FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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CALIFORNIA SUPREME COURT PRACTICE

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FDAP
FIRST DISTRICT APPELLATE PROJECT

CALIFORNIA SUPREME COURT PRACTICE

Petitions for Review
Merits briefing
Grant-and-holds
Habeas corpus
Remands to Court of Appeal
And more….

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THINKING OF CALIFORNIA SUPREME COURT AT BEGINNING OF CASE — TRACKING WHAT'S UP THERE.

- **Don't just rely on your regular case research, newsletters, etc., re what's before Supreme Court.**
    - Newsletters, articles may cover blockbuster review-grants, but not every issue relevant to your own appeals.
    - Review grants in *published* cases are both over- and under-inclusive.
        - Sometimes appellate lead case was unpublished and didn't draw much attention at time.
        - Some review grants in published cases turn out to be grant-and-holds on different (sometimes less interesting) issues. So can't be sure that the review-grant concerns the same issue as published portion of appellate opinion.
- **Keeping tabs on pending issues – the Cal. Supreme Court site.** https://www.courts.ca.gov/supremecourt.htm
    - **Pending Issues Summaries** (separate for Civil and Criminal).
        - Short blurbs on issues prepared by court staff. But, unlike SCOTUSblog, these are *not* verbatim quotes of Question Presented in Petition for Review.

        - Exception: If Supreme Court explicitly limited or refined question in its review-grant order, the summary will closely track the order
        - The Pending Issues Summaries are updated after every Supreme Court conference.
    - **Updating & tracking.**
        - **Supreme Court conferences on pending petitions** – most Wednesdays, except oral argument weeks. Three ways to monitor what happened.
            - **Wed afternoon.** Sign up in advance for email notifications re PFR's you're following (your own cases and any others that may affect your cases).
            - **Thurs. morning.** Weekly Conference Results posted.
            - **Fri Morning.** Weekly Case Summaries posted.
- **Why it matters.**
    - **Issues you might otherwise forego.** E.g., eyewitnesses certainty instruction:
      "*People v. Lemcke*, S250108. (G054241; nonpublished opinion; Orange County Superior Court; 14CF3596.) Petition for review after the Court of Appeal affirmed judgments of conviction of criminal offenses. This case presents the following issue: Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights?" (Review gr., Oct. 10, 2018)
        - U.S. Supreme Court has taken a pass at refining standards in this area. See *Perry v . New Hampshire* (2012) 565 U.S. 228.
        - *Some* state high courts (e.g., New Jersey) have taken on eyewitness issues (identification protocols, admissibility, instructions, etc.).
        - But there are adverse Cal. Supreme Court precedents, and Court has denied PFR's in this area in recent years. See *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232.
        - Would be reasonable to forego issue in Court of Appeal if you didn't know Cal. Supreme Court has now taken an interest.
    - **Macro picture –** Pending Issues Summary gives some clues what general issue areas are of current interest to Supreme Court.
        - Subjects it takes multiple opinions to address, e.g. juvenile LWOP. Multiple Cal. Supreme Court opinions since *Miller v. Alabama*.
        - Issues driven by recent legislation or by social or technological developments.
            - Digital age issues: E.g. *People v. Veamatahau*, S249872 (*Sanchez* hearsay issues re criminalist's reliance on database

to identify pharmaceutical drugs by markings); *In re Ricardo P.*, S230923 (electronic search condition of probation).

- Remaining Prop 47 issues.
- Soon: Likely lots of review grants on S.B. 1437. Applicability of "natural & probable consequence" theory to attempted murder after S.B. 1437, being briefed in an already pending case, *People v. Mateo*, S232674.

▪ A few review grants appear to be principally for "error correction," rather than to address unresolved legal questions.

- E.g., special circumstance harmless error.

"*People v. Frazier*, S250300. (B281888; nonpublished opinion; Los Angeles County Superior Court; LA083934.) Petition for review after the Court of Appeal modified and affirmed a judgment of conviction of criminal offenses. The court limited review to the following issue: Was the trial court's failure to instruct the jury that the special circumstance required the aider and abettor harbor the intent to kill prejudicial?"

- Harmless error framework for omission of an element seems pretty clear now, so this review-grant may simply be error correction.

○ **Other helpful features on Supreme Court site.**

▪ Calendar dates for the next year and upcoming calendars.

- Argument calendars posted approx. 3-4 weeks in advance (minimum 20 days).

▪ Briefs in recently argued and about-to-be argued cases.
▪ Streaming oral arguments.

○ **What's missing –** no SCOTUSBlog! (https://www.scotusblog.com)

▪ No go-to source for all Cal Supreme Court topics.
▪ No comprehensive source for merits briefs in all review-granted cases (although some are in Westlaw and/or Lexis).
▪ No "Petitions to Watch" or "In the Pipeline" features re noteworthy pending PFR's.

REHEARING PETITION.

- Rehearing petition generally **not** required.
  - Don't need to rehash arguments or point out everything the opinion got wrong.
  - **But** other circumstances where rehearing may be necessary.

- Court of Appeal opinion entirely **omitted** a distinct briefed issue or got crucial facts or procedural history wrong.
    - Debate: Whether rehearing petition required or advisable where appellate opinion addresses basic issue but not its federal constitutional dimension.
        - Pro: Any risk that issue will be deemed not exhausted? See Rule 8.500(c)(2) (Cal. Supreme Court ordinarily won't review omitted or misstated issue if not called to appellate court's attention in rehearing petition). However, we are **not** aware of any federal court finding inadequate exhaustion on that ground.
        - Con: Rehearing petition may just give Court of Appeal opportunity to "clean up" an affirmance by adding a sentence stating error would be harmless under *Chapman*, as well. (That modification, in turn, would impede prospects for federal relief on merits, because it would be subject to federal court deference under AEDPA.)
- Converse: Court of Appeal decided case on ground not addressed in briefs. Govt. Code § 68081.
    - Numerous Cal. Supreme Court grant-and-transfer orders directing Court of Appeal to grant rehearing, citing § 68081.
- New decision or legislation, possibly raising entirely new issue – e.g., discretion to strike firearm and serious felony enhancements.
- Less common but worth remembering— **Court of Appeal opinion gives rise to new error/issue.**
    - E.g., Court of Appeal opinion disagrees with prior published appellate opinion re elements, theory of liability, etc. Potential due process violation -- unforeseeable due process enlargement of criminal liability. *Bouie v. City of Columbia* (1964) 378 U.S. 347; e.g., *People v. Morante* (1999) 20 Cal.4th 403, 430-432.

