AUGUST 2012 – ADI NEWS ALERT

BY

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This alert[1] covers:

- Court now *requires* electronic copies of briefs; ADI will act if it is not shown on the proof of service.
- Bryan Garner seminar: sign up quickly.
- *People v. Caballero*: Lengthy, but non-LWOP, sentence that has effect of confining defendant for life, with no meaningful opportunity to obtain release during natural life expectancy of the defendant, is cruel and unusual punishment when imposed for crime committed by juvenile.
- Pre-sentence credits saga continues: *Lara* holds priors used to make defendant ineligible for enhanced credits need not be pled and proven, and Penal Code section 1385 does not authorize striking or disregarding priors to make defendants eligible; *Olague*, on credit for time served after October 1, 2011, for defendants who committed their crimes before then, is granted review, with briefing deferred pending finality of *Brown*.
- *People v. Bailey*: Appellate court lacks authority to reduce conviction of completed escape, a general intent crime, to attempted escape, a specific intent crime.

Electronic copy of briefs must be filed with Court of Appeal; effective September 1, this must be shown on proof of service

The court reports that compliance with its strong request for electronic copies of briefs and writs in criminal cases has been sporadic. It has now asked ADI to *require* such filings. Since we are already requiring service on ADI by PDF copy, filing a copy with the court should entail a de minimis amount of additional effort by attorneys.

Instructions for filing and a list of types of documents included in the term "briefs" and "writs or opposition" are on the **court's website**.[2] In summary:

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[1] As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

[2] http://www.courts.ca.gov/17377.htm

The term "Brief" includes:	The term "Writ or Opposition" includes:
Appellant's Opening Brief	Petition for Writ of Mandate, Prohibition or Certiorari
Respondent's Brief	Petition for Writ of Habeas Corpus
Appellant's Reply Brief	Petition for Writ of Supersedeas
Amicus Curiae Brief	Petition for Writ of Review (WCAB, PUC, ALRB, PERB)
Petition for Rehearing	Petition for Extraordinary Writ
Answer to Petition for Rehearing	Supporting documents if bound separately
Answer to Amicus Curiae Brief	Exhibits if bound separately
Letter Brief	Opposition, Reply, Answer, Return or Traverse

The brief must be a single, text-searchable PDF document,[3] an exact duplicate of the paper copy, and otherwise comply with the court's **Terms of Use**.[4]

For any briefs or writ documents filed *on or after September 1, 2012*, *the electronic submission to the court must be shown on the proof of service*. If it is not, ADI will contact the panel attorney about the deficiency. To assist counsel, we have modified our sample proofs of service on the **Forms and Samples page**[5] of our website to include electronic filing with the court. They are available in WordPerfect, Word, and PDF.

Reminder: The electronic copy is *in addition to* the regular paper copies for briefs and writs (rule 8.44(b)(1), (3), (5)).

Bryan Garner seminar: limited capacity

As we have announced, seating is limited at the September 22 Paul Bell Fellowship seminar, Bryan Garner on *The Winning Brief*. Interest is high, and so, to avoid disappointment, it is important to register sooner rather than later. The **Invitation and RSVP**[6] form is on ADI's website.

ADI panel attorneys on inactive status, such as a wait list or voluntary hold, may apply but will be considered only if there is space after regular registration closes.

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[3]ADI'S website offers guidance on **Converting Documents**. (http://www.adi-sandiego.com/Converting_Documents.html) ADI staff attorney Lynelle Hee (lkh@adi-sandiego.com) also can provide assistance.

[4]http://www.courtinfo.ca.gov/cms/docsub/documents/termscoa.pdf

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

[6]http://www.adi-sandiego.com/PDFs/2012_Paul_Bell_Fellowship_Invitation_and_RSVP%20form.pdf

***People v. Caballero*: Sentence so lengthy the defendant has no meaningful opportunity to gain release is cruel and unusual punishment when imposed for a non-homicide committed by a juvenile**

In ***People v. Caballero***[7] (Aug. 16, 2012, S190647) ___ Cal.4th ___ [2012 WL 3516135], the California Supreme Court held that, under *Graham* and *Miller*,[8] a 110-year-to-life sentence for three attempted murders committed when the defendant was a minor is cruel and unusual punishment under the Eighth Amendment. A juvenile offender must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" – i.e., eligibility for parole some time during the person's natural life expectancy. (See also *People v. Mendez* (2010) 188 Cal.App.4th 47.)

