

# MEASURES APPELLATE COUNSEL CAN TAKE IN RESPONDING TO CHANGES IN THE LAW POTENTIALLY BENEFICIAL TO THEIR CLIENTS

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*Always check for possible updates or revisions.*

## **INTRODUCTION**

On a number of occasions Appellate Defenders has found it important to notify appellate attorneys of major favorable changes in the law, to ensure that all clients who can benefit from the change do so. Sometimes, indeed, we have needed to alert counsel to *potential* changes, so that they can properly preserve issues pending before an appellate court.

Responding appropriately to these changes, or possible changes, can require complex evaluations of a number of factors, such as the potential for benefit and risk, the scope and likely “shelf life” of the decision (especially intermediate appellate court rulings), possible retroactivity of the new law, the stage of the case, the client’s needs and wishes, and so forth. In this memo we set forth general considerations and possible procedural steps to take in a variety of situations. This memo will provide broad guidance and answer many of the most common questions. *Always be looking for the exceptions and the nuances, however, and carefully adapt any general advice to the needs of your particular case and client.*

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## **I. PRELIMINARY RESPONSIBILITIES**

### **A. Review of Open and Closed Cases To Determine Where the Change Might Be Applicable**

Attorneys should review all of their pending and already-final appeals for a possible issue in light of the new law. No client should lose a potential benefit because of attorney oversight. Depending on the applicable retroactivity principles (see appendix) and the procedural history of the case, the issue may or may not be available. If it is, action is needed. In *pre-remittitur* cases, the appellate attorney may be able to raise an available issue with a reviewing court, even at a late stage. In *post-remittitur* cases, remedies may include a request to recall the remittitur or a habeas corpus petition.

B. Determination of All Applicable Deadlines for Seeking Relief and Identification of Urgent Cases

At any early stage counsel should ascertain the time limits in which relief must be sought in each case requiring action. The review should include identification of cases that may need immediate relief – e.g., where the client might be entitled to release from custody if a prior is stricken. As discussed below in section IV, counsel has several options for dealing with these high-priority cases.

C. Evaluation of Potential Adverse Consequences

The usual caution should be exercised in examining each case for potential risks of pursuing relief. Risks include upsetting an advantageous plea bargain and identifying unauthorized sentences that favor the client. Counsel should also consider practical matters, such as the possibility that pulling the client out of prison to return to court will risk the loss of a prison job or position of responsibility, when there is little chance of ultimately getting a more favorable result. Consultation with trial counsel, the client, and ADI can help identify and sort out the risks and benefits.

D. Contact with Trial Counsel

We strongly recommend immediate consultation with trial counsel. Trial counsel can give invaluable insight into the realistic chances of obtaining benefits or incurring risks by pursuing the issue. Coordination with trial counsel will also help avoid duplication, conflicts, or gaps in representation and ensure the issue is raised in the proper forum by the proper attorney.<sup>1</sup>

E. Communication with Clients

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<sup>1</sup> For example, trial counsel should not ordinarily file a habeas petition in the trial court while the direct appeal is pending, if the issue could properly be raised on appeal. The jurisdiction of the trial court to entertain such a petition is highly questionable (*People v. Mayfield* (1993) 5 Cal.4th 220, 224-225), and simultaneous proceedings by different attorneys in different courts create not only confusion but the risk of conflicting strategies and rulings. In post-remittitur situations, however, a habeas corpus petition in the trial court may be the appropriate approach, and normally trial counsel is in the best position to handle that kind of proceeding.

We also recommend prompt contact with clients. Many may have heard of the decision and understandably would be anxious to know how it affects them. Clients need to be made aware that not all apparently favorable decisions will automatically help them and that they should never proceed precipitously without consultation with their lawyer. They may lose potential benefits by presenting the issues improperly and may even run into serious adverse consequences if their particular case is not analyzed correctly before any pleading is filed.

