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Preface

Many changes in California criminal law have been established by creative appellate attorneys. Appeals and Writs in Criminal Cases, Third Edition, provides practitioners with a comprehensive practice guide to appeals and habeas corpus practice in both state and federal court. This edition also includes discussion of extraordinary writs of mandamus and prohibition, usually used before trial, as appellate practice is not restricted to postconviction work, and trial attorneys—both defense attorneys and prosecutors—may be able to win their cases through appropriate pretrial writs. This resource also includes a chapter that is an introduction to postconviction practice in capital cases. Practitioners are also provided with a guide to the fundamentals of seeking review in the United States Supreme Court.

The third edition replaces the second edition of Appeals and Writs in Criminal Cases, published in 2000. The third edition has been extensively revised and reorganized to make topics easier to locate. Particular care has been taken to make sure pleading instructions for writ practice are clear and that forms are up-to-date. All forms printed in the book are available on a Forms CD, which is available separately. This book complements California Criminal Law Procedure and Practice (Cal CEB Annual), which provides a comprehensive overview of California substantive and procedural criminal law.

Criminal appellate practice is a challenging area. Appellate defense attorneys may be able to secure the release of an innocent person or reduction of a charge or sentence. They could find trial errors that may have affected the trial but are not adequately reflected in the record to be resolved on appeal. Although not obligated to investigate possible grounds for a collateral attack on the judgment, many appellate defense practitioners do investigate and bring habeas corpus actions on behalf of their clients. Appellate defense practitioners may also find errors that could have resulted in the violation of the federal Constitution, and an important aspect of the appellate practitioner's responsibility is to preserve the client's right to federal review of federal constitutional error by identifying possible deprivations of federal rights and bringing them to the attention of the state courts. In addition, many attorneys receive appointments to represent federal habeas corpus petitioners or may represent clients in federal court on a pro bono basis. Conversely, appellate prosecutors are also involved in collateral attacks on state court judgments both in state court and in federal court. Appellate prosecutors may protect the conviction of a guilty person and save the expense of a retrial.

CEB would like to thank the authors of this edition: Charles M. Bonneau, Sacramento; Adrian G. Driscoll, Ropers, Majeski, Kohn & Bentley, San Francisco; Clifford Gardner, Oakland; Amy Haddix, Deputy Attorney General, San Francisco; Susan Horst, Writ Attorney, First District Court of Appeal; Neoma D. Kenwood, Berkeley; James A. Lassart, Ropers, Majeski, Kohn & Bentley, San Francisco; Therene Powell, Sunnyvale; Morgan Prickett, Staff Attorney, First District Court of Appeal; Lynda A. Romero, San Diego; Michael Satris, Bolinas; George Schraer, San Diego; David Y. Stanley, Klamath Falls, Oregon; and Carolyn Wiggin, Deputy Federal Public Defender, Sacramento. More complete biographies of the authors can be found in the "About the Authors" section that follows.

CEB also extends thanks to the authors and consultants of the second edition: Morris Beatus, Dennis A. Fischer, David F. Glassman, Laurence F. Jay, Dennis Peter Maio, Gary Mandinach, Alex Ricciardulli, John Hamilton Scott, Cynthia A. Thomas and Richard Wiebet. Mr. Dennis A. Fischer co-authored the first edition of this book with Russell Lynn.

CEB Attorney Editor Sara H. Ruddy and Legal Editors Christina M. Lauridsen, Christopher Dow, and Dorothy M. Robins contributed to this title. Dorie Riepe handled copyediting and production. Grier Thornburg designed the cover. Administrative support was provided by Nila Kanzaria. The index was prepared by Kathryn Te Selle and Robert Burke. Composition was performed by CEB's Electronic Publishing staff.

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Selected Developments

May 2010 Update

RULES OF COURT REVISIONS:

Federal. In January 2010, the United States Supreme Court adopted revised rules, effective February 16, 2010. See Chapter 12.

Federal Habeas Corpus Rules were amended and adopted effective December 1, 2009. See Chapter 18; Appendix B.

Federal Rules of Appellate Procedure and Ninth Circuit Court Rules were amended effective December 1, 2009. See Chapter 18.

STATUTORY DEVELOPMENTS:

Conduct credits. Under a January 25, 2010 amendment to Pen C §4019, a defendant held in county custody now appears to be entitled to earn day for day credits. See §2.17.

CASE LAW DEVELOPMENTS:

Sixth Amendment waiver of counsel. The U.S. Supreme Court in *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 970, 129 S Ct 2079, overruled *Michigan v Jackson* (1986) 475 US 625, 89 L Ed 2d 631, 106 S Ct 1404, and held that doctrines ensuring the voluntariness of Fifth Amendment waiver ensure the voluntariness of Sixth Amendment waiver of counsel. See §13.33.

State procedural impediments to habeas relief. A state procedural rule is not automatically "inadequate" because it is discretionary; if it is "firmly established" and "regularly followed" it can serve as an adequate ground to bar federal habeas review. *Beard v Kindler* (2009) ___ US ___, 175 L Ed 2d 417, 130 S Ct 612. See §15.21.

Equitable tolling. In *Townsend v Knowles* (9th Cir 2009) 562 F3d 1200, 1206, the petitioner was entitled to equitable tolling when the delay in filing the federal petition for habeas corpus was due to reliance on Ninth Circuit precedent subsequently overruled by the U.S. Supreme Court. However, in *Ford v Pliler* (9th Cir 2009) 590 F3d 782, the petitioner was not entitled to equitable tolling because he could not show he had been affirmatively misled by district court about the statute of limitations before opting to dismiss his mixed petitions. See §15.4.

Stay and abeyance procedure. In *King v Ryan* (9th Cir 2009) 564 F3d 1133, the Ninth Circuit held that the three-step stay and abeyance procedure for habeas petitions first articulated by *Calderon v U.S. Dist. Court* (*Taylor*) (9th Cir 1988) 134 F3d 981, 986 and then *Kelly v Small* (9th Cir 2002) 315 F3d 1063, remains viable after *Rhines v Weber* (2005) 544 US 269, 276, 161 L Ed 2d 440, 125 S Ct 1528, and does not require petitioner to show good cause for failing to have exhausted his or her claims in state court. See §14.36.

Suggestive *Palma* notices. In *Brown, Winfield & Canzoneri v Superior Court* (2010) 47 C4th 1233, 104 CR3d 145, the California Supreme Court approved the use of "suggestive *Palma* notices" where a reviewing court issues notice that it is considering granting a peremptory writ in the first instance, discusses the merits of the writ petition with a suggestion that the trial court erred in the manner claimed by the petitioner, grants power and jurisdiction to the trial court to allow it to change its disputed order and replace it with a new one consistent with the view of the reviewing court, and solicits opposition to the issuance of the peremptory writ should the trial court not follow the reviewing court's recommendation. The Court analogized a *Palma* notice to a "tentative ruling," not binding on the trial court, and held such notice valid provided that the trial court informs the parties of its intent to revisit its disputed order in response to the notice and provides the parties with an opportunity to be heard.

***Cunningham* error.** Once it finds *Cunningham* error, the district court should remand the case to the trial court for resentencing. *Chioino v Kernan* (9th Cir 2009) 581 F3d 1182, 1186. See §9.29.

Certificate of probable cause. An appeal based on defects in the hearing on a defendant's motion to withdraw a plea requires a certificate of probable cause. *People v Johnson* (2009) 47 C4th 668, 101 CR3d 332. See §1.13.

Notice of appeal. It is the appellate court that rules on the applicability of the constructive filing doctrine to a particular case; a defendant may present the issue to the appellate court by filing either a petition for writ of habeas

corpus or a motion. *People v Zarazua* (2009) 179 CA4th 1054, 101 CR3d 902. See §2.7.

FORMS:

Misdemeanor appeals. New Judicial Council forms related to misdemeanor appeals: Notice Regarding Record of Oral Proceedings, Proposed Statement on Appeal and Order Concerning Appellant's Proposed Statement on Appeal have been added to Chapter 3. See §§3.52-3.54.

Felony appeals. Forms relevant to filing a settled statement when portions of the oral proceedings have not been transcribed in a felony case have been updated. See §§3.48-3.50.

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Appellate Review of Criminal Convictions

Amy Haddix

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I. RIGHT TO APPEAL

§1.1 A. Source of Right

"It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute." *People v Chi Ko Wong* (1976) 18 C3d 698, 709, 135 CR 392, disapproved on other grounds in *People v Green* (1980) 27 C3d 1, 34, 164 CR 1; *People v Mazurette* (2001) 24 C4th 789, 792, 102 CR2d 555. Every individual convicted of a crime in the state of California on a plea of not guilty has a statutory right to appeal the judgment of conviction. Pen C §§1237 (felony), 1466(2) (misdemeanor or infraction). The prosecution likewise may appeal from a number of specified orders. Pen C §§1238 (felony), 1466(1) (misdemeanor or infraction). In delinquency proceedings, Welf & I C §800 governs the right to appeal by both the minor and the prosecution. See *Ricki J. v Superior Court* (2005) 128 CA4th 783, 27 CR3d 494. The right to appeal includes the right to present oral argument to the court and the right to a written decision. Cal Const art VI, §§3, 14. See also *People v Medina* (1972) 6 C3d 484, 99 CR 630 (right to present oral argument and right to written opinion are important incidents of appeal); *People v Brigham* (1979) 25 C3d 283, 157 CR 905 (court may not summarily affirm conviction without affording defendant opportunity for oral argument).

The federal Constitution does not guarantee the right of appeal in a criminal case. *McKane v Durston* (1894) 153 US 684, 38 L Ed 867, 14 S Ct 913. See also *Evitts v Lucey* (1985) 469 US 387, 83 L Ed 2d 821, 105 S Ct 830. When, however, a state affords criminal defendants the right to appeal their convictions, the procedures it adopts to implement that right must comport with principles of due process and equal protection guaranteed under the Fourteenth Amendment to the United States Constitution. *Evitts v Lucey* (1985) 469 US 387, 393, 83 L Ed 2d 821, 105 S Ct 830. See also *Halbert v Michigan* (2005) 545 US 605, 610, 162 L Ed 2d 552, 559, 125 S Ct 2582; *Griffin v Illinois* (1956) 351 US 12, 20, 100 L Ed 891, 76 S Ct 585 (procedures must include minimum safeguards necessary to make appeal "adequate and effective").

Thus, the United States Supreme Court has held that the Due Process Clause gives an appellant in a serious criminal case the right to counsel and that the Equal Protection Clause requires the state to appoint counsel for an appellant who cannot afford to retain an attorney. *Douglas v California* (1963) 372 US 353, 357, 9 L Ed 2d 811, 83 S Ct 814 (disapproving procedure giving court of appeal discretion to deny indigent's request for counsel if after reviewing record it determined that appointment of counsel would not be helpful to court or defendant). See also *Halbert v Michigan* (2005) 545 US 605, 610, 162 L Ed 2d 552, 559, 125 S Ct 2582. The right to counsel encompasses a due process right to the effective assistance of counsel on appeal, which is equally applicable to appellants who retain counsel and appellants for whom counsel is appointed. *Evitts v Lucey* (1985) 469 US 387, 395, 83 L Ed 2d 821, 105 S Ct 830. See also *Cuyler v Sullivan* (1980) 446 US 335, 344, 64 L Ed 2d 333, 100 S Ct 1708 (due process entitles accused to effective assistance of retained counsel at trial). The right to effective assistance of counsel on appeal entitles the criminal defendant to independent review of the record by the appellate court when appointed counsel is unable to identify any arguable issue. *People v Wende* (1979) 25 C3d 436, 441, 158 CR 839; *People v Kelly* (2006) 40 C4th 106, 119, 51 CR3d 98. For further discussion, see §§2.26-2.27.

Principles of due process and equal protection also require the state to provide indigent appellants with a free transcript of trial proceedings if a transcript is necessary to ensure adequate appellate review (*Griffin v Illinois* (1956) 351 US 12, 19, 100 L Ed 891, 76 S Ct 585) and to give indigent appellants access to the appellate process without payment of filing fees (*Burns v Ohio* (1959) 360 US 252, 258, 3 L Ed 2d 1209, 79 S Ct 1164).

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§1.2 B. Purposes of Appeal

Review on appeal serves a number of purposes. Most important to the appellant, the appeal provides a full and fair opportunity to secure an adjudication of all claimed deprivations of his or her constitutional or statutory rights appearing on the face of the trial record. See *In re Sterling* (1965) 63 C2d 486, 488, 47 CR 205. Second, the prospect of review discourages error and unfairness. *People v Bolton* (1979) 23 C3d 208, 215 n5, 152 CR 141. Third, appeals may establish precedent for future cases, thus helping to determine and maintain consistent standards in the trial courts and ensure that the same rules of substantive law and essential rules of procedure are applied in all courts within the jurisdiction. See Cal Rules of Ct 8.500(b) (supreme court may review decision of court of appeal to secure uniformity of decision or settle important question of law), 8.1002 (court of appeal may transfer case to itself from appellate division of superior court to secure uniformity of decision or settle important question of law).

The appellate process is also a pathway for evolution of the law. Appellate counsel "serves both the court and his client by advocating changes in the law if argument can be made supporting change." *People v Feggans* (1967) 67 C2d 444, 447, 62 CR 419.

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§1.3 C. Defendant's Right to Notice

After the trial court imposes sentence or makes an order deemed to be a final judgment, it must advise a defendant who has been convicted after trial of the right to appeal. The required advisements include notice of the steps required to perfect the appeal, the applicable time limits, and the right of an indigent defendant to have counsel appointed by the reviewing court. Cal Rules of Ct 4.470 (conviction after trial), 4.306 (misdemeanor conviction of unrepresented defendant after trial). The court must also advise the defendant of the right to appeal after a contested revocation of probation. Cal Rules of Ct 4.306, 4.470. A minor adjudicated a delinquent under Welf & I C §601 or §602 and his or her parent or guardian, if present in court, also are entitled to notice of the right to appeal (Cal Rules of Ct 5.590; *In re Gary R.* (1976) 56 CA3d 850, 853, 129 CR 26 (timely notice of appeal rights held a jurisdictional requirement in juvenile cases)). However, there is no requirement that a prevailing defendant be notified of the prosecutor's right to appeal. *People v Brusell* (1980) 108 CA3d 712, 716, 166 CR 690.

Under the federal Constitution, trial counsel has a "duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v Flores-Ortega* (2000) 528 US 470, 480, 145 L Ed 2d 985, 120 S Ct 1029. See also Pen C §1240.1 (imposing a duty on trial counsel for indigent defendant to provide counsel and advice regarding appeal).

NOTE: An attorney who disregards specific instructions from a defendant to file a notice of appeal "acts in a professionally unreasonable manner." *Roe v Flores-Ortega* (2000) 528 US 470, 145 L Ed 2d 985, 120 S Ct 1029; see *U.S. v Sandoval-Lopez* (2005) 409 F3d 1193, 1197 (it is ineffective assistance of counsel for attorney to refuse to file notice of appeal when client tells attorney to do so, even if doing so would be contrary to plea agreement and harmful to client).

To show prejudice from counsel's deficient performance, defendant must demonstrate that but for counsel's failure to consult, defendant would have timely appealed. Defendant need not specify the points he or she would raise on appeal or show that an appeal might have been successful. *Roe v Flores-Ortega,* 528 US at 484, 145 L Ed 2d at 999.

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II. APPEALABLE JUDGMENTS AND ORDERS

§1.4 A. Questions Appealable by Prosecution and Defense

Both the defendant and the People in a criminal case have the right to appeal from a judgment or order as provided by statute. See §1.1. Except where a judgment of death has been rendered, an appeal from a judgment or order in a felony case is to the appellate district in which the court from which the appeal is taken is located. Cal Const art VI, §11; Pen C §1235(b); Cal Rules of Ct 8.304(a).

California Rules of Court 8.304-8.368 and 8.500-8.540 govern the procedural aspects of appeals in noncapital felony cases when those procedures differ from the procedures applicable in civil appeals. Otherwise, the rules of procedure applicable to civil appeals apply in criminal cases. See, *e.g.,* Cal Rules of Ct 8.360(a) ("briefs in criminal appeals must comply as nearly as possible with rules 8.200 and 8.204").

Appeals by the defendant are liberally construed in favor of validity (see, *e.g., People v Lavergne* (1971) 4 C3d 735, 745, 94 CR 405 (construing appeal from nonappealable order denying motion for new trial as appeal from judgment of conviction)), while the prosecution's right to appeal is strictly construed (*People v Williams* (2005) 35 C4th 817, 822, 28 CR3d 29). If the prosecution has not been granted a statutory right to appeal, it is entitled to seek review of any alleged error by petition for writ of mandate when (1) a trial court has acted in excess of its jurisdiction, and (2) the need for such review outweighs the risk of harassment of the accused. *People v Superior Court (Stanley)* (1979) 24 C3d 622, 625, 156 CR 626. See also *People v Superior Court (Jones)* (1998) 18 C4th 667, 679, 76 CR2d 641 (prosecution properly sought review of juvenile court's error at fitness proceeding by writ of mandate). For discussion of appealable orders and judgments, see §§1.5-1.33. For discussion of state court writs, see chaps 7-11.

Both prosecution and defense also have the right to appeal a judgment in a related civil proceeding. CCP §904.1. For example, a defendant who is committed as a controlled substance addict may separately challenge the conviction (Pen C §§1237(a), 1466(2)) and the commitment proceedings. For discussion of appealing controlled substance addiction commitment orders, see §1.10.

In addition to the issues a defendant may raise on appeal, an appellate court must also review all trial court rulings adverse to the prosecution on which the Attorney General requests a ruling to secure affirmance of the judgment or to resolve questions likely to arise on retrial. See Pen C §1252; *People v Braeseke* (1979) 25 C3d 691, 701, 159 CR 684, vacated and remanded sub nom *California v Braeseke* (1980) 446 US 932, 64 L Ed 2d 784, 100 S Ct 2147, reiterated (1980) 28 C3d 86, 168 CR 603; *People v Rowland* (1988) 206 CA3d 119, 253 CR 190. The prosecution may not use Pen C §1252 to seek review of issues that could have been, but were not, challenged in a timely People's appeal. *People v Braeseke*, 25 C3d at 698.

The court of appeal also has the inherent power to order correction of clerical errors on its own motion or at the request of a party. See *People v Mitchell* (2001) 26 C4th 181, 187, 109 CR2d 303 (when various fines and penalties imposed by trial court at sentencing were inadvertently omitted from abstract of judgment, court of appeal should have ordered correction of clerical error at prosecution's request, even though prosecution had not appealed and arguably did not have right to appeal error).

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B. Defendant's Appeals

1. Felony Cases

a. After Plea of Not Guilty

§1.5 (1) In General

In felony cases, a defendant is entitled to take an appeal from a final judgment of conviction after a trial held on a plea of not guilty, and from any order after judgment affecting his or her substantial rights. Pen C §1237(a)-(b). But see Pen C §1237.1 (no appeal from error in custody credits without attempt to correct error in trial court), discussed in §1.8. As used in Pen C §1237(a), the term "final judgment" includes a "sentence, an order granting probation, or the commitment of a defendant for insanity,… or the commitment of a defendant for controlled substance addiction," even when such an order would not be considered final for other purposes. See, *e.g., People v Superior Court (Giron)* (1974) 11 C3d 793, 796, 114 CR 596 (order granting probation); *Stephens v Toomey* (1959) 51 C2d 864, 338 P2d 182 (general discussion of finality of order of probation). In addition, the sole remedy of a defendant who is found ineligible for deferred entry of judgment (drug diversion) is a postconviction appeal. Pen C §1000(b); *Butler v Superior Court* (1998) 63 CA4th 64, 73 CR2d 504.

Appeals after plea of guilty or nolo contendere and appeals after probation revocation on admission of violation, are governed by Pen C §1237.5 and Cal Rules of Ct 8.304(b). For discussion, see §§1.11-1.15, 2.8.

NOTE: Under Cal Rules of Ct 8.204(a)(2)(B), appellant's opening brief must state that the appeal is from a final judgment or "explain why the order appealed from is appealable."

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.6 (2) Final Judgment of Conviction

§1.6 (2) Final Judgment of Conviction

On appeal from a final judgment of conviction following a jury trial, the defendant may challenge any errors occurring in the trial, the sufficiency of the evidence to support the judgment, the validity of the judgment, and the denial of a new trial motion. Pen C §§1237(a) (felony case), 1466 (misdemeanor or infraction case); *People v Gonzalez* (1996) 12 C4th 804, 822, 50 CR2d 74 (citing Pen C §1466); see *People v Lavergne* (1971) 4 C3d 735, 94 CR 405.

On appeal from the judgment, the appellate court may review prejudgment orders that may have affected the outcome of the case, including:

- Orders denying the defendant's request for appointment of counsel (*People v Williams* (1959) 174 CA2d 364, 345 P2d 47);
- Orders denying a defendant's motion to withdraw a guilty plea (*In re Brown* (1973) 9 C3d 679, 682, 108 CR 801, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301; *People v Brotherton* (1966) 239 CA2d 195, 197, 48 CR 513);
- Orders denying a motion in arrest of judgment (*People v McNamara* (1951) 103 CA2d 729, 230 P2d 411); and
- Orders denying a motion to suppress evidence under Pen C §1538.5 (*People v Smith* (1977) 67 CA3d 638, 643 n1, 136 CR 764).

CAUTION: While an order denying a motion to set aside an information under Pen C §995 is technically reviewable on an appeal from the judgment (see *People v Flores* (1974) 12 C3d 85, 89 n2, 115 CR 225), review of such orders should be sought before trial by filing a petition for a writ of prohibition (see Pen C §§999a, 1510). See §§7.34-7.39. On appeal, the court will not reverse a conviction based on the erroneous denial of a Pen C §995 motion unless the defendant establishes that he or she was deprived of a fair trial or otherwise suffered prejudice as a result of error at the preliminary hearing. *People v Pompa-Ortiz* (1980) 27 C3d 519, 165 CR 851; *People v Hampton* (1981) 116 CA3d 193, 172 CR 25.

When the defendant reasserts on appeal the claims previously raised in an unsuccessful new trial motion, the appellate court must independently review the record to determine whether prejudicial trial error occurred. *People v Ault* (2004) 33 C4th 1250, 1261, 17 CR3d 302.

In keeping with the liberal construction accorded the notice of appeal under California law (see Cal Rules of Ct 8.304(a)(4); *People v Robinson* (1954) 43 C2d 143, 271 P2d 872), when a defendant otherwise entitled to appeal his or her conviction files a notice of appeal from a nonappealable prejudgment order (*e.g.,* denial of a motion for a new trial), the reviewing court will treat the appeal as being from the judgment itself. *People v Lavergne* (1971) 4 C3d 735, 745, 94 CR 405. See also *People v Garrow* (1959) 176 CA2d 269, 1 CR 271 (notice of appeal purported to appeal from the verdict; court of appeal construed notice as appeal from judgment).

A defendant may not appeal the following court rulings:

- Denial of a Pen C §1168 motion to recall a state prison commitment. *People v Niren* (1978) 76 CA3d 850, 143 CR 130. However, the prisoner may appeal the denial of a motion to recall a state prison commitment initiated by the state Board of Prison Terms. *People v Herrera* (1982) 127 CA3d 590, 179 CR 694, disapproved on another ground in *People v Martin* (1986) 42 C3d 437, 451, 229 CR 131.
- Grant or denial of a challenge to the trial judge, whether peremptory (CCP §170.6) or for actual bias (CCP §170.1). Review must be sought by a petition for writ of mandate filed within 10 days of service of the order. CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 2 CR2d 526. See §7.24. The rule precluding appellate review of a disqualification motion applies only to a claim of statutory error. It does not foreclose appellate review of a claim that the defendant was denied his or her due process right to an impartial judge. *People v Brown* (1993) 6 C4th 322, 335, 24 CR2d 710.
- Grant or denial of writ of prohibition or mandate when the writ was sought in a case that would formerly have been within the jurisdiction of the municipal court. CCP §904.1(a)(1); *Andrus v Municipal Court* (1983) 143 CA3d

1041, 1045, 192 CR 341, overruled on another ground in *Evangelatos v Superior Court* (1988) 44 C3d 1188, 1208 n11, 246 CR 629. In such cases, the aggrieved party may seek writ relief in a higher court. CCP §904.1(a)(1).

- An order denying the defendant's motion to suppress evidence when the trial court subsequently grants the defendant deferred entry of judgment. Deferred entry of judgment is not a final judgment triggering the right to appeal. *People v Mazurette* (2001) 24 C4th 789, 792, 102 CR2d 555.

A defendant's Fourth Amendment challenge to the requirement that he or she comply with the DNA and Forensic Identification Database and Data Bank Act of 1998 (Pen C §§295-300.3) is also not cognizable on appeal from a judgment of conviction. *People v Dial* (2005) 130 CA4th 657, 30 CR3d 252.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.7 (3) Postjudgment Orders

§1.7 (3) Postjudgment Orders

Postjudgment orders that affect the substantial rights of a defendant are appealable. Pen C §1237(b). The following list provides a few examples:

- An order revoking probation, when an original sentence has been imposed and suspended. Pen C §1237(b); *People v Coleman* (1975) 13 C3d 867, 871 n1, 120 CR 384; *People v Vickers* (1972) 8 C3d 451, 453 n2, 105 CR 305.
- An order denying credit for time served in presentence confinement. But see Pen C §2900.5; *People v Culpepper* (1994) 24 CA4th 1134, 29 CR2d 719 (defendant must seek correction of error in trial court in first instance).
- An order denying a petition for writ of error coram nobis, unless the petition fails to state a prima facie case for relief or it raises issues that were or could have been raised in other proceedings. *People v Gallardo* (2000) 77 CA4th 971, 980, 92 CR2d 161; *People v Chaklader* (1994) 24 CA4th 407, 29 CR2d 344 (citing text).

Substantial rights do not include rights that could have been, but were not, reviewed on a timely appeal from the judgment. *People v Howerton* (1953) 40 C2d 217, 253 P2d 8. Moreover, a postjudgment order denying a petition for writ of habeas corpus is not appealable. *People v Garrett* (1998) 67 CA4th 1419, 79 CR2d 803 (appeal from superior court denial of habeas corpus petition dismissed; purported appeal treated as writ petition in court of appeal). But see *People v Gallardo* (2000) 77 CA4th 971, 976, 92 CR2d 161 (treating purported appeal as writ petition, but warning litigants that court would not be "as accommodating" in future).

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§1.8 (4) Sentence

A sentence is considered a final judgment, and is therefore appealable by the defendant. Pen C §1237(a). For rules governing appeal of sentence following guilty plea, see §§1.11, 1.14. Because of the complexities of California's felony sentencing laws, and the legislature's frequent amendments, additions, and deletions of sentencing provisions, sentencing errors are among the most common errors found on appeal. Counsel should carefully examine the process by which the client's sentence was determined and, if an error was made, seek reversal of the judgment and correction of the sentence.

In *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, the United States Supreme Court held California's Determinate Sentencing Law unconstitutional under the Sixth and Fourteenth Amendments insofar as it permitted upper-term sentences to be based on facts found by the sentencing judge by a preponderance of the evidence rather than on facts found by the jury beyond a reasonable doubt. Following *Cunningham,* the legislature amended Pen C §1170(b) and the Judicial Council amended the California Rules of Court. The amendments remove most references to "upper," "middle," and "lower" terms. Rather than considering "facts" to elevate the middle term, the sentencing court is now directed to use its "sound discretion" to select one of the "three possible terms." Pen C §1170(b); Cal Rules of Ct 4.420. The court must set forth its reasons for imposing any "term selected." Pen C §1170(b).

NOTE: In a case in which the trial and sentencing took place before the decision in *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531, the defendant's Sixth Amendment claim is not forfeited on appeal even if no objection was made in the trial court. *People v Black* (2007) 41 C4th 799, 810, 62 CR3d 569 (*Black II*); *People v Sandoval* (2007) 41 C4th 825, 837 n4, 62 CR3d 588. However, when a successful *Cunningham* claim is raised on appeal, any sentencing proceedings on remand must be conducted in accordance with the "new" sentencing rules; doing so does not deny due process or violate ex post facto laws. *People v Sandoval* (2007) 41 C4th 825, 853, 62 CR3d 588. Furthermore, the upper-term sentence may be imposed when at least one aggravating factor has been found by the jury beyond a reasonable doubt, even if the judge engaged in additional fact finding when deciding on the upper-term sentence. *People v Black* (2007) 41 C4th 799, 812, 62 CR3d 569 (*Black II*). For more discussion of felony sentencing after *Cunningham,* see California Criminal Law Procedure and Practice, chap 37 (Cal CEB Annual).

Sentencing errors involving a trial court's failure to properly make or articulate its discretionary sentencing choices are forfeited on appeal absent a timely objection in the trial court. *People v Scott* (1994) 9 C4th 331, 356, 36 CR2d 627. By contrast, an "unauthorized sentence" is subject to judicial correction whenever the error comes to the attention of the trial or reviewing court. *People v Smith* (2001) 24 C4th 849, 852, 102 CR2d 731. "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." 9 C4th at 354. See, *e.g.*, *People v Smith* (2001) 24 C4th 849, 102 CR2d 731 (invalid parole revocation fine could be corrected on appeal because it presented pure question of law); *People v Guiffre* (2008) 167 CA4th 430, 434, 84 CR3d 165 (erroneously imposed second restitution fine corrected on appeal).

NOTE: If the improper calculation of presentence custody credits is the sole issue raised on appeal, appellant must first present the claim to the trial court, either at sentencing or afterward by motion for correction, if the error was not discovered until after sentencing. Pen C §1237.1. However, Pen C §1237.1 does not require the defendant to file a motion for corrections in the trial court when the error in calculating custody credits is not the only error to be argued on appeal. *People v Acosta* (1996) 48 CA4th 411, 55 CR2d 675.

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§1.9 (5) Probation Orders

Order granting or denying probation. A trial court may grant probation either by pronouncing judgment and staying the *execution* of sentence (also known as a "conditional sentence") or by suspending the proceedings before the pronouncement of judgment or *imposition* of sentence. Pen C §1203(a). In the first instance, the trial court's action is a final judgment for all purposes. In the second instance, the order granting probation is considered a final judgment for purposes of appeal but not for other purposes. Pen C §1237(a); *People v Cook* (1975) 13 C3d 663, 666 n1, 119 CR 500, disapproved on other grounds by *People v Doolin* (2009) 45 C4th 390, 419, 87 CR3d 209; *People v Flores* (1974) 12 C3d 85, 93, 115 CR 225.

An order denying probation is not directly appealable, but it may be challenged on appeal from the judgment. Pen C §1237(a).

Order revoking or modifying probation. When a trial court suspends the proceedings and grants probation without pronouncing judgment, it retains full sentencing discretion when revoking probation. *People v Howard* (1997) 16 C4th 1081, 1087, 68 CR2d 870. If the trial court sentences the defendant and enters judgment in conjunction with terminating probation, the date of the order imposing sentence, not the date on which probation began, governs the time for appealing the sentence. *People v Simon* (1983) 144 CA3d 761, 193 CR 28. The order revoking probation is not directly appealable, but may be reviewed in an appeal from the judgment. See Pen C §1237(a); *People v Robinson* (1954) 43 C2d 143, 145, 271 P2d 872; *People v Smith* (1970) 12 CA3d 621, 624 n1, 90 CR 811.

When the judge pronounces sentence and then suspends its execution, the court loses power to modify the sentence if it later terminates probation. The court's power is limited to ordering that exact sentence into effect. Pen C §1203.2(c); Cal Rules of Ct 4.435(b)(2); *People v Howard* (1997) 16 C4th 1081, 1088, 68 CR2d 870. In this situation, an order revoking probation is an order after judgment that can be directly appealed. Pen C §1237(b); *People v Vickers* (1972) 8 C3d 451, 453 n2, 105 CR 305.

CAUTION: In neither situation does a notice of appeal from the judgment or order revoking probation entitle a defendant who has not appealed the original judgment or order granting probation to obtain review of issues that could have been but were not raised at the time of entry of judgment or order of probation. *People v Ramirez* (2008) 159 CA4th 1412, 1421, 72 CR3d 340.

A defendant may move to modify or terminate probation before probation ends. Pen C §§1203.3-1203.4. Denial of such a motion is an appealable order. *People v Romero* (1991) 235 CA3d 1423, 1 CR2d 468. An order improperly modifying probation is also appealable. Pen C §1237(b); *In re Bine* (1957) 47 C2d 814, 306 P2d 445.

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§1.10 (6) Commitment Orders

Depending on the circumstances of its issuance, an order of civil commitment may be a final judgment or an order after judgment. A commitment under Pen C §1026.5(a) after a defendant has been found not guilty by reason of insanity is considered a final judgment under Pen C §1237(a). *People v Wetmore* (1978) 22 C3d 318, 323, 149 CR 265. Penal Code §1026.5(b) establishes a procedure for extending the period of commitment authorized by Pen C §1026.5(a) in 2-year increments. A civil commitment under Pen C §1026.5(b) is appealable as an order after judgment. See Pen C §1237(b); CCP §904.1(a)(2). A finding of competence to stand trial is not appealable as a final judgment. *People v Lawson* (1918) 178 C 722, 174 P 885.

The commitment of a person found to be a sexually violent predator under the Sexually Violent Predator Act (SVPA) (Welf & I C §§6600-6609.3) is generally considered to be appealable as an order after judgment. See Pen C §1237(b); CCP §904.1(a)(2).

The commitment of a defendant to the California Rehabilitation Center (CRC) for controlled substance addiction (Welf & I C §§3050-3051) is deemed to be a final judgment and therefore appealable. Pen C §1237(a). There are two methods for appealing such a commitment order: (1) a review of the conviction and errors in the criminal trial (Pen C §1237(a)), and (2) a review of errors in the civil commitment proceedings following conviction (CCP §904.1(b)).

No appeal lies from a subsequent nonjudicial order of the Director of Corrections excluding a defendant from the CRC under Welf & I C §3053. Review of these orders for abuse of discretion is available in the trial court, on the return of the defendant for resumption of the criminal proceedings and in the court of appeal after an adverse judgment. *People v Ramirez* (1979) 25 C3d 260, 265, 158 CR 316.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/ b. After Plea of Guilty or Nolo Contendere/§1.11 (1) Scope of Appellate Review

b. After Plea of Guilty or Nolo Contendere

§1.11 (1) Scope of Appellate Review

A guilty plea (or a plea of nolo contendere) is an admission of every element of the crime. For that reason, errors that concern the question of a defendant's guilt or innocence are waived by a guilty plea and cannot be reviewed on appeal. *People v Jones* (1995) 10 C4th 1102, 1109, 43 CR2d 464, disapproved on another ground in *In re Chavez* (2003) 30 C4th 643, 656, 134 CR2d 54, citing *People v DeVaughn* (1977) 18 C3d 889, 895, 135 CR 786. See also *People v Kaanehe* (1977) 19 C3d 1, 8, 136 CR 409. The range of appealable issues is very narrow: "review is instead limited to issues going to the jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea. [Citations.]" *People v Hoffard* (1995) 10 C4th 1170, 1178, 43 CR2d 827. "Claims of error in postplea proceedings to determine punishment are also cognizable." *People v Jones* (1995) 10 C4th 1102, 1109, 43 CR2d 464; see *People v Miller* (2006) 145 CA4th 206, 212, 51 CR3d 421 (defendant who pled no contest was allowed to appeal sentence without obtaining certificate of probable cause because plea agreement left sentence open to trial court; thus claim of sentencing error did not amount to attack on plea's validity).

NOTE: When a defendant charged with a felony takes advantage of the process under Pen C §859a that authorizes a magistrate to accept a guilty or no contest plea and then certify the case to the superior court after pronouncement of judgment, the defendant may not thereafter challenge on appeal the magistrate's pre-plea denial of any defense motions to suppress under Pen C §1538.5 or to dismiss under Pen C §995. *People v Richardson* (2007) 156 CA4th 574, 67 CR3d 552.

A defendant must obtain a certificate of probable cause from the trial court in order to appeal any issue other than the denial of a motion to suppress evidence under Pen C §1538.5 or an error that occurred after the entry of the plea that does not challenge its validity. Pen C §1237.5; Cal Rules of Ct 8.304(b). The requirement of a certificate of probable cause cannot be waived by the court. *People v Mendez* (1999) 19 C4th 1084, 1098, 81 CR2d 301; *People v Thurman* (2007) 157 CA4th 36, 41, 68 CR3d 425. For discussion of the certificate of probable cause requirement, see §§1.12, 2.8. If the defendant alleges that he or she is raising a noncertificate issue, and the appeal goes forward without a certificate of probable cause, defendant may not raise additional claims on appeal that do require a certificate. *People v Mendez* (1999) 19 C4th 1084, 1104, 81 CR2d 301.

Note that this requirement is limited to felony cases and to uncontested revocations of probation. Pen C §1237.5. A certificate of probable cause is not required to appeal from:

- Judgments of conviction in misdemeanors and infractions. These convictions are governed by Pen C §1466, which does not require a certificate of probable cause. *People v Woods* (1978) 84 CA3d 149, 154, 148 CR 312.
- A plea of not guilty by reason of insanity. Though it admits the act elements of the offense, it is not a guilty plea; no certificate of probable cause is required to appeal a conviction following an insanity plea. *People v Wagoner* (1979) 89 CA3d 605, 609, 152 CR 639.
- Juvenile court proceedings. A minor who has admitted the allegations in a Welf & I C §602 petition is not required to secure a certificate of probable cause to obtain appellate review of juvenile court proceedings. *In re Joseph B.* (1983) 34 C3d 952, 955, 196 CR 348.

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§1.12 (2) Certificate of Probable Cause Requirement

Penal Code §1237.5 and Cal Rules of Ct 8.304(b) set forth the requirements for obtaining a certificate of probable cause. To obtain a certificate of probable cause, the defendant must file with the trial court both a notice of appeal and a written statement showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. Cal Rules of Ct 8.304(b). The statement must be signed and made under oath or penalty of perjury. Pen C §1237.5; Cal Rules of Ct 8.304(b). The trial court has 20 days from the date on which the statement is filed to issue or deny the certificate. Pen C §1237.5; Cal Rules of Ct 8.304(b)(2). The trial court must certify any arguably meritorious appeal. Pen C §1237.5; *People v Holland* (1978) 23 C3d 77, 84, 151 CR 625, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301.

Under former Rule 31(d), which Cal Rules of Ct 8.304(b) replaced, the application for a certificate of probable cause was the equivalent of a notice of appeal in a case requiring a certificate, and like any other notice of appeal, it had to be filed within 60 days of the judgment. Under Rule 8.304(b), the certificate request and the notice of appeal are not the same document and may be filed separately. See *Drake v Superior Court* (2009) 175 CA4th 1462, 1465, 97 CR3d 323. The new rule mentions no deadline for filing the application for a certificate of probable cause; it appears that 8.304(b)(1) sets out *what* is to be included in defendant's filings, not *when* the materials are to be filed. *Drake,* 175 CA4th at 1465; Cal Rules of Ct 8.304(b). However, Cal Rules of Ct 8.308(a) gives criminal defendants 60 days to file "a notice of appeal and any statement required by Pen C §1237.5." See also *Drake, supra*. On constructive filing, see *In re Benoit* (1973) 10 C3d 72, 109 CR 785, discussed in §2.7.

Once a certificate of probable cause has been obtained, the appeal is not limited to the issues specified in the certificate; as long as the defendant obtains certification of one nonfrivolous issue, he or she may raise other issues in the opening brief. *People v Hoffard* (1995) 10 C4th 1170, 43 CR2d 827. However, those issues still must be ones that are cognizable on an appeal after a defendant has pleaded guilty. *People v Hoffard* (1995) 10 C4th 1170, 1178, 43 CR2d 827; *People v Marlin* (2004) 124 CA4th 559, 566, 21 CR3d 470 (challenge to conviction for second-degree murder of fetus on federal constitutional grounds foreclosed by guilty plea because plea amounts to admission of every element of crime).

If the certificate is denied, the defendant's only remedy is to file a petition for writ of mandate to review the trial court's decision. *In re Brown* (1973) 9 C3d 679, 683, 108 CR 801, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301; *People v Nigro* (1974) 39 CA3d 506, 114 CR 213. See §7.29. On petitions for mandate generally, see §§7.16-7.31. In reviewing a court's refusal to issue a certificate, the applicable probable cause standard is whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion, not whether there was probable ground for reversal of the judgment. *People v Ribero* (1971) 4 C3d 55, 63 n4, 92 CR 692.

Effective representation may require trial counsel to assist the defendant in applying for a certificate of probable cause if there are arguable grounds for appeal or if trial counsel is aware that the defendant desires to appeal. See *Roe v Flores-Ortega* (2000) 528 US 470, 480, 489, 145 L Ed 2d 985, 120 S Ct 1029 (discussing constitutional dimension of trial counsel's duty to consult with defendant about appeal). See also *People v Santos* (1976) 60 CA3d 372, 376, 131 CR 426, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301. Although the requirement of a certificate of probable cause cannot be waived by the court (*People v Mendez* (1999) 19 C4th 1084, 1098, 81 CR2d 301; *People v Thurman* (2007) 157 CA4th 36, 41, 68 CR3d 425), counsel's failure to secure a certificate of probable cause may constitute constitutionally ineffective assistance that allows the appellate court to excuse the procedural bar and reach the merits of the claim. See, *e.g., People v Bautista* (2005) 129 CA4th 1431, 1435, 29 CR3d 272. For further discussion of counsel's duty, see §1.3.

Judicial Council Form CR-120, reproduced in §2.31, may be filed as the notice of appeal and the request for a certificate of probable cause. Attorneys who prefer to draft their own forms may use the sample forms reproduced in §§2.33-2.35 as a model for requesting a certificate of probable cause.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.13 (3) Issues That Require Certificate of Probable Cause

§1.13 (3) Issues That Require Certificate of Probable Cause

Examples of issues going to the legality of the proceedings, which a defendant may appeal by obtaining a certificate of probable cause, include:

- The constitutionality of the statute of conviction (*People v Green* (1991) 227 CA3d 692, 278 CR 140);
- A claim that a plea was induced by misrepresentations of a fundamental nature (*People v DeVaughn* (1977) 18 C3d 889, 896, 135 CR 786);
- A claim of discriminatory prosecution as described in *Murgia v Municipal Court* (1975) 15 C3d 286, 124 CR 204 (*People v Moore* (2003) 105 CA4th 94, 129 CR2d 84);
- A claim that defendant was mentally incompetent when the plea was entered (*People v Laudermilk* (1967) 67 C2d 272, 282, 61 CR 644);
- A claim of procedural irregularity in obtaining defendants' admission to an enhancement. (*People v Fulton* (2009) 179 CA4th 1230, 1237, 102 CR3d 229);
- A claim that defendant received inadequate warning of the effect of a guilty plea on the right to appeal (*People v Kaanehe* (1977) 19 C3d 1, 8, 136 CR 409);
- The denial of a motion to withdraw a plea of guilty or nolo contendere (*People v Ribero* (1971) 4 C3d 55, 63, 92 CR 692); and
- Defects in the hearing on defendant's motion to withdraw a plea (*People v Johnson* (2009) 47 C4th 668, 101 CR3d 332; *People v Brown* (2010) 181 CA4th 356, 104 CR3d 528).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.14 (4) Issues Appealable Without Certificate of Probable Cause

§1.14 (4) Issues Appealable Without Certificate of Probable Cause

The most important exceptions to the certificate of probable cause requirement are for appeals based solely on grounds that (Cal Rules of Ct 8.304(b)(4)):

- Occur after entry of the plea and do not challenge its validity; or
- Involve a search or seizure that was contested under Pen C §1538.5.

