NEW LEGISLATION – NECESSITY TO REVIEW PENDING APPEALS FOR POTENTIAL OPPORTUNITIES FOR SEEKING RELIEF

The 2021 legislative session resulted in enactment of an extraordinary number of criminal justice reform bills. There have been so many newly-enacted laws potentially relevant to our practice that some of these are probably not on everyone's radar.

This overview is designed to **identify categories of pending cases that may be affected by one or more of the new laws.** These include some broad categories, such as cases with upper term sentences and, for certain defendants, cases with either middle or upper terms. Appellate attorneys should review all of their non-final cases and assess which may be candidates for supplemental briefing or other efforts (e.g., petition for review, habeas corpus) to obtain review of the applicability of one or more of the new laws.[1]

We believe that most of the new laws will likely be found retroactive under *In re Estrada* (1965) 63 Cal.2d 740 to cases not yet final on Jan. 1, 2022 – i.e., cases in which the appeal is still pending in the Court of Appeal or the California Supreme Court and those in which the time for filing a petition for writ of certiorari has not expired as of that date. As indicated in the webinar materials, the *Estrada* retroactivity issues will be more complicated as to a few of the new laws.

In this overview, we will identify categories of cases to consider and the specific bills that may be applicable. In addition to differences as to the strength of the *Estrada* retroactivity arguments, the standards for obtaining reversal or remand based on particular bills will vary. For example, as to laws that confer new discretion to exercise forms of leniency (e.g., granting probation, choice of which term to stay under § 654), remand will generally be required unless the record "clearly indicates" that the sentencing court would have declined to exercise that specific form of leniency if it had been aware of its discretion to do so. (See *People Gutierrez* (2014) 58 Cal.4th 1354; *People v Almanza* (2018) 24 Cal.App.5th 1104, 1110.) Laws that alter the elements of an offense or enhancement or otherwise implicate a defendant's right to *jury* findings on particular matters (including the new rules as to findings of aggravating factors for upper terms) will likely trigger *Chapman* review. (See generally, e.g., *Neder v. United States* (1999) 527 U.S. 1.)

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[1] For a more substantive analysis of the new laws, FDAP sponsored a webinar on new legislation on November 9, 2021, with materials available here.

The 2021 legislative session also saw enactment of several bills affecting various *post-conviction proceedings* – e.g., Pen. Code, § 1170(d) sentence recalls, § 1170.95 petitions challenging homicide convictions, and § 1473.7 motions concerning defective immigration advisements. This overview does not address those bills, but will focus on new legislation that will potentially apply to *pending criminal appeals* – i.e., the original appeal from the conviction and judgment and any subsequent appeal following a resentencing or other remand proceeding.

Attorneys should review all pending cases to identify which clients might benefit from the new legislation. Here are some of the most significant categories of potentially-affected cases.

- **Cases with gang enhancements, § 186.22 – A.B. 333.** A.B. 333 tightens the elements necessary for a gang enhancement finding, implicating the adequacy of the instructions on the enhancement and the defendant's right to jury findings as to each element.

- **Victims of human trafficking, intimate partner violence, and sexual violence – A.B 124.** A.B. 124 expands the availability of the "coercion" defense for these categories of victims. Where the evidence would have been sufficient to support that defense under the expanded definition, the expansion of that defense implicates a defendant's due process right to instructions on a defense theory supported by the evidence.

- **Determinate sentence law: jury findings necessary for most upper term decisions – S.B. 567.** S.B. 567 overhauls the DSL by conditioning imposition of an upper term upon findings of aggravating factors. The new laws *require jury findings beyond a reasonable doubt for aggravating factors other than a prior conviction.* S.B. 567 effectively undoes the *"Cunningham* fix," through which the Legislature sidestepped the holding of *Cunningham v. California* (2007) 549 U.S. 270. Assuming that SB 567 is found retroactive under *Estrada* (which is a somewhat more complicated question than on most of the other recent bills), counsel could attempt to challenge upper terms based on the failure to submit the aggravating factors for jury determination under the reasonable doubt standard. The framing of such arguments

would be similar to those at the time of *Cunningham* prior to the legislative fix. (*People v. Sandoval* (2007) 41 Cal.4th 825 [error in pre-*Cunningham* imposition of upper term]; *People v. Black* (2007) 41 Cal.4th 799 [same].) Again, however, such arguments would not apply to reliance on a prior conviction as an aggravating factor.

