 WL 2725387; *People v. Jones* (E050882) 2010 WL 4160558. These cases can be considered for their reasoning but of course cannot be cited to the court.

applicable. Sample briefing is available. This topic is not included in the accompanying memo.

### **Rule Changes Effective January 1, 2011**

Counsel need to take note of, and comply with, any changes to the California Rules of Court that went into effect at the first of 2011. The changes are enumerated on the court website,<sup>5</sup> which also has a complete version of the current rules.<sup>6</sup> Those most relevant to our work are summarized here:

#### **Exclusions from word count limits**

The tables required under rule 8.204(a)(1), the cover information required under rule 8.204(b)(10), any Certificate of Interested Entities or Persons, a certificate of word count, a signature block, and any attachment permitted under rule 8.204(d) are excluded from the count. For convenience, the length limits are spelled out in an attached chart.

#### **Copies of motion filed in Court of Appeal**

Unless the court orders otherwise, an original plus only **one** copy of a motion or an opposition or other response to a motion in the Court of Appeal is necessary. (Rule 8.44(b)(4).) Note: The ruling on the motion is sometimes deferred to the merits panel; in that situation, the court will ask for additional copies for the members of the panel. The Supreme Court requirements are unchanged – original and eight copies of a motion or response. (Rule 8.44(a)(5).)

### **Coming Events**

#### **Day-long seminar on client relations**

Counsel will find much of direct relevance to their practice at the January 29 seminar at the University of San Diego, 8:30 a.m. to 3:30 p.m., on “You and Your Client: Insights, Conflicts & the Law.” Topics include ethics, difficult clients, and similar matters. An announcement with registration form accompanies this alert.

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<sup>5</sup><http://www.courtinfo.ca.gov/rules/amendments.htm>

<sup>6</sup><http://www.courtinfo.ca.gov/rules/>.

Save the date: Defender Dinner on April 8

The annual Defender Dinner will be on Friday, April 8, 2011. Please be sure to calendar this event, at which we strongly encourage attendance. The Paul Bell and E. Stanley Conant Awards will be presented. Wilbert Rideau will be the speaker. He was sentenced to death in 1961 and released in 2005 after a jury in a new trial convicted him of manslaughter, a crime for which he had already served more than the maximum sentence. While in prison, he won many journalism awards and now educates the public about the realities of the justice system and prison through speaking engagements and his recently-published autobiography, *In the Place of Justice: A Story of Punishment and Deliverance*. For more information, go to: <http://wilberrideau.com/>