A notice of appeal filed without a certificate of probable cause must state that the appeal is based on one of the issues that does not require a certificate (*People v Panizzon* (1996) 13 C4th 68, 75, 51 CR2d 851), but the courts will construe the notice of appeal liberally. See *People v Lloyd* (1998) 17 C4th 658, 665, 72 CR2d 224 (notice of appeal from "sentence" sufficiently identifies grounds for appeal); *People v Jones* (1995) 10 C4th 1102, 1110, 43 CR2d 464, disapproved on another ground in *In re Chavez* (2003) 30 C4th 643, 656, 134 CR2d 54 (former Rule 31(d) did not restrict appeal to noncertificate grounds specified in notice of appeal). Note, however, that in *People v McEwan* (2007) 147 CA4th 173, 178, 54 CR3d 86, when the defendant filed a notice of appeal raising only an issue going to the validity of the plea, the court of appeal denied the defendant's request to construe or amend the notice to include a noncertificate ground when nothing in the appellate record indicated that the appellant intended to appeal on noncertificate grounds.

Although the principal event that occurs after the plea is the imposition of sentence, case law establishes that in some circumstances an appeal from the sentence requires a certificate of probable cause. For example, a challenge to a specified term of years imposed as part of a negotiated plea agreement is an attack on the validity of the plea itself and requires a certificate of probable cause. *People v Panizzon* (1996) 13 C4th 68, 73, 51 CR2d 851. See also *People v Navarro* (2008) 161 CA4th 1100, 1104, 74 CR3d 828 (challenge to imposition of 10-year gang enhancement as part of plea agreement required certificate of probable cause); *People v Sturns* (2000) 77 CA4th 1382, 92 CR2d 547, disapproved on another ground in *In re Chavez* (2003) 30 C4th 643, 657 n6, 134 CR2d 54 (challenge to prior conviction as a "strike" under Three Strikes Law (Pen C §1170.12) admitted as part of plea agreement, required certificate of probable cause); *People v Young* (2000) 77 CA4th 827, 829, 91 CR2d 916 (challenge to imposition of agreed upon maximum sentence as cruel and unusual punishment required certificate of probable cause).

"[T]he critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." *People v Panizzon* (1996) 13 C4th 68, 76, 51 CR2d 851. See also *People v Hernandez* (2008) 166 CA4th 641, 83 CR3d 29, disapproved on other grounds in *People v Picklesimer* (Mar. 15, 2010, S165680) 2010 Cal Lexis 1893 (equal protection challenge to mandatory sex offender registration was not attack on validity of plea and did not require certificate of probable cause); *People v Oglesby* (2008) 158 CA4th 818, 70 CR3d 443 (challenge to court's failure to hold second competency hearing before sentencing was challenge to procedure, not validity of plea); *People v Brown* (2007) 147 CA4th 1213, 1220, 54 CR3d 887 (appeal to enforce terms of negotiated plea agreement or permit withdrawal of plea not an attack on validity of plea); *People v Vera* (2004) 122 CA4th 970, 978, 18 CR3d 896 (as a general rule, challenge to denial of postplea *Marsden* motion does not implicate validity of plea).

When a plea agreement specifies a sentencing range or maximum sentence (as opposed to a specified term of years), a defendant may challenge the trial court's *exercise of discretion* in selecting a sentence within that range without obtaining a certificate of probable cause. *People v Buttram* (2003) 30 C4th 773, 785, 134 CR2d 571. See also *People v Miller* (2006) 145 CA4th 206, 214, 51 CR3d 421 (when plea agreement left question concerning scope of sentencing discretion to trial court's resolution, defendant could appeal court's unfavorable resolution of question without first obtaining certificate of probable cause). The defendant may also raise a claim of postplea *Cunningham* error without obtaining a certificate of probable cause where the plea agreement does not specify a term of years. *People v French* (2008) 43 C4th 36, 43, 73 CR3d 605.

By contrast, a defendant's challenge to the trial court's *legal authority* to impose the maximum sentence (for example under Pen C §654), implicates the validity of the plea and requires a certificate. *People v Cuevas* (2008) 44 C4th 374,

384, 79 CR3d 303; *People v Shelton* (2006) 37 C4th 759, 769, 37 CR3d 354. A plea bargain that specifies the maximum sentence the court can impose "implies a mutual understanding and agreement that the trial court has authority to impose the specified maximum sentence and preserves only the defendant's right to urge that the trial court should or must exercise its discretion in favor of a shorter term." *People v Shelton*, 37 C4th at 763.

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§1.15 (5) Waiver of Right to Appeal

As part of a negotiated plea agreement, a defendant can validly waive the right to appeal issues that would otherwise be cognizable following the plea. The waiver must be knowing, voluntary, and intelligent. *People v Panizzon* (1996) 13 C4th 68, 80, 51 CR2d 851; *People v Kelly* (1994) 22 CA4th 533, 27 CR2d 383; *People v Castrillon* (1991) 227 CA3d 718, 278 CR 121; *People v Charles* (1985) 171 CA3d 552, 217 CR 402.

Depending on its terms, a general waiver of the right to appeal may not include within its scope subsequent sentencing errors that were unforeseen or unknown at the time of the waiver. *People v Vargas* (1993) 13 CA4th 1653, 17 CR2d 445; *People v Sherrick* (1993) 19 CA4th 657, 24 CR2d 25. See, *e.g., People v Brandt* (1987) 191 CA3d 143, 236 CR 258 (trial court's failure to state reasons for its sentence choice). However, an explicit waiver in a plea agreement of the right to appeal the sentence may be deemed an enforceable waiver, if it was knowing, voluntary, and intelligent. *People v Panizzon* (1996) 13 C4th 68, 84, 51 CR2d 851. But see *People v Orozco* (2010) 180 CA4th 1279, 103 CR3d 646 (appellate waiver does not bar ineffective assistance of counsel claim in connection with defendant's entry into the plea bargain and waiver agreement); *People v Rosso* (1994) 30 CA4th 1001, 1006, 36 CR2d 218 (oral waiver of right to appeal not effective; record contained no evidence that defendant understood appeal rights and no written waiver).

Even absent an explicit waiver of the right to appeal, a defendant may be estopped from raising certain sentencing errors (such as application of Pen C §654) by agreeing to a specified sentence as part of the negotiated plea. See Cal Rules of Ct. 4.412(b); *People v Hester* (2000) 22 C4th 290, 295, 92 CR2d 641; *People v Ramirez* (2008) 159 CA4th 1412, 1427, 72 CR3d 340.

NOTE: Waiver as used here denotes the intentional relinquishment of a known right. *Johnson v Zerbst* (1938) 304 US 458, 464, 82 L Ed 1461, 1466, 58 S Ct 1019. A defendant who has not waived the right to appeal following a trial or a guilty plea may still forfeit certain issues on appeal by inviting the error (see *Lorenzana v Superior Court* (1973) 9 C3d 626, 640, 108 CR 585) or by failing to lodge a timely objection in the trial court (see Evid C §353(a)). See also *People v Marks* (2003) 31 C4th 197, 228, 2 CR3d 252; *People v Rodriguez* (1998) 17 C4th 253, 262, 70 CR2d 334; *People v Galindo* (2006) 142 CA4th 531, 537, 48 CR3d 241. On the distinction between "waiver" and "forfeiture," see §4.26. For a detailed discussion of forfeiture and invited error, see §§4.28-4.29. When trial counsel has forfeited or invited an error, the defendant's recourse is generally a claim of ineffective assistance of counsel. See §4.34.

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2. Misdemeanor and Infraction Cases

§1.16 a. In General

The defendant may take an appeal from a judgment or order in a misdemeanor or infraction case to the appellate division of the superior court of the county in which the court from which the appeal is taken is located. Cal Const art VI, §11(b); Pen C §1466. Misdemeanor and infraction appeals are governed by Cal Rules of Ct 8.800-8.816, 8.850-8.929.

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§1.17 b. Pretrial

The defendant in a misdemeanor or infraction case has a pretrial right to appeal the denial of a Pen C §1538.5 motion to suppress evidence to the appellate division of the superior court. Pen C §1538.5(j).

NOTE: A defendant in a felony case has no comparable right of appeal from the superior court's denial of a §1538.5 motion; the only pretrial remedy in a felony case is a petition for writ of mandate to the court of appeal. Pen C §1538.5(i). For discussion of writs of mandate, see chaps 7-8.

The motion to suppress evidence must have been grounded on a claim that the search or seizure was unlawful under the state or federal constitution or a specific statute. Motions to exclude evidence under Evid C §402 (lack of foundation) and common law suppression motions based on other constitutional violations may not be appealed before trial. *People v Superior Court (Scott)* (1980) 112 CA3d 602, 169 CR 412. See also *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 661, 117 CR 20 (pretrial writ will not lie to challenge trial court's rulings on admission of evidence).

NOTE: A misdemeanor defendant who appeals the denial of the Pen C §1538.5 motion before trial is entitled to bail of right; the trial court has discretion to release the defendant on his or her own recognizance and to stay the trial during the pendency of the appeal. Pen C §1538.5(*l*).

A defendant in a misdemeanor or infraction case may not, however, appeal the grant or denial of a writ of prohibition or mandate. CCP §904.1(a)(1); *Andrus v Municipal Court* (1983) 143 CA3d 1041, 192 CR 341, overruled on another ground in *Evangelatos v Superior Court* (1988) 44 C3d 1188, 1208 n11, 246 CR 629. Relief may be sought by filing a petition for extraordinary relief in a higher court. CCP §904.1(a)(1). See §8.77.

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§1.18 c. Posttrial

Like a defendant in a felony case, a defendant in a misdemeanor or infraction case may appeal from:

- A final judgment of conviction (including a sentence, an order granting probation, and a conviction in a case in which, before final judgment, the defendant is committed for insanity or controlled substance addiction); or
- Any postjudgment order affecting the defendant's substantial rights.

Pen C §1466(2).

No certificate of probable cause is required when appealing misdemeanor or infraction convictions after a plea of guilty or nolo contendere. *People v Woods* (1978) 84 CA3d 149, 154, 148 CR 312. For discussion of certificates of probable cause, see §1.12. The scope of the appeal is, however, limited by the plea to issues "based on constitutional, jurisdictional, or other grounds going to the legality of the proceedings." *People v Komatsu* (1989) 212 CA3d Supp 1, 6, 261 CR 681. For discussion of cognizable issues in guilty plea appeals, see §§1.13-1.14.

For forms for misdemeanor appeals, see California Criminal Law Forms Manual, chap 43 (2d ed Cal CEB 2005).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/ C. Prosecution Appeals/ 1. Felony Cases/§1.19 a. Scope of Appeal

C. Prosecution Appeals

1. Felony Cases

§1.19 a. Scope of Appeal

In contrast to the broad scope of a defendant's appeal from the judgment, which permits the reviewing court to consider virtually every aspect of the trial that could have affected the outcome, the prosecution's right to appeal is limited by the terms of Pen C §1238, the statutory provision authorizing the prosecution to appeal in criminal cases. See, *e.g., People v Douglas* (1999) 20 C4th 85, 89, 82 CR2d 816; *People v Smith* (1983) 33 C3d 596, 600, 189 CR 862; *People v Superior Court (Maldonado)* (2006) 137 CA4th 353, 362, 40 CR3d 365. Penal Code §1238 lists 11 categories of orders and judgments that are appealable by the prosecution, and courts have rebuffed attempts by the prosecution to appeal unspecified orders, even when the trial court has made an obvious error. See, *e.g.*, *People v Williams* (2005) 35 C4th 817, 822, 28 CR3d 29; *People v Superior Court (Howard)* (1968) 69 C2d 491, 499, 72 CR 330. Appealable orders and judgments include:

- An order setting aside an indictment, information, or complaint;
- An order sustaining a demurrer;
- An order granting a new trial;
- An order arresting judgment;
- An order after judgment affecting the substantial rights of the people;
- An order reducing the degree of the offense, reducing the punishment, or modifying the offense to a lesser offense;
- An order dismissing a case before trial based on an order granting a Pen C §1538.5 motion to return or suppress evidence;
- An order or judgment terminating all or any portion of the action;
- An order denying a motion by the prosecution to reinstate a complaint after dismissal by the magistrate (see Pen C §871.5);
- The imposition of a sentence not authorized by law; and
- An order recusing the district attorney.

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§1.20 b. Order Setting Aside Indictment or Information

Under Pen C §995, an indictment and an information must be set aside if it is not supported by "reasonable or probable cause." See *Cummiskey v Superior Court* (1992) 3 C4th 1018, 13 CR2d 551 (discussing quantum of proof necessary to uphold indictment); *Rideout v Superior Court* (1967) 67 C2d 471, 474, 62 CR 581 (discussing quantum of proof necessary to uphold information).

The prosecution is entitled to appeal an order setting aside all or any portion of an indictment, information, or complaint. Pen C §1238(a)(1). See, *e.g., People v Superior Court* (*Engert)* (1982) 31 C3d 797, 183 CR 800 and *People v Bolter* (2001) 90 CA4th 240, 108 CR2d 760 (appeal from order setting aside special circumstance); *People v McClaurin* (2006) 137 CA4th 241, 246, 39 CR3d 887 (appeal from order directing specific performance of plea agreement that had effect of setting aside one or more counts of information or complaint); *Ervin v Superior Court* (1981) 119 CA3d 78, 173 CR 208 (appeal from order setting aside sentencing enhancement); *People v Fraijo* (1977) 78 CA3d 977, 144 CR 424 (appeal from order setting aside some, but not all, counts of multicount information). When there is a partial dismissal of the information, appeal may not be an adequate remedy, however. Under such circumstances, the appellate court has discretion to entertain an extraordinary writ of mandate in order to avoid multiple trials involving the same facts. *People v Superior Court* (*Caudle*) (1990) 221 CA3d 1190, 1192, 270 CR 751.

NOTE: Penal Code §1238(a)(1) does not allow the prosecution to appeal a magistrate's determination at a preliminary hearing that a "wobbler" is a misdemeanor rather than a felony. *People v Williams* (2005) 35 C4th 817, 831, 28 CR3d 29. However, the *Williams* court noted that writ review of the order may be available. 35 C4th at 833.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.21 c. Order Sustaining Demurrer

§1.21 c. Order Sustaining Demurrer

The prosecution is entitled to appeal an order sustaining a demurrer to all or any portion of the indictment, accusation, or information. Pen C §1238(a)(2). When the magistrate at the preliminary hearing binds the defendant over for trial and the trial court sustains a demurrer, Pen C §1238(a)(2) unquestionably permits the prosecution to appeal the order. It would appear that the language of the provision authorizing the prosecution to appeal an order sustaining a demurrer to any portion of the *accusation* would authorize the prosecution to appeal the order of a magistrate sustaining a demurrer. See *In re Geer* (1980) 108 CA3d 1002, 1009, 166 CR 912 (magistrate has inherent power to hear and rule on demurrer and to dismiss complaint if amendment will not cure defect). However, in *People v Mimms* (1988) 204 CA3d 471, 251 CR 672, the court of appeal held that the prosecutor could not directly challenge a magistrate's order sustaining a demurrer and dismissing a felony complaint, but instead was required to make a Pen C §871.5 motion in superior court to reinstate the complaint.

NOTE: In a situation in which the prosecution has the option of refiling the charges after a dismissal, the prosecution is not required to elect between appealing the dismissal and refiling until the defendant has been arraigned on the new pleading or the new pleading has withstood a Pen C §995 challenge. *Anderson v Superior Court* (1967) 66 C2d 863, 867, 59 CR 426.

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§1.22 d. Order Granting New Trial

The prosecution is entitled to appeal an order granting the defendant a new trial. Pen C §1238(a)(3); *People v Daniels* (1975) 14 C3d 857, 122 CR 872. See also *People v Chavez* (1996) 44 CA4th 1144, 52 CR2d 347. However, as the court of appeal pointed out in *People v Andrade* (2000) 79 CA4th 651, 654, 94 CR2d 314, the granting of a new trial motion is entrusted to the trial court's discretion, and an appellate attack on its exercise of discretion "is a 'daunting task,' and an 'uphill battle.'" See also *People v Ault* (2004) 33 C4th 1250, 1263, 17 CR3d 302 (trial court's order granting new trial will not be disturbed if fairly debatable, even if reviewing court itself, addressing issues de novo, would not have found basis for reversal). But see *People v Masotti* (2008) 163 CA4th 504, 77 CR3d 483 (trial court had no jurisdiction to grant motion for new trial on ground not raised by defendant).

Because an order granting a new trial motion is an interim order, the trial court retains jurisdiction to reconsider it before judgment. *People v DeLouize* (2004) 32 C4th 1223, 13 CR3d 302. Once the People file an appeal from the granting of a new trial motion, the appeal divests the trial court of jurisdiction to proceed with a second trial until the case is finally decided by the appellate court. *People v Sonoqui* (1934) 1 C2d 364, 35 P2d 123; *People v Saunoa* (2006) 139 CA4th 870, 43 CR3d 287; *People v Superior Court (Miller)* (1956) 140 CA2d 510, 295 P2d 464.

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§1.23 e. Order Arresting Judgment

The prosecution is entitled to appeal an order arresting judgment. Pen C §1238(a)(4). Penal Code §1185 defines a motion in arrest of judgment as:

> [A]n application on the part of the defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict against the defendant, on a plea of a former conviction, former acquittal or once in jeopardy. It may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced.

It appears that this provision is seldom invoked, possibly because many of the grounds on which a motion in arrest of judgment can be made are forfeited if not presented before trial. See, *e.g., People v Jennings* (1991) 53 C3d 334, 357, 279 CR 780; *People v Polowicz* (1992) 5 CA4th 1082, 7 CR2d 640.

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§1.24 f. Postjudgment Order Affecting Substantial Rights of Prosecution

The prosecution is entitled to appeal postjudgment orders affecting its substantial rights. Pen C §1238(a)(5). This provision authorizes appeals from a wide variety of orders, including:

- An order denying the prosecution's motion to vacate the granting of a certificate of rehabilitation on the ground that the certificate was void. *Sovereign v People* (1983) 144 CA3d 143, 192 CR 469, overruled on another ground in *People v Ansell* (2001) 25 C4th 868, 893, 108 CR2d 145; *Daudert v People* (1979) 94 CA3d 580, 156 CR 640.
- An order granting credit for time served that reduces the defendant's sentence (Pen C §§2900.5, 4019). *People v Minjarez* (1980) 102 CA3d 309, 162 CR 292.
- An order staying sentence under Pen C §654 on one count and imposing sentence or granting probation on another count, if the effect is to reduce punishment. *People v Perez* (1979) 23 C3d 545, 549 n2, 153 CR 40.
- An order made after a grant of probation declaring a "wobbler" offense to be a misdemeanor. *People v Douglas* (1999) 20 C4th 85, 82 CR2d 816 (suggesting that because prosecution appeal under Pen C §1238.5(a)(5) from order reducing offense to misdemeanor is not direct attack on grant of probation, it is not barred by Pen C §1238(d), even though order may have made grant of probation legally possible).
- An order setting the amount of restitution owed to the victim. *People v Hamilton* (2003) 114 CA4th 932, 937, 8 CR3d 190.
- An order returning a defendant to the Division of Juvenile Justice after a determination by the Youthful Offenders Parole Board that he was not an appropriate candidate for Juvenile Justice treatment. *People v Lo* (1996) 42 CA4th 189, 196, 49 CR2d 594. See also *People v Munoz* (1973) 31 CA3d 87, 107 CR 451 (order recommitting defendant to Division of Juvenile Justice, after he was excluded under Welf & I C §3053, was appealable under CCP §§904 and 904.1(b) as order after judgment). The same reasoning would likely apply to orders in proceedings under the Sexually Violent Predator Act (SVPA). Welf & I C §§6600-6609.3.
- An order granting a petition for writ of error coram nobis or a motion to vacate the judgment. *In re Paiva* (1948) 31 C2d 503, 509, 190 P2d 604; *People v Ibanez* (1999) 76 CA4th 537, 542, 90 CR2d 536.
- An order made after judgment exempting defendant from sex offender registration under Pen C §290. *People v Cavallaro* (2009) 178 CA4th 103, 108, 100 CR3d 139.

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§1.25 g. Order Modifying Verdict or Finding

The prosecution is entitled to appeal an order modifying a verdict or finding if it reduces the degree of the offense, decreases the punishment imposed, or modifies the offense to a lesser one. Pen C §1238(a)(6). This provision authorizes the prosecution to appeal the following orders:

- A sentencing order not imposing a sentence enhancement the court was required by law to impose. *People v Gaines* (1980) 112 CA3d 508, 169 CR 381.
- An order granting credit for time served that reduces the defendant's sentence. *People v Minjarez* (1980) 102 CA3d 309, 162 CR 292; *People v Penner* (1980) 111 CA3d 168, 168 CR 431.
- An order striking prior prison term enhancements under former Pen C §1170.1(h). *People v Jordan* (1986) 42 C3d 308, 228 CR 197.
- An order reducing a "wobbler" prosecuted as a felony to a misdemeanor at sentencing. *People v Statum* (2002) 28 C4th 682, 122 CR2d 572.

NOTE: Penal Code §1238(a)(6) does not authorize the prosecution to appeal a magistrate's order at the preliminary hearing declaring a wobbler offense to be a misdemeanor. *People v Williams* (2005) 35 C4th 817, 830, 28 CR3d 29.

The California capital punishment scheme provides that when the trier of fact returns a verdict of death, the defendant is considered to have made an application to modify the verdict to life imprisonment without the possibility of parole under Pen C §1239(b). If the application is granted, it is reviewable by the prosecution on appeal. Pen C §190.4(e).

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§1.26 h. Pretrial Order of Dismissal as a Result of Suppression of Evidence

The prosecution is entitled to appeal a pretrial order dismissing the case as a result of a successful motion to suppress evidence. Pen C §1238(a)(7). No appeal lies if the dismissal was entered on motion of the prosecuting attorney. *People v Caserta* (1971) 14 CA3d 484, 92 CR 382. See also *People v Bonds* (1999) 70 CA4th 732, 83 CR2d 10.

A Pen C §1538.5 motion to suppress requires the court to hold a full hearing at which the court as finder of fact judges the credibility of witnesses, resolves conflicts in testimony, weighs the evidence, and draws factual inferences. See *People v Johnson* (2006) 38 C4th 717, 723, 42 CR3d 887 (at suppression hearing, prosecution could not meet its burden of proving justification for warrantless search and seizure by presenting affidavit of investigating officer in lieu of officer's live testimony).

On appeal, all presumptions favor the proper exercise of the trial court's power, and its findings, both express and implied, will be upheld if supported by substantial evidence. *People v Superior Court (Keithley)* (1975) 13 C3d 406, 410, 118 CR 617; *People v Lawler* (1973) 9 C3d 156, 160, 107 CR 13. Furthermore, if the evidence was properly suppressed on the legal theories and evidence presented at the Pen C §1538.5 motion, the prosecution may not seek to justify the search on a legal theory presented for the first time on appeal. *Lorenzana v Superior Court* (1973) 9 C3d 626, 640, 108 CR 585 (to allow parties to reopen issue of propriety of search on new theory would defeat purpose of Pen C §1538.5). But see *People v Brooks* (1980) 26 C3d 471, 483, 162 CR 177 (when suppression motion was presented on alternate grounds and trial court suppressed evidence on one ground at bifurcated hearing, it was appropriate, after reversal, to allow defendant to relitigate ground that trial court did not reach).

NOTE: Pen C §1538.5 sets forth in detail the procedures by which the superior court may entertain a defendant's motion to suppress evidence and the parties' respective appellate remedies from the court's ruling on the motion.

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§1.27 i. Order of Dismissal

The prosecution is entitled to appeal an order or judgment dismissing or otherwise terminating all or any portion of an action, including an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or when the defendant has waived jeopardy. Pen C §1238(a)(8). See *People v Chacon* (2007) 40 C4th 558, 564, 53 CR3d 876.

A 1998 amendment greatly expanded the prosecutor's right to appeal under this subdivision. Before that amendment, the prosecutor could appeal a dismissal that occurred after jeopardy attached only if the defendant waived jeopardy. Thus, it could not appeal the trial court's dismissal of a case after verdict. See, *e.g., People v Smith* (1983) 33 C3d 596, 189 CR 862; *People v Superior Court (Howard)* (1968) 69 C2d 491, 498 n5, 72 CR 330. The legislative history of the 1998 amendment indicates that it was intended to permit the prosecutor to appeal the dismissal of a case in all situations other than those that would violate the double jeopardy prohibition, and was specifically intended to permit the prosecution to appeal dismissals in the furtherance of justice under Pen C §1385. *People v Salgado* (2001) 88 CA4th 5, 12, 105 CR2d 373. Although retrial after a trial court's Pen C §1385 dismissal *may* be barred by double jeopardy considerations if the dismissal is based on the trial court's clearly expressed conclusion that the evidence is legally insufficient to support the verdict (see *People v Hatch* (2000) 22 C4th 260, 92 CR2d 80), in *Salgado*, the court of appeal ruled that the prosecutor could appeal the trial court's dismissal of a count of conviction under Pen C §1385 without offending double jeopardy because the result of a successful appeal would not be a retrial but simply the entry of judgment on the verdict. *People v Salgado, supra*. See generally *U.S. v Martin Linen Supply Co.* (1977) 430 US 564, 51 L Ed 2d 642, 97 S Ct 1349.

The People's right under Pen C §1238(a)(8) to appeal a dismissal includes the right to challenge the trial court's evidentiary ruling underlying the dismissal. *People v Chacon* (2007) 40 C4th 558, 53 CR3d 876. See also *People v Dewberry* (1974) 40 CA3d 175, 182, 114 CR 815 ("It would have little meaning if the court could consider only the technical correctness of the order of dismissal but not review the reason behind it, especially when the two are intertwined…"). However, if the prosecution appeals the dismissal and loses, it is bound by the decision on appeal. The prosecution may not refile the case. Pen C §1238(b).

Penal Code §1238(a)(8) authorizes the prosecution to appeal an order precluding the prosecution from seeking the death penalty based on a pretrial determination that the defendant is mentally retarded (see Pen C §1376). Alternatively, the prosecution may seek pretrial review by way of writ of mandate or prohibition in circumstances in which an appeal would significantly delay the trial. See *People v Superior Court (Vidal)* (2007) 40 C4th 999, 1008, 56 CR3d 851.

Penal Code §1238(a)(8) does not support prosecution appeal of a magistrate's determination at a preliminary hearing that a "wobbler" is a misdemeanor rather than a felony. *People v Williams* (2005) 35 C4th 817, 830, 28 CR3d 29. However, it does support appeal of an order determining that a crime could not be charged as a felony because it was a straight misdemeanor. See *People v Booker* (1994) 21 CA4th 1517, 26 CR2d 715.

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§1.28 j. Order Denying Prosecution's Motion to Reinstate Complaint

When the magistrate dismisses part or all of a complaint under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or Veh C §41403, the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the dismissed counts, and to reinstate the custodial status of the defendant under the terms and conditions that applied when the defendant last appeared before the magistrate. Pen C §871.5. If the motion to reinstate is denied, the order denying the motion is appealable under Pen C §1238(a)(9). See Pen C §871.5(f). The right to review of a magistrate's decision, and the corresponding right to appeal, are strictly limited to those orders enumerated in Pen C §871.5. *People v Williams* (2005) 35 C4th 817, 827, 28 CR3d 29. The procedures by which the superior court reviews a magistrate's actions remain in effect after court unification. *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 804, 123 CR2d 31.

NOTE: Under Pen C §859c, unless the parties agree otherwise, a motion to compel reinstatement of the complaint must be heard by a superior court judge other than the judge or magistrate who originally made the ruling that is being reviewed.

A Pen C §871.5 motion to reinstate the charges is not a prosecutor's only recourse after a magistrate's dismissal. For example, the same charges can be refiled before a different magistrate as long as they are not barred by Pen C §1387, which bars refiling of an action that has been previously dismissed in some situations. See *People v Luna* (1983) 140 CA3d 788, 189 CR 792; *People v Workman* (1989) 209 CA3d 687, 257 CR 753. Also, the prosecutor may file the same charge in a criminal information if the defendant has been held to answer on charges transactionally related to the dismissed counts. Pen C §739. See *Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289.

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§1.29 k. Imposition of Unlawful Sentence

The prosecution is entitled to appeal the imposition of an unlawful sentence whether or not the court suspends the execution of the sentence. Penal Code §1238(a)(10) defines an unlawful sentence as a sentence not authorized by law or based on an order of the court that unlawfully strikes or otherwise modifies the effect of an enhancement or prior conviction. Examples include the following:

- The trial court's decision to strike a prior serious or violent felony conviction under *People v Superior Court* (*Romero*) (1996) 13 C4th 497, 53 CR2d 789. *People v Carmony* (2004) 33 C4th 367, 376, 14 CR3d 880; *People v Williams* (1998) 17 C4th 148, 157, 69 CR2d 917.
- The trial court's finding that a prior conviction is not a serious or violent felony under the Three Strikes Law (Pen C §1170.12) based on the record of conviction. *People v Trujillo* (2006) 40 C4th 165, 51 CR3d 718.

A claim of unlawful sentence falls within the scope of the right to appeal under Pen C §1238(a)(10) even if the court concludes that the sentence was not unlawful. *People v Trausch* (1995) 36 CA4th 1239, 1243 n5, 42 CR2d 836; *People v Carranza* (1996) 51 CA4th 528, 531, 59 CR2d 134.

The prosecution may also draw the court's attention to an unlawful sentence on an appeal from the judgment by the defendant. *People v Johnwell* (2004) 121 CA4th 1267, 1285, 18 CR3d 286; *People v Rowland* (1988) 206 CA3d 119, 253 CR 190. See §2.28. If the prosecution prevails on appeal, a trial court may impose a more severe sentence on remand. *People v Askey* (1996) 49 CA4th 381, 56 CR2d 782.

The prosecution may not appeal the trial court's discretionary sentence choice (*e.g.,* the court's choice of the appropriate term to impose on a count subject to the determinate sentencing law, or decision to impose a term consecutively or concurrently) unless the sentence choice is itself unlawful. Pen C §1238(a)(10).

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§1.29A I. Order Granting Probation

The prosecution may challenge a grant of probation only by writ of mandate or prohibition filed within 60 days after probation is granted. *People v Bailey* (1996) 45 CA4th 926, 931, 53 CR2d 198. See Pen C §1238(d) ("[N]othing contained in this section shall be construed to authorize an appeal from an order granting probation"). In *People v Douglas* (1999) 20 C4th 85, 94, 82 CR2d 816, however, the California Supreme Court held that the trial court's grant of probation did not preclude the prosecution from appealing the trial court's separate order reducing the offense of conviction from a felony to a misdemeanor as an order after judgment under Pen C §1238(a)(5). The court strongly suggested that an appeal brought under Pen C §1238(a)(10) would also be proper in a case presenting a slightly different procedural posture. Unlawful sentencing orders are appealable "even though they were followed by, and may have made legally possible, a grant of probation." Although in such an appeal the court of appeal may not reverse the order of probation (20 C4th at 94), presumably if the court found that the grant of probation was unauthorized, it would remand the case to the trial court for further proceedings that would result in the order of probation being vacated.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.30 m. Order Granting Habeas Corpus Relief

§1.30 m. Order Granting Habeas Corpus Relief

The prosecution is entitled to appeal the grant of a writ of habeas corpus. *People v Hatch* (2000) 22 C4th 260, 268 n4, 92 CR2d 80; *People v Miller* (1992) 6 CA4th 873, 876, 8 CR2d 193. The appeal is from the superior court to the court of appeal except in death penalty cases, which must be appealed directly to the California Supreme Court. Pen C §1506; *In re Carpenter* (1995) 9 C4th 634, 645, 38 CR2d 665; *In re Walker* (1974) 10 C3d 764, 770, 112 CR 177. See Cal Rules of Ct 8.388. If the prosecution seeks appellate review of an order granting the defendant's discharge or release, Pen C §1506 requires that a defendant be released on bail or on his or her own recognizance (OR), subject to applicable conditions. If the court orders relief other than discharge or release from custody, the court may, on application by the prosecution, stay execution of the order pending its final determination. *People v Huff* (1975) 46 CA3d 361, 120 CR 210. An order that has the effect of releasing the defendant on parole is not a release from custody under Pen C §1506; therefore, the appellate court may stay its execution. *In re Stinnette (*1979) 94 CA3d 800, 155 CR 912; *In re Fain* (1976) 65 CA3d 376, 387 n9, 135 CR 543.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.31 2. Misdemeanor and Infraction Cases

§1.31 2. Misdemeanor and Infraction Cases

Under Pen C §1466(1), the prosecution may appeal the following judgments or orders in a misdemeanor or infraction case to the appellate division of the superior court of the county in which the court from which the appeal is taken is located:

- An order recusing the district attorney or city attorney under Pen C §1424.
- An order or judgment dismissing or otherwise terminating all or any portion of the action, including an order or judgment entered after a verdict or finding of guilty or a verdict or judgment entered before the defendant has been placed in jeopardy or when the defendant has waived jeopardy.
- An order sustaining a demurrer to any portion of the complaint or pleading.
- An order granting a new trial.
- An order arresting judgment.
- Any order made after judgment affecting the substantial rights of the People.
- The imposition of an unlawful sentence, whether or not the court suspends its execution.

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§1.32 a. Probation Order

As in felony cases, the prosecution is not authorized to appeal from an order granting probation. Instead, it may seek appellate review of any grant of probation, whether or not the court imposes sentence, by means of a petition for a writ of mandate or prohibition that is filed within 60 days after probation is granted. The review of a grant of probation includes review of any order underlying the grant of probation. Pen C §1466(1)(H).

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§1.33 b. Order of Dismissal

If the trial court dismisses or otherwise terminates a criminal prosecution, the prosecution may appeal from the order or judgment if the defendant could be retried without violating the prohibition against double jeopardy. See Pen C §1466(1)(B). See also *Marler v Municipal Court* (1980) 110 CA3d 155, 159, 167 CR 666. For interpretation of a similar provision in Pen C §1238(a), see *People v Chacon* (2007) 40 C4th 558, 53 CR3d 876, and *People v Salgado* (2001) 88 CA4th 5, 12, 105 CR2d 373, discussed in §1.27.

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III. APPELLATE AND WRIT JURISDICTION OF CALIFORNIA COURTS

A. Appeal of Right

§1.34 1. Supreme Court

The criminal appellate jurisdiction of the California Supreme Court is limited to cases in which a judgment of death has been rendered. Cal Const art VI, §11(a). All other review by the supreme court in criminal cases is discretionary. Cal Const art VI, §12. On petitions for review, see §§5.41-5.50.

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§1.35 2. Court of Appeal

In criminal cases, courts of appeal have appellate jurisdiction over cases coming within the original jurisdiction of superior courts. Cal Const art VI, §11(a). See *People v Burns* (1993) 20 CA4th 1266, 25 CR2d 230 (prohibiting parties from conferring jurisdiction on appellate court by agreement). Courts of appeal also have jurisdiction over misdemeanor and infraction cases that are transferred to them from the appellate division of the superior court. See generally Cal Rules of Ct 8.1000-8.1018.

NOTE: California is divided into six appellate districts, each containing a court of appeal with one or more divisions. Each court or division consists of a presiding justice and two or more associate justices. Cal Const art VI, §3; Govt C §§69100-69106. The appealing party must file the notice of appeal in the superior court that rendered the judgment or order. The superior court clerk will notify the court of appeal in the district in which the appeal is filed. Cal Rules of Ct 8.100(a), (e).

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§1.36 3. Appellate Division of the Superior Court

Each superior court has an appellate division with appellate jurisdiction in cases prescribed by statute. Cal Const art VI, §§4, 11(b); CCP §77(e). In criminal cases, the appellate divisions have appellate jurisdiction in misdemeanor and infraction cases. Pen C §1466. Regardless of whether the original complaint included a felony charge, if the defendant is held to answer only on one or more misdemeanors, the appeal is to the appellate division. *People v Nickerson* (2005) 128 CA4th 33, 26 CR3d 563; Cal Rules of Ct 8.304(a)(2). By contrast, if a felony information or indictment is filed charging the defendant with at least one felony count, the court of appeal has appellate jurisdiction even if the prosecution did not result in a punishment of imprisonment in a state prison. See Cal Rules of Ct 8.304(a)(2).

NOTE: If the superior court clerk erroneously directs an appeal of a misdemeanor conviction to the court of appeal, rather than the appellate division, the court of appeal may transfer the case back to the appellate division of the superior court. Govt C §68915; *People v Nickerson* (2005) 128 CA4th 33, 26 CR3d 563.

For procedural rules governing criminal appeals to the appellate division, see Cal Rules of Ct 8.800-8.816 and 8.850-8.929. On applications to the appellate division for certification of a case to the court of appeal, see Cal Rules of Ct 8.1005. On petitions to the court of appeal for transfer of an appellate case to that court, see Cal Rules of Ct 8.1008. See also §1.38.

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B. Discretionary Review

§1.37 1. Supreme Court

The California Supreme Court may review the decision of a court of appeal either at the request of a party or on its own motion. Cal Const art VI, §12(b). The constitution also authorizes the supreme court to transfer a pending court of appeal case to itself for decision. Cal Const art VI, §12(a).

A party may request the California Supreme Court to review any decision of the court of appeal, including an interlocutory order, by filing a petition for review within 10 days after the court of appeal decision becomes final as to that court. Cal Rules of Ct 8.500(a)(1), (e)(1).

CAUTION: Under Cal Rules of Ct 8.500(e)(2), the Chief Justice may accept a late-filed petition for review if the time for the supreme court to order review on its motion has not expired (see Cal Rules of Ct 8.512(c)), but in practice leave to file a late petition for review is seldom granted.

If a petition for review has been filed, the supreme court may order review of a court of appeal decision within 60 days after the filing of the last timely petition for review. Within the original 60-day period or any extension of it, the supreme court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 30 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the filing of the last timely petition for review. Cal Rules of Ct 8.512(b)(1).

Even if no petition for review is filed, the supreme court may review the decision of a court of appeal on its own motion within 30 days after the decision becomes final as to the court of appeal. Cal Rules of Ct 8.512(c). The supreme court may for good cause extend the time to a maximum of 90 days after the court of appeal's decision becomes final. Cal Rules of Ct 8.512(c)(1).

Under Cal Rules of Ct 8.500(b), the supreme court may review a decision of a court of appeal:

- When review is necessary to secure uniformity of decision or to settle an important question of law;
- When the court of appeal was without jurisdiction;
- When the decision of the court of appeal lacks the concurrence of the required majority of qualified judges; or
- For the purpose of transferring the matter back to the court of appeal for further proceedings that the supreme court may order.

For procedures applicable to petitions for review to the California Supreme Court, see §§5.43-5.46. For a comprehensive discussion of review by the California Supreme Court, see California Civil Appellate Practice, chap 22 (3d ed Cal CEB 1996).

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§1.38 2. Court of Appeal

A court of appeal may order a case transferred to itself from the appellate division of the superior court when the transfer is necessary to secure uniformity of decision or to settle an important question of law. Cal Rules of Ct 8.1002. There are several routes to the court of appeal from the appellate division of the superior court. A party may request the appellate division to certify the case to the court of appeal, or the appellate division may certify the case on its own motion. Cal Rules of Court 8.1005(a). Certification may take place at any time after the record is filed and before the appellate division's decision becomes final as to that court. Cal Rules of Court 8.1005(d). For finality of appellate division decisions see Cal Rules of Ct 8.888. If a party's application for certification is denied, the party may petition the court of appeal for transfer. Cal Rules of Court 8.1008(b). The court of appeal may also transfer an appellate division case to itself on its own motion. Cal Rules of Court 8.1008(a). For procedures and time limits, see Cal Rules of Ct 8.1005-8.1008.

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§1.39 C. Writ Jurisdiction

The supreme court, the court of appeal, and the superior court have original jurisdiction in habeas corpus proceedings. Cal Const art VI, §10.

The supreme court, the court of appeal, and the appellate division of the superior court have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. Cal Const art VI, §10. The writ jurisdiction of the appellate division of the superior court is limited to cases subject to its appellate jurisdiction. Cal Const art VI, §10. In criminal matters, its jurisdiction is limited to misdemeanor and infraction cases.

Generally, the supreme court and the court of appeal will decline to exercise jurisdiction over a petition for writ of habeas corpus or extraordinary writ of mandate or prohibition that has not been brought in the first instance in the superior court. *Funeral Directors Ass'n of Los Angeles and So. Cal. v Board of Funeral Dir. and Embalmers of Cal.* (1943) 22 C2d 104, 110; *In re Hillery* (1962) 202 CA2d 293, 294, 20 CR 759. See §10.6.

NOTE: The constitution does not give the appellate division of the superior court original jurisdiction over writs of habeas corpus. This means that a habeas petition in a misdemeanor or infraction case will be heard by a single judge of the superior court—the same court that tried the case. In *In re Ramirez* (2001) 89 CA4th 1312, 108 CR2d 229, the court of appeal rejected an argument that because of the basic principle that one judge cannot overrule the decision of another judge of the same court (see, *e.g., In re Kowalski* (1971) 21 CA3d 67, 70, 98 CR 444), the superior court could not exercise habeas corpus jurisdiction in a misdemeanor case tried in the superior court. The court in *Ramirez* explained that in *Kowalski* and similar cases, a judge of the superior court had in essence attempted to exercise *appellate* jurisdiction. With the exception of its appellate division, the superior court does not have appellate jurisdiction. Cal Const art VI, §11. The superior court does, however, have original *habeas* jurisdiction. Cal Const art VI, §10. Thus, a superior court hearing a habeas corpus petition may review the decision of the superior court sitting as a trial court. *In re Ramirez* (2001) 89 CA4th 1312, 1318, 108 CR2d 229. The superior court likewise has original jurisdiction over a petition for writ of mandamus challenging a ruling by a magistrate in a felony case. *People v Superior Court* (*Jimenez*) (2002) 28 C4th 798, 802, 123 CR2d 31.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/1 Appellate Review of Criminal Convictions/§1.40 D. Appellate Court Jurisdiction

§1.40 D. Appellate Court Jurisdiction

Once a timely notice of appeal has been filed, the appellate court acquires jurisdiction, even if the record has not been lodged with the court. *In re Byrnes* (1945) 26 C2d 824, 161 P2d 376, superseded on other grounds by Rule as stated in *People v Lyons* (2009) 178 CA4th 1355, 1360, 101 CR3d 241. The appellate court retains jurisdiction until issuance of the remittitur. *People v Perez* (1979) 23 C3d 545, 554, 153 CR 40.

