POTENTIALLY FAVORABLE CHANGES IN THE LAW

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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.

While this memo provides broad guidance and may answer many of the most common questions, attorneys must always verify that legal principles and authorities are current and correct before relying on them and must carefully adapt any general advice to the nuances of the particular case and the needs of the client. Please contact the assigned ADI staff attorney if you need help or if your case poses an unusual situation.

Many topics in this memo are covered in depth in the ADI California Appellate Practice Manual, covering criminal and juvenile appeals and writs.[1] To assist the reader, this memo includes references to the manual, where applicable.

PART ONE of this memo sets forth general considerations and possible procedural steps appellate counsel can take in a variety of situations to help their clients.

PART TWO provides a review of the basic principles of retroactivity, which always must be factored into the equation.

All rule references are to the California Rules of Court unless otherwise stated.

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[1] http://www.adi-sandiego.com/panel/manual.asp

— PART ONE —

WAYS APPELLATE COUNSEL CAN HELP THEIR CLIENTS

PRELIMINARY RESPONSIBILITIES

Review of open and closed cases to determine where the change might be applicable

Attorneys should review all of their pending appeals – and at least consider looking at their already-final cases – for possible issues in light of the new law. Our goal is that no client should lose a potential benefit because of attorney oversight. Depending on the applicable retroactivity principles (see Part Two) and the procedural history of the case, an 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, appellate counsel may decide to file a motion to recall the remittitur or at least notify clients or trial counsel of a possible remedy, such as habeas corpus or other writ petition.

Determination of all applicable deadlines for seeking relief and identification of urgent cases

At an 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, counsel has several options for dealing with these high-priority cases. (See also ADI California Appellate Practice Manual, § 1.30 et seq.)

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 spotting and correcting unauthorized sentencing errors favoring 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, placement, or position of responsibility, in situations where there is little chance of getting an appreciably more favorable result in the end. Consultation with trial counsel, the client, and ADI can help identify and sort out the risks and benefits. The topic of adverse

consequences is considered in depth in the ADI California Appellate Practice Manual, § 4.91 et seq.

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[2] – or at least that the client knows to file in pro per.

Communication with clients

We also recommend prompt contact with clients. Many may have heard of the new 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 to seek relief without consultation with their lawyer. They may lose potential benefits by presenting the issues improperly, may create a successive petition bar to later relief, and may even run into serious adverse consequences if their particular case is not analyzed correctly before any pleading is filed.

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[2]For example, trial counsel should not ordinarily file a habeas corpus 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; cf. *People v. Carpenter* (1995) 9 Cal.4th 634, 646 [superior court has concurrent habeas corpus jurisdiction over case on matters that are not, and could not be, raised in contemporaneous appeal].) Further, simultaneous proceedings by different attorneys in different courts create not only confusion but the risk of conflicting strategies and rulings, as well as a successive petition bar to later relief.

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.

Evaluation of cases involving a guilty plea

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

PRE-REMITTITUR CASES

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,[3] 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.[4] If the court rejects the filing, the very fact it was at least submitted at the earliest possible stage will help avoid future claims of forfeiture, procedural default, failure to seek appellate remedies before resorting to habeas corpus, etc.

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[3]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, motions and applications such as augmentations and extensions of time (rule 8.50 et seq.); appellant's opening brief, respondent's brief, and appellant's reply brief (rules 8.360, 8.412, 8.520); petition for rehearing (rules 8.268, 8.536); petition for review, answer, and reply (rule 8.500); motion to recall the remittitur (rules 8.272, 8.540); and supplemental briefs after remand or transfer from the Supreme Court if addressed to matters arising after the previous Court of Appeal decision (rule 8.200(b)). In addition, rule 8.254 permits a supplemental letter in the Court of Appeal citing (but not arguing) newly available authorities, and rule 8.520(d) permits a supplemental brief in the Supreme Court on new authorities up to 10 days before oral argument, both as a matter of right.

