

AUGUST 2016 – ADI NEWS ALERT

BY

ELAINE A. ALEXANDER, EXECUTIVE DIRECTOR

CONTENTS

This alert¹ covers:

- [Fourth District courts will not accept errata filings; instead, move to strike original and file replacement document.](#)
- [New rules on publication of review-granted cases likely apply only to cases granted review on or after July 1, 2016.](#)
- [Juvenile LWOP and equivalent:](#)
 - (a) [Franklin finds section 3051 satisfies constitutional requirement that defendants who commit crimes as juveniles have reasonable opportunity to earn release in their lifetime;](#)
 - (b) [Habeas corpus is apparently available to gain evidentiary hearing on youth-related factors at time of offense: In re Reyes, S233936 \(remand order\);](#)
 - (c) [Appellate counsel should raise Franklin and related issues and hopefully will help distribute ADI's pro per materials;](#)
 - (d) [High court has not yet spoken on terms for juvenile offenders not covered by section 3051.](#)

Fourth District courts will not accept errata filings; instead, move to strike original and file replacement document.

All divisions of the Fourth Appellate District have asked ADI to instruct panel attorneys that they cannot accept errata filings (letters or motions pointing out errors in a previous filing and purporting to correct them). The courts are unable to alter TrueFiling or other documents to reflect desired changes. Counsel should instead file a new, corrected brief, along with a motion to strike the brief affected by the error. This should

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

be relatively inexpensive, given that filing and service are largely electronic throughout the district.²

Although TrueFiling has not yet started in Division Three, the court confirms it wants counsel to follow the procedure of striking the old and filing a new brief in non-TrueFiling cases, too. This is a long-expressed preference of the court.

New rules on publication of review-granted cases likely apply only to cases granted review on or after July 1, 2016.

In its [June 16 alert](#),³ ADI addressed new rules 8.1105 and 8.1115 of the California Rules of Court, allowing published opinions in review-granted cases to remain published and citable pending decision by the Supreme Court, though not to have a binding effect on lower courts within the meaning of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450. The previous alert did not consider whether the new rules are retroactive, i.e., whether cases granted review *before* July 1, 2016, might be citable.

Apparently various organizations have answered that question differently, ranging from fully retroactive to applicable only to cases granted review on or after July 1, 2016.⁴ Because of the apparent confusion, ADI has reexamined the area and concluded the most plausible answer is the rules are prospective, applying only to cases granted review on or after July 1. But that is not an authoritative or “official” conclusion, of course, and we urge counsel to review carefully the legal authorities laid out here.

²See [ADI Claims Manual](#) under FILINGS DUE TO ATTORNEY ERROR and related entries for statewide policy on compensation for corrections.

³http://www.adi-sandiego.com/pdf_forms/2016_6_June_16_alert.pdf

⁴SDAP’s email alert said the rules “presumably” apply to cases with grants of review *before* July 1, 2016, because they are procedural not substantive; the SDAP website is more tentative. (<http://www.sdap.org/>) CCAP takes a “don’t know” position and (like this alert) considers the practical difficulties and collateral questions if the rules are applied to decades-old cases.

(http://www.capcentral.org/resources/enews_announce.asp) A CACJ column concludes the rules allow citation only of review-granted cases only if the review was granted on or after July 1.

Supreme Court language

A heading to the rule change is inconclusive: “effective on July 1, 2016.” A June 1 [Supreme Court announcement](#)⁵ nevertheless unambiguously says:

The Supreme Court’s decision to adopt the amendments was unanimous and will apply to any published Court of Appeal decision as to which review is granted on or after July 1, 2016.

(Emphasis added.) Granted, this is a news release and therefore not “law.” But presumably the court approved the content and language before allowing it to be released. I would consider it to have more than a little validity as a reflection of the court’s intent and an extrinsic aid to interpretation. (See *People v. Caraballo* (2016) 246 Cal.App.4th 936, 940 [referring to various extrinsic aids, including intent reflected in ballot materials, which themselves are in no sense binding “law”].)

