IS IT RETROACTIVE? DUE PROCESS, EX POST FACTO, AND LEGISLATIVE INTENT

A basic primer on retroactivity

There are two primary axioms on the law of retroactivity: changes made by caselaw generally apply retroactively (County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 680-681), and changes made by statute, unless expressly retroactive, do not (Pen. Code § 3). Neither can be trusted. The law on retroactivity has a long and tortured history, with most of the major decisions rendered by highly fractionated courts. To determine whether a particular change in the law affects one’s client can require asking, beyond whether it stemmed from caselaw or statute, such questions as whether it is a federal constitutional rule, was dictated by precedent, overruled a prior rule, what its purpose is, how its retroactive application would affect law enforcement and the administration of justice, whether it was unexpected, whether it can be said to alter the requisite proof of a crime or reduce or increase punishment, what the Legislature or citizens intended when creating the law now changed, what they intended in enacting a change, whether its retroactive application would deny equal protection and whether one’s client’s case is final. Most of these questions leave room for argument. What follows is intended to be a basic primer, setting forth the rules and the categories that appear to fit them, with examples where reasonably available, and identifying the questions that must be answered in order to tell whether any particular change in law is retroactive.

1 Retroactivity of judicial decisions
   A Procedural rules
      1 Rules founded on the federal constitution
         a Pending cases

The controlling case is Griffith v. Kentucky (1987) 479 U.S. 314. Griffith held that the Supreme Court’s declaration of “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past” (at p. 328). This holding overruled not only the previously recognized exception to retroactivity for new rules constituting a clear break with the past (United States v. Johnson (1982) 457 U.S. 537, 54-550; Desist v. United States (1969) 394 U.S. 244, 248) but also the tripartite test formerly used to determine whether newly announced federal constitutional rules should be retroactively applied (Stovall v. Denno (1967) 388 U.S. 293 [holding that test of Linkletter v. Walker (1965) 381 U.S. 618, designed for cases that had become final, applies to all pending cases as well, so that each
cases required an analysis of the purpose of the new rule, the extent law enforcement relied on the old one and the effect on the administration of justice of a retroactive application of the new rule). The rationale for Griffith’s bright line rule was that the integrity of judicial review requires application of new constitutionally-based rules to all similar cases pending on direct review and that selective application of such new rules violates the principle of treating similarly situated defendants alike.

Examples:

Griffith v. Kentucky: applied Batson v. Kentucky (1985) 476 U.S. 79 [lightening burden of proving the state violated equal protection clause by exercising peremptory challenges to exclude a protected class from the petit jury] retroactively to all cases pending on direct review

Powell v. Nevada (1994) 511 U.S. 79: applied County of Riverside v. McLaughlin (1991) 500 U.S. 44 [absent extraordinary circumstances, determinations of probable cause must be held within 48 hours of arrest in jurisdictions that combine such determinations with other pretrial proceedings] retroactively to all cases pending on direct review


United States v. Gonzalez (9th Cir. 2009) 578 F.3d 1130 and 598 F.3d 1095 [the latter decision giving reasons for rejecting rehearing en banc]: applied Arizona v. Gant (2009) [overruling New York v. Belton (1981) 453 U.S. 454 to hold that search-incident-to-arrest exception to Fourth Amendment doesn’t include search of car unless car might contain evidence of crime or is accessible to arrestee] retroactively to case where Gant issued in between affirmation of conviction and filing of petition for cert, rejecting state’s argument that good-faith exception should apply
b Final cases

The controlling case for “final” cases is *Teague v. Lane* (1989) 489 U.S. 288 [holding, as had *Allen v. Hardy* (1986) 478 U.S. 255, that *Batson v. Kentucky* is not retroactive to cases on collateral review of final convictions]. *Teague* established the criteria for determining when newly declared constitutional rules of criminal procedure are applicable to cases that became final before the rule was announced. *Held*: such a rule does not apply retroactively to final cases unless it (1) places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” (at p. 310) or (2) is a “watershed” rule of criminal procedure (at p. 311).

For purposes of retroactivity analysis, a case that is “final” at the time a new rule was announced means that a conviction was rendered, the availability of appeal exhausted and either the time for a certiorari petition elapsed or a certiorari petition was denied (*Griffith v. Kentucky*, *supra*, fn. 6 at p. 321; *Linkletter v. Walker*, *supra*, fn. 5 at p. 622).

Since the *Teague* limitation on retroactivity applies only to “new” rules, the determination whether a rule is new is crucial. Per *Teague*, “[i]t is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. See, e.g., *Rock v. Arkansas*, 483 US. 44, 62 (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant’s right to testify on his behalf); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” (p. 301.)

Cases interpreting the meaning of “new rule” are legion. E.g., *Lambrix v. Singletary* (1997) 520 U.S. 518, 527-528: a rule isn’t dictated by precedent (and is therefore “new”) unless it would have been “apparent to all reasonable jurists”; *O’Dell v. Netherland* (1997) 521 U.S. 151: a rule rendered by a greatly divided court is likely susceptible to debate among reasonable minds and therefore new; *Chaidez v. U.S.* (2013) 185 L.Ed.2d 149: a case doesn’t announce a new when it is merely “an application of the principle that governed” a prior decision to a different set of facts. [Citing *Teague* at p. 307.]
Thus, garden-variety applications of the test in *Strickland v. Washington*, 466 U.S. 668, for assessing ineffective assistance claims do not produce new rules.”; *Goeke v. Branch* (1995) 51 U.S. 115: the question is whether a state court considering the defendant’s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the constitution; BUT *Butler v. McKellan* (1990) 494 U.S. 407: the fact a court says its decision is within the “logical compass” of an earlier decision or even “controlled” by one isn’t conclusive, since the court could be wrong.