WHETHER AND WHEN TO FILE PETITION FOR REVIEW.

- **Basic decision** – **whether to file petition for review** or simply advise client of option to do so on own.
    - **Easy decision.** When there's plausible ground for pitching it as review-worthy -- "necessary to secure unanimity of decision or to settle an important question of law." Rule 8.500(b)(1).
        - E.g., *explicit* split of authority (Court of Appeal flatly states disagreement with another published case).
        - E.g., new issue, arising in multiple cases, under recent legislation, voter initiative, or U.S. Supreme Court decision.
    - **Don't limit the decision to technical review worthiness!**

- **Always consider whether petition is appropriate to exhaust for federal habeas purposes.** Principal considerations:
  - **Does case pose a substantial federal constitutional claim?**
    - Except Fourth Amendment issues. Generally, Fourth Amendment claims are *not* cognizable on federal habeas. *Stone v. Powell* (1976) 428 U.S. 465.
  - **Sentence length.**
    - Should seriously consider a petition for review on any case with substantial federal issue and a lengthy sentence. ~~(~~But no bright line.
  - **Significant collateral consequences.**
    - May want to exhaust federal claims even in a short sentence case (including a juvenile appeal) where conviction or adjudication is a "strike."
  - **The client.**
    - Consider likelihood that this particular client will want to pursue federal habeas relief on his/her own.
  - **Balancing the considerations.**
    - The stronger the federal issue appears, the more reason to exhaust it, even for a case with relatively short sentence.
    - Conversely, for a murder case or other very lengthy sentence, may want to exhaust an issue with significant effect on trial even if its federal dimension is more tenuous.

- **When to file – don't inadvertently forfeit opportunity to exhaust (or re-exhaust).** Some common problems:
  - **Court of Appeal affirms all or most convictions, but reverses or remands for resentencing or other further proceedings.** Many such dispositions recently in view of intervening legislation. E.g., Prop. 57 remands for juvenile transfer hearings, remands for exercise of newly-conferred discretion to strike firearm or "serious felony" enhancements.
    - **Time to petition for review of the claims concerning the affirmed counts is now**, rather than on some subsequent post-remand appeal. Original opinion's rejection of those claims would almost certainly be deemed "law of the case" on any subsequent post-remand appeal.
  - **Court of Appeal opinion following Supreme Court transfer for reconsideration of limited issue.** What about the *other* issues which were raised in first petition for review, but not covered by Supreme Court grant-and-hold or transfer order?

- Safest course is to **file another petition for review re-asserting those issues** to ensure no question re adequacy of exhaustion.
    - A Cal Supreme Court grant of review "nullifies the [appellate] opinion and causes it to no longer exist." Cf. *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109.
    - In view of that effect of earlier review grant, on remand after a grant-and-hold or other grant-and-transfer, the Court of Appeal will typically reiterate the prior opinion's discussion of all the other issues.
    - Since the original opinion "no longer exists," a petition for review following the post-transfer opinion is most prudent option to remove any doubt about adequacy of exhaustion.
- But **one unpublished federal decision says another petition for review isn't necessary.** *Knoller v. Miller* (N.D. Cal. 2012) 2012 U.S.Dist.LEXIS 119018 (no authority "requiring a petitioner to present her [cumulative error] claim to the state's highest court multiple times, even after that court has passed on merits of the claim").
    - Is *Knoller* sufficient to remove concern about possible necessity for a post-remand petition for review? Not clear. Just a single unpublished decision. Also may be distinguishable on its procedural history.

EXHAUSTION PETITIONS VS. "REGULAR" PETITIONS FOR REVIEW.

- **There's less difference than you think.** Despite rule's description of it as an "abbreviated petition for review" (Rule 8.508(a)), titling document as "exhaustion" petition doesn't dramatically reduce necessary contents.
- Only true difference is that **no need to attempt to frame the issues as review-worthy**. Compare Rule 8.508(b)(3) with Rules 8.500(b), 8.504(b)(1)-(2).
- Rule provides for "brief statement of the factual and legal bases of the claim." Rule 8.504(b)(3). But:
    - No provision for incorporation by reference of Court of Appeal briefing; and
    - The statement of the issues must be sufficiently comprehensive and specific to exhaust all aspects of the claim for federal purposes.

- Illustrations.
    - If multiple instances of prosecutorial misconduct, must still identify each one and the nature of the violation (e.g., vouching, confrontation violation, etc.).
    - If *Batson* issue involved multiple jurors, must contain sufficient description as to each challenged juror.
- Many petitions for review are de facto exhaustion petitions, but not labeled as such.
    - Common to include short pro forma statements invoking review-worthiness criteria.

CHOOSING CLAIMS

- **Mix and match.**
    - There's no problem with combining a review-worthy claim on which you're making a strong argument for a grant of review with other claims – raised as bases for grant-and-holds or principally for exhaustion.
- **Do not forego including other solid claims** just because principal focus of petition is a lead issue which you think presents a good ground for review.
    - Easy to write petition in way that highlights the lead review-worthy issue, while still adequately exhausting other claims.
- **But don't necessarily include every claim raised in Court of Appeal.** Especially when the petition presents one or more stronger issues, feel free to weed out:
    - Weaker issues that implicate state law only.
    - Issues that are principally state law and have only a tenuous federal dimension.
    - Issues that do not significantly affect the defendant's disposition or which will soon moot out.
        - E.g., issues going only to counts with stayed or concurrent terms.