Practical considerations

The conclusion that the Supreme Court meant what its announcement said is bolstered by consideration of the practicalities. Could the court really have intended that once-published cases granted review (or hearing) decades ago should suddenly become republished and citable? Who would be responsible for hunting these down? Burdening the court with such a task would seem unthinkable in this time of budget constraints. Burdening litigants would favor those with ample resources to investigate obscure and long-dormant authorities. One of the policy reasons behind selective publication in the first place was to level the playing field somewhat by confining necessary research to a reasonably-sized database. In the exercise of its broad discretion under article VI, section 14 of the California Constitution to set the conditions for publication of opinions, the Supreme Court may well have given dominant weight to such practicalities and opted for straight prospectivity.

General principles of retroactivity

Normally a new rule concerned with *just* the procedure for conducting an appeal would presumptively apply to all cases on appeal. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289-290.) But here, as already pointed out, the “normal” rule is countered by the court’s explicit announcement and the arguable practical grounds for departing from that principle. “Normal” or presumptive rules are, after all, just default guides for construction in the absence of affirmative evidence of the enacting authority’s actual

⁵<http://newsroom.courts.ca.gov/news/supreme-court-eliminates-automatic-depublication>

intent. (See *People v. Floyd* (2003) 31 Cal.4th 179, 184-185; *People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

Additionally, it is not self-evident this change is in fact just a rule of appellate *procedure*. Publication rules affect, not just the permissible citations within briefs and other documents, but the content and thus the very nature of the governing law itself. Specifically, they determine what cases constitute “authority” that other appellate courts should consider and give weight to in their own decisional processes. As discussed in the [June 16 ADI alert](#),⁶ California Courts of Appeal observe horizontal stare decisis in a non-binding form: appellate courts tend to follow their own rulings and those of other courts of equal rank in the absence of good reasons to do otherwise. (See *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 879-880; ADI Appellate Practice Manual (2d ed.), [ch. 7, “The End Game: Decisions by Reviewing Courts and Processes After Decision,”](#)⁷ § 7.7.) Only published cases are to be consulted in this process. (Rule 8.1115(a).) In this sense, the new publication rules have distinct *substantive* dimensions.

The law of retroactivity is not reducible to simple procedural-substantive labels. It is, rather, incredibly nuanced and varied. (See generally *Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 230-232; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; [Potentially Favorable Changes in the Law](#),⁸ ADI practice article, part two, General Principles of Retroactivity.) For example:

- State law may differ from federal law. (E.g., *People v. Carrera* (1989) 49 Cal.3d 291, 327-328 [declining to follow the retroactivity rule of *Griffith v. Kentucky* (1987) 479 U.S. 314 when construing state law]; see also *Danforth v. Minnesota* (2008) 552 U.S. 264 [state courts not bound to follow *Teague v. Lane* (1989) 489 U.S. 288 on retroactivity principles applicable to federal habeas corpus proceedings].)
- Some laws may be fully retroactive. (E.g., *In re Kapperman* (1974) 11 Cal.3d 542 [equal protection considerations in custody credits]; *People v. Mutch* (1971) 4 Cal.3d 389, 394-396 [definition of aggravated kidnapping]; see *Michigan v. Payne* (1973) 412 U.S. 47, 53, fn. 6 [listing examples of full retroactivity, but finding *North Carolina v. Pearce* (1969) 395 U.S. 711 not in that category].)

⁶http://www.adi-sandiego.com/pdf_forms/2016_6_June_16_alert.pdf

⁷http://www.adi-sandiego.com/panel/manual/Chapter_7_Decisions_and_later.pdf

⁸http://www.adi-sandiego.com/pdf_forms/RECENT_CHANGES_Favorable_changes_Feb_2013_EAA.pdf

- Many changes apply to cases not yet final when the law is changed. (*Griffith v. Kentucky* (1987) 479 U.S. 314 and *Teague v. Lane* (1989) 489 U.S. 288; *People v. Charles* (1967) 66 Cal.2d 330 [*People v. Aranda* (1965) 63 Cal.2d 518 applies to cases on appeal when it was decided]; *In re Estrada* (1965) 63 Cal.2d 740, 748 [ameliorative changes in sentence].)
- Many laws are prospective only. (E.g., *People v. Brown* (2012) 54 Cal.4th 314 [presentence conduct credits]; *People v. Floyd* (2003) 31 Cal.4th 179, 184-188 [statute ameliorating consequences of certain drug offenses]; see Pen. Code, § 3 [“No part of [the Penal Code] is retroactive, unless expressly so declared”].)
- Some laws are applicable only to specified events occurring after the decision. (E.g., *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 39 [police conduct]; *People v. Engelman* (2002) 28 Cal.4th 436, 449, and *People v. Roberts* (1992) 2 Cal.4th 271, 314 [instructions]; *People v. Scott* (1994) 9 Cal.4th 331, 357-358, and *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [sentencing procedures].)