[4]Examples of pleadings that specifically require leave to file are a supplemental opening brief (rule 8.200(a)(4)) and a late petition for rehearing or review (rules 8.268(b)(4), 8.500(e)(2)). Pleadings not mentioned in the rules but not precluded by them include, for example, a request to strike an opponent's brief or withdraw one's own brief, a letter supplementing an already-filed petition for rehearing or review, or a request to expand the scope of review.

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.

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.

Post-AOB, pre-opinion

Depending on the court's preference and the stage of the case, you should (1) move to strike the AOB and replace it with a brief that includes the new issue or (2) file a supplemental opening brief along with a request that the presiding justice grant leave to file it.[5] (Rule 8.200(a)(4).) If the original filing was a *Wende* brief, ask for leave to withdraw it and file a new opening brief. Post-submission filings should be accompanied by a separate request to vacate the submission. (Rule 8.256(d) & (e).) If the point has already been made in the brief and the new authority is relevant but requires no discussion, a supplemental letter brief under rule 8.254 may be filed without leave of the court. That rule prohibits commentary on the new authority, however.

Opinion filed, but not yet final[6]

File a 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 late petition under rule 8.268(b)(4).[7] 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 raised for the first time in a petition for rehearing. (See *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111,

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[5]We suggest checking with the court, since preferences may shift over time, depending on internal procedures for handling documents, especially now that filings are electronic. The court's preferences may depend on whether the respondent's brief has been filed.

[6]A modification of the opinion that changes the judgment or an order for publication restarts the 30-day clock between the filing of the opinion and its finality. (Rule 8.264(b)(5), (c)(2).)

[7]The court may also grant rehearing on its own motion under rule 8.268(a)(1) before the case becomes final as to that court – normally up to 30 days from the filing of the opinion.

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. Petitions for rehearing are covered in § 7.33 et seq. of the ADI California Appellate Practice Manual.

Opinion final as to Court of Appeal, but pre-remittitur

These cases must be taken to the California Supreme Court; the Court of Appeal has lost jurisdiction. Petitions for review are covered in § 7.46 et seq. of the ADI California Appellate Practice Manual.

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:

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. The excuse for not having raised the issue in the Court of Appeal, as is normally required under rule 8.500(c)(1), would be the recency of the new law.[8]

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 8.500(e)(2). The excuse for late filing would be the recency of the new law.[9]

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.

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 8.500(c)(1), on the ground the issue became available only recently.

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[8]*People v. Braxton* (2004) 34 Cal.4th 798, 809, noted: "[T]he rule prohibiting parties from raising new issues in this court is not absolute."

[9]The court may also grant review on its own motion under rule 8.500(c).

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 consideration of the new issue. (Rules 8.500(b)(4), 8.528(d); see also rule 8.200(b).)

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 8.516(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 8.528(c) & (f)). If the Supreme Court opinion has already been filed and is not yet final,[10] the request should be made by petition for rehearing (rule 8.536). Proceedings in review-granted cases are discussed in § 7.83 et seq. of the ADI California Appellate Practice Manual.

POST-REMITTITUR CASES

After the issuance of the remittitur under rule 8.272 (or rule 8.540 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 Part Two of this memo, "General Principles of Retroactivity.") ADI will provide guidance in particular situations as they arise.

Limitations on appellate counsel

For the most part, appellate counsel's responsibilities end with issuance of the remittitur. In general, without specific authorization of the court, the projects cannot authorize compensation for post-remittitur activities. Occasional exceptions may occur. Consult with ADI before spending more than de minimis time on post-remittitur efforts.

[10]The usual time of finality is 30 days after filing. (Rule 8.532(b)(1)); see exceptions listed in rule 8.532(b)(2).)

Steps appellate counsel can take

Despite these limitations, appellate counsel nevertheless may choose to assist former clients in some ways.

