

FIRST DISTRICT APPELLATE PROJECT

**HABEAS CORPUS PRACTICE
IN CALIFORNIA CRIMINAL APPEALS
(ESPECIALLY IN THE FIRST DISTRICT)**

PERILS, PROMISES & PRACTICE POINTERS

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INTRODUCTION AND SCOPE

This outline is intended to assist panel attorneys and staff attorneys in investigation and preparation of habeas corpus petitions under Court of Appeal appointments, especially in the First District. Although we will note other situations which may result in appointments (e.g., a Court of Appeal “out of the blue” appointment on an inmate’s pro. per. petition), the principal subject of these materials and the seminar panel will be investigation and preparation of a habeas corpus petition, where appropriate, in the course of an attorney’s appointment on a defendant’s direct appeal.

This outline will principally focus on **practice tips**, rather than analysis of legal doctrines. Moreover, many of the comments and suggestions here are based on our observations of common practices and “unwritten rules” in the First District’s consideration of habeas petitions filed in conjunction with appeal (e.g., timing of a habeas petition relative to briefing and argument in the direct appeal). For the most part, these practices are not expressly set out in published precedents and rules, and the descriptions here are based on our observations.

Most importantly, our objective here is to clear up some of the “mysteries” of habeas corpus practice, to dispel any anxieties on the subject, and to encourage attorneys to consider potential bases for habeas relief during their representation on direct appeals.

I. PARAMOUNT IMPORTANCE OF COUNSEL

The great majority of habeas corpus petitions in California are filed pro. per. and are denied summarily without issuance of an Order to Show Cause and without appointment of counsel. To serve our clients’ interests, it’s essential to take advantage of the opportunity to provide habeas representation under the rubric of our direct appeal appointments, even if there is not a formally recognized right to appointment of habeas counsel under these circumstances.

A. Right to Counsel vs. Opportunity for Counsel

- Very limited **right** to appointment of habeas counsel in non-capital cases:

- “[I]f a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.” *In re Clark* (1993) 5 Cal.4th 750, 780; see Cal. Rules of Court, rules 4.451(d)(1) (super. courts) & 8.385(g)(1) (appellate courts) (each requiring appointment upon issuance of an OSC).
- Catch 22: Frequently *establishing a prima facie case represents most of the work in litigating a habeas petition*. Stating a prima facie case requires factual development (often including investigation and experts) and extensive legal briefing (petition & informal reply). But the due process right to counsel (*Clark*) only clicks in *after* the habeas court has found a prima facie case.
- Fortunately, in *most* California appellate districts, there’s a much greater **opportunity** for appointed appellate counsel to pursue habeas corpus under their appellate appointments than recognized under the relatively limited formal right to counsel:
 - “A court-appointed appellate attorney has a duty to investigate any such issues which come to his or her attention during the course of representing the client on direct appeal, and to file a petition for writ of habeas corpus if it appears that trial counsel’s failure deprived the defendant of the effective assistance of trial counsel.” *People v. Thurman* (2007) 157 Cal.App.4th 36, 47.
 - *Thurman* relies in part on *Clark*, 5 Cal.4th at 783-784 fns. 20, 21 (which doesn’t really say that) and *in part on ADI’s Appellate Practice Manual!*
- Overview:
 - In First, Second, Fourth, and Sixth Districts, appointment of counsel on direct appeal also allows investigation and preparation of a habeas corpus petition where counsel becomes aware of potential grounds for habeas relief.
 - No need in those districts to seek “expansion” of appointment to cover habeas.

- In Third and Fifth Districts, counsel *does* need to move for expansion of appointment. Consult with CCAP on procedure and hours guidelines.

B. Three Broad Categories of Habeas Representation by Appointed Counsel (at least in First District):

- **Habeas petition prepared and filed by appointed counsel during pendency of appeal.**
 - This will be principal focus of this outline and the seminar panel.
 - These petitions typically involve claims going to the current conviction or sentence and rely, entirely or in part, on evidence outside the appellate record. E.g.:
 - IAC (most common).
 - Purpose of habeas petition may be just to establish counsel’s lack of tactical reason for courtroom error or omission (e.g., failure to object or to request instruction), and claim may otherwise rest on trial record; or
 - May involve substantial new evidence (uncalled percipient witnesses, experts, etc.) which counsel neglected to investigate and present.
 - *Brady* (prosecutorial suppression/non-disclosure of exculpatory evidence).
 - Juror misconduct.
 - Racial Justice Act claims. Pen. Code §§ 745(b), 1473(e).
 - Disclaimer: We’re not going to separately address substantive RJA standards in these materials.
 - Other statutory claims:
 - “*False evidence* that is material on the issue of guilt or punishment” introduced at trial or other hearing. § 1473(b)(1)(A) (emphasis added).
 - “[F]alse evidence’ includes *opinions of experts that have either been repudiated by the expert who*

originally provided the opinion at a hearing or trial or *that have been undermined by the state of scientific knowledge* or later scientific research or technological advances.” § 1473(b)(2) (emphasis added).