PETITION FOR REVIEW BASICS.

- **Question Presented.**
    - "A concise, nonargumentative statement of the issues presented for review framing them in terms of the facts of the case but without unnecessary detail." Rule 8.504(b)(1).
    - Give careful thought to boiling each issue down to a single sentence question that gives reader a good sense of the nature of the issue and its potential applicability to other cases but doesn't pack in too many facts.

        - E.g. **Not:** "Did the *Miranda* advisements adequately inform the defendant of his right to counsel?"
        - **More like:** "Is a generalized advisement on the right to an attorney sufficient to inform a 17-year-old arrestee of his *Miranda* rights, where there is no reference to the right to assistance of the attorney *before and during the police interrogation* – in contrast to the U.S. Supreme Court's description of this component of *Miranda* advisements as an 'absolute prerequisite to interrogation'?"
        - Adding more detail would risk losing the readers' attention and would undercut argument for broad applicability (and thus review-worthiness) of the question.
- **Reasons for Granting Review and body of Argument**
    - When making a strong bid for review, common approach is to include a "Reasons for Review" section, distinct from and preceding the body of the arguments on each claim.
    - While body of the Argument addresses the specific facts and analyzes under relevant cases, the "Reasons" section is more policy-oriented and makes the case why the issue has broad implications beyond immediate case and is sufficiently important to warrant a place on the Supreme Court's docket.
    - Many petitions do not separate out Reasons for Review and body of Arguments. But we still recommend a Reasons section to succinctly make that broader case for review-worthiness.
- **Federalize your claims!** (In both exhaustion petitions and those making bid for Cal. Supreme Court review.)
    - **Should** also have federalized in Court of Appeal briefing. But better late than never. Be sure to federalize in petition for review even if you neglected to do so in appellate briefs.
    - Classic tale of woe. *Duncan v. Henry* (1995) 513 U.S. 364. Victory snatched away by U.S. Supreme Court.
        - Throughout state proceedings, defense trial and appellate counsel consistently objected to evidence of prior molestation claim.
        - State courts rejected claims, but both federal district court and Ninth Circuit found due process violation and granted habeas petition.
        - **U.S. Supreme Court summarily reversed for lack of exhaustion.** Defense arguments in state court were framed in terms of traditional state law grounds, Evid. Code §§ 352, 1101, and didn't explicitly assert federal due process.

- **Broader lessons.** Be sure to **explicitly assert the federal constitutional basis of common state law claims.** E.g.:
  - Every § 1368 competency argument is also a federal due process claim, *Pate v. Robinson*, etc.
  - Every sufficiency of evidence challenge is also a due process claim, *Jackson v. Virginia*, etc.
  - Every *Marsden* argument is a Sixth Amendment claim.
- **Cite to specific federal constitutional provisions and/or federal cases.**
  - Even where principal focus is on California cases or federal court cases more closely analogous, **be sure to cite to leading U.S. Supreme Court cases on a subject.**
    - Framing in terms of SCOTUS cases will help set up the case for future federal habeas review under the AEDPA standard. 28 U.S.C. § 2254(d)(1).
    - Federalization doesn't need to be verbose or distracting:
      - Rather than "in violation of the right to counsel under the Sixth Amendment of the United States Constitution,"
      - "Ineffective assistance of counsel under the Sixth Amendment" and a cite to *Strickland v. Washington* will work just as well.
- **Added benefit of a well-crafted federalization of issues.**
  - Client can use your petition for review if he or she wishes to file pro. per. federal habeas petition.
  - Using the federal forms, client can copy argument headings on lines for listing claims **and can attach and incorporate by reference relevant portions of your petition for review.**

ANSWER TO PETITION FOR REVIEW.

- You won in Court of Appeal! Great. But now the Attorney General has filed a petition for review.
  - Per Rule 8.500(e)(4), any Answer is due 20 days after the filing of the PFR.
  - What do you do now – file an Answer or lie low?
- **There's no requirement or expectation that the party that won in Court of Appeal file an answer to a petition for review**.
  - Do **not** file an Answer simply to rebut the merits of the petition's arguments or to defend the Court of Appeal's analysis.
  - It's almost always preferable to let the Court of Appeal opinion speak for itself.

- Note that the Attorney General's Office never (or almost never) files an Answer unless the Supreme Court specifically requests it to do so.

- **Answer to oppose review.**
  - Principal reason to file an Answer is to address **why the asserted issue isn't review-worthy (as opposed to defending merits of appellate opinion)** or to call attention to any circumstances which make this case a poor vehicle for deciding the asserted issue. E.g.:
    - The case doesn't actually present the issue as framed in the petition for review.
    - The issue is not an important or commonly recurring issue warranting a place on the Supreme Court's calendar.
      - E.g., the case concerns unique circumstances unlikely to arise in other case or a practice that the relevant lower court or police department has already discontinued.
    - The case has become moot or is about to become moot (e.g., challenge to probation condition where probation about to expire).
    - The case is a poor vehicle for decision of the issue because the proceedings below raise questions whether it is properly cognizable.
      - E.g., the petition for review seeks to justify a search on a ground never asserted in the trial court.
- **Answer to raise additional issues for Supreme Court to decide.**
  - "In the answer, the party may ask the court to address additional issues if it grants review." Rule 8.500(a)(2).
  - This provision gives the answering party the opportunity for Supreme Court review of any *other* issues, *including any other claims that the Court of Appeal rejected.*
  - These can include other, alternative claims going to the same conviction or sentence as the PFR's claims, or claims going to other aspects of the case.
  - If Supreme Court grants review without specifying or limiting the issues, the review is deemed to cover any issues that "are raised or fairly included in the petition or answer." Rule 8.516(b)(1).
    - E.g., *People v. Randle* (2005) 35 Cal.4th 987.
      - Court of Appeal rejected challenges to second-degree felony murder theory but reversed murder conviction due to refusal of requested instruction on imperfect defense of another person.
      - Attorney General petitioned for review on imperfect defense issue.

