JULY 2014 – ADI NEWS ALERT

BY

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STATEWIDE RULES FOR CLAIMING HABEAS TIME AND EXPENSES — Except for stand-alone habeas, claim all time on line 11 and expenses in section H, with a breakdown for both in the comments to line 11.

After years of inconsistencies, the projects and AOC have agreed on a uniform, statewide procedure for claiming time and expenses spent on habeas corpus-related work. We elaborate on these in the attached memo.[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.adi-sandiego.com/pdf_forms/Habeas%20Time%20and%20Expenses_Statewide_rules_rev_July_2014.pdf

Habeas time: Claim all habeas attorney time on line 11. This includes time on the petition and traverse and investigation, as well as habeas-related communication, review of filings, motions, argument, travel, etc.[3]

Habeas expenses: Claim all habeas-related expenses on the usual lines in section H of the form. Habeas expenses are combined with others in this section.

Itemization of time and expenses in the comment field to line 11: Explain all habeas-related time and expenses in the comments, in addition to the usual description of the issues and the work required:

- Itemize the attorney time reported on line 11 – e.g., 2.2 hours spent on communication, 5.1 hours on investigation, 7.5 hours drafting the petition, etc., with additional detail as needed to justify the claim.

- Itemize the expenses devoted to habeas, which were combined with others and claimed in section H – e.g., $23.00 habeas photocopying, $15.75 habeas postage.

Stand-alone habeas: A stand-alone habeas, not connected to an appeal or other proceeding, is treated differently. Claim petition and investigation time on line 11, but other time on the usual lines, such as line 1 for client communication, 16 for traverse, 17 for oral argument, etc.

eCLAIMS — Now's the time to practice: mandatory electronic submission is coming

We are advising panel attorneys to start using eClaims now, rather than paper ones. ADI's upcoming "panel portal," part of our new case management system, is being prepared for its launching later this year. That system will require electronic submission of claims.

Our new system is designed to emulate eClaims. Those used to eClaims should have little trouble with the transition. Now is a good opportunity to get practice before electronic submission becomes mandatory.

An eClaim is easier, faster, more secure, and more accurate than a paper claim. Also less expensive – no copying, postage, storage, etc. ADI staff attorney Lynelle Hee, lkh@adi-sandiego.com, can provide technical assistance.

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[3]This has been the rule for some time, except for habeas-related communication, formerly on lines 1 and 23.

Very easy instructions for getting started with eClaims are on ADI's website under Claims, Guidelines and Policies, eClaims,[4]

CONFIDENTIALITY OF PROBATION REPORTS — Fourth District misc. order: probation reports can be cited in publicly filed briefs; counsel should be alert for exceptions.

Rule 8.47(c)(1), which become effective January 1, 2014, provides:

> Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a confidential record, including a record that, by law, a party may choose be kept confidential in reviewing court proceedings and that the party has chosen to keep confidential.

Under Penal Code section 1203.05, absent a court order, probation reports become confidential, except as to the defendant and the People, 60 days after sentencing.

Shortly after the rule became law, the Administrative Presiding Justice of the Fourth District issued miscellaneous order 11314,[5] providing:

> [E]ffective January 13, 2014, the prohibition under California Rules of Court, rule 8.47(c)(1) against disclosure of material in a confidential record does not apply to references to material contained in a probation report that is part of the record on appeal.

This order apparently applies throughout the Fourth Appellate District. It seems to have been based on the concern some attorneys might think the new rule requires redacted and unredacted briefs whenever a probation report is cited. Some other courts seem to have shared this concern.[6] The Judicial Council now has under consideration a proposed Advisory Committee Comment to rule 8.47,[7] which states probation reports often include non-confidential matters. (See *People v. Connor* (2004) 115 Cal.App.4th 669.)

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[4] http://www.adi-sandiego.com/claims/guidelines_policies.asp#eclaims

[5] http://www.courts.ca.gov/documents/4DCA-011314-Exception-to-Rule-8-47-c-1.pdf

[6] For example: Second District, misc. order 13-1, Third District order 2013-001, Sixth District misc. order 14-1.

[7] http://www.courts.ca.gov/documents/SPR14-01.pdf

ADI agrees that in the vast majority of cases, order 11314 makes good legal and practical sense. The presence of a fact in a probation report does not make that fact "confidential." The general rule is that court proceedings are presumed to be public. (Code Civ. Proc, § 124; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178; rules 2.550(c), 10.500; see U.S. Const., 1st Amend.)