- **Determinate sentence law: presumption of lower term for youthful offenders and victims of abuse – A.B. 124.** In an equally important revamping of longstanding DSL standards, A.B. 124 effectively prescribes the lower term as the presumptive sentence for three categories of offenders: (1) individuals who have "experienced psychological, physical, or childhood trauma, including but not limited to abuse, neglect, exploitation, or sexual violence"; (2) youthful offenders (25 or younger at time of offense); and (3) victims of "intimate partner violence or human trafficking." The statute provides that *the court "shall" impose the lower term* if it finds that any of those factors was "a contributing factor" in the offense, "unless the court finds that aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice." Though the statute is awkwardly worded, it steers a sentencing court toward a lower term if the defendant comes within any of the three categories and those circumstances were a "contributing factor."
    - Practice tip: Counsel should consider the potential applicability of this provision in any case in which the court imposed either a middle or upper term. **Very substantial numbers of our clients come within these categories.** Many defendants were 25 or younger at the time of their offenses. Also, an extraordinary proportion of criminal defendants have experienced some form of "abuse," "neglect," or "childhood trauma" in their lives potentially within the scope of this provision. Even if the trial evidence did not reveal any such history, counsel should review probation reports, statements in mitigation, and other sentencing materials for any indications of a history of such abuse, neglect or childhood trauma.

- **§ 654, discretion to impose sentence on shorter term and to stay lower term – A.B. 518.** Where § 654 bars imposition of sentence on

two related counts, current law requires the court to impose sentence "under the provision that provides for the longest potential term of imprisonment." (§ 654(a).) A.B. 518 repeals that mandate and leaves the court free to impose sentence on either count. Thus, the legislation restores a sentencing court's discretion to impose sentence on the count with the lesser punishment and to stay the count carrying the longer term. (Cf. *People v. Norrell* (1996) 13 Cal.4th 1.) Not long after the Supreme Court in *Norrell* recognized such discretion to sentence on the count with the lesser term, the Legislature abrogated that discretion and added the language mandating sentencing on the count carrying the longer term. A.B. 518 repeals that mandate and restores the *Norrell* discretion to choose between the shorter and longer terms.

- **Probation eligibility in drug cases – S.B. 73.** S.B 73 repeals the categorical prohibition on probation eligibility for several enumerated drug-trafficking offenses and instead allows a court to grant probation "in unusual cases" in the "interests of justice." As to several other categories of drug offenses, the bill eliminates the former limitation of probation to "unusual cases" in the "interests of justice." Thus, as to the latter offenses, a court will now have broad discretion to grant probation, without any such restriction to "unusual cases."

- **Repeal of various fees and cost assessments – A.B. 177.** A.B. 177 eliminates 17 specific fees and cost assessments, makes any associated debt for such fees/costs unenforceable, and requires that any portion of a judgment imposing those fees/costs must be vacated. In contrast to other provisions discussed here, A.B. 177 will likely be found retroactive to *both final and non-final cases.*

- **Juvenile delinquency: client committed to DJJ or non-DJJ facility, and court set a maximum term of confinement according to the upper term – S.B. 823, S.B. 92.** Effective September 30, 2020 and May 14, 2021, the Legislature amended the Welfare and Institutions Code so that the maximum term of confinement to either a DJJ or non-DJJ facility is now set according to the middle term (instead of the upper term) of the underlying offense. (S.B. 823 [amending Welf. & Inst. Code, § 731; effective Sep. 30, 2020]; S.B. 92 [amending Welf. & Inst. Code, §§ 726 and 731; effective May 14,

2021].) A number of unpublished decisions have found that these changes apply retroactively under *Estrada*. (See, e.g., *In re M.R.* (Cal. Ct. App., Aug. 19, 2021, No. E076603) 2021 WL 3673846; *In re F.M.* (Cal. Ct. App., July 26, 2021, No. H048693) 2021 WL 3140078; *In re J.J.* (Cal. Ct. App., Apr. 21, 2021, No. A159333) 2021 WL 1556610.) Note that because the changes took effect prior to January 1, 2022, they were not covered in the recent webinar on new legislation, but there are likely still many pending appeals in which retroactive application of the changes could be sought.

- **Juvenile Informal Supervision and Deferred Entry of Judgment – S.B. 383.** S.B. 383 authorizes a juvenile court receiving a delinquency case transferred from another county to determine whether a minor is suitable for deferred entry of judgment if the transferring court did not do so. It also expands the circumstances under which a minor is eligible for informal supervision by eliminating two restrictions that previously made a minor presumptively ineligible for informal supervision and authorizing courts to grant informal supervision to presumptively ineligible minors if the interests of justice would be served by doing so.

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Again, the purpose of this overview is to assist attorneys in identifying which of their non-final cases *may* potentially be affected by the newly-enacted legislation, not to provide detailed information on those bills or analysis of the framing of such arguments. Counsel should review the materials from the FDAP Nov. 9, 2021, webinar for further information on the particular bills. And, as always, attorneys should feel free to contact their FDAP consulting attorneys with any case-specific questions regarding the applicability of those new laws to their individual cases.