        - Answer opposed review but argued that, if the Court were to grant review, it should also consider and decide the felony-murder issues.
        - Supreme Court granted review without limiting issues, and parties briefed both imperfect defense and felony murder.
        - Supreme Court ultimately ruled for defense on both grounds.
    - Tactical considerations. Where Court of Appeal reversed on the principal or most consequential issue of case but affirmed other counts or sentence components, may want to forego petition for review on the rejected claims in hopes that Attorney General won't seek review. But if Attorney General does file a PFR, an answer provides an opportunity to seek review on those other claims.

ADDING CLAIMS FOR REVIEW BASED ON NEW LEGAL DEVELOPMENTS.

- Various favorable legal developments in recent years, including criminal justice reform legislation, have demonstrated that the Supreme Court is receptive to adding claims at a late stage, provided that the petition for review itself was timely. These include:
    - In **petition for review**. Where there was insufficient time to raise the issue in the Court of Appeal, such as new legislation or an important case decided after the appellate opinion, can raise that issue for the first time in the petition for review.
    - **Timely petition for review pending.** The Supreme Court has granted motions to file a supplemental petition or otherwise add claims to an already-pending PFR.
    - **After grant-and-hold on other issue**. The Court has also granted motions to **expand** a pending grant-and-hold review to include additional claims based on intervening developments.
    - In these situations, the Supreme Court will often transfer the case to the Court of Appeal for consideration of the late-arising issue.

SUPREME COURT ACTION REQUESTED.

- As we're all painfully aware, Supreme Court grants full review on a tiny fraction of the petitions for review it receives.
- Always consider whether there's some action you can request short of full review, such as grant-and-hold.

- Don't be coy about requesting a grant-and-hold. Explicitly identify the pending leading case (including Supreme Court docket number) in both Reasons for Granting Review and body of Argument.
    - If there's some reason you believe that your case would be better vehicle than the lead case or that it presents a different variation on issue deserving its own review grant, you can make that suggestion, as well.
- Apart from securing uniformity of decision and other traditional grounds, rules explicitly authorize petition "for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." Rule 8.500(b)(4).
- Can always ask for a grant-and-transfer based on some post-opinion decision, legislation, or other development.
- **Can also seek grant-and-transfer where appellate opinion ignored or misstated an issue or aspect of issue**, even when it doesn't concern some new authority.
    - Back story of *People v. Thomas* (2013) 218 Cal.App.4th 630. Appellate opinion found refusal of heat-of-passion manslaughter instructions harmless under *Watson* without any discussion of briefs' argument that it represented federal constitutional error, triggering *Chapman*.
    - Supreme Court granted review and transferred back to Court of Appeal "with directions to address defendant's contention that the trial court's refusal to instruct on heat of passion voluntary manslaughter constituted federal constitutional error."
    - On remand, Court of Appeal agreed that the instructional error represented a due process violation and found the error prejudicial under *Chapman*.

SUPREME COURT REVIEW OF HABEAS DENIALS.

- Can seek review of an appellate court's habeas denial **either by petition for review or by a new habeas petition in "original" jurisdiction of Supreme Court.**
- Court of Appeal habeas denial after OSC, Return, Traverse & opinion.
    - Should definitely go petition-for-review route rather than new original petition.
    - Same procedure and timeline as PFR on a direct appeal opinion – i.e., 40 days after opinion.
- **Court of Appeal summary denial of a "stand alone" habeas petition <u>not</u> related to a pending appeal**.
    - **Can proceed by either PFR or new habeas petition**.
    - But summary denial becomes final as to Court of Appeal immediately, so **petition for review due 10 days after the summary denial.**

- No fixed deadline for seeking review via a new original petition, **but should try to file a new "original" petition no later than 60 days after appellate order**.
    - If unable to file within 60 days, include any explanation of the delay in the pleading portion of petition.

- **Court of Appeal summary habeas denial on same date as opinion on direct appeal** – habeas denial either in same opinion or in separate order. This is the most common situation faced by appointed appellate counsel.
    - One petition or two?
        - **Form over substance -- look for magic word "consolidate."**
            - **If Court of Appeal formally "consolidated" the direct appeal and the habeas, can file a single consolidated petition for review** (with both appeal and habeas captions & docket numbers) covering both the appeal & habeas issues
            - **Test is <u>not</u> whether the appellate court decided both matters in the same opinion but whether it ever "consolidated" them,** either in the original order after habeas was filed, in some later order, or in the opinion itself.
            - Orders stating that the habeas petition will be "considered together with" or "concurrently with" the appeal don't count. The habeas will still require a separate Supreme Court petition
            - First District practices:
                - In 1st District, Div. 3 is only one that routinely "consolidates" the habeas with the appeal.
                - Other 1st District divisions generally do **not** consolidate the habeas with the appeal. But they do ordinarily decide the habeas on same date as the appellate opinion (sometimes in the opinion itself but more commonly in a separate order).
    - Unless Court of Appeal "consolidated" the habeas proceeding with the appeal, you must file **separate Supreme Court petitions on each**.
    - However, as long as the habeas is denied on same date as opinion on related appeal, the finality of the habeas denial runs on same schedule as that of the opinion (even if the two were not consolidated). Rule 8.387(b)(2)(B). Consequently**, in this situation, the petition for review deadline for both the appeal and the habeas is 40 days**, even though the petitions must be separate.

- As with a "stand alone" summary habeas denial, the Supreme Court petition on the habeas can be either a petition for review or a new "original" habeas petition.