If a constitutional rule is not “new” and therefore retroactive to final cases under *Teague*, California allows relief via state habeas corpus (*In re Gomez* (2009) 45 Cal.4th 650-655 [ordinarily, California courts will provide a remedy on collateral review of a final judgment if that remedy would be available in the federal courts; whether or not California is compelled to afford a comparable state collateral remedy, the availability of the federal remedy makes it pointless to refuse to do so].) Even if federal relief is barred under *Teague*, California courts are still “free to give greater retroactive impact to a decision than the federal courts choose to give” (*In re Johnson* (1970) 3 Cal.3d 404, 415; *Gomez* at p. 656, fn. 3). (See also *Danhforth v. Minnesota* (2008) 552 U.S. 264 [state courts have the authority to give broader effect to new rules of criminal procedure than is required by *Teague*].) Further, even if retroactive application is barred under *Teague*, the bar is not jurisdictional; therefore a state’s failure to raise it in defense to a federal habeas petition may constitute a waiver (*Collins v. Youngblood* (1990) 497 U.S. 37; *Schiro v. Farley* (1994) 510 U.S. 222).

1. Rule isn’t “new,” i.e., it’s dictated by precedent

In a case preceding, but approved in, *Teague*, the Court held that the rule announced in *Francis v. Franklin* (1985) 471 U.S. 307 [Due process clause prohibits jury instructions creating rebuttable presumption of existence of a required element of the charged crime] was not new, but “merely an application of the principle that governed our decision in *Sandstrom v. Montana*” (1979) 442 U.S. 510 [same, for irrebuttable presumptions].

In a rare decision, the Court in *In re Gomez* (2009) 45 Cal.4th 650 held that the rule announced in *Cunningham v. California* (2007) 549 U.S. 270 [California defendants have constitutional right to have jury
determine facts used to impose upper term] did not constitute a new rule but was dictated by the precedent of Blakely v. Washington (2004) 542 U.S. 296 [Sixth Amendment requires jury finding beyond a reasonable doubt of facts increasing sentence beyond “statutory maximum”]. Since Gomez’s conviction wasn’t final at the time Blakely was decided, its finality at the time of Cunningham didn’t bar him from relief under Teague principles.

(2) “New” rule
(a) Exception to bar: D’s conduct placed beyond reach of criminal law

Although Teague termed this exception to refer to “conduct” placed beyond the reach of criminal law, the Court has since extended it to include punishments. Thus, Penry v. Lynaugh (1989) 492 U.S. 302, 330, reasoned that “In our view, a new rule placing a certain class of individuals beyond the State’s power to punish by death is analogous to a new rule placing certain conduct beyond the State’s power to punish at all . . . Therefore the first exception set forth in Teague should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. “Penry went on to contemplate that if the Court ever were to hold that the Eighth Amendment prohibits the execution of the mentally retarded, such a rule would fall under Teague’s first exception and would be retroactively applicable to defendants on collateral review of final convictions. The Court later held precisely that (Atkins v. Virginia (2002) 536 U.S. 304) and, in conformance with the Penry dicta, the new rule of Atkins has been held to come within the exception (Bell v. Cockrell (5th Cir. 2002) 310 F.3d 330).

(b) Exception to bar: Watershed rule

The Court’s definition of a “watershed” rule of constitutional criminal procedure is so strict that only one case has ever been identified as qualifying: Gideon v. Wainwright (1963) 372 U.S. 335, requiring that defendants charged with felonies be afforded appointed counsel on the grounds that denial of representation raises an intolerably high risk of an unreliable verdict (per Wharton v. Bockting (2007) 549 U.S. 406). Wharton [rejecting the notion that
that the new confrontation clause rule announced in Crawford v. Washington, supra, 541 U.S. 36 was “watershed” noted that since the advent of Teague, the Court has rejected every claim that a new rule satisfies the requirements necessary to qualify as a watershed. That record remains unsullied and likely always will, because a watershed rule must do no less than “alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding” (Wharton at p. 418), or be necessary to prevent an “impermissibly large risk” on an inaccurate conviction (Schiro v. Summerlin (2004) 542 U.S. 348, 356).