An appeal from a trial court judgment divests the trial court of jurisdiction to make or vacate any order affecting the judgment pending determination of the appeal and issuance of the remittitur. *People v Perez, supra; People v Sonoqui* (1934) 1 C2d 364, 35 P2d 123; *People v Alanis* (2008) 158 CA4th 1467, 71 CR3d 139; *People v Saunoa* (2006) 139 CA4th 870, 43 CR3d 287. See also *People v Johnson* (1992) 3 C4th 1183, 14 CR2d 702 (once defendant had appealed sentence, the trial court had no continuing jurisdiction to grant discovery).

There are, however, a number of situations in which the trial court retains jurisdiction:

- A sentence that is unauthorized and therefore void or partially void can be corrected by the trial court after the defendant files a notice of appeal. *People v Chagolla* (1983) 144 CA3d 422, 193 CR 711. See also *People v Serrato* (1973) 9 C3d 753, 109 CR 65, disapproved on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855; *People v Williams* (2007) 156 CA4th 898, 905, 67 CR3d 516 (court may also take necessary action to avoid unauthorized sentence).
- The trial court may recall a state prison sentence within 120 days on its own motion or at any time on recommendation of the Board of Prison Terms or Director of Corrections, regardless of whether a notice of appeal has been filed. Pen C §1170(d); *Dix v Superior Court* (1991) 53 C3d 442, 279 CR 834; *Portillo v Superior Court* (1992) 10 CA4th 1829, 13 CR2d 709. Recall must be only for purposes rationally related to sentencing. *People v Alanis* (2008) 158 CA4th 1467, 1476, 71 CR3d 139 (court abused discretion by recalling sentence for sole purpose of permitting defendant to file notice of appeal). Note, however, that under the terms of Pen C §1170(d), the court may not impose a greater sentence following the recall.
- The trial court may correct an error in Pen C §2900.5 credits for time served, even after that court has lost jurisdiction for other matters. *People v Hyde* (1975) 49 CA3d 97, 122 CR 297. See Pen C §1237.1 (motion for correction in trial court is prerequisite to appeal of error in calculating presentence custody credit), discussed in §1.8. See also *People v Clavel* (2002) 103 CA4th 516, 127 CR2d 660.
- When a new trial motion is granted and the prosecution appeals the granting of the motion, the trial court has continuing jurisdiction over discovery matters in anticipation of a new trial. *Wisely v Superior Court* (1985) 175 CA3d 267, 220 CR 893.
- The trial court retains the power to revoke probation when any of its conditions have been violated while the appeal is still pending if the order granting probation was not stayed by that court or the appellate court. *In re Stallings* (1970) 5 CA3d 322, 330, 85 CR 96, disapproved on other grounds in *People v Cookson* (1991) 54 C3d 1091, 1100, 2 CR2d 176.
- A trial court retains jurisdiction to hear a habeas corpus petition filed concurrently with an appeal. *People v Pope* (1979) 23 C3d 412, 152 CR 732 (superior court's habeas jurisdiction limited to issues not addressed in appeal).
- After an appeal has been filed, the trial court retains concurrent jurisdiction to deal with bail applications and procedures for preparing the record. *In re Podesto* (1976) 15 C3d 921, 127 CR 97.
- The trial court retains jurisdiction to correct clerical, but not judicial errors in the record. *In re Johannes* (1931) 213 C 125, 1 P2d 984; *People v McGee* (1991) 232 CA3d 620, 283 CR 528; *Smith v Superior Court* (1981) 115 CA3d 285, 289, 171 CR 387, interpreting *In re Candelario* (1970) 3 C3d 702, 91 CR 497.

Note that the appellate court also has jurisdiction to order correction of clerical errors on its own motion or at the request of a party, and according to the California Supreme Court, should do so when such an error is brought to its attention and the trial court is in no better position to correct the error than the court of appeal. *People v Mitchell* (2001) 26 C4th 181, 187, 109 CR2d 303.

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§1.41 IV. FEDERAL REVIEW OF STATE COURT CONVICTIONS: NONCAPITAL CASES

The United States Supreme Court and the lower federal courts have jurisdiction over federal questions presented in state law proceedings. US Const art VI, cl 2 (supremacy clause). In state court criminal cases, the Supreme Court exercises this jurisdiction through its discretion to grant writs of certiorari (28 USC §1254; US Sup Ct R 10-16); the lower federal courts have jurisdiction to hear habeas corpus petitions brought by state prisoners. 28 USC §2254.

With rarely applicable exceptions, eligibility for federal review of a state court conviction requires the defendant first to seek relief in the state court of last resort—the highest court of the state in which the defendant is entitled to seek relief. 28 USC §1257(a); US Sup Ct R 13.1 (certiorari); 28 USC §2254(b)(1) (requiring exhaustion of state remedies by habeas corpus petitioners); *O'Sullivan v Boerckel* (1999) 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728 (petitioner required to exhaust remedies in state supreme court even when that court's review discretionary). For defendants convicted of felonies, the court of last resort in California is the California Supreme Court. A state criminal defendant convicted of a noncapital felony may seek federal relief after the denial of a petition for review by the California Supreme Court or after an unfavorable decision on review.

NOTE: The California Rules of Court permit the use of a simplified format for a petition for review filed solely for the purpose of exhausting state remedies. See Cal Rules of Ct 8.508, discussed in §5.44.

The court of last resort for a defendant in a misdemeanor or infraction case is the court of appeal. In order to seek federal relief, a defendant in a misdemeanor or infraction case must request the appellate division to certify the case to the court of appeal. Cal Rules of Ct 8.1005(b). If the request is denied, the defendant should petition the court of appeal for transfer. Cal Rules of Ct 8.1008(b). It appears that the defendant must also file a petition for a writ of habeas corpus in the California Supreme Court. See *Larche v Simons* (9th Cir 1995) 53 F3d 1068, 1072. For further discussion of exhaustion in misdemeanor cases, see §14.31.

A petition for a writ of certiorari must be filed in the United States Supreme Court within 90 days of the entry of judgment or denial of discretionary review in the state's court of last resort. US Sup Ct R 13.1. The Court will grant certiorari only for "compelling reasons." US Sup Ct R 10. Neither the grant nor the denial of certiorari poses a procedural bar to filing a federal habeas corpus petition, although, as is readily apparent, the Supreme Court's resolution of a constitutional question is dispositive of that issue.

United States Supreme Court review of state criminal convictions is the subject of chap 12.

Unlike certiorari, the habeas corpus jurisdiction of lower federal courts is not discretionary. The court must hear the petition, and if appropriate, grant relief. A petition for a writ of habeas corpus must be filed in the federal trial court of the federal judicial district in which the state trial court is located before the expiration of the limitations period set out in 28 USC §2244(d). For discussion of the limitations period for federal habeas corpus petitions, see §§15.1-15.8.

On denial of relief by the federal district court, the petitioner may appeal to the United States Court of Appeals for the federal circuit encompassing the district court that denied the petition. If the court of appeals denies the petition, the petitioner may file a petition of certiorari in the United States Supreme Court under 28 USC §1257. See §13.3 for listing of postconviction procedures available in state and federal court.

Federal habeas corpus review of state criminal convictions is the subject of chaps 13-18.

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2

The Right to Counsel on Appeal; Implementation in California

David Y. Stanley

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/ I. CONSTITUTIONAL RIGHT TO COUNSEL ON APPEAL/§2.1 A. Indigent Defendant's Right to Appointment of Counsel on Appeal

I. CONSTITUTIONAL RIGHT TO COUNSEL ON APPEAL

§2.1 A. Indigent Defendant's Right to Appointment of Counsel on Appeal

Direct appeal. Every individual convicted of a crime in the state of California on a plea of not guilty has a statutory right to appeal the judgment of conviction. Pen C §§1237 (generally), 1466(2) (misdemeanor or infraction). See also Welf & I C §800 (delinquency proceedings). Even after a guilty plea, a defendant has a limited right to appeal. Pen C §1237.5. See §§1.11-1.15.

Although the federal constitution does not give convicted defendants a right to appeal (see *McKane v Durston* (1894) 153 US 684, 38 L Ed 867, 14 S Ct 913; *Evitts v Lucey* (1985) 469 US 387, 83 L Ed 2d 821, 105 S Ct 830), when a state grants the right to appeal, the procedures it adopts to implement it must comport with the requirements of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Evitts v Lucey* (1985) 469 US 387, 393, 83 L Ed 2d 821, 827, 105 S Ct 830. See also *Halbert v Michigan* (2005) 545 US 605, 162 L Ed 2d 552, 560, 125 S Ct 2582; *Griffin v Illinois* (1956) 351 US 12, 20, 100 L Ed 891, 899, 76 S Ct 585 (procedures must include minimum safeguards necessary to make appeal "adequate and effective").

Thus, the state must:

- Appoint counsel for appellants who cannot afford to retain an attorney (*Douglas v California* (1963) 372 US 353, 358, 9 L Ed 2d 811, 815, 83 S Ct 814). See also *People v Kelly* (2006) 40 C4th 106, 117, 51 CR3d 98 ("Having provided criminal defendants with an appeal as a matter of right, the states must provide indigent defendants with the assistance of counsel on appeal…"); *In re Barnett* (2003) 31 C4th 466, 472, 3 CR3d 108 ("[C]onsistent with these constitutional principles, California provides a statutory right to appointed counsel for both capital and noncapital criminal appeals."). See Pen C §§1239-1240.1.
- Provide indigent appellants with a free transcript of trial proceedings if necessary to ensure adequate appellate review (*Griffin v Illinois* (1956) 351 US 12, 19, 100 L Ed 891, 899, 76 S Ct 585).
- Give indigent appellants access to the appellate process without payment of filing fees (*Burns v Ohio* (1959) 360 US 252, 258, 3 L Ed 2d 1209, 1213, 79 S Ct 1164).

The California Supreme Court has construed *Douglas* as requiring the appointment of counsel in misdemeanor as well as felony appeals, particularly when conviction may result in serious consequences. *In re Henderson* (1964) 61 C2d 541, 39 CR 373. But see *Mowrer v Appellate Dep't* (1990) 226 CA3d 264, 268, 276 CR 38 (no statutory authorization under Govt C §27706 for appellate division to order appointment of public defender in misdemeanor appeals).

NOTE: Courts have refused to appoint appellate counsel for appeals of misdemeanor traffic convictions in which only a small fine is imposed. *People v Batiste* (1980) 109 CA3d 328, 167 CR 171 (reasoning that automatically providing counsel on appeal to misdemeanants punished solely by fine with no collateral consequences would flood superior court appellate divisions with frivolous appeals, causing those with nonfrivolous appeals in more serious cases to suffer).

Collateral attack on judgment. The federal Constitution does not give criminal defendants a constitutional right to appointed counsel when mounting collateral attacks on their convictions; the right extends to the first appeal of right and no further. *Pennsylvania v Finley* (1987) 481 US 551, 555, 95 L Ed 2d 539, 545, 107 S Ct 1990. States are, however, free to extend this right to criminal defendants. *Ross v Moffitt* (1974) 417 US 600, 41 L Ed 2d 341, 94 S Ct 2437. Under California law, the court must appoint counsel for an indigent petitioner mounting a collateral attack on the judgment of conviction when petitioner "has stated facts sufficient to satisfy the court that a hearing is required." *People v Shipman* (1965) 62 C2d 226, 232, 42 CR 1. For further discussion, see Anno, *Supreme Court's Views as to Accused's Federal Constitutional Right to Counsel on Appeal*, 102 L Ed 2d 1049 (1999).

Self-representation. Although a criminal defendant has a constitutional right to represent himself or herself at trial

(*Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525), a person appealing a criminal conviction has no comparable right to self-representation on appeal. As the court explained in *In re Barnett* (2003) 31 C4th 466, 473, 3 CR3d 108, the Sixth Amendment is the sole source of the right of self-representation and it "pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction." See also *Martinez v Court of Appeal* (2000) 528 US 152, 145 L Ed 2d 597, 120 S Ct 684; *People v Scott* (1998) 64 CA4th 550, 75 CR2d 315.

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§2.2 B. Defendant's Right to Effective Assistance of Counsel on Appeal

The right to counsel on appeal encompasses a Fourteenth Amendment due process right to the effective assistance of counsel. *Evitts v Lucey* (1985) 469 US 387, 395, 83 L Ed 2d 821, 829, 105 S Ct 830. It applies whether counsel is retained or appointed. *Cuyler v Sullivan* (1980) 446 US 335, 344, 64 L Ed 2d 333, 100 S Ct 1708. The test for determining whether appellate counsel has provided effective assistance, based on US Const amend VI and Cal Const art I, §15, is the same as that used for determining the adequacy of trial counsel's representation. See *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052; *People v Pope* (1979) 23 C3d 412, 152 CR 732.

The two-part inquiry asks whether (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, considering all the circumstances of the case (*Strickland v Washington* (1984) 466 US 668, 689, 80 L Ed 2d 674, 694, 104 S Ct 2052), and (2) there is a reasonable probability that, absent counsel's errors, the trier of fact would have had a reasonable doubt about the defendant's guilt. *Harris v Wood* (9th Cir 1995) 64 F3d 1432, 1435. For examples of ineffective assistance of appellate counsel, see §2.25.

The United States Supreme Court has interpreted the term effective assistance to require active advocacy on the part of appellate counsel. *Anders v California* (1967) 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396 (appellate attorney who filed letter stating that appeal lacked merit provided ineffective assistance of counsel). For further discussion of appellate counsel's responsibilities when there are no arguable issues, see §§2.26-2.27.

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II. ROLE OF TRIAL COUNSEL IN APPELLATE PROCESS

A. Trial Counsel Should Not Represent Defendant in Appellate Court

§2.3 1. Different Skills Required

It is seldom, if ever, a good idea for trial counsel to represent a criminal defendant on appeal because trial and appellate practitioners have substantially different areas of expertise. Trial lawyers who do not also have expertise in criminal appeals are often unfamiliar with concepts essential to the effective prosecution of a criminal appeal, *e.g.*, waiver and forfeiture, standards of review, the necessity of showing prejudice; with procedural matters peculiar to appeals, *e.g.*, timing and formatting of documents; and may not have developed the writing skills necessary to produce adequate appellate briefs, which tend to be more sophisticated than motions filed in trial courts. The State Bar recognizes these differences, at least inferentially, by providing separate fields of specialization certification in criminal and appellate law.

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§2.4 2. Inherent Conflict of Interest

Most appellate attorneys agree that a basic duty of appellate counsel in criminal cases is to evaluate the adequacy of trial counsel's representation. For discussion of raising ineffective assistance of trial counsel, see §4.34. There is an obvious and unavoidable conflict involved in any attempt to evaluate one's own performance. In *People v Bailey* (1992) 9 CA4th 1252, 12 CR2d 339, the court of appeal held that the practice of appointing trial counsel to represent the defendant on appeal entailed an inherent conflict of interest because of the possibility that an ineffective assistance of counsel claim would need to be raised on appeal or in a collateral writ petition.

CAUTION: The court in *Bailey* did not address the issue of whether a defendant could choose to *retain* the same attorney. An attorney who has represented a criminal defendant at trial would be well advised to counsel the client regarding the concerns articulated in *Bailey* before accepting an offer to handle the client's appeal.

In *Bonin v Vasquez* (9th Cir 1993) 999 F2d 425, however, an analogous issue was posed with a different result. Counsel on federal habeas corpus urged that new counsel should be appointed to prepare the federal habeas petition so that the issue of ineffective counsel in the state appeal could be raised. The Ninth Circuit held that the right to conflict-free representation does not extend to the federal habeas corpus stage. For discussion of federal habeas corpus, see chaps 13-18.

Similarly, the state supreme court will not presume ineffective assistance of appellate counsel when that same appellate counsel is later appointed state habeas counsel. While acknowledging the possibility of conflict of interest in having state habeas counsel investigate the effectiveness of its own appellate representation, the court held that there is no constitutional right to effective assistance of counsel in state habeas corpus proceedings. *People v Boyer* (2006) 38 C4th 412, 488, 42 CR3d 677.

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B. Duty of Trial Counsel to Advise Client of Rights and Perfect Appeal

§2.5 1. Duty to Advise Convicted Client

Penal Code §1240.1(a) provides that in any criminal, juvenile, or civil commitment case, in which the defendant would be entitled to the appointment of counsel on appeal if indigent, trial counsel must advise the defendant on whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. Counsel must also inform the defendant that he or she cannot provide advice on his or her own competency. Pen C §1240.1(a). See §2.4.

NOTE: Penal Code §1240.1(a) states that trial counsel should refer the client to the State Public Defender or another lawyer for advice on whether an issue regarding the competency of counsel's representation should be raised on appeal. After the statute's enactment, however, the duties of the State Public Defender became limited almost entirely to capital appeals. Each of California's six appellate districts has contracted with an appellate project that oversees representation of indigent defendants in noncapital felony appeals. Each appellate project has an attorney on duty during business hours who can provide such information. For addresses and telephone numbers of the appellate projects, see §2.21.

Trial lawyers should be prepared to discuss with convicted clients at least four concerns of immediate importance:

- The wisdom of contesting the verdict or the sentence by (a) filing an appeal from the judgment, or (b) collaterally attacking the judgment by filing a petition for writ of habeas corpus in state (see chaps 9-10) or federal (see chaps 13-18) court;
- The possibility of obtaining a stay of execution of the judgment (see §2.15);
- The possibility of obtaining the defendant's release from custody pending conclusion of the appeal or writ proceedings (see §2.13); and
- The possibility of obtaining a satisfactory term of probation through the cooperation of counsel and client with the probation office (see California Criminal Law Procedure and Practice, chap 38 (Cal CEB Annual)) or of receiving a sentence that can be served or paid without necessitating an appeal.

Trial counsel should warn clients that appeals often take years, and that only a few are successful. Moreover, in some cases there may be adverse consequences to appealing a criminal conviction. Errors in sentencing favorable to the defendant are the greatest concern. A legally unauthorized sentence (*i.e.*, one that violates "mandatory provisions governing the length of confinement") is subject to review and correction at any time. *People v Scott* (1994) 9 C4th 331, 354, 36 CR2d 627; *People v Serrato* (1973) 9 C3d 753, 109 CR 65, disapproved on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855; *People v Askey* (1996) 49 CA4th 381, 56 CR2d 782. Such an unauthorized sentence, involving an error favoring the defendant, is more likely to be observed and corrected if the defendant proceeds with an appeal, although some of the more obvious errors are noted by the Department of Corrections and Rehabilitation, which can ask the trial court to correct the error. An appellate lawyer is obliged to protect the client's interests in a case of potential adverse consequences, however, and the mere filing of a notice of appeal is not likely to increase the risk of harm to the defendant. For a more through discussion of adverse consequences, see §2.28.

CAUTION: Ordinarily, trial counsel should not advise his or her client that there are no issues worth appealing. The trial lawyer should realize that there may be appellate issues of which he or she is unaware, and unless there is a likelihood of adverse consequences (see §2.28), a defendant convicted after a plea of not guilty, especially after a jury trial, is generally well advised to file a notice of appeal so that an appellate lawyer can review the trial record for prejudicial error, particularly when the client is eligible for appointed counsel.

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2. Duty to Assist Defendant in Perfecting Appeal

§2.6 a. Duty to File Notice of Appeal

Even if trial counsel does not expect to represent the defendant on appeal, he or she must either file the notice of appeal or instruct and assist the defendant in filing the notice. See §2.31. Failure to fulfill these duties may subject counsel to disciplinary action by the State Bar. *In re Benoit* (1973) 10 C3d 72, 88, 109 CR 785. It is crucial, then, that counsel note the jurisdictional time periods for filing a notice of appeal in his or her calendar and act within those periods.

NOTE: An attorney who disregards specific instructions from a defendant to file a notice of appeal "acts in a professionally unreasonable manner." *Roe v Flores-Ortega* (2000) 528 US 470, 145 L Ed 2d 985, 120 S Ct 1029. See *U.S. v Sandoval-Lopez* (2005) 409 F3d 1193, 1197 (it is ineffective assistance of counsel for attorney to refuse to file notice of appeal when client tells attorney to do so, even if doing so would be contrary to plea agreement and harmful to client). Trial counsel can ensure that a defendant receives the assistance of counsel without assuming the responsibilities of appellate counsel by using the defendant's name in propria personam when preparing a notice of appeal, a request for the record on appeal, a request for a certificate of probable cause, and any certificate of probable cause issued by the judge.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/ (1) Felony Appeals/§2.7 (a) Appeals After Trial

(1) Felony Appeals

§2.7 (a) Appeals After Trial

An appeal from a conviction in a felony case is taken by filing a written notice of appeal with the clerk of the trial court within 60 days of the judgment or appealable order. Cal Rules of Ct 8.308(a). The 60 days is computed by excluding the first day (*i.e.*, the day on which the judgment or order was made) and including the last; if the last day is a court holiday, it is also excluded. CCP §12. Note that a felony case is any action in which the defendant was charged with a felony, even if the defendant is convicted only of a misdemeanor or an infraction. Pen C §691(f); Cal Rules of Ct 8.304(a)(2).

A premature notice of appeal—one filed before the entry of judgment or appealable order (for example, after the guilty verdict but before the sentencing hearing)—may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the entry of the judgment or order. Cal Rules of Ct 8.308(c). A late notice of appeal may not be filed. Instead, the court clerk must date it, mark it "Received but not filed," advise the party seeking to file the notice that it was not filed because it was late, and send a copy of the marked notice of appeal to the appellate project for that district. Cal Rules of Ct 8.308(d). For a list of appellate projects, see §2.21. A notice of appeal sent by mail from a custodial institution will be considered timely if the envelope shows that it was mailed or delivered to custodial officials for mailing within 60 days of the judgment or order. See also *In re Jordan* (1992) 4 C4th 116, 13 CR2d 878.

NOTE: Though discouraged as a practice likely to cause significant delays, unless there is a valid local rule to the contrary, a criminal defendant may file a notice of appeal with the courtroom clerk of the judge who imposes sentence, not just the main clerk's office. *In re Gray* (2009) 179 CA4th 1189, 1200, 102 CR3d 551.

The court has no power to grant relief from default for a party's failure to file a timely notice of appeal or a timely statement of reasonable grounds in support of a certificate of probable cause. Cal Rules of Ct 8.60(d). See also *In re Chavez* (2003) 30 C4th 643, 652, 134 CR2d 54. However, the common law doctrine of constructive filing may permit a late notice to be considered timely in compelling circumstances. See, *e.g., In re Benoit* (1973) 10 C3d 72, 109 CR 785 (notice of appeal deemed constructively filed when defendant reasonably relied on trial counsel's promise to file notice); *People v Lyons* (2009) 178 CA4th 1355, 1361, 101 CR3d 241 (Benoit not applicable; defendant had not shown arrangement with trial counsel to file notice of appeal). See also *In re Chavez* (2003) 30 C4th 643, 675, 134 CR2d 54; *In re Jordan* (1992) 4 C4th 116, 125, 13 CR2d 878. It is the appellate court that rules on the applicability of the constructive filing doctrine to a particular case; a defendant may present the issue to the appellate court by filing either a petition for writ of habeas corpus or a motion. *People v Zarazua* (2009) 179 CA4th 1054, 101 CR3d 902.

If the appeal is by the defendant, defendant or his or her attorney must sign the notice; if the appeal is by the prosecution, the attorney for the prosecution must sign. Cal Rules of Ct 8.304(a)(3). The notice need not specify the court to which the appeal is taken; it will be treated as an appeal to the court of appeal for the district in which the trial court is located. Cal Rules of Ct 8.304(a)(4). Only one copy of the notice of appeal is necessary. On receipt, the clerk notifies the attorney of record for each party, each unrepresented defendant, the clerk of the reviewing court, each court reporter, and any primary reporter or supervisor. Cal Rules of Ct 8.304(c)(1).

A notice of appeal in a criminal case must be liberally construed; it is sufficient if it identifies the judgment or order being appealed. Cal Rules of Ct 8.304(a)(4). For a sample notice of appeal, see §2.31.

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§2.8 (b) After Guilty or No Contest Plea

In a felony case, with two exceptions, a notice of appeal from a judgment entered on a plea of guilty or no contest (sometimes collectively called guilty plea appeals) must be accompanied by a statement of reasonable grounds for appeal in support of issuance of a certificate of probable cause from the trial court. Pen C §1237.5; Cal Rules of Ct 8.304(b)(1)-(3). Trial counsel must help the defendant obtain a certificate of probable cause from the sentencing judge. See *People v Hodges* (2009) 174 CA4th 1096, 1107, 94 CR3d 862 (requiring trial counsel's assistance with certificate of probable cause does not violate appellant's right to due process or equal protection). If the certificate of probable cause is denied and defendant has grounds for appeal, counsel should also file a petition for writ of mandate to compel its issuance. See *In re Brown* (1973) 9 C3d 679, 108 CR 801, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301; *People v Santos* (1976) 60 CA3d 372, 376, 131 CR 426, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301. See also *People v Davis* (1967) 255 CA2d 907, 64 CR 1.

The certificate of probable cause requirements of Pen C §1237.5 and Cal Rules of Ct 8.304(b)(1)-(3), which apply to all felony cases, are strictly enforced. The court of appeal is not authorized to grant relief from default resulting from the defendant's failure to file a timely request for a certificate of probable cause. *In re Chavez* (2003) 30 C4th 643, 134 CR2d 54; Cal Rules of Ct 8.60(d).

CAUTION: Counsel must be mindful that many issues are waived by a guilty plea and such issues are not made cognizable on appeal by obtaining a certificate of probable cause. See, *e.g., People v Perez* (1985) 172 CA3d 806, 810, 218 CR 417; *People v Hunter* (2002) 100 CA4th 37, 122 CR2d 229.

The exceptions to the certificate of probable cause requirement are for appeals raising:

- Grounds occurring after the entry of the plea "which do not challenge its validity" (usually a sentencing issue); or
- The denial of a motion to suppress evidence under Pen C §1538.5.

Cal Rules of Ct 8.304(b)(4); see also *People v Miller* (2006) 145 CA4th 206, 212, 51 CR3d 421.

Although these appeals do not require a certificate of probable cause, the notice of appeal must specify the grounds for the appeal. Pen C §1237.5; Cal Rules of Ct 8.304(a)(4); *People v Lloyd* (1998) 17 C4th 658, 72 CR2d 224. Counsel should draft the notice of appeal, or assist the client in its drafting, to ensure that the notice is sufficiently specific.

NOTE: When the plea agreement specifies only a maximum sentence, the defendant does not need a certificate of probable cause to challenge a sentence that is within the maximum negotiated term. *People v French* (2008) 43 C4th 36, 45, 73 CR3d 605; *People v Buttram* (2003) 30 C4th 773, 134 CR2d 571. However, if a challenge is to be made under such circumstances and that challenge could be construed as an attack on the validity of the plea (see, *e.g.*, *People v Cuevas* (2008) 44 C4th 374, 79 CR3d 303, involving a claim that sentence on certain counts should have been stayed pursuant to Pen C §654), the safer course would be to request the issuance of a certificate of probable cause, even if the sentence is within the maximum range provided by the negotiated plea.

These rules apply to probation revocations following an admission of the violation. See Pen C §1237.5. They do not, however, apply to appeals of misdemeanor or infraction cases, which are governed by Pen C §1466. For further discussion of guilty plea appeals governed by Pen C §1237.5, see §§1.11-1.15. For further discussion of misdemeanor appeals, see §§1.16-1.18, 2.9. For a sample notice of appeal for use in a misdemeanor case, see §2.32.

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§2.9 (2) Misdemeanor Appeals

An appeal of a misdemeanor conviction, like a felony appeal, is taken by filing a written notice of appeal in the trial court. The notice must be signed by the appellant or the appellant's attorney. It should identify "in substance" the judgment or order that is the subject of the appeal, but will be liberally construed in favor of its sufficiency. Cal Rules of Ct 8.852(a).

The notice of appeal must be filed within 30 days after the date of the judgment or appealable order. If the defendant is committed before final judgment for insanity, narcotics addiction, or as a mentally disordered sex offender, the notice of appeal must be filed within 30 days after the commitment. Cal Rules of Ct 8.853(a).

A notice of appeal filed before the date of judgment or appealable order may, in the discretion of the reviewing court for good cause, be treated as if it had been filed immediately after entry of the judgment or order. Cal Rules of Ct 8.853(c). The clerk may not file a late notice of appeal, but must mark it "received (date) but not filed," and advise the party seeking to file the notice that it was not filed because it was received after the filing period had elapsed. Cal Rules of Ct 8.853(d). Failure to timely file a notice of appeal may be excused in compelling circumstances. See, *e.g., People v Leftwich* (1979) 97 CA3d Supp 6, 158 CR 758 (trial attorney failed to file notice of appeal for client); *People v Riley* (1977) 73 CA3d Supp 1, 141 CR 16. For further discussion of misdemeanor appeals, see §§1.16-1.18.

NOTE: If defense trial counsel has reason to believe his or her client is indigent and will file an appeal, he or she has an obligation to the client to prepare and file an application for appointment of counsel. Cal Rules of Ct 8.851(b)(1). If the defendant was represented by appointed counsel, that must be noted in the application. Cal Rules of Ct 8.851(b)(2). Counsel may use Request for Court-Appointed Lawyer in Misdemeanor Appeal (Judicial Council Form CR-133) for this purpose. If the appellant was not represented by the public defender or other appointed counsel in the trial court, the appellant must use Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210) to prove indigency and request appointed counsel. Comment to Cal Rules of Ct 8.851.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.10 (3) Juvenile Appeals

§2.10 (3) Juvenile Appeals

Juvenile court appeals take precedence over all other cases. Welf & I C §800(a). Appeals and writs in juvenile cases are governed by Cal Rules of Ct 8.400-8.474.

An appeal from the juvenile court in a Welf & I C §601 or §602 case, is taken by filing a written notice of appeal with the clerk of that juvenile court within 60 days after the rendition of the judgment or the making of the order being appealed, or, in matters heard by a referee not sitting as a judge pro tem, within 60 days after the referee's order becomes final. See Cal Rules of Ct 8.400(d)(1)-(2) (repealed July 1, 2010); Cal Rules of Ct 8.406(a)(1)-(2) (effective July 1, 2010). A notice of appeal from a denial of an application for rehearing of an order of a referee not acting as a judge pro tem must be filed 60 days after that denial order is served or 30 days after entry of the order denying rehearing, whichever is later. See Cal Rules of Ct 8.400(d)(3) (repealed July 1, 2010); Cal Rules of Ct 8.406(a)(3) (effective July 1, 2010).

NOTE: As of July 1, 2010, the rules relating to juvenile appeals and writs are reorganized, expanded, and amended.

Beginning on July 1, 2010, the following rules apply to juvenile Welf & I C §602 appeals:

- Application of rules and confidentiality. Cal Rules of Ct 8.400, 8.401.
- Right to appointment of counsel. Cal Rules of Ct 8.403.
- Stay pending appeal. Cal Rules of Ct 8.404.
- Filing the notice and clerk's duties. Cal Rules of Ct 8.405.
- Time to appeal and record on appeal. Cal Rules of Ct 8.406-8.410.
- Abandoning the appeal. Cal Rules of Ct 8.411.
- Briefs by parties and amici curiae. Cal Rules of Ct 8.412.
- Hearing and decision. Cal Rules of Ct 8.470-8.474.

NOTE: Cal Rules of Court 8.450-8.456 apply to appeals from dependency proceedings.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.11 b. Additional Duties for Indigent Clients

§2.11 b. Additional Duties for Indigent Clients

Penal Code §1240.1(b) imposes the following additional duties on trial attorneys representing indigent defendants:

- Trial counsel must execute and file a timely notice of appeal on an indigent client's behalf when he or she (1) believes there are arguably meritorious grounds for reversal or modification of the judgment or appealable order and it is in the defendant's best interest to seek appellate relief, or (2) is directed to do so by a defendant with a right to appeal.
- With the notice of appeal, the trial attorney must file a brief statement of the grounds for appeal together with a description of any documents, papers, pleadings, or transcripts of oral proceedings that are necessary to properly present the points to be raised on appeal but are not part of the normal record on appeal (see Cal Rules of Ct 8.324; §§3.2-3.5). Executing the notice of appeal does not commit trial counsel to representing the defendant on appeal unless the notice of appeal explicitly states that counsel will represent defendant on appeal. Pen C §1240.1(b). See Comment to §2.31.
- If trial counsel was appointed or if it appears that the defendant may request the appointment of counsel on appeal because of indigency, trial counsel must help the defendant prepare and submit a motion for appointment of appellate counsel with a supporting declaration or affidavit on his or her financial condition. The motion and any supporting documents must be filed with the trial court along with the notice of appeal.

NOTE: The trial court clerk must forward a request for appointment of counsel on appeal to the appellate court clerk within 3 days of receiving it. The appellate court is required to act on the motion without unnecessary delay. If the defendant's counsel fails to file a motion for appointment of counsel with the notice of appeal, the defendant may make such a request on learning that his or her attorney has not done so. The defendant may also request appointment of counsel while the appeal is pending if he or she later becomes indigent. Pen C §1240.1(b). See Form: Motion for Appointment of Counsel on Appeal, §2.36.

A trial attorney's failure to perform any duty prescribed by Pen C §1240.1, assign any particular point or error in the notice of appeal, or designate any particular item for inclusion in the record on appeal does not (a) foreclose the defendant's right to file a notice of appeal himself or herself or to raise any point or argument on appeal, or (b) preclude the defendant or appellate counsel from requesting additions to or correction of the record in the reviewing court. Pen C §1240.1(d).

NOTE: Penal Code §1240.1 permits counsel for an *indigent* defendant to execute and file a notice of appeal on behalf of his or her client without committing to represent the defendant on appeal. The section, however, contains no similar protection for *retained* counsel. Therefore, unless retained counsel is prepared to pursue the appeal, he or she should not file or sign the notice of appeal in his or her own name. In such cases, the best practice is to place the defendant's name and most recent address in the upper left hand corner of the notice of appeal followed by the words "in pro per" and to have the defendant sign the notice of appeal, also in pro per.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/ 3. Application for Bail on Appeal/§2.12 a. Appropriate Case

3. Application for Bail on Appeal

§2.12 a. Appropriate Case

In felony cases involving substantial prison sentences, bail on appeal is very rarely granted. In such cases, the pivotal criterion typically is whether the case presents a substantial legal question on appeal. Although in ruling on a motion for bail, the trial court is not required to determine whether it committed error, as a practical matter the defendant is in the position of having to convince a trial judge that a matter of days or weeks earlier he or she made an error of law that is reasonably likely to result in reversal. This is not very likely because if the judge believed the right decision was made at the time it was made, he or she will probably still believe the decision was correct when passing on the request for bail. This factor can change, however, if appellate counsel files an opening brief that makes a strong showing for relief on appeal. A motion for bail pending appeal can be made at this stage. It must be made first in the trial court (see Cal Rules of Ct 8.312(b)), which retains jurisdiction to grant bail even though an appeal is pending. If the trial court denies the motion, the motion can then be made in the court of appeal.

In cases involving lesser sentences, the prospects for obtaining bail pending appeal are greater. Whether to seek bail depends upon the situation of the particular defendant, assuming such a defendant even has the means to make bail. The variables to be considered are potentially numerous and are generally common-sense concerns of the particular individual. If a client wants to seek bail on appeal, it usually cannot hurt to ask, and often the argument for bail will dovetail nicely with factors in mitigation presented in favor of a lesser sentence. In this situation again, the probability of success on appeal often will be the decisive factor.

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b. Criteria for Granting

§2.13 (1) Felony Appeals

Before conviction, a defendant is entitled to bail as a matter of right except when charged with a capital offense or certain violent felonies. Cal Const art I, §12 (formerly §6). After conviction, a defendant charged with a felony not punishable by death is entitled to bail as a matter of right if only a fine is imposed. Pen C §1272. If the judgment imposes imprisonment, bail is discretionary. Pen C §1272(3); *In re Scaggs* (1956) 47 C2d 416, 303 P2d 1009. If bail is denied pending appeal, the trial court is required to provide a brief statement of reasons for the denial. *In re Podesto* (1976) 15 C3d 921, 937, 127 CR 97. See also *In re Pipinos* (1982) 33 C3d 189, 187 CR 730 (statement must articulate basis of conclusions). An abuse of discretion regarding a bail decision is reviewable by an appellate court. *In re Torres* (1947) 80 CA2d 579, 182 P2d 573.

NOTE: Absent other factors, if a defendant is given a sentence in a felony case that is equivalent to what would be imposed in a misdemeanor case (*e.g.,* probation with a term of a year or less in jail), a denial of bail on appeal would be an abuse of discretion. *In re McCaughan* (1956) 142 CA2d 690, 298 P2d 871.

To obtain release on bail pending appeal, the defendant must show by clear and convincing evidence that he or she is not likely to flee, and that he or she does not pose a danger to the safety of another person or the community. Pen C §1272.1. The defendant must also show that the appeal is not taken for the purpose of delay, and that it raises a substantial legal question that could result in reversal of the conviction. Pen C §1272.1.

See Form: Application for Bail on Appeal—Trial Court, §2.37.

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§2.14 (2) Misdemeanor Appeals

A defendant is entitled to bail pending appeal as a matter of right in misdemeanor cases before judgment is pronounced pending application for probation, including when the appeal is from a judgment imposing a fine only, or when the appeal is from a judgment imposing imprisonment. Pen C §1272(1)-(2). If the appeal of a misdemeanant released on bail in place of county jail time ordered as a condition of probation has not been completed when the probation period ends, the defendant still must serve the jail time if the conviction is affirmed by the appellate court. *In re Bakke* (1986) 42 C3d 84, 227 CR 663. The court, however, has inherent authority to excuse its service in the interest of justice. 42 C3d at 90 n4.

The right to bail on appeal in misdemeanor cases applies whether the sentence is imposed on the original conviction or on a later violation of probation. *In re O'Driscoll* (1987) 191 CA3d 1356, 236 CR 882.

NOTE: Counsel should note that conditions of probation are not suspended when the misdemeanor appellant posts bail on appeal. Under *In re Bakke, supra,* an appellant continues to be subject to search and seizure, firearms restrictions, and other noncustodial conditions of probation specified in the court's order unless the court specifically suspends those conditions pending the appeal.

If the trial court denies bail pending appeal, a misdemeanor defendant may apply to the appellate division of the superior court for bail, a reduction in bail, or for release on other conditions. Cal Rules of Ct 8.854(a). The application must be served on the prosecuting attorney. Cal Rules of Ct 8.854(c). The application must show that the defendant sought relief in the trial court and that the court unjustifiably denied the application. Cal Rules of Ct 8.854(b).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.15 4. Application for Stay of Execution of Judgment

§2.15 4. Application for Stay of Execution of Judgment

An appeal does not stay execution of judgment in noncapital cases unless the trial or appellate court so orders. Pen C §§1243 (felony appeals), 1467 (misdemeanor and infraction appeals). Note that although a judgment imposing a sentence of death is automatically stayed pending determination of the automatic appeal (see Pen C §1239), a defendant in a capital case who does not receive the death penalty must file a notice of appeal and application for stay. *People v Riser* (1956) 47 C2d 594, 305 P2d 18.

In cases appealed to the court of appeal, a stay of execution should first be requested in the trial court. See Cal Rules of Ct 8.312(a)(1). If the trial court denies the stay, counsel should then apply to the reviewing court. The reviewing court can order interim relief pending its ruling on the application, but must notify the superior court that it has done so. Cal Rules of Ct 8.312(d).

NOTE: Such stays are extremely rare, and a defendant would have to show some unique, extreme hardship in order to make out a proper case for the granting of such a stay.

Stays in misdemeanor and infraction appeals may be granted by the appellate division of the superior court. See Cal Rules of Ct 8.854 (misdemeanors), 8.903 (infractions).

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§2.16 a. Criteria for Granting

Penal Code §1243 provides no criteria for granting a stay of execution, but simply provides, "The granting or refusal of such an order shall rest in the discretion of the court." Thus, some unique, extreme hardship surely would have to be shown in order for a defendant to obtain such a stay. Such stays are extremely rare. See Form: Application for Stay of Execution (and Bail)—Trial Court, §2.38.

NOTE: Any duty of the defendant to register as a sex offender under Pen C §290 cannot be stayed. Pen C §1243.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.17 b. Effect of Stay

§2.17 b. Effect of Stay

Once a trial or appellate court orders a stay of execution of judgment, the clerk of the court will issue a certificate to that effect. Pen C §1243. If the defendant is in custody and has not been admitted to bail, the sheriff, on being served with a copy of the certificate, will keep the defendant in his or her custody without executing the judgment (execution of the judgment in felony cases is usually to send the defendant to state prison) to await determination of the appeal. Pen C §§1244-1245; *In re Fishman* (1952) 109 CA2d 634, 241 P2d 603.

A defendant held in county custody formerly suffered a form of "dead time" in which he or she earned a maximum of 2 days of conduct credit for each 4 days served. Pen C §2900.5 and former §4019. See also *People v Bravo* (1990) 219 CA3d 729, 268 CR 486. However, under a January 25, 2010 amendment to Pen C §4019, such a person now appears to be entitled to earn day for day credits, although at the time of this writing, there is considerable uncertainty regarding the interpretation and application of this amendment. See *e.g., People v Brown* (March 16, 2010, C056510) 2010 Cal App Lexis 344 (amendment intended to be retroactively applied to defendants sentenced before January 25, 2010, whose convictions are not yet final); *People v Rodriguez* (2010) 182 CA4th 535, ___ CR3d ___ (amendment intended to be applied prospectively only).

NOTE: It is obviously to the prisoner's advantage to begin serving one-for-one time as soon as possible. Therefore, if an eligible defendant is sentenced to state prison and is not released on bail pending appeal, it is generally unwise to seek a stay of execution of judgment unless the defendant is entitled to one-for-one credits for this period of time under the January 25, 2010 amendment as it is ultimately interpreted by the courts.

However, limitations on conduct credits for prisoners convicted under the Three Strikes Law (see Pen C §§667(c)(5), 1170.12(a)(5)) and prisoners convicted of violent felonies listed in Pen C §667.5(c) (see Pen C §2933.1), mean that a defendant sentenced to prison for one of these offenses might benefit from a stay of execution that would result in his or her staying in county jail longer. See *People v Hill* (1995) 37 CA4th 220, 44 CR2d 11 (limitation on conduct credits for defendant convicted under Three Strikes law not applicable to presentencing credits).