Communication with client: Appellate counsel can determine which former clients may benefit from a change in the law and inform them of such a potential. They can also send the Judicial Council habeas corpus form.[11] But counsel should advise such clients to consult trial counsel before filing for relief, in order to assess potential adverse consequences and avoid successive petitions problems.

Coordination with trial counsel – important: 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. Appellate counsel can urge trial counsel to take needed action and can provide any sample arguments that might be available. 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 about the most advantageous forum, etc.

Types of post-remittitur remedies

Recall of remittitur: A fundamental change in the law is a ground for recalling the remittitur. A party may make a motion for recall under rule 8.272(c)(2) or 8.540(c)(2). (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.) Appellate counsel would presumptively be responsible for such a filing. (See § 7.45 of ADI California Appellate Practice Manual.) But counsel should confer with ADI before undertaking such a step, because, as noted above, compensation for post-remittitur work is problematic.

State habeas corpus: If the new law is fully retroactive or the case was pre-remittitur when the new law was announced, state habeas corpus may be available even though the remittitur has since issued. The California courts will normally accept state habeas corpus jurisdiction if federal habeas corpus relief would be available. (*In re Gomez* (2009) 45 Cal.4th 650, 655; *In re Spencer* (1965) 63

[11] http://www.courts.ca.gov/documents/mc275.pdf

Cal.2d 400, 405-406; *In re Shipp* (1965) 62 Cal.2d 547, 553, fn. 2.) See chapter 8 of the ADI California Appellate Practice Manual for guidance on state habeas.

Requirements for habeas corpus: The standard limitations on habeas corpus apply in this context:

Custody: The defendant must be in actual or constructive custody, as defined by the applicable law. (Pen. Code, § 1473, subd. (a); *People v. Villa* (2009) 45 Cal.4th 1063; *In re Azurin* (2001) 87 Cal.App.4th 20, 26; *In re Wessley 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); see ADI California Appellate Practice Manual, §§ 8.7, 9.1.)

Inadequacy of appeal as 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.)

Other requirements: Other requirements for habeas corpus in the jurisdiction must also be observed, such as those governing successive petitions, timeliness, and venue. (See ADI California Appellate Practice Manual, §§ 8.5 et seq., 9.1 et seq.)

AEDPA: Requirements applicable to federal habeas corpus 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)(C); *Tyler v. Cain* (2001) 533 U.S. 656.) This topic is covered extensively in chapter 9 of the ADI California Appellate Practice Manual.

Other considerations: Counsel must consider a number of other factors:

Choice of forum: Both the superior court and the Court of Appeal would have jurisdiction. The trial court is normally the preferred forum for a petition filed for the first time on a particular ground or for cases involving factual issues, but there may be exceptions. Strategic considerations may be important here; consult with trial counsel. Appellate counsel should be

aware that compensation for proceedings in the superior court normally comes from that court, not the Court of Appeal.

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. That relief may be, for example, a new trial, resentencing, release from custody, etc. It may also ask for procedural relief. If filed in the Court of Appeal, for example, it may seek recall of the remittitur; this process would reopen the appeal and permit briefing on the new law. (See *In re Smith* (1970) 3 Cal.3d 192, 203-204.)

Counsel: If the remedy chosen is habeas corpus in the Court of Appeal, appellate counsel would usually be responsible, But in post-remittitur situations compensation is problematic, and therefore it may be necessary to urge trial counsel to file a petition or assist the client in doing so in pro per. If habeas corpus in the superior court is to be pursued, trial counsel is presumptively responsible in most situations, but appellate counsel can 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.

Other writs: If habeas corpus is not available for one reason or another, counsel can explore the possibility of other writs, such as error *coram nobis* or *vobis*[12] or mandate. (See *People v. Kim* (2009) 45 Cal.4th 1078 [discussing cases granting and denying the writ]; *In re Azurin* (2001) 87 Cal.App.4th 20, 27, fn. 7.) ADI's California Appellate Practice Manual discusses *coram nobis* and *coram vobis* in § 8.66 et seq., mandate and prohibition in § 8.71 et seq., supersedeas in § 8.82, and statutory writs in § 8.83. This memo focuses on habeas corpus.