Section 1203.05 is not intended to protect matters that are otherwise part of the public record or that reveal only non-personal information. (*People v. Connor*, *supra*, 115 Cal.App.4th 669, 690, 695.) Rather, it protects previously undisclosed information that the defendant does not want released and that may reveal "details concerning a defendant's family background, medical and psychological condition, financial status, military record, history of substance abuse, etc. – information that most would consider confidential and try to keep private." (*Id*. at p. 695.) In the great majority of cases, facts relevant to an issue on appeal are either part of the public record or are non-personal, such as facts of the crime and the defendant's criminal record.

There is a "BUT": In rare situations, counsel may find it important to refer to sensitive personal information about the defendant, the family, the victim, etc., that is in a probation report but was *not* mentioned in open court or otherwise made part of the public record. Making such matters public might injure or seriously embarrass the client or others. In this situation, *notwithstanding order 11314*, counsel should file unredacted and redacted briefs under rule 8.47(c). The application should acknowledge order 11314 and explain why the facts sought to be sealed are protected by Penal Code section 1203.05 and rule 8.47(c) and thus require an exception to the order. Contact ADI if this request encounters resistance.

ANSWER TO PETITION FOR REHEARING — Division Three no longer routinely invites it

Counsel may have noticed that Division Three has stopped inviting an answer to a petition for rehearing as a matter of routine. Under rule 8.268(b)(2), a party may not file an answer to a petition for rehearing unless the court requests it. To allow parties to answer whenever they wish, the court used to issue a blanket request. Now it has stopped.

This change will save some time and expense, since some attorneys had felt compelled to file an answer every time the opposing party filed a petition. (This happens more frequently in retained than in appointed work.) The invitation is not necessary: the rule protects the client by providing that normally the court will not grant the petition without requesting an answer. If counsel sees an urgent need to file an uninvited answer, counsel probably could ask the court to issue a request.

CRIMES BY JUVENILES — *Gutierrez* holds Penal Code section 190.5(b) does not create a presumption of LWOP

Interpretation of section 190.5(b)

In *People v. Gutierrez* (2014) 58 Cal.4th 1354, decided May 5 with companion case *People v. Moffett*, the California Supreme Court held Penal Code section 190.5, subdivision (b)[8] does not create a rebuttable presumption that the appropriate sentence for a special circumstance murder committed by a juvenile is life without possibility of parole. It overruled *People v. Guinn* (1994) 28 Cal.App.4th 1130 and progeny.

The Supreme Court agreed the presumption of LWOP found by *Guinn* was a reasonable reading of the statutory language and history. But it found equally reasonable the interpretation that the trial court was given two options, with neither being the default or preferred one. (*People v. Gutierrez*, *supra*, 58 Cal.4th 1365, 1370-1372.) To resolve the ambiguity, the court turned to the principle of constitutional doubt:

> [A] court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which avoids any doubt concerning its validity.

(*Id.* at p. 1373, quoting *People v. Leiva* (2013) 56 Cal.4th 498, 506–507, interior quotation marks omitted; see also *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548.)

The court expressed concern that a presumption of LWOP would run afoul of *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455]. *Miller* found mandatory LWOP for murder committed by a juvenile to be cruel and unusual punishment. It also held the Constitution requires a trial court, in sentencing for a crime committed by a minor, to consider a range of individualized factors. To avoid potential conflict with *Miller*, *Gutierrez* interpreted section 190.5 as allowing the court free discretion to consider, without a presumption, the full range of individualized factors mandated by *Miller.* (*Gutierrez*, at pp. 1381-1382, 1387-1390.)

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[8]Section 190.5 provides in relevant part: "(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

The recent enactment of Penal Code section 1170, subdivision (d)(2), which allows a juvenile serving a LWOP sentence to petition the court for recall and resentencing, did not eliminate the constitutional doubt. The court pointed out: "[T]he same questionable presumption would apply at resentencing." (*People v. Gutierrez*, *supra*, 58 Cal.4th 1354, 1384-1387.)

Related lead case: *Caballero*

Gutierrez arose in the context of a prior California Supreme Court decision on punishment of youth: *People v. Caballero* (2012) 55 Cal.4th 262, discussed in the August 30, 2012, news alert.[9] That case found that a sentence for a non-homicide so long (there, 110-life) that the defendant could not, realistically, ever earn the right to release, is the functional equivalent of LWOP. A sentence for a non-homicide committed when the defendant was a minor, is cruel and unusual punishment if it does not offer 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.

Caballero was an extension of *Graham v. Florida* (2010) 560 U.S. 48, which held an LWOP sentence for juveniles who commit crimes other than homicide is cruel and unusual punishment. *Graham* relied on findings that minors have a lower capacity for good judgment and a greater potential for rehabilitation than do adults.

