

Recent Changes in the Law Potentially Beneficial for Clients

by Cindi Mishkin, ADI Staff Attorney

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Several recent favorable changes in the law require counsel to evaluate their cases and determine whether arguments based on these changes should be raised.

A. Changes based on case law:

1. Lifetime registration for sex offenders

In *People v. Mosley* (2010) 188 Cal.App.4th 1090, the Fourth District Court of Appeal, Division Three held that under *Blakely-Apprendi*¹ a defendant must be provided the right to a jury trial and proof beyond a reasonable doubt on the truth of the factors the court must consider before imposing a discretionary sex offender registration requirement under Penal Code section 290.006.² It found that the imposition of a registration requirement, with its concomitant residency restrictions under Jessica's Law (Pen. Code, § 3003.5, subd. (b)), has an "overwhelmingly punitive effect." (*Mosley, supra*, 188 Cal.App.4th at p. 1112.) Noting that *In re E.J.* (2010) 47 Cal.4th 1258, upholding a sex registration condition of parole with residency restrictions, was quite narrow, *Mosley* determined that it did not dictate a different result. (*Mosley, supra*, 188 Cal.App.4th at pp. 1112-1117.) Before the court can impose a registration requirement, the defendant must be afforded *Blakely-Apprendi* rights on the factors necessary to the court's determination. (*Id.* at p.1117.) Because *Mosley* had not been afforded such rights, the court struck the discretionary sex offender registration requirement from which the residency restriction flowed. (*Id.* at p. 1119.)

In the still more recent case of *In re J.L.*³ (Dec. 16, 2010, G040507) ___ Cal.App.4th ___ [2010 WL 5121652], also from Division Three, the minor faced lifetime

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

²Section 290.006 permits the court to impose a registration requirement if it finds the defendant committed the offense because of sexual compulsion or gratification.

³ <http://www.courtinfo.ca.gov/opinions/documents/G040507.PDF>.

registration and residency restrictions as a result of his juvenile adjudications for violations of Penal Code section 288, subdivision (a). (Pen. Code, § 290.008, subs. (a) and (c)(2).) The court held that, because these consequences are so serious, as a matter of due process under *Blakely-Apprendi* the state must provide a jury trial before imposing them. (Slip opn., page 12.) The court ruled the trial court must enjoin application of the residency restriction unless and until the government afforded the minor a jury trial on the charges requiring registration. (Slip opn., page 15.)

Neither case is final. A petition for review is pending in *Mosley*, and the government could file a petition for review in the *J.L.* case; in addition, the California Supreme Court could grant review on its own motion.

Regardless of whether review is granted, the current rationale of the cases can and should be employed to advocate for relief. ADI recommends attorneys raise the issue on behalf of their clients in criminal cases where the court exercised its discretion and ordered defendant to register as a sex offender under Penal Code section 290.006 and in juvenile delinquency cases where minor was ordered to register as a sex offender under Penal Code section 290.008.

Counsel should give some thought as to the remedy to request. The *Mosley* court struck the entire sex offender registration requirement, rejecting the Attorney General's argument the residency restrictions should be severed from the rest of the registration just requirements. This is a more complete remedy than that provided in *J.L.*, which enjoined enforcement of the residency restrictions. Presumably in most situations counsel would argue for a disposition like that of *Mosley* first, with a *J.L.* type of injunction as a fallback. As for other outcomes, such as the contingent reversal and possible new trial compliant with *Blakely-Apprendi* ordered in *J.L.*, counsel should think through the implications for the specific case and consult with the client, trial counsel, and ADI staff attorney.

2. LWOP sentences for juvenile non-homicide crimes are cruel and unusual punishment

In *Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011, 176 L.Ed.2d 825], the United States Supreme Court held that a life without parole sentence for juveniles who commit crimes other than homicide is cruel and unusual punishment in violation of the Eighth Amendment.

Graham does not explicitly address sentences for non-homicides that effectively are life without parole because of their length, even if they are technically non-LWOP; its

reasoning, however, supports the same conclusion. The Court of Appeal in *People v. Mendez* (2010) 188 Cal.App.4th 47 invalidated an 84-life sentence for a juvenile convicted of non-homicide crimes who did not inflict bodily injury. The court declared it was “guided by the principles set forth in *Graham*.” This case can be used to support an argument against a very long sentence, effectively for life, for a crime committed when the person was a juvenile.

B. Changes in statutory law:

1. Health and Safety Code section 11357

On January 1, 2011, amendment to Health and Safety Code section 11357 [possession of marijuana] became effective, classifying simple possession of up to 28.5 grams of marijuana as an infraction instead of a misdemeanor. (Sen. Bill No. 1449⁴ (2009-2010 Reg.Sess.)) Because there is no language in the legislation making the change prospective only, the ameliorative effect of the change may apply to all appellants whose cases are not yet final. (*In re Estrada* (1965) 63 Cal.2d 740.) A review of the legislative history is necessary to answer this question.

2. Penal Code section 487

On January 1, 2011, amendment to Penal Code section 487 [grand theft] became effective, raising the threshold value differentiating petty theft and grand theft from \$400 to \$950. (Assem. Bill No. 2372⁵ (2009-2010 Reg. Sess.)) Because there is no language in the legislation making the change prospective only, the ameliorative effect of the change may apply to all appellants whose cases are not yet final under *Estrada*. A review of the legislative history is necessary to answer this question definitively. This change may convert some felonies into misdemeanors and may require review for urgency.

⁴http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1449_bill_20100930_chaptered.pdf

⁵http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2351-2400/ab_2372_bill_20100930_chaptered.pdf

C. Steps panel attorneys can take in their cases

ADI's *Favorable Changes*⁶ memo, Part One, on what appellate attorneys can do to help their clients, provides detailed guidance on applying a favorable change in the law at various stages of a case. The main points applicable here are, in brief:

Evaluation of need for urgent action: In some cases the client may be entitled to immediate or imminent release with the application of the an argument based on the changes discussed above. Counsel should review their entire pre-final caseload to identify any such cases and take swift action. *Favorable Changes, supra*, Part One, section IV on alternative and expedited procedures discusses options. (See also ADI Criminal Appellate Practice Manual, chapter 1, § 1.30 et seq.)⁷

Evaluation of adverse consequences: As always, counsel should be alert to the possibility that pursuing a remedy will call attention to an error in the client's favor and end up costing the client more time than it saves. Counsel should not plunge in without investigating such a possibility. (See Manual, *supra*, chapter 4, § 4.91 et seq.)

Communication with trial counsel: It is important to contact trial counsel early and see if he or she is raising the issue in superior court. If so, keep in touch to make sure trial counsel is following through. The previous two steps – evaluation of urgency and adverse consequences – are needed even if trial counsel will handle it, in case he or she overlooks that aspect.

Argument in appellate court in pre-remittitur cases: The argument can be raised in the appellate courts by opening brief, supplemental brief, petition for rehearing, petition for review, or modification to petition for review – depending on the stage of the appeal. See *Favorable Changes, supra*, Part One, section II, on pre-remittitur procedures.

Post-remittitur cases: At this time we do not contemplate routinely pursuing a remedy in cases final for purposes of appellate review. Consult the ADI staff attorney if a final case seems to require action. Preapproval is needed for any compensation for such action.

⁶ <http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf>.

⁷ <http://www.adi-sandiego.com/manual.html>.