[12]A petition for writ of error *coram nobis* in the criminal law context is filed in the superior court that rendered judgment and is the equivalent of a post-judgment motion to withdraw a guilty plea or a motion to vacate the judgment. If the judgment was previously appealed and affirmed, a petition for writ of error *coram vobis* is filed in the reviewing court that rendered the decision. (*People v. Welch* (1964) 61 Cal.2d 786, 790; *In re De La Roi* (1946) 28 Cal.2d 264, 276.)

Choice of remedy

The Court of Appeal may require a particular procedure. Sometimes a given court is receptive to recalling the remittitur; sometimes it may decline and inform us that habeas corpus is to be used. In the absence of court preference, if both habeas corpus and recall of the remittitur appear to be appropriate, counsel have to weigh the benefits of each.

Advantages of habeas corpus: Habeas corpus will often be the remedy of choice, for both strategic and practical reasons:

Receptivity of courts: Habeas corpus is a more traditional and conventional remedy than is recall of the remittitur, which is often seen as extraordinary. As the centuries-old Great Writ, "the safe-guard and the palladium of our liberties," protected by the Constitution, it has considerable stature. (*In re Sanders* (1999) 21 Cal.4th 697, 704, internal quotation marks deleted.) Recall of the remittitur, on the other hand, is a creature of the Rules of Court. For these reasons courts may be more receptive to a habeas petition.

Right to relief: Courts are *required* to issue an order to show cause if a habeas corpus petition states a prima facie case for relief. (*People v. Romero* (1994) 8 Cal.4th 728, 740; see Pen. Code, § 1476; rules 8.385(d), 4.551(c)(1).) A motion to recall the remittitur, in contrast, may be denied summarily, regardless of its merits.[13]

New facts: A writ petition allows introduction of factual matters outside the record. Recall of the remittitur just reopens the appeal, with its usual restrictions against relying on off-record facts.

Practicalities: As previously noted, compensation for appellate counsel is problematic in post-remittitur situations. This factor alone may dictate filing a habeas corpus petition in the trial court, because trial counsel normally are not so limited. If neither appellate counsel nor trial counsel can act, the client can file in pro per.

Advantages of recall of remittitur: A *motion to recall the remittitur* under rule 8.272(c)(2) may be the better option in some situations. It could ask the Court of

[13]Denial of a motion to recall the remittitur may be reversed for abuse of discretion, however. (E.g., *People v. Mutch* (1971) 4 Cal.3d 389.)

Appeal to grant rehearing and to permit briefing on the new case. If filed by counsel, it should be *accompanied by a supplemental opening brief*. It has certain advantages over habeas corpus:

Efficiency: As a simple motion, it is more efficient and less cumbersome procedurally than habeas corpus, which typically has such components as a verification, petition, memorandum of authorities, supporting documents, etc.

Successive petitions: 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 ["absent 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"]; see also *In re Reno* (2012) 55 Cal.4th 428; Pen. Code, § 1475.) A motion to recall the remittitur can and should be limited to the change in the law, without prejudice to the right to file a habeas corpus petition later on other issues.

AEDPA[14] statute of limitations: 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 during the proceeding. (28 U.S.C. § 2244(d)(1)(A), (d)(2); see ADI California Appellate Practice Manual, § 9.4 et seq.)

Remedy in law, not equity: It reflects the normal policy preference for legal/appellate remedies over equitable/writ remedies. (*In re Harris* (1993) 5 Cal.4th 813, 825-829.)

ALTERNATIVE PROCEDURES AND EXPEDITED RELIEF

Situations in which ordinary procedures may not be the most appropriate

Identification of special situations: As indicated at the start, in reviewing your cases, be sure to consider whether an alternative to the usual procedures may be more effective or efficient or whether expedited relief may be needed. For example, recall of the sentence under Penal Code section 1170, subdivision (d), to apply new sentencing law might achieve the desired result more efficiently than litigating the question on appeal. Or normal appellate remedies may be too slow if

[14]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

the client is entitled to immediate or virtually immediate release or is serving "dead time" in light of the new law.