F. Evaluation of Cases Involving a Guilty Plea

With some types of issues, these cases can be more complicated than cases that were tried. They may raise factual and procedural issues and special risks of adverse consequences. ADI will provide guidance in particular situations. Consultation with ADI and trial counsel is very important.

**III. PRE-REMITTITUR CASES: STEPS THAT CAN BE TAKEN AT VARIOUS STAGES OF A PENDING APPEAL**

New issues should be raised at the earliest possible stage. Even if no procedures expressly permitted as a matter of *right* under the Rules of Court are available,<sup>2</sup> counsel should submit the issue to the court and, where required, a request for leave to file the particular pleading, addressed to the presiding justice in the Court of Appeal or the Chief Justice in the Supreme Court.<sup>3</sup> If the court rejects the filing,

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<sup>2</sup> Filings of right do not require leave of the court if they are timely and otherwise conform to the rules. Examples of those expressly mentioned in the Rules of Court include, among many others, such motions and requests as augmentations and extensions of time; appellant's opening brief, respondent's brief, and appellant's reply brief; petition for rehearing; petition for review, answer, and reply; motion to recall the remittitur; and supplemental briefs after remand or transfer from the Supreme Court if addressed to matters arising after the previous Court of Appeal decision. (See, e.g., rules 12, 13, 25, 26, 28, 28.1, 29.1, 29.5, 29.6, 32.1, 33, 33.1-33.3, 39 et seq., 43, 45.) In addition, rule 29.1(d) permits supplemental briefs on new authorities, up to 10 days before oral argument, as a matter of right in the Supreme Court. The Judicial Council is considering an amendment to rule 13 to permit, as a matter of right in the Court of Appeal, a letter brief on new authorities not available to be included in previous pleadings.

<sup>3</sup> Examples of pleadings that specifically require leave to file are a supplemental opening brief (rule 13(a)(4)) and a late petition for rehearing or review (rules 25(b)(4), 28(e)(2)). Examples of pleadings not mentioned in the rules but not precluded by them include a

the very fact it was at least submitted at the earliest possible stage will help avoid future claims of procedural default, failure to seek appellate remedies before resorting to habeas corpus, etc.

If appellate counsel wishes to consult about the issue or needs a sample of any of the motions or petitions required to present the new issue to the court, ADI may be able to help.

A. Pre-AOB

If the opening brief has not yet been filed and you determine the newly decided issue should be raised on appeal, it of course should be included in the brief.

B. Post-AOB, Pre-Opinion

File a supplemental opening brief along with a request that the presiding justice grant leave to file it.<sup>4</sup> (Cal. Rules of Court, rule 13(a)(4).) If the original filing was a *Wende* brief, ask for leave to withdraw it and file a new opening brief.

C. Post-Opinion, but Fewer than 30 Days Since the Opinion Was Filed<sup>5</sup>

Petition for rehearing. The petition would ask that a rehearing be granted in order to permit supplemental briefing on the new issue. If it has been more than 15 days since the opinion, ask the presiding justice for leave to file a

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request to expedite the appeal, to strike an opponent's brief or withdraw one's own brief, to supplement an already-filed petition for rehearing or review, to expand the scope of review, and for the Supreme Court to order the remedy of transfer or remand to the Court of Appeal as an alternative to plenary review.

<sup>4</sup> If the respondent's brief has not yet been filed, some courts may require a motion to withdraw the opening brief, so that the new issue can be integrated into a single opening brief.

<sup>5</sup> An order for publication or a modification of the opinion that changes the judgment restarts the 30-day clock between the filing of the opinion and its finality. (Rule 24(b)(5), (c)(2).)

late petition under rule 25(b)(4).<sup>6</sup> Argue a very recent change in the law as the basis for (a) late filing and (b) an exception to the usual rule that issues may not be raised for the first time in a petition for rehearing (see *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121; *People v. Payne* (1977) 75 Cal.App.3d 601, 605). If a petition for rehearing is already pending on other grounds, file a letter raising the new issue and asking leave to supplement the petition with the letter.