Behind *Caballero* on grant and hold are *People v. Ramirez*, S192558, rejecting a *Graham* issue; *People v. Nunez*, S194643, a Division Three case, overturning a juvenile's sentence for non-homicide offenses, which resulted in the possibility of parole after 175 years; and *In re J.I.A.*, S194841, another Division Three case, overturning a juvenile's sentence for non-homicides of 50 years to life, plus two consecutive life terms.

ADI's guidance on raising these and related issues in pending cases is on our **RECENT CHANGES IN THE LAW**[9] web page. Under *Responsibilities of counsel*, it notes:

> In pre-remittitur cases, appellate counsel should raise issues related to *Graham-Miller-Caballero* when they would be beneficial, no matter what the stage. See **Potentially Favorable Changes in the Law**,[10] which discusses procedures at each stage of an appeal, plus basic principles of retroactivity.
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> In post-remittitur cases, *Caballero* suggests defendants "may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole

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[7] http://www.courts.ca.gov/opinions/documents/S190647.PDF

[8] *Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011] (LWOP sentence for non-homicide crime committed by juvenile is cruel and unusual punishment); *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (same: mandatory LWOP for homicide committed by juvenile).

[9] http://www.adi-sandiego.com/recent_changes_cases.html#LWOP

[10] http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.PDF

hearings." Normally, trial counsel would be responsible for seeking relief in the trial court. ADI cannot offer any realistic expectation that appellate counsel would receive compensation from the Court of Appeal for efforts on post-remittitur cases. Counsel may wish to seek a superior court appointment, however – or at least voluntarily help affected former clients by alerting them and/or their trial counsel to these new cases.

The projects are coordinating with one another, some prisoner groups, and some law schools to produce sample pleadings and identify sources of legal assistance on this matter for prisoners. We will provide information as these efforts move along.

ADI has generated a partial list of defendants who *possibly* may be in a position to benefit from these cases, although we have not looked at the cases individually. We will try to narrow the list as we work with it. Please contact the assigned staff attorney or the duty day staff attorney for assistance.

Administrative or legislative remedies may also be available. **SB 9**[11] of the current session has passed both houses and been presented to the Governor for signature. It amends Penal Code section 1170, subdivision (d), to authorize an LWOP prisoner who was a juvenile at the time of the offense to file a petition for recall and resentencing in the sentencing court. Possibly the Legislature will react to *Caballero* by making such a recall petition available for non-LWOP prisoners, as well.

Pre-sentence credits saga: *Lara* and *Olague*

A month after the decision in *People v. Brown* (2012) 54 Cal.4th 314, the Supreme Court once again rejected an effort to expand pre-sentence conduct credits for defendants. *People v. Lara* (2012) 54 Cal.4th 896 held priors that make a defendant ineligible for enhanced credits under former Penal Code section 4019, which became effective January 25, 2010, need not be pled and proven. Credit disabilities in general need not be pled and proved, the Legislature did not create a pleading and proof requirement, and the Constitution does not mandate one, since decreasing credits does not increase punishment above the statutory maximum. *Lara* also found that the trial court has no discretion under Penal Code section 1385 to dismiss or disregard those priors in order to make the defendant eligible.

Lara did note that due process procedures of notice and a fair opportunity to be heard still apply. Thus it leaves open this potential issue in appropriate cases.

[11] http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120821_enrolled.pdf

Meanwhile, the court has granted review in a case favorable to defendants, *People v. Olague*, S203298, formerly published at 205 Cal.App.4th 1126, which dealt with the version of Penal Code section 4019 that became effective October 1, 2011. That law eliminated a number of the factors that made defendants ineligible for enhanced credits. *Olague* held the Legislature intended that defendants who committed their crimes before October 1 be entitled to enhanced credits for time served after that date. *Olague* is on hold pending the finality of *Brown*.[12] Meanwhile, counsel can raise issues using the reasoning of *Olague*, even though that case is no longer citable.

We call counsel's attention to **ADI's analysis of credits issues**[13] relating to *Lara*, as well as *Olague* and the October 1 amendment. It is also imperative that counsel consider the factors discussed in the cover email accompanying this alert. Counsel may request a copy from staff attorney Jamie Popper at jlp@adi-sandiego.com.