(c) All other cases

Examples of cases where collateral review held barred by Teague on grounds rule relied on is new and fits neither of the two above exceptions:


United States v. Sanchez-Cervantes (9th Cir. 2002) 282 F.3d 664: rule of Apprendi v. New Jersey (2000) 530 U.S. 466 [facts, other than of prior convictions, used to increase penalty beyond prescribed statutory maximum must be submitted to jury and proved beyond a reasonable doubt] new and not watershed

2 Nonconstitutional rules of criminal procedure

These, since not implicating federal constitutional principles, are not retroactive
to final cases (at least on federal habeas) and, since they are not controlled by Griffin v. Kentucky, not necessarily retroactive to pending cases either. The basic rules are summarized in People v. Guerra (1984) 37 Cal.3d 385: If a holding does not establish a “new” rule, it is retroactive to nonfinal cases. If it does establish a new rule, but no prior contrary rule exists, it is likewise retroactive to nonfinal cases. If it establishes a new rule which supplants a prior rule to the contrary, then the tripartite test of Stovall v. Denno (1967) 388 U.S. 293 determines whether or not it should be applied retroactively; that test asks the purpose of the new rule, the extent law enforcement relied on the old one and the effect on the administration of justice of a retroactive application of the new rule. (NB: Though some aspects of Guerra’s retroactivity exposition have been superceded by United States Supreme Court decisions, those mentioned here continue to be cited in California opinions and appear to remain good law.)

a  Rule isn’t “new”

Per Guerra, a rule isn’t new if it makes no material change in the law but rather, e.g., explains or refines the holding of a prior case, applies existing precedent to a different fact situation even if the result may be said to extend that precedent, or draws a conclusion that was clearly implied in or anticipated by previous opinions. (Guerra also lists in this category decisions giving effect to a statutory rule that the courts had theretofore misconstrued (fn. 13 at p. 399) but in light of later United States Supreme Court authority, two of the three cases it cites as examples are probably more accurately considered under the category of caselaw altering the scope of crimes or punishment (see IB below) since a non-new rule of this type under Guerra’s analysis would necessarily be retroactive whereas the due process clause would prevent that result for decisions which, despite only giving effect to a previously misconstrued statute, create an unexpected enlargement of the statute construed.) In any event, if a decision makes no material change in the law, “the decision simply becomes part of the body of case law of this state, and under ordinary principles of stare decisis applies in all cases not yet final. ‘As a rule, judicial decisions apply “retroactively.” Indeed, a legal system based on precedent has a built-in presumption of retroactivity.’” (Guerra at p. 399, citations omitted.)

b “New” rule
(1) No contrary prior rule exists

If an opinion states a new rule in the absence of a prior rule to the
contrary, the new rule applies retroactively to all nonfinal cases “for the obvious reason that there cannot have been any justifyable reliance on an old rule when no old rule existed. And the emphasized word is crucial: ‘Unjustified “reliance” is no bar to retroactivity.’ [Citation.]” (Guerra at p. 400.) Decisions in this category are those resolving a conflict between lower court decisions or addressing an issue not previously presented to the courts, including instances in which the issue was presented but not squarely decided in prior opinions, or in which prior Court of Appeal decisions resolving it were vacated by grants of review.

Examples:

People v. Beeman (1984) 35 Cal.3d 547 [then-standard jury instructions on the criminal intent necessary for aider-abettors inadequate to convey the required specific intent] resolved conflict among Courts of Appeal, therefore held retroactive to all nonfinal cases in People v. Croy (1985) 41 Cal.3d 1

People v. Shirley (1982) 31 Cal.3d 18 [use of hypnosis to improve memory of a potential witness is unreliable, requiring exclusion of the witness’ testimony as to matters that were the subject of the hypnosis] is a new rule where none existed (and even if one had, the purpose of the new rule is to prevent subversion of truth-finding function of criminal trials), therefore held retroactive to all nonfinal cases in Guerra, supra.

(2) Prior contrary rule exists

Per Guerra, a prior contrary rule can be shown to exist only when the new decision explicitly overrules a California Supreme Court precedent, disapproves a practice impliedly sanctioned by prior California Supreme Court decisions or disapproves a longstanding and widespread practice expressly approved by a near-unanimous body of lower court authorities. In this situation, courts can choose to make, on policy grounds, an exception to the ordinary assumption of the retroactivity of judicial decisions by weighing the three Stovall v. Denno factors. However the first factor is paramount in that if the purpose of the new rule points plainly toward retroactivity or prospectivity, there’s no need to consider the other two factors which, in any event, functionally collapse into one since police reliance on an old rule is the major reason why giving retroactive application of a new one might adversely impact the
administration of justice. Where the purpose of the new rule is to promote reliable determinations of guilt or innocence, it will necessarily apply retroactively. Conversely, per People v Carrera (1989) 49 Cal.3d 291, where the purpose of the new rule is otherwise, it probably won’t. (Though Carrera appears to be an oddity in that it applied the Stovall v. Denno factors to a decision (De Lancie v. Superior Court (1982) 31 Cal.3d 865 [construing statutes to prohibit monitoring of jail conversations for nonsecurity purposes] which announced a new rule where no prior rule had existed. Further, Carrera’s presumption of prospectivity for newly announced rules not impacting the fairness of trials doesn’t appear to recognize that when such rules favor the prosecution rather than defense the courts have no problem applying them retroactively; see the two examples below.) Even if a court which adopts a new rule chooses to make it prospective only, the rule still applies to the defendant in whose appeal the rule was adopted (People v. Bustamante (1981) 30 Cal.3d 88, 102).

