JULY 2012 – ADI NEWS ALERT

BY
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This alert[1] covers:

- Requesting reporter's transcripts on CD.
- *Miller v. Alabama*, cruel and unusual punishment for mandatory juvenile LWOP.
- *People v. Brown*, pretrial conduct credits under amendments to Penal Code section 4019.
- *People v. Jones* and *People v. Correa*, reinterpreting Penal Code section 654.

Requesting reporter's transcripts on CD

We are aware that many panel attorneys prefer to review records on the computer, because that format allows for annotations and easy searches, as well as copying for pasting into notes or the brief. It can be very cost-effective. It also allows attorneys to take records with them easily and store them inexpensively. Some have been scanning hard copies to convert them into computer-readable form.

Many attorneys may not be aware they may request reporter's transcripts in computer-readable form on a case-by-case basis. Rule 8.130(f)(4)[2] provides:

> On request, and unless the superior court orders otherwise, the reporter must provide any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271(b).

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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]Although rule 8.130 is in a chapter entitled "Civil Appeals," in our experience reporters have been willing to comply with requests made by attorneys in criminal and dependency cases, as well. Many prefer providing transcripts in computer form.

The request must be submitted before the record is completed, because the computerized version is instead of, not in addition to, the paper version (unless you want to pay for it yourself). To facilitate this, you may ask us to offer you only those cases that are not record-ready when the appointment is made.

Caveats:

- Attorneys often send the record to clients when the appeal is over. (See **ADI Manual**, §§ 1.63-1.68.) Unless the client has access to a computer, that would entail printing it out, which is not now a reimbursable expense. *But* counsel has the option of simply telling the client, "I'll keep it for you and send it to you if you request it now or in the future." It needs to be printed only if the client (a) asks for it and (b) does not have access to a computer. Many clients probably do not want the record and have no practical way of storing it safely; the attorney is more likely to safeguard it properly than the client. That practice fulfills the attorney's ethical obligation to give the client the file on request.[3] With paper transcripts, this approach is usually not feasible because of storage costs for the attorney, but computer-readable transcripts obviate such concerns.

- Reporters have their own equipment, and some may use antiquated computers. In our experience with getting dependency minors' copies on disc, we encountered some records in unusable form, such as floppy discs and inaccessible programs. We suggest clarifying this matter with the reporter before finalizing a request.

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[3]Rules of Professional Conduct, rule 3-700(D) states:

> A member whose employment has terminated shall: (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, *at the request of the client*, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

(Emphasis added; see also *In the Matter of Valinoti* (Review Dept.2002) 4 Cal. State Bar Ct. Rptr. 498, 536 [express element of rule 3-700(D) violation is client request for return of file]; **Cal. State Bar Formal Opn. 2001-157** [duty to retain file unless provided to client or client consents to other disposition].)

***Miller v. Alabama*, Cruel and Unusual Punishment for Mandatory Juvenile LWOP**

In ***Miller v. Alabama*** (June 25, 2012, No. 10-9646) __ U.S. __ [2012 WL 2368659], the United States Supreme Court held that mandatory LWOP sentences for minors under age 18 convicted of homicide violate the prohibition against cruel and unusual punishment. The decision relied on two main lines of authority: (1) *Graham v. Florida*, which decided mandatory LWOP for a juvenile non-homicide offense is unconstitutional, and (2) cases beginning with *Woodson v. North Carolina* (1976) 428 U.S. 280, which require a death sentence be imposed only after considering the characteristics of the offender and offense. "Mitigating qualities of youth" is one such characteristic. (*Johnson v. Texas* (1993) 509 U. S. 350, 367.)

The **Recent Changes in the Law** page on the ADI website analyzes *Miller* and potential issues it may spawn. I will not repeat that analysis here, but merely point out the main areas discussed:

- Very long non-LWOP sentences
- Discretionary LWOP
- Absence of finding defendant killed or intended to kill
- Mandatory laws applying to youth
- Retroactive applicability of *Graham-Miller*

***People v. Brown*, Pretrial Conduct Credits under Amendments to Penal Code Section 4019**

On June 18, 2012, the California Supreme Court handed down its long-awaited decision in *People v. Brown* (2012) 54 Cal.4th 314 on the retroactivity of the beneficial aspects of SB3x 18 and other 2010 amendments to Penal Code section 4019 on pretrial conducts. The court determined the changes were prospective only. It rejected arguments under *In re Estrada* (1965) 63 Cal.2d 740, 748, and equal protection principles, as applied in *In re Kapperman* (1974) 11 Cal.3d 542, 546-550, and *People v. Sage* (1980) 26 Cal.3d 498. It also determined that credits for individuals in custody when the amendment went into effect should be calculated by a hybrid method: the former version of the law governs custody before the amendment, and the amendment governs later custody.

