

## ***PEOPLE V. HOWARD: ALERT***

### **Reckless Evasion of Police Offense Under Vehicle Code Section 2800.2 Invalidated as a Basis for Second Degree Felony Murder**

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On January 27 the California Supreme Court decided *People v. Howard* (2005) 34 Cal.4th 1129, holding that reckless evasion of police (Veh. Code, § 2800.2) is not an “inherently dangerous felony” and thus does not qualify as the predicate felony for second degree felony murder. The *Howard* decision applies at least to acts committed after 1998 and arguably earlier. It affects defendants with currently active appeals and also those whose appeals have concluded. This memorandum is meant to alert attorneys to the issue and give general guidance on how to raise it. ADI is posting sample arguments and filings on its website, [www.adi-sandiego.com](http://www.adi-sandiego.com). It has also designated staff attorney Neil Auwarter, as its *Howard* contact at ADI. ([nfa@adi-sandiego.com](mailto:nfa@adi-sandiego.com), or (619) 696-0284, ext. 27.)

#### **The Howard Decision**

By way of background, second degree felony murder is a non-statutory, court-made rule that a person is guilty of second degree murder when he or she commits a homicide in the commission of any felony “inherently dangerous to human life.” A felony is inherently dangerous when by its nature it cannot be committed without creating a substantial risk of death. This determination is based on the elements of the offense in the abstract and not on the manner of commission in a particular case. (See *People v. Howard, supra*, 34 Cal.4th at p. 1135, and cases cited.)

In *Howard*, the defendant caused a fatal automobile accident while fleeing from police. Before the collision the defendant drove at excessive speeds, ran a red light and stop signs, and drove on the wrong side of the road. The defendant was convicted of second degree murder and reckless vehicular evasion of police (Veh. Code, § 2800.2). Jurors were instructed that reckless evasion is an inherently dangerous felony and a predicate offense for second degree felony murder. The Court of Appeal affirmed the judgment, rejecting the defendant’s argument that reckless evasion is not an inherently dangerous felony.

The California Supreme Court reversed. It held reckless evasion is not an inherently dangerous felony because, under a 1998 amendment to section 2800.2 adding subdivision (b), the crime is statutorily defined to include any flight from an officer in which the driver commits three traffic violations having a “point count” under Vehicle

Code section 12810. Section 12810 includes numerous point count traffic violations that do not endanger human life, and so it is possible to commit a violation of section 2800.2 without creating a substantial risk of death. Thus violation of section 2800.2 cannot serve as the predicate for second degree felony murder. (*People v. Howard, supra*, 34 Cal.4th at pp. 1137-1139.)

### **Applicability and Retroactivity of Howard**

Whether and how *Howard* may be applied depends on the stage of the case and the date of the offense. The topic is discussed in the ADI article on taking advantage of favorable changes in the law at <http://www.adi-sandiego.com/articles.html> and attorneys are encouraged to contact the assigned ADI staff attorney or Neil Auwarter for additional guidance.

#### **A. Cases Not Yet Final on Appeal**

*Howard* is unquestionably applicable to cases not yet final on appeal. (*People v. Garcia* (1984) 36 Cal.3d 539, 549 [decision finding an intent requirement for felony murder special circumstances is retroactive to crimes committed before the decision].) For retroactivity purposes, appeals are not final until the time for filing a petition for certiorari has expired. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 794, fn. 5, and *In re Pine* (1977) 66 Cal.App.3d 593, 594-595.)

#### **B. Final Cases Where Offense Committed After 1998 Amendment to Section 2800.2**

Because it affects the definitional elements of the crime and is an interpretation of what reckless evasion under the 1998 amendment to Vehicle Code section 2800.2 has always meant *Howard* is almost surely applicable to all final cases in which the underlying offense was committed after January 1, 1998. (*People v. Mutch* (1971) 4 Cal.3d 389, 394-396 [*People v. Daniels* (1969) 71 Cal.2d 1129, which rejected prior Supreme Court decisions on the meaning of Penal Code section 209 kidnaping, is fully retroactive]; see *Fiore v. White* (2001) 531 U.S. 225 [violation of federal due process to punish defendant under a law declared, by a subsequent court decision, to be inapplicable to his conduct]; see also *Bousley v. United States* (1998) 523 U.S. 614.)

