DIVISION OF JUVENILE JUSTICE COMMITMENTS

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AMENDMENTS OF 2007 AND 2012

Through enactments effective September 1, 2007, the Legislature greatly restricted the juvenile cases for which there can be a Division of Juvenile Justice[1] (DJJ) commitment. DJJ is the former California Youth Authority and is now part of the Department of Corrections and Rehabilitation. Previously, there had been no offense-related limitation on DJJ commitments. Since these initial amendments, courts have clarified the scope of the amendments. Most recently, the Legislature modified the law.

The 2007 amendments to Welfare and Institutions Code sections[2] 731, subdivision (a)(4), 733, subdivision (c)[3], and 1731.5, subdivision (a)(1) gave courts discretion to

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[1]These juvenile prisons also sometimes are called Division of Juvenile Facilities (DJF). As *In re Jose T.* (2010) 191 Cal.App.4th 1142, 1145, footnote 1, explained:

> Effective July 1, 2005, the correctional agency formerly known as the California Youth Authority (CYA) became known as the Division of Juvenile Facilities (DJF). DJF is part of the Division of Juvenile Justice, which in turn is part of the Department of Corrections and Rehabilitation. (Welf. & Inst. Code, 1710, subd. (a); Pen. Code, 6001; Gov. Code, 12838, subd. (a), 12838.3, 12838.5, 12838.13.)

[2]Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

[3]Former section 733 provided in relevant part:

> A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities:
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> . . . (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 [now subd. (c) of § 290.008] of the Penal Code. This subdivision shall be effective on and after September 1, 2007.

order a DJJ commitment only in cases with: 1) a true finding of a section 707, subdivision (b) offense for the most recent petition; or 2) a true finding of a former Penal Code section 290, subdivision (d)(3) [now Pen. Code, § 290.008, subd. (c)] sex offense in the most recent petition and a prior section 707(b) true finding.

Initially, there was disagreement on whether courts could order DJJ commitments in cases not involving a section 707(b) offense, either prior or current. The Supreme Court ended this debate by concluding that, in cases where the latest offense admitted or found true is an enumerated sex offense but not a section 707(b) offense, the court has authority to order a DJJ commitment *only if* the minor previously was found to have committed a section 707(b) offense. (*In re C.H.* (2011) 53 Cal.4th 94; §§ 731(a)(4), 733(c).)

However, **AB 324**, effective February 29, 2012, amended sections 731 and 733 in response to *C.H.* to permit a DJJ commitment in any case with a true finding in the most recent petition of a section 707(b) offense or enumerated sex offense.[4]

APPLYING THE AMENDMENTS

Counsel should consider arguing for application of the ameliorative provisions of the various amendments in appropriate cases. Seeking relief and/or recall can have a significant impact beyond preventing additional time at DJJ. For example, the requirement to register as a sex offender for life applies to a minor only if that minor is committed to DJJ. (Pen. Code, § 290.008(a).)

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[4]Section 731, subdivision (a)(4) permits a DJJ commitment as follows: "if the ward has committed an offense described in subdivision (b) of Section 707 or subdivision (c) of Section 290.008 of the Penal Code, and is not otherwise ineligible for commitment to the division under Section 733."

Section 733(c) permits a DJJ commitment, in relevant part, where: "The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707 or subdivision (c) of Section 290.008 of the Penal Code. This subdivision shall be effective on and after September 1, 2007."

AB 324 reads, in relevant part, as follows: "This bill would expand the class of persons who may be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities to include a ward who has committed a specified sex offense, or who was previously found to have committed a specified serious or violent offense or a specified sex offense."

Nevertheless, as with all remedies sought on behalf of a client, it is important to consult the client about the desirability of seeking it and to investigate potential adverse consequences before filing any document. ADI's memo on taking advantage of favorable changes in the law discusses these concerns and outlines procedures to use at various stages of appeals.[5] (See also **ADI Criminal Appellate Practice Manual**, § 4.111, on "unwanted remedies" on appeal.)