An appeal to the court of appeal or a petition for review to the California Supreme Court from a judgment of conviction does not stay the execution of the judgment or order granting probation unless the court so orders. Pen C §1243 (but the court may not stay defendant's duty to register as sex offender); *In re Bakke* (1986) 42 C3d 84, 88, 227 CR 663 (misdemeanor case); *People v Fields* (1981) 119 CA3d 386, 389, 174 CR 49 (felony case). When probation is not specifically stayed, all terms of probation, including search conditions and restrictions on conduct, remain in effect pending the outcome of the appeal. Sanctions can be imposed for violations of probation during the period of the stay on appeal. *In re Bakke, supra*; *People v Fields, supra*.

The trial court lacks jurisdiction to modify the judgment if the defendant remains in custody pending appeal and the judgment is affirmed. The trial court may, however, make probation conditions less onerous on a showing of the defendant's good conduct during the pendency of the defendant's unsuccessful appeal. *In re Stallings* (1970) 5 CA3d 322, 85 CR 96, disapproved on other grounds in *People v Cookson* (1991) 54 C3d 1091, 1100, 2 CR2d 176.

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III. PRIVATELY RETAINED COUNSEL

§2.18 A. Referral

Prior relationships between trial and appellate attorneys, the reputation of certain appellate attorneys, and the like, may lead to a case being referred to a specific attorney for the purpose of handling the appeal. If the referral is by other counsel and contemplates any sharing of fees, counsel must be vigilant to consult current rules of ethics on fee splitting. California Rules of Professional Conduct 2-200 requires an attorney to obtain the written consent of the client to any arrangement to share the fee with another attorney. On the consequences of failing to obtain the required consent, see *Scolinos v Kolts* (1995) 37 CA4th 635, 640, 44 CR2d 31, 34; *Margolin v Shemaria* (2000) 85 CA4th 891, 102 CR2d 502.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.19 B. Setting Fees

§2.19 B. Setting Fees

An attorney is entitled to fair compensation for his or her services. There is no definitive standard, however, to measure the value of the attorney's services to a defendant in a criminal case on appeal. Fee schedules are rarely prepared by specialists in the field of criminal appeals. To determine the fees for counsel's services on appeal, the following factors generally should be taken into consideration:

- The time required to handle the matter, including consulting with prior counsel, reading the record, analyzing and researching the facts and issues, writing the brief, preparing and presenting oral argument, interviewing the client, and traveling to visit an incarcerated client;
- The novelty and difficulty of the question or questions of law presented;
- The degree of professional skill and experience required of the attorney;
- The loss of other employment while the attorney is engaged in the appeal;
- The customary charges for similar employment in the legal community; and
- The professional standing and exceptional qualifications of counsel. See Pen C §987.3 (factors to be considered in determining reasonable compensation for court-appointed attorneys).

Attorneys entering a case for the first time at the appellate level should request a retainer or fee to cover the preliminary time necessary to review the case and determine whether to accept it. Counsel must consider the length of the trial transcript and the number of legal issues on appeal to make a reasonably accurate evaluation of the time and effort required to handle the matter properly.

When setting the fee, it is wise to advise the client that an adverse decision may lead to a petition for rehearing and a petition for review in the state supreme court. Even a favorable decision may require that the client file answers in the appellate courts to prosecution petitions for rehearing and review. A petition for certiorari to the United States Supreme Court, discussed in chap 12, or a writ of habeas corpus in federal district court, discussed in chaps 13-18, may be indicated if the case presents a substantial federal question. Because of the variables in how far a case may be taken beyond the direct appeal, the attorney must be certain that the retainer agreement, discussed in the next section, is clear as to what, if any, proceedings beyond the direct appeal are covered. For example, the agreement should specify such matters as whether the retainer includes filing a petition for review in the supreme court in the event of an adverse ruling in the court of appeal, whether it includes filing a petition for writ of habeas corpus if review of the case suggests that such a petition is appropriate, and so on.

On occasion, an appellate attorney is retained by trial counsel rather than by the client. In this situation, the appellate attorney should try to work through the trial attorney on matters such as fee arrangements.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.20 C. Written Representation Agreement

§2.20 C. Written Representation Agreement

California lawyers are required to have written fee contracts with their clients whenever the client's total expense, including fees, will likely exceed $1000. Under Bus & P C §6148(a), a written contract must include:

- An explanation of how the attorney will be compensated, *e.g.,* hourly rates, statutory fees, or flat fees;
- A description of other charges and fees that are applicable to the case;
- A description of the general nature of the legal services to be provided to the client; and
- A description of the respective responsibilities of the attorney and the client concerning the performance of the contract.

For sample forms, see California Criminal Law Forms Manual, chap 3 (2d ed Cal CEB 2005).

All bills rendered by an attorney to a client must clearly state the basis for the bill. Bills for fees must include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for costs and expenses must clearly identify the costs and expenses incurred. See Bus & P C §6148(b) for additional requirements.

If an attorney fails to comply with the requirements of Bus & P C §6148(a)-(b), the fee agreement is voidable at the option of the client; the attorney is, however, entitled to collect a reasonable fee. Bus & P C §6148(c).

See Bus & P C §6148(d) for exceptions to the requirements of Bus & P C §6148(a)-(b).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/ IV. COURT-APPOINTED COUNSEL/ A. Felonies Punishable by Imprisonment/§2.21 1. Appointment and Selection

IV. COURT-APPOINTED COUNSEL

A. Felonies Punishable by Imprisonment

§2.21 1. Appointment and Selection

California Rules of Court 8.300 requires each appellate court district to adopt procedures for the appointment of counsel in indigent criminal appeals. Those procedures require appointed counsel to fill out a questionnaire regarding their qualifications. Cal Rules of Ct 8.300(a)(2). On the basis of these qualifications, an attorney is then placed on a list used to assign appeals according to difficulty. Cal Rules of Ct 8.300(b)-(c).

Courts may contract out the rating and appointment of counsel to indigent appeals to an appellate project administrator. Cal Rules of Ct 8.300(e). This is the method currently used by the courts of appeal. Now that project administrators are in place in every appellate district, the courts of appeal have little or no direct input into the appointment of counsel except for issuing the appointment. Typically, all notices of appeal and requests for appointment of counsel are sent by the court of appeal to the appellate project under contract with the district. The project then verifies the defendant's indigency. If court-appointed counsel is considered appropriate, the administrator makes a recommendation for appointment of counsel to the court from the panel list, and this recommendation is almost always followed. Sometimes, an attorney may request appointment directly from the court of appeal but this is rare. Moreover, the court of appeal is most likely to seek administrator input before granting the request. The administrator provides consultation and assistance to appointed counsel as well as providing an oversight function. See *In re Jones* (1994) 27 CA4th 1032, 33 CR2d 469 (ineffective assistance of counsel petition filed by appellate project attorney against panel attorney appointed to represent appellant).

Each appellate project maintains a list of panel attorneys eligible to accept appointments in the district or districts that the project serves. The panel attorneys are evaluated as to their level of skill and experience when accepted onto the panel, and on a continuing basis thereafter, so that the project administrator can assign to them cases of the proper level of severity and complexity for the given attorney's level of skill and experience.

Below is a list of administrative offices currently operating in California:

First District
First District Appellate Project
730 Harrison St., Suite 201
San Francisco, CA 94107
(415) 495-3119
(415) 495-0166 (fax)
http://www.fdap.org
Executive Director: Matthew Zwerling

Second District
California Appellate Project
520 South Grand Ave., Fourth Floor
Los Angeles, CA 90071
(213) 243-0300
(213) 243-0303 (fax)
http://www.lacap.com
Executive Director: Jonathan B. Steiner

Third District
Central California Appellate Program
2407 J St., Suite 301

Sacramento, CA 95816-4736
(916) 441-3792
(916) 442-0330 (fax)
http://www.capcentral.org
Executive Director: George Bond

Fourth District
Appellate Defenders, Inc.
555 West Beech St., Suite 300
San Diego, CA 92101
(619) 696-0282
(619) 696-7789 (fax)
http://www.adi-sandiego.com
Executive Director: Elaine Alexander

Fifth District
Central California Appellate Program
2407 J St., Suite 301
Sacramento, CA 95816-4736
(916) 441-3792
(916) 442-0330 (fax)
http://www.capcentral.org
Executive Director: George Bond

Sixth District
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050
(408) 241-6171
(408) 241-2877 (fax)
http://www.sdap.org
Executive Director: Michael A. Kresser

California Supreme Court
California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105
(415) 495-0500
(415) 495-5616 (fax)
http://www.capsf.org
Executive Director: Michael G. Millman

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.22 2. Supervision

§2.22 2. Supervision

Panel attorneys who accept appointments to handle felony appeals are independent contractors and are not supervised in a technical sense by the project administrator. However, there often is some degree of collaboration between the panel attorney and a project staff attorney. The nature of the appointment—whether it is "independent" or "assisted"—is a key factor in the amount of collaboration.

Independent appointments comprise the majority of the caseload statewide. In an independent case, the panel attorney typically receives the record directly from the court. The panel attorney is required to serve documents filed with the court on the project, but any other contact between the attorney and the project is voluntary. Project staff attorneys are available to provide limited consultation if needed, but because independent assignments are made to panel attorneys with a relatively high level of skill and experience, many independent cases involve no consultation at all, and when there is consultation, it usually is limited to unusual, complex issues.

In an assisted case, a project staff attorney will review all or part of the appellate record before the record is sent to the panel attorney, and will provide a memo outlining possible issues for the panel attorney to consider including in the brief. The project attorney will also review a draft of the opening brief, often recommending revisions or additions, before the brief is filed.

NOTE: In Sixth District cases, unless a conflict is declared because of multiple appellants, the panel attorney is appointed in association with the Sixth District Appellate Program even in independent cases. This project, consequently, may have greater input into the case than occurs in the other five districts.

Although, strictly speaking, the project does not supervise the panel attorney, the staff attorney assigned to a particular case does evaluate the attorney's work in both independent and assisted cases, typically once after the project attorney has reviewed the opening brief and again at the close of the case. These evaluations, done in writing, play a key role in determining the kinds of cases assigned to individual panel attorneys.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.23 3. Fee Recommendations

§2.23 3. Fee Recommendations

The process by which appointed counsel are compensated in felony appeals is highly systematized. By agreement among the Administrative Presiding Justices of the Court of Appeal, the Administrative Office of the Courts (AOC), and the project administrators, the project administrators have the primary responsibility for reviewing fee claims, subject to a quarterly auditing process by the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC), a standing committee of the AOC, on behalf of the Judicial Council.

Compensation is based on time billed by the attorney, adjusted in some cases to comport with statewide compensation guidelines. These guidelines, based on the estimated time it would take an experienced appellate attorney to perform the tasks involved in handling an appellate case, establish a range of appropriate awards of compensation for all hourly tasks and a range of proper levels of reimbursement for necessary expenses, such as postage and photocopying. A copy of the guidelines is provided to an attorney when he or she is admitted to one of the appellate panels. They can also be found on websites maintained by each of the court of appeals projects by clicking on "claims" and then, depending on the project, either "guidelines," "claim guidelines," or "rates & guidelines."

PRACTICE TIP: If an attorney's hours on a project are "over guidelines," it is a good idea to enclose an explanation when sending the compensation claim to the project for review. The guidelines do not provide an upper limit for allowable compensation, but they do set a limit on the number of hours that will be approved without explanation. Project attorneys (and the AIDOAC auditors) are often willing to authorize compensation above the guideline amounts for good cause. There is, for example, a broad consensus among practitioners in the field that the guideline allowance for communication with the client is artificially low. Panel attorneys who document their communications with their clients and present that documentation along with their claims are likely to be compensated above the guideline rates for this aspect of their representation.

Hourly compensation of appointed appellate counsel varies, depending on the nature of the assignment and the complexity of the case. For appointments made after October 1, 2005, the rates are $70 an hour for assisted cases, $80 an hour for the majority of independent cases, and $90 an hour for independent cases that meet specified criteria relating to the length of the record, the seriousness of the offense, and/or the nature of the proceedings in the trial court. Beginning with appointments made on or after July 1, 2007, the three tiers have increased to $85, $95, and $105. See http://www.sdap.org/c-rates.html.

An attorney appointed in any of California's six appellate districts may submit an interim claim for compensation when the opening brief is filed (except for *Wende* briefs; see §§2.25-2.26), and a final claim after the court of appeal files its decision. The court will generally pay 95 percent of the approved hours and 100 percent of reimbursable expenses on the interim claim. Counsel does not need to wait until the court issues the remittitur to submit a final claim. However, any work done after the submission of the final claim will not be compensated.

Appointed counsel must submit all compensation claims to the appellate project that recommended the appointment. A project staff attorney reviews the claim and makes a compensation recommendation based on the guidelines and the quality of the work done by the panel attorney in that case. This recommendation is transmitted electronically to the AOC, where it is reviewed and approved, if appropriate, by the manager of appellate court services. The AOC then sends the data to the state controller, who issues a check within 2 to 3 weeks after receiving the data from the AOC, or initiates a direct deposit within 1 to 2 weeks for those who have chosen this option.

Fee awards made under this system are audited quarterly by AIDOAC, which reviews randomly selected claims and claims that are triggered for review under a formula that identifies claims that are unusually large in relation to the length of the appellate record. The audit sometimes results in a decrease in the attorney's approved compensation, and on occasion the audit will result in some restoration of money reduced by a project.

The hourly rate for capital appeals and writs in the California Supreme Court is $145. See http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. The supreme court has instituted an optional flat fee arrangement in place of hourly billings for capital appeals. The appeal is weighted primarily by the length of transcript

under this arrangement. The fee is then dispensed in six payments as the appeal progresses. Counsel who opt for hourly billing have their claims reviewed by the California Appellate Project, San Francisco, which sends a recommendation that is then reviewed by the full court for the award of compensation.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.24 B. Misdemeanors and Infractions

§2.24 B. Misdemeanors and Infractions

On application, the appellate division of the superior court must appoint appellate counsel to a person convicted of a misdemeanor who (Cal Rules of Ct 8.851(a)):

- Is subject to incarceration or a fine of $500 or more (including penalty and other assessments); or who is likely to suffer significant adverse collateral consequences as a result of the conviction; *and*
- Establishes indigency; or was represented by appointed counsel in the trial court.

Attorneys interested in such appointments typically can get information from the local county public defender or contract public defender, or from the clerk of the court.

Defendants appealing infractions are not entitled to appointed counsel. See Cal Rules of Ct 8.900-8.929.

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V. DUTIES OF APPELLATE COUNSEL

§2.25 A. Duty to Raise All Arguable Issues

In California, effective assistance of counsel on appeal requires counsel to prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must set forth a statement of the procedural history of the case and a statement of the facts of the case, with citations to the transcript, discuss the legal issues with citations to appropriate authority, and argue all issues that are arguable. If counsel concludes that there are no reasonably arguable issues (*i.e.*, that the appeal is frivolous), he or she may limit the brief to a statement of the procedural history and the facts. Counsel must not, however, argue the case against his or her client or describe the appeal as frivolous to the court. *People v Wende* (1979) 25 C3d 436, 439, 158 CR 839; *People v Feggans* (1967) 67 C2d 444, 447, 62 CR 419, citing *Anders v California* (1967) 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396. For discussion of *Wende* briefs, see §2.26.

A reasonably arguable issue has two elements. First, the issue must be one that, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will be a reversal or a modification of the judgment. *People v Johnson* (1981) 123 CA3d 106, 109, 176 CR 390. However, appellate counsel has no duty to raise every nonfrivolous issue requested by his or her client. *Jones v Barnes* (1983) 463 US 745, 77 L Ed 2d 987, 103 S Ct 3308.

The United States Supreme Court has held that the two-prong test enunciated in *Strickland v Washington* (1984) 466 US 668, 687, 80 L Ed 2d 674, 694, 104 S Ct 2052, for determining whether trial counsel's representation was constitutionally adequate, applies to claims of ineffective assistance of appellate counsel. See *Smith v Robbins* (2000) 528 US 259, 285, 145 L Ed 2d 756, 780, 120 S Ct 746 (finding that appellate counsel following California's *Wende* procedures was not ineffective); *Smith v Murray* (1986) 477 US 527, 535, 91 L Ed 2d 434, 445, 106 S Ct 2661. Thus, to establish constitutionally deficient representation on appeal, the defendant must show that (1) the challenged act or omission was objectively unreasonable, *and* (2) there was a reasonable probability that, but for counsel's error, the appellant would have prevailed on appeal. *Smith v Robbins* (2000) 528 US 259, 285, 145 L Ed 2d 756, 780, 120 S Ct 746.

In the following cases, counsel's failure to raise arguable issues resulted in a finding of ineffective assistance of counsel on appeal:

- *In re Smith* (1970) 3 C3d 192, 202, 90 CR 1 ("inexcusable failure" of counsel to raise any crucial assignments of error that arguably might have resulted in reversal).
- *People v Rhoden* (1972) 6 C3d 519, 523, 99 CR 751 (in representing defendant sentenced to life without possibility of parole, counsel filed brief that raised frivolous issue and failed to raise other substantial assignments of error).
- *People v Barton* (1978) 21 C3d 513, 146 CR 727 (appointed counsel failed to obtain adequate appellate record; record included transcript of second day of Pen C §1538.5 hearing, but did not contain first-day transcript during which witnesses for both sides had testified).
- *People v Taylor* (1974) 39 CA3d 495, 496, 114 CR 169 (appellate counsel failed to include authorities in support of contentions in "woefully inadequate" brief).
- *In re Greenfield* (1970) 11 CA3d 536, 89 CR 847 (counsel neglected to cite recent line of cases that would have resulted in reduction of charge against appellant).

Failure to raise an issue due to neglect or ignorance amounting to ineffective assistance of counsel may allow the defendant to gain relief by way of habeas corpus at a later time. For discussion of habeas corpus relief in state court, see chaps 9-10. For discussion of habeas corpus relief in federal court, see chaps 13-18.

If the only arguable error is a miscalculation of presentence credits, counsel may not argue the issue on appeal without first moving for correction in the trial court. Pen C §1237.1; *People v Clavel* (2002) 103 CA4th 516, 127 CR2d

660. Appellate attorneys have found that an informal letter to the trial court (with service on all appropriate parties) is often an effective remedy for custody credit errors. However, if an informal letter does not yield results, counsel must file a formal motion to preserve the issue for appeal. *People v Clavel, supra*.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/ B. Duty When Appellate Counsel Finds No Arguable Issues/§2.26 1. Appointed Counsel

B. Duty When Appellate Counsel Finds No Arguable Issues

§2.26 1. Appointed Counsel

Anders v California (1967) 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396, sets forth the constitutionally mandated duties of appellate counsel who, upon reviewing the record on appeal, finds no arguably meritorious issues. The Supreme Court held that merely reading the record, consulting with the defendant, and then filing a no-merit letter with the court constituted ineffective assistance of counsel because the assistance did not rise to the level of active advocacy. Instead, *Anders* requires that if, after a conscientious examination of the record, counsel finds that an appeal would be wholly frivolous, the attorney must (386 US at 744):

- Advise the court;
- Request permission to withdraw; and
- Accompany the request with a brief referring to anything in the record that might arguably support the appeal. A copy of this brief must be furnished to the client, and the client must then be given time to raise any point he or she chooses.

In *People v Wende* (1979) 25 C3d 436, 441, 158 CR 839, the California Supreme Court, relying on *Anders*, adopted a procedure for appellate counsel to use in California courts, when, after reviewing the record, he or she finds no arguable issues. The *Wende* procedure requires counsel to:

- Inform the client that counsel is submitting a *Wende* brief to the reviewing court;
- Describe the *Wende* procedures;
- Advise the client that he or she may file a supplemental brief in the court of appeal notifying the court of any issues the client wants the court to consider;
- Advise the client that the client has the right to ask the court to relieve counsel; and
- Send the trial transcripts to the client for the client's use in preparing a supplemental brief.
- File a brief in the court of appeal that includes:
- A thorough summary of the procedural history of the case, including all motions, objections, rulings, and other significant events that theoretically could have given rise to an appellate issue;
- A thorough summary of the material facts of the case;
- A request to the court to conduct an independent review of the record; and
- A declaration advising the court that counsel has informed the client that he or she is filing a *Wende* brief, has given the client the required advisements, and has sent the record to the client.

The *Wende* procedure was approved by the United States Supreme Court in a 5-4 decision in *Smith v Robbins* (2000) 528 US 259, 145 L Ed 2d 756, 120 S Ct 746. For discussion of *Wende* procedures, see California Criminal Law Procedure and Practice §§44.37-44.38 (Cal CEB Annual). For sample *Wende* brief and supporting declaration, see §2.39.

NOTE: The appellate projects in each district expect panel attorneys handling both independent and assisted cases to consult with a staff attorney before filing a *Wende* brief. This is a service that many appellate practitioners find valuable because it gives the attorney an opportunity for a second opinion before making a decision that in the vast majority of cases will result in a speedy affirmance. Although project staff attorneys do not routinely read the record, at least in independent cases, most will if counsel asks them to do so.

Under *Anders*, the appellate court must review the entire record to "decide for itself whether the appeal is frivolous" when appointed counsel submits a brief that raises no specific issues. *People v Wende* (1979) 25 C3d 436, 440, 158 CR 839. If, after independently reviewing the record, the court finds no arguable issues, California practice requires the court to issue a decision on the merits. 25 C3d at 443. The opinion must meet standards of completeness articulated by the supreme court in *People v Kelly* (2006) 40 C4th 106, 109, 51 CR3d 98. If the defendant has filed a supplemental

brief, the court of appeal decision must briefly describe the defendant's "contentions and the reasons they fail." 40 C4th at 120. Appellate counsel with a *Wende* case should be familiar with the standards articulated in *Kelly*.

If the court finds any of the legal points arguable on their merits, it must, before decision, afford the indigent the assistance of counsel to argue the appeal. *Anders v California* (1967) 386 US 738, 744, 18 L Ed 2d 493, 498, 87 S Ct 1396; *People v Wende* (1979) 25 C3d 436, 442 n3, 158 CR 839. The *Wende* procedure, which does not require counsel to withdraw, and does not permit counsel to describe the appeal as frivolous, permits the attorney originally appointed to represent the defendant to brief the issues the court has identified. 25 C3d at 442 n3.

PRACTICE TIP: Many appellate practitioners are uneasy about the very idea of filing a *Wende* brief. Counsel does not, however, provide a service to the client by briefing an issue that counsel believes to be frivolous, as an alternative to filing a *Wende* brief. As *Wende* itself noted, "counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues than when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation." 25 C3d at 442. See also *People v Hackett* (1995) 36 CA4th 1297, 1302, 43 CR2d 219.

NOTE: The *Wende/Anders* review procedures generally apply only in criminal cases. *In re Sade C.* (1996) 13 C4th 952, 962 n2, 55 CR2d 771 (*Wende/Anders* procedures inapplicable to proceeding seeking to terminate parental rights). See also *People v Taylor* (2008) 160 CA4th 304, 3112, 72 CR3d 740 (*Wende* procedures not available for post conviction, civil commitments under the Mentally Disordered Offender Act).

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§2.27 2. Private Counsel

The right to request an independent review of the record does not apply to a defendant who has retained counsel. If retained counsel believes that no arguable issue can be presented on appeal, counsel must discuss this conclusion with the client and either obtain the client's permission to dismiss the appeal or move to withdraw from the case. Counsel must also advise the client to consider retaining other counsel. *People v Placencia* (1992) 9 CA4th 422, 428, 11 CR2d 727.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.28 C. Duty When There May Be an Adverse Consequence

§2.28 C. Duty When There May Be an Adverse Consequence

Definition of adverse consequence. Appellate defense practitioners use the term "adverse consequence" to refer to circumstances in which a defendant runs the risk of more severe punishment by pursuing the appeal. The double jeopardy clause of the California Constitution ordinarily prohibits imposition of a more severe sentence after retrial. *People v Henderson* (1963) 60 C2d 482, 35 CR 77. There are two major exceptions to this rule:

- An unauthorized sentence; and
- The withdrawal of a guilty plea.

CAUTION: Failure of trial or appellate counsel to properly advise the defendant of adverse consequences that may result from an appeal can give rise to a claim of ineffective counsel. *People v Harris* (1993) 19 CA4th 709, 23 CR2d 586 (claim raised but rejected based on facts).

Unauthorized sentence. In reviewing the trial record, appellate counsel must be alert to the possibility of sentencing errors in the defendant's favor because "once [a defendant] lays his cause at an appellate doorstep he subjects himself to thorough scrutiny of the proceedings below." *People v Iniguez* (2002) 96 CA4th 75, 116 CR2d 634 (citation omitted). A legally unauthorized sentence (*i.e.*, one that violates "mandatory provisions governing the length of confinement") is subject to review and correction at any time. *People v Scott* (1994) 9 C4th 331, 354, 36 CR2d 627; *People v Serrato* (1973) 9 C3d 753, 109 CR 65, disapproved on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855. See also *People v Askey* (1996) 49 CA4th 381, 56 CR2d 782 (judgment modified to add term for prior conviction). This rule permits the Attorney General to draw the court's attention to an unauthorized sentence, despite the state's failure to appeal. *People v Rowland* (1988) 206 CA3d 119, 253 CR 190. The reviewing court may also correct an unauthorized sentence on its own motion. See, *e.g.*, *People v Hammer* (2003) 30 C4th 756, 771, 134 CR2d 590 (after affirming trial court's decision to sentence defendant under One Strike sex crime law, reviewing court on its own motion remanded to trial court to consider whether he should also be sentenced under Three Strikes).

The rules pertaining to unauthorized sentences also apply to such trial court errors as failing to impose a mandatory restitution fine (*People v Rowland* (1988) 206 CA3d 119, 127, 253 CR 190), failing to impose a mandatory drug case fee (*People v Turner* (2002) 96 CA4th 1409, 118 CR2d 99), or imposing a fee that exceeds the statutory limit (*People v Martinez* (1998) 65 CA4th 1511, 77 CR2d 492). In addition, the court of appeal may correct a clerical error on its own motion or on motion of any party. *People v Mitchell* (2001) 26 C4th 181, 187, 109 CR2d 303 (ordering court of appeal to correct abstract of judgment to include restitution fines and penalty assessments reflected in reporter's transcript and court's minutes).

Withdrawal of guilty plea. The withdrawal of a guilty plea restores the parties to the position they were in before the plea. This may not be in the defendant's best interests because it permits the prosecution to bring any charges shown by the evidence. See *People v Superior Court (Garcia)* (1982) 131 CA3d 256, 258, 182 CR 426 (special circumstances were charged for first time on remand after defendant's guilty plea on noncapital charges was set aside on appeal).

EXAMPLE: In at least one case, an unauthorized sentence brought to the reviewing court's attention by the attorney general resulted in the forced withdrawal of the defendant's guilty plea. In *People v Iniguez* (2002) 96 CA4th 75, 116 CR2d 634, the defendant, originally charged with murder, pleaded guilty to the nonexistent crime of conspiracy to commit attempted murder. On appeal, he raised only sentencing issues. At the behest of the Attorney General, the court treated the sentence for the nonexistent crime as an unauthorized sentence and reversed the conviction, in the process setting aside the defendant's guilty plea and returning the parties to the position they were in before the appeal. The court rejected arguments of invited error and equitable estoppel as irrelevant to the conviction of a nonexistent crime. 96 CA4th at 81.

Abandonment of appeal. An appellant may voluntarily abandon an appeal at any time. If the record has not been filed, the abandonment should be filed in the trial court. If the record has been filed, the abandonment should be filed in

the reviewing court, which may order dismissal and immediate issuance of the remittitur. Cal Rules of Ct 8.316. See Form: Abandonment of Appeal, §2.40. See also §5.20.

The clerk of the court in which the abandonment is filed is required to notify the adverse party immediately of the abandonment or order of dismissal. If the defendant abandons the appeal of a felony case, the clerk notifies both the district attorney and Attorney General. Cal Rules of Ct 8.316(c). The abandonment may be signed either by the appellant or his or her attorney of record. Cal Rules of Ct 8.316(a).

The defendant should make the decision. When appellate counsel discovers an adverse consequence, he or she must immediately communicate the discovery to the client. It is up to the *client*, not the attorney, to decide whether to proceed with an appeal in spite of the possibility of adverse consequences. After all, the client will be serving the additional time if the appeal is unsuccessful and the sentence is increased, or will be subject to an additional fine or fee if a mandatory assessment had been overlooked at the initial sentencing hearing. The attorney's role in this situation is to make sure the client's decision is an informed one.

NOTE: Counsel should obtain the client's decision in writing.

In many cases, the decision will be fairly obvious to both attorney and client (*e.g.*, long sentence, minor adverse consequence; short sentence, substantial adverse consequence). In those cases in which the decision is more difficult, counsel must be familiar enough with the facts and law to make an informed assessment of the likelihood of success on appeal and the likelihood that the additional sentence or fine will be imposed. An important factor to include in the equation is whether the client has a substantial federal constitutional claim that may result in a new trial. If so, defendant must exhaust the claim in state court (by appealing and filing a petition for review in the California Supreme Court) in order to file a petition for a writ of habeas corpus in federal court. See *O'Sullivan v Boerckel* (1999) 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728. This consideration militates in favor of proceeding in spite of the adverse consequence if counsel believes there is a reasonable chance for a significant success in federal court, as balanced against the severity of the adverse consequence. On exhaustion of state remedies, see §§14.18-14.40. On filing an exhaustion petition in the California Supreme Court, see Cal Rules of Ct 8.508, discussed in §5.44.

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§2.29 D. Duty When Showing of Error or Prejudice Depends on Facts Outside Record

Appellate counsel has no duty to investigate possible bases for a collateral attack on the judgment. *In re Clark* (1993) 5 C4th 750, 783 n20, 21 CR2d 509. However, when the record suggests that an error in the proceedings could have affected the outcome, but the record itself is inadequate for the argument to succeed on appeal, many appellate practitioners feel that it is good practice to look into the matter further to determine whether extrinsic evidence exists that would support filing a petition for a writ of habeas corpus in conjunction with an appeal.

NOTE: Despite the California Supreme Court's clear statement in *In re Clark, supra,* some of the administrators who oversee the appointment of counsel for indigent appellants (see §§2.21-2.22) expect attorneys appointed in their districts to investigate possible bases for habeas relief that appear in the record and to file a habeas petition if investigation establishes an arguable basis for relief. When appointed counsel discovers the existence of a possible habeas issue in a record, he or she should consult with the appellate project that recommended the appointment to find out its policy on investigating and seeking relief on habeas corpus.

An indigent petitioner who makes a prima facie case for relief on habeas corpus is entitled to the appointment of counsel under California law. *People v Barton* (1978) 21 C3d 513, 519 n3, 146 CR 727; *People v Shipman* (1965) 62 C2d 226, 232, 42 CR 1. There is, however, no uniformity among the district courts of appeal about the role of appointed appellate counsel in regard to habeas corpus petitions filed in conjunction with the appeal. In some districts, *e.g.,* the First District, the appointment of appellate counsel carries with it the expectation that counsel will file a writ petition if he or she discovers a reasonably arguable issue that depends on facts outside the record on appeal, whereas in the Third and Fifth Districts, counsel must submit an application to expand the appointment to include the filing of a petition for writ of habeas corpus if counsel plans to seek compensation for time on this task and reimbursement of related expenses. These latter courts require a rather strong showing of potential merit before they will grant such a request. (This process is described in the manual provided for panel attorneys by the Central California Appellate Program, and that project's staff attorneys should be able to provide appointed counsel with a sample application form on request; many sample forms are also available on the project's website.) In all districts, counsel must obtain authorization in advance from the court to obtain reimbursement for any significant expenditures on ancillary services, such as investigators or experts; in some districts the projects can give this approval up to a certain dollar amount. And in all districts, an appointed attorney who wishes to be compensated for the work involved in preparing the petition is well advised to consult with a project staff attorney before embarking on the work involved. The project attorneys are well acquainted with the court in their district, and can provide valuable assistance to appellate counsel in formulating a strategy for persuading the court that a possible habeas issue warrants further investigation in a proper case, and can inform counsel of the requirements in that district.

A claim of ineffective assistance of counsel should be raised by way of habeas corpus rather than appeal if the record on appeal sheds no light on the reason for counsel's actions. *People v Mendoza Tello* (1997) 15 C4th 264, 266, 62 CR2d 437; *People v Pope* (1979) 23 C3d 412, 425, 152 CR 732.

PRACTICE TIP: As a practical matter, this means that unless there is no conceivable tactical reason for counsel's error, the issue should be raised by a habeas petition. Counsel should assume that the Attorney General will devote some attention to trying to conceive of tactical reasons to suggest to the court.

In this situation, a petition for writ of habeas corpus may be joined with a direct appeal. *People v Pope, supra* (procedure provides opportunity for evidentiary hearing at which trial counsel can fully describe reasons for acting or failing to act in manner complained of). See also *People v Adams* (1980) 101 CA3d 791, 802, 162 CR 72 (writ petition must be verified).

For discussion of habeas corpus relief in state court, see chaps 9-10. For discussion of habeas corpus relief in federal court, see chaps 13-18.

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§2.30 E. Duty to Communicate With Client

Appellate counsel has a professional responsibility to maintain communication with his or her client. California Rules of Professional Conduct 3-500 requires that counsel keep a client reasonably informed about significant developments relating to employment or representation, including promptly complying with reasonable requests for information and copies of significant documents. To accommodate this communication, counsel is entitled to:

- Ready access to confined clients. *In re Ketchel* (1968) 68 C2d 397, 66 CR 881.
- Confidential correspondence with prisoners. Pen C §2601(b); 15 Cal Code Regs §3141(c)(6).
- Personal consultation with prisoners. 15 Cal Code Regs §3175. See also *Bounds v Smith* (1977) 430 US 817, 822, 52 L Ed 2d 72, 97 S Ct 1491, overruled on other grounds in *Lewis v Casey* (1996) 518 US 343, 354, 135 L Ed 2d 606, 619, 116 S Ct 2174 (Fourteenth Amendment guarantees meaningful access to courts); *Ching v Lewis* (9th Cir 1990) 895 F2d 608, 609 (meaningful access includes contact visits between attorneys and clients). But see *Casey v Lewis* (9th Cir 1993) 4 F3d 1516, 1520 (prison's restrictions on attorney-client contact visits reasonable).

Despite counsel's best efforts, changes in representation may become necessary. When there has been a total breakdown in the attorney-client relationship, appointed counsel may be substituted (*People v Marsden* (1970) 2 C3d 118, 84 CR 156 (outlining procedure for replacement of appointed trial counsel)) and retained counsel discharged (*People v Ortiz* (1990) 51 C3d 975, 275 CR 191 (timely request to discharge *retained* trial counsel must be honored without showing of attorney's incompetence)). This is a very rare occurrence on appeal. Counsel should approach the attorney-client relationship in a very proactive manner, taking the lead in informing the client about the appellate process, which likely will seem both foreign and foreboding. For sample information sheet explaining the appellate process, see §4.45. Counsel should advise the client of the nature and timing of each step in the process and should respond in a timely manner to the client's questions and suggestions. By being proactive in this relationship and by being responsive to the reasonable needs of the client, appellate counsel can nearly always assure a positive attorney-client relationship on appeal.

NOTE: A breakdown of attorney-client communications caused by a client's mental incompetence (see Pen C §§1368-1370) will not interrupt an appeal. *People v Kelly* (1992) 1 C4th 495, 544, 3 CR2d 677 (appeal may proceed even if defendant is unable to assist appellate counsel). For an outline of trial court procedures on competence to stand trial, see California Criminal Law Procedure and Practice §§48.7-48.17 (Cal CEB Annual).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/ VI. FORMS/§2.31 A. Form: Notice of Appeal--Felony (Defendant) (Judicial Council Form CR-120)

VI. FORMS

§2.31 A. Form: Notice of Appeal—Felony (Defendant) (Judicial Council Form CR-120)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
PEOPLE OF THE STATE OF CALIFORNIA VS. DEFENDANT: Date of birth: _____ Cal. Dept. of Corrections and Rehabilitation No. (if any): _____	
NOTICE OF APPEAL—FELONY (DEFENDANT) **(Pen. Code, §§ 1237, 1237.5, 1538.5(m); Cal. Rules of Court, rule 8.304)**	CASE NUMBER(S):

NOTICE

- **You must file this form in the SUPERIOR COURT WITHIN 60 DAYS after the court rendered the judgment or made the order you are appealing.**
- **IMPORTANT:** If your appeal challenges the validity of a guilty plea, a no-contest plea, or an admission of a probation violation, you must also complete the Request for Certificate of Probable Cause on page 2 of this form. (Pen. Code, § 1237.5.)

1. Defendant appeals from a judgment rendered or an order made by the superior court.

   NAME of defendant:

   DATE of the order or judgment:

2. ***Complete either item a. or item b. Do not complete both.***

   a. If this appeal is after entry of a plea of guilty or no contest or an admission of a probation violation, check all that apply:

   (1) ☐ This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b).)

   (2) ☐ This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5.

   (3) ☐ This appeal challenges the validity of the plea or admission. *(You must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature.)*

   (4) ☐ Other basis for this appeal *(you must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature) (specify):*

   b. For all other appeals, check one:

   (1) ☐ This appeal is after a jury or court trial. (Pen. Code, § 1237(a).)

   (2) ☐ This appeal is after a contested violation of probation. (Pen. Code, § 1237(b).)

   (3) ☐ Other *(specify)*:

3. ☐ Defendant requests that the court appoint an attorney for this appeal. Defendant ☐ was ☐ was not represented by an appointed attorney in the superior court.

4. Defendant's mailing address is: ☐ same as in attorney box above.
   ☐ as follows:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
CR-120 [Rev. January 1, 2010]

NOTICE OF APPEAL—FELONY (DEFENDANT)
(Criminal)

CEB

Penal Code, §§ 1237, 1538.5(m);
Cal. Rules of Court, rule 8.304
www.courtinfo.ca.gov

Print

CR-120

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT:	CASE NUMBER(S):

REQUEST FOR CERTIFICATE OF PROBABLE CAUSE

I request a certificate of probable cause. The reasonable constitutional, jurisdictional, or other grounds going to the legality of the guilty plea, no-contest plea, or probation violation admission proceeding are *(specify)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

COURT ORDER

This Request for Certificate of Probable Cause is *(check one)*: ☐ granted ☐ denied.

Date:

JUDGE

Copies: Original for trial court clerk. Courtesy copy for opposing party optional.

Comment: This form has been approved for optional use by the Judicial Council. Only one copy of the notice of appeal must be filed. On receipt, the clerk must promptly notify the attorney of record for each party, any unrepresented defendant, the clerk of the reviewing court, each court reporter, and any primary reporter or supervisor that the notice of appeal has been filed. Cal Rules of Ct 8.304(c)(1). See also Cal Rules of Ct 8.852 (misdemeanors), 8.901 (infractions). Notice of appeal forms have been established by the Judicial Council for optional use in misdemeanor (Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132)) and infraction appeals (Notice of Appeal and Record of Oral Proceedings (Infraction) (Judicial Council Form CR-142)).

NOTE: With infraction appeals, at the same time that counsel files the notice of appeal, appellant must also make his or her election about the oral record. For discussion, see §3.16.

The notice should be filed in the trial court. It need not specify the court to which the appeal is taken; it will be treated as an appeal to the court of appeal for the district in which the trial court is located. Govt C §68915; Cal Rules of Ct 8.304(a)(4).

A notice of appeal in a criminal case must be liberally construed; it is sufficient if it identifies the judgment or order being appealed. Cal Rules of Ct 8.304(a)(4). See also *People v Robinson* (1954) 43 C2d 143, 271 P2d 872; *People v Bernhardt* (1963) 222 CA2d 567, 35 CR 401.

When the defendant is appealing a conviction based on a plea of guilty or nolo contendere, the appeal will not be operative unless the notice of appeal states the grounds on which the appeal is based. Pen C §1237.5; Cal Rules of Ct 8.304(b)(4). If the appeal challenges the validity of the plea or raises any issue other than the denial of a motion to suppress evidence under Pen C §1538.5 or a ground that arose after the entry of the plea, the notice of appeal must be accompanied by a request for issuance of a certificate of probable cause. Cal Rules of Ct 8.304(b)(1)-(4). Judicial Council Form CR-120 includes a request for a certificate of probable cause on the back. For discussion of appeals after plea of guilty or nolo contendere, see §§1.11-1.15, 2.8.

NOTE: A common misconception is that an attorney's signature on a notice of appeal obligates the attorney to prepare the appeal. Many attorneys prepare pro per notices to be mailed to the client for signature and then sent by the client to the court. This often leads to the forms getting lost or delayed in the mail, especially if the client is transferred to another institution. The whole problem is easily avoided if the attorney signs and files the notice of appeal on behalf of the client. Penal Code §1240.1 makes it clear that, at least on behalf of indigent clients, the filing of a notice of appeal by an attorney is not an undertaking to handle the appeal. To avoid confusion, it is helpful to state in the notice that the attorney will not represent the defendant on appeal and for the attorney to refer to himself or herself as "attorney for [name of defendant] in pro per." For discussion of the trial attorney's obligations regarding notices of appeal, see §§2.6-2.10.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.32 B. Form: Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132)

§2.32 B. Form: Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132)

CR-132 Notice of Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

Instructions

- This form is only for appealing in a **misdemeanor case.** You can get other forms for appealing in a civil or infraction case at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- You must file this form **no later than 30 days after the trial court issued the judgment or order you are appealing** (see rule 8.853(b) of the California Rules of Court for very limited exceptions). **If your notice of appeal is late, the court will not take your appeal.**
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v.

The clerk will fill in the number below:

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form)*:

The lawyer filling out this form *(check (1) or (2))*:

(1) ☐ was the appellant's lawyer in the trial court. (2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

2 Judgment or Order You Are Appealing

I am/My client is appealing *(check one):*

a. ☐ the final judgment of conviction in this case (Penal Code section 1466(2)(A)).
The trial court issued (rendered) this judgment on *(fill in the date):*_____

b. ☐ an order that denied a motion to suppress evidence in this case (Penal Code section 1538.5(j)).
The trial court issued this order on *(fill in the date):*_____

c. ☐ an order made after judgment in this case that affects an important right of mine/my client (for example, an order after a probation violation) (Penal Code section 1466(2)(B)).
The trial court issued this order on *(fill in the date):*_____

d. ☐ other action *(describe the action you are appealing and give the date the trial court took the action):*

_____
_____
_____
_____

3 Record of the Oral Proceedings

(See form CR-131-INFO for information about the record of the oral proceedings.)

(Check a or b):

a. ☐ I have attached a completed *Notice Regarding Record of Oral Proceedings (Misdemeanor)* (form CR-134).

b. ☐ I have **not** attached a *Notice Regarding Record of Oral Proceedings (Misdemeanor)* (form CR-134). I understand that I must file this notice in the trial court within either: (1) 20 days after I file this notice of appeal; or, if it is later, (2)10 days after the court decides whether to appoint a lawyer for me (if I file a request for a court-appointed lawyer within 20 days after I file my notice of appeal). I also understand that if I do not file the notice on time, the court will not be able to consider what was said in the trial court in deciding whether an error was made in the trial court proceedings.