- “*New evidence* exists that is presented without substantial delay, is admissible, and is sufficiently material and credible that it *more likely than not would have changed the outcome of the case.*” § 1473(b)(1)(C)(i) (emphasis added).

- **“Out-of-the-blue” Court of Appeal appointments on pro. per. habeas petitions.**

- These have typically involved pro. per. petitions that were not on the project’s radar until the Court’s issuance of an order directing the project to assign appointed counsel.
- Stage of case at which Court may order appointment.
 - Sometimes Court orders appointment only upon issuance of an Order to Show Cause (as required by *Clark* and Rule 8.385(g)(1)); or
 - Court may exercise discretion to order *a pre-OSC appointment* and direct appointed counsel to file some form of further pleading or brief (such as a Supplemental Memorandum supporting the petition or an Amended Petition).
- In our experience, there is *very little overlap between the types of claims commonly raised in petitions filed by appointed counsel in conjunction with appeals (e.g., IAC, new evidence, etc.)* and those on which the Court of Appeal orders *appointments on pro. per. petitions.*
 - Out-of-the-blue appointments have frequently involved post-judgment prison- or parole-related claims rather than conviction challenges. E.g.,
 - Parole denials.

- Prison practices, discipline, or conditions of confinement.
- Disproportionate sentence claims. *In re Palmer* (2020) 10 Cal.5th 959.

- ***Nunc Pro Tunc* Appointments** {You may not know about these}

On numerous instances over past 15 or so years, a panel or staff attorney has prepared a habeas petition for a former client, without benefit of any current appointment, and has filed *a motion for appointment of counsel nunc pro tunc*. **This discussion of *nunc pro tunc* appointments is limited to our experience in the First District**, and we're not familiar with any similar history of *nunc pro tunc* appointments in other districts. Counsel should always contact the relevant appellate project before preparing a petition in hopes of obtaining a *nunc pro tunc* appointment in any other district.

- Counsel consults with FDAP regarding viability of the claims and prospects for *nunc pro tunc* appointment *before* preparing the petition.
- Counsel tracks and records preparation time just as on an appointed case.
- Concurrently with filing the petition in the Court of Appeal, counsel files a motion for appointment *nunc pro tunc*. In addition to serving FDAP, separately contact the FDAP attorney regarding the appointment motion.
- If FDAP concurs that an appointment is appropriate, FDAP will submit a letter recommending that the Court grant the *nunc pro tunc* appointment request.
- Cautionary note: Preparation of a petition in these circumstances is performing without a net. There is no guarantee that Court will grant *nunc pro tunc* appointment (since appointment isn't mandatory unless and until Court issues an OSC).

- Typical subjects of petitions on which the First District has granted *nunc pro tunc* appointments fall into two categories.
 - *Purely legal claims based on intervening fully-retroactive precedents* which significantly altered substantive law or sentencing. E.g.:
 - *Miller v. Alabama* (2012) 567 U.S. 460 (barring mandatory LWOP for juveniles convicted of murder);
 - *People v. Chiu* (2014) 59 Cal.4th 155 (abrogation of natural and probable consequences as grounds for first-degree murder);
 - *People v. Banks* (2015) 61 Cal.4th 788; and *People v. Clark* (2016) 63 Cal.4th 522 (tightening standards for “reckless indifference to human life” basis for felony-murder special circumstance).
 - Appellate habeas petition seeking review of superior court’s post-OSC denial of habeas corpus petition (including denials without an evidentiary hearing or after an evidentiary hearing).

- **Other situations?**

Contact the appellate project if you become aware of other circumstances, which you believe call out for investigation and preparation of a habeas corpus petition on behalf of someone who doesn’t have a currently pending appeal. (Contact the project even if you don’t believe you would be able to conduct the necessary investigation yourself.)

- E.g., potentially exculpatory information comes to light regarding a former client or someone else with no currently pending appeal, and there’s no one in place to conduct the necessary investigation.
- We’ll brainstorm other possible ways to obtain assistance for the defendant (such as referral to an Innocence Project or a law school clinic, seeking pro bono services from a law firm, etc.).

II. HABEAS CORPUS INVESTIGATION AND PREPARATION IN CONJUNCTION WITH APPOINTMENT FOR DIRECT APPEAL

In *all* districts, counsel needs to obtain some form of pre-authorization before incurring any ancillary expenses (investigators, experts, etc.). Some districts also require consultation with the appellate project before counsel expends substantial hours on research or investigation of potential habeas claims. In any event, in any district, it's wise to discuss any potential habeas issues in advance with the project consulting attorney.