In dealing with the new rules on publication and any other change in the law, counsel should look at such cases and their stated reasons for applying a particular rule of retroactivity.

ADI guidance

ADI’s conclusion, from the court’s own unambiguous announcement and the impracticalities of full retroactivity, is that the rule change probably applies only to published opinions in cases granted review on or after July 1, 2016. If some readers disagree and want to cite an older case, they of course are free to try. But that would be at some risk of violating the general prohibition against citing unpublished cases. Or they can take a more cautious course and ask the Supreme Court to order the case published.⁹ Regardless, the point of this alert has been not so much to answer the question as to offer some structure for making an informed decision.

⁹The court has theoretical authority to order a case published or depublished at any time in perpetuity, it appears. (See, e.g., Justice Kennard’s dissent in *People v. Saunders* (1993) 5 Cal.4th 580, 607, calling attention to the April 26, 1990, orders of the Supreme Court in *People v. Laury*, A043042, and *People v. Casillas*, A043679, depublishing cases that had become final a month or more earlier.) For the sake of maintaining an orderly process, however, the court very rarely acts far outside the regular time frame for cases.

Juvenile LWOP and equivalent

- (a) **Franklin finds section 3051 satisfies constitutional requirement that defendants who commit crimes as juveniles have reasonable opportunity to earn release in their lifetime.**

In *People v. Franklin* (2016) 63 Cal.4th 261, the defendant alleged he received the equivalent of a life without possibility of parole sentence without individualized consideration of the mitigating factors of youth. This argument relied on *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407], which forbade mandatory LWOP without such consideration. The defendant also drew on *People v. Caballero* (2012) 55 Cal.4th 262, holding defendants may not receive sentences equivalent to life without possibility of parole for non-homicides committed when they were minors.

On review, the Supreme Court unanimously agreed *Miller* prohibits mandatory sentences for juvenile offenders that are the functional equivalent of LWOP. (*People v. Franklin, supra*, 63 Cal.4th 261, 276.) It nevertheless found the 2015 enactment of Penal Code section 3051 and related amendments to sections 3046 and 4801 mooted the challenge to the sentence by requiring that the defendant receive a parole hearing during his 25th year of incarceration. Under the new laws, the defendant's sentence was not equivalent to LWOP. (*Id.* at pp. 277-279.)

The court further added, this time over Justice Werdegar's dissent, that the defendant may not have had adequate opportunity or motivation at trial to make a record of mitigating evidence tied to his youth – evidence that would come into play at the section 3051 parole hearing. The case was remanded for sufficient opportunity to make such a record. (*People v. Franklin, supra*, 63 Cal.4th 261, 282-284.)

- (b) **Habeas corpus apparently is available to gain evidentiary hearing on youth-related factors at time of offense: *In re Reyes*, S233936 (remand order)**

Franklin left unanswered whether cases not in trial or on active appeal should be reopened for an evidentiary hearing – and, if so, through what mechanism. In a petition for review ([S233936](#))¹⁰ in the still-ongoing case of *In re Reyes* ([G052777](#)),¹¹ the court has suggested an answer. The defendant filed a pro per habeas corpus petition alleging, among other claims, a violation of *Miller-Caballero* because of the 52-life sentence

¹⁰http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2139104&doc_no=S233936

¹¹http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=43&doc_id=2124657&doc_no=G052777

imposed in 2008 for an offense committed when he was a juvenile. Appellate counsel was appointed. The Court of Appeal denied the habeas petition summarily. Defendant filed a petition for review on April 20, 2016. On May 26, *Franklin* was decided.

On June 29, the Supreme Court granted review in *Reyes*. It transferred the case to the Court of Appeal with directions to issue an order to show cause returnable before the superior court for a hearing along the lines required by *Franklin*:¹²

The Secretary of the Department of Corrections and Rehabilitation is to be ordered to show cause, when the matter is placed on calendar, why petitioner is not entitled to make a record of “mitigating evidence tied to his youth.” [Citing *Franklin*.]