4 Court-Appointed Lawyer

a. I/My client ☐ was ☐ was not represented by the public defender or another court-appointed lawyer in the trial court.

b. I am/My client is *(check (1) or (2)):*

(1) ☐ asking the court to appoint a lawyer to represent me/my client in this appeal. I have completed *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133), and attached it to this notice of appeal.

(2) ☐ **not** asking the court to appoint a lawyer to represent me/my client in this appeal.

REMINDER—Except in the very limited circumstances listed in rule 8.853(b), you must file this form no later than 30 days after the trial court issued the judgment or order you are appealing in your case. If your notice of appeal is late, the court will not take your appeal.

Date:_____

_____ ▶ _____

Type or print your name | *Signature of appellant or attorney*

Copies: Original for trial court clerk, one for court reporter (or supervisor), one for client, one for office. Courtesy copy

for opposing party optional.

Comment: This form has been approved for optional use by the Judicial Council. For further discussion, see Comment to §2.31.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.33 C. Form: Application for Certificate of Probable Cause

§2.33 C. Form: Application for Certificate of Probable Cause

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

[*Title of court*]

[*Title of case*]	)	**No.** _ _ _ _ _ _
	)	
	)	**APPLICATION FOR**
	)	**CERTIFICATE OF PROBABLE**
	)	**CAUSE**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

TO THE HONORABLE _ _[*name of judge*]_ _**:**

Defendant, _ _[*name of defendant*]_ _**, requests that the honorable judge,** _ _[*name of judge*]_ _**, execute the attached Certificate of Probable Cause and file it with the clerk of the superior court.**

This application is based on the attached declaration of _ _[*name of declarant*]_ _**, signed under penalty of perjury, showing that there are reasonable** _ _[*e.g., constitutional, jurisdictional, or other grounds*]_ _ **going to the legality of the proceedings. Penal Code §1237.5 requires defendant to obtain a Certificate of Probable Cause to be able to appeal from a** _ _[*judgment of conviction based on a plea of guilty or nolo contendere/revocation of probation following an admission of violation*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with trial judge's clerk); one copy for the client; one office copy.

Comment: Judicial Council Form CR-120 can be used for the notice of appeal and the request for certificate of probable cause. Attorneys who prefer to draft their own forms can use this form and the forms in §§2.34-2.35 as models for requesting a certificate of probable cause. A notice of appeal should be filed as well.

The defendant's attorney should file the notice of appeal, and the application, declaration, and certificate with the trial judge as soon as possible after the plea of guilty or nolo contendere, or the admission of violation, has been entered. The jurisdictional deadline to file the application is 60 days from the pronouncement of judgment. Pen C §1237.5; Cal Rules of Ct 8.304(b), 8.308(a).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.34 D. Form: Declaration in Support of Certificate of Probable Cause

§2.34 D. Form: Declaration in Support of Certificate of Probable Cause

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DECLARATION IN SUPPORT OF APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE (PENAL CODE §1237.5(a))

I, _ _[*name of attorney*]**_ _, declare as follows:**

That I am the attorney for the defendant in the above-entitled matter;

That _ _[*judgment of conviction has been entered in said action following defendant's plea of guilty/probation was revoked following defendant's admission of violation*]**_ _;**

That notwithstanding the _ _[*guilty plea/admission of violation*]**_ _, there are reasonable _ _**[*e.g., constitutional/jurisdictional*]**_ _ grounds going to the legality of the proceedings to be reviewed on appeal, namely:**

[*State issues briefly*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name of declarant*]_ _

Comment: No caption is required if this form is attached to papers served. Otherwise, use the same caption as on those papers. See Cal Rules of Ct 2.111(f).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.35 E. Form: Certificate of Probable Cause

§2.35 E. Form: Certificate of Probable Cause

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[*Title of court*]

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**CERTIFICATE OF PROBABLE**
_____	)	**CAUSE**

Good cause having been shown under Penal Code §1237.5(a) that defendant has reasonable _ _[*e.g., constitutional/jurisdictional*]**_ _ grounds for appellate review of the legality of the proceedings in the above-entitled case, it is therefore**

CERTIFIED that there is probable cause for appeal from judgment of the conviction on defendant's _ _[*plea of guilty/admission of violation*]**_ _.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]**_ _**

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.36 F. Form: Motion for Appointment of Counsel on Appeal

§2.36 F. Form: Motion for Appointment of Counsel on Appeal

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar no. or pro per party*]_ _
_ _[*Address*]_ _
_ _[**Telephone**]_ _

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ APPELLATE DISTRICT, DIVISION _ _ _ _

[*Title of case*]	)	**No. _ _ _ _ _**
	)	
	)	**MOTION FOR APPOINTMENT**
	)	**OF COUNSEL ON APPEAL**
	)	**AND SUPPORTING**
_____	)	**DECLARATION**

TO THE PRESIDING JUDGE/JUSTICE OF THE _ _[*specify appropriate court*]_ _:

_ _[*Name*]_ _, defendant and appellant, requests appointment of counsel on appeal. This motion is made on the ground that defendant and appellant is entitled to appointed counsel on appeal under the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

In support of this motion, _ _[*name*]_ _, defendant and appellant, states as follows:

1. My total assets are listed as follows:

2. My total income is listed as follows:

3. My current obligations are as follows:

The foregoing is declared to be true under penalty of perjury. Executed this _ _[*date*]_ _, at _ _[*location*]_ _, California.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Defendant and Appellant

Copies: Original and one copy for clerk of court of appeal, with proof of service on the following (one copy each): the district attorney, the state Attorney General, the trial court clerk (for delivery to the trial judge), the client. One office copy.

Comment: If the defendant was represented by appointed counsel in the trial court, that attorney must also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit concerning the defendant's financial condition. This document is filed in the trial court. Pen C §1240.1(b). If no request for the appointment of appellate counsel is made in the trial court, one may be made to the appellate court. Pen C §1240.1(b).

NOTE: A properly prepared motion for appointment of appellate counsel under Pen C §1240.1(b) may expedite the appointment process, and it eliminates the risk that the appeal will be dismissed under Cal Rules of Ct 8.220(a) for failure to file an opening brief because defendant did not properly fill out and return the indigency forms required by the court of appeal. See Cal Rules of Ct 8.412(b)(5). (Defendants can obtain assistance from the

appellate projects; see §2.21.) Before filing the motion for appointment of counsel, counsel should consult local rules to find out whether the court has any unique procedural requirements. It is also a good idea to find out about the court's customs and preferences by talking to a project staff attorney or consulting the clerk's office. When a petition for review filed by counsel appointed in the court of appeal is granted, the current policy of the supreme court is to contact the appellant about a request for appointment of counsel in that court, but appellate counsel can also advise the client to write to the supreme court to request appointment of counsel in that court, with a statement in the letter that the client is indigent.

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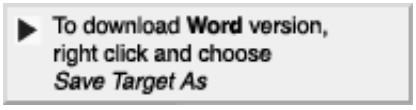
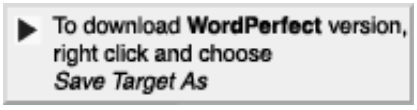
Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.37 G. Form: Application for Bail on Appeal--Trial Court

§2.37 G. Form: Application for Bail on Appeal—Trial Court





_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[**Telephone**]_ _

SUPERIOR COURT, STATE OF CALIFORNIA,
COUNTY OF _ _ _ _ _ _

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**NOTICE OF APPLICATION**
_____	)	**FOR BAIL PENDING APPEAL**

To _ _[*name*]_ _, District Attorney for the County of _ _ _ _ _ _:

PLEASE TAKE NOTICE that, based on all the pleadings and records in this case _ _[*and on the enclosed declaration*]_ _, defendant and appellant will move the Superior Court of the County of _ _ _ _ _ _, State of California, in Department _ _[*number*]_ _, on _ _[*date*]_ _, at _ _[*time*]_ _, or as soon thereafter as counsel can be heard, for an order admitting defendant and appellant to bail pending the hearing and determination of _ _[*his/her*]_ _ appeal on important legal and constitutional questions to the _ _[*Court of Appeal, _ _[number]_ _ Appellate District, Division _ _[number]_ _/Superior Court of _ _ _ _ _ _ County, Appellate Division*]_ _, State of California, from the judgment of said Superior Court convicting defendant and appellant of _ _[*specify crime*]_ _.

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Defendant and Appellant

Comment: A motion for bail in the trial court is usually made orally, with written notice provided to the district attorney. If a motion for release on bail is made after a sentencing hearing, notice of the bail hearing must be given to the prosecuting attorney at least 5 days before the hearing. Pen C §1272(3).

To strengthen a motion for bail pending appeal, trial counsel should consider introducing evidence consistent with the factors discussed in Pen C §1272.1.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.38 H. Form: Application for Stay of Execution (and Bail)--Trial Court

§2.38 H. Form: Application for Stay of Execution (and Bail)—Trial Court

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

SUPERIOR COURT, STATE OF CALIFORNIA,
COUNTY OF _ _ _ _ _ _

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**APPLICATION FOR STAY OF**
	)	**EXECUTION OF JUDGMENT**
	)	**_ _[*AND BAIL*]_ _ PENDING**
_____	)	**APPEAL**

To _ _[*name*]_ _, Judge of the Superior Court, _ _[*City of _ _ _ _ _ _,/City and*]_ _ County of _ _ _ _ _ _, State of California:

Defendant and appellant respectfully petitions this Honorable Court for a stay of execution of the judgment _ _[*and for bail*]_ _ pending the hearing and determination of _ _[*his/her*]_ _ appeal.

This petition is based on all the proceedings and records in this case _ _[*and on the enclosed declaration*]_ _.

1. Defendant and appellant was convicted of _ _[*state nature of crime*]_ _ on _ _[*date*]_ _, and was _ _[*sentenced/granted probation*]_ _ by the Honorable _ _[*name*]_ _, Judge presiding, Superior Court of the County of _ _ _ _ _ _, State of California, to imprisonment in the _ _[*state prison/county jail for the term prescribed by law/on the following terms and conditions*]_ _.

2. Defendant and appellant was _ _[*first admitted to bail in the sum of _ _[dollar amount*]_ _*/released on own recognizance*]_ _ during the pendency of __[*his/her*]_ _ trial on _ _[*date*]_ _.

3. Defendant and appellant has at all times responded to the processes of the court.

4. Defendant and appellant filed _ _[*his/her*]_ _ notice of appeal from the judgment of conviction on _ _[*date*]_ _.

5. Defendant and appellant submits that _ _[*a*]_ _ substantial question(s) _ _[*is/are*]_ _ presented on the appeal: _ _[*Specify*]_ _.

Wherefore, defendant and appellant prays that _ _[*he/she*]_ _ be granted a stay of execution of judgment and _ _[*admitted to bail in the sum of _ _[dollar amount*]_ _*/released on own recognizance*]_ _, pending the hearing and determination of _ _[*his/her*]_ _ appeal.

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Defendant and Appellant

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.39 I. Form: Wende Brief

§2.39 I. Form: *Wende* Brief

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COURT OF APPEAL, STATE OF CALIFORNIA
_ _ _ _ _ APPELLATE DISTRICT, DIVISION _ _ _ _ _

People of the State of California,	**No. _ _ _ _ _ _**
Plaintiff and Respondent	**_ _[*Name*]_ _ County Case No. _ _ _ _ _ _**
vs	
_ _[*Name*]_ _,	
Defendant	

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT,
STATE OF CALIFORNIA, _ _ _ _ _ _ _ _ _ _ _ COUNTY
Honorable _ _ _ _ _ _ _ _ _ _ _ _ _ _ _, Judge

APPELLANT'S OPENING BRIEF
(*People v. Wende* (1979) 25 Cal.3d 436)

_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for _ _[*defendant*]_ _,
_ _[*name*]_ _

[*Table of Contents and Table of Authorities should follow cover. Caption should be repeated on first page of brief.*]

[*Continue*]

STATEMENT OF APPEALABILITY

This appeal is from a judgment entered upon a conviction by plea of guilty, a judgment which finally disposes of all issues between the parties, and, as such, the appeal is authorized by Penal Code section 1237.5 and California Rules of Court 8.320(d).

STATEMENT OF THE CASE

[*State procedural facts*]

STATEMENT OF FACTS

[*State facts of offense(s)*]

DISCUSSION

THIS COURT MUST MAKE ITS OWN INDEPENDENT REVIEW OF THE RECORD ON APPEAL UNDER *PEOPLE V WENDE*,

In *People v Wende* (1979) 25 Cal.3d 436, 441, the California Supreme Court held that *Anders v California*

(1967) 386 U.S. 738, "requires the court to conduct a review of the entire record whenever appointed counsel submits a brief that raises no specific issues."

Counsel may properly remain in the case so long as he has not described the appeal as frivolous and has written to inform appellant that he may request the court to have counsel relieved, if he so desires, and that appellant may file a supplemental brief on his own behalf within 30 days of the filing of this brief. (*People v Wende*, *supra,* 25 Cal.3d at 442.) Counsel in this case does not describe the appeal as frivolous and has written to appellant and advised him of the above two rights. Present counsel has reviewed the entire record on appeal.

Accordingly, appellant respectfully requests that the court conduct an independent review of the record pursuant to *People v Wende*. (See also *Smith v Robbins* (2000) 528 U.S. 259 [145 L.Ed.2d 756].) Should the court wish further briefing on an issue of law on behalf of appellant, counsel is available to do so.

CONCLUSION

For the reasons stated above, appellant respectfully requests that this court conduct an independent review of the entire record on appeal.

Dated: _ _ _ _ _ _

Respectfully submitted,
_ _[*name*]_ _, _ _[*State Bar no.*]_ _
_ _[*address*]_ _
_ _[*telephone*]_ _
Attorney for Appellant
_ _[*name of appellant*]_ _

DECLARATION OF COUNSEL

I, _ _[*name of attorney*]_ _**, hereby declare:**

As counsel appointed to represent appellant, _ _[*name*]_ _, **in this appeal, I have read the entire record, consisting of _ _ pages of clerk's transcript and a later-filed amended abstract of judgment, and I have determined that a *Wende* brief is appropriate. By written correspondence, I have discussed with** _ _[*name of appellant*]_ _ **my findings and his views regarding the case.**

In a letter dated _ _[*date*]_ _**, I have advised appellant of the nature of this brief; that I would serve a copy of this brief on appellant; that appellant may file a supplemental brief on appellant's own behalf within 30 days of the filing of this brief; that I would remain available to brief issues as requested by the court; that appellant may file a request for the court to relieve me as appellant's counsel in this appeal; and that I would ship the transcripts to appellant on this date, which I have done.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at _ _ _ _ _ _, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Like any opening brief for the appellant, an original containing a signed proof of service and four copies of a *Wende* brief should be filed in the court of appeal. If counsel encloses a copy of the brief (or a cover page) along with a stamped self-addressed envelope, the appellate court clerk will send counsel a conformed copy of the brief or cover by return mail. Counsel should serve one copy of the brief by first-class mail on the defendant, the Attorney General, the attorney for any co-defendant, the superior court clerk for delivery to the trial judge, and the district attorney. Counsel should retain one copy of the brief for his or her files.

Comment: In writing the statement of the case and the statement of facts in a *Wende* brief, counsel should err on the side of thoroughness. In a brief which contains assignments of error, counsel may decide not to include in the statement of case any reference to motions, even important motions, that are not germane to any point the court needs to understand. In a *Wende* brief, however, the main purpose of the statement of the case is to orient the court to

proceedings in which arguably reversible error might have occurred. Therefore, counsel should refer (with citations to the record) to all significant procedural matters in the brief, even though counsel has already decided they did not result in reversible error. For similar reasons, counsel should include facts established at any significant motion hearings in the statement of facts. See §2.26.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/2 The Right to Counsel on Appeal; Implementation in California/§2.40 J. Form: Abandonment of Appeal

§2.40 J. Form: Abandonment of Appeal

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

COURT OF APPEAL, STATE OF CALIFORNIA
_ _ _ _ _ APPELLATE DISTRICT, DIVISION _ _ _ _ _

[*Title of case*]	)	**No.** _ _ _ _ _ _
	)	
	)	**NOTICE OF ABANDONMENT**
_____	)	

TO THE _ _[*HONORABLE JUSTICES OF THE COURT OF APPEAL*]_ _**:**

Appellant _ _[*name*]_ _ **gives Notice of Abandonment of** _ _[*his/her*]_ _ **appeal and requests that the court order the dismissal of the appeal** _ _[*and the issuance of the remittitur*]_ _**.**

Date: _ _ _ _ _ _ __[*Signatures of appellant and attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original and one copy for clerk of court of appeal, with proof of service on the following (one copy each): the district attorney, the state Attorney General, the trial court clerk (for delivery to the trial judge), the client. One office copy. Although appellate counsel seldom has enough information about a case to discover an adverse consequence before the appellate record is filed, if this does occur, the abandonment should be filed in the trial court.

Comment: It is very important for appellate counsel to write to the client promptly upon the discovery of a potentially adverse consequence to explain the nature of the problem and to give the client an opportunity to decide what to do. Many attorneys enclose two copies of the abandonment (one for the client to sign and return, the other to keep). Many attorneys also enclose two copies of an informed consent form in the letter, instructing the client to sign it if he or she wants to continue with the appeal despite the adverse consequence. California prisons (but not federal prisons) permit counsel to enclose self-addressed stamped envelopes.

There are judicial council forms that may be used to abandon an appeal in misdemeanor (Abandonment of Appeal (Misdemeanor) (Judicial Council Form CR-137)) and infraction (Abandonment of Appeal (Infraction) (Judicial Council Form CR-145)) cases. Abandonment may be made at any time and should be filed in the appellate division. Cal Rules of Ct 8.855(a)-(b) (misdemeanors), 8.904(a)-(b) (infractions). The abandonment must be signed by the appellant or appellant's counsel. Cal Rules of Ct 8.855(a) (misdemeanors), 8.904(a) (infractions).

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3

Procedural Aspects of Appellate Representation

Charles M. Bonneau

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I. RECORD ON APPEAL

§3.1 A. Record in Appeals to the Court of Appeal and the Supreme Court

Under California law, an official court stenographer routinely makes a verbatim record of all oral proceedings in a felony case. See CCP §269(a). In addition, in every case in which a defendant is convicted of a felony after trial, the court reporter is required to prepare a transcript of the proceedings "immediately after the verdict or finding of guilt is announced" unless the court finds it likely that the defendant will not appeal. CCP §269(c). A defendant appealing a conviction in a felony case or responding to the prosecution's appeal from an order granting a new trial is entitled to a free copy of the reporter's transcript regardless of his or her ability to pay for the transcript. Govt C §69952(a)(1); *People v Smith* (1949) 34 C2d 449, 211 P2d 561 (trial court erred in refusing to order preparation of reporter's transcript for appellant who declined to take pauper's oath); see Cal Rules of Ct 8.320(a), (c). See also *Griffin v Illinois* (1956) 351 US 12, 19, 100 L Ed 891, 76 S Ct 585 (constitutional right to adequate record). Note, however, that a state prisoner whose time for appeal has elapsed is not entitled to a free trial transcript for the sole purpose of searching the record for error. 50 Ops Cal Atty Gen 124 (1967). On the right to appeal in general, see §1.1. On the right to counsel on appeal, see §§2.1-2.2.

Only a certified shorthand reporter may record the oral proceedings in felony cases. *California Court Reporters Ass'n v Judicial Council* (1995) 39 CA4th 15, 26, 46 CR2d 44 (invalidating Judicial Council Rule authorizing use of audio and video recording of superior court proceedings in absence of statutory authorization). However, in *People v Turner* (1998) 67 CA4th 1258, 79 CR2d 740, the court of appeal ruled that the trial court's use of an electronic device to record the trial proceedings did not violate any constitutional right of the defendant, because the record produced was equivalent to one that would have been produced by a court reporter (67 CA4th at 1263). The court also held that the defendant had waived any statutory right to a court reporter by acquiescing to the procedure adopted by the trial court (67 CA4th at 1264).

PRACTICE TIP: The lack of a complete reporter's transcript may amount to a denial of due process and then be a ground for reversal on appeal. A criminal appellant must seek a settled statement. See discussion in §3.10. Relief is warranted only when the record settlement process is unsuccessful. See §3.12.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/ 1. Normal Record on Appeal/§3.2 a. From Judgment of Conviction or Order Granting New Trial

1. Normal Record on Appeal

§3.2 a. From Judgment of Conviction or Order Granting New Trial

Whenever the defendant appeals from the judgment of conviction or the prosecution appeals from an order granting a motion for new trial, trial court personnel must prepare a record of the trial court proceedings, consisting of a clerk's transcript containing copies of the significant documents filed in the case, and a reporter's transcript containing a verbatim transcription of the important oral proceedings in the case. Cal Rules of Ct 8.320(a). No request from the appellant is necessary.

Clerk's transcript. Under Cal Rules of Ct 8.320(b), the clerk's transcript must contain copies of:

- The accusatory pleading and any amendments;
- Any demurrer or other plea;
- All court minutes;
- All written instructions given by the court, as well as any jury instructions submitted in writing with the cover page required by Rule 2.1055(b)(2), identifying the party requesting each instruction;
- Any written communication between the court and the jury or any individual juror;
- Any verdict;
- Any written opinion of the court;
- The judgment or order appealed from and any abstract of judgment or commitment;
- Any motion for a new trial and supporting and opposing memorandums and attachments;
- The notice of appeal and any certificate of probable cause filed under Cal Rules of Ct 8.304(b);
- All transcripts of audio or video recordings provided to the jury or tendered to the court under Cal Rules of Ct 2.1040; and
- Any application for additional record, and any order made on the application.

On an appeal by the defendant, the record must also include:

- Any written defense motions denied in whole or in part, and supporting and opposing memorandums and attachments;
- Any search warrant and return, and the reporter's transcript of any preliminary hearing or grand jury hearing, if related to an unsuccessful defense motion;
- Any certified record admitted to prove a prior conviction, juvenile adjudication, or prison term;
- The probation officer's report; and
- Any court-ordered diagnostic or psychological report required under Pen C §1203.03(b) or §1369.

For juvenile appeals under Welf & I C §§601, 602, the contents of the clerk's transcript are detailed in Cal Rules of Ct 8.407 (effective July 1, 2010).

Reporter's transcript. Under Cal Rules of Ct 8.320(c), the reporter's transcript must contain copies of:

- The oral proceedings on the entry of any plea other than "not guilty";
- The oral proceedings on any in limine motion;
- The oral proceedings at trial, except for the jury voir dire and any opening statements;
- All oral jury instructions;
- Any oral communication between the court and the jury or any individual juror;
- Any oral opinion of the court;
- The oral proceedings on any new trial motion; and
- The oral proceedings at sentencing, granting or denial of probation, or other dispositional hearing.

On an appeal by the defendant, the reporter's transcript must also include:

- The oral proceedings on any defense motion that was denied in whole or in part, other than motions to disqualify the trial judge and Pen C §995 motions;
- The closing arguments; and
- Any comment on the evidence by the trial court to the jury.

Exhibits. In addition, all exhibits, whether admitted, lodged, or rejected are considered part of the normal record; however, they may be transmitted to the reviewing court only as provided in Cal Rules of Ct 8.224. Cal Rules of Ct 8.320(e). For discussion of Rule 8.224, see §5.3.

PRACTICE TIP: Documentary exhibits, as opposed to physical exhibits, are to be made part of the normal record. Documentary exhibits may include transcripts of audio and audio-visual recordings. See Cal Rules of Ct 2.1040(a), 8.320(b)(11) (requiring that a transcription be prepared and submitted along with any recorded exhibit). Note that essential parts of the record, such as a defendant's pretrial statement, are often found in these transcriptions. Particular care should be taken to ensure that all such transcriptions are made part of the clerk's transcript.

Requesting additional record in the trial court. Both the prosecution and defense may apply to the trial court for inclusion of additional items in the record. See Cal Rules of Ct 8.324(a)-(b). The application must be filed promptly and will be deemed denied if it is filed after the record is sent to the reviewing court. It should describe the material to be included and explain how it may be useful on appeal. Cal Rules of Ct 8.324(c). If the trial judge does not act on an application for additional records within 5 days after it is filed, the requested material must be included in the record without a court order. Cal Rules of Ct 8.324(d). It is not uncommon for trial counsel to file a request for additional record along with the notice of appeal.

WARNING: The normal record does *not* include the voir dire examination of jurors or opening statements of counsel. Cal Rules of Ct 8.320(c). If appellate counsel has information that these proceedings may be useful on appeal (for example, the clerk's transcript indicates that a *Wheeler/Batson* motion (see *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 137, 125 S Ct 2410, and *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712) was made and denied, or the prosecutor engaged in misconduct in the opening statement), it will be necessary to file a motion to augment the record. See §3.8.

(For sample form, see §3.46.)

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.3 b. From Other Orders

§3.3 b. From Other Orders

On appeal by the prosecution from a judgment on a demurrer to the indictment, information, or accusation, or on appeal by either the defendant or the prosecution from any appealable order other than an order on motion for a new trial, under Cal Rules of Ct 8.320(d), the clerk's transcript must contain copies of:

- The accusatory pleading with any amendments;
- Any demurrer or other plea;
- Any motion or notice of motion granted or denied by the order appealed from, with supporting and opposing memoranda and attachments;
- The judgment or order appealed from and any abstract of judgment or commitment;
- The court minutes relating to the judgment or order appealed from; and
- The notice of appeal.

The record must also include a reporter's transcript of the oral proceedings incident to the order appealed from. Cal Rules of Ct 8.320(d). Physical exhibits are considered part of the record but may be transmitted to the reviewing court only as provided in Rule 8.224. Cal Rules of Ct 8.320(e). See §5.3. Transcripts of sound or sound and video recordings furnished to the jury or tendered to the court under Cal Rules of Ct 2.1040 are part of the normal record on appeal, and are subject to augmentation. See Cal Rules of Ct 8.320(b)(11), 8.155. On transcription of recorded exhibits, see §3.2.

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§3.4 c. Confidential Proceedings; Sealed Records

***Marsden* hearings.** In addition to the content requirements discussed in §3.2, the record on appeal in a criminal action must also include a sealed reporter's transcript of any *Marsden* hearings. Cal Rules of Ct 8.328(b). See *People v Marsden* (1970) 2 C3d 118, 84 CR 156 (outlining procedures for trial court to use when defendant represented by appointed counsel requests new attorney).

NOTE: The transcription of the *Marsden* hearings should not be in the reporter's transcript; however, the chronological index to the reporter's transcript must refer to any *Marsden* hearing. See Cal Rules of Ct 8.328(b)(1).

The trial court clerk must send the original and one copy of the sealed transcript to the reviewing court and one copy to the defendant's appellate counsel, or, if appellate counsel has not yet been retained or appointed, to the appellate project for the district in which the reviewing court sits. Cal Rules of Ct 8.328(b)(2)-(3). If the defendant raises a *Marsden* issue in the opening brief, the confidentiality of the relevant portions of the *Marsden* proceeding is effectively waived. Counsel for the respondent may then obtain a copy of the sealed transcript by written application to the clerk unless the defendant serves and files a notice that the transcript contains confidential material not relevant to issues on appeal. Cal Rules of Ct 8.328(b)(4). In that case, the prosecution may move to obtain a copy of any relevant portion of the sealed transcript. Cal Rules of Ct 8.328(b)(5).

Other confidential proceedings. Under Cal Rules of Ct 8.328(c), a party may also apply to the trial court for any order to include any of the following in the record on appeal:

- A reporter's transcript of any confidential in camera proceeding from which a party was not allowed to be represented. The transcript will be sealed and separately paginated, and the chronological index to the reporter's transcript shall refer to the in camera proceeding.
- Any item withheld from a party because the trial court determined it was confidential.

An application for confidential materials submitted under Cal Rules of Ct 8.328(c) (typically *Pitchess* files or mental health records) must comply with Cal Rules of Ct 8.324, on applications to the trial court for additional record, discussed in §§3.2, 3.7.

Juror-identifying information. Code of Civil Procedure §237(a)(2) requires the trial court to seal the record of the names, addresses, and telephone numbers of trial jurors and alternates when the verdict is recorded in a criminal case. Under Cal Rules of Ct 8.332(b), the clerk and the court reporter must replace the names of jurors and alternates with numbers, and delete their addresses and telephone numbers in all documents in which they appear. Identifying information about individuals called but not sworn as trial jurors or alternates should not be deleted unless the court has ordered it sealed under CCP §237(a)(1). Cal Rules of Ct 8.332(c).

NOTE: The sealing of juror-identifying information can make review of the voir dire proceedings for jury selection issues (*e.g.*, discriminatory use of peremptory challenges under *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 137, 125 S Ct 2410, and *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712), very difficult. If counsel receives a transcript of jury voir dire that redacts the names of jurors who did not actually try the case, it might be advisable to investigate whether an order for sealing this information was made, and if made, whether a "compelling interest" justifies its sealing under CCP §237(a)(1). Under *People v Lenix* (2008) 44 C4th 602, 607, 80 CR3d 98, the appellant may be able to review the entire jury voir dire transcript for purposes of comparative analysis (comparing the voir dire responses of minority prospective jurors who were subject to a prosecution peremptory challenge, later raised in a *Wheeler/Batson* motion, with the voir dire responses of similarly situated non-minority prospective jurors who were not subject to a prosecution peremptory challenge, in order to establish a presumption of racial motivation forbidden under *Wheeler/Batson*).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.5 d. Preparation, Certification, and Filing

§3.5 d. Preparation, Certification, and Filing

In almost every case in which the defendant is found guilty of a felony after trial, and files a notice of appeal, preparation of the record on appeal begins immediately. See Cal Rules of Ct 8.336(a). Both clerk's and reporter's transcripts must be completed within 20 days after the filing of the notice of appeal unless the time is extended. Cal Rules of Ct 8.336(c)-(d).

NOTE: The superior court may not extend the time for preparing the record. Only the reviewing court has the authority to extend time for record preparation, and the extensions cannot exceed 60 days altogether. Cal Rules of Ct 8.336(e).

As soon as both the clerk's and reporter's transcripts are completed and certified as correct, the trial court clerk sends the originals to the reviewing court, one copy to each appealing defendant's appellate attorney (or the district appellate project if the defendant does not yet have an appellate attorney), one copy to the Attorney General, and one copy to the district attorney if requested. Cal Rules of Ct 8.336(f).

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§3.6 2. Obtaining a Complete Record

Making sure that the record on appeal contains every item necessary to afford the client the best opportunity for a favorable outcome is a vital aspect of appellate counsel's job. See *People v Barton* (1978) 21 C3d 513, 146 CR 727 (ineffective assistance of appellate counsel found; counsel failed to request augmentation of record on appeal). See also *People v Acosta* (1996) 48 CA4th 411, 426, 55 CR2d 675; *People v Harris* (1993) 19 CA4th 709, 714, 23 CR2d 586. For discussion of other duties of counsel, see §§2.25-2.30.

Although the court has inherent authority to complete or augment the record on its own motion (see Cal Rules of Ct 8.155(a)), appellate counsel must not rely on the court to discover omissions from the record. The reviewing court will not consider arguments based on material that is not contained in the record on appeal. See, *e.g., Mesaris v Superior Court* (1970) 4 CA3d 976, 978, 85 CR 124 ("we cannot pass on contentions made here unless they were urged in the trial court and were there determined; and we can know what occurred in the trial court only if we are furnished with an adequate record of the proceedings there").

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§3.7 a. Obtaining Items Omitted From Normal Record

Under California Rules of Ct 8.340(b), the superior court clerk and the court reporter are under a continuing duty to see that the record is complete. Thus, if it is discovered that any document that should be included in the record has been omitted, it must be promptly prepared or copied, certified, and sent to the court and all parties as an augmentation of the record. See Cal Rules of Ct 8.340(b)-(c).

Rule 8.155 permits a party to obtain materials omitted from the normal record by filing a notice with the trial court, identifying the missing materials, and requesting that they be prepared, certified, and transmitted to the reviewing court. Cal Rules of Ct 8.155(b)(1). A copy of the notice must be served on counsel for the other parties to the proceeding and on the reviewing court. Cal Rules of Ct 8.155(b)(1). If the clerk does not comply within 10 days, the party may file a motion to augment in the reviewing court, attaching a copy of the notice to the augmentation request. Cal Rules of Ct 8.155(b)(2).

PRACTICE TIP: This procedure is faster and less costly than a formal motion in the court of appeal to augment the record. The procedure should be considered whenever the additional requested material is limited to items included in the normal record on appeal. On what is included in the normal record, see §3.2. In some districts, when the clerk of the court of appeal is served with the notice provided to the superior court clerk, the due date for the opening brief is automatically suspended pending resolution of the request. Counsel should check district rules to determine whether the due date is automatically extended by a motion to augment the record.

Rule 8.155 does not specify what form the notice should take. Consulting the court clerks about their local customs in matters such as this can often be very helpful. In some trial courts, a letter directing the clerk's attention to the omitted items, with proof of service attached, is acceptable. In others, it may be necessary to caption and format the document as a court paper. In still others, the deputy clerk who handles the preparation of appellate records may consider a telephone call from counsel sufficient notification.

PRACTICE TIP: Appointed counsel can obtain useful information and assistance from the appellate projects. The California Appellate Project in Los Angeles has sample letters available for counsel appointed in the Second Appellate District to use to notify the superior court clerk of materials that have been omitted from the normal record. See http://www.lacap.com/Knowledge_Base/Documents/documents.asp.

Whatever form the request for omitted materials takes, counsel should be as specific as possible about what materials are needed. Including the information specified in Cal Rules of Ct 8.130(a) (designation of transcripts) will help the clerk's office identify the needed materials. When requesting a reporter's transcript, for example, it is a good idea to include the reporter's name and certification (CSR) number if known, the date on which the proceedings took place, and any other information that counsel believes will help the clerk locate the transcript.

For sample letter notifying the clerk that materials have been omitted from the record on appeal, see §3.46.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.8 b. Augmenting the Record

§3.8 b. Augmenting the Record

If counsel is unable to obtain the necessary material using the Cal Rules of Ct 8.155(b)(1) notification procedure, or if material that counsel deems necessary for a complete review of the trial proceedings is not part of the normal record on appeal, counsel must request augmentation by filing a motion to augment the record in the reviewing court under Cal Rules of Ct 8.155(a). Cal Rules of Ct 8.340(c). See *Boyd v Newland* (9th Cir 2006) 467 F3d 1139, 1150 (denial of petitioner's request for complete voir dire transcript and full comparative analysis violated due process); *People v Lenix* (2008) 44 C4th 602, 607, 80 CR3d 98 (counsel may be entitled to complete voire dire transcript for comparative analysis). Rule 8.155(a) provides that, on the motion of any party or on its own motion, the reviewing court may order augmentation of the record with any document that was filed or lodged in the case in the trial court, or with a certified transcript (or agreed or settled statement) of any oral proceedings not designated under Cal Rules of Ct 8.130. Except for documentary exhibits (see Rule 8.320(b)(11)), counsel should not request exhibits to be provided to the reviewing court in a motion to augment the record. Under Cal Rules of Ct 8.320(e), exhibits may be transmitted to the reviewing court only as provided in Cal Rules of Ct 8.224.

NOTE: The procedures outlined in Cal Rules of Ct 8.120-8.163, which give instructions for creating an appellate record in civil appeals, are not completely applicable to criminal appeals in which a rather extensive record is prepared when the notice of appeal is filed, without further request on the part of the appellant. Cal Rules of Ct 8.320. See §3.2.

A motion to augment the record is a formal motion and should comply with the requirements of Cal Rules of Ct 8.54 (motions in the reviewing court) and 8.40 (form, number, and cover of documents). See Comment to Cal Rules of Ct 8.155. If counsel has a copy of documents or other material included in the augmentation request, they must be attached to the motion. Cal Rules of Ct 8.155(a)(2). If no copy is available, counsel must identify the requested materials as required by Cal Rules of Ct 8.120-8.163. Cal Rules of Ct 8.155(a)(3).

Thus, a request to augment the reporter's transcript "must state the date the notice of appeal was filed and specify the date of each proceeding to be included in the transcript, and may specify portions of designated proceedings that are not to be included" if a transcript is used in the notice designating the record on appeal under Rule 8.121. Cal Rules of Ct 8.130(a)(1). It is helpful to include the name and certification (CSR) number of the reporter if known. A request to augment the clerk's transcript must include the following information:

- A request for a document must state the date the notice of appeal was filed and specify the title of the document and its filing date, or the date on which it was signed if the filing date is unknown. Cal Rules of Ct 8.122(a)(1).
- A request for an exhibit must specify the exhibit's number or letter. Cal Rules of Ct 8.122(a)(3).

A request for a document may specify portions of the document to be omitted. Cal Rules of Ct 8.122(a)(1). If the record needs to be augmented for minute orders, it is sufficient for the augmentation request to designate "all minute orders or all minute orders entered between specified dates." Cal Rules of Ct 8.122(a)(1). A request for written jury instructions may, if appropriate, simply designate "all written jury instructions given, refused, or withdrawn." Cal Rules of Ct 8.122(a)(1).

NOTE: Under Cal Rules of Ct 8.54(a)(2), a memorandum (commonly called a memorandum of points and authorities) must accompany a motion filed in the reviewing court, and if the motion is based on matters not appearing in the record, it must be accompanied by "declarations or other supporting evidence."

The motion for augmentation must show "with some certainty *how* the requested materials may be useful on appeal." *People v Gaston* (1978) 20 C3d 476, 480, 143 CR 205 (emphasis in original). The motion should state the relevant issue or argument that is, at least potentially, to be raised on appeal. The requested material must be related to the potential appellate argument. The motion need not, however, describe the specific errors or underlying facts that the material is expected to reflect. See *People v Silva* (1978) 20 C3d 489, 143 CR 212.

NOTE: Rule 8.155(a) provides that the record on appeal may be augmented at any time, but a motion to augment the record should be made promptly when counsel recognizes the need for augmentation. See Comment to Cal Rules of Ct 8.155 ("Whether the motion is made within a reasonable time and is not for the purpose of delay … are among the factors the reviewing court may consider in ruling on such a motion"). Some districts require that the motion to augment be filed within 30 days of filing the record on appeal, or 40 days in project-assisted criminal appeals. See, *e.g.,* 1st App Dist Local R 7(b); 5th App Dist Local R 1(b) (file 40 days after filing of record). See also, *e.g.,* 2d App Dist Local R 2(b) (providing that, unless good cause for a later motion is shown, an appellant's motion to augment the record should be made within 40 days of the filing of the record, and a respondent's motion to augment should be made within 30 days of the filing of appellant's opening brief).

The procedure for augmenting a record in a juvenile appeal under Welf & I C §§601 and 602 is outlined in Cal Rules of Ct 8.410 (effective July 1, 2010).

See Form: Motion to Augment Record on Appeal in §3.47.

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§3.9 c. Bringing Exhibits to the Attention of the Court

Under Cal Rules of Ct 8.320(e), any exhibit admitted, lodged, or rejected by the trial court is considered part of the record on appeal and may be transmitted to the reviewing court only as provided in Cal Rules of Ct 8.224. It may be necessary to transmit nondocumentary exhibits under Cal Rules of Ct 8.224; documentary exhibits may become part of the clerk's transcript, if designated for inclusion by any party. See Cal Rules of Ct 8.122(b)(3)(B). For further discussion, see §5.3.

Under Cal Rules of Ct 8.204, a party may attach to a brief copies of exhibits or other documents, not exceeding 10 pages in length, without first obtaining a court order. Cal Rules of Ct 8.204(d). The presiding justice of the reviewing court may permit a longer attachment for good cause. Cal Rules of Ct 8.204(d).

Sometimes listening to a recording is necessary because "[a] written summary cannot accurately convey the tenor of the interviews and conversations." See *In re Sodersten* (2007) 146 CA4th 1163, 1182 n9, 53 CR3d 572. At other times, listening to the recordings will reveal what was actually said in portions of recordings that the transcriptionist could not decipher. 146 CA4th at 1182 n9.

When a tape recording is in evidence, the tape itself may be reviewed by the court of appeal, even though the trial court found it to be undecipherable and no transcript was offered in evidence. See *People v Anderson* (2006) 141 CA4th 430, 438, 45 CR3d 910.

It is not entirely clear what appellate counsel should do if he or she finds significant discrepancies between the transcript and the actual recording. In *People v Anderson* (2006) 141 CA4th 430, 438, 45 CR3d 910, the court of appeal held that record settlement procedures under Cal Rules of Ct 8.346(a) were not available to determine the actual contents of portions of a tape-recorded confession deemed indecipherable by the trial court. Thus, to obtain review of an issue that depends on a discrepancy between a transcript and the actual recording, it may be necessary to file a petition for writ of habeas corpus. See *In re Sodersten* (2007) 146 CA4th 1163, 53 CR3d 572.

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§3.10 d. Settling the Record

When a potentially significant part of the oral proceedings cannot be transcribed for any reason, it is incumbent upon appellate counsel to make an effort to reconstruct it. It will not be possible to argue effectively for reversal on any ground that depends on facts that were established at a proceeding that is not a part of the record in the reviewing court. "No presumption of prejudice arises from the absence of materials from the appellate record." *People v Samayoa* (1997) 15 C4th 795, 820, 64 CR2d 400; *People v Cummings* (1993) 4 C4th 1233, 1333, 18 CR2d 796. If it becomes apparent during counsel's efforts to complete the record under Cal Rules of Ct 8.155(b) (see §3.7), or to augment the record under Cal Rules of Ct 8.155(a) (see §3.8), that some or all of the oral proceedings are unavailable, it will be necessary to attempt to settle the record by applying to the trial court for permission to prepare a settled statement. Cal Rules of Ct 8.346(a).

NOTE: Record settlement is only available to ensure that the record transmitted to the reviewing court preserves and conforms to proceedings that actually occurred in the trial court. *People v Tuilaepa* (1992) 4 C4th 569, 585, 15 CR2d 382 ("The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier.").

Because an appellant in a criminal case has a due process right to a transcript that is adequate to preserve the right to appeal (see §1.1), the loss or destruction "in whole or in substantial part" of the reporter's notes may justify setting aside the judgment. See Pen C §1181(9); CCP §914. However, an appellate record is inadequate only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his or her appeal (*People v Young* (2005) 34 C4th 1149, 1170, 24 CR3d 112; *People v Alvarez* (1996) 14 C4th 155, 196 n8, 58 CR2d 385; *People v Jordan* (2006) 146 CA4th 232, 246, 53 CR3d 18) and the burden is on the defendant to show that the record is inadequate to permit "meaningful appellate review." *People v Young* (2005) 34 C4th 1149, 1170, 24 CR3d 112; *People v Arias* (1996) 13 C4th 92, 158, 51 CR2d 770; *People v Freeman* (1994) 8 C4th 450, 509, 34 CR2d 558. The omissions must be substantial and consequential. *People v Howard* (1992) 1 C4th 1132, 1165, 5 CR2d 268; *People v Bills* (1995) 38 CA4th 953, 959, 45 CR2d 364. Courts have reversed or vacated the judgment and ordered a new trial in cases involving the loss or destruction of the entire reporter's transcript, a large or crucial part of the reporter's transcript, or a crucial exhibit. See *People v Bills, supra,* and cases cited therein.