A. Authorization for Investigative and Expert Expenses in First District.

The procedures for pre-clearance of ancillary habeas expenses (investigators, experts) vary from district-to-district. *The procedures below are specific to the First District.* For appeals in other districts, check with the relevant appellate project.

- FDAP can authorize expenses up to \$900, but only within outdated rate limits of \$65/hr for investigators and \$125/hr for experts. (As a practical matter, most current applications exceed those limits and require application to Court.)
- All applications not within those limits require *ex parte* application to Court. *But don't file it yourself, route it through FDAP.*
 - Submit it through Assistant Director (or Exec. Director). FDAP will submit it to Court with a confidential recommendation letter.
- Tips for applications: Usually *don't need any legal analysis or exposition* (e.g., re right to ancillary services, IAC principles, etc.) *Do need:*
 - Sufficient description of case facts and requested expert review or witness investigation to show *materiality of the investigation to potential defense theories.*
 - *Breakdown of the expert's or investigator's estimated hours.* Don't just say "the expert's services will take 20 hours." Give a breakdown (usually 3-5 categories).

- Prepare application on assumption that it will cover *all* services necessary to preparation of report or declaration for the habeas petition. Court of Appeal expects that there will just be a single application covering all expert or investigative expenses, not series of applications (as in many trial courts).
 - If unexpected developments require additional time, you can do a supplemental application but try to avoid it.

B. Seeking Discovery from the Prosecution.

- **Informal discovery – prosecutors’ post-trial ethical duties.**
 - Even after conviction, “[p]rosecutors have a continuing duty to disclose information favorable to the defense” *In re Steele* (2004) 32 Cal.4th 682, 694. The California Supreme Court has “repeatedly stated that a prosecutor had an ethical duty to disclose exculpatory evidence in the postconviction setting.” *In re Jenkins* (2023) 14 Cal.5th 493, 515.
 - Where there’s reason to believe that prosecution may have additional information potentially favorable to the defense (including both information not disclosed before trial and information received or developed after trial), contact the District Attorney’s Office.
 - Those ethical rules also apply to the Attorney General’s Office: “[I]n responding to a petition for writ of habeas corpus alleging a *Brady* violation, the Attorney General has an ethical duty to make timely disclosure to the petitioner of all evidence or information known to the Attorney General that was available but not disclosed at trial [fn.] that the Attorney General knows or reasonably should know tends to negate the guilt of the petitioner, mitigate the offense, or mitigate the sentence, except when the Attorney General is relieved of this responsibility by a protective order of the tribunal. [Fn.]” *Jenkins*, 14 Cal.5th at 518.
 - Where you’re looking for specific records or other information you believe is in possession of District Attorney and/or police or other law enforcement agencies, consider formulating an informal

discovery request identifying the requested categories of records and sending it to District Attorney (possibly with a copy to Attorney General).

- Follow up with District Attorney if you don't receive a response.

- **§ 1054.9 disclosure motion.** Pen. Code § 1054.9 establishes a post-conviction discovery motion procedure available to a defendant “convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more.” § 1054.9(a). The statute applies to “materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.” § 1054.9(c). If informal efforts to obtain potentially exculpatory materials in possession of the prosecution prove unsuccessful, appellate counsel should consider filing a motion in superior court under § 1054.9. (There is a substantial body of case law addressing both substantive and procedural issues under § 1054.9, and we will not attempt to address those subjects further in these materials.)

C. **Timeliness of Habeas Petition. Three Different Concerns:**

- **Procedural default/laches/unreasonable delay.** A habeas petition must be filed without “unreasonable delay” and must explain any such delay. See *In re Clark* (1993) 5 Cal.4th 750; *In re Robbins* (1998) 18 Cal.4th 770.
 - No fixed rules or benchmarks in non-capital cases, but the time runs from when counsel or the petitioner knew or should have known of “triggering facts” suggesting a basis for habeas relief. (*Robbins*.)
 - *Laches/procedural default is generally not a problem for habeas petitions filed during the pendency of the appeal* (so we’re not going to address standards in greater depth).
 - If you *are* in a situation where you’re concerned there may be laches concerns (such as on a post-affirmance petition), *address those concerns pre-emptively in the petition pleading* and in your

own declaration. Explain the chronology of the habeas investigation and any circumstances that delayed its completion, including lack of cooperation by defense trial counsel, the District Attorney, or other parties (e.g., other agencies in possession of records, such as medical providers). See generally *Robbins*, 18 Cal.4th at 780, 787-788, 799 fn. 21. Also address any other circumstances (including caseload, illness or other personal matters) that delayed completion of the investigation.