D. More than 30 Days Since Opinion Filed, Pre-Remittitur

If it has been more than 30 days since the opinion was filed, the case must be taken to the California Supreme Court; the Court of Appeal has lost jurisdiction.

1. Procedure: The procedure varies according to how long it has been since the opinion was filed and whether a petition for review on other grounds has already been submitted:
  - a. 31-40 days since opinion filed, no petition for review yet filed: On or before the 40th day after the opinion was issued, file a petition for review including the new issue, even if it was not raised below.
  - b. 41-60 days since opinion filed, no petition for review yet filed: File a petition for review raising the new issue, along with a request to the Chief Justice for relief from late filing under rule 28(e)(2). The excuse for late filing would be the recency of the new rule.<sup>7</sup>
  - c. Petition for review already pending, but the new issue not yet included: File a letter raising the new issue and asking leave to supplement the petition for review with the letter.
2. Alternative remedy of grant and transfer: In appropriate cases the petition for review can request, in addition to plenary review, a grant of review and transfer to the Court of Appeal for rehearing and

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<sup>6</sup> The court may also grant rehearing on its own motion under rule 25(a) up to 30 days from the filing of the opinion.

<sup>7</sup> The court may also grant review on its own motion under rule 28.2(c).

consideration of the new issue (rule 29.3(d); see also rules 13(b) and 29.3(f)).

3. Addressing failure to raise issue in Court of Appeal: Ask the Supreme Court to excuse failure to have raised the new issue in the Court of Appeal (as normally required by rule 28©) on the ground the issue became available only recently.

E. Cases Already in the California Supreme Court on Grant of Review, but New Issue Not Raised

It is possible to ask the Supreme Court to expand the scope of review (rule 29(b)(2)) or to remand the case to the Court of Appeal after resolution of the issue on which review was granted (if the new issue is not mooted by the Supreme Court decision), with instructions to permit briefing on the new issue (rule 29.3©, (f)). If the Supreme Court opinion has already been filed and is not yet final,<sup>8</sup> the request should be made by petition for rehearing (rule 29.5).

### III. POST-REMITTITUR SITUATIONS

After the issuance of the remittitur under rule 26 (or rule 29.6 if the Supreme Court decided the case), the availability of a remedy based on a change of law depends on the likely retroactivity of the issue, which in turn depends its nature (e.g., procedural vs. substantive), source (e.g., federal Constitution vs. state law), the procedural history of the case, and the time frame. (See appendix, General Retroactivity Principles.) ADI will provide guidance in particular situations as they arise.

\_\_\_\_\_ A. IMPORTANT – Coordination with Trial Counsel

Consultation with trial counsel is especially important in post-remittitur situations, since neither the trial nor appellate court has active jurisdiction and both have potential writ jurisdiction. Consultation between counsel will help identify adverse consequences, make sure *someone* is doing *something* if necessary, prevent duplicative proceedings or conflicting positions in the trial and appellate courts, provide a chance to strategize

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<sup>8</sup> The usual time of finality is 30 days after filing. (Rule 29.4(b)(1); see exceptions listed in rule 29.4.)

about the most advantageous forum, etc. ADI will offer guidance to the panel as to these issues and as to any preferences expressed by our courts concerning the forum or procedure.