People v. Bailey: Appellate court may not reduce a conviction for completed escape to attempted escape

In *People v. Bailey* (2012) 54 Cal.4th 740, the Supreme Court held an appellate court may not reduce a conviction by a jury for a completed escape to attempted escape. The Court of Appeal had found the evidence of the completed offense insufficient and the evidence of attempted escape more than ample, but declined to reduce the conviction under Penal Code section 1260. The sole issue on review was the refusal to modify the conviction. The Supreme Court agreed with the Court of Appeal.

The court reasoned that attempt has the element of specific intent, whereas a completed escape is a general intent crime. In convicting the defendant of a completed escape, the jury did not necessarily find the defendant had the requisite specific intent to commit an attempt. An appellate court's reduction to the offense to attempt would require a factual finding by that court of specific intent, in violation of the defendant's constitutional right to a jury trial on every element of the offense.

The determination whether an offense is "included" in another must consider *why* one is asking the question, because a multitude of rights are involved. For example:

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[12]The Supreme Court has extended the time for granting or denying rehearing in ***Brown*** to September 14. (http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1940643&doc_no=S181963)

[13]http://www.adi-sandiego.com/recent_changes_statutes.html#Amendments

- The *Bailey* scenario involves the power of an appellate court to reduce the conviction to an offense that has an element not determined by the jury at trial. It rests on the constitutional right to have every element of the offense determined by a jury. Attempted escape is not a lesser included offense of escape in this context because in convicting of the former the jury does not decide the existence of specific intent.

- If the question is whether the trial court erred in instructing on the lesser offense because it is not included, one is concerned with the due process right to notice of the charges. (*People v. Seaton* (2001) 26 Cal.4th 598, 640-641; *People v. Lohbauer* (1981) 29 Cal.3d 364; see also *In re Robert G.* (1982) 31 Cal.3d 437, 440-445.)

- If the question is whether the trial court erred in not instructing on the lesser offense because it is included, one is invoking the state constitutional right to have the jury determine every issue raised by the evidence. (*People v. Lopez* (1998) 19 Cal.4th 282; *People v. Memro* (1995) 11 Cal.4th 786, 871; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.)[14]

- If the issue is whether the defendant can be convicted of *both* the greater and the lesser, the answer looks to the California judicially created rule that a defendant may not be convicted of both a greater offense and a lesser included offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

- If the case concerns the state's authority to try the defendant on an offense after a previous conviction or acquittal of a greater or lesser offense, constitutional principles of double jeopardy and related statutes come into play. (*People v. Fields* (1996) 13 Cal.4th 289; *People v. Kurtzman* (1988) 46 Cal.3d 322; *Stone v. Superior Court* (1982) 31 Cal.3d 503; cf. *People v. Tideman* (1962) 57 Cal.2d 574.)

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[14]At this time the constitutional right is based on the state Constitution. The United States Supreme Court has not held a defendant has a federal constitutional right to sua sponte instructions on lesser included offenses in a non-capital case, although it has not rejected that position, either. (*People v. Breverman* (1998) 19 Cal.4th 142, 165-166; see also *People v. Moye* (2009) 47 Cal.4th 537, 558, fn. 5; *People v. Birks* (1998) 19 Cal.4th 108, 120-121; cf. *Beck v. Alabama* (1980) 447 U.S. 625 [holding unconstitutional an Alabama law forbidding instructions in capital cases on lesser included non-capital offenses].) The U.S. court has specifically held there is no constitutional duty, even in a capital case, to instruct on request on *non*-included offenses. (*Hopkins v. Reeves* (1998) 524 U.S. 88.)

Some of these scenarios require application of the "statutory elements" test for included offenses. (*People v. Birks* (1998) 19 Cal.4th 108, 117; *People v. Pendleton* (1979) 25 Cal.3d 371, 382; *People v. Anderson* (1975) 15 Cal.3d 806, 809-810.) In some, but not all, an alternative test – "allegations of the accusatory pleading" – is available. (*People v. Toro* (1989) 47 Cal.3d 966, 972, dicta on a different point disapproved in *People v. Guiuan* (1998) 18 Cal.4th 558, 563, fn. 3; *People v. Marshall* (1957) 48 Cal.2d 394.)

The doctrine of lesser included offenses is a multi-edged weapon. Sometimes clients need to argue a given offense *is* included, and at other times that it is *not*. Because of the obvious complexities of these matters and their potential to be beneficial to some clients and detrimental to others, counsel needs to think through the particular issues and facts carefully and hone arguments precisely to fit the individual situation.