Cases with Disposition before September 1, 2007, but Not Yet Final for Appellate Purposes as of That Date

Because the 2007 changes were apparently ameliorative and because the Legislature had not stated otherwise, they arguably should have been retroactive for all cases not yet final as of September 1, 2007. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1044-1046; *In re Estrada* (1965) 63 Cal.2d 740, 748; *In re Aaron N.* (1977) 70 Cal.App.3d 931, 937-938.) Unfortunately for this position, multiple courts of appeal disagreed in decisions finding the amendments were not retroactive to cases with a dispositional order prior to September 1, 2007. Their rationales varied. (E.g., *In re N.D.* (2008) 167 Cal.App.4th 885, 890-894 [changes not ameliorative; deal with placement, not level of punishment]; *In re Carl N.* (2008) 160 Cal.App.4th 423, 437-438 [legislative intent for non-retroactivity expressed]; *In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1081 [same].) The California Supreme Court has not spoken on the retroactivity issue. Likely, few cases of this kind remain in the system.

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Cases with Dispositional Order on or after September 1, 2007, but before February 29, 2012

If the disposition was ordered after September 1, 2007, but before February 29, 2012, the 2007 amendments apply, and a DJJ commitment is permissible only as outlined in *C.H.*: it is unauthorized if a true finding in the most recent petition was not for a current section 707(b) offense or for a current Penal Code section 290.008(c) offense where the minor had a prior section 707(b) true finding.

Related issue: The law requires a true finding for an enumerated offense in the most recent "petition." A question exists whether "petition" includes section 777 petition for probation violation. While the Fourth District in *Carl N.* presumed Welfare and Institutions Code section 777 petitions fell within the purview of the statute, other Courts of Appeal concluded that section 777 petitions did not fall within the purview of the statute. (Compare *Carl N.*, *supra*, 160 Cal.App.4th at pp. 437-438 with *In re D.J.* (2010)

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

185 Cal.App.4th 278, 286, *In re M.B.* (2009) 174 Cal.App.4th 1472 and *In re J.L.* (2008) 168 Cal.App.4th 43, 60-61.) The Supreme Court has not spoken on the issue.

Related issue: A similar issue occurs where the court dismissed the most recent petition in order to commit a minor to DJJ, when section 733 otherwise prohibits commitment. At least one Court of Appeal found this error: *V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455. This issue currently is on review in *In re Greg F.*, review granted June 8, 2011, **S191868**.

Cases with Dispositional Order on or after February 29, 2012

For cases with offense *and* dispositional order on or after February 29, 2012, the court still is greatly limited in when it may order DJJ: only where the most recent petition included a true finding for a section 707(b) or Penal Code section 290.008(c) offense. The *related issues* outlined in the preceding section may still apply.

If the disposition was on or after February 29, 2012, but the *qualifying offense occurred before February 29, 2012*, counsel should check for an ex post facto violation. Arguably, the more lenient pre-2012 amendment law, as interpreted in *C.H.*, must be applied because a DJJ commitment was not permitted on the basis of a current Penal Code section 290.008(a) true finding with no prior section 707(b) true finding.

The ex post facto prohibition ensures that, *at the time the offense was committed*, the defendant had fair notice of the punishment attached to the act. A later enacted law raising the punishment cannot be applied retroactively, because the person in committing the offense could not have known the punishment could be that great. An ex post facto violation, therefore, occurs where the increased penalty is retrospective and disadvantageous to the client. (*Weaver v. Graham* (1981) 450 U.S. 24, 29-30 [101 S.Ct. 960, 67 L.Ed.2d 17].)

While juvenile law is civil and the term "punishment" often is avoided in juvenile court, counsel should argue ex post facto laws apply here. (See *John L. v. Superior Court* (2004) 33 Cal.4th 158 [assuming without discussion that ex post facto principles apply in delinquency cases].) Section 202, subdivision (e) provides DJJ commitments and other possible sanctions are permissible forms of "punishment." DJJ is regarded as the most severe – most restrictive – punishment available through juvenile court. (*People v. Thomas* (2005) 35 Cal.4th 635, 644; *In re Eddie M.* (2003) 31 Cal.4th 480, 488; *In re Ricky H.* (1981) 30 Cal.3d 176, 183 [statutory scheme contemplates "progressively restrictive and punitive series of disposition orders," with DJJ [then CYA] as a "last resort," reserved for "incarceration and discipline of serious offenders"]; *In re Carl N.*, *supra*, 160 Cal.App.4th 423, 433; *In re Christopher B.* (156 Cal.App.4th 1557, 1564.)