#### **C. Final Cases Where Offense Committed Before 1998**

The holding in *Howard* was expressly limited to offenses committed after the 1998 amendment. (*People v. Howard, supra*, 34 Cal.4th at p. 1137.) The court declined to

decide the validity of *People v. Johnson* (1993) 15 Cal.App.4th 169, which held the pre-1998 version of section 2800.2 described an inherently dangerous offense.

At the time *Johnson* was decided, a violation under section 2800.2 could be committed by driving with “willful or wanton disregard for the safety of persons *or property*.” (Emphasis added.) *Johnson* first found that “wanton disregard” necessarily includes disregard for human life and thus acting with such a state of mind is inherently dangerous. (*People v. Johnson, supra*, 15 Cal.App.4th at pp. 173-174.) This proposition is probably no longer tenable after *Howard*. Alternatively, the court noted that fleeing from a pursuing peace officer whose vehicle is displaying lights and sirens inevitably endangers the life of the pursuing officer, even if it does not endanger non-participants in the chase. (*Id.* at p. 174.) Justice Brown’s dissent in *Howard* made the same point. (*People v. Howard, supra*, 34 Cal.4th at p. 1140.) Although the majority in *Howard* discussed *Johnson* and of course was aware of the dissent, it did not mention this argument, but focused its analysis solely on danger to non-participants.

Arguably, the majority’s analytical approach, together with its failure to approve *Johnson*, is an implicit rejection of the position that danger to officers is an inevitable feature of section 2800.2 chases. Thus there may be renewed vitality in attacks on pre-1998 convictions.

### **Prejudice**

The Supreme Court in *Howard* did not determine whether the error in submitting the case to the jury on the theory of second degree felony murder was prejudicial in that case. The jury had not been expressly instructed on implied malice second degree murder, but the instruction on felony murder required it to find the defendant acted in “conscious disregard for the safety of persons or property.” (*People v. Howard, supra*, 34 Cal.4th at p. 1134, and pp. 1142, 1145-1146, dis. opn. of Baxter, J.) Noting the parties had not briefed the question of prejudice, the Supreme Court remanded to the Court of Appeal for a determination of that matter. (*People v. Howard, supra*, 34 Cal.4th at p. 1139, fn. 4.)

When the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the verdict rested, the conviction must be reversed. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-70, overruled on other grounds in *People v. Martinez* (2004) 20 Cal.4th 225, 239.) *Chapman v. California* (1967) 386 U.S. 18, governs a prejudice determination

for federal constitutional violations such as, generally, instructional errors affecting the elements of the crime. (*People v. Flood* (1998) 18 Cal.4th 470, 491-507; see, e.g., *People v. Sanchez* (2001) 86 Cal.App.4th 970, 980; *People v. Jones* (2000) 82 Cal.App.4th 663, 670; *People v. Baker* (1999) 74 Cal.App.4th 243, 253; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1238 [each finding federal constitutional error in submission of invalid felony-murder predicate offenses].)

Prejudice arguments are part of the sample pleadings on the ADI website. Counsel should add any case-specific circumstances, such as prosecutorial emphasis on the felony murder theory during closing argument, jury questions on the theory, lengthy deliberations, etc.

### **Raising *Howard* Error for Your Client: Procedural Steps**

If the case is on appeal and the opening brief has not yet been filed, raising this issue is quite straightforward. But raising it in later stages of the appeal, and post-appeal, is more complicated and requires selection of a procedural vehicle appropriate to the stage of the case. To avoid any questions of procedural default, *Howard* should be raised at the earliest stage possible. The topic is discussed generally in the ADI article on taking advantage of favorable changes in the law at <http://www.adi-sandiego.com/articles.html>. Again, attorneys are encouraged to contact the assigned ADI staff attorney or Neil Auwarter for additional guidance.

#### A. Pre-Remittitur Cases

1. Pre-AOB: If an opening brief has not yet been filed, briefing a *Howard* issue presents no procedural difficulty. ADI is posting a sample argument on its website.
2. Post-AOB, pre-opinion: If the opening brief has been filed, but the opinion has not issued, file a supplemental opening brief, along with a request to file it, citing California Rules of Court, rule 13(a)(4).
3. Post-opinion, but within 30 days of its issuance: If the opinion has issued, and it is still within the 15-day period for petitioning for rehearing, file a petition for rehearing. If it is between 16 and 30 days after the opinion, file a petition for rehearing accompanied by a motion for relief from failure to file a timely petition. (Rule 25(b)(4).)

