

\*\*\*PLEASE NOTE: After distribution of this article, three Court of Appeal decisions unfortunately concluded the significant change in the law described below is not retroactive to cases not yet final with dispositional orders from prior to September 1, 2007. (*In re N.D.* (2008) 167 Cal.App.4th 885, 890-894; *In re Carl N.* (2008) 160 Cal.App.4th 423, 437-438; *In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1081.) They employ different reasoning. The California Supreme Court has not yet spoken on the retroactivity issue.

Additionally, while the court in *Carl N.* presumed section 777 petitions falls within the purview of the statute, at least one Court of Appeal concluded that section 777 petitions do not fall within the purview of the statute. (Compare *Carl N.*, *supra*, 160 Cal.App.4th at pp. 437-438 with *In re J.L.* (2008) 168 Cal.App.4th 43, 60-61.)

## DIVISION OF JUVENILE JUSTICE COMMITMENTS

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Recently, a very significant change in the law has taken place. Through enactments effective September 1, 2007, the Legislature has greatly restricted the juvenile cases for which there can be a Division of Juvenile Justice (DJJ) commitment. DJJ is the former California Youth Authority and is now part of the Department of Corrections and Rehabilitation.

Under the amendment courts have discretion to order a DJJ commitment in cases only when **the most recent petition** filed in a case alleges an offense listed in **Penal Code section 290, subdivision (d)(3)**, or **Welfare and Institutions Code section 707, subdivision (b)**, and such offense is admitted or found true. (Welf. & Inst. Code, § 733, subd. (c)<sup>1</sup>; see also Welf. & Inst. Code §§ 731, subd. (a)(4), 1731.5, subd. (a)(1).) Previously, there was no offense-related limitation on DJJ commitments.

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<sup>1</sup>Section 733 provides 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:

. . . (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 of the Penal Code. This subdivision shall be effective on and after September 1, 2007.

This change is significant in many ways. Not only will DJJ commitments contrary to this law be error in cases with dispositions after September 1, 2007, but also this law arguably should apply retroactively to all cases not final as of September 1, 2007. Further, the law provides a means for recall of final cases. Seeking relief and/or recall is important in all cases and can have a significant impact beyond avoiding 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, subd. (d)(1).)

The following discussion covers remedies for invoking the benefits of the new law at various procedural stages. 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.<sup>2</sup>

## URGENCY

Claims related to the change in the law should be handled on an expedited basis, because 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 Welf. & Inst. Code, § 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).

Counsel should investigate the possibility that the case could be recalled under Welfare and Institutions Code section 731.1.<sup>3</sup> The recall is initiated by recommendation

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<sup>2</sup><http://www.adi-sandiego.com/PDFs/favorable%20changes%20revised.pdf>.

<sup>3</sup>Section 731.1 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 whose commitment offense was not an offense listed in subdivision (b) of Section 707, unless the offense was a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code, and who remains confined in an institution operated by the division on or after September 1, 2007. 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.”

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, counsel should consider sending a letter to the superior court judge indicating that the sentence is unauthorized. This letter would be much like the letter sent to request a credits correction and should cite authority for the fact that superior courts retain discretion to fix unauthorized sentences, even where an appeal is pending. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044; *People v. Chagolla* (1983) 144 Cal.App.3d 422, 434.) Also, counsel may wish to contact the Attorney General's office to request the case be reviewed as soon as possible. Sometimes concessions and/or stipulation to immediate issuance of the remittitur might be appropriate. (Cal. Rules of Court, rule 8.272 (c)(1).)

#### **PENDING CASES WITH DISPOSITIONAL ORDER ON OR AFTER SEPTEMBER 1, 2007**

If the disposition was ordered after September 1, section 733 unquestionably applies. A court abuses its discretion by sending a minor to DJJ if not based on a Penal Code section 290, subdivision (d)(3), or Welfare and Institutions Code section 707, subdivision (b), offense. A court also abuses its discretion by sending a minor to DJJ if a designated offense was not in the most recent "petition." A "petition" certainly includes a Welfare and Institutions Code section 602 petition, but it arguably may also include a Welfare and Institutions Code section 777 petition for probation violation. Such arguments should be raised in briefing.

#### **PENDING CASES WITH DISPOSITIONAL ORDER BEFORE SEPTEMBER 1, 2007**

Because the change in the law is ameliorative and because the Legislature has not stated otherwise, it should be retroactive for all cases not yet final. (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.) In Welfare and Institutions Code section 731.1, the Legislature has provided a means for the juvenile court to order recall of sentences for individuals in DJJ custody who would not have been committed to DJJ under current law.

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This provision establishes the Legislature envisioned that the new law would apply retroactively.

Therefore, counsel should argue for reversal of a DJJ commitment in any case for which the remittitur has not yet issued. If the opening brief has already been filed, a supplemental brief or other filing will be necessary, depending on the stage of the case. See ADI memo referenced above for available procedures.

### **POST-REMITTITUR CASES THAT BECAME FINAL ON OR AFTER SEPTEMBER 1, 2007**

If the remittitur has issued, but the date of finality was after September 1, 2007, the minor still should be entitled to the benefit of the law. Normally, it is preferable to ask trial counsel to apply for relief in the juvenile court. (It is possible that a recall under Welf. & Inst. Code, § 731.1 is already in process, as well.) Alternatively, appellate counsel may file a motion or writ of habeas corpus to recall the remittitur in order to make a retroactivity argument. (See *People v. Mutch* (1971) 4 Cal.3d 389, 396-397; Cal. Rules of Court, rule 8.272(c)(2).)

### **CASES THAT BECAME FINAL BEFORE SEPTEMBER 1, 2007**

As mentioned before, in Welfare and Institutions Code section 731.1, the Legislature has included a provision for the juvenile court to order recall of DJJ commitments where the minor would not have been committed to DJJ under current law. There is no stated time limit as to how far back the recall can reach, and the implication is that the provision of section 731.1 apply to all cases, no matter when they became final, if the minor is still in the DJJ. Appellate counsel should contact the minor's trial attorney to inform the trial attorney that the minor fits into that category and to ensure that the minor's trial attorney the recall process and if necessary has contacted the probation officer or juvenile court to get it started.