This conclusion is reinforced by the fact severe consequences can flow from a DJJ commitment, such as a lifetime duty to register as a sex offender.[6] (Pen. Code, § 290.008(a).) A "punitive" sanction, reserved for "serious offenders," and carrying both the heaviest stigma of juvenile dispositions and potential lifetime liabilities, cannot be dismissed as a mere "placement" option (cf. *In re N.D.*, *supra*, 167 Cal.App.4th 885, 890-894[7]).

URGENCY

Claims related to the changes in the law may need to be handled on an expedited basis, when the minors should not be at DJJ. If the case is pending on appeal, a motion for an expedited appeal is appropriate. (Cal. Rules of Court, rule 8.240.) Other methods of handling time-sensitive cases are discussed in the **ADI Criminal Appellate Practice Manual**, chapter 1, §1.30 et seq. Possible steps might include a motion for summary reversal (if direct application of § 733 is the only issue), a writ instead of appeal, or motion for modification of the commitment – effectively, release pending appeal (see *In re Antoine D.* (2006) 137 Cal.App.4th 1314; *In re Talbott* (1988) 206 Cal.App.3d 1290, 1293).

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[6]This point need not contend registration per se is punishment. Whether the current lifetime registration law is punishment subject to ex post facto laws is uncertain. (See *People v. Mosley*, S187965, review granted January 26, 2011 [does discretionary sex offender registration, including the residency restriction, increase the penalty for an offense and require the facts supporting its imposition be found by a jury beyond a reasonable doubt?]; *People v. Castellanos* (1999) 21 Cal.4th 785, 796 [former section 290, without current residency restriction, is not punishment subject to ex post facto laws].) Regardless, linking only a particular disposition to onerous collateral consequences is evidence that the disposition is more than a mere "placement" decision; it is treated as a qualitatively more serious punishment than others.

[7]*N.D.* found the 2007 amendments to be fiscally motivated, shifting custodial responsibility from the state to local officials; the court concluded they did not reflect a finding DJJ is too harsh a punishment. The same cannot be said of the reverse 2012 amendments. They surely were not intended to shift costs back to the state, in the midst of a critical state fiscal situation. Rather, they were a direct response to *C.H.*, reflecting a judgment that DJJ should not be off limits for serious sex offenders who have no section 707(b) priors. Such a purpose is classical "punishment" and so subject to ex post facto limitations.

Counsel should investigate the possibility of recalling the case under section 731.1.[8] The recall is initiated by recommendation of the probation officer, but appellate counsel may monitor the case to ensure the recall is progressing expeditiously or ask trial counsel to do so. Although section 731.1 does not provide for recall on motion of the minor, it may be possible to get the process started by an informal application for recall. (See *People v. Gallardo* (2000) 77 Cal.App.4th 971, 985 [construing analogous provision of Pen. Code, § 1170, subd. (d)].)

In addition, in the case of any straight direct application error, counsel should consider sending a letter or motion[9] to the superior court judge indicating that the disposition is unauthorized. This document would be much like the one sent to request a credits correction and should cite authority for the fact that superior courts retain discretion to fix unauthorized dispositions, even when an appeal is pending. (*People v.*

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[8]The version of section 731.1 enacted for the September 1, 2007, amendments specified recall for the specific situation at issue here. It recently was amended to be more generalized and provides in relevant 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 confined in an institution operated by the division. 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. The court shall provide to the division no less than 15 days advance notice of the recall hearing date, and the division shall transport and deliver the ward to the custody of the probation department of the committing county no less than five days prior to the scheduled date of the recall hearing. Pending the recall disposition hearing, the ward shall be supervised, detained, or housed in the manner and place, consistent with the requirements of law, as may be directed by the court in its order of recall. The timing and procedure of the recall disposition hearing shall be consistent with the rules, rights, and procedures applicable to delinquency disposition hearings, as described in Article 17 (commencing with Section 675).

[9]Although an informal letter is sufficient if the right to relief is incontestable, in other cases counsel should consider a formal motion instead. (See *People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519 [informal letter does not preserve appellate reviewability of Pen. Code, § 1237.1 credits decision].)

Cunningham (2001) 25 Cal.4th 926, 1044; *People v. Chagolla* (1983) 144 Cal.App.3d 422, 434.)

In expedited appeals, counsel may wish to contact the Attorney General's office to request the case be reviewed as soon as possible. Sometimes concessions and/or a stipulation to the immediate issuance of the remittitur (Cal. Rules of Court, rule 8.272 (c)(1)) might be available.