B. Types of Post-Remittitur Remedies

1. State habeas corpus: If the new law is retroactive to the case (see appendix), state habeas corpus may be available. The California courts will normally accept state habeas corpus jurisdiction if federal habeas corpus relief would be available. (*In re Spencer* (1965) 63 Cal.2d 400, 405-406; *In re Shipp* (1965) 62 Cal.2d 547, 553, fn. 2.) These points may be helpful in considering state habeas relief:
  - a. Choice of forum: Strategic considerations may be important here; consult with trial counsel. Both the superior court and the Court of Appeal would have habeas corpus jurisdiction in most instances. However, the trial court is normally the preferred forum for a petition filed for the first time on a particular issue or for cases involving factual questions, and the Court of Appeal has occasionally expressed strong preference for that procedure. If there are good grounds for making an exception in the particular situation, counsel should explain the reasons in the petition. Appellate counsel should be aware that compensation for proceedings in the superior court normally comes from that court, not the Court of Appeal.
  - b. Which counsel should file: If the remedy chosen is habeas corpus in the Court of Appeal, appellate counsel should file the request. If habeas corpus in the superior court is to be pursued, trial counsel is presumptively responsible in most situations, but appellate counsel should make sure appropriate steps are taken by maintaining communication with trial counsel and the client and generally monitoring the process. If after diligent inquiry it becomes apparent that trial counsel is not going to be following through in a meritorious case, please contact ADI. We can explore other possibilities.
  - c. Inadequacy of appellate remedy: A recent change in fundamental applicable law may allow an exception to the usual rule that habeas corpus may not be used to raise an issue

that theoretically could have been raised on appeal or that was raised and rejected. (*In re Harris* (1993) 5 Cal.4th 813, 841.)

- d. Relief to be sought: A habeas corpus petition filed in any court can ask for direct relief on the grounds of the recent change in law. If filed in the Court of Appeal, it may also seek recall of the remittitur. (See *In re Smith* (1970) 3 Cal.3d 192, 203-204.) This process would reopen the appeal and permit briefing on the new issue.
2. Recall of remittitur: If there are good reasons to select the Court of Appeal rather than the trial court as the initial forum for seeking relief, an alternative to habeas corpus would be a motion to recall the remittitur under rule 26(c)(2). A fundamental change in the law is a ground for recalling the Court of Appeal remittitur. (See *People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *People v. Ketchel* (1966) 63 Cal.2d 859, 868; *People v. Curtis* (1971) 21 Cal.App.3d 704, 705, 708, overruled on other grounds in *In re Earley* (1975) 14 Cal.3d 122, 130, fn. 11.) As with most Court of Appeal filings, appellate counsel would be the attorney presumptively responsible for such a filing.
- C. Choice of remedy: When a remedy in the Court of Appeal (either habeas corpus or recall of the remittitur) rather than the trial court appears to be appropriate, we think that a motion under rule 26(c)(2) to recall the remittitur, grant rehearing, and permit briefing on the new law, *accompanied by a supplemental opening brief*, has a good deal to recommend it:
- A simple motion is more efficient and much less cumbersome procedurally than habeas corpus, which requires such formalities as a verified petition, exhibits, and points and authorities.
  - It avoids successive petitions problems that might require investigating and adding other issues to the habeas petition. (*In re Clark* (1993) 5 Cal.4th 750, 797;<sup>9</sup> Pen. Code, § 1475.)

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<sup>9</sup> “[A]bsent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied.” (*In re Clark* at p. 797.)

- In cases involving a new federal right, recall of the remittitur reinstates direct review and so would allow the federal habeas statute of limitations to restart from day one, rather than simply tolling it from the original starting date. (28 U.S.C. § 2244(d)(1)(A), (d)(2).)
- It reflects the normal policy favoring legal (appellate) remedies over equitable (writ) remedies. (*In re Harris, supra*, 5 Cal.4th 813, 825-829.)

Although of course it depends on the court's internal procedures, it might be more likely that the case would return to the original panel of justices who decided the appeal, rather than go to a writs panel, if recall of the remittitur instead of habeas corpus is sought. In choosing between the two remedies, counsel should consider whether this would or would not be an advantage.

The Court of Appeal may express a preference for one procedure over another, and ADI will inform counsel if that is so. In the absence of such direction, we suggest a motion to recall the remittitur be tried initially, unless there are strategic or other advantages to habeas corpus (e.g., the need to rely on facts outside the record). If the motion to recall is denied as an improper remedy, there would be no obstacle to filing a later habeas petition.