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§3.11 (1) Rules of Court

The procedures for settling the record in a criminal case in the court of appeal or supreme court are set forth in Cal Rules of Ct 8.137 and 8.346. See §3.48 for an application for permission to submit the settled statement.

The application for permission to settle the record should be made as soon a party learns that a reporter's transcript cannot be obtained, and it must explain why it cannot be obtained. Cal Rules of Ct 8.346(a). The judge must decide on the application within 5 days. Cal Rules of Ct 8.346(b). Note that in some appellate districts the application must be made to the court of appeal.

If the court grants the application, the parties must comply with the relevant provisions of Cal Rules of Ct 8.137. Cal Rules of Ct 8.346(b). The applicant for settlement must serve and file a proposed statement within 30 days of the order. Cal Rules of Ct 8.346(b).

NOTE: In a criminal case, only the *reviewing* court may extend the time for filing the statement. Cal Rules of Ct 8.346(b). For form of application for extension of time, see §3.51.

The other party must serve and file any proposed amendments within 20 days of service of appellant's proposed statement. Cal Rules of Ct 8.137(b)(4). The clerk must schedule a settlement hearing within the earlier of (1) 10 days after respondent files proposed amendments, or (2) 10 days after the proposed amendments are due. The parties must be given at least 5 days' notice of the hearing. Cal Rules of Ct 8.137(c). At the settlement hearing, the judge will settle the statement and set a time for appellant to prepare, serve, and file the statement. Cal Rules of Ct 8.137(c). The respondent then has 5 days to object to the prepared statement. When the settlement process is complete, the trial court will certify the statement and it will become part of the appellate record. A stipulation by the parties that the statement is correct is the equivalent of the judge's certification. Cal Rules of Ct 8.137(c).

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§3.12 (2) Preliminary Steps

An application to settle the record is a trial court motion, and the trial court's role in settling the record will be limited to making the order permitting settlement, holding a record-settlement hearing, and certifying the statement that results from the proceedings. Appellate counsel must be diligent in making sure that the record gets settled in a timely manner. For appointed counsel operating through an appellate project, it is necessary to expand the appointment to be compensated for an appearance in the superior court for record settlement. If the superior court is some distance from appellate counsel's office, the court may appoint local counsel to make appearances in superior court for record settlement.

It is courteous to let appellant's trial counsel and the deputy district attorney who handled the case know that you plan to start record-settlement proceedings before you serve them with the application for permission to settle the record. Although it is possible that no deputy attorney general will have been assigned to the case at the time of record-settlement proceedings, if one has, appellate counsel might want to notify him or her as well. Because trial attorneys tend to have very full calendars, they are likely to be more cheerful about their enforced role in the process if you show at the outset that you are willing to take their scheduling concerns into account to the extent that this is possible. Notifying trial counsel in advance may enable you to work out a tentative timeline for submitting the proposed statement and amendments and for holding the hearing before you file the application.

Talking with trial counsel in advance has other advantages, too. If defense counsel has a vivid memory of what happened at the proceeding, it may be possible to expedite the record-settlement process by attaching defendant's proposed statement to the application.

If, as often happens, neither trial attorney remembers what happened at the proceeding well enough to provide an accurate summary, the trial court should be apprised of that fact at the outset of the record-settlement process. In this situation, appellate counsel might want to prepare for attachment to the application, a statement for one or both trial attorneys, along the following lines: "I have discussed this matter with appellate counsel, have reviewed documents he/she sent me concerning the matter, and have consulted my own notes from trial. I am still unable to recollect the proceeding in enough detail to provide an accurate reconstruction of them."

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§3.13 (3) Filing the Application

Unlike motions in the reviewing court, which need only be served on the attorney general and counsel for any other parties to the appeal, an application to settle the record must be served on the trial attorneys as well. It is also a good idea to serve a copy of the motion on the reviewing court. Appellate counsel should follow the customary trial court practice of drafting a proposed order for the trial judge to sign, and including sufficient copies of the proposed order (along with stamped, addressed envelopes, including one for him or herself) for service on all counsel.

Appellate counsel should attach defendant's proposed statement to the application to settle the record; if a date for the hearing has not been worked out in advance, the trial judge may expect counsel for appellant to find out from trial counsel what dates will be convenient with them before he or she sets the date for the settlement hearing. It is the responsibility of appellate counsel to prepare, serve, and file the settled statement. Local counsel may make the actual court appearance for the hearing on record settlement. Counsel's presence is essential to ensure that appellant's interests are properly represented at the hearing, and to preserve any objections appellant may have to the content of the record as settled.

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§3.14 3. Appeal on Agreed Statement

Under Cal Rules of Ct 8.344, the parties to a criminal appeal may present it on an agreed statement. See Cal Rules of Ct 8.134(a). However, because an appeal by a criminal defendant under Pen C §1237 places at issue every unwaived error that may have had an effect on the judgment or order appealed from (see also *Smith v Murray* (1986) 477 US 527, 91 L Ed 2d 434, 106 S Ct 2661; *Evitts v Lucey* (1985) 469 US 387, 83 L Ed 2d 821, 105 S Ct 830; *Reed v Ross* (1984) 468 US 1, 82 L Ed 2d 1, 104 S Ct 2901), it would seldom, if ever, be appropriate for appellate defense counsel to agree to bring a defendant's appeal from the judgment of conviction on less than a complete record. See Cal Rules of Ct 8.320 for contents of normal record.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/ B. Appeals to Appellate Division of the Superior Court/ 1. Contents of Record/§3.15 a. Normal Record

B. Appeals to Appellate Division of the Superior Court

1. Contents of Record

§3.15 a. Normal Record

The normal record on appeal to the appellate division in a misdemeanor or infraction case consists of a record of the written documents from the trial court proceedings in the form of either a clerk's transcript or an original trial court file (if allowed by local rule) and, if relevant, a record of the oral proceedings in the court. Cal Rules of Ct 8.860(a) (misdemeanors), 8.910(a) (infractions). The clerk's transcript includes the following items, or as many of these items as may exist in the particular case (Cal Rules of Ct 8.861 (misdemeanors), 8.912 (infractions)):

- The complaint, including any amendment or notice to appear, or both;
- The plea(s) of the defendant;
- All written jury instructions given, or requested and refused (misdemeanors only);
- Any written communication between the judge and the jury or any individual juror (misdemeanors only);
- Any verdict, or, if a jury was waived, the entry of the waiver in the minutes or docket and the finding of the court on the issues (misdemeanors only);
- Any written motion or notice of motion for new trial, in arrest of judgment, or to dismiss or otherwise terminate the action, along with the supporting or opposing memoranda and attachments, or the entry in the minutes or docket of any oral motion to the same effect and the order of the court on it;
- Any demurrer to the complaint, and the order of the court on it;
- Any written findings or opinion of the court;
- All minutes of the court relating to the action;
- The judgment, or if the appeal is from an order, the order appealed from;
- Any sound or video recording, or transcript of it, provided to the jury or to the court under Cal Rules of Ct 2.1040;
- The notice of appeal;
- Any statement on appeal settled and certified by the trial judge as provided for in Cal Rules of Ct 8.869 (see §§3.17-3.18); and,
- If the appellant is the defendant:
- Any defense motion that was denied along with the supporting and opposing memoranda and attachments;
- If related to a defense motion that was denied, any search warrant and return;
- Any document proving a prior conviction, juvenile adjudication, or prison term (misdemeanor only). If these were held confidential by the trial court, the appellate division must keep these confidential as well unless the trial court orders otherwise;
- The probation officer's report (misdemeanor only); and
- Any court-ordered psychological report required under Pen C §1369 (misdemeanor only).

Exhibits. All exhibits, whether admitted, lodged, or rejected are considered part of the normal record. They may be transmitted to the reviewing court only as provided in Cal Rules of Ct 8.870 (misdemeanors), 8.921 (infractions). If the appellant wishes the appellate division to consider an exhibit, he or she must serve and file notice in the trial court designating those exhibits within 10 days after the last respondent's brief is filed or could have been filed under Cal Rules of Ct 8.882 (misdemeanors) or 8.927 (infractions). Cal Rules of Ct 8.870(b)(1) (misdemeanors), 8.921(b)(1) (infractions). Other parties who wish to designate additional exhibits, must do so within 10 days of appellant's notice. Cal Rules of Ct 8.870(b)(2) (misdemeanors), 8.921(b)(2) (infractions). All designations must be filed with the trial court and served on all parties to the appeal and the appellate division. Cal Rules of Ct 8.870(b) (misdemeanors), 8.921(b) (infractions). The appellate division may at any time request additional exhibits from the trial court or any party. Cal

Rules of Ct 8.870(c) (misdemeanors), 8.921(c) (infractions).

Under Cal Rules of Ct 8.911, in an infraction appeal, the prosecutor may notify the trial court and other parties that he or she does not want to receive a copy of the record.

- **Limited Normal Record.** When the People appeal from a judgment on a demurrer to the complaint, including any notice to appear or, when the defendant or the People appeal from an appealable order other than a ruling on a motion for new trial, the normal record is more limited than that listed above. Cal Rules of Ct 8.867 (misdemeanors), 8.920 (infractions). The normal record in these circumstances is either a clerk's transcript or original trial court file, and a record of oral proceedings as necessary. The clerk's transcript or original trial court file must include (Cal Rules of Ct 8.867(1) (misdemeanors), 8.920(1) (infractions)):
- The complaint, including any amendment or notice to appear, or both;
- Any demurrer or other plea(s) of the defendant;
- Any motion or notice of motion granted or denied by the order appealed from, with supporting and opposing memoranda and attachments;
- The judgment or order appealed from and any abstract of judgment or commitment;
- Any court minutes about the judgment or order appealed from; and
- The notice of appeal.

Stipulation That Part of Record Unnecessary. If the appellant and the respondent, before the record is certified, stipulate in writing that any part of the record is not required for proper determination of the appeal and file that stipulation in the trial court, that part of the record must not be prepared or sent to the appellate division. Cal Rules of Ct 8.860(b) (misdemeanors), 8.910(b) (infractions).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.16 b. Verbatim Record of Oral Proceedings: Reporter's Transcripts or Official Electronic Recording

§3.16 b. Verbatim Record of Oral Proceedings: Reporter's Transcripts or Official Electronic Recording

In misdemeanor or infraction cases, a verbatim record of the oral proceedings is required if the judge so orders. CCP §269(a). Government Code §69957 permits electronic recording of proceedings in misdemeanor and infraction cases if a certified court reporter is not available. See Cal Rules of Ct 2.952 for required procedures.

Due process and equal protection require the state to provide an *indigent* misdemeanor defendant with a record in the appellate court equivalent to a verbatim transcript. *Mayer v Chicago* (1971) 404 US 189, 194, 30 L Ed 2d 372, 92 S Ct 410. If an alternative to a certified court reporter, such as electronic recording of the proceedings, produces a verbatim transcript that is not inferior to one produced by a shorthand reporter, its use does not violate the defendant's right to due process or equal protection. *People v Turner* (1998) 67 CA4th 1258, 79 CR2d 740; *In re Armstrong* (1981) 126 CA3d 565, 575, 178 CR 902.

Unlike an indigent appellant in a felony case, an indigent appellant in a misdemeanor or infraction case must demonstrate a "colorable need" for a verbatim transcript. *March v Municipal Court* (1972) 7 C3d 422, 428, 102 CR 597. Once the appellant demonstrates a colorable need for a transcript, the burden shifts to the state to show that an alternative such as a settled statement will suffice. In *March*, the stated grounds of appeal—insufficient evidence and prejudicial misconduct—were sufficient to shift the burden. 7 C3d at 429.

For determining whether a defendant qualifies for a free transcript, it is the appellant's financial status at the time of appeal that is determinative, not future earning potential. 7 C3d at 430. The court is not required to provide a free transcript to a misdemeanor defendant who is not indigent. *Andrus v Municipal Court* (1983) 143 CA3d 1041, 192 CR 341, overruled on another ground in *Evangelatos v Superior Court* (1988) 44 C3d 1188, 1207 n11, 246 CR 629. But see *In re Armstrong* (1981) 126 CA3d 565, 178 CR 902 (state may not condition *creation* of an adequate record on defendant's indigency). The finding of indigency necessary to qualify for the service of the Public Defender is, however, sufficient. No other formal showing or motion need be made. *Eyrich v Municipal Court* (1985) 165 CA3d 1138, 210 CR 738. A pro per appellant may apply for indigency by filing Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council form MC-210).

The Oral Record. An appellant who wishes to raise issues illustrated by the oral record of proceedings in the trial court must use one of the following as the record on appeal (Cal Rules of Ct 8.860(a)(2) (misdemeanors), 8.910(a)(2) (infractions):

- A reporter's transcript as described by Cal Rules of Ct 8.865-8.867 (misdemeanors), 8.918-8.920 (infractions);
- An official electronic recording made under Government Code §69957, if permitted by local rule or order and stipulated to by the parties as set out under Cal Rules of Ct 8.868 (misdemeanors), 8.917 (infractions);
- A transcript of an official electronic recording made under Government Code §69957 as set out by Cal Rules of Ct 8.868 (misdemeanors), 8.917 (infractions);
- A statement on appeal prepared according to Cal Rules of Ct 8.869 (misdemeanors), 8.916 (infractions). (For a discussion of this option, see §3.17).

Notice of Election Required. An appellant must notify the trial court whether he or she intends to proceed with or without a record of the oral proceedings in the trial court. If the appellant elects to proceed with a record of the oral proceedings, the notice must specify which form of the record the appellant elects to use. Cal Rules of Ct 8.864(a) (misdemeanors), 8.915(a) (infractions). The Notice Regarding Record of Oral Proceedings (Misdemeanor) (Judicial Council Form CR-134) or Notice of Appeal and Record of Oral Proceedings (Infraction) (Judicial Council Form CR-142) may be used for this purpose. For infractions, the election notice must be filed with the notice of appeal. Cal Rules of Ct 8.915(b). For misdemeanors, the notice of election must be filed no later than (Cal Rules of Ct 8.864(b)):

- 20 days after filing of the notice of appeal, if no application for appointment of counsel is filed; or
- If application for counsel has been timely filed under Cal Rules of Ct 8.851 (misdemeanors), the later of:
- 10 days after the court appoints counsel;
- 10 days after denial of the application; or

- 20 days after the notice of appeal is filed.

If the appellant does not file a timely election, the court clerk must promptly notify the appellant by mail that he or she has 15 days after the notice is mailed to file the election, and that failure to comply will result in the appeal proceeding without a record of the oral proceedings. Cal Rules of Ct 8.864(c) (misdemeanors), 8.915(c) (infractions).

Reporter's Transcript. If the appellant elects to use a reporter's transcript, the clerk promptly mails a copy of the notice of election to each court reporter involved. Cal Rules of Ct 8.864(a)(1) (misdemeanors), 8.915(a)(3) (infractions). Unless local rules provide otherwise, the court reporters must immediately begin preparing the record if the appellant was represented by appointed counsel at trial (misdemeanors only), or if the appellant is the People. Cal Rules of Ct 8.866(a)(1) (misdemeanors), 8.919(a) (infractions).

NOTE: The trial clerk must notify the appellant within 10 days of the filing of the appellant's notice of election if a transcript cannot be made. The appellant must decide within 15 days of the clerk's notice whether to use a statement on appeal. Cal Rules of Ct 8.864(d) (misdemeanors), 8.815(c) (infractions).

If the appellant was not represented by counsel at trial, all reporters must file an estimate of costs with the clerk no later than 10 days after the clerk mailed the notice of election. Cal Rules of Ct 8.866(a)(2)(A) (misdemeanors), 8.919(a)(2)(a) (infractions). Reporters also must notify the appellant and counsel of the cost and, within 10 days of the date of that notice, the appellant must (Cal Rules of Ct 8.866(a)(2)(c) (misdemeanors), 8.919(a)(2)(c) (infractions)):

- Deposit the estimated costs with the clerk;
- File Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210); or
- Notify the clerk that appellant will be using a statement on appeal instead of a reporter's transcript.

Once the clerk receives the estimated costs or determines that the appellant is indigent, he or she instructs the reporter(s) to begin the transcript. Cal Rules of Ct 8.868(d)(2)(C) (misdemeanors), 8.919(a)(2)(D) (infractions). Once the reporter begins working on the transcript, the transcript must be certified and delivered to the trial court clerk within 20 days. Cal Rules of Ct 8.866(d) (misdemeanors), 8.919(d) (infractions).

The reporter's transcript must include (Cal Rules of Ct 8.865 (misdemeanors), 8.918 (infractions)):

- Any oral proceedings on the entry of any plea other than a not guilty plea;
- Any oral proceedings on a motion in limine;
- Any oral proceedings at trial, but not the voir dire of jurors (misdemeanors only) or any opening statement;
- Any oral jury instructions (misdemeanors only);
- Any oral conversations between the court and the jury or any individual juror (misdemeanors only);
- Any oral court opinion;
- Any oral proceedings involving any motion for new trial;
- Any oral proceedings about sentencing, granting or denying probation, or any other dispositional proceeding; and
- If the appellant is the defendant:
- Any oral proceedings on any defense motion denied in whole or in part but not motions to disqualify a judge;
- Any closing arguments; and
- Any comment on the evidence by the court to the jury (misdemeanors only).

Original Electronic Recording. If the appellant elects to use an official electronic recording, the following is required (Cal Rules of Ct 8.864(a)(2), 8.868(a), (c) (misdemeanors), 8.915(a)(2), 8.917(a), (c) (infractions):

- The recording must have complied with Govt C §69957 and other applicable rules;
- Use of the recording must be permitted by local rule or order;
- The parties all must stipulate to the use of the recording and an executed, written stipulation must be attached to the Notice of Election.

NOTE: The trial clerk must notify appellant within 10 days of the filing of appellant's notice of election, if an official electronic recording was not made. The appellant must decide within 15 days of the notice whether to use a statement on appeal. Cal Rules of Ct 8.864(d) (misdemeanors), 8.815(c) (infractions).

Electronic Recording Transcript. If the appellant elects to use a transcript of the official electronic recording under Cal Rules of Ct 8.864(a)(2) (misdemeanors), 8.915(a)(3) (infractions), the recording must have been done in compliance with Govt C §69957 and local rules. Cal Rules of Ct 8.868(a) (misdemeanors), 8.917(a) (infractions). The People do not have an obligation to pay for a transcript. Cal Rules of Ct 8.868(d)(1)(B) (misdemeanors), 8.917(d)(1) (infractions). If not indigent, or formerly represented by appointed counsel at trial (misdemeanors only), a criminal defendant must pay for the transcript. Cal Rules of Ct 8.868(d) (misdemeanors), 8.917(d)(2) (infractions). The court reporter will begin preparation of the transcript immediately if the appellant is indigent, was represented at trial by counsel (misdemeanors only), or is the People. Cal Rules of Ct 8.868(d)(1) (misdemeanors), 8.917(d) (infractions). If a criminal defendant is not indigent and has not filed a Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210), then the reporter begins work on the transcript once the clerk receives the required deposit. Cal Rules of Ct 8.868(d)(1)(C) (misdemeanors), 8.917(d)(2)(C)(i) (infractions).

NOTE: The trial clerk must notify appellant within 10 days of the filing of appellant's notice of election, if a transcript cannot be made. The appellant must decide within 15 days of the notice whether to use a statement on appeal. Cal Rules of Ct 8.864(d) (misdemeanors), 8.815(c) (infractions).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.17 c. Statement on Appeal

§3.17 c. Statement on Appeal

In contrast to felony appeals, in which a verbatim reporter's transcript of most of the oral proceedings is part of the normal record on appeal (see Cal Rules of Ct 8.320(b)) and the settled statement is rarely necessary, appeals in misdemeanor and infraction cases are routinely heard on statements on appeal. See Cal Rules of Ct 8.860(a)(2)(C), 8.869 (misdemeanors), 8.915(a)(1), 8.916 (infractions). If an appellant wishes to pursue this option, he or she must file a notice electing to use a statement on appeal. Cal Rules of Ct 8.864(a) (misdemeanors), 8.915(a)(1) (infractions). The Notice Regarding Record of Oral Proceedings (Misdemeanor) (Judicial Council Form CR-134) or the Notice Regarding Record of Oral Proceedings (Infraction) (Judicial Council Form CR-142) may be used for this purpose. For infractions, the notice must be filed with the notice of appeal. Cal Rules of Ct 8.915(b). For misdemeanors, the notice must be filed no later than (Cal Rules of Ct 8.864(b)):

- 20 days after filing of the notice of appeal, if no application for appointment of counsel is filed; or
- If application of counsel has been timely filed under Cal Rules of Ct 8.851 (misdemeanors), the later of:
- 10 days after the court appoints counsel;
- 10 days after denial of the application; or
- 20 days after the notice of appeal is filed.

The process of creating a statement on appeal begins with counsel for the appellant who must file a proposed statement on appeal within 20 days of filing the notice of election for a statement on appeal. Cal Rules of Ct 8.869(b)(1) (misdemeanors), 8.916(b)(1) (infractions). Counsel may use the Statement on Appeal (Misdemeanor) (Judicial Council Form CR-135) or Statement on Appeal (Infraction) (Judicial Council Form CR-143). These forms *must be used* by in pro per appellants, unless the court permits otherwise on a showing of good cause. Cal Rules of Ct 8.869(b)(2) (misdemeanors), 8.916(b)(2) (infractions).

The statement on appeal must include (Cal Rules of Ct 8.869(c) (misdemeanors), 8.916(c) (infractions)):

- A condensed narrative of the oral proceedings that are necessary to adjudicate the appeal;
- A summary of the trial court's holding and the sentence imposed on the defendant.

NOTE 1: With the court's approval, the appellant may present some or all of the summary evidence by question and answer.

- A statement of the points the appellant is raising on appeal that:
- Specifies the intended grounds of appeal by clearly stating each point to be raised but that does not need to identify each particular ruling or matter to be challenged;
- Includes as much of the evidence or proceeding as necessary to support the stated grounds.

NOTE 2: The appeal will be limited to these points unless the court determines that the record permits full consideration of another point. In settling the statement on appeal, the trial court judge must not eliminate any of the appellant's specified points on appeal (Cal Rules of Ct 8.869(d)(5) (misdemeanors), 8.916(c) (infractions)).

- If one of the points raised on appeal is insufficiency of the evidence, the statement must state how the evidence is insufficient.
- If one of the points on appeal challenges the giving, refusal, or modification of a jury instruction, the statement must include any oral instructions submitted and identify the party that requested the instruction and any modification (misdemeanor only).

NOTE 3: The court will presume that any evidence or portion of oral proceedings not included in the statement supports the judgment or order appealed from.

For a sample form of a proposed statement on appeal, see §3.50.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.18 d. Settlement and Certification of Statement on Appeal

§3.18 d. Settlement and Certification of Statement on Appeal

Appellant's proposed statement on appeal must be filed in the trial court within 20 days after filing the notice of election to use a statement on appeal. Cal Rules of Ct 8.869(b)(1) (misdemeanors), 8.916(b) (infractions). If the appellant fails to serve and file a proposed statement on appeal within the time provided, the trial court clerk will notify the appellant that he or she has 15 days from the date the notice was sent to file the proposed statement and failure to do so will result in the appeal being dismissed. Cal Rules of Ct 8.869(b)(3) (misdemeanors), 8.916(b)(3) (infractions).

Within 10 days after the appellant files the proposed statement, the respondent may serve and file proposed amendments to the statement. Cal Rules of Ct 8.869(d)(1) (misdemeanors), 8.916(d)(1) (infractions).

NOTE: Under Pen C §1240.1, trial counsel (whether appointed or retained) has the obligation to assist in the preparation and settlement of the statement on appeal whenever the defendant files a notice of appeal. *People v Wilson* (1977) 72 CA3d Supp 59, 140 CR 274. For further discussion of duties of trial counsel on appeal, see §§2.5-2.17.

Any party may request a hearing to review and correct the proposed statement on appeal within 10 days after the respondent files any proposed amendments or the time to do so has expired. The trial court judge will rarely set a hearing, however, unless there is a material, factual dispute involving the oral proceedings. Cal Rules of Ct 8.869(d)(2) (misdemeanors), 8.916(d)(2) (infractions). If the court grants the request for a hearing, it must promptly set the hearing date and provide at least 5 days' written notice to the parties. Cal Rules of Ct 8.869(d)(3) (misdemeanors), 8.916(d)(3) (infractions). The hearing date will be as early as the business of the court will permit, and the hearing may be held either in chambers or in open court. At least one court has suggested that the hearing be set no later than 10 calendar days after the filing of any amendments to the proposed statement or the expiration of time to file amendments. *People v Hernandez* (1985) 166 CA3d Supp 1, 10, 212 CR 563.

If a hearing is granted, the trial court judge has 10 days after the hearing to settle the statement. Cal Rules of Ct 8.869(d)(4) (misdemeanors), 8.916(d)(4) (infractions). If no hearing is ordered, the trial court judge must settle the statement no later than 10 days after the time to request a hearing expires. The trial judge must settle the statement or transcript and proposed amendments to make it set forth accurately, fairly and truly the evidence and proceedings relating to the specified grounds of appeal or the matters set forth by the appellant in support of it. Cal Rules of Ct 8.869(d)(4) (misdemeanors), 8.916(d)(4) (infractions); *Williams v Goldberg* (1944) 66 CA2d 40, 46, 151 P2d 853 (duty is not satisfied by judge merely taking appellant's proposed statement and respondent's proposed amendments and certifying both to appellate court). A respondent's failure to file proposed amendments does not relieve a trial judge of his or her duty to settle the proposed statement. *Western States Const. Co. v Municipal Court* (1951) 38 C2d 146, 151, 238 P2d 562.

If the judge makes no changes to the proposed statement on appeal, he or she must promptly certify it. Cal Rules of Ct 8.869(f)(1) (misdemeanors), 8.916(f)(1) (infractions). If the judge has made corrections or changes, the clerk must mail the revised statement to the parties. Cal Rules of Ct 8.869(e)(1) (misdemeanors), 8.916(e)(1) (infractions). The parties then have 10 days to serve and file any objections or proposed additional changes. Cal Rules of Ct 8.869(e)(2) (misdemeanors), 8.916(e)(2) (infractions). After this time has expired, the judge has no more than 5 days to review any objections or requests for additional changes, make necessary changes to ensure an accurate record of the oral proceedings, and certify the statement. Cal Rules of Ct 8.869(f)(2) (misdemeanors), 8.916(f)(2) (infractions). The record settlement should be performed by the same judge who presided over the trial. See *People v Cervantes* (2007) 150 CA4th 1117, 1121, 58 CR3d 861. The judge must not eliminate the appellant's specified grounds for appeal from the statement on appeal. Cal Rules of Ct 8.869(d)(5) (misdemeanors), 8.916(d)(5) (infractions).

NOTE: Instead of settling and certifying the statement on appeal, the trial court judge has the discretion, if he or she determines that it would save court time and resources, to order the use of a transcript from the official electronic recording of the trial court proceedings made in accordance to Govt C §69957, or, if local rules permit, the use of the official recording itself. The court pays the costs associated with the chosen alternative. Cal Rules of Ct

8.869(d)(6) (misdemeanors), 8.916(d)(6) (infractions**).**

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.19 2. Preparation and Transmission of Record on Appeal

§3.19 2. Preparation and Transmission of Record on Appeal

The record on appeal is prepared by the clerk of the trial court. Cal Rules of Ct 8.872 (misdemeanors), 8.922 (infractions).

Normal Record Without Oral Proceedings. If the appellant elected to use the clerk's transcript, the clerk must complete the preparation of that transcript within 20 days after the notice of appeal is filed. Cal Rules of Ct 8.862(d) (misdemeanors), 8.913(c) (infractions). If no record of oral proceedings is necessary, the record is complete when the transcript is certified. Cal Rules of Ct 8.872(a)(1) (misdemeanors), 8.922(a)(1) (infractions). If local rules permit, and the appellant has elected to use the original trial court file, the clerk must organize the file and complete an index and list of attorneys within 20 days after the notice of appeal is filed. Cal Rules of Ct 8.863(a)-(b) (misdemeanors), 8.914(a)-(b) (infractions). If no record of oral proceedings is necessary, the record is complete when the file is ready to be transmitted to the appellate division. Cal Rules of Ct 8.872(a).

Normal Record With Oral Proceedings. The clerk's transcript or original trial court file must be prepared along with the elected record of oral proceedings. If the appellant elected to use a reporter's transcript, the reporter has 20 days to complete the transcript under Cal Rules of Ct 8.866(a) and (d) (misdemeanors), 8.919(a) and (d) (infractions). If a criminal defendant appellant is not indigent, that 20 days begins to run from the date the clerk notifies the reporter that the required deposit of funds to pay for the transcript has been made. Cal Rules of Ct 8.866(a) (misdemeanors), 8.919(a)(2)(D) (infractions). If the appellant elected to use a transcript of the official electronic recording, it should be prepared and certified as provided under Cal Rules of Ct 2.952, 8.868(b) (misdemeanors), 8.917(b) (infractions). If the appellant elected to use the official electronic recording itself and has met all conditions to do so (see §3.16), the record is complete when it is prepared. Cal Rules of Ct 8.868(a), (c), 8.872(a)(2)(C) (misdemeanors), 8.917(a), (c), 8.922(a)(2)(C) (infractions). If the appellant has elected to use a statement on appeal, it must be settled and certified as provided under Cal Rules of Ct 8.869(d)-(f) (misdemeanors), 8.916(d)-(f) (infractions).

Transmission. When the record is complete, the clerk of the trial court transmits the original to the clerk of the appellate division of the superior court. Cal Rules of Ct 8.872(b)(1) (misdemeanors), 8.922(b)(1) (infractions). The trial clerk also sends to counsel for appellant, pro per appellants, and respondents copies of the following (Cal Rules of Ct 8.872(b)(2)-(3) (misdemeanors), 8.922(b)(2)-(3) (infractions)):

- The clerk's transcript, or
- The index to the original court file; and
- The option elected of the record of the oral proceedings, *i.e.,*
- a reporter's transcript;
- a transcript of the official electronic recording;
- the actual official electronic recording; or
- a statement on appeal.

The appellate court clerk then files the original normal record and notifies the parties by mail of the filing date. Cal Rules of Ct 8.872(c) (misdemeanors), 8.922(c) (infractions).

Confidential Information. Code of Civil Procedure §237(a)(2) requires the trial court to seal the record of the names, addresses, and telephone numbers of trial jurors and alternates when the verdict is recorded in a criminal case. Under Cal Rules of Ct 8.871, the clerk and the court reporter must replace the names of jurors and alternates with numbers and delete their addresses and telephone numbers in all documents in which they appear. Identifying information about individuals called but not sworn as trial jurors or alternates should not be deleted unless the court has ordered it sealed under CCP §237(a)(1). Cal Rules of Ct 8.871(c). This rule does not apply to infractions. See Cal Rules of Ct 8.910-8.923.

NOTE: The sealing of juror-identifying information can make review of the voir dire proceedings for jury selection issues (*e.g.*, discriminatory use of peremptory challenges under *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 137, 125 S Ct 2410, and

Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712) very difficult. If counsel receives a transcript of jury voir dire that redacts the names of jurors who did not actually try the case, it might be advisable to investigate whether an order for sealing this information was made, and if made, whether a "compelling interest" justifies its sealing under CCP §237(a)(1).

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§3.20 3. Augmenting the Record

After the record is certified, if the trial court amends or recalls the judgment or makes any other subsequent order, including an order affecting the sentence or probation, or, if it becomes apparent that the record omits a required document or transcript, the trial court clerk has an obligation to augment or correct the record in the appellate division. Cal Rules of Ct 8.873 (misdemeanors), 8.923 (infractions). The document or transcript augmenting the record must be promptly sent to all parties as well. Cal Rules of Ct 8.873(a)-(b), 8.923(a)-(b).

On a motion of a party or on its own motion, the appellate division may order the record augmented or corrected as set forth under Cal Rules of Ct 8.841 (limited civil appeal). Cal Rules of Ct 8.873(c) (misdemeanors), 8.923(c) (infractions).

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II. BRIEFS

A. Appeals in the Court of Appeal and Supreme Court

§3.21 1. Required Briefs: Appellant's Opening Brief, Respondent's Brief

Every appellant in the California Supreme Court or the court of appeal must file an opening brief, and every respondent must file a respondent's brief. Cal Rules of Ct 8.200(a). For juvenile appeals see also Cal Rules of Ct 8.412 (effective July 1, 2010) and §2.10. A party may, however, rely on another party's brief in whole or in part, by joining it, or by incorporating it by reference. Cal Rules of Ct 8.200(a).

NOTE: Many appellate practitioners consider it good practice to send a separate "Notice of Joinder" to the reviewing court specifying what parts of other parties' briefs they are joining, even when they have incorporated an argument by reference in the brief. This practice calls attention to the joinder and minimizes the possibility that the court will overlook the fact of joinder when deciding the case.

CAUTION: Keep in mind that some legal errors may affect different coappellants in different ways, particularly with respect to the determination of harmless error. Any joinder in another appellant's argument should address the different ways the co-appellants may be affected by the same legal error.

Appellant's opening brief must be served and filed within 40 days after the filing of the record in the reviewing court; respondent's brief must be filed within 30 days after the filing of appellant's opening brief. Cal Rules of Ct 8.360(c). The time for filing a brief in a criminal case can be extended only on order of the court; it may not be extended by stipulation of the parties. Cal Rules of Ct 8.360(c)(4). For discussion of applications for extension of time, see §3.25; for form, see §3.51.

If appellant or respondent fails to file a brief on time, the clerk of the reviewing court must notify the parties by mail that, if the brief is not filed within 30 days after the date of mailing, the court may impose one of the following sanctions (Cal Rules of Ct 8.360(c)(5)):

- If the appellant is the People or a defendant who is not represented by appointed counsel, the court will dismiss the appeal;
- If the appellant is a defendant represented by appointed counsel, the court will relieve that attorney and appoint new counsel;
- If the appellant is a defendant proceeding in pro per or with retained counsel, the court will dismiss the appeal;
- If the respondent's brief is late, the appeal will be decided on the record, appellant's opening brief, and any oral argument by appellant.

If the brief is filed within the 30-day grace period, no sanctions will be imposed. It is unnecessary for counsel to file a formal motion permitting late filing of the brief. Advisory Committee Comment, Rule 8.220(a). The party may, within the 30-day grace period, apply for an extension of time for good cause. See Cal Rules of Ct 8.220(d). If, however, the party does not file a brief within the grace period, or within the extended period, the court may impose one of the sanctions listed above without further notice. Cal Rules of Ct 8.360(c)(6).

NOTE: Rule 8.360(c)(5) effectively gives counsel an automatic, one-time 30-day extension to file the opening brief. By analogy, counsel need not file an extension request if he or she can file the brief within the time allowed by Rule 8.220. Cal Rules of Ct 8.212(b)(4) (governing civil appeals). Confusingly, however, some courts of appeal encourage counsel to make use of the 30-day period (see 1st App Dist Local R 11(a) (request for extension not necessary if counsel anticipates brief will be filed within 30 days of due date)), while other courts expect counsel to file a request for an extension of time if the brief will not be submitted by the due date. If unsure about a court's stance on extension requests, counsel should consult with the appellate project in the district in which the appeal

is pending. Contact information for the appellate projects can be found in §2.21.

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2. Permitted Briefs

§3.22 a. Appellant's Reply Brief

An appellant's reply brief, if any, must be served and filed within 20 days after the filing of the respondent's brief. Cal Rules of Ct 8.360(c)(3) (supreme court and courts of appeal). For juvenile appeals see also Cal Rules of Ct 8.412(b)(3) (effective July 1, 2010) and §2.10. Request for extensions of time should be avoided because in some cases the court begins working on the case when respondent's brief is filed.

NOTE: Although the rules of court do not require appellant to file a reply brief, except in extraordinary instances, counsel for appellant should always file a reply brief. Failure to do so leaves respondent's brief unanswered. As a practical matter, if the court has been persuaded by the respondent's argument, saving a reply until oral argument may be too late. On the other hand, failure to address in the reply brief a particular argument made by respondent will not be considered a waiver of the point on appeal. See *People v Hill* (1992) 3 C4th 959, 995 n3, 13 CR2d 475, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.23 b. Supplemental Brief

§3.23 b. Supplemental Brief

Supplemental briefs may be filed only with permission of the presiding justice of the reviewing court. Cal Rules of Ct 8.200(a). Practitioners should not regard the possibility of obtaining permission to file a supplemental brief as an excuse for piecemeal presentation of their claims: It hardly needs saying that the competent appellate practitioner will make an effort to present every arguable issue in the first brief to the reviewing court. There are, however, occasions when a supplemental brief is appropriate. For example:

- Counsel must file a supplemental brief when the court requests supplemental briefing under Govt C §68081. See §5.9.
- Counsel for the appellant must request permission to file a supplemental brief if he or she realizes after filing the opening brief that an issue that could result in a more favorable outcome for the defendant has been omitted.
- Counsel for the appellant should request permission to file a supplemental brief when the answer to one of respondent's contentions requires appellant to make an argument that the reviewing court might view as a new argument for two reasons: (1) the courts will not consider new arguments raised in the reply brief; (2) filing a supplemental brief gives respondent a chance to answer the argument.
- Counsel should request permission to file a supplemental brief to call the court's attention to a new case or enactment that may be important to the decision.

This is not an exhaustive list. Other occasions when it is appropriate to request permission to file a supplemental brief may occur to the practitioner; for example, an attorney may realize after filing the opening brief that an issue he or she briefed as state law error may also be error under the United States Constitution. Most appellate practitioners have found that California reviewing courts are willing to grant permission to file supplemental briefs if presented with a substantial reason.

NOTE: A violation of Govt C §68081 may result if the court of appeal bases its opinion on a ground not addressed in the briefing. If supplemental briefing is not invited before the issuance of the court of appeal opinion, and the new issue affects the substantial rights of the parties, counsel should file a Petition for Rehearing. See complete discussion in *People v Alice* (2007) 41 C4th 668, 61 CR3d 648.

A supplemental brief in the court of appeal is usually a letter brief, without covers or introductory matter, addressed to the clerk of the court. It should be accompanied by proof of service, and counsel should serve all the parties on whom he or she would serve any other brief, *i.e.,* all parties to the appeal, the trial court judge, and the district attorney.

PRACTICE TIP: Many appellate practitioners serve the application for permission to file the supplemental brief along with the brief. Counsel should consult local rules or call the court clerk to find out if this is acceptable to the court in which the appeal is pending and whether the court treats such a request as a routine application under Cal Rules of Ct 8.50, or wants counsel to comply with the requirements of Cal Rules of Ct 8.54 for formal motions. Appointed counsel can obtain this information from the district appellate project. See §2.21 for a list of the appellate projects and their addresses and telephone numbers.

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§3.24 c. Amicus Curiae Briefs

When a case raises significant new questions of state or federal constitutional law, or when a decision will affect many other pending cases, a prosecutor's or defender's office, lay organization, bar association committee, or group of individuals may desire to file an amicus curiae or friend of the court brief. An amicus brief often provides a court with a deeper analysis of one or two key questions on appeal or a historical perspective. Appellate counsel may be unable to provide this type of concentrated treatment because their briefs must cover all issues in the case, and their approach necessarily must focus on the individual case rather than the broader institutional concerns of amici.

The rules for filing an amicus curiae brief on the merits of a case on review in the California Supreme Court are set forth in Cal Rules of Ct 8.520(f). Any individual or group may request permission to file such a brief. Cal Rules of Ct 8.520(f)(1).

NOTE: The request to file an amicus brief must be filed with the supreme court or the court of appeal within 30 days after all briefs that the parties may file (other than supplemental briefs) have been filed or were required to be filed. The Chief Justice may allow later filing for good cause shown. Cal Rules of Court 8.200 and 8.520(f)(2).

The brief itself must accompany the request, and may be combined with it. For the required contents of the request and deadline for filing an amicus brief in the supreme court, see Cal Rules of Ct 8.520(f). Note that an individual or group that desires to support or oppose the granting of a petition for review or original writ in the supreme court should not file a brief but may lodge a letter in the supreme court stating the nature of the individual's or group's interest in the case. Cal Rules of Ct 8.500(g).

The rules for applications to file an amicus curiae brief in the court of appeal are set forth in Cal Rules of Ct 8.200(c). For juvenile appeals see also Cal Rules of Ct 8.412(a) (effective July 1, 2010) and §2.10. As in the supreme court, the brief itself must accompany the application. Cal Rules of Ct 8.200(c)(4). A request to file an amicus curiae brief in either the court of appeal or the supreme court must state the nature of the applicant's interest in the case and explain why the brief will be helpful to the court. Cal Rules of Ct 8.200(c)(2) (court of appeal), 8.520(f)(3) (supreme court). The application must also state whether any party or counsel in the appeal drafted any part of the amicus brief or contributed money to support the brief. Any other party who contributed money to support the brief must be identified, as well. Cal Rules of Ct 8.200(c)(3) (court of appeal), 8.520(f)(4) (supreme court).

In both the court of appeal and the California Supreme Court, the Attorney General may file an amicus curiae brief without permission unless the brief is filed on behalf of another state officer or agency. See Cal Rules of Ct 8.200(c)(7) (court of appeal), 8.520(f)(8) (supreme court). The Attorney General must, however, provide the information required by other individuals and groups in support of a request to file an amicus curiae brief.

A brief in support of the position of one of the parties must note that fact on the cover of the brief. Cal Rules of Ct 8.200(c)(5) (court of appeal), 8.520(f)(6) (supreme court). The cover of an amicus curiae brief should be gray. Cal Rules of Ct 8.40(b).

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§3.25 3. Obtaining Additional Time to File Brief

An application to extend the time within which to serve a required brief is considered a routine application under Cal Rules of Ct 8.50, and will be granted on a showing of good cause. Cal Rules of Ct 8.63(a). The application must state (Cal Rules of Ct 8.60(c)):

- When the document is due;
- How much additional time is requested;
- Whether any prior extensions have been granted and, if so, their length; and
- Specific facts related to the case or counsel's professional or other obligations that substantiate the need for the extension.

In determining whether there is good cause for the extension under Cal Rules of Ct 8.63(b), the court will consider:

- Whether there would be significant prejudice to any litigant from a grant or denial of extension;
- The number of issues that counsel for appellant expects to raise or has raised and describe their complexity;
- The length of the clerk's and reporter's transcripts and the number of relevant trial exhibits;
- Whether the litigation is entitled to priority;
- Whether counsel handling the appeal is new to the case;
- Whether other counsel or the client need to review the brief before it is filed;
- Whether the attorney responsible for preparing the brief has other time-limited commitments (note that establishing good cause requires a specific showing of other obligations either involving deadlines that as a practical matter preclude filing the brief by the due date without impairing quality, or are in cases entitled to priority); and
- Any other cause for counsel's inability to file the brief by the due date, *e.g.,* illness of counsel, a personal emergency, or a planned vacation that cannot reasonably be rearranged and that was not reasonably expected to conflict with the due date.