- O’Connell advice: Where necessary, include a “Diligence” subsection toward the end of the habeas pleading.

- **Appellate court’s willingness to exercise “original jurisdiction” and consider the habeas petition in conjunction with appeal.**
 - This is usually the biggest concern on a habeas petition prepared under counsel’s direct appeal appointment.
 - Not as grave as procedural default/laches. Just implicates whether Court of Appeal is willing to exercise habeas jurisdiction in the first instance. If not, it may dismiss the habeas petition without prejudice to refile it in superior court.
 - Do *not* need to file habeas petition concurrently with AOB. (That almost never happens.) But Court may be unwilling to consider petition if filed too late during the appeal.
 - Our perception of an “unwritten rule” of First District practice: **Habeas petition should be filed sufficiently before the date of oral argument on the appeal that there’s sufficient time for a round of informal opposition/reply before argument.**
 - We have few data points. But *First District panels have considered petitions filed approximately one month before oral argument* (and have ordered expedited informal briefing) (This doesn’t mean that the Court will allow discussion of the habeas petition at argument on appeal, but it does want to consider appeal and habeas concurrently.)
 - When we file the ARB, we have no idea how long it will take for Court to set oral argument. Could be a couple months; could be

much longer. But by the time that the Court sends out an oral argument notice, there may be insufficient time to wrap up the habeas petition and get it on file sufficiently before argument for there to be time for informal opposition and reply.

- Lessons:
 - **Prioritize completing the petition and getting it on file by time of reply brief or not too long after.**
 - If you run into problems, consult with appellate project and strategize. If petition is filed close to date of argument or after argument or opinion, substantial likelihood that Court may dismiss it and require refile in superior court.
- **Final timing concern: “Gap tolling” (huh?).** Time between a lower court’s denial of habeas petition and filing a new habeas petition in reviewing court on same claims.
 - In contrast to other habeas timing issues, there’s a clear standard.
 - **“Safe harbor:”** “A new petition filed in a higher court within *120 days of the lower court’s denial* will never be considered untimely due to gap delay.” *Robinson v. Lewis* (2020) 9 Cal.5th 883, 901 (emphasis added).
 - If “gap” between lower court denial and habeas filing in higher court is greater than 120-day “safe harbor,” counsel should include an explanation in the pleading.

D. Preparation of the Habeas Petition – Putting It All Together.

Contents of petition: Pleading; Memo of Points & Authorities; and Exhibits

- Exhibits – your factual showing
 - Allegations of habeas petition must be “verified” – i.e., in a form that would subject the declarant to a perjury prosecution if false. As practical matter, that usually requires *sworn non-hearsay declarations* (or sworn testimony in some other proceeding). See

People v. Madaris (1986) 122 Cal.App.3d 234, 241-242 {disapprov. on diff. ground, *People v. Barrick* (1982) 33 Cal3d 115}.

- Verification of a declaration requires a “jurat”: “... declare under penalty of jury under the laws of the State of California that the foregoing is true and correct. Executed at _____, on _____.” (Be sure to include the “under the laws of the State of California” recital if declarant is signing outside the state (as is often the case with expert witnesses).)
- **Bonus tip on expert declarations.** There’s no rule that a “verified” assessment by an expert must always be a declaration in pleading-like form with numbered paragraphs (which screams: “An attorney drafted this for me to sign”).
 - Especially with experts, consider having the expert draft a report in whatever form they ordinarily use for professional assessments and have the expert sign a “jurat” at the end of the report, so it qualifies as a sworn statement.
- We do the best we can. Make every effort to obtain non-hearsay declarations (trial counsel, witnesses, experts, etc.). But we sometimes have to settle for second-best.
 - E.g., your declaration recounting trial attorney’s statements before the attorney stopped cooperating.
- Other common habeas exhibits (generally not requiring verification):
 - Judicial records (e.g., excerpts of transcripts or accusatory pleading in another case)
 - Other official records (e.g., State Bar proceedings, governmental reports, statistics, etc.)
 - Other documentary evidence
 - Scientific, medical, or forensic journal articles.
- Pleading alone vs pleading plus memorandum.
 - In California *capital* habeas practice, it’s been common to pack everything into the pleading (including full legal analysis).
 - In non-capital habeas practice, especially petitions filed by appointed counsel in conjunction with direct appeals, counseled

petitions ordinarily include a separate Memorandum of Points and Authorities, which functions as the legal brief for the petition's arguments.