#### **IV. ALTERNATIVE PROCEDURES AND EXPEDITED RELIEF**

##### **A. Situations in Which Ordinary Procedures May Not Be the Most Appropriate**

1. Identification of special situations: As indicated at the start, in reviewing your cases, be sure to note any in which an alternative to the usual procedures may be more effective or efficient (e.g., recall of the sentence under Pen. Code, § 1170, subd. (d)) or in which expedited relief may be needed (e.g., under the new law, the client might be entitled to immediate or virtually immediate release or might even be serving "dead time").
2. Considerations: Some alternative procedures are listed in the next section. Which measures might be best in any given case would depend on the stage, the degree of urgency, the nature and merits of the issue, the existence and merits of other issues on appeal, the

probable leanings of the trial judge and appellate panel, and numerous other factors. Some options may have a downside to be weighed. Please discuss the situation with ADI if you have any questions. If appellate counsel needs a sample of any of the motions required to request that the court consider the new issue, ADI may be able to help.

B. Options That Might Replace or Supplement Standard Remedies

1. Release pending appeal: Bail or other form of release pending appeal may be available. Consult with trial counsel and ADI about who should file the request and in what court. (See rule 30.2; Pen. Code, §§ 1272, 1272.1, 1273.)
2. Expedited appeal: A request for an expedited appeal may be filed. Specify the exigencies and the needed time frame. Counsel should be prepared to proceed without extensions of time and to oppose extensions of time by the Attorney General's Office.
3. Summary reversal or stipulated reversal: Another option might be to make a motion for summary reversal (*People v. Geitner* (1982) 139 Cal.App.3d 252; *People v. Browning* (1978) 79 Cal.App.3d 320) or to seek the Attorney General's stipulation to reversal in certain cases – for example, where the client's entitlement to relief is incontestable and no other issues are being raised. These approaches could save considerable time and resources. Before electing to use them, however, counsel should be aware that they may involve waiver of other appellate issues. (See *People v. Senior* (1995) 33 Cal.App.4th 531 [issues that could have been but were not raised in a previous appeal are waived].)
4. Immediate issuance of remittitur: The Attorney General may be willing to stipulate to immediate issuance of the remittitur (rule 26(c)(1)) if entitlement to relief is uncontested.
5. Recall of sentence in trial court: If the case is within 120 days of commitment and the new issue involves sentences, appellate counsel may want to consider the option of asking the trial court to recall the sentence under Penal Code section 1170, subdivision (d), as a more expeditious and direct way of obtaining relief. Such an approach should be coordinated closely with trial counsel, who would normally be in a better position to request and argue for such relief.

6. Habeas corpus: It may be possible to raise the issue in a petition for writ of habeas corpus in the appellate court, arguing that appeal is an inadequate remedy because of the client's entitlement to imminent release. (*In re Quackenbush* (1996) 41 Calliope.4th 1301, 1305; *In re Duran* (1974) 38 Calliope.3d. 632, 635.) Habeas corpus in the trial court may also be an option if the issue involved could not be raised on appeal;<sup>10</sup> coordinate with trial counsel.

C. Ensuring Effectiveness of Remedy

Remedies granted but not acted on are just a piece of paper. Cases do slip through the cracks and simply languish in the trial court or prison after the appellate court has ordered some form of relief. Appellate counsel should follow through. Make certain that the *trial court and trial counsel* are alerted to any case being remanded for further proceedings, so that they can act on them promptly. Also check to make sure that *custodial officials* know about the issuance of the remittitur, the grant of a writ, issuance of a release order, or other remedy affecting custody and that they take action on it; sometimes courts forget to inform the prison, or the prison itself may delay taking action.