The order in *Reyes* seems to suggest the court did indeed contemplate evidentiary hearings in long-final *Miller-Caballero* cases along the lines ordered in *Franklin*. Habeas corpus seems the logical remedy – a conclusion ratified by the remand order in *Reyes*.¹³

(c) Appellate counsel should raise *Franklin* and related issues and hopefully will help distribute ADI’s pro per materials

Counsel with *Franklin*-related issues on appeal should raise the *Franklin* issue and request an evidentiary hearing where applicable – and advisable.¹⁴

¹²As a preliminary matter, it appears that orders of the Supreme Court are published and citable. (See *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2; *People v. Dee* (1990) 222 Cal.App.3d 760.) Caveat: To the extent *Conrad* and *Dee* purport to discern the Supreme Court’s position on the *merits* in orders publishing or depublishing opinions and granting or denying review, their reasoning is highly suspect. (*People v. Saunders* (1993) 5 Cal.4th 580, 591, fn. 7; rules 8.1120(d), 8.1125(d).) The cases are invoked here only for the proposition that courts and parties may *cite* orders of the Supreme Court. Neither the *Saunders* majority nor the dissenters disagreed with that proposition.

¹³The court has transferred a number of *Miller-Caballero* cases to the Court of Appeal for consideration of the need for a *Franklin* evidentiary hearing. See list in Supreme Court [news release of August 19, 2016](#).

¹⁴Counsel should consider whether the client will benefit from such a “baseline” hearing in terms of improved likely success in a later parole release hearing. Appellate counsel should not assume a benefit, just because the legal issue is theoretically available. Consultation with trial counsel and the client may be useful in deciding the actual benefit to the client. If the answer is “not helpful,” counsel may advise the client that not pursuing the issue (or even the appeal itself in some instances) is an advisable course.

We also note that section 3051 relief is not strictly limited to defendants coming within the letter of *Miller-Caballero*. The need for a *Franklin*-type proceeding designed to preserve evidence for an eventual parole hearing would apply to all defendants potentially entitled to section 3051 parole consideration. That includes, for example, many offenders who were over 18 but less than 23 at the time of their offense. Parole hearings are also available in many cases where the defendant is serving a determinate sentence with an expected release date that will result in as little as 15 total years of incarceration. Attorneys should consider seeking *Franklin* proceedings if their clients are arguably entitled to parole consideration under section 3051. (See also point (d), below, for related issues that non-3051 defendants may need to preserve.)

Many such cases, however, either are post-appeal or never were appealed. Those defendants are likely without counsel. ADI has developed pro per materials in a number of similar situations over the last few years and has done so for the *Franklin* situation. They are posted in the same area as the [Gutierrez-Caballero pro per materials](#).¹⁵ We hope counsel will help disseminate these to their own past clients and/or use any contacts with penal institutions to make them widely available for inmate use.

(d) High court has not yet spoken on juvenile offenders ineligible for parole hearing under section 3051

Penal Code section 3051 excludes several categories from eligibility for a youth offender parole hearing: those who are sentenced under the Three Strikes Law (§§ 667, subds. (b)-(I), 1170.12) or Jessica’s Law (§ 667.61), those who are sentenced to life without parole, and those who commit another crime “subsequent to attaining 23 years of age . . . for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.” (§ 3051, subd. (h).) The *Franklin* court noted, 63 Cal.4th at page 280:

Our mootness holding is limited to circumstances where, as here, section 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy mandatory sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under section 3051, subdivision (h), or who are serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes.

On August 17, 2016, the Supreme Court ordered supplemental briefing in *People v. Contreras*, [S224564](#), on the question whether a total sentence of 50 years to life or 58 years to life is the functional equivalent of life without the possibility of parole for a juvenile offender. The defendants in *Contreras* do not come within the provisions of

¹⁵http://www.adi-sandiego.com/news_alerts/recent_changes_cases.asp#LWOP

section 3051. Attorneys should preserve the issue in their own cases if relevant; they may ask staff attorney Helen Irza (hsi@adi-sandiego.com) for sample briefing.