Examples:

People v. Breverman (1998) 19 Cal.4th 142, 178: overruled prior Cal. Supreme Court decisions to hold that prejudice standard of People v. Watson (1956) 46 Cal.2d 818 applies to failure to instruct on lesser included offenses in noncapital prosecutions in lieu of the more stringent Sedeno standard, and declaring its holding retroactive. “We discern no institutional or societal reliance interests that weigh strongly against the new rule we announce today. We also reject defendant’s contention that any such new rule may not be applied ‘retroactively’ to his or any other pending case. Due process does not require such a result, since the change in appellate review standards adopted in this opinion neither expands criminal liability nor enhances punishment for a crime previously committed. Nor does it implicate any other cognizable reliance interest of individual criminal defendants. We therefore conclude that our decision may have full [sic] retroactive effect.” (Fn. 26 at p. 178, citations omitted.)

People v. Cuevas (1995) 12 Cal.4th 252: overruled prior Cal. Supreme Court decision which had held corroborated of an out-of-court identification necessary to support a conviction, applying substantial evidence standard instead, and applied its holding retroactively on the grounds it didn’t expand criminal liability.
B Rules altering scope of crime or punishment

1 Enlargement of crime or punishment

The controlling case is *Bouie v. City of Columbia* (1964) 378 U.S. 347. *Bouie* held that the South Carolina Supreme Court violated the due process right of fair notice by applying its new expansive construction of a trespass statute [statute that proscribed entry after notice prohibiting such entry construed to encompass remaining on property after notice to leave] to defendants whose conduct predated the new statutory interpretation. Finding that the new interpretation was “unforeseeable,” *Bouie* declared that when an “unforeseeable state court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of Due Process of law in the sense of fair warning that his contemplated conduct constitutes a crime.” Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one ‘that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,’ or ‘that aggravates a crime, or makes it *greater* than it was, when committed.’ *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648, 650. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process clause from achieving the same result by judicial construction. The fundamental principle that ‘the required criminal law must have existed when the conduct in issue occurred’ must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given retroactive effect.” (pp. 353-355, some citations omitted.)

*Bouie* largely remains good law, although the Court, in *Rogers v. Tennessee* (2001) 532 U.S. 451 slightly cut back on it, holding that despite *Bouie*’s broad language, the due process protection of fair notice is not coextensive with the ex post facto protections described in *Calder v. Bull*. Rather, the only test for whether judicial alteration of a common law doctrine of criminal law violates the due process principle of fair warning and therefore cannot be given retroactive effect is whether it is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” (*Rogers* at p. 462.)

Most of the litigation in enlargement cases is over the question whether prior law accorded “fair warning” of the new construction:
a Change was unexpected (no fair warning)

Following is a sample of cases applying the due process clause to prohibit retroactive application of new judicial constructions on grounds they weren’t preceded by fair warning:

In re Baert (1988) 205 Cal.App.3d 514: holding of People v. Anderson (1987) 43 Cal.3d 1104, which overruled Carlos v. Superior Court (1983) 35 Cal.3d 131 to declare that intent to kill is not a necessary element of felony murder special circumstances for actual killers, could not be retroactively applied to killings occurring in between Carlos and Anderson

People v. King (1993) 5 Cal.4th 59: Court declared its decision overruling In re Culbreth (1976) 17 Cal.3d 330 which had limited the number of firearm enhancements that could be imposed for multiple crimes committed with a single objective in one transaction, to be prospective only

Clark v. Brown. (9th Cir. 2006) 450 F.3d 898: California Supreme Court’s holding in People v. Clark (1990) 5 Cal.3d 583 reinterpreted its prior decision in People v. Green (1980) 27 Cal.3d 1 [underlying felony that’s incidental to murder cannot support a felony murder special circumstance] so broadly as to constitute an unforeseeable judicial enlargement of the special circumstances statute which could not be retroactively applied to Clark

People v. Martinez (1999) 20 Cal.4th 225: Court declared its holding overruling People v. Caudillo (1978) 21 Cal.3d 562 [which had held that factors other than distance are irrelevant to the sufficiency of distance to prove a kidnapping] nonretroactive as an unforeseeable enlargement of Penal Code section 207

People v. Morante (1999) 20 Cal.4th 403: On petition for review, Court reinterpreted conspiracy statute (Pen. Code § 182), expanding its scope, but held the new interpretation unforeseeable in light of a prior contrary Cal. Supreme Court opinion, therefore could not be applied retroactively to defendant

People v. Blakely (2000) 23 Cal.4th 82: In what it called a case of first impression, Court disapproved multiple instances of its own prior dicta plus a handful of Court of Appeal decisions whose conclusions it termed unsupported, to reinterpret the voluntary manslaughter statute to not require
intent to kill, further finding its reinterpretation unforeseeable at the time of defendant’s crime, therefore not retroactively applicable to him

People v. Farley (2009) 46 Cal.4th 1053: Overruling People v. Wilson (1969) 1 Cal.3d 431 to hold the merger prohibition on use of an assaultive felony as a felony-murder predicate can no longer apply to first-degree murder, Court recognized its holding was an unforeseeable judicial enlargement of penal liability and thus applied prospectively only

People v. Correa (2012) 54 Cal.4th 331: Court’s declaration of new rule that, contrary to long-followed footnote in Neal v. State of California (1960) 55 Cal.2d 11, multiple firearm possession convictions could support multiple punishment, declared prospective to crimes committed after the new rule announced

b  Change not unexpected (fair warning given)

Following are examples of cases holding judicial enlargement of penal statutes to have been foreseeable in light of prior law, therefore applicable retroactively without violating due process:

Rogers v. Tennessee (2001) 532 U.S. 451: held, Tennessee’s judicial abolition of its “year and a day rule,” which had barred murder convictions unless death occurred within a year and a day of the defendant’s act, could be applied retroactively because not “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” Since the rule had been widely viewed as an outdated relic of the common law, routinely rejected by modern courts and legislators and mentioned in reported Tennessee decisions only in the dicta of a handful of cases, abolishing it was a routine exercise of common law decision-making rather than a marked and unpredictable departure from prior precedent. The 5-member majority also declared that the number of other jurisdictions that have abolished a common law rule bears on the question whether its abolition was preceded by fair notice.