- In our view, that approach is more useful and persuasive. Pleadings are more formal and cumbersome than conventional appellate briefs. It's easier to write and to read a legal argument in the form of a brief, rather than one that consists entirely of more formal numbered paragraphs and sub-paragraphs.
- Pleading vs memo (especially what goes in pleading).
 - *Do* use those numbered paragraphs and sub-paragraphs.
 - If you obtain an OSC, the numbering makes it easier for the subsequent formal pleadings (return & traverse) to admit, deny, or incorporate allegations paragraph by paragraph so that the court can assess which allegations are actually in dispute.
 - Plead procedural history and your habeas factual showing (i.e., your new facts). But, in petition related to a pending appeal, generally *not* necessary to reprise your Statement of Facts.
 - Plead all that formal habeas stuff:
 - *Petitioner is in custody.*
 - Identify the nature of the custody (prison, jail, probation, parole, bail, etc.), the location, and the official custodian.
 - For prison inmates, it's helpful to list both the warden *and the Secretary of the Department of Corrections and Rehabilitation as respondents.* (Don't necessarily have identify warden and Secretary by name. It's all right to designate them by their positions).
 - *Petitioner has no plain, speedy, adequate remedy at law.* For petitions in conjunction with pending appeals, the basis is that the petition rests, in part, on matters outside the record. For post-affirmance petitions, such as petitions resting on new retroactive legal authority, the

unavailability of a direct appeal remedy is basis for proceeding on habeas.

- *Petitioner has proceeded without any unreasonable delay.*
 - For most habeas petitions filed during pendency of the appeal, this can be a pro forma allegation, not requiring any detailed chronology.
 - As discussed earlier, for post-affirmance petitions, the pleading should affirmatively explain any delay in presentation of the claims.
- **Tips on pleading the claims** – what goes in pleading and what goes in memo.
 - Identify each claim and sub-claim separately.
 - General advice:
 - **Plead the facts supporting each claim and plead the legal theory.** Be sure to plead the outside-the-record facts shown in your supporting declarations or other habeas exhibits.
 - Identify the constitutional or statutory basis for each claim.
 - **But don't plead the legal analysis.** Save that for the memo.
 - Generally, don't get into discussions of cases in the pleading. But it's useful to refer to leading authorities (*Strickland*, *Brady*, etc.) as shorthand for relevant claims.
 - If there's a specific case very closely on point, may want to refer to it as a convenient way of identifying your specific claim. (E.g., ineffective assistance in failing to consult same type of expert.)
 - But *don't get drawn into comparing/contrasting cases* in the pleading. Save that for the memorandum.
- **Prayer:** Short, mainly boilerplate section stating relief requested:
 - Issuance of Order to Show Cause;
 - After Return and Traverse, grant the petition or order an evidentiary hearing;

- Describe relief requested (reversal of conviction or specific counts, enhancements).
- **Verification:** Your statement (under oath) that all allegations in the petition are based either on the appellate record, the declarations and other exhibits to the petition, or your own personal knowledge.
- **Memorandum of Points & Authorities.**
 - It's a brief. The memo, much more than the pleading, is your primary vehicle for persuasion and analysis of the legal merits of your claims. This outline will focus on points specific to presentation of habeas claims.
 - Overlap with AOB.
 - Some habeas petitions and some claims in multi-claim petitions overlap substantially with AOB arguments and are presented on habeas only to supplement the appeal argument with discrete evidence outside the record (such as trial counsel's mea culpa declaration or counsel's refusal to answer queries regarding a challenged omission).
 - Replicating your direct appeal argument, with modest additions addressing the new material, is fine.
 - **Make it easy for the reader.** Explicitly identify which portions of the argument are adapted and what text is new. E.g., "Argument I of this petition is adapted from Part III of the Appellant's Opening Brief, with the exception of Part I-C below, addressing trial counsel's declaration."
 - Framing your habeas arguments – the crucial significance of **the *Duwall prima facie* case standard for issuance of an OSC.**
 - Like your briefs in the appeal, the *ultimate* objective of your habeas petition is winning the case – to obtain reversal of the conviction and/or sentence.
 - **But the immediate objective of the habeas petition is obtaining an Order to Show Cause.**
 - "An appellate court ... evaluates [a habeas corpus petition] by asking whether, *assuming the petition's factual*

allegations are true, the petitioner would be entitled to relief. [Citations.]” *People v. Duvall* (1995) 9 Cal.4th 464, 474-475 (emphasis added); accord, e.g., *Maas v. Superior Court* (2016) 1 Cal.5th 962, 974; *People v. Tuilapea* (2025) 108 Cal.App.5th 1262, 1273.