*Please call ADI if you need help or if your case poses an unusual situation. If a staff attorney has already been assigned to your case, please consult him or her.*

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<sup>10</sup> The superior court has concurrent habeas jurisdiction over the case on matters that are not and could not be raised in a contemporaneous appeal. (*People v. Carpenter* (1995) 9 Cal.4th 634.)

## APPENDIX

### GENERAL RETROACTIVITY PRINCIPLES

#### I. INTRODUCTION

This section reviews the general principles used to determine the applicability of a change in the law to cases pending or concluded at the time of the change. ADI will provide specific guidance in particular situations as they arise.

##### A. Kinds of Retroactivity for Changes in Law

For the most part, changes in the law fall into a few broad categories: (1) a fully retroactive change, meaning it applies to cases that are already past the stage of direct review; (2) a new rule of law retroactive to cases not past direct review at the time of the change; and (3) a change that is prospective only or has limited retroactivity (meaning it applies only to specified events occurring after the decision).

##### B. Decisions Not Changing the Law

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A decision dictated by, and not changing or extending, an established rule is not “new law” at all and is as applicable as the established rule would be. Thus a case merely applying or interpreting an earlier case that changed the law may be relied on in habeas corpus proceedings, even if handed down after the petitioner’s case became final, provided the earlier precedent is applicable; the new decision would in effect be retroactive to the earlier one. (E.g., *Yates v. Aiken* (1988) 484 U.S. 211; see *Teague v. Lane* (1989) 489 U.S. 288; see also *Saffle v. Parks* (1990) 494 U.S. 484, 489-491; *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36-37.)

#### II. FULLY RETROACTIVE CHANGES IN LAW

##### A. General

1. Meaning of full retroactivity: A new rule of law is fully retroactive if it applies even to cases final for direct review purposes. Collateral relief is available, provided the defendant is otherwise in a position to invoke the applicable remedy. (See C, below, “Limits: Habeas Corpus Requirements.”)

2. Responsibilities of counsel: Cases affected by a fully retroactive change should be acted on if the defendant is in a position to benefit from them. (See C, below.) To reiterate: usually post-appeal relief should be sought in the trial court by way of habeas corpus; since trial counsel would normally be responsible, appellate counsel should coordinate with trial counsel to make sure appropriate steps are taken. Occasionally relief in the Court of Appeal, by habeas corpus or recall of the remittitur, is appropriate; that is normally appellate counsel's responsibility. Check with ADI when in doubt.

## B. Kinds of Fully Retroactive Changes

Some changes in the law are declared fully retroactive by the issuing authority, such as the Legislature. The United States or California Supreme Court may, in a later case, decide one of its decisions will be retroactive. Some changes are by their very nature fully retroactive. Examples of fully retroactive changes include:

1. Legislative intent: The Legislature may evince an intent for the law to apply retroactively to cases past direct review. (E.g., *In re Chavez* (2004) 114 Cal.App.4th 989.)
2. Fundamental powers of the state: A decision setting constitutional restrictions on the power to prosecute (*Ashe v. Swenson* (1970) 397 U.S. 436, 437) or punish (*Moore v. Illinois* (1972) 408 U.S. 786, 800) or make something criminal (*Lawrence v. Texas* (2003) 539 U.S. 558) may be applicable to cases past direct review.
3. Elements of the crime: A re-interpretation of what constitutes the offense may give those convicted under the old interpretation a right to relief. (*Bousley v. United States* (1998) 523 U.S. 614; *People v. Mutch, supra*, 4 Cal.3d 389, 394-396.)
4. Integrity of judicial process: Certain decisions announcing a “watershed” procedural rule fundamental to the integrity of the fact-finding process may be fully retroactive. (See examples cited in *Michigan v. Payne* (1973) 412 U.S. 47, 53, fn. 6; see *Teague v. Lane, supra*, 489 U.S. 288, 313-314; compare *Schriro v. Summerlin* (2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2519, 159 L.Ed.2d 442] and *DeStefano v. Woods* (1968) 392 U.S. 631.)