Lancaster v. Metrish (2013) 185 L.Ed.2d 988: After defendant’s crime but
before his retrial, the Michigan Supreme Court abolished a judge-made diminished capacity defense that had been recognized by a consistent line of lower court cases though never before addressed by the high court. *Held:* Fairminded jurists could have concluded that such a state Supreme Court decision was not unexpected and indefensible by reference to existing law, therefore the new gloss could be applied retroactively to D on retrial without violating due process. Note though: the case came to the United States Supreme Court through habeas, making the question not precisely whether the Michigan court’s finding of retroactivity was proper under *Bouie* and *Rogers v. Tennessee,* but whether it rested on an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement, an admittedly “demanding” standard to meet (p. 992).

2 Amelioration of crime or punishment

When a judicial opinion interprets a criminal statute to make it less onerous than it was previously held to be, the opinion is generally deemed a clarification made to effectuate, though belatedly, the original Legislative intent. In that event, if a defendant was convicted of a crime which, upon clarification of its scope, he wasn’t proven to have committed, he is entitled to relief even if his conviction is final, on grounds not so much that the clarifying opinion should be fully retroactive (i.e., made applicable to all cases, whether final or not), but that as correctly construed, the statute did not proscribe his conduct and the convicting court therefore acted in excess of its jurisdiction. (*People v. Mutch* (1971) 4 Cal.3d 389.) On the other hand, the United States Supreme Court appears to have recognized a possibility that a judicial reinterpretation of a penal statute could be a new rule changing rather than clarifying its meaning, in which event it is an open question whether due process requires the new rule to be applied to final cases (*Fiore v. White* (2001) 531 U.S. 225; *Bunkley v. Florida* (2003) 538 U.S. 835).

a Opinion clarifies statute to effectuate presumed Legislative intent

The most noteworthy example may be *People v. Daniels* (1969) 71 Cal.2d 1119. The *Daniels* Court overruled at least one of its prior decisions to hold that the intent of the Legislature in amending Penal Code section 209 (kidnapping for the purpose of robbery) in 1951 was to exclude from its reach all robberies in which forced movements of the victim are merely incidental to the robbery and do not substantially increase the risk of harm beyond that inherent in the robbery itself. In holding *Daniels* to be fully retroactive,
People v. Mutch, supra, 4 Cal.3d 389, found all the usual tests for retroactivity inapplicable, declaring instead that since what Daniels had done was to conform the substantive definition of a crime to the Legislature’s original intent, the only question to be asked was whether the record of conviction showed that the defendant had violated the statute. Since it did not, he was entitled to relief on habeas corpus on the grounds that habeas is available where there is no material dispute as to the facts relating to the defendant’s conviction and it appears that the statute under which he was convicted did not prohibit his conduct (In re Zerbe (1964) 60 Cal.2d 666). Moreover, relief could also be obtained in final judgment cases via motion to recall the remittitur: “The present application is to recall the remittitur. As a general rule, an error of law does not authorize the recalling of a remittitur. An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. The remedy of recall of the remittitur may then be deemed an adjunct to the writ, and will be granted when appropriate to implement the defendant’s right to habeas corpus.” (pp. 396-397, citations omitted.)

In a more recent example, In re Lucero (2011) 200 Cal.App.4th 38 ruled that the California Supreme Court’s holding in People v. Chun (2009) 45 Cal.4th 1172 that the crime of shooting at an occupied vehicle couldn’t be used as a predicate for second-degree felony murder should similarly be given full retroactive effect on the grounds it impacts on the reliability of murder convictions.

According to People v. Crumpton (1973) 9 Cal.3d 463, collateral relief from convictions based on insufficient evidence of a crime as belatedly construed by judicial opinion is available even if the conviction was obtained by plea, as long as the Preliminary Hearing transcript undisputably shows the statute wasn’t violated. (See, though, People v. Jackson (1985) 37 Cal.3d 826, 837 [“When a defendant enters into a bargain to protect himself against uncertainty in the law, we see no reason why defendant should not be bound to the terms of his bargain and the plea.”].)

b Opinion states new rule changing definition of crime

In Fiore v. White, supra, 531 U.S. 225, the United States Supreme Court granted certiorari on the question whether the federal due process clause requires a state to apply a new interpretation of a state criminal statute retroactively to cases on collateral review. In order to determine if that
question was in fact presented, the court asked the state supreme court if its
decision interpreting a statute not to apply to conduct like the defendant’s was
a new interpretation, or whether it was, instead, a correct statement of the law
when his conviction became final. Since the state Supreme Court's response
made clear that its interpretation was not new law and that the defendant's
conduct did not violate the statute, the Court resolved the case by holding that
his conviction and continued incarceration violated due process because he
had been convicted of a crime absent proof of the elements of the crime
beyond a reasonable doubt. This left open the question on which cert had been
granted and appears to indicate that the Supreme Court contemplates a
situation where a state decision ameliorating the definition of a crime so that a
defendant’s conduct doesn’t fall within its definition is not a clarification of
the original meaning of the statute but, instead, a new rule changing the
definition of the crime, in which event it is an open question whether the new
rule must be applied retroactively to final cases.