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. The topic of time-sensitive cases is addressed in the ADI California Appellate Practice Manual, § 1.30 et seq.

Options that might replace or supplement standard remedies

Release pending appeal: Bail or OR release pending appeal may be available. Consult with trial counsel and ADI about who should file the request and in what court. (See rule 8.312; Pen. Code, §§ 1272, 1272.1, 1273; ADI California Appellate Practice Manual, § 3.37 et seq.)

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. (See ADI California Appellate Practice Manual, § 1.32.)

Summary reversal or stipulated reversal: A highly streamlined option might be a motion for summary reversal. (*People v. Geitner* (1982) 139 Cal.App.3d 252; *People v. Browning* (1978) 79 Cal.App.3d 320.) Another would be 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. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273; *In re Rashad H.* (2000) 78 Cal.App.4th 376; Code Civ. Proc, § 128, subd. (8).) These approaches could save considerable time and resources. Before electing to use them, however, counsel should consider whether they would involve waiver of other appellate issues. (See ADI California Appellate Practice Manual, § 1.33.)

Immediate issuance of remittitur: The Attorney General may be willing to stipulate to immediate issuance of the remittitur (rule 8.272(c)(1)) if entitlement to relief is uncontested.

Recall of sentence in trial court: If the case is within 120 days of commitment and the new issue involves sentences, appellate counsel may consider the option of a recall of 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 1170(d) review.

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 Cal.App.4th 1301, 1305; *In re Duran* (1974) 38 Cal.App.3d 632, 635.) Habeas corpus in the trial court may also be an option; coordinate with trial counsel.

ENSURING EFFECTIVENESS OF REMEDY

Remedies 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 lose track of the paperwork and delay taking action.

— Part Two —

GENERAL PRINCIPLES OF RETROACTIVITY

INTRODUCTION

This section gives guidance on 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. It does not purport to provide in-depth analysis. ADI will provide guidance in particular situations as they arise.

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 prospectivity (meaning it applies only to specified events occurring after the decision, such as police procedures, instructions, or sentencing).

Decisions not changing the law

A decision dictated by, and not changing or extending, an established rule is not "new law" at all and so is as applicable as the established rule would be. For example, 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., *Stringer v. Black* (1992) 503 U.S. 222, qualified on another point in *Brown v. Sanders* (2006) 546 U.S. 212; *Yates v. Aiken* (1988) 484 U.S. 211; see *Teague v. Lane* (1989) 489 U.S. 288; *Saffle v. Parks* (1990) 494 U.S. 484, 489-491; *In re Gomez* (2009) 45 Cal.4th 650, 656; *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36-37.) The subject of "old" versus "new" law is analyzed in detail in ADI's amicus curiae brief in *Gomez*.[15]

[15] http://www.adi-sandiego.com/news_alerts/pdfs/2008/ADI-amicus-brief-in-Gomez.pdf

FULLY RETROACTIVE CHANGES IN LAW

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 discussion of the restrictions on habeas corpus in Part One.

Expressed 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.) Sometimes a court, too, will find one its holdings to be fully retroactive. (See examples cited in *Michigan v. Payne* (1973) 412 U.S. 47, 52, fn. 6.)

Fundamental powers of state to criminalize or punish

A decision setting constitutional restrictions on the power to criminalize a certain kind of conduct, impose a certain kind of punishment, prosecute or punish a certain class, etc., may be applicable to cases past direct review. (*Penry v. Lynaugh* (1990) 492 U.S. 302, 330 [constitutionality of executing a retarded person can be considered on habeas corpus, even though holding in favor of petitioner would be change in law], abrogated on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304; cf. *Lambrix v. Singletary* (1997) 520 U.S. 518, 539; *Saffle v. Parks* (1990) 494 U.S. 484, 494-495.)