- If so, issuance of an OSC is “mandatory.” *People v. Romero* (1994) 8 Cal.4th 728, 737.
- “[T]he ‘prima facie bar was intentionally and correctly set very low.’” *People v. Lewis* (2021) 11 Cal.5th 952, 971, 972 (describing similar requirement to “take petitioner’s factual allegations as true” for § 1172.6 petitions.)
- **Don’t relegate the *Duvall* prima facie case standard to a boilerplate paragraph on general habeas principles! Integrate it into the substance of your specific habeas claims.**
 - Frame both the error and prejudice components of your specific habeas claims in terms of the necessity to take the habeas declarations and other supporting evidence as true.
 - E.g., the duty to take as true a trial attorney’s declaration or other admission re failure to consider a particular line of investigation or failure to object to certain evidence or prosecutorial statements.
 - E.g., the duty to take as true an expert’s assessment, such as a witness’s probable inability to discern a suspect’s features and to make a reliable identification under the conditions of the observation.
 - E.g., the duty to take as true an uncalled witness’s declaration supporting the defendant’s alibi.
- **Reminder: On many of the habeas petitions we file in conjunctions with appeals (e.g., IAC, newly discovered evidence, alleged juror misconduct, etc.), our entire objective as appellate counsel is to obtain an OSC, returnable in superior court, so there can be an evidentiary hearing.**
 - It’s equivalent to obtaining a remand for further proceedings that *may* result in a new trial or sentencing.

E. Informal Opposition and Reply.

- A court may deny a habeas petition summarily without ordering any responsive briefing. But, in practice, the Court of Appeal ordinarily orders “informal” briefing on habeas petitions filed by counsel during the pendency of an appeal.
- The Attorney General almost never seeks to submit any counter-declarations or other opposing evidence at the informal response stage. The Attorney General commonly urges the appellate court to deny the habeas petition summarily without issuance of an OSC.
- Informal opposition briefs frequently pay lip service to the *Duvall* prima facie case standard but ignore it in substance.
 - E.g.: Where trial counsel has acknowledged not having had a tactical reason for an omission, respondent may argue that defense attorneys “commonly fall on their sword” and confess to mistakes when they actually had valid tactical reasons.
 - E.g., respondent’s harmless error analysis may emphasize strength of the prosecution case and ignore the import of expert’s analysis or discount the veracity or reliability of a new witness’s account.
- Even more so than in the petition itself, **frame your reply to the Attorney General’s opposition in terms of the *Duvall* standard and the necessity to take the petition’s factual showing as true for purposes of prima facie assessment.**
 - Integrate that standard into your discussion of both the error and prejudice prongs of your prima facie case showing.
 - E.g., emphasize the necessity for the Court to take as true the petition’s showing that trial counsel offered no tactical reason for a challenged omission.
 - E.g., emphasize the necessity to take as true a new witness’s account or an expert’s assessment.

III. COURT OF APPEAL'S OPTIONS AFTER INFORMAL BRIEFING.

- Can deny petition summarily – usually in separate order (rather than in the appellate opinion) not stating reasons (other than “failure to state a prima facie case”).
 - We’ll deal with mechanisms for seeking Supreme Court review after a summary denial in last section of this outline.
- Can issue an Order to Show Cause *returnable before itself*.
 - Makes OSC returnable before itself on petitions raising purely legal claims (e.g. appeal-like claims involving application of new precedents).
- Can issue an OSC *returnable in superior court*. (Most OSC’s on habeas petitions filed during pendency of appeal are made returnable in superior court because the claims (e.g. IAC, *Brady*, newly discovered evidence) are likely to require an evidentiary hearing.

IV. POST-OSC HABEAS PRACTICE.

A. Post-OSC Formal Pleadings and Opportunity for Argument

- Respondent files a formal opposition pleading – a “Return.” The Return must formally respond to the habeas pleading, either admitting or denying each paragraph and raising any additional opposition claims (including any procedural bars).
- Petitioner files a reply pleading – a “Traverse” (if the OSC is returnable in appellate court) or a “Denial” (if returnable in superior court).

- See *People v. Duvall, supra*, 9 Cal.4th 464, for further rules re adequacy of Return and Traverse, including the disapproval of Returns including only “general denials” of a petition’s allegations.
 - If you haven’t prepared a Traverse or Denial before, ask the appellate project for samples.

- An appellate court’s issuance of an OSC on a writ petition creates a “cause” entitling the petitioner to two crucial rights, not applicable where the court has ordered only “informal” briefing.
 - The right to **oral argument**; and
 - Disposition of the petition in an **opinion stating the reasons for decision**. See *People v. Romero* (1994) 8 Cal.4th 728, 740; cf. *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895 (analogous principles re petitions for writs of mandate or prohibition).
 - In contrast, as noted earlier, an appellate court’s habeas denial without issuance of an OSC does not require a full opinion, and appellate courts frequently deny such petitions summarily in short orders not stating reasons.

B. Evidentiary Hearings.

- After the filing of the Return and Traverse (or Denial) the habeas court must assess whether the pleadings show there are contested factual issues requiring an evidentiary hearing. See *Duvall, supra*, 9 Cal.4th 464, for further discussion.

