

NOVEMBER 2017 – ADI NEWS ALERT

Take timely steps to ensure affected clients get the benefit of two potentially ameliorative statutory changes – SB 620 and SB 180

This alert¹ covers two laws that potentially reduce certain sentence enhancements – SB 620 on firearm enhancements and SB 180 on certain enhancements for controlled substance violations. The laws go into effect January 1, 2018. The new laws are:

SB 620: [SB 620](#) ends the statutory prohibition on using Penal Code section 1385 to strike firearm enhancements under Penal Code sections 12022.5, subdivision (c), and 12022.53, subdivision (h).

SB 180: [SB 180](#) eliminates 10 out of the current 11 controlled substance statutory violations that under Health and Safety Code section 11370.2 can add a three-year enhancement to certain crimes involving controlled substances. The only remaining enhancement is for prior convictions involving the use of minors as an agent of drug sales.

This alert gives guidance to help counsel assess and present claims based on these changes in affected cases. ADI also has sample arguments.

Likely *Estrada* retroactivity

ADI has concluded both of these amendments will likely be held retroactive within the meaning of *In re Estrada* (1965) 63 Cal.2d 740 – that is, applicable to all cases not yet final for purpose of appellate review as of January 1, 2018. “Not yet final for purpose of appellate review” means the time for petitioning for certiorari in the United States Supreme Court on direct appeal has not yet expired on that date (or, if a cert petition is filed, it has not yet been denied).

The statutory language itself asserts the amendments will apply to “resentencings,” confirming the intent for retroactive effect.

In a typical case, a petition for certiorari is due no more than 90 days after the California Supreme Court denied review. (See [Rules of the Supreme Court of the United States](#),² rule 13, paragraph 1; see also rule 30, paragraph 1, on computation of time. A filing on January 2, 2018, would be deemed timely to meet a December 30 or 31, 2017, or January 1, 2018, deadline.) If review was granted or other complications arise, consult

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

²<https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>

paragraph 3 of rule 13 of the Supreme Court Rules. (See also [ADI Appellate Practice Manual, chapter 7](#), “The End Game: Decisions by Reviewing Courts and Processes After Decision,” §§ 7.75 et seq., 7.93 et seq., 7.113 et seq.)

Raising the issue on appeal

Counsel are urged to follow the procedures outlined in our memo, [Potentially Favorable Changes in the Law](#),³ which points out options at each stage of a case, from pre-AOB to post-appeal. Consultation with the staff attorney buddy can help counsel determine the appropriate steps. The buddy will have access to the most recent positions taken by the court and Attorney General and can help guide counsel to the course of action most likely to be fruitful.

Staff attorneys Art Martin and Lynelle Hee have prepared sample arguments, based on samples produced by the First District Appellate Project, which has kindly given its permission to use these materials:

[Sample SB 620 argument](#)

[Sample SB 180 argument](#)

Although theoretically making these arguments now might be considered premature, since the new laws are not yet in effect, the Fourth District and apparently most other California appellate courts have been accepting supplemental briefs raising them. By the time most pending cases are decided, after all, the laws *will* be effective. Raising the issue earlier, rather than later, makes for a smoother, more efficient, and more economical process.

Cases at late stages

Counsel should also attempt to keep cases now at late stages alive on direct review past January 1, 2018, if possible, and also to do whatever possible to ensure clients have the assistance of counsel in presenting their position.

When Estrada is available

If the time for filing a certiorari petition will not have expired when the new laws become effective, *Estrada* retroactivity is available. Nothing need be done to preserve *Estrada*'s applicability.

³http://www.adi-sandiego.com/pdf_forms/RECENT_CHANGES_Favorable_changes_Feb_2013_EAA.pdf

If the case will still be on direct appeal in the California courts on January 1, 2018, counsel may present the SB 620/SB 180 argument to the court having jurisdiction at the time of the filing (Court of Appeal or Supreme Court).

If the California courts no longer have appellate jurisdiction (for example, because a petition for review was denied), but the cert period will still be running at the first of 2018, an *Estrada* argument is available. But it must be presented by habeas corpus or other post-appeal mechanism, such as a motion to recall the remittitur. If the timing permits, counsel should prepare the filing while counsel is still on the case. *Always consult ADI before filing a post-remittitur document.* If it is too late for that but the cert time is still running, counsel may send the client a copy of the applicable sample argument, hopefully filled out with the appropriate details, and a copy of [MC-275](#),⁴ the required Judicial Council form for pro per habeas petitions.

When certiorari petition is needed to protect Estrada availability

If the time for filing a cert petition has not expired yet but will expire before January 1, 2018, counsel should assess whether a cert petition is advisable to keep the case on direct appeal. Since such a petition requires the approval of the executive director, counsel should consult with the assigned staff attorney about seeking that approval. If counsel's appointment has expired, but there is still time to file a certiorari petition, counsel may send the client a sample certiorari petition, the applicable 620/180 sample argument, and a copy of [Guide for Prospective Indigent Petitioners for Writs of Certiorari](#).⁵

Cases now or recently in California Supreme Court

Counsel should also pay attention to their present and recently-resolved review-granted cases in the California Supreme Court. There are some lead cases and dozens of cases on grant and hold, mostly on Proposition 47 issues. Most of those cases will not be final for *Estrada* purposes by January 1, 2018, and so would be entitled to *Estrada* retroactivity if SB 620/180 applies.

A problem for grant and hold cases is remedy – if the court simply dismisses review (as often happens, if the Court of Appeal opinion was in line with the Supreme Court decision), the appeal is over, and the client is relegated to habeas corpus or another post-appeal remedy. Counsel may write to the Supreme Court and ask for the opportunity to brief the statutory change issue, either in the Supreme Court or Court of Appeal. Or

⁴<http://www.courts.ca.gov/documents/mc275.pdf>

⁵<https://www.supremecourt.gov/casehand/guideforIFPcases2015.pdf>

counsel may draft a habeas corpus petition during the hold period, to be filed when the appeal is over. Consult with your buddy on that.