*Bunkley v. Florida* (2003) 538 U.S. 835 indicates that that question is still
pending. Where, after finality of Bunkley’s conviction of first-degree burglary
on the grounds he was armed with a deadly weapon, the state Supreme Court
defined the “pocketknife” exception to the deadly weapon statute to exclude
the knife Buckley had been armed with, the United States Supreme Court
remanded the case for consideration of whether the evolution of the law was
such that the knife fit the exception at the time his conviction became final.

II Statutory changes

In contrast to judicial changes in the law, changes made by statute are presumed,
absent contrary intent, to apply only prospectively. The rule has been codified without
change since 1872 in Penal Code section 3: “No part of [this Code] is retroactive,
unless expressly so declared.” Nonetheless, the question of retroactive application of
statutes comes up frequently, most commonly when laws are passed that either
ameliorate or enlarge the scope of crimes or punishments.

A Ameliorative changes

The seminal case is *In re Estrada* (1965) 63 Cal.2d 740, which, overruling *People v.
Harmon* (1960) 54 Cal.2d 9, held that statutory amendments which lessen
punishment apply retroactively to all nonfinal judgments:

“There is one consideration of paramount importance. It leads inevitably to the
conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.” (pp. 744-745.)

_Estrada_ dealt with the presumption of Penal Code § 3 by holding that it applies “only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent,” a situation not occurring when ameliorative penal laws are passed since the factors described above indicate a legislative intent that such statutes apply retroactively (at p. 746). This aspect of _Estrada_ was disapproved in, e.g., _People v. Brown_ (2012) 54 Cal.4th 314 which held that _Estrada_ unduly watered down section 3's presumption of prospectivity. _Brown_ emphasized that section 3 is the default rule for when the legislature hasn’t made its intent clear that a statute should operate retroactively, reiterating “‘the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the legislature . . . must have intended a retroactive application.’ (Evangelatos _v._ Superior Court (1988) 44 Cal.3d 1188, 1209-1209 . . .)” (at p. 319.)

Most of the fights in this area are on the question whether the Legislature intended any particular ameliorative statute or amendment to apply prospectively. This is almost the entire subject of petitioner’s Brief on the Merits in the pending case _People v. Conley_, S211275 (rev. granted 8/14/13), where the question presented is “Does the Three Strikes Reform Act of 2012 (Pen. Code §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), which reduces punishment for certain non-violent third-strike offenders, apply retroactively to a defendant who was sentenced before the Act’s effective date but whose judgment was not final until after that date?” (review on same issue granted with briefing deferred in _People v. Lewis_ (S211494), _People v. Zapata_ (S213877) and _People v. Mallett_ (S214584). The Courts of Appeal are split on this question in both published and unpublished opinions. Conley’s Brief on the Merits, written by CCAP Staff Attorney Carol Foster is included in the CD
accompanying these materials.

The issue of legislative intent is also likely to come up regarding Assembly Bill No. 721's amendment to sections 11352 and 11379 of the Health and Safety Code (sale or transport of drugs), effective January 1, 2014 to add the requirement that when convictions are based on transport, the transportation must be for purposes of sale. Since the prior version of the statute had no such intent requirement, this is an ameliorative change that can be argued retroactive under Estrada principles in order to effectuate the legislature’s apparent intent to correct the inequity of treating drug dealers and mere users alike so long as the latter are in motion in a public place.

Following are a sample of cases applying statutes retroactively under Estrada principles:

*People v. Wade* (2012) 204 Cal.App.4th 1142: 2010 amendment to Penal Code section 487(a), raising amount of property needed to elevate theft from misdemeanor to felony; legislative history showed concern with high prison population supporting finding of intended retroactivity

*People v. Vinson* (2011) 193 Cal.App.4th 1190: 2010 amendment to Penal Code section 666, raising number of requisite prior theft convictions from 1 to 3 in order to elevate misdemeanor theft to felony; legislative history showed concern with costs of prison overcrowding supporting finding of intended retroactivity

*In re Kirk* (1965) 63 Cal.2d 761: amendment to Penal Code section 476a (writing bad checks) raising minimum amount of money involved to elevate misdemeanor to felony

*People v. Francis* (1969) 71 Cal.2d 66: amendment to statute authorizing alternative county jail sentence for marijuana possession applied retroactively to defendant whose case was on appeal

*People v. Chapman* (1978) 21 Cal.3d 124: statutory reduction of certain marijuana possession offenses from felonies to misdemeanors retroactively applied to all nonfinal convictions

*People v. Rossi* (1976) 18 Cal.3d 295: amendment of oral copulation statute to eliminate any criminal sanction for defendant’s acts applied retroactively to her nonfinal conviction since Estrada applies “when criminal sanctions have been completely repealed before a criminal conviction becomes final”
In re Fink (1967) 67 Cal.2d 692: new ameliorative law applied to defendant under Estrada principles even though the only reason his case wasn’t final at the time of the amendment was that he escaped after his plea and it took 3 years to bring him back for sentencing