Retroactivity

Gutierrez and *Caballero*, as well as *Miller* and *Graham*, should be fully retroactive. They represent a substantive rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." (*Penry v. Lynaugh* (1990) 492 U.S. 302, 300.) *Penry* held a decision that execution of the mentally retarded is cruel and unusual punishment would apply retroactively to all cases, regardless of their finality:[10]

> [A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty . . . . "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."

(*Ibid.*)

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[9] http://www.adi-sandiego.com/news_alerts/pdfs/2012/2012_8_Aug_alert.pdf

[10] On the merits, *Penry* found execution of the retarded was not cruel and unusual punishment. This holding was overruled in *Atkins v. Virginia* (2002) 536 U.S. 304.

Resentencing remedies

A defendant who received a sentence longer than that person's lifetime for a non-homicide, committed when the defendant was a minor, is categorically entitled to resentencing under *Caballero.* The sentence is per se unconstitutional.

A defendant who received LWOP under section 190.5(b) before *Gutierrez* (May 5, 2014) is entitled to be resentenced, unless the record "clearly indicate[s]" that the trial court would have reached the same conclusion "even if it had been aware that it had such discretion." (*People v. Gutierrez*, *supra*, 58 Cal.4th 1354, 1391.) In other words, the record must explicitly rebut the inference that the trial court relied at least in part on *Guinn* and affirmatively show the court would have chosen LWOP, anyway, in the exercise of unfettered discretion. A silent or ambiguous record requires resentencing. (See *People v. Chavez* (Jul. 22, 2014, D061946) ___ Cal.App.4th ___ [2014 WL 3586508].)

Gutierrez offers a potentially independent ground for resentencing, apart from its construction of section 190.5. A defendant who received LWOP or an LWOP-equivalent sentence for a crime committed as a juvenile may be entitled to resentencing if the trial court did not consider the constitutionally mandated individualized factors identified in *Miller*, including the defendant's youthfulness, background, role in the crime, ability to deal with the legal system, and potential for rehabilitation.

In response to *Caballero-Gutierrez*, the Legislature enacted Penal Code section 3051 (S.B. 260 (2013–2014 Reg. Sess.)), effective January 1, 2014. It requires the Board of Parole Hearings to conduct youth offender parole hearings during the 15th, 20th, or 25th year of incarceration, and the offender is eligible for release if found suitable. Case law is just beginning to explore its effect on *Caballero-Gutierrez* remedies. The issue is before the California Supreme Court in *In re Alatriste*, S214652, and *In re Bonilla*, S214960.

Resources for counsel and for unrepresented inmates

ADI is preparing an analysis of this ever-changing law for its Recent Changes in the Law page. For now, as mentioned above, counsel may find general guidance in the memo on helping clients take advantage of legal changes, Potentially Favorable Changes in the Law (PDF).[11] Part One outlines available steps in both pre-remittitur cases and post-remittitur cases. Part Two analyzes general principles of retroactivity.

In pre-remittitur cases, the approach is straightforward: raise the *Caballero* or *Gutierrez* issue in the opening brief, supplemental brief, petition for rehearing or review, or other appropriate pleading, depending on the stage.

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[11] http://www.adi-sandiego.com/news_alerts/pdfs/2008/Favorable-changes-11-08.pdf

In final cases – past the time for appeal – the remedy is habeas corpus:

> Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed 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 hearings.

(*People v. Caballero*, *supra*, 55 Cal.4th at p. 269.)

If the cruel and unusual punishment issue was raised and rejected on appeal, conceivably a motion to recall the remittitur under rule 8.272(c) would be another option.

Consult ADI before undertaking either remedy.

Many inmates potentially eligible for relief under *Caballero* or *Gutierrez* will not be entitled to court-appointed counsel, because they never appealed or their appeals are final. To assist these inmates and facilitate counsel's assisting their own former clients, ADI has prepared two sets of materials[12] – one for *Caballero-Graham* situations (LWOP-equivalent sentence for non-homicide) and one for *Gutierrez-Miller* cases (LWOP sentence under Pen. Code, § 190.5).

The *Caballero* set of materials includes:

1. Cover letter to inmate introducing the materials and procedures.
2. Instructions for preparing the habeas corpus petition.
3. Attachment to the form answering Question 6, "Grounds for Relief."
4. Required form for pro per habeas corpus petition, Judicial Council MC-275.

The *Gutierrez* set of materials includes:

1. Cover letter to inmate introducing the materials and procedures.
2. Instructions for preparing the habeas corpus petition.
3. Attachment to the form answering Question 6, "Grounds for Relief."
4. Required form for pro per habeas corpus petition, Judicial Council MC-275.

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[12] http://www.adi-sandiego.com/news_alerts/recent_changes_cases.asp#LWOP