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* (1971) 4 Cal.3d 389, 394-396.)

Integrity of judicial process

Certain decisions announcing a "watershed" procedural rule fundamental to the integrity of the fact-finding process – such as the right to counsel – may be fully retroactive. (See examples cited in *Michigan v. Payne* (1973) 412 U.S. 47, 52, fn. 6; *Ashe v. Swenson* (1970) 397 U.S. 436, 437, fn. 1; see *Teague v. Lane* (1989) 489 U.S. 288, 313-314.)

Equal protection requirements

Some changes in the law apply fully retroactively because to do otherwise would violate equal protection. *In re Kapperman* (1974) 11 Cal.3d 542, for example, held pre-sentence *custody* credits cannot be denied some prisoners while granting them to others, because all prisoners are similarly situated for purposes of such credits. But *People v. Brown* (2012) 54 Cal.4th 314 found no violation of equal protection in setting a retroactivity limit with respect to beneficial *conduct* credits, because a law cannot affect conduct that has already occurred.

CHANGES IN LAW APPLICABLE TO CASES THAT ARE NOT YET FINAL ON DIRECT REVIEW WHEN THE NEW LAW BECOMES EFFECTIVE

A number of decisions are applicable to cases not yet final on direct review when the new decision is announced, but not to cases past the direct review stage. Note that the test is *whether the present case is/was on direct review on the date of the new decision or statute changing the law, not the date that relief is sought*. Thus the form of relief is not limited to direct appeal; habeas corpus is available for post-remittitur cases meeting the "direct review at the time of the new decision" test.

Direct review

Normally direct review is concluded when no further state appellate remedies are available[16] and the time for petitioning for certiorari to the United States Supreme Court has expired.[17] (See *Beard v. Banks* (2004) 542 U.S. 406; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390; *Teague v. Lane* (1989) 489 U.S. 288; *People v. Nasalga* (1996) 12 Cal.4th 784, 794, fn. 5; *In re Spencer* (1965) 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.

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[16]Recall of the remittitur is not considered an appellate remedy for this purpose.

[17]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 8.528(b) [dismissal of review]).

Judicial decisions

Most judicial decisions are applicable to the parties in the case and to cases pending when they are filed. These include most federal court decisions (see *Griffith v. Kentucky* (1987) 479 U.S. 314, 328; *Teague v. Lane* (1989) 489 U.S. 288),[18] as well as many state procedural decisions (e.g., *People v. Charles* (1967) 66 Cal.2d 330, 334).

Statutory changes ameliorating punishment

Some statutory ameliorative changes are retroactive to cases not yet past the stage of direct review. (*In re Estrada* (1965) 63 Cal.2d 740, 748; see *Bell v. Maryland* (1964) 378 U.S. 226, 230; *People v. Rossi* (1976) 18 Cal.3d 295, 304.) As *Estrada* said: "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." (*Estrada*, at p. 745.) This is a matter of presumed legislative intent, not a constitutional limitation, and the Legislature may declare a different intention. (E.g., *People v. Floyd* (2003) 31 Cal.4th 179, 184-188.) *People v. Brown* (2012) 54 Cal.4th 314 qualified the *Estrada* presumption significantly, finding it inapplicable when the statutory change does not mitigate the prescribed punishment *for a specific crime*. (*Id*. at p. 325.)

PROSPECTIVE-ONLY OR LIMITED-PROSPECTIVITY DECISIONS

Some kinds of changes in the law are or can be applied only to events occurring after they are enacted or decided.

Ex post facto laws

Statutes that increase punishment, criminalize given conduct for the first time, or change the burden of proof in a criminal proceeding unfavorably to the defendant cannot be applied to acts performed before the changes became effective, because of constitutional prohibitions against ex post facto laws. (*Calder v. Bull* (1798) 3 U.S.