People v. Figueroa (1993) 20 Cal.App.4th 65: amendment of enhancement statute for drug trafficking near schoolyards to require offense be committed while school in session or minors using school applied retroactively; case remanded to allow prosecution to present evidence on the added element

In re Chavez (2004) 114 Cal.App.4th 989: an unusual case where amendment to false tax return statute in order to correct defect that had inadvertently been inserted in a former amendment under which defendant had been sentenced held retroactive to defendant even though his case had become final before the corrective amendment

2 Legislature intended prospectivity

The courts rely on various indications, combined with the statutory presumption that statues are prospective in their application, to rebut the Estrada analysis. But a finding that the Legislature intended prospectivity, or more properly, did not express an intention of retroactivity, can still be trumped by a showing that retroactive application of an ameliorative statutory change would violate state and constitutional rights to equal protection of the law (see In re Kapperman (1974) 11 Cal.3d 542 [despite express statutory direction of prospective application, new Penal Code section 2900.5, awarding prison inmates actual credits for time spent in local presentence custody, must be applied retroactively to all prison inmates and parolees because prospective application not reasonably related to a legitimate public purpose and therefore violative of equal protection under the state and federal constitutions]). Following is a sample of cases holding that various ameliorative changes should not be applied retroactively:

People v. Floyd (2003) 31 Cal.4th 179: Relying partly on the principle that a provision for postponement of the effective for an act indicates an intention it be applied prospectively (since if the statute were to have retroactive effect, there would be no need for postponing it), the Court held that Proposition 36 (approved 2000), which required that an eligible defendant convicted of a nonviolent drug possession offense be granted probation, did not apply retroactively to a defendant sentenced before its effective date but after its passage, due to a savings clause inserted into the act: “Except as otherwise provided, the provisions of this act shall
become effective July 1, 2001, and its provisions shall be applied prospectively.” Citing Kapperman, supra, 11 Cal.3d at p. 546, “The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.” (p. 188.) And the Court noted that Estrada itself had recognized that when the Legislature had amended a statute to lessen punishment, its determination as to which statute should apply to all convictions not yet final, “either way,” would have been legal and constitutional. (Estrada at p. 744; Floyd at pp. 188-189.) The court declined to find any equal protection violation, noting that the defendant cited no case recognizing such a violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense, while numerous courts had rejected such a claim.

People v. Brown (2012) 54 Cal.4th 314: held, January 25, 2010 amendment to Penal Code section 4019, increasing the rate at which prisoners in local custody can earn conduct credits, is not retroactive to prisoners who served their local custody beforehand; rather, the statute applies beginning at its operative date. Estrada, “properly understood,” merely informed the default rule on nonretroactive application of statutes “in a specific context by articulating the reasonable presumption that a legislative act mitigating punishment for a particular criminal offense is intended to apply to all nonfinal judgments.” (p. 324.) The present situation is different, since the credits statute does not address a particular criminal offense but rather, future conduct by providing more incentive for good behavior. There is no equal protection violation in denying the statute’s benefits to prisoners no longer in local custody, since they lack the incentive to keep to good behavior that currently local inmates possess, therefore are not similarly situated for purposes of equal protection analysis.

People v. Kennedy (2012) 209 Cal.App.4th 385: following Brown, prospective application of the October 1, 2011 amendment to the same statute would not violate equal protection even if defendants who committed crimes before its effective date were similarly situated to those who committed their crimes afterward, since legislators could rationally believe that, by making application of the amendment depend on the date of the offense, they were preserving the deterrent effect of the criminal law as to those crimes committed before that date.

B Enlargement of crime or punishment

Both the federal and California constitutions prohibit ex post facto laws (U.S. Const., Art. I, §§ 9, 10; Cal. Const., Art. I, § 9), and their protections are identical (Tapia v. Superior Court (1991) 53 Cal.3d 282, 295-296). An ex post facto law is a retroactive criminal statute applying to crimes committed before its enactment, and substantially injuring the accused by (1) punishing an act innocent when done, (2) increasing the punishment beyond what was authorized when the crime was committed, (3) taking away a defense related to an element of the crime or an excuse or justification for the conduct or (4) altering the rules of evidence so that a conviction may be obtained on less or different testimony than was required when the crime was committed. (See Calder v. Bull (1798) 3 U.S. 386; Beazell v. Ohio (1925) 269 U.S. 167; Collins v. Youngblood (1990) 497 U.S. 37; People v. Frazer (1999) 21 C.4th 737.)

Mere “procedural” changes do not normally involve the ex post facto prohibition, and, despite the fourth prong of the test, evidentiary changes don’t tend to either. But Collins v. Youngblood, supra, cautioned that labeling a law “procedural” doesn’t immunize it from scrutiny under the Ex Post Facto Clause: “Subtle ex post facto violations are no more permissible than overt ones.”