4. More than 30 days post-opinion, but pre-remittitur: The Court of Appeal lacks jurisdiction during this period, so you must seek review in the California Supreme Court. If the *Howard* issue was not raised in the Court of Appeal (as normally required by rule 28(c)), ask the court to excuse this failure on the ground *Howard* was only recently decided.
  - a. 31-40 days post-opinion, no petition for review yet filed: File a petition for review raising the *Howard* issue.
  - b. 41-60 days post-opinion, no petition filed: File a petition for review, along with a request to excuse the late filing pursuant to rule 28(e)(2), again on the ground *Howard* was decided recently.
  - c. Petition for review already filed on other grounds and pending: File a supplemental petition for review, along with a request for leave to file it, explaining why the issue could not have been raised at an earlier stage.
5. Petition for review already granted: File a request for the court to expand the scope of review (rule 29(b)(2)) or to remand the case to the Court of Appeal following the Supreme Court's disposition of the issue(s) already on review (rule 29.3(c), (f)). If the Supreme Court has already issued an opinion that is not yet final, make the request by petitioning for rehearing (rule 29.5).

#### B. Post-Remittitur Cases

The choice of remedy at this stage poses some complications. Both trial and appellate courts have habeas corpus jurisdiction at this time, and recall of the remittitur is an additional remedy available in the Court of Appeal. Again, we call attention to the ADI website's sample *Howard* pleadings and article on taking advantage of favorable changes in the law and encourage consultation with the assigned ADI staff attorney or Neil Auwarter.

1. Coordination with trial counsel: It is possible trial counsel is preparing or has already filed a writ petition in the trial court. Thus it is important to contact trial counsel to coordinate actions, avoid duplication of effort, and select the most advantageous forum.

2. Waltreus-Dixon issues: Post-remittitur cases must address the problem that normally habeas corpus is not available to address issues that were raised unsuccessfully on appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225) or could have been but were not raised on appeal (*In re Dixon* (1953) 41 Cal.2d 756, 759). A change in the law is recognized as an exception to that rule. (*In re Harris* (1993) 5 Cal.4th 813, 841; *In re King* (1970) 3 Cal.3d 226, 229, fn. 2.) Ineffective assistance of appellate counsel is another way around it. (*Harris* at pp. 832-834.)
3. Ineffective assistance of appellate counsel: If the *Howard* issue was not raised on appeal, an issue of ineffective assistance of appellate counsel may arise. Although a previous Court of Appeal decision had gone the other way (*People v. Sewell* (2000) 80 Cal.App.4th 690, disapproved in *Howard*), Court of Appeal authority was hardly overwhelming, and the Supreme Court had not yet spoken on the matter. Thus it is possible that failure to raise the issue on appeal would not be excused on the ground it would have been futile, and in that case ineffective assistance of counsel on appeal might arise as a fallback response to a waiver or *Dixon* contention. (*In re Harris, supra*, 5 Cal.4th at pp. 832-834 [ineffective assistance of appellate counsel and *Dixon*].) Please contact ADI if that problem appears in your case.
4. Habeas corpus petition filed in superior court: Filing a habeas petition in the superior court has some advantages. The Court of Appeal has occasionally expressed a strong preference for starting in that forum. Starting there gives the defendant a chance to persuade the trial court to grant relief, and then go on to the Court of Appeal if that is unsuccessful. (If the case starts in the Court of Appeal and is decided on the merits, the defendant cannot try again in the superior court.) Relief can be obtained more expeditiously: it is possible the district attorney will concede the judgment must be vacated and offer the defendant a beneficial bargain to avoid retrying the case, all in one proceeding. The habeas corpus proceeding probably can be handled by trial counsel.<sup>1</sup>

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<sup>1</sup>Trial counsel is presumptively responsible for superior court filings, but appellate counsel should make sure appropriate steps are taken by maintaining communication 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. Appellate counsel should be aware that compensation for proceedings in the superior court normally comes from that court, not the Court of