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[18]Examples include *Schriro v. Summerlin* (2004) 542 U.S. 348 (*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* (1968) 392 U.S. 631 (same for *Duncan v. Louisiana* (1968) 391 U.S. 145).

(3 Dall.) 386, 390; see also *Carmell v. Texas* (1990) 529 U.S. 513, 521-522; *Collins v. Youngblood* (1990) 497 U.S. 37, 41, 46.)

Due process violation akin to ex post facto law

Sometimes 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; *Bouie v. 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; see "Due Process / Ex Post Facto Issues in *Sandoval* Remedy"[19] [discussing ex post facto laws and judicial decisions as implicated by *People v. Sandoval* (2007) 41 Cal.4th 825].)

Penal Code section 3 and general presumption of non-retroactive statutory changes

Penal Code section 3 provides: "No part of it [the Penal Code] is retroactive, unless expressly so declared." Prospective-only is thus the default rule for determining the application of a new statute. (*People v. Brown* (2012) 54 Cal.4th 314.) This rule is qualified by the holding in *In re Estrada* (1965) 63 Cal.2d 740, which found a presumption of retroactivity when the Legislature has enacted an ameliorative change in the law. But *Estrada* in turn is qualified by the limitation that its presumption applies only when the penalty for a particular crime is reduced; other ameliorative changes remain subject to the Penal Code section 3 rule. (*Brown*, at p. 325.)

Some rules of judicial procedure

Although changes in judicial decisional law – especially in federal cases – generally follow the "direct review" retroactivity rule and are not prospective only (*Teague v. Lane* (1989) 489 U.S. 288; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328), retroactivity may be restricted or precluded in some instances for reasons of constitutionality, fairness, or judicial economy. The California Supreme Court, for example, has made some decisions announcing a judicially declared rule of procedure prospective, or applicable only to specified events occurring after the decision. The event depends on the subject matter of the decision, e.g.:

Police conduct: *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 39;

[19] http://www.adi-sandiego.com/news_alerts/pdfs/2007/Ex-post-facto-issues-in-Sandoval-remedy.pdf

Trial procedures: *People v. Engelman* (2002) 28 Cal.4th 436, 449; *People v. Roberts* (1992) 2 Cal.4th 271, 314;

Sentencing procedures: *People v. Scott* (1994) 9 Cal.4th 331, 357-358; *People v. Welch* (1993) 5 Cal.4th 228, 237-238.

Appellate procedures: California Rules of Court, rules 8.1105 and 8.1115 allowed a published case in which the Supreme Court had granted review to remain published and citable. The court announced this rule would apply only to cases granted review after the effective date of the rule change (July 1, 2016).[20]

Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal.4th 223, 230-232, and *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289-290, explore some of the complexities of these decisions.

Expressed 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.)

STATE AND FEDERAL OVERLAP

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 [declining 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].)

State collateral remedies to vindicate federal rights

The U.S. Supreme Court has not specifically held the federal Constitution requires states to provide collateral remedies, although as far as we know all do. As a matter of judicial economy and accommodation, however, the California courts will normally accept state habeas corpus jurisdiction if federal habeas corpus relief

[20] https://newsroom.courts.ca.gov/news/supreme-court-eliminates-automatic-depublication

would be available. (*In re Gomez* (2009) 45 Cal.4th 650, 655; *In re Spencer* (1965) 63 Cal.2d 400, 405-406; *In re Shipp* (1965) 62 Cal.2d 547, 553, fn. 2.) The inverse is not necessarily true: a state need not automatically deny habeas corpus on a federal issue just because federal habeas corpus is barred for one reason or another. *Teague v. Lane* (1989) 489 U.S. 288 sets a floor, not a ceiling, and states may choose to offer broader collateral remedies than those open to federal courts under *Teague*. (*Danforth v. Minnesota* (2008) 552 U.S. 264; see *Gomez*, at p. 655, fn. 3; see *In re Clark* (1993) 5 Cal.4th 750, 795-799 [standards for "successive" petitions do not precisely conform to federal ones].)