The following cases exemplify the kinds of procedural and evidentiary changes whose retroactive application to trials of crimes occurring before their enactment don’t constitute ex post facto violations: People v. Flores (2009) 176 C.A.4th 1171 [admission of evidence of defendant's prior acts of domestic violence did not violate ex post facto principles even though defendant's current offense was committed before enactment of Evidence Code § 1109, since the evidence didn’t change the elements of the current crime or lower the prosecution's burden of proving those elements beyond reasonable doubt, and didn’t create the kind of unfairness arising from a change in the rules governing the sufficiency of the evidence that the ex post facto doctrine prohibits]; People v. Ward (1958) 50 C.2d 702 [statute providing for separate determination of guilt and penalty in murder cases]; People v. Bradford (1969) 70 C.2d 333, 342, 74 C.R. 726, 450 P.2d 46 [statutes placing husband-wife privilege entirely within election of witness spouse]; People v. Talkington (1935) 8 C.A.2d 75 [constitutional amendment giving trial courts power to comment on the evidence]; People v. Berumen (1969) 1 C.A.3d 471 [change in procedure for motion to suppress illegally obtained evidence]; People v. Seldomridge (1984) 154 C.A.3d 362, 364 [statute prohibiting admission of evidence of polygraph tests without stipulation of all parties]; People v. Brodit (1998) 61 C.A.4th 1312, [new hearsay exception for statements of child under age 12
describing abusive acts].

In contrast, *Carmell v. Texas* (2000) 529 U.S. 513 found an ex post facto violation from the retroactive application of an evidentiary statute that authorized conviction of certain sex offenses on the victim’s testimony alone. The previous statute had required that the victim’s testimony be corroborated. *Held*, the statute, as amended, violated the Ex Post Facto Clause since it altered the legal rules of evidence and required less or different testimony than the law required at the time of the commission of the crime. Under the law at the time of the crime, the prosecution’s case (which consisted of the victim’s testimony alone) was legally insufficient. Defendant was therefore entitled to a judgment of acquittal unless the state could produce corroborative evidence.

Retroactive application of a change in the statute of limitations was held to create a similar kind of ex post facto violation in *Stogner v. California* (2003) 539 U.S. 607. After the statute of limitations for Stogner’s crimes had expired, a new statute was enacted creating a new limitations period authorizing prosecution that the passage of time had previously barred. The United States Supreme Court termed this exactly the kind of retroactivity the Constitution forbids, i.e., a new law that inflicts punishment on a person not then subject to that punishment. The Court also found that application of the new statute had the effect of altering the legal rules of evidence in place at the time of the crime. A statute of limitations essentially ensures that after a certain period, no quantum of evidence is sufficient to convict. To resurrect a prosecution after the limitation period has expired is “to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient.” (Contrast cases upholding the retroactive application of extensions of unexpired statutes of limitations, e.g., *People v. Robertson* (2003) 113 Cal.App.4th 389.)

In an analogous situation, ex post facto principles were applied in *Strong v. Superior Court* (2011) 198 Cal.App.4th 1076 to stop a murder prosecution where the statute in effect at the time of the defendants’ acts required that the victim die within 3 years and a day for a killing to be murder or manslaughter, the 3-year period had long passed before the statute was amended to replace that requirement with a rebuttable presumption that the killing wasn’t criminal if the death occurred beyond the 3-year period, the victim died still later and only then did the murder prosecution commence. Although not labeled as such, the original statute was held to have functioned as a statute of limitations, such that its amendment was neither a mere procedural modification of the rules of evidence nor the extension of an unexpired
statute of limitations. Rather, as applied to the defendants, it created the same ex post facto problem as in *Stogner*.

The more traditional aspects of the ex post facto prohibition were relied on by the California Supreme Court in *Tapia v. Superior Court* (1991) 53 Cal.3d 282 to deny retroactive application to a number of provisions of Proposition 15 on the grounds that they changed the legal consequences of criminal behavior to the defendant’s detriment. These provisions were the addition of crimes to the list of felonies that would support a felony-murder prosecution, the addition of new special circumstances, the dilution of the intent requirement for accomplices in order to support felony-murder special circumstances, the elimination of the corpus delicti rule for those special circumstances, the availability of greater punishment for defendants who were 16 to 18 years old at the time of their acts resulting in a conviction of murder with special circumstances, the addition of the new crime of torture and the prohibition against striking special circumstances that have been admitted or found true.

Recidivist statutes are generally held to present no ex post facto problem, since the defendant is deemed punished not for his past behavior but for his new crime. “A statute is not retroactive in operation merely because it draws upon facts antecedent to its enactment for its operation . . . The crime for which the defendant is punished . . . is not the earlier felony, but the new and separate crime of which the prior felony conviction is only a constituent element. Without the defendant’s commission of new and additional acts after he has notice of the new legislation, the statute passed or amended after the constituent felony conviction would not come into play.” (*People v. Venegas* (1970) 10 Cal.App.3d 814, 823.)


C Procedural changes (that don’t alter definition of crime, requisite proof, defenses or
Statutory changes that aren’t ameliorative within the meaning of Estrada or barred from retroactive application by the Ex Post Facto Clause may be applied prospectively or retroactively, according to the perceived will of the Legislature. If no will one way or the other is perceived, prospective application is the presumption and the norm. But prospective application doesn’t mean application only to defendants whose crimes were committed before the change. Rather, it means prospective to events, including trials, occurring after the date the change is enacted. Thus, for instance, Tapia v. Superior Court, supra, 53 Cal.3d 282 held that Proposition 115’s various provisions addressing the conduct of trials which the Court deemed prospective could be applied to pending cases regardless of when the charged offense was alleged to occur.