The application must be made in the form of a declaration by counsel, signed under penalty of perjury. Counsel's declaration should contain enough detail to enable the court to determine whether additional time is necessary to enable counsel to prepare a brief that effectively represents his or her counsel and assists the court. See Cal Rules of Ct 8.63(a)(2). For example, if counsel is relying on the length of the record as the main ground for the request, it is important to state the length of the record in the request (Cal Rules of Ct 8.63(b)(3)); if counsel is relying on other time-limited commitments, the application should specify the other matters and their deadlines (Cal Rules of Ct 8.63(b)(9)).

The application must be served on all parties to the appeal. Cal Rules of Ct 8.60(c). If the extension of time is sought in the court of appeal, an original and one copy must be filed, plus an additional copy for each separately represented or unrepresented party. Cal Rules of Ct 8.44(b)(7). If the extension of time is sought in the supreme court only an additional and one copy is required. Cal Rules of Ct 8.44(a)(6).

CAUTION: If counsel is not familiar with the procedures applicable to extensions of time in the district in which the appeal is pending, it is important to check the local rules or consult with the court clerk about the court's policies before filing an extension request. See, *e.g.,* 1st App Dist Local R 11. The appellate projects will also provide this information for appointed counsel.

For discussion of timeliness of briefs, see §3.21. For sample form for requesting extension of time, see §3.51.

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4. Form and Format Requirements for Briefs

§3.26 a. Format

Briefs may be produced on a typewriter or on a computer; they must conform, as far as practicable, to the rules governing briefs on appeal in civil cases set forth in Cal Rules of Ct 8.200 and 8.204. Cal Rules of Ct 8.360(a). For juvenile appeals see also Cal Rules of Ct 8.412 (effective July 1, 2010) and §2.10. As provided in Cal Rules of Ct 8.204(b):

- Briefs must be printed on opaque, unglazed recycled paper, white or unbleached, of not less than 20-pound weight, 8½ by 11 inches.
- The typeface may be either proportionally spaced or monospaced.
- The type style must be roman, but italics, boldface, or underlining may be used for emphasis.
- Case names must be italicized or underlined.
- If produced on a computer, at least 13-point type must be used for both text and footnotes.
- If produced on a typewriter, the type must be no smaller than standard pica type, unless the brief is submitted by an unrepresented incarcerated litigant who lacks access to a typewriter with larger characters.
- Both sides of the paper may be used if the brief is produced by a computer, or if photocopies of a typewritten brief are filed. Note that if a brief is produced by a typewriter, photocopies must be filed unless the presiding justice grants permission to file an original and carbon copies, and that such permission will ordinarily only be given to pro per litigants proceeding in forma pauperis.
- Line numbering should not be used.
- The body of the brief must be at least one-and-a-half spaced, although quotations may be indented and single-spaced; headings and footnotes may also be single-spaced.
- The margins must be at least 1.5 inches on the left and right sides and one inch on the top and bottom.
- Pages must be consecutively numbered, although different numbering systems may be used for tables and indexes and for the body of the brief. Many appellate practitioners use small Roman numerals (i, ii, iii, *etc.*) for the introductory material, and Arabic numerals (1, 2, 3, *etc.*) for the body of the brief.
- Briefs must be bound on the left side. If stapled, the bound edge and the staples must be covered with tape.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.27 b. Length

§3.27 b. Length

The body of a brief filed in a criminal case in the court of appeal must not exceed 25,500 words (including footnotes) if it is produced on a computer, and must not exceed 75 pages if it is typewritten. Cal Rules of Ct 8.360(b)(1)-(2). If produced on a computer, the brief must include a certificate signed by appellate counsel (or by the defendant if he or she is not represented by counsel) stating the number of words in the brief. The person certifying the word count may rely on the word count of the computer program used to prepare the brief. Cal Rules of Ct 8.360(b)(1). Tables, the word-count certificate, and attachments submitted under Rule 8.204(d) are not included in the word and page limitations. Cal Rules of Ct 8.360(b)(3).

Appellate counsel should strive for brevity. Occasionally, however, in a case with a long record or a number of complex issues, it may not be possible to do justice to the argument within the 25,500-word limit. A longer brief may be permitted by the presiding justice for good cause (Cal Rules of Ct 8.360(b)), but it is good practice to avoid exceeding the word limit. See *In re S.C.* (2006) 138 CA4th 396, 400, 41 CR3d 453 (describing unusually long brief as "an appeal run amok").

A request to file a longer brief is a routine application governed by Cal Rules of Ct 8.50. In most courts it is acceptable to submit the brief and the application to file it simultaneously.

PRACTICE TIP: If unsure of the practice in the court in which the brief is to be filed, check the local rules or ask the court clerk. The appellate projects will also provide information of this type to appointed counsel.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.28 c. Covers

§3.28 c. Covers

It is customary to use heavier paper for brief covers than for the body of the brief, usually 60-pound card stock, available at most photocopier and office supply stores. The court prefers, but does not require, the use of recycled paper for the cover. Cal Rules of Ct 8.204(b)(10). The front cover must include the following information (Cal Rules of Ct 8.204(b)(10)):

- The title of the brief;
- The title, trial court number, and court of appeal number of the case;
- The name of the trial court and the names of each participating judge;
- The name, address, telephone number, and California State Bar membership number of the attorney filing the brief (but the Bar number of any supervising attorney is not required); and
- The name of the party that each attorney on the brief represents.

Sample briefs can be found in California Criminal Law Forms Manual, chaps 43 (Misdemeanor Appeals) and 44 (Felony Appeals) (2d ed Cal CEB 2005).

NOTE: When the defendant appeals, the defendant is designated "Defendant and Appellant," and the prosecution is designated "Plaintiff and Respondent." When the prosecution appeals, it is designated "Plaintiff and Appellant," and the defendant is designated "Defendant and Respondent."

Covers of briefs and petitions filed in the courts of appeal and the California Supreme Court must be in the following colors (Cal Rules of Ct 8.204(b)(10), 8.40(b)):

- Appellant's opening brief—green;
- Respondent's brief—yellow;
- Appellant's reply brief—tan;
- Amicus curiae brief—gray;
- Petition for rehearing—orange;
- Answers to petition for rehearing—blue;
- Petition for original writ or answer to petition—red;
- Petition for review—white;
- Answer to petition for review—blue;
- Reply to answer to petition for review—white;
- Petitioner's brief on the merits—white;
- Answer brief on the merits—blue; and
- Reply brief on the merits—white.

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d. Contents

§3.29 (1) Headings and Tables

A brief in the court of appeal or the supreme court must begin with a table of contents and a table of authorities. Cal Rules of Ct 8.204(a)(1)(C). The table of contents should list each separate section of the brief. It should list each argument separately, including subheadings if they are used. The table of authorities must separately list cases, statutes, constitutional provisions, court rules, and other authorities cited. Cal Rules of Ct 8.204(a).

For forms of table of contents and table of citations, see California Civil Appellate Practice §§12.12-12.13, 12.15 (3d ed Cal CEB 1996).

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§3.30 (2) Citations to the Record

References to any matter contained in the record must be supported by citation to the record by the volume and page number of the record where the matter appears. Cal Rules of Ct 8.204(a). In California, it is customary to use the abbreviations "RT" (reporter's transcript) and "CT" (clerk's transcript) followed by the page number when citing to the record, *e.g.,* RT 436. If the record has been augmented, or if the court reporter or clerk has not paginated a multivolume transcript consecutively, it may be necessary to provide additional identification for the record reference. For example, counsel might use "CTA" or "ACT" to refer to a clerk's transcript obtained through augmentation, or "3RT" to refer to a specific volume of the reporter's transcript. Although it is usually unnecessary to designate line numbers, they may be useful to focus the court's attention on a particularly important statement or event. For example, the designation "1RT 123: 5-8" refers to specific lines on page 123 of the reporter's transcript.

PRACTICE TIP: It is good practice to include a footnote in the brief at the first citation to the record explaining the conventions that will be used in citing to the record.

Sometimes documents or other items in the record do not lend themselves to easy categorization. To take a common example, in response to a Rule 8.340 request (see §3.7), a trial court clerk may include the transcript of an audio or videotape in the appellate record without numbering it as part of the clerk's transcript. When first referring to such an item in a brief, counsel should include a footnote describing it with enough specificity to allow the court to find the item in the record.

If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears. Cal Rules of Ct 8.204(a)(1)(C).

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§3.31 (3) Statement of the Case

Appellant's opening brief must "[s]tate the nature of the action, the relief sought in the trial court, and the judgment or order appealed from." Cal Rules of Ct 8.204(a)(2)(B). This statement of the case (sometimes entitled "procedural history") should be accurate and confined to matters in the record. It should include page references to the record. For California conventions in citing to the record, see §3.30.

The statement of the case advises the court of the charges and other pertinent allegations, the pleas that the defendant entered, pretrial motions and the court's ruling when at issue on appeal, whether a jury trial was had or waived, the verdict or other result of trial, any proceedings on motion for new trial, the pronouncement of judgment, sentence imposed, or the granting of probation, and the timely filing of the notice of appeal. It should be brief. It should confine itself to those aspects of the procedural history of the case that are important to the appeal. If, for example, appellant does not intend to challenge the trial court's ruling on a motion for severance, the statement of the case need not mention that such a motion was made.

For sample briefs, see California Criminal Law Forms Manual, chaps 43 (Misdemeanor Appeals) and 44 (Felony Appeals) (2d ed Cal CEB 2005).

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§3.32 (4) Statement of Appealability

An appellant's opening brief must either state that the appeal is from a final judgment or explain why the order appealed from is appealable. Cal Rules of Ct 8.204(a)(2)(B). The statement of appealability should be a separate section. It is usually placed between the statement of the case and the statement of facts.

If the appeal is from a final judgment entered after trial, a single sentence (*e.g.,* "This appeal is from a final judgment, made appealable by Penal Code section 1237, subdivision (a)") should be sufficient. If the appeal is from an order after judgment it may be necessary to explain briefly why the order affects appellant's "substantial rights." See Pen C §1237(b). If the appeal is from a judgment entered after a guilty plea or plea of nolo contendere, the statement of appealability should state whether the appeal challenges the validity of the plea, and if so, that the defendant has obtained a certificate of probable cause. See Pen C §1237.5. A prosecution appeal should specify what subdivision of Pen C §1238 authorizes the appeal.

For further discussion of guilty plea appeals, see §§1.11-1.15, 2.8. For further discussion of prosecution appeals, see §§1.19-1.33.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.33 (5) Statement of Facts

§3.33 (5) Statement of Facts

An appellant's opening brief must provide a summary of the significant facts. Cal Rules of Ct 8.204(a)(2)(C). This summary must be limited to the record of the case, and must contain accurate citations to the record on appeal. For California conventions in citing to the record, see §3.30.

"An appellant must fairly set forth all the significant facts, not just those beneficial to the appellant." *In re S.C.* (2006) 138 CA4th 396, 402, 41 CR3d 453, citing *Foreman & Clark Corp. v Fallon* (1971) 3 C3d 875, 881, 92 CR 162. Some practitioners believe that a concise, accurate statement of facts is the most important part of the brief.

PRACTICE TIP: The facts should be stated in narrative form. A witness-by-witness summary of the evidence can be confusing, and rarely holds the reader's interest.

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§3.34 (6) Questions on Appeal

Some practitioners believe it is helpful to the reviewing court for counsel to include a separate section listing the issues to be briefed, although it is not mandatory. Such a section is unnecessary if the argument headings and subheadings, which are included in the table of contents, are clear and specific. See §3.37.

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§3.35 (7) Summary of Argument

Although not required by the rules of court, it is customary for respondent to preface the argument with a brief section summarizing appellant's contentions, followed by a brief summary of respondent's arguments.

Appellate arguments may be prefaced with a summary of the argument to be made. (Some federal courts require such a brief summary.) The purpose of a summary is to give the appellate court an overview of the argument in greater depth than it would get from an examination of the argument headings or table of contents. A good summary also may help the court understand counsel's oral argument.

The summary should be a succinct, accurate, and clear statement of the argument made in the brief. If the argument is predicated on leading cases, appellate counsel may wish to cite those cases in the summary. Counsel should also consider setting off the paragraphs of the summary with numerals or letters that correspond with the divisions of the argument. The summary should not deviate from the argument.

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§3.36 (8) Argument

Each ground for reversal should be argued separately. To be considered by the court of appeal an argument should never be presented within another argument, such as within a footnote, or without designation in the heading. See *People v Senior* (1995) 33 CA4th 531, 537, 41 CR2d 1; *In re David L.* (1991) 234 CA3d 1655, 1661, 286 CR 398. Each argument should include the facts on which it relies and be supported by authority. This requirement is of fundamental importance. The court of appeal explained this point as follows in *In re S.C.* (2006) 138 CA4th 396, 408, 41 CR3d 453:

> To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, "it is deemed to be without foundation and requires no discussion by the reviewing court." [Citations.]

The burden of demonstrating error is on the appellant. "Hence, conclusory claims of error will fail." 138 CA4th at 408. An appellant who fails "to advance any pertinent or intelligible legal argument" in support of a claim of error will be considered to have abandoned the claim. *Berger v Godden* (1985) 163 CA3d 1113, 1117, 210 CR 109.

PRACTICE TIP: Each argument should generally include the following: 1) a one-paragraph summary of the issue and the procedural and factual background; 2) a statement, in the most general terms, of the rule relied on; 3) a summary that includes the procedural background with motions, objections, and lower court rulings, and the factual background with citations to the record; 4) analysis, including citations to cases with similar facts, key quotations from the trial record, and argument for the application of established rule to these facts; 5) a statement of the prejudice resulting from the error, including the standard of review and prior caselaw dealing with prejudicial error; 6) a conclusion restating the application of the rule to this record.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.37 (a) Section Headings

§3.37 (a) Section Headings

Each separate argument in a brief must appear separately under an appropriate heading or subheading that summarizes the subject covered. Cal Rules of Ct 8.204(a)(1)(B). An argument heading should be a synopsis of the point made in the body of the argument. Being specific when drafting the headings will enable the court to get an overview of the party's major contentions at a glance. For example, "The trial court erred in failing to instruct on the lesser included offense of voluntary manslaughter" is better than "The judgment must be reversed for instructional error." Subheadings should be used for all but the shortest arguments. Subheadings for the previous example might include "The trial court has a sua sponte duty to instruct on lesser included offenses when there is substantial evidence that defendant committed a lesser included offense" and "Defendant's testimony constituted substantial evidence that he acted in the heat of passion." If the argument headings and subheadings are well drafted, the table of contents should provide an outline of the argument.

This rule "is not a mere technical requirement." *In re S.C.* (2006) 138 CA4th 396, 408, 41 CR3d 453. As the court explained (138 CA4th at 408):

> [I]t is "designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass." (*Landa v. Steinberg* (1932) 126 Cal.App. 324, 325 [14 P.2d 532]; accord, *Opdyk v. California Horse Racing Bd., supra*, 34 Cal.App.4th at p. 1830-1831, fn. 4.)

NOTE: Beyond stating that headings may be single-spaced, the rules of court do not specify a format for headings. Most appellate practitioners use outline format, assigning each principal argument a roman numeral, and alternating letters and numbers for subheadings. Using different styles to differentiate outline levels (all caps, boldface, underlining) is also an aid to clarity.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.38 (b) Citation of Authorities

§3.38 (b) Citation of Authorities

Authorities should support the legal propositions for which they are cited and the argument should explain why the cited authorities are helpful to the appellant's case. See *In re S.C.* (2006) 138 CA4th 396, 411, 41 CR3d 453. It is helpful to the court (and ultimately to the client) to include pinpoints for the pages of the case that are relevant to the argument. One or two well-chosen cases that illustrate counsel's point are almost always more persuasive than string cites. See 138 CA4th at 411.

PRACTICE TIP: Avoid the use of "supra" standing alone. Even if you are citing the same case extensively, it is a good idea to include at least the volume of the official reporter and the page on which the pertinent point is discussed each time you rely on the case. See 138 CA4th at 411.

The Advisory Committee Comment to Cal Rules of Ct 8.204(b) states that "[b]rief writers are encouraged to follow the citation form of the California Style Manual (4th ed 2000)." Although some appellate practitioners have a personal preference for The Bluebook: A Uniform System of Citation (18th ed 2005), it is a good idea to defer to the stated preference of the courts when practicing in California.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.39 (9) Conclusion

§3.39 (9) Conclusion

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An appellate brief should close with a conclusion summarizing counsel's arguments, and stating exactly what relief is sought. The conclusion can be as brief as this:

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment should be reversed.

Date: _ _ _ _ _ _ __[*Signature of attorney or pro per defendant*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

The original of the brief must be signed as well as the accompanying Proof of Service. Copies need not be signed.

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§3.40 (10) Attachments

A party may attach copies of exhibits and other materials from the appellate record of up to 10 pages in length without obtaining permission from the court. Cal Rules of Ct 8.204(d). Permission to file longer attachments may be granted by the presiding justice on the party's application. See Cal Rules of Ct 8.50. Attachments do not count in the word and page limitations of Cal Rules of Ct 8.360(b)(3), but counsel should not hesitate to request permission to file an attachment if the attachment will assist the court in understanding an issue. Cal Rules of Ct 8.204(d).

In addition, Cal Rules of Ct 8.1115(c) provides that when a party's brief cites an unpublished decision or a decision from another jurisdiction "that is available only in a computer-based source of decisional law," that opinion "must be furnished to the court and all parties by attaching it to the document in which it is cited." Such an attachment does not count toward the 10-page limit imposed in Cal Rules of Ct 8.204(d). See Comment, Cal Rules of Ct 8.204(d).

An unpublished California appellate decision may be cited only when it is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or because it states reasons for a decision affecting the same defendant or respondent in another case. Cal Rules of Ct 8.1115(a)-(b).

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§3.41 5. Service and Filing of Briefs

Every brief of the defendant must be served on both the district attorney and the Attorney General and, unless the defendant has requested otherwise, a copy must be sent to the defendant. Cal Rules of Ct 8.360(d)(1). The proof of service must state that a copy of defendant's brief was sent to the defendant or counsel must file a signed statement that the defendant requested in writing than no copy be sent. Cal Rules of Ct 8.360(d)(2). The prosecution must serve two copies of its briefs on appellate defense counsel and one copy of the district appellate project. Cal Rules of Ct 8.360(d)(3). Defense counsel should send the extra copy to appellant. All briefs must be served on the clerk of the superior court for delivery to the trial judge. Cal Rules of Ct 8.360(a)(4).

If a brief is filed in the supreme court, an original and 13 copies must be filed. Cal Rules of Ct 8.44(a)(1). If a brief is filed in a court of appeal, an original and four copies must be filed. Cal Rules of Ct 8.44(b)(1).

NOTE: It is customary to include the proof of service in the brief as the last page.

PRACTICE TIP: In many cases, particularly those involving sex offenses, the appellant may not wish to have a copy of the brief in his or her prison cell. Service may be made on the defendant "in care of" a relative or counsel may submit a statement following the proof of service, that the appellant has made a request that no copy of the brief be sent to him or her. Cal Rules of Ct 8.360(d)(2).

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§3.42 6. Noncomplying Briefs

A brief that does not comply with the requirements of Cal Rules of Ct 8.204 may be either marked "Received but not filed" and returned to the party, or filed. Cal Rules of Ct 8.204(e)(1). If the brief is filed, the reviewing court, on its own motion or on motion of any party, may (Cal Rules of Ct 8.204(e)):

- Order the brief returned to counsel for corrections and refiling within a specified time;
- Strike the brief with leave to file a new brief within a specified time; or
- Disregard the noncompliance.

A brief prepared in accordance with the California Rules of Court must be accepted for filing notwithstanding any local court of appeal rule imposing other requirements. Cal Rules of Ct 8.20.

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B. Appeals in Misdemeanor and Infraction Cases

1. In the Appellate Division of the Superior Court

§3.43 a. Briefs Permitted or Required

Briefing Schedule. When the record is filed in the appellate division, the clerk notifies all counsel or unrepresented parties of the filing date and provides a briefing schedule. Cal Rules of Ct 8.872(c), 8.881 (misdemeanors), 8.922(c), 8.926 (infractions). The appellant must file an opening brief within 30 days after the filing of the record on appeal; the respondent must file a brief within 30 days after the filing of the appellant's opening brief; and the appellant may file a reply brief within 20 days after the filing of respondent's brief. Cal Rules of Ct 8.882(a)(1)-(3) (misdemeanors), 8.927 (infractions). Before the brief is due, a party may apply to the presiding judge of the appellate division for an extension of time. The application must show that there is good cause to grant an extension under Cal Rules of Ct 8.811(b), 8.882(b)(3) (misdemeanors). Any other brief may be filed only with the permission of the presiding justice. Cal Rules of Ct 8.882(a)(4) (misdemeanors), 8.927(a)(4) (infractions). Any party may join another party or other parties in a brief or may adopt by reference any brief in the same or a companion case. Cal Rules of Ct 8.882(a)(5) (misdemeanors), 8.927(a)(5) (infractions).

Untimely Filings in Misdemeanor Appeals. If a misdemeanor appellant fails to timely file an opening brief, the appellate division clerk must promptly notify the appellant by mail that the brief must be filed 30 days from the date the notice was mailed and that failure to do so may result in sanctions (Cal Rules of Ct 8.882(c)). If the appellant is the defendant and is represented by appointed council, the court may appoint new counsel. Cal Rules of Ct 8.882(c)(2)(A), (4). In other circumstances, the court may dismiss the appeal. Cal Rules of Ct 8.882(c)(2)(B), (4). If the respondent is a criminal defendant and he or she fails to timely file a brief, the court mails notice giving the respondent an additional 30 days from the date of the mailing to file a response and a warning of sanctions for noncompliance. If the brief is not filed within the 30 days, the court may decide the appeal based only on the record, the appellant's opening brief, and any oral argument of appellant. Cal Rules of Ct 8.882(c)(3), (4).

Untimely Filings in Infraction Appeals. The clerk notifies an infraction appellant by mail who has not filed a timely opening brief that he or she has 20 days from the date of the mailed notice to file a brief and that failure to comply may result in dismissal (Cal Rules of Ct 8.927(b)(1), (3)). If respondent is the defendant and fails to file a timely brief, the court mails notice giving the respondent an additional 20 days to file a brief from the date of the mailing and a warning of sanctions for noncompliance. If the brief is not filed within the 20 days, the court may decide the appeal based only on the record, the appellant's opening brief, and any oral argument of appellant. Cal Rules of Ct 8.927(b)(2)-(3).

Service. Briefs must be served, before filing, on each adverse party who has appeared separately. The original brief, with proof of service, must be filed with the appellate clerk. Cal Rules of Ct 8.25, 8.882(a), (e) (misdemeanors), 8.927(a), (c) (infractions). A copy of each brief must be served on the trial court for delivery to the judge who tried the underlying case. Cal Rules of Ct 8.882(e)(3) (misdemeanors), 8.927(c)(3) (infractions). If required by Cal Rules of Ct 8.29, a copy of each brief must be served on a public officer or agency. Cal Rules of Ct 8.882(e)(4) (misdemeanors), 8.927(c)(4) (infractions). Amicus briefs may be filed only in misdemeanor appeals as provided under Cal Rules of Ct 8.882(d).

Procedures applicable to misdemeanor appeals when one party appears as both appellant and respondent are set out in Cal Rules of Ct 8.884.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.44 b. Form and Content Requirements

§3.44 b. Form and Content Requirements

Appellant's Statement of the Case. Appellant's opening brief must "[s]tate the nature of the action, the relief sought in the trial court, and the judgment or order appealed from." Cal Rules of Ct 8.883(a)(2)(A) (misdemeanors), 8.928(a)(2)(A) (infractions). The brief should state that the judgment is final or explain why the order is appealable. Cal Rules of Ct 8.883(a)(2)(B) (misdemeanors), 8.928(a)(2)(B) (infractions). A summary of significant facts supported by the record must be provided. Cal Rules of Ct 8.883(a)(2)(C) (misdemeanors), 8.928(a)(2)(C) (infractions). This statement of the case (sometimes entitled "procedural history") should be accurate and confined to matters in the record. It should include page references to the record. For California conventions in citing to the record, see §3.30.

For sample briefs, see California Criminal Law Forms Manual, chaps 43 (Misdemeanor Appeals) and 44 (Felony Appeals) (2d ed Cal CEB 2005).

Form and Formatting. Rules on form are provided in Cal Rules of Ct 8.883(c) (misdemeanors), 8.928(c) (infractions). These rules generally parallel those for the court of appeal and the supreme court. In the appellate division, no table of contents or table of authorities is necessary. The brief must state concisely the propositions of law and fact that the party relies on, with references (by line and page, if possible) to the record and citations to authorities. Each point, and the argument in support of it, must be presented separately under an appropriate heading, with subheadings if desired. Cal Rules of Ct 8.883(a) (misdemeanors), 8.928(a) (infractions). According to Cal Rules of Ct 8.883 (misdemeanors) and 8.928 (infractions), in the appellate division of the superior court:

- Briefs must be printed on opaque, recycled paper, white or unbleached, of not less than 20-pound weight, 8½ by 11 inches.
- Briefs must be bound on the left side, unless a local rule provides otherwise. If bound and stapled, the bound edge and the staples must be covered with tape.
- Both sides of the paper may be used if the brief is not bound on top. Note that if a brief is produced by a typewriter, photocopies must be filed unless the presiding justice grants permission to file an original and carbon copies, and that such permission will ordinarily only be given to pro per litigants proceeding in forma pauperis.
- The typeface may be either proportionally spaced or monospaced.
- The type style must be roman, but italics, boldface, or underlining may be used for emphasis.
- Case names must be italicized or underlined.
- Headings may be in capital letters.
- If produced on a computer, at least 13-point type must be used for both text and footnotes.
- If produced on a typewriter, the type must be no smaller than standard pica type, unless the brief is submitted by an unrepresented incarcerated litigant who lacks access to a typewriter with larger characters.
- Lines of text should not be numbered (infraction appeals only).
- The body of the brief must be at least one-and-a-half spaced, although quotations may be indented and single-spaced; headings and footnotes may also be single-spaced.
- The margins must be at least 1.5 inches on the left and right sides and one inch on the top and bottom.
- Pages must be consecutively numbered.
- The brief need not be signed.

Length. If produced on a computer, the body of a brief filed in the appellate division must not exceed 6800 words (including footnotes) for misdemeanors (Cal Rules of Ct 8.883(b)(1)) and 5100 words (including footnotes) for infractions (Cal Rules of Ct 8.928(b)(1)). Briefs produced on a computer must include a certificate signed by appellate counsel (or by the defendant if he or she is not represented by counsel) stating the number of words in the brief. The person certifying the word count may rely on the word count of the computer program used to prepare the brief. Cal Rules of Ct 8.883(b)(1) (misdemeanors), 8.928(b)(1) (infractions). The word-count certificate is not included in the word and page limitations. Cal Rules of Ct 8.883(b)(3) (misdemeanors), 8.928(b)(3) (infractions).

If produced on a typewriter, the brief must not exceed 20 pages for a misdemeanor appeal (Cal Rules of Ct

8.883(b)(2)) and 15 pages for an infraction appeal (Cal Rules of Ct 8.928(b)(2)).

Appellate counsel should strive for brevity. Occasionally, however, in a case with a long record or a number of complex issues, it may not be possible to do justice to the argument within the word limit. A longer brief may be permitted by the court for good cause (Cal Rules of Ct 8.83(b)(4) (misdemeanors), 8.928(b)(4) (infractions)), but it is good practice to avoid exceeding the word limit. See *In re S.C.* (2006) 138 CA4th 396, 400, 41 CR3d 453 (describing unusually long brief as "an appeal run amok").

Noncomplying Briefs. A brief that does not comply with the requirements of Cal Rules of Ct 8.883 (misdemeanors), 8.928 (infractions) may be either marked "received but not filed" and returned to the party, or filed. Cal Rules of Ct 8.883(d)(1) (misdemeanors), 8.928(d)(1) (infractions). If the brief is filed, the court may (Cal Rules of Ct 8.883(d)(2) (misdemeanors), 8.928(d)(2) (infractions)):

- Order the brief returned to counsel for corrections and refiling within a specified time;
- Strike the brief with leave to file a new brief within a specified time; or
- Disregard the noncompliance.

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§3.45 2. In Cases Transferred to Court of Appeal

Although the court of appeal can on its own motion order the parties to brief a transferred case, a party who desires to brief the case must ordinarily obtain permission from the court of appeal. Cal Rules of Ct 8.1012(a)(1). Appellant's opening brief must be served and filed within 20 days after entry of the briefing order and respondent's brief must be served and filed within 20 days after service and filing of the opening brief. Cal Rules of Ct 8.1012(b)(1)-(2). If the appellant wants to file a reply brief, it is due 10 days after respondent's brief is served and filed. Cal Rules of Ct 8.1012(b)(3). All briefs must be served on the appellate division of the superior court from which the case was transferred, and all briefs for the defendant in a criminal case must be served on the prosecuting attorney and on the Attorney General. Cal Rules of Ct 8.1012(c).

Briefs should comply with the form and formatting requirements applicable to briefs in the court of appeal (see Cal Rules of Ct 8.204(a)-(b)) but may not exceed 5600 words or 20 pages typewritten. Cal Rules of Ct 8.1012(d). For form and formatting requirements for briefs filed in the court of appeal, see §§3.26-3.40.

If the court of appeal denies a Request for Transfer, it may be advisable to seek review in the California Supreme Court. There are at least two reasons to seek review in the Supreme Court: (1) There is some chance that the Supreme Court may act on a case which meets the criteria for review (see Cal Rules of Ct 8.1002: to secure uniformity of decision or to settle an important question of law); (2) State supreme court review may be a necessary step in securing review of a federal constitutional claim (see *Fowler v Sacramento Co. Sheriff's Dept.* (9th Cir 2005) 421 F3d 1027).

If the appeal includes a potentially meritorious federal constitutional claim, which has been unsuccessful in the state courts, it may be advisable to seek collateral review through federal habeas corpus. It is a fundamental requirement of federal habeas corpus review that all federal constitutional claims be presented to the highest state court with jurisdiction to review the claim. 28 USC §2254 (b)(1)(A). See discussion in §§14.20, 14.27. Note that a misdemeanor defendant meets the "in custody" requirement of federal habeas corpus if he or she remains on probation at the time of filing the federal petition. Therefore, it is necessary to petition the California Supreme Court with any federal habeas corpus claim which is to be presented later in federal court.

The precise mechanism for review of a misdemeanor appeal in the California Supreme Court is not set forth in the California Rules of Court. A petition for review appears to be precluded by Rule 8.500(a)(1), which provides: "A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal, including any interlocutory order, *except the denial of a transfer of a case within the appellate jurisdiction of the superior court*." (Emphasis added.)

In *Tecklenburg v Appellate Division* (2009) 169 CA4th 1402, 87 CR3d 460, the misdemeanor defendant/appellant filed a petition for writ of mandate to the California Supreme Court following the denial of his request for transfer to the Court of Appeal. Despite Rule 8.500(a)(1), the Supreme Court refiled the petition as a Petition for Writ of Certiorari and transferred the matter to the Court of Appeal.

In other cases state misdemeanor appellants have petitioned for habeas corpus review to the California Supreme Court in order to meet the exhaustion requirement of the federal habeas corpus statute, 28 USC §2254(b)(1)(A). This may be the preferred means of seeking high court review for a misdemeanor appellant.

Code of Civil Procedure §1068(a) authorizes a grant of review in the California Supreme Court, but only where the lower court has exceeded its jurisdiction. It is not available to review legal errors. Therefore, despite the procedure followed in *Tecklenburg*, the appellant takes a risk by filing a petition for writ of mandate or a petition for review or certiorari in the California Supreme Court in these circumstances.

If further state or federal review is to be sought after a denial of transfer by the Court of Appeal, the preferred method appears to be through Petition for Writ of Habeas Corpus to the California Supreme Court (see §9.9), followed by a federal habeas corpus petition if that relief is advisable in view of all circumstances related to the case. See *Fowler v Sacramento Co. Sheriff's Dept.* (9th Cir 2005) 421 F3d 1027 (involving federal relief from a state misdemeanor conviction).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/ III. FORMS/§3.46 A. Form: Sample Letter Notifying Superior Court Clerk of Omissions From Appellate Record

III. FORMS

§3.46 A. Form: Sample Letter Notifying Superior Court Clerk of Omissions From Appellate Record

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_ _[*Date*]_ _

_ _ _ _ _ _ _ _ Superior Court
_ _[*Address*]_ _

Attention: Appeals Deputy

Re: People v. _ _[*name*]_ _

Super. Ct. No. _ _[*number*]_ _, Court of Appeal No. _ _[*number*]_

Request for additional record under California Rules of Court 8.155(b) and 8.340(b)

Dear Appeals Deputy:

I am writing to notify you that a portion of the normal record on appeal in the above-captioned case is missing and to request you to prepare, certify, and transmit the following materials to the Court of Appeal, _ _ _ Appellate District, Division _ _[*number*]_ _, under California Rules of Court 8.155(b) and 8.340(b).

The clerk's transcript should be completed to include:

(1) The transcript of a tape that was played to the jury on _ _[*date*]_ _, in Department No. _ _[*number*]_ _, _ _[*name*]_ _ County Superior Court. The transcript in question was marked as People's Exhibit No. _ _[*number*]_ _.

(2) The clerk's minutes of trial proceedings in Department _ _[*number*]_ _, _ _[*name*]_ _ County Superior Court, the Honorable _ _[*name*]_ _, presiding, from _ _[*date*]_ _ to _ _[*date*]_ _ inclusive.

(3) All written jury instructions _ _[*given, refused, or withdrawn*]_ _.

The reporter's transcript should be completed to include:

Verbatim transcript of oral proceedings that began at 9:30 a.m., _ _[*date*]_ _, and ended at 12 p.m. on that same date, in Department _ _[*number*]_ _ of the _ _[*name*]_ _ County Superior Court, the Honorable _ _[*name*]_ _, presiding. The court reporter was _ _[*name*]_ _, CSR No. _ _[*number*]_ _.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you need additional information.

Very truly yours,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: This sample letter can be modified to notify the superior court clerk of omissions from the record on appeal to the appellate division of the superior court (in misdemeanor and infraction proceedings) under Cal Rules of Ct

8.841, 8.873(c), and 8.923(c).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.47 B. Form: Motion to Augment Record on Appeal

§3.47 B. Form: Motion to Augment Record on Appeal

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_ _[*Name of attorney*; *State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for _ _[*e.g., defendant*]_ _, _ _[*name*]_ _

[*Title of court*]

People of the State of California,	**No.** _ _ _ _ _ _
Plaintiff and Respondent,	_ _[*Name*]_ _ **County Superior Court No.** _ _ _ _ _ _
vs	**MOTION TO AUGMENT RECORD ON APPEAL**
_ _[*Name*]_ _, **Defendant and Appellant**	

TO THE HONORABLE JUSTICES OF THIS COURT:

Appellant _ _[*name*]_ _ **respectfully requests that the record on appeal be augmented as follows:**

A. Clerk's transcript consisting of [*list requested documents, e.g.*:

(1) The jury questionnaires filled out by prospective jurors. All completed questionnaires were filed on _ _[*date*]_ _;

(2) A copy of defendant _ _[*name*]_ _*'s arrest record, admitted as People's Exhibit* _ _.]

B. Reporter's transcript consisting of [*list requested transcripts, e.g.*:

(1) The jury voir dire, which began during the afternoon session on _ _[*date*]_ _*, and continued through the morning session on* _ _[*date*]_ _*. The court reporter was* _ _[*name*]_ _*, CSR* _ _[*number*]_ _**.**

(2) The prosecutor's opening statement, which was made during the morning session on _ _[*date*]_ _*. The court reporter was* _ _[*name*]_ _*, CSR* _ _[*number*]_ _.]

These matters are material to the appeal for the following reasons [*list reasons, e.g.*:

(1) The record indicates that all defense counsel objected to the prosecutor's peremptory challenges of prospective _ _[*e.g., African-American, female*]_ _ *jurors under People v Wheeler* (1978) 22 C3d 258, 283, 148 CR 890 and *Batson v Kentucky* (1986) 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69. *The trial court denied the* Wheeler/Batson *motion without finding a prima facie case of discriminatory challenges. The completed jury questionnaires and the transcript of the voir dire are necessary to determine whether the denial of defendants' motion was an abuse of discretion.*

(2) People's Exhibit _ _ *is sought because appellant expects to contend on appeal that* _ _[*he/she*]_ _ *was prejudiced by the introduction of* _ _[*his/her*]_ _ *arrest record.*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: This motion can be modified to request the augmentation of the record on appeal in the appellate division of the superior court (in misdemeanor and infraction proceedings) under Cal Rules of Ct 8.841, 8.873(c), and 8.923(c).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.48 C. Form: Application for Permission to Prepare Settled Statement

§3.48 C. Form: Application for Permission to Prepare Settled Statement

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for _ _[*e.g., defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

People of the State of California,	)	**No. _ _ _ _ _ _**
Plaintiff	)	**Court of Appeal No.**
	)	**_ _ _ _ _ _**
vs	)	
	)	**APPLICATION FOR**
_ _[*Name(s)*]_ _,	)	**PERMISSION TO PREPARE**
Defendant(s)	)	**SETTLED STATEMENT**
	)	
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Trial judge:** _ _[*name*]_ _

To the Honorable _ _[*name*]_ _, Judge of the Superior Court:

Defendant and appellant, _ _[*name*]_ _, through his appellate attorney, _ _[*name*]_ _, applies to this court for permission to prepare a settled statement in the above-captioned case. The reasons for this request are as follows:

(1) The reporter's transcript of the _ _[*e.g., second day of trial*]_ _, which took place on _ _[*date*]_ _, was omitted from the record on appeal.

[*Add one of the following alternatives*]

[*Alternative 1*]

(2) The certification of the clerk of this court, showing that the reporter's transcript for that date cannot be obtained, is attached to this application as Exhibit A.

[*Alternative 2*]

(2) The court reporter for that date, _ _[*name*]_ _, CSR _ _ _ _, has informed me that due to a _ _[*e.g., computer problem*]_ _, _ _[*his/her*]_ _ notes for that day cannot be transcribed. A declaration by the court reporter, describing the circumstances, and showing that a reporter's transcript for that day cannot be obtained, is attached to this application as Exhibit A.

[*Continue*]

(3) The unavailable transcript is necessary to defendant's appeal because _ _[*e.g., it contained the testimony of the only eye-witness to the offense of which defendant was convicted*]_ _.

[*If appropriate, add one of the following alternatives*]

[*Alternative 1*]

Defendant's proposed statement is attached to this motion as Exhibit B.

[*Alternative 2*]

I have not been able to prepare a proposed statement on behalf of defendant because I did not represent defendant at trial, and defendant's trial counsel has been unable to assist me in preparing a proposed statement because _ _[*he/she*]_ _ _ _[*e.g., has been in trial since*]_ _ _ _[*date*]_ _.

[*If appropriate, add*]

I have spoken with the trial attorneys, _ _[*name*]_ _ and _ _[*name*]_ _. They have informed me that they will be available for a record-settlement hearing at _ _[*time*]_ _, on _ _[*date*]_ _, if the court is available at that time.

[*Continue*]

Therefore, defendant respectfully requests this court to issue its order:

(1) Granting permission to prepare a settled statement;

[*If appropriate, add*]

(2) Directing defendant's trial counsel, _ _[*name*]_ _, to prepare a proposed statement by _ _[*date*]_ _;

[*Continue*]

(3) Directing the attorney for the People, _ _[*name*]_ _, to prepare proposed amendments by _ _[*date*]_ _; and

[*If appropriate, add*]

(4) Setting a record-settlement hearing no later than 10 days after the date on which the proposed amendments are due.

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Application for permission to prepare a settled statement is authorized by Cal Rules of Ct 8.346. See also *People v Gzikowski* (1982) 32 C3d 580, 584 n2 (unreported aspects of trial proceedings may be made part of appellate record through settled statement when party demonstrates they may be useful on appeal). Cal Rules of Ct 8.346 is interpreted differently in different appellate districts. Some appellate districts require the appellant to seek permission from the reviewing court before filing a motion for settled statement in superior court while others permit the appellant to file a motion directly in the superior court. Check with the DCA or appellate project for the local practice. The superior court judge must rule on the application within 5 days; if the application is granted, the appellant must comply with the relevant provisions of Cal Rules of Ct 8.137 and serve and file in the superior court, within 30 days, a condensed narrative of the oral proceedings that appellant believes is necessary to the appeal.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.49 D. Form: Order Granting Application to Prepare Settled Statement [Deleted]

§3.49 D. Form: Order Granting Application to Prepare Settled Statement [Deleted]

The Order Granting Application to Prepare Settled Statement has been deleted.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.50 E. Form: Sample Proposed Statement on Appeal

§3.50 E. Form: Sample Proposed Statement on Appeal

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

[*Title of court*]

People of the State of California,	)	**No. _ _ _ _ _ _**
Plaintiff	)	**PROPOSED STATEMENT ON APPEAL**
vs	)	
_ _[*Name*]_ _,	)	
Defendant	)	
_____	)	

PROCEDURAL FACTS

Defendant was arraigned in Department _ _[*number*]_ _ **of the** _ _[*name of county*]_ _ **Superior Court, Honorable** _ _[*name*]_ _**, Judge presiding, on a felony complaint alleging a violation of** _ _[*e.g., Health and Safety Code §11351*]_ _**. The offense was alleged to have taken place on** _ _[*date*]_ _**, in the** _ _[*e.g., City of Los Angeles*]_ _**. Counsel** _ _[*name*]_ _ _ _[*appeared/was appointed*]_ _**, and defendant pleaded not guilty and requested a jury trial.**

STATEMENT OF FACTS

[*Include all facts relevant to the appeal.*]

GROUNDS FOR APPEAL

Dated the _____ day of _____, 20_.

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: The applicant must prepare, serve, and file in superior court an original plus three copies of the settled statement. Cal Rules of Ct 8.346(c). The settled statement must be accompanied with all copies of items required by Cal Rules of Ct 8.122(b)(1), showing the dates required by Rule 8.122(b)(2). Cal Rules of Ct 8.436.

Comment: The procedural summary and statement of facts should be limited to facts pertinent to the issue to be raised on appeal.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.51 F. Form: Application for Extension of Time

§3.51 F. Form: Application for Extension of Time

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I, _ _[*name of attorney*]_ _, declare:

1. I am the attorney for the _ _[*appellant/respondent*]_ _.

2. _ _[*Appellant's opening brief/Respondent's brief*]_ _ is due on _ _[*date*]_ _.

3. I have reviewed the record in this case but I have not filed _ _[*appellant's opening brief/respondent's brief*]_ _ and do not anticipate that I will be able to file the brief within 30 days of its due date.