- Pros and cons of PFR vs. Supreme Court habeas petition.
  - **New claims or evidence.** If you're going to add any additional claim or any new declaration(s) or other evidence in support of the claims, you must go by way of a Supreme Court habeas petition rather than a PFR.
  - Otherwise, most of the differences between the two routes involve logistics and other practical considerations rather than substance.
  - Generally, same relief is available regardless of whether the petition is framed as a PFR or a habeas petition within Supreme Court's original jurisdiction.
  - Where it's filed concurrently with the PFR on the direct appeal, a Supreme Court petition will likely be considered by same staff as the appeal PFR.
  - PFR:
    - Need to convert your Court of Appeal habeas petition (pleading plus legal memorandum) into the format for a petition for review.
    - Ordinarily, only item to attach is the appellate habeas denial order.
    - Certainty on time of disposition. Since it's a petition for review, California Supreme Court must act on it within 90 days (60 days plus 30 day extension of time to act).
  - Supreme Court habeas petition.
    - As noted earlier, have option of adding new claims or new exhibits.
    - Very easy to convert from Court of Appeal habeas petition. Just need to add allegations re the Court of Appeal habeas filing and the dispositions of the appeal and the habeas petition.
    - But **need to resubmit all of the exhibits, plus copies of the Court of Appeal habeas proceedings** (the petition, any opposition & reply, and the denial order).
      - With e-filing, this isn't as much of a hassle as before. But will involve more copying/binding for the hard copies.
    - No certainty on time of disposition. Because it's a habeas, Supreme Court isn't required to act within 90 days. Sometimes the Court can take a year or more before acting on an original habeas petition. But when the habeas petition is filed concurrently with a PFR on the direct appeal, the Supreme Court will *probably* act on both at the same time (hence within 90 days). But occasionally the Court won't act on the habeas petition until months after its denial of review in the appeal.

- **Relief requested from Supreme Court after appellate court summary denial.**
    - Do **not** need to try to fit the habeas claims into the usual "review-worthy" categories (split of authority, importance of issue, etc.).
    - Generally, your **Supreme Court petition will not be asking that Court to grant full review and to hear and decide merits**. Supreme Court ordinarily will not take up the merits of a habeas case until after there has been full consideration by the appellate court rather than a summary denial.
    - Regardless of whether your Supreme Court filing is a PFR from the habeas denial or a Supreme Court habeas petition, **the express object of the petition should be to obtain an Order to Show Cause** returnable either in superior court or in the appellate court (depending on nature of claims).
    - You should always be certain to frame your discussion of the habeas claims in terms of the prima facie case standard for issuance of an OSC, including principle that, for purposes of that assessment, the court should take the petition's allegations and supporting showing (declarations, etc.) as true. See generally *People v. Duvall* (1994) 9 Cal.4th 464, 474-475.
    - Supreme Court has authority to grant an OSC returnable in lower court, regardless of whether your petition is a PFR or a new habeas petition. Just a slight difference in phrasing of the order.
        - On PFR: "The petition for review is granted. The matter is transferred to the Court of Appeal with directions to issue an order to show cause returnable in [identifying either appellate court or superior court]."
        - On habeas petition. "The Director of the Department of Corrections and Rehabilitation is ordered to show cause before [identifying either appellate court or superior court] why the relief prayed for in the petition should not be granted."
        - The Supreme Court's order may also identify the specific claim and/or cite a leading case on that claim. It's most likely to specify the claim, where it is intending to limit the OSC to one or more specific claims of a multi-claim petition.
            - Where the Supreme Court issues an OSC on only specified claims of a multi-claim petition, the disposition is deemed a summary denial of the claims not specified. But where the order's language is more general and does not specify or limit the issues, the OSC is deemed to encompass all the claims of the petition.
        - The Supreme Court's "Weekly Conference Results" lists reflect that it issues many such OSC's returnable in lower courts – on both counsel-filed and pro. per. habeas petitions.

THE BIG TIME – SUPREME COURT MERITS REVIEW.

- Appointment of counsel and working with the projects.
    - On any grant of review (either full review or grant-and-hold), the Court will ask the relevant project for an appointment recommendation. FDAP evaluates each review grant (especially full grants) in determining whether to recommend re-appointment of the same attorney or a different attorney.
    - FDAP assists on all review-granted Supreme Court cases, as needed. Although the extent of FDAP assistance varies from case to case, there is no formal independent/assisted distinction. In addition to consultation throughout the case, FDAP's assistance on Supreme Court cases ordinarily involves:
        - Review of the attorney's draft merits brief; and
        - Sponsoring a moot court for the attorney prior to oral argument.
- Mysteries of Supreme Court practice:
    - Captioning. In contrast to the U.S. Supreme Court, where the name of the party seeking certiorari always goes first, the case caption remains the same on a review-granted California Supreme Court case.
    - Nomenclature and order of arguments.
        - The order of both briefing and oral argument is ordinarily determined by the parties' postures on the petition for review. The petitioning party files the opening merits brief, the answering party responds, and the petitioning party files a reply. Oral argument follows the same order. Consequently, where the appellant won in the Court of Appeal and the Attorney General successfully petitions for review, the Attorney General files the opening merits brief and the defendant-appellant files an Answer Brief on the Merits.
        - **But the Supreme Court's practice is to continue to refer to the parties by their roles in the Court of Appeal, rather than by their Supreme Court postures.** Consequently, on review of a Court of Appeal reversal of a conviction, the Court and the parties will continue to refer to the defendant as the "appellant." Conversely, where the Court grants an appellant's petition for review, the Court and parties will continue to refer to him as "appellant" rather than "petitioner."
        - In unusual cases, such as where both parties have filed petitions for review, the Court's review-grant order may specify which side is to

be deemed the petitioning party for purposes of order of briefing and argument.