### C. Limits: Habeas Corpus Requirements

Not all past defendants can take advantage of habeas corpus relief even under fully retroactive decisions.<sup>11</sup> The general procedural and jurisdictional prerequisites of habeas corpus still apply.

1. Custody: The defendant must be in actual or constructive custody, as defined by the applicable law. (Pen. Code, § 1473, subd. (a); *In re Azurin*, *supra*, 87 Cal.App.4th 20, 26; *In re Wesley W.* (1981) 125 Cal.App.3d 240, 246; see *Lackawanna County District Attorney v. Coss* (2001) 532 U.S. 394; 28 U.S.C. § 2254(a).)
2. Standard requirements: Other requirements for habeas corpus in the jurisdiction must also be observed, such as those governing successive petitions, unavailability of appellate remedies, timeliness, and venue.
3. AEDPA: Special federal habeas corpus requirements are codified in the Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et. seq.) The United States Supreme Court must expressly declare a decision retroactively applicable to cases on collateral review in order to make federal habeas corpus available in certain situations. (28 U.S.C. § 2244(b)(2)(A), (d)(1)©; *Tyler v. Cain* (2001) 533 U.S. 656.)

### III. CHANGES IN LAW APPLICABLE TO CASES THAT ARE ON DIRECT REVIEW WHEN THE NEW DECISION IS ANNOUNCED

A number of decisions are applicable to cases still on direct review when the new decision is announced, but not to cases past the direct review stage.

#### A. Direct Review

Normally direct review is concluded when no further state appellate remedies are available<sup>12</sup> and the time for petitioning for certiorari to the

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<sup>11</sup> Other forms of relief, such as coram nobis, possibly may be available, depending on the issue. (See *In re Azurin* (2001) 87 Cal.App.4th 20, 27, fn. 7.)

<sup>12</sup> Recall of the remittitur is not considered an “appellate” remedy for this purpose.

United States Supreme Court has expired.<sup>13</sup> (See *Beard v. Banks* (2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2504; 159 L.Ed.2d 494]; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390; *Teague v. Lane, supra*, 489 U.S. 288; *People v. Nasalga* (1996) 12 Cal.4th 784, 794, fn. 5; *In re Spencer, supra*, 63 Cal.2d 400, 405-406; *In re Pine* (1977) 66 Cal.App.3d 593, 594-595.) If no notice of appeal was filed, it is concluded when the time expires for filing the notice.

B. Examples

These include most federal decisions (see *Teague v. Lane, supra*, 489 U.S. 288),<sup>14</sup> many state procedural decisions (e.g., *People v. Charles* (1967) 66 Cal.2d 330, 334), and most ameliorative changes in statutes (*Bell v. Maryland* (1964) 378 U.S. 226, 230; *People v. Rossi* (1976) 18 Cal.3d 295, 304; *In re Estrada* (1965) 63 Cal.2d 740, 748).<sup>15</sup>

C. Responsibilities of Counsel

Cases should be acted on if they meet the “direct review” standard. Cases past that stage and thus unlikely to be affected should be flagged, but need not be acted on unless the decision is found to be retroactive to them.

#### IV PROSPECTIVE ONLY OR LIMITED RETROACTIVITY DECISIONS

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<sup>13</sup> Certiorari requires a previous petition for review. The certiorari petition must be filed within 90 days from the entry of the decision by the California Supreme Court. (U.S. Supreme Ct. Rules, rule 13.) That decision may be the denial of review, the filing of an opinion, the denial of a petition for rehearing following a decision on a grant of review, or other order concluding state appellate proceedings (e.g., Cal. Rules of Court, rule 29.3(b) [dismissal of review]).