Estrada

Brown explored the relationship between *Estrada*, which creates a presumption that the Legislature intended an ameliorative change to be retroactive, and Penal Code

section 3, which establishes a rebuttable presumption that changes in criminal statutes are prospective. The *Brown* decision found section 3 to state the overriding general principle and significantly limited *Estrada* to situations in which a particular offense is made non-criminal or the punishment for it is reduced:

> . . . *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.

The court found no evidence in the amendments to section 4019 of an intended "legislative mitigation of the penalty for a particular crime."

Equal protection

As for the argument that applying the amendments prospectively violates equal protection unless applied retroactively to prisoners who had previously earned conduct credits at a lower rate, the court reasoned:

> [T]he important correctional purposes of a statute authorizing incentives for good behavior (citation) are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.

The court found language in *People v. Sage*, *supra*, 26 Cal.3d 498 not to require a different conclusion, because it did not take account of the purpose of conduct credits. It significantly confined the impact of that decision: "we decline to read *Sage* for more than it expressly holds."

Issues following *Brown*

The decision affects a large number of cases, both open and closed, and so counsel must be familiar with its implications. The ADI web page on **Recent Changes in the Law** analyzes *Brown* and appellate issues that may (or may not) be raised in its wake. The areas covered include:

- *Estrada* and hybrid issues

- Equal protection
- Ex post facto claims
- Strike priors: pleading, proof, and striking
- Realignment hybrid credits

Counsel ***must*** also consider related issues raised in the memo accompanying this alert. Additional copies may be requested from staff attorney Jamie Popper (jlp@adi-sandiego.com).

People v. Jones **and** ***People v. Correa*****, Reinterpreting Penal Code Section 654**

In two decisions filed June 21, the Supreme Court reinterpreted Penal Code section 654 in important ways and disapproved parts of a leading case on that statute, *Neal v. State of California* (1960) 55 Cal.2d 11.

In *People v. Correa* (June 21, 2012, S163273) ___ Cal.4th ___ [2012 WL 2344999], the court held punishment for multiple violations of the same statute is not within the scope of section 654. The defendant was found in illegal possession of seven guns and was sentenced to consecutive terms for each of the guns. The court disapproved dictum in a footnote in *Neal*, which had said, "Although section 654 does not expressly preclude double punishment when an act gives rise to more than one violation of the same Penal Code section or to multiple violations of the criminal provisions of other codes, it is settled that the basic principle it enunciates precludes double punishment in such cases also." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 18, fn. 1.)

In *People v. Jones* (June 21, 2012, S179552) ___ Cal.4th ___ [2012 WL 2345003], the defendant was found with a firearm and convicted of being an ex-felon with a firearm, carrying a concealed firearm, and carrying a loaded firearm for this single act. He was sentenced to concurrent terms. The court concluded section 654 prohibits multiple punishment for these offenses. It held, "Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law." In so holding, the court overruled *In re Hayes* (1970) 70 Cal.2d 604, which had concluded that section 654 does not prohibit double punishment for driving under the influence and with an invalid license, and *People v. Harrison* (1969) 1 Cal.App.3d 115, which had permitted double punishment for possessing a firearm when he was a felon and it was loaded.

The court declined to apply a "single objective" test, such as prescribed in *Neal*. Instead, it concluded, "[T]his case should be decided on the basis that it involves a single act or omission that can be punished but once."

The concurring opinions noted the lack of guidance provided in the majority opinion and would have decided the case under the *Neal* "single objective" test.

Issues

ADI will be studying the implications of these cases. Meanwhile, an obvious one, raised in *Correa*: an ex post facto or due process application[4] of either decision to cases where the offense occurred before it.

The *Correa* court recognized that it was overturning previously established law, more favorable to defendants, that reasonably could have been relied on. Its decision could therefore not be applied constitutionally to Correa. (See *Marks v. United States* (1977) 430 U.S. 188, 191–192, and ADI's article on **ex post facto/due process implications of judicial decisions** [in particular, *People v. Sandoval* (2007) 41 Cal.4th 825].)

Counsel should be vigilant to guard against application of *Correa*'s interpretation of section 654 to defendants whose offenses were committed before that case becomes ***final***. (Cal. Rules of Court, rule 8.532(b); see also *People v. King* (1993) 5 Cal.4th 59, 80 ["our holding overruling [a more favorable case] cannot be applied retroactively to crimes committed during the period between [the more favorable case] and the finality of this decision"].)

To the extent that applying any provision in *Jones* that departs from established precedent might result in greater punishment than that permissible under prior law, the same principles may be invoked.

[4]Technically, ex post facto constitutional provisions apply to statutes. But due process creates analogous restrictions on judicial decisions affirmatively changing the law in a way unfavorable to defendants.