- Where an OSC issues on a claim highly dependent on new facts (e.g, IAC, newly discovered evidence), the petition is very likely to require an evidentiary hearing.

- In *Rose v Superior Court* (2000) 81 Cal.App.4th 564, an appellate court had issued an OSC, returnable in superior court, on several ineffective assistance claims, including failures to consult an eyewitness identification expert, to challenge suggestive photographic line-ups, and to introduce evidence of police bias. Like most OSC’s, it directed

respondent “ to show cause ... *why the relief prayed for in the petition should not be granted.*” *Rose* at 574 (emphasis in *Rose* opinion). After the filing of the Return and Traverse, the superior court denied the petition without an evidentiary hearing. The appellate court subsequently issued a new writ directing the superior court to hold a hearing: “Our order [the prior OSC] was explicit.... Respondent’s choice was clear: either release *Rose* or hold an evidentiary hearing.” *Ibid.*

- An OSC on ineffective assistance or similar claims dependent on additional facts may not *necessarily* mandate an evidentiary hearing in all instances. But, under the rationale of *Rose* and other authorities, it very likely will require one. See also, e.g.:
 - *In re Sims* (2018) 27 Cal.App.5th 195, 202-207, 211 (superior court erred in denying petition without evidentiary hearing on defendant’s competence to stand trial after Supreme Court issued OSC returnable in superior court);
 - *In re Vargas* (2000) 83 Cal.App.4th 1125 (ordering evidentiary hearing on ineffective assistance claims related to nolo contendere plea, including counsel’s lack of investigation and preparation for trial and deficient advice on the terms of the plea offer).

C. Reference Hearings vs. OSC’s “Returnable” in Superior Court

As a practical matter, any habeas evidentiary hearing is going to be conducted in superior court, but there are two different models for an appellate court to order such a hearing:

- **Reference hearing.** Court of Appeal can retain jurisdiction and designate a judge (or retired judge) to sit as “referee” and conduct evidentiary hearing on its behalf.
 - Referee submits a report of findings to Court of Appeal, and Court of Appeal ultimately issues decision on habeas petition.
 - In recent decades, the First District has almost never ordered reference hearings. (We believe other districts too commonly

issue OSC's returnable in superior court rather than order reference hearings.)

- **Transferring or remanding case to superior court.** Court of Appeal typically transfers the habeas proceeding to superior court by making its OSC “returnable” in superior court.
 - Even if OSC was initially returnable in appellate court, Court of Appeal can still remand the matter to superior court if, after considering Return and Traverse, it determines an evidentiary hearing is necessary.
 - Making OSC returnable in superior court or otherwise remanding it means that the superior court hears and decides the merits of the petition.
 - If the superior court ultimately denies relief, the petitioner must file a new habeas petition in appellate court as mechanism for appellate review of the denial.

D. Superior Court Representation.

- Two most common questions attorneys may ask when the Court of Appeal issues an OSC returnable in superior court:
 - “Can I do the evidentiary hearing?”
 - “Do I have to do the evidentiary hearing?”
- Good news. Because making an OSC returnable in superior court transfers jurisdiction to superior court, that court must appoint counsel. Rule 4.551(d)(1).
 - Appellate court’s order *may* encourage superior court to appoint the appellate attorney. But that’s rare, and, in any event, appellate counsel can decline the appointment.
- Appellate counsel *can* seek appointment for the post-OSC proceedings by contacting the superior court and the relevant county conflict panel.
 - Procedures vary among counties. Some courts may welcome the opportunity to appoint someone already familiar with the case

(and with habeas law and procedures). But there is no guarantee. You will need to explore that county's procedures for seeking an off-panel appointment.

- If you're *not* seeking the superior court appointment, follow up with the superior court and/or the local conflict panel to make sure that the matter doesn't fall through the cracks and that counsel is appointed.
 - Superior court's appointment of counsel may take more time than an appointment after a reversal or remand because:
 - If it's an IAC claim, prior counsel can't be re-appointed (and, if prior counsel was PD, that whole office will be conflicted out); and/or
 - Relatively few attorneys on the superior court panel may have habeas experience.
 - After counsel is appointed, may need greater "baton passing" communications with the new attorney than on a regular reversal for a new trial or remand for resentencing.

V. SUPREME COURT REVIEW AFTER APPELLATE HABEAS DENIAL

A. Seeking Supreme Court Review after a Summary Denial Without an OSC (Most Common Situation).

- Do **not** approach decision to seek review or strategy for doing so the same way as decision to petition for review after an affirmance on direct appeal.
 - Don't think in terms of trying to formulate a "review-worthy" Question Presented or to relate the issue to a pending review-granted lead case.
 - Object of a petition for review after a summary denial is *not* a grant of review in which Supreme Court will receive merits briefing and hear and decide the case itself.