- Briefing schedule ordinarily runs from date of order granting reviewing -- 30 days for opening brief, 30 for answer brief, 20 for reply. Rule 8.520(a).
    - If there's a greater delay than usual in issuance of the Supreme Court's appointment order, the Court may set the time to run from that order (especially if new counsel is being appointed). But that's not the norm. Work on assumption that initial due date for opening brief is 30 days from review grant order.
    - Usually no trouble obtaining a first extension of time for 30 days. A second extension is usually available but not automatic – and may be granted with a "no further extensions contemplated" admonition.
    - **Unlike Court of Appeal practice, there is no equivalent "default notice" or grace period.** If unable to file by existing due date, must file another extension request.
- **Supreme Court merits briefs**
    - Nominally the rules allow a party to refile "the brief it filed in the Court of Appeal." Rule 8.520(a). However, we're not aware of any review-granted criminal case in which an attorney chose that option. Instead, ordinarily each party will file a new Supreme Court merits brief.
    - Pursuant to the rules, each side's merits brief must begin with a Questions Presented statement quoting either the Supreme Court's "order specifying the issues to be briefed"; or (if there was no such specification order) "[t]he statement of issues in the petition for review and, if any, in the answer." Rule 8.520(b)(2).
    - **As in the Court of Appeal, each side's principal brief should include: Statements of the Case and Facts**.
        - In lieu of replicating your Court of Appeal Statement of Facts, **consider possibility of reprinting or adapting the appellate opinion's Statement of Facts.** Because it was prepared by the appellate court, the opinion's factual summary may carry enhanced credibility as a fair, neutral statement directed to all the facts most material to the issues.
            - Adopting the appellate opinion's Statement of Facts will often be useful in an Answer Brief on the Merits – i.e., where the Court of Appeal ruled in your favor and you are defending that decision.
        - However, if you find the appellate opinion's Statement unsatisfactory, you can prepare your own Statement – either

adapting the Statement from your Court of Appeal brief or drafting a new one.
        - Also, consider whether some subjects may require less extensive treatment in view of the more limited issues before the Supreme Court. For example, the Statement of Facts can provide a substantially abbreviated factual summary, if the issues on review do not turn on the underlying facts – e.g., a *Wheeler-Batson* claim; "three strikes" or other issues regarding prior convictions.
        - Doesn't have to be a binary choice between your own statement and the appellate opinion's. May choose to use the appellate opinion's statement as the principal foundation for the facts, but then use your own text for subjects that you think require greater detail or clarification. Just be sure that it's clear to reader which portions are taken from appellate opinion and which represent your own drafting.
    - Speaking of the appellate opinion: Even if the appellate opinion was published, **it's generally preferable to cite to the pagination of slip opinion rather than to the published reporter pagination**. The slip opinion is more readily available to the justices and staff, since it's attached to the PFR.
    - Although the rules don't explicitly require one, it's good practice to include a separate Summary of Argument section, succinctly setting forth the main themes of your brief, followed by the body of the arguments.
    - General thoughts on Supreme Court briefing.
        - Remember: **They want to hear this case**. Grant of review reflects their recognition of importance of the issue.
        - Opportunity to paint on a broader canvass than in your Court of Appeal briefs.
        - May want to draw from other kinds of sources – historical evolution of issue, legislative history, out-of-state cases, law reviews and other secondary sources, statistics, etc. – even if you didn't do so in Court of Appeal briefing.
        - Depending on issue, Supreme Court forum may present better opportunity to address policy considerations, systemic consequences of a certain holding, etc.
        - Rather than a laser focus on prior authorities on the precise issue (as common in Court of Appeal briefing), may also want to address how the rule you're advocating makes sense in view of the Supreme Court's treatment of related or analogous issues.

        - Unlike Court of Appeal, Supreme Court has much more leeway to disapprove prior appellate opinions and even tweak or overrule its own precedents.
        - Where applicable, address any way in which social or technological developments should inform treatment of the issue.
        - Won't necessarily be employing all these methods in every case. Again, it all depends on the issue.
- **Looking for friends** -- consider soliciting amicus support.
    - Usual suspects: defense-side criminal justice organizations involved in broad array of issues – e.g., CACJ, CPDA, CADC, some of the large public defenders' offices (e.g., Los Angeles).
    - The appellate projects.
        - FDAP and the other projects occasionally file amicus briefs, though not as commonly as CACJ and similar organizations. The projects have most often been involved in amicus briefing on issues specifically going to the availability of appellate remedies and the role of appellate defense counsel.
    - Criminal justice organizations with specific issue focuses – e.g., innocence projects, Pacific Juvenile Defender Center, Stanford Third Strike Project, etc.
    - Civil rights and civil liberties groups. E.g., ACLU, NAACP, Human Rights Watch, Electronic Frontier Foundation.
    - Law professors, retired justices or judges, and other scholars.
    - Professional organizations with particular expertise on the subject. E.g., American Psychological Association, American Psychiatric Association, etc.
        - Amicus briefs from these kinds of groups have played major roles in some of the U.S. Supreme Court's leading cases on juvenile LWOP and other issues implicating young offenders. E.g., *Miller v. Alabama* (2012) 567 U.S. 460.
    - Unexpected or uncommon allies -- prosecutors, police organizations, probation or parole officers, victims groups, or others who support the defense position on this issue.
    - Groups bringing lessons from other areas or addressing possible implications of the issue beyond immediate context.
        - E.g. A brief by a group of retired senior military officers played a significant role in one of the U.S. Supreme Court's leading cases on affirmative action in university admissions. "[H]igh-ranking retired officers and civilian leaders of the United States military assert that 'based on [their] decades of experience,' a 'highly qualified, racially diverse officer corps … is essential to the military's ability to fulfill

its principle mission to provide national security.' [Citation.]" *Grutter v. Bollinger* (2003) 539 U.S. 306.

- An application to file an amicus brief (together with the brief itself) "must be filed no later than 30 days after all briefs that the parties may file under this rule – other than supplemental briefs – have been filed or were required to be filed." Rule 8.520(f)(2).
  - As a practical matter, that means that any amicus brief (supporting either side) is due 30 days after either the filing of the petitioning party's reply brief or the expiration of the date for the reply.
- Any party may file a brief in response to an amicus brief (or briefs) within 30 days of the last amicus filing. Rule 8.520(f)(7).