<sup>14</sup> Examples include *Schriro v. Summerlin, supra*, \_\_\_ U.S. \_\_\_ [124 S.Ct. 2519, 159 L.Ed.2d 442] [*Ring v. Arizona* (2002) 536 U.S. 584, not retroactive to cases no longer on direct review when *Ring* decided]; *Solem v. Stumes* (1984) 465 U.S. 638, 650-651 [same for *Edwards v. Arizona* (1981) 451 U.S. 477]; *DeStefano v. Woods, supra*, 392 U.S. 631 [same for *Duncan v. Louisiana* (1968) 391 U.S. 145].

<sup>15</sup> Note that the test is whether the present case is/was on “direct review” on *the date of the new decision changing the law*, not the date that relief is sought. Thus the form of relief is not limited to appellate remedies; habeas corpus is available for post-remittitur cases meeting the “direct review” test.

Although changes in the law generally follow the preceding retroactivity rules and are not prospective only (*Teague v. Lane, supra*, 489 U.S. 288; *Griffith v. Kentucky, supra*, 479 U.S. 314, 328), retroactivity may be precluded or restricted in some instances for reasons of constitutionality, fairness, or judicial economy. For example:

A. Ex Post Facto Laws and Due Process

Laws passed after commission of an act that increase punishment, criminalize the act for the first time, or change the burden of proof are barred as ex post facto. (*Collins v. Youngblood* (1990) 497 U.S. 37.) Retroactive application of a judicial decision directly contradicting prior decisions may constitute a due process violation analogous to an ex post facto law. (E.g., *Marks v. United States* (1977) 430 U.S. 188; *Bowie v. District of Columbia* (1964) 378 U.S. 347, 361-362; *People v. King* (1993) 5 Cal.3d 59, 80; *In re Baert* (1988) 205 Cal.App.3d 514.)

B. Rules of Judicial Procedure and Similar Rules Not Affecting Truth-finding Process

The California Supreme Court has made some decisions announcing a judicially declared or similar rule of procedure prospective only, or applicable only to specified events occurring after the decision. The event depends on the subject matter of the decision, such as police conduct (e.g., *Donaldson v. Superior Court, supra*, 35 Cal.3d 24, 39), trial procedures (e.g., *People v. Engelman* (2002) 28 Cal.4th 436, 449, and *People v. Roberts* (1992) 2 Cal.4th 271, 314 [instructions]), and sentencing procedures (e.g., *People v. Scott* (1994) 9 Cal.4th 331, 357-358; *People v. Welch* (1993) 5 Cal.4th 228, 237-238).

C. Legislative Intent

The Legislature (or electorate) may specifically indicate a new law is intended to be prospective only. (E.g., *People v. Floyd* (2003) 31 Cal.4th 179, 184-188; see *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049-1052, and cases listed at p. 1055, fn. 4 (dis. opn. of Arabian, J.).

D. Responsibilities of Counsel

These cases of course should be acted on if they come within the scope of the announced applicability.

## V. STATE AND FEDERAL OVERLAP

### A. Federal Retroactivity Rules

A state is not required to follow federal retroactivity rules, even on direct review, in the absence of a federal constitutional violation. (*People v. Carrera* (1989) 49 Cal.3d 291, 327-328 [in case involving violation of a state statutory right, court declined to follow the holding of *Griffith v. Kentucky* (1987) 479 U.S. 314, 328, that a new procedural rule must apply to all cases on direct review].)

### B. State Collateral Remedies To Vindicate Federal Rights

There is no present federal constitutional requirement that a state must provide collateral remedies. However, as a matter of judicial economy and accommodation, the California courts will normally accept state habeas corpus jurisdiction if federal habeas corpus relief would be available. (*In re Spencer, supra*, 63 Cal.2d 400, 405-406; *In re Shipp, supra*, 62 Cal.2d 547, 553, fn. 2.) It is unclear whether the converse is true: whether the state will decline habeas corpus jurisdiction on a federal issue if federal habeas corpus relief is barred for one reason or another.