5. Habeas corpus petition and/or application to recall remittitur filed in Court of Appeal: Starting in the Court of Appeal has potential advantages, too. First, if the *Howard* issue was raised unsuccessfully on a previous appeal, the Court of Appeal is the highest tribunal that committed the legal error and thus arguably is the one that should correct it. Second, filing in the superior court could muddy the waters and delay the case, since a trial court may be reluctant to “overrule” the previous holding of the Court of Appeal on the identical issue in the same case even though, legally, it should.<sup>2</sup> Third, ineffective assistance of appellate counsel (if the *Howard* issue was not raised on appeal) probably should be presented to the court where it occurred. Fourth, the appellate court may be better equipped to deal with the complexities of post-appeal relief, retroactivity, prejudicial error, etc.
  - a. Habeas corpus: Habeas corpus filed in the Court of Appeal is an appropriate remedy when a later decision of the Supreme Court undermines the grounds relied on by the Court of Appeal in its previous decision. It may also be used to raise ineffective assistance of appellate counsel. (*In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood, supra*, 18 Cal.4th 470, 484, fn.12.) If the right to relief under the new case is clear, the petition can directly ask for that remedy. If the right to relief is likely to be contested, the remedy would be recall of the remittitur to allow briefing on the *Howard* issue. (*People v. Mutch, supra*, 4 Cal.3d 389, 396-397.)

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Appeal. Use of ADI sample pleadings may allow counsel to prepare or “ghostwrite” pleadings in minimal time.

<sup>2</sup>The law of the case doctrine is inapplicable when there has been an intervening Supreme Court decision, which both the trial court and the Court of Appeal must follow. (*People v. Sequeira* (1982) 137 Cal.App.3d 898, 900-902; see also *In re Saldana* (1997) 57 Cal.App.4th 620, 624-626.) In other words, under these circumstances the binding stare decisis effect of the rulings of higher courts on lower courts (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450) “trumps” the law of the case, which is a doctrine of general policy and practice, not jurisdiction.

- b. Recall of remittitur: Counsel should first consider filing a motion to recall the remittitur under rule 26(c)(2).<sup>3</sup> A fundamental change in the law is a ground for recalling the Court of Appeal remittitur. (See *People v. Mutch, supra*, 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.) Ineffective assistance of appellate counsel is another ground. (*In re Smith, supra*, 3 Cal.3d 192, 203-204; *People v. Valenzuela, supra*, 175 Cal.App.3d 381, 388.)

Recall of the remittitur has a good deal to recommend it. It is procedurally easier than habeas corpus. It avoids *Waltreus-Dixon* issues, successive petition restrictions, custody requirements, and other such complications of habeas corpus. If recall is granted and the Court of Appeal issues a new decision, the federal habeas corpus statute of limitations is restarted, not just tolled. (28 U.S.C. § 2244(d)(1)(A), (d)(2).)

This approach has already been successful in one Fourth Appellate District case. Division Two issued an order recalling the remittitur on *Howard* grounds in *People v. Bordeau*, E033230 (Feb. 22, 2005).<sup>4</sup>

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<sup>3</sup>If the defendant is right up against the statute of limitations, the recall request should be filed as part of a habeas corpus petition (as in *Mutch*) to ensure the federal clock is tolled immediately and does not expire while the Court of Appeal is considering the request.

<sup>4</sup>This order is not published and thus is probably not citable to persuade a court to use the remedy. (Cal. Rules of Court, rule 977(a); see *In re Sena* (2001) 94 Cal.App.4th 836, 838-9 [unpublished Court of Appeal orders have no *Auto Equity* stare decisis effect]; see also *TBG Insurance Services Corporation v. Superior Court (Zieminski)* (2002) 96 Cal.App.4th 443, 447, fn. 2 [unpublished superior court orders]; compare *People v. Duvall* (1995) 9 Cal.4th 464, 478, fn. 5 [lack of published case law on exceptions to sufficiency of habeas corpus return explained by fact the issue is usually decided by order rather than opinion, as illustrated in several Supreme Court minutes].) We mention the order only for counsel's informal consideration in choosing remedies.

C. Alternative Remedies

The ADI article on favorable changes in the law discusses alternative remedies that may be more efficient or expeditious than those detailed above. We will not repeat them here, but urge counsel to consult the article at <http://www.adi-sandiego.com/articles.html> and always to consider the need for expedited relief if the client may be facing “dead time” under the new decision.