- **Purpose of a Supreme Court petition after a summary habeas denial is an OSC returnable in lower court, *not* a grant of full review.**
- Supreme Court will make its own determination whether the petition appears to state a prima facie case (applying *Duvall* standard discussed earlier).
 - If so, it will issue an OSC returnable either in superior court or appellate court, depending on the nature of the claims.
- This means that the prospect of obtaining favorable Supreme Court action on a habeas petition after a summary denial may be somewhat better than seeking review after an adverse opinion on appeal.
 - Since Supreme Court conducts its own prima facie review, it *does* effectively engage in “error correction” on summary habeas denials (regardless of whether the petition’s claims present any review-worthy issue).
- **Two alternative mechanisms for seeking Supreme Court review of habeas denial:**
 - Separate petition for review in the habeas proceeding.
 - If the habeas denial order was on same date as the opinion in the direct appeal, it becomes final on the same schedule. PFR is due *40 days* after order.
 - If the habeas denial was on a different date than the opinion or if it was a standalone habeas petition not related to a current appeal, the denial is final immediately. PFR is due in *10 days*.
 - Same format as a regular petition for review – i.e., a brief, not a formal pleading.
 - A petition for review of a habeas denial “brings up” the Court of Appeal file (as with a petition for review in an appeal), so it’s *not* necessary to relog all the exhibits.

- New habeas corpus petition within Supreme Court’s original jurisdiction.
 - No fixed due date, but subject to 120-day “safe harbor” of *Robinson v. Lewis, supra*, 9 Cal.4th 883, 901.
 - However, if possible, try to file it on same date as petition for review in the appeal (or within a few days of that PFR) and cross-reference the pending appeal PFR on the cover, so they’ll be considered together.
 - Like the Court of Appeal filing, it’s a habeas petition (with pleading and memo).
 - Usually easy to adapt from the Court of Appeal habeas petition and to add allegations re the Court of Appeal habeas filing and disposition.
 - But Supreme Court habeas petition does *not* “bring up” the appellate habeas file, so need to relodge all the habeas exhibits and the prior habeas filings in superior court (if any) and in the Court of Appeal.
- The remedy of an OSC returnable in lower court is available through either of these alternative procedures (petition for review or new Supreme Court habeas petition).
 - Some formal difference in how Supreme Court will frame its order, but substance is the same.
 - PFR: Review-granted and transferred to Court of Appeal with directions to issue OSC (returnable either in appellate court or superior court) vs.
 - Supreme Court habeas petition: Court issues its own OSC (returnable either in appellate court or superior court).
- Can counsel file a single PFR covering both the appeal and habeas denial?
 - Only if the Court of Appeal formally “**consolidated**” the habeas petition with the appeal and used that magic word.
 - Current First District practice (with some exceptions) is *not* to “consolidate” a habeas petition with a related appeal but

to use seemingly synonymous terms (“will be considered together,” “joined with,” etc.).

- Those don’t count. This is a point on which form trumps substance. Unless Court of Appeal formally “consolidated” the appeal and the habeas petition (and used that term rather than seemingly synonymous language), assume that you can’t do a unitary petition for review covering both proceedings. Instead, you’ll need to do a separate petition for the habeas proceeding (either petition for review or new habeas petition).

B. Seeking Supreme Court Review after Post-OSC Court of Appeal Denial of Habeas Relief in an Opinion.

- Where Court of Appeal issued an OSC returnable before itself but ultimately denied relief in an opinion, petitioners’ counsel can seek Supreme Court review either through a petition for review or an original Supreme Court habeas petition (as with seeking review after an appellate court’s summary denial).
- But, where appellate court has denied habeas relief in a full opinion, Supreme Court has historically expressed *a strong preference for a petition for review* of the appellate court’s habeas opinion, rather than a new original habeas petition in the Supreme Court. See *In re Michael E.* (1975) 15 Cal.3d 183, 193 fn. 15; *In re Reed* (1983) 33 Cal.3d 914, 918 fn. 2.
 - Nonetheless, despite that general preference, in one recent instance, the Supreme Court did undertake full review by issuing an OSC returnable before itself in an “alternative theory error” case that came before it on a new habeas petition rather than via a petition for review. *In re Farrell* (2023) 14 Cal.5th 593, 600.
- Where there’s already been an OSC and a Court of Appeal opinion, need to approach Supreme Court review in same way as seeking review after an adverse opinion on appeal.

- Try to formulate a review-worthy issue; or
- Identify a basis for a grant-and-hold behind a pending review-granted lead case or a grant-and-transfer in view of some recent legal development.