- **Calendaring argument.**
  - The California Supreme Court ordinarily hears arguments every month (usually around first week) except July and August. The Court hears arguments at its courtrooms in San Francisco, Los Angeles, and Sacramento (which it shares with the appellate courts there). The schedule of argument weeks available on the Court's site indicates the cities where the Court anticipates the arguments will be held for each month in the coming year.
    - However, occasionally the Court will "ride circuit" and conduct arguments elsewhere for community outreach or other purposes, such as at law schools or at an historic courthouse.
  - In contrast to the U.S. Supreme Court, the California Supreme Court does **not** have a formal annual "Term." Also, while the date of a certiorari grant allows a very reliable estimate of which month the U.S. Supreme Court will hear a case, it is impossible to make any comparable calendaring predictions at the time of a California Supreme Court grant or even at the time of completion of briefing.
  - The California Supreme Court calendars fully-briefed cases on a rolling basis, but *not* necessarily in the order in which they were granted or briefed.
    - For example, the non-capital criminal cases on the January 2019 calendar included a double jeopardy case in which review was granted in Dec. 2013 (*People v. Aranda*, S241116, the oldest such case pending) and a right to counsel case granted in Feb. 2018 (*Gardner v. Superior Court*, S246214).
    - Currently, the oldest not-yet-calendared non-capital criminal case is *People v. Canizales*, S221958 (granted in Nov. 2014), on the "kill zone" theory of attempted murder.

- The Supreme Court Clerk's Office has recently instituted a practice of sending counsel a letter advising "that the court could set this case for argument in the next few months."
    - As stated in the Court's letter, **counsel should proactively advise the court by letter of any dates in the coming months when he or she will be unavailable**, including the reasons (e.g., planned vacation, weddings and other family events, etc.).
    - Generally, the Supreme Court does seem to be calendaring cases roughly six months or so after these "new few months" heads-up letters. But not always. For example, in the pending *Canizales* case noted above, the "next few months" letter went out in Nov. 2016.
  - The Court must give counsel a minimum of 20 days notice in calendaring an argument date. Generally, the Court seems to issue its calendars 3-4 weeks in advance.
- **Pre-argument supplemental letter brief on new authorities.**
  - "A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." Rule 8.520(d)(1).
  - The supplemental brief is due "no later than 10 days before oral argument" and "must not exceed 2800 words." Rule 8.520(d)(2).
    - Because the rule explicitly authorizes a pre-argument brief on new authorities, there is no need to request leave to file it.
    - Although this is not explicit in the rule itself, the supplemental brief may be in a letter form if it is just a few pages, as is usually the case.
    - Note that, in contrast to some appellate courts' limitations on pre-argument new authorities letters, the rule does not require that the brief be limited to a mere citation of the case and an identification of the issue to which it relates. Counsel is free to include a brief description of the case's holding and relevance to the issues on review.
- **Moot courts.**
  - On First District review-granted cases, FDAP will generally arrange with the panel attorney to conduct a moot court a few days before argument. The moot court panel will usually consist of at least three "justices," including FDAP staff attorneys and possibly other attorneys with interest in the relevant issues, such as attorneys who filed defense-side amicus briefs in the case.
  - Occasionally, an appellate project will conduct a moot court on a case arising from another district for reasons of convenience -- such as where a

Bay Area attorney has an argument calendared for San Francisco on a case arising from Southern California.

- **Oral argument.**
  - Argument in the California Supreme Court is more formal and structured than in the appellate courts.
  - Counsel must request permission in advance if he or she wants to split the argument with another attorney (e.g., with amicus counsel).
    - The fact that the Court has allowed amicus filings does *not* create any expectation that any of the amicus counsel will argue.
    - Splitting the argument is not the norm. Counsel should think carefully before making such a request since it will cut substantially into counsel's own time.
  - Each side receives 30 minutes for argument. The Court enforces those times more strictly than in the Court of Appeal (though it will likely let counsel complete his or her response to a question).
  - The petitioning party argues first. If counsel wishes to reserve time for reply, he or she should make that request at the beginning of the argument.
- **Decision.**
  - Unless there is post-argument supplemental briefing or the Court defers submission for some other reason, the matter will be submitted on the date of argument, and the Court will issue its decision within 90 days.
  - The Supreme Court ordinarily issues its opinions on Monday and Thursday mornings at 10:00 am. The Court will post a "Notice of Forthcoming Filing" sometime the previous day.
    - The "Forthcoming Filing" notice is another action for which counsel or anyone else interested in the case may sign up for email notification.
    - This is another contrast to the U.S. Supreme Court's practice. Though the U.S. Supreme Court Clerk's Office typically provides advance notice of the days on which opinions are expected, it doesn't indicate which ones are coming out. As reflected in SCOTUSBlog's coverage on opinion days, court watchers don't know which specific opinion(s) will be issued until the Court announces them from the bench (and only then are the opinions posted).
  - As with a Court of Appeal decision, a party may file a petition for rehearing within 15 days of the Supreme Court's opinion. Rules 8.268(b), 8.536.
  - A California Supreme Court decision becomes final as to that Court 30 days after the opinion unless the Court either "orders a shorter period" or

extends the finality period "not to exceed a total of 60 additional days." Rule 8.532(b).
    - After the opinion becomes final, the Supreme Court Clerk will issue a remittitur directed to the Court of Appeal. Rule 8.540(b)(2).

SUPREME COURT REMANDS AND TRANSFERS.

- **Further appellate proceedings after Supreme Court opinion.** Ordinarily, the Supreme Court's opinion in a review-granted criminal case resolves the appeal, one way or the other, and does *not* require any further proceedings in the Court of Appeal.
    - For example, ordinarily when the Supreme Court finds error, it will proceed to conduct any harmless error review itself.
    - Sometimes, however, the Supreme Court's opinion will explicitly require further proceedings in the Court of Appeal – to evaluate prejudice, to address issues not resolved in the original appellate opinion, or for some other purpose.
- **Grant-and-transfers and grant-and-holds.**
    - Although relatively few Supreme Court opinions require further substantive Court of Appeal proceedings, the Court issues numerous grant-and-transfer orders and transfer orders following grant-and-holds. These orders typically direct the appellate court to reconsider the case "in light of" the Supreme Court's new opinion in a "lead case" or for some other reason (such as where the appellate court apparently neglected to address an issue).
    - The Supreme Court waits until a "lead case" has become final to dispose of the cases it has been holding pending that case. Sometimes the Court does not act on the grant-and-holds until several weeks after finality of the lead case. Presumably, this is to allow the Court and its staff sufficient time to sort through the grant-and-holds and determine the appropriate disposition for each.
        - Ordinarily, the Court will simply dismiss review in held cases in which the Court of Appeal disposition was clearly consistent with the Supreme Court's later opinion.
        - Where the appellate opinion appears inconsistent with the Supreme Court opinion or where the matter isn't clear, the Court will remand the case to the Court of Appeal for reconsideration in light of the lead opinion.
        - Generally, it is *not* necessary for counsel to take any action in the Supreme Court following issuance of the opinion in the lead case.

- However, if counsel believes that the appropriate disposition of a held case may not be self-evident, counsel may seek leave to file a short letter or motion addressing the appropriate disposition.
- For example, where the Supreme Court's lead opinion decided an issue adversely to the defense, counsel might argue that the held case should still be remanded for reconsideration, rather than dismissed, due to significant distinguishing circumstances.

- Occasionally, rather than dismiss the review or transfer the matter, the Court will take some different action.
  - The Court may decide that a previously-held case presents an issue or a variation on an issue not resolved in the lead case. In that instance, the Court may issue an order indicating that it will continue to hold the case pending disposition of some different lead case.
  - Although this is rare, occasionally the Court may decide to use the previously-held case to consider additional issues left open by the opinion in the lead case.
    - The Court may convert a previously-held case to a full review and order merits briefing on specified issues.
    - If you receive such an order, promptly confer with FDAP (or the relevant project in another district) on how to proceed.

- **Post-transfer proceedings in Court of Appeal.**
  - Where the Supreme Court transfers a case to the Court of Appeal for reconsideration in light of a recently-decided lead opinion or for some other purpose, **counsel should not wait for the appellate court to set a briefing schedule.**
  - **The rules already set a schedule for supplemental briefs.**
    - "**Within 15 days** after finality of a Supreme Court decision remanding or order transferring a cause to a Court of Appeal, any party may serve and file a supplemental opening brief in the Court of Appeal. Within 15 days after such a brief is filed, any opposing party may serve and file a supplemental responding brief." (Rule 8.200(b)(1) (emphasis added).)
    - Note that the 15-day period runs from the "finality" of the Supreme Court's disposition.
      - As indicated above, a Supreme Court *opinion* ordinarily becomes final in 30 days, unless the Court orders otherwise.

        - Consequently, unless the Supreme Court has shortened or extended the finality period, a supplemental brief following an opinion in the same case will be due 45 days after the opinion.
    - However, **a transfer order becomes final immediately upon filing**. Rules 8.528(d)-(e), 8.532(b)(2)(B).
        - Consequently, after a grant-and-transfer, a post-hold transfer, or any other transfer order, the supplemental brief will be due 15 days after the transfer order.
  - The 15-day rule is not jurisdictional. As with deadlines for most other briefs, counsel may seek an extension of time. But **counsel must be sure to file any extension application before the initial 15 days run.**
- **Scope of post-transfer briefing and consideration in Court of Appeal.**
  - Even when the Supreme Court transfers a matter for reconsideration in light of a specific intervening decision, *supplemental briefing is not necessarily limited to that issue.*
  - "Supplemental briefs must be **limited to matters arising after the previous Court of Appeal decision in the cause**, unless the presiding justice permits briefing on other matters. Rule 8.200(b)(2) (emphasis added).
    - Counsel's supplemental brief may address any new authorities or other new developments since the time of the original appellate opinion.
    - Consequently, if there have been other relevant intervening decisions or other developments, counsel may address those in the supplemental brief *even if they concern a different issue than the subject of the original grant-and-hold.*
- **Court of Appeal consideration on remand or transfer.** As noted earlier, transfers or remands to the appellate courts are very common. That has especially been so in recent years, due to the high number of grant-and-holds associated with some of the Court's lead cases on some frequently recurring issues (e.g., the many lead cases on various Prop. 47 issues).
  - There is no rule requiring an appellate court to afford an opportunity for a new oral argument following a transfer or remand from the Supreme Court**. The appellate courts decide most such cases based on the post-transfer supplemental briefing without affording oral argument.**

- However, we are aware of a handful of cases in the First District in which the Court of Appeal has, nonetheless, held a new oral argument (usually on its own motion).
- Counsel should *not* expect an appellate court to send out a new argument waiver notice when a case is in this posture. If counsel believes that the intervening Supreme Court opinion or other developments have so substantially altered the standards governing the issues that a new oral argument is warranted, counsel should proactively file a motion requesting an opportunity for argument.
    - However, as noted earlier, a new oral argument following a Supreme Court transfer or remand is the exception rather than the rule, and we cannot predict how receptive an appellate court may be to such a request.

CERTIORARI.

- Certiorari petitions are beyond the scope of this outline on practice in the California Supreme Court. We will only add a few comments.
- When the California Supreme Court rejects a federal constitutional claim in its opinion in a review-granted counsel, counsel must evaluate whether the issue lends itself to a certiorari petition (just as counsel must make a similar assessment in the more common situation of denial of a petition for review).
- Generally, however, a petition arising on a case decided by the highest court of the nation's most populous state may be a more promising candidate for certiorari than one challenging a decision by an intermediate state appellate court.
- Counsel should evaluate the usual factors in assessing the prospects for U.S. Supreme Court review and for a favorable disposition in that court. Those include whether the California Supreme Court was divided on its decision, any conflicts with out-of-state or federal circuit decisions on the same issue, and whether the U.S. Supreme Court has recently demonstrated a particular interest in issues in that area.
- **Counsel should consult with FDAP (or the other relevant appellate project) if he or she is considering filing a cert. petition following a California Supreme Court opinion.**