4. _ _[*No, one, two*]_ _ previous extension(s) of time _ _[*has/have*]_ _ been granted.

5. The record on appeal consists of _ _[*number*]_ _ volumes of clerk's transcript, totaling _ _[*number*]_ _ pages, _ _[*number*]_ _ volumes of reporter's transcript, totaling _ _[*number*]_ _ pages, and _ _[*number*]_ _ of relevant trial exhibits, consisting of _ _[*e.g., the videotape of defendant's interrogation by police*]_ _.

6. Defendant was convicted of _ _[*list offenses*]_ _ and sentenced to _ _[*number*]_ _ years in state prison.

7. Defendant _ _[*is/is not*]_ _ on bail pending appeal.

8. This _ _[*is/is not*]_ _ a priority case.

I need an extension of time to file _ _[*appellant's opening brief/respondent's brief*]_ _ because of:

[*Add one or more of the following options*]

[*Option 1*]

The length of the record _ _[*and/or*]_ _ the number _ _[*and/or*]_ _ complexity of the issues. _ _[*Add description of issues. Include enough detail to convince the court that they are numerous and/or complex.*]_ _

[*Option 2*]

Other time-limited commitments. _ _[*List other cases, including due dates of other briefs, petitions, etc.*]_ _

[*Option 3*]

Personal reasons. _ _[*List reasons, e.g., illness, personal emergency, planned vacation that cannot reasonably be rearranged and was not, when scheduled, expected to conflict with due date of brief.*]_ _

[*Option 4*]

Other reasons. _ _[*List reasons, e.g., augmentation not complete, record-settlement in progress, need to consult with client. Describe steps you have taken to obtain record or consult with client, etc.*]_ _

[*Continue*]

Therefore, I request an extension of time to and including _ _[*date*]_ _, within which to file said brief.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at _ _[*place*]_ _, California on _ _[*date*]_ _.

__[*Signature*]__

_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _
California State Bar No. _ _ _ _ _

[*Add one of the following alternatives*]

[*Alternative 1*]

It is so ordered.

_____
PRESIDING JUSTICE

[*Alternative 2*]

Extension of time is

Granted until _____.

Denied _____.

_____
PRESIDING JUSTICE

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.52 G. Form: Notice Regarding Record of Oral Proceedings (Misdemeanor) (CR-134)

§3.52 G. Form: Notice Regarding Record of Oral Proceedings (Misdemeanor) (CR-134)

CR-134 Notice Regarding Record of Oral Proceedings (Misdemeanor)

Clerk stamps date here when form is filed.

Instructions

- This form is only for giving the court notice about the record of the oral proceedings in an appeal of a **misdemeanor** case.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131 INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- This form can be filed with your notice of appeal. If it is not filed with your notice of appeal, this form must be filed within either:
  (1) 20 days after you file your notice of appeal, or, if it is later
  (2) 10 days after the court decides whether to grant your request for a court-appointed lawyer (if you file a request within 20 days after you file your notice of appeal).

  If you do not file this form on time, the court will not be able to consider what was said in the trial court in deciding whether a legal error was made in the trial court proceedings.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where you filed your notice of appeal. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v. _____

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form)*:

The lawyer filling out this form *(check (1) or (2))*:

(1) ☐ was the appellant's lawyer in the trial court.

(2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

Information About Your Appeal

(2) On *(fill in the date):*_____ I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

Your Choices (Election) about the Record of the Oral Proceedings

You do not have to provide the appellate division with a record of what was said in the trial court (this is called a record of the "oral proceedings"). But if you do not, the appellate division will not be able to consider what was said during those proceedings in deciding whether a legal error was made in the trial court proceedings.

(3) I elect (choose)/My client elects to proceed *(check a or b):*

a. ☐ WITHOUT a record of the oral proceedings in the trial court *(skip item (4); sign and date this form).* I understand that if I proceed without a record of the oral proceedings, the appellate division will not be able to consider what was said during those proceedings in deciding whether a legal error was made.

*(Write initials here):*_____

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item (4) below).* I understand that if I elect (choose) to proceed WITH a record of the oral proceeding in the trial court, I have to choose the record I want to use and take the actions described below to make sure this record is provided to the appellate division. I understand that if I do not take the actions described below and the appellate division does not receive this record, I am not likely to succeed in my appeal.

*(Write initials here):*_____

(4) I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one**—a, b, c, or d):*

a. ☐ **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. (Check and complete (1) or (2)):*

(1) ☐ I will pay the trial court clerk's office for this transcript myself when I receive the court reporter's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this transcript be prepared at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer at my trial.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer at my trial, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms. *The court will review this form to decide if you are eligible for a free reporter's transcript.)*

OR

Print

Trial Court Case Name:_____ | Trial Court Case Number:

4 *(continued)*

b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. (Check and complete (1) or (2)):*

(1) ☐ I will pay the trial court clerk's office for this transcript myself. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this transcript be provided at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer at trial.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer at my trial, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms. *The court will review this form to decide whether you are eligible for a free transcript.)*

OR

c. ☐ **Copy of Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court, the court has a local rule for the appellate division permitting the use of the official electronic recording itself as the record of the proceedings, and you and the respondent (the prosecuting agency) have agreed (stipulated) that you want to use the official electronic recording itself as the record of what was said in your case. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. You must attach a copy of the agreement (stipulation) between you and the respondent to this notice. (Check and complete (1) or (2)).*

(1) ☐ I will pay the trial court clerk's office for this official electronic recording myself. I understand that if I do not pay for this recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this official electronic recording be provided at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer at my trial.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer at my trial, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms. *The court will review this form to decide whether you are eligible for a free copy of the official electronic recording.)*

OR

Print

Trial Court Case Name:_____

Trial Court Case Number:

4 *(continued)*

d. ☐ **Statement on Appeal.** *A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form CR-131-INFO for information about preparing a proposed statement. (Check and complete (1) or (2)):*

(1) ☐ I have attached my proposed statement on appeal. (*If you are not represented by a lawyer in this appeal, you must use* Proposed Statement on Appeal (Misdemeanor) *(form CR-135) to prepare and file this proposed statement. You can get form CR-135 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms.)

(2) ☐ I have NOT attached my proposed statement on appeal. I understand that I must file this proposed statement in the trial court within 20 days of the date I file this notice and that if I do not file the proposed statement on time, the court may dismiss my appeal.

Date:_____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.53 H. Form: Proposed Statement on Appeal (Misdemeanor) (CR-135)

§3.53 H. Form: Proposed Statement on Appeal (Misdemeanor) (CR-135)

CR-135 Proposed Statement on Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

Instructions

- This form is only for preparing a proposed statement on appeal in a **misdemeanor case.**
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- This form can be attached to your *Notice Regarding Record of Oral Proceedings (Misdemeanor)* (form CR-134). If it is not attached to that notice, this form must be filed **no later than 20 days after you file that notice. If you have chosen to prepare a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v.

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form):*

The lawyer filling out this form *(check (1) or (2)):*

(1) ☐ was the appellant's lawyer in the trial court. (2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____

Trial Court Case Number:

Information About Your Appeal

(2) On *(fill in the date):* _____, I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

(3) On *(fill in the date):* _____, I/my client filed a *Notice Regarding Record of Oral Proceedings*, choosing to use a statement on appeal as the record of what was said in this case.

Proposed Statement

(4) The Charges Against Me/My Client

a. The charges against me/my client were *(list all of the charges indicated on the complaint or citation filed with the court by the prosecutor):* _____

_____

_____

_____

_____

b. I/My client *(check (1), (2), or (3)):*

(1) ☐ pleaded not guilty to all the charges.

(2) ☐ pleaded guilty to only the following charges: _____

_____

(3) ☐ pleaded guilty to all of these charges.

(5) Summary of Any Motions

a. Were any motions (requests for the trial court to issue an order) filed in this case?

☐ Yes *(fill out b)* ☐ No *(skip to* (6) *)*.

b. *In the spaces below, please describe any motions (requests for orders) that were made in the trial court. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions.*

(1) *Describe the first motion:* _____

_____

_____

The motion was filed by the ☐ prosecutor. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing:

_____

_____

_____

_____

_____

Print

Trial Court Case Name: _____ | Trial Court Case Number:

5 b. (continued)

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

_____

_____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing it. At the top of each page, write "CR-135, item 5b(1)."*

(2) *Describe the second motion:* _____

_____

_____

The motion was filed by the ☐ prosecutor. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

_____

_____

_____

_____

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

_____

_____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing it. At the top of each page, write "CR-135, item 5b(2)."*

☐ *Check here if any other motions were filed, and attach a separate page or pages describing each motion, identifying who made the motion and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write "CR-135, item 5b(3)."*

Print

Trial Court Case Name:_____ | Trial Court Case Number:

6 Summary of Testimony

a. Was there a trial in your case?

No ☐ *(skip items b, c, and d and go to item 7)*

Yes ☐ *(check (1) or (2) and complete items b, c, and d)*

(1) ☐ Jury trial

(2) ☐ Trial by judge only

b. Did you/your client testify at the trial?

☐ No

☐ Yes *(write a complete and accurate summary of the testimony you/your client gave. Include only what you actually said; do not comment on or give your opinion about what you said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize your/your client's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, item 6b."*

c. Did an officer from the police department, sheriff's office, or other government agency that charged you/your client testify at the trial? *(check one):*

☐ No

☐ Yes *(complete (1) and (2)):*

(1) The name of the officer who testified is *(fill in the officer's name):*_____

(2) This officer testified that *(write a complete and accurate summary of the officer's testimony. Include only what the officer actually said; do not comment on or give your opinion about what the officer said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize the officer's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, item 6c."*

d. Were there any other witnesses at the trial?

☐ No

☐ Yes *(fill out (1)–(4)):*

(1) The witness's name is *(fill in the witness's name):*_____

(2) This witness ☐ was ☐ was not an officer from the police department, sheriff's office, or other government agency that charged me/my client.

(3) This witness testified on behalf of ☐ me/my client. ☐ the prosecution.

6 d. (continued)

(4) This witness testified that *(write a complete and accurate summary of the witness's testimony. Include only what the witness actually said; do not comment on or give your opinion about what the witness said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize this witness's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, item 6d."*

☐ *Check here if any other witnesses testified at the trial. Attach a separate page or pages identifying each witness, whether the witness testified on your/your client's behalf or the prosecution's behalf, and summarizing what that witness said in his or her testimony. At the top of each page, write "CR-135, item 6e"*

7 The Trial Court's Findings

a. ☐ I/My client was found guilty of the following offenses *(list all of the offenses for which you were/your client was found guilty):* _____

_____

_____

_____

b. ☐ I/My client was found not guilty of the following offenses *(list all of the offenses for which you were/your client was found not guilty):* _____

_____

_____

_____

8 The Sentence

The trial court ordered the following punishment for me/my client in this case *(check all that apply and fill in any required information):*

a. ☐ Jail time *(fill in the amount of time you are/your client is required to spend in jail):* _____

_____

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine):* $_____

c. ☐ Restitution *(fill in the amount of the restitution):* $_____

d. ☐ Probation *(fill in the amount of time you are/your client is required to be on probation):* _____

_____

e. ☐ Other punishment *(describe any other punishment that the trial court imposed in this case):*

_____

_____

_____

Print

Trial Court Case Name:_____

Trial Court Case Number:

9 Reasons for Your Appeal

Remember, in an appeal, the appellate division can only review a case for whether certain kinds of legal errors were made in the trial court proceedings (read form CR–131-INFO to learn about these legal errors):

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing*
- *A "prejudicial error" was made during the trial court proceedings.*

The appellate division:

- *Cannot retry your case or take new evidence*
- *Cannot consider whether witnesses were telling the truth or lying*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision*

(Check all that apply and describe in detail the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision I am/my client is appealing in this case. *(Explain why you think the judgment, order, or other decision was not supported by substantial evidence):*

_____
_____
_____
_____
_____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me/my client. *(Describe each error and how you were/your client was harmed by that error):*

(1) *Describe the error:* _____
_____
_____
_____

Describe how this error harmed you/your client: _____
_____
_____
_____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

9 b. (continued)

(2) *Describe the error:* _____

Describe how this error harmed you/your client: _____

(3) *Describe the error:* _____

Describe how this error harmed you/your client: _____

☐ *Check here if you need more space to describe these or other errors, and attach a separate page or pages describing the errors. At the top of each page, write "CR-135, item 9."*

REMINDER: You must serve and file this form no later than 20 days after you file your notice regarding the oral proceedings. If you do not file this form on time, the court may dismiss your appeal.

Date:_____

_____ ▶ _____

Type or print name | *Signature of appellant or attorney*

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Source: Criminal Law/Appeals and Writs in Criminal Cases/3 Procedural Aspects of Appellate Representation/§3.54 I. Form: Order Concerning Appellant's Proposed Statement on Appeal (Misdemeanor) (CR-136)

§3.54 I. Form: Order Concerning Appellant's Proposed Statement on Appeal (Misdemeanor) (CR-136)

CR-136 Order Concerning Appellant's Proposed Statement on Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

(1) The court has received and reviewed the *Proposed Statement on Appeal* (form CR-135) filed by the appellant on *(fill in date):* _____

(2) The court makes the following order:

a. ☐ The court certifies that parts (4) through (8) of the statement as proposed by the appellant are a complete and accurate summary of the trial court proceedings. This statement is ready to be sent to the appellate division.

b. ☐ The following corrections are needed in order for parts (4) through (8) of the statement proposed by the appellant to be a complete and accurate summary of the trial court proceedings.

(1) _____

(2) _____

(3) _____

This modified statement must be sent to the parties.

c. ☐ More corrections than could be listed above were needed in order for parts (4) through (8) of the statement proposed by the appellant to be a complete and accurate summary of the trial court proceedings. A corrected statement is attached to this order. This modified statement must be sent to the parties.

d. ☐ The trial court proceedings in this case were reported by a court reporter or officially recorded electronically under Government Code section 69957. Instead of correcting this statement, the court orders under rule 8.869(d)(6)(B) that a transcript be prepared as the record of these proceedings. *(Check the court's local rules to make sure the court has not adopted a rule providing that this option is not available.)*

e. ☐ This superior court has a local rule for the appellate division authorizing the use of an official electronic recording as the record of the oral proceedings. The trial court proceedings in this case were officially electronically recorded. Instead of correcting this statement, the court orders that a copy of that electronic recording be prepared as the record of these proceedings at the court's expense.

Clerk fills in the name and street address of the court:

Superior Court of California, County of

Clerk fills in the number and name of the case:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v. _____

Clerk fills in the number below:

Appellate Division Case Number:

Date: _____

_____
Signature of trial court judicial officer

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4

Handling a Criminal Appeal

George Schraer

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§4.1 I. STEPS TO TAKE BEFORE OBTAINING RECORD

An appellate defense attorney new to the case can do little or no substantive work before obtaining the record. It is, however, important to get in touch with your client promptly after taking the case or being appointed. Many attorneys enclose a document, such as the one reproduced in §4.45, that explains the criminal appellate process, in the first letter to the client, especially when the client, as is usually the case in felony appeals, is in prison. A number of attorneys have been surprised to learn from clients who received a version of the information sheet reproduced in §4.45, that it was the first time anyone had made the effort to explain any part of the process to them. The information sheet should not, however, substitute for a letter from the attorney.

Many attorneys believe that good communication between attorney and client is the single most important factor in client satisfaction with the attorney's performance. See also Cal Rules of Prof Cond 3-500.

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II. ASCERTAINING THE FACTUAL AND LEGAL BASIS FOR APPEAL

§4.2 A. Reviewing the Record

Reviewing the record on appeal is perhaps the single most important task of an appellate attorney. Only by thoroughly combing the record for error can appellant's attorney determine what issues to raise in the reviewing court. This is true even if counsel is familiar with the facts beforehand. Although appellate counsel should pay attention to trial counsel's assessment of the case, if available, the ultimate responsibility for determining what issues can and should be argued in the appellate court is appellate counsel's.

There are a number of ways to go about reviewing the record. Many appellate attorneys like to block out an extended period of time to review a new record, but in a long-record case, this may not be possible. Although many attorneys start at the first page of the clerk's transcript and continue straight through until they come to the last page of the reporter's transcript, others say that reading the closing arguments of counsel, or if available, the opening statements, first gives them an overview of the case that helps them identify important aspects of the trial when they come upon them in the transcript. Some appellate attorneys take copious notes on every aspect of the record, including the facts (the California Appellate Project, which provides assistance to private attorneys handling death penalty cases, expects the attorney reviewing the record to submit transcript notes that include an entry for each page of the record). Others write up a summary of the testimony of each witness as they read it.

It is very important to make a detailed list of potential issues that includes page references to parts of the transcript that may be relevant to discussion of those issues. Keeping transcript notes on the computer makes it easy to find important record references later if counsel flags each item pertaining to a particular issue and remembers to use a consistent system throughout the notes (*e.g.*, "LIO ARG" for an issue involving failure to instruct on lesser included offenses). Whatever system counsel adopts, counsel should keep in mind that the ultimate goal of reviewing the record is to find potential issues on appeal, and the purpose of transcript notes is to help counsel locate factual and procedural matters underlying each potential argument when it comes time to write the opening brief.

NOTE: Even though most court reporters take their notes on a computer and transcribe them with the aid of transcription software, the reporter's transcript sent to appellate counsel will be a print version. Some appellate attorneys like to create a searchable record using high-speed scanning equipment to scan the record into the computer.

Even if counsel does not have time to review the record completely when it arrives, it is important to look it over within the first 30 days to check for obvious omissions. This can usually be done fairly quickly by skimming the clerk's transcript for significant hearings and rulings, making sure that pleadings for all important motions are included, and checking the table of contents and the reporter's certification in the reporter's transcript to make sure that the oral proceedings reflecting the hearings and rulings mentioned in the clerk's transcript are included. See Cal Rules of Ct 8.320 (normal record on appeal). See also §§3.6-3.20 on completing, augmenting, and settling the record.

NOTE: One item that is often omitted from the record is the transcript of a taped statement—typically, the defendant's interview with police—that was played for the jury but not transcribed. The party offering the statement is required to provide a transcript (Cal Rules of Ct 2.1040) and the transcript is supposed to be part of the normal record (Cal Rules of Ct 8.320(b)(11)). Procedures for obtaining such tapes are discussed in §3.9.

In reviewing the record, counsel should also be alert for things that did not happen at trial that counsel believes should have happened. For example, in a case in which a defendant, found with a small amount of an illicit substance, was convicted of possession with intent to distribute, appellate counsel might wonder why trial counsel did not put on evidence showing that the drugs were for the defendant's personal use; or in a homicide case, in which the probation report indicates that defendant suffers from a mental disorder, appellate counsel might question trial counsel's failure to raise a mental defense. Appellate counsel should note such omissions and discuss them with trial counsel. If trial counsel has no satisfactory explanation, further investigation may be in order, and if appropriate, a petition for a writ of habeas corpus filed in conjunction with appellant's opening brief. See §§9.35-9.38, 10.28.

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§4.3 B. Reviewing the Trial Court File

It is a good idea to take the time to go to the trial court and review the trial court's file, if possible. Doing so gives counsel a chance to look at the exhibits, which can be very enlightening. Occasionally, counsel will find materials in the trial court file that were inadvertently omitted from the record. If counsel is appointed and if he or she is handling an out-of-district case, the appellate project that recommended the appointment may be able to send a paralegal to look at the trial court file.

Counsel should call the clerk's office before going to the trial court to look at the file, especially if he or she wants to look at the exhibits.

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§4.4 C. Discussing Case With Trial Counsel

It is essential for appellate counsel to discuss the case with trial counsel at least once during the course of the appeal. The best time for an in-depth discussion is shortly after appellate counsel has finished reviewing the record while the facts and potential issues are fresh in counsel's mind. Although appellate counsel should raise any questions he or she has about trial counsel's performance, this should not be the main focus of the conversation. It is usually better to begin the conversation with any questions you have about the trial that do not involve trial counsel's performance. If trial counsel has talked with the jurors after the case, find out what they said. Although you will not be able to use information about the jury's thought processes directly (see Evid C §1150 (evidence of jurors' mental processes may not be used to impeach verdict)), knowing what aspects of the evidence or instructions were important to the jury in reaching its verdict may suggest issues or help you formulate your prejudice argument by showing you how an error might have affected the verdict. If you can get trial counsel to discuss his or her trial strategy and overall impressions of the case, it may be easier to introduce potentially touchy questions about trial counsel's performance.

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§4.5 D. Finding Arguable Issues

There is nothing arcane about finding issues to argue on appeal. It does, however, require a fairly extensive knowledge of criminal procedure, substantive criminal law, and, perhaps even more important, a clear understanding of the limits of that knowledge. Following the "Sitwell Rule"—if it doesn't sit well, check it out—yields surprising results even for experienced appellate practitioners.

EXAMPLE: In a lengthy murder trial with several defendants, the prosecutor offered one defendant a generous plea bargain and then reneged on the offer after leading the trial judge and defendant to believe that he would keep it open until the next court recess. The trial judge ordered the prosecutor to perform, but withdrew the order because he was persuaded by the prosecutor that to do so would impinge on prosecutorial discretion. This did not sit well with appellate counsel, and so she reexamined the pertinent case law, although she thought she knew that the trial court did *not* have the authority to order the prosecutor to perform. She was surprised to discover that these cases simply held that the defendant was not entitled to specific performance if the trial court refused to order it, and that there was United States Supreme Court authority for the proposition that the trial court *could* order specific performance under arguably similar circumstances.

Appellate counsel's primary focus should be on the principal legal points at issue during trial, and especially on the trial court's adverse rulings on those issues. These are the grounds a reviewing court is most likely to find prejudicial enough to warrant reversal. It is important, however, to remember that potentially reversible error can occur at any point in the trial—from defendant's first contact with police through the sentencing hearing.

The questions posed in the following sections may help counsel navigate an appellate record for legal error. Remember, though, that the list is only a guide and highlights only a small number of potential issues. It is impossible for any list to exhaust the vast universe of potential errors.

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§4.6 1. Regularity of Proceedings

Procedural irregularities in the conduct of criminal trials that are significant enough to warrant reversal of a conviction are relatively rare, but they do occur. Counsel should thoroughly review the pleadings, examine any waivers of rights given by the defendant, compare the dates of the offense with the dates of significant procedural events, compare the written instructions with the reporter's transcript of instructions read to the jury, compare the jury verdicts with the clerk's minutes, look at minutes of the sentencing hearing, examine the abstract of judgment, and do his or her own sentencing calculations, including calculating credits for time served. Some questions to keep in mind include:

- Was the prosecution of any offense barred by the statute of limitations?
- Was probable cause shown when required by statute or due process?
- Was each step timely taken by the prosecution?
- Were all necessary papers served and filed correctly by the prosecution?
- Did the court have subject-matter jurisdiction? Jurisdiction of the person?
- Did the court have venue?
- Were there grounds for a change of venue? Did trial counsel move for a change of venue?
- Did the defendant enter a plea of once in jeopardy? If not, was the defendant entitled to such a plea?
- Was the trial "speedy" within the meaning of Pen C §1382? Within the meaning of US Const amend VI, and Cal Const art I, §15?
- Was the defendant tried in jail clothes? In restraints? If so, might the jury have been aware of the restraints?
- Was the defendant excluded from the courtroom for any portion of the proceedings?
- Was the courtroom closed to the public or to the defendant's family during any part of the proceedings?
- Is there any indication that the trial judge gave information to the jury without first discussing this with defense counsel or without counsel or the defendant being present?

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§4.7 2. Interrogation, Confessions, and Admissions

If the defendant made any statements to the police or the prosecution that were used at trial, appellate counsel must determine whether there was any violation of the Fifth Amendment privilege against self-incrimination and, if so, whether the use of the statements affected the outcome of the trial. Note that although the Sixth Amendment right to counsel does not attach until an accusatory pleading has been filed, the holding of the United States Supreme Court in *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, implies a Fifth Amendment right to counsel during in-custody interrogations. *U.S. v Gouveia* (1984) 467 US 180, 188 n5, 81 L Ed 2d 146, 154 n5, 104 S Ct 2292. Questions to keep in mind include:

- Were the statements made in a custodial setting (i.e., would a reasonable person in defendant's circumstances have believed that he or she was not free to leave) after suspicion had focused on the defendant? If so:
- Were the statements the product of interrogation?
- Did the police read defendant his or her Miranda rights (right to remain silent, right to counsel, right to appointment of counsel if indigent)? See *Dickerson v U.S.* (2000) 530 US 428, 147 L Ed 2d 405, 120 S Ct 2326, reaffirming *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602.
- Did defendant waive the right to remain silent?
- Did defendant waive the right to counsel?
- Were the waivers intelligent?
- Did defendant express or imply a desire to stop the interrogation or to consult with counsel at any point? If implied, was the request clear and unequivocal?
- Did the police reinterrogate the defendant after a request to consult with counsel without affording the opportunity to consult with counsel?
- If the defendant invoked the right to silence or the right to counsel, did the police continue to ask the defendant questions about his or her meaning or wishes?
- Were defendant's statements voluntary (whether or not made in a custodial setting) under the totality of the circumstances?
- How long did the questioning last? Were there any breaks?
- What was the defendant's physical condition during interrogation? Was he or she injured, ill, drunk, under the influence of drugs or medications, overtired? Hungry or thirsty? Mentally ill?
- Was the statement the product of physical or psychological coercion?
- Was the statement the product of express or implied threats or promises of leniency?
- Was the admissibility of the statement fully litigated at trial?
- What instructions were requested or given to guide the jury's consideration of the statement?
- What was the effect of the admission of the statement on the outcome of the trial? See *Arizona v Fulminante* (1991) 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246 (admission of involuntary confession is evaluated under harmless-beyond-reasonable-doubt standard); *People v Cahill* (1993) 5 C4th 478, 20 CR2d 582 (adopting federal rule in California).

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§4.8 3. Search and Seizure

Evidence seized in violation of the Fourth Amendment to the United States Constitution may be inadmissible at trial if exclusion of the evidence will serve the purpose of the exclusionary rule—deterrence of police misconduct. See, *e.g., Arizona v Evans* (1995) 514 US 1, 10, 131 L Ed 2d 34, 115 S Ct 1185 (citing pertinent United States Supreme Court cases). See also *In re Lance W.* (1985) 37 C3d 873, 210 CR 631 (Proposition 8 abolished independent state grounds for exclusion). Pertinent questions on the admissibility of evidence obtained as a result of a detention, arrest, or search include:

- Was a warrant issued? If so:
- Did the affidavit in support of the warrant accurately state the facts supporting its issuance? See *Franks v Delaware* (1978) 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674; *Theodor v Superior Court* (1972) 8 C3d 77, 104 CR 226.
- Was the warrant supported by probable cause?
- Was the execution of the warrant timely?
- Was the search within the scope of the warrant?
- Did the warrant specify the person or place to be searched?
- Was the place searched the one specified in the warrant?
- Did the officers seize items not listed in the warrant?
- Was reliance on an invalid warrant in good faith?
- If the police did not have a warrant:
- Did the search or seizure come under one of the exceptions to the warrant requirement? See, *e.g., Warden v Hayden* (1967) 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642 (hot pursuit); *Terry v Ohio* (1968) 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (temporary detention and pat-down search); *Coolidge v New Hampshire* (1971) 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (evidence of crime in plain view); *Schneckloth v Bustamonte* (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (consent); *People v Woods* (1999) 21 C4th 668, 88 CR2d 88 (probation search).
- Was there probable cause for the warrantless search or seizure? But see, *e.g., Terry v Ohio, supra* (reasonable suspicion supports stop and frisk); *Schneckloth v Bustamonte, supra* (consent); *Skinner v Railway Labor Executives' Ass'n* (1989) 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402 (individualized suspicion not required for drug tests of key railway employees).
- Did the defendant have a reasonable expectation of privacy in the place searched or object seized? See, *e.g., O'Connor v Ortega* (1987) 480 US 709, 94 L Ed 2d 714, 107 S Ct 1492 (discussing employee's expectation of privacy in contents of office desk and files).
- Did the search exceed its proper scope?
- Was the search the fruit of the poisonous tree, *i.e.*, a product of an invalid admission, a confession, or other illegal official action? See *Wong Sun v United States* (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.
- Did trial counsel file a motion to suppress evidence in the trial court under Pen C §1538.5? If so, did trial counsel present all relevant facts and arguments?

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§4.9 4. Identification Procedures

There is almost universal agreement that, in the words of Justice Felix Frankfurter, "[t]he identification of strangers is proverbially untrustworthy" (quoted in *U.S. v Wade* (1967) 388 US 218, 228, 18 L Ed 2d 1149, 87 S Ct 1926). Although reviewing courts seldom find due process violations in the admission of eyewitness identification testimony, appellate counsel should review the record carefully in any case in which an eyewitness identification of the defendant was an important factor, paying particular heed to any facts casting doubt on the reliability of the identification, instructions (given or requested) on evaluating eyewitness identification testimony, and the effectiveness of trial counsel's efforts to prevent its admission or mitigate its effect. Some questions to keep in mind include:

- Were the identification procedures suggestive, *i.e.,* did they focus the witnesses' attention on the defendant? If so, were they unduly suggestive under the circumstances? If so, was there a substantial likelihood of irreparable misidentification in the totality of the circumstances? *Manson v Brathwaite* (1977) 432 US 98, 104, 53 L Ed 2d 140, 97 S Ct 2243. See also *People v Cunningham* (2001) 25 C4th 926, 989, 108 CR2d 291.
- Was the defendant exhibited in a lineup without an attorney present and without a valid waiver of counsel after the right to counsel had attached? See *U.S. v Gouveia* (1984) 467 US 180, 187, 81 L Ed 2d 146, 104 S Ct 2292.
- If an in-court identification was based on an unduly suggestive out-of-court identification, did it have indications of independent reliability?
- What instructions did the trial court give on eyewitness identification? See CALCRIM 315. Did the trial court refuse any requested instructions?
- Did trial counsel make a motion to suppress the identification evidence on due process grounds?
- Did trial counsel introduce or attempt to introduce evidence on the reliability of eyewitness identification? See *People v McDonald* (1984) 37 C3d 351, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431.

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§4.10 5. Right to Counsel

The Sixth Amendment right to counsel has been considered a fundamental element of the Fourteenth Amendment due process guaranty at least since the landmark decision of the United States Supreme Court in *Powell v Alabama* (1932) 287 US 45, 77 L Ed 158, 53 S Ct 55. Questions relevant to this right include:

- Was counsel present at every critical stage of the proceedings after the right to counsel had attached? See *U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926; *U.S. v Gouveia* (1984) 467 US 180, 187, 81 L Ed 2d 146, 104 S Ct 2292.
- If the defendant waived his or her right to counsel at any critical point in the proceedings, was the waiver intelligent? See *Johnson v Zerbst* (1938) 304 US 458, 82 L Ed 1461, 58 S Ct 1019.
- Did counsel have any conflict of interest based on, *e.g.,* prior representation of someone other than the defendant or on a financial interest that was in conflict with the interest of the client? See *People v Doolin* (2009) 45 C4th 390, 87 CR3d 209 (lump sum fee agreement combining counsel's compensation with expenses for investigative and expert services did not create a conflict).
- Did the police or other government agent interfere with the right to counsel? For example, was a jailhouse informant instructed by police or jail officials to discuss the offense with the defendant after the right to counsel had attached? *U.S. v Henry* (1980) 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183. Or did the police improperly overhear confidential communications between the defendant and his attorney? *Barber v Municipal Court* (1979) 24 C3d 742, 157 CR 658.
- Did trial counsel provide effective assistance? For example, did he or she investigate defenses, consult with the defendant, prepare adequately for trial? See *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052; *People v Pope* (1979) 23 C3d 412, 152 CR 732.
- If counsel was appointed, did the defendant express dissatisfaction with his or her performance? Did the trial court provide the defendant with an adequate opportunity to explain his or her dissatisfaction? See *People v Marsden* (1970) 2 C3d 118, 84 CR 156; *People v Cole* (2004) 33 C4th 1158, 1190, 17 CR3d 532. See also *People v Solorzano* (2005) 126 CA4th 1063, 24 CR3d 735 (trial court's refusal to hear *Marsden* motion while competency proceedings were pending required reversal).
- Did the trial court improperly deny the defendant's request to discharge retained counsel? *People v Ortiz* (1990) 51 C3d 975, 275 CR 191.
- Did the trial court err in refusing to grant a continuance to permit the defendant to be represented by recently retained counsel? *People v Courts* (1985) 37 C3d 784, 210 CR 193.
- Did the trial court deny defendant permission to represent him or herself? *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525.
- Did the trial court permit a defendant who was incompetent to waive counsel to represent him or herself? See *Godinez v Moran* (1993) 509 US 389, 400, 125 L Ed 2d 321, 113 S Ct 2680. See also *People v Welch* (1999) 20 C4th 701, 729, 85 CR2d 203.
- If the defendant was allowed to represent him or herself, was the defendant adequately advised of the dangers and disadvantages of self-representation?
- Was trial counsel's performance during trial adequate? Was counsel prepared? Did counsel make all necessary objections, motions, etc., to preserve potential appellate issues for appeal?

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§4.11 6. Joinder of Defendants or Counts

The determination of whether joinder of defendants (see Pen C §1098) or counts (see Pen C §954) is appropriate is a matter of trial court discretion. To obtain reversal because of prejudicial joinder in a case that does not involve *Aranda/Bruton* error, the defendant must usually show that joinder was so fundamentally unfair that it resulted in a denial of due process of law. If trial counsel failed to move for severance in a case in which there was a strong argument in favor of severance, appellate counsel may be able to argue—on direct appeal, in a petition for writ of habeas corpus, or both—that the failure to give the judge the opportunity to exercise his or her discretion was ineffective assistance of counsel. Pertinent questions include:

- If the defendant was tried jointly with other defendants:
- Were the defendant and all codefendants jointly charged in at least one count in the information? *People v Ortiz* (1978) 22 C3d 38, 148 CR 588 (conviction reversed). But see *People v Hernandez* (1983) 143 CA3d 936, 192 CR 432 (when all charges stemmed from same transaction, joinder proper even though no codefendant jointly charged with any other).
- Did one or more codefendants have conflicting defenses? Was there a substantial discrepancy between the defendant's involvement in the charged offense and that of a codefendant? Was there a substantial discrepancy in the strength of the evidence linking different defendants to the offenses? Was evidence cross-admissible?
- Were any statements by codefendants implicating defendant in the charged offenses admitted at a joint trial? *People v Aranda* (1965) 63 C2d 518, 47 CR 353; *Bruton v U.S.* (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620.
- If the defendant was charged with multiple counts (see, *e.g., People v Sandoval* (1992) 4 C4th 155, 14 CR2d 342):
- Were all the offenses related in their commission or of the same class, *e.g.,* property offenses, crimes against the person? See Pen C §954.
- Was the evidence cross-admissible?
- Was a weak count tried together with a strong count or were two weak counts tried together?
- Was one of the charges particularly inflammatory?
- Did one or more counts carry the death penalty, or did joinder turn the matter into a capital case?
- Did joinder, even if correct under the law, result in such gross unfairness that defendant was denied due process? See *People v Arias* (1996) 13 C4th 92, 127, 51 CR2d 770.
- Did defense counsel make a motion for severance? If not, did the failure to move for severance deprive the defendant of the effective assistance of counsel?

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.12 7. Issues Involving the Statute Defining the Charged Offense

§4.12 7. Issues Involving the Statute Defining the Charged Offense

It is essential for appellate counsel to become intimately acquainted with the statute defining the charged offense. This is not simply a matter of knowing the elements of the offense and understanding what conduct is prohibited. Appellate counsel must also know or find out if there are any lesser included offenses and what their elements are; know or find out what instructions are required sua sponte and what instructions must be given on request in appropriate cases; and be or become familiar with cases discussing the elements of the offense.

EXAMPLE: The importance of familiarity with the cases interpreting penal statutes can be illustrated with an examination of the crime of robbery. The Penal Code defines robbery ("the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear" (Pen C §211)); defines fear (Pen C §212); and divides the crime into degrees (Pen C §212.5) that determine the punishment (Pen C §213). Case law establishes the following:

- The crime requires proof of the specific intent to commit larceny, which in turn requires proof that the defendant intended to permanently deprive the owner of the property (*People v Butler* (1967) 65 C2d 569, 573, 55 CR 511, overruled on another ground in *People v Tufunga* (1999) 21 C4th 935, 956, 90 CR2d 143; *In re Albert A.* (1996) 47 CA4th 1004, 1007, 55 CR2d 217);
- The specific intent to steal must arise *before* the application of force or fear (*People v Green* (1980) 27 C3d 1, 52, 164 CR 1, overruled on other grounds in *People v Martinez* (1999) 20 C4th 225, 239, 83 CR2d 533), but if "a killer wounds the victim, then decides to steal, and *thereafter* finishes off the victim to accomplish this purpose, the perpetrator has committed robbery, because at the time of the second attack the killer's larcenous intent coincides with acts of force against the victim" (*People v Seaton* (2001) 26 C4th 598, 644, 110 CR2d 441);
- A simple larceny can become a robbery if the perpetrator resorts to the use of force or fear while carrying away the property (*People v Gomez* (2008) 43 C4th 249, 264, 74 CR3d 123; *People v Cooper* (1991) 53 C3d 1158, 1165 n8, 282 CR 450);
- "[A] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it" (*People v Hayes* (1990) 52 C3d 577, 626, 276 CR 874 (robbery conviction reversed for instructional error; question of whether property located in different room, 107 feet away from victim, was in his immediate presence was question for jury));
- Theft is a lesser included offense of robbery (*People v Melton* (1988) 44 C3d 713, 746, 244 CR 867);
- Assault is not a lesser included offense of robbery under the statutory definitions (*People v Wolcott* (1983) 34 C3d 92, 98, 192 CR 748), but whether assault is a lesser included offense if the accusatory pleading charges "force and fear" is undecided (*People v Sakarias* (2000) 22 C4th 596, 622 n4, 94 CR2d 17); and
- For purposes of aider and abettor liability, the duration of a robbery "continues so long as the loot is being carried away to a place of temporary safety" (*People v Cooper* (1991) 53 C3d 1158, 1169, 282 CR 450), but for purposes of the felony murder rule, the duration of the robbery continues until the perpetrators have escaped to a place of temporary safety (*People v Fields* (1983) 35 C3d 329, 365, 197 CR 803).

NOTE: These rules may have bearing on the sufficiency of the evidence, on the admissibility of evidence, and on instructions that should have been given or requested. To provide a client convicted of robbery with effective assistance of counsel, an appellate attorney must be (or become) familiar with them, and must understand how they might apply in a variety of factual situations.

General questions pertinent to potential issues relating to the statute defining the charged offense include:

- Does the statute actually apply to defendant's conduct as shown by the evidence? Statutory history may shed some light on this question, as may cases interpreting the statute. See, *e.g.*, *People v Gauze* (1975) 15 C3d 709, 125 CR 773 (defendant who entered his own apartment with intent to assault roommate could not be convicted of burglary).
- Did the evidence establish every element of the offense beyond a reasonable doubt? Pay particular attention to whether the evidence established the intent element of the offense beyond a reasonable doubt. See *Jackson v Virginia* (1979) 443 US 307, 319, 61 L Ed 2d 560, 99 S Ct 2781 (defining substantial evidence rule under federal

constitution); *People v Johnson* (1980) 26 C3d 557, 575, 162 CR 431 (same).

- Is the statute so vague or so overbroad that it does not adequately differentiate permitted conduct from prohibited conduct?
- Was the statute in effect at the time of the alleged offense? Have subsequent amendments increased the punishment or expanded the range of conduct it prohibits?
- Have amendments subsequent to the alleged offense demonstrated a legislative intent to exclude defendant's conduct or lessen the punishment?
- Does the statute punish conduct protected by the First Amendment (freedom of speech, press, assembly)? If the defendant's conduct arguably is protected by the First Amendment, the sufficiency of the evidence may be subject to independent review rather than deferential review. *In re George T.* (2004) 33 C4th 620, 631, 16 CR3d 61.
- Has the defendant been convicted under a generally applicable statute based on facts that fall under a more specific "special" statute? See *People v Jenkins* (1980) 28 C3d 494, 170 CR 1.
- Did the trial court properly define every element of the offense and instruct the jury that the prosecution had to prove each element beyond a reasonable doubt? See *Cabana v Bullock* (1986) 474 US 376, 384, 88 L Ed 2d 704, 106 S Ct 689, disapproved on other grounds in *Pope v Illinois* (1987) 481 US 497, 503 n7, 95 L Ed 2d 439, 447 n7, 107 S Ct 1918. See also *People v Kobrin* (1995) 11 C4th 416, 45 CR2d 895 (in perjury prosecution, materiality of false statement is element of offense, and hence question for jury).
- Did the trial court's instructions on intent allow or require the jury to presume that if the defendant acted in a certain way, he had the requisite intent? See *Sandstrom v Montana* (1979) 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450; *People v Roder* (1983) 33 C3d 491, 189 CR 501.

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§4.13 8. Issues Involving Defendant's Mental Condition

Impairment of a defendant's mental condition, due to mental disease or disorder, mental retardation, or voluntary or involuntary intoxication, is potentially relevant in a variety of contexts at trial and on appeal. Even if no issues concerning the defendant's mental condition were litigated below, appellate counsel should be on the alert for evidence in the record indicating that the defendant's mental condition was impaired at the time of the offense, during any interrogation or advisement of rights, or during the trial proceedings. Such indications can take many forms. For example, the circumstances of the crime may be bizarre, the defendant may mention to police that he had been drinking, a witness may describe the defendant as crazy or slow, the defendant may make odd or inappropriate comments at court proceedings or file motions that make no sense, or the probation report may discuss the defendant's mental condition. Even if the record does not suggest any impairment in the defendant's mental condition, the defendant may claim impairment.

NOTE: Under California law, evidence of a mental disease, defect, or disorder can be used to negate a number of mental states, including implied malice. Pen C §28(a). However, Pen C §22 provides that evidence of *voluntary intoxication* is admissible in a criminal case "solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored *express* malice aforethought." Stats 1995, ch 793, §1 (italics added). In *People v Martin* (2000) 78 CA4th 1107, 1115, 93 CR2d 433, the Fifth District Court of Appeal, relying on *Montana v Egelhoff* (1996) 518 US 37, 116 S Ct 2013, 135 L Ed 2d 361, upheld the constitutionality of amended Pen C §22, concluding that the legislature may, without depriving a defendant of due process, prohibit the trier of fact from taking voluntary intoxication into consideration in deciding whether the defendant harbored implied malice.

The question of what role a defendant's voluntary intoxication should play in determining his or her liability for criminal acts is the subject of ongoing debate. In *Egelhoff*, for example, four members of the Court (Scalia, Kennedy, and Thomas, JJ, and Rehnquist, CJ) agreed that a state *can*, without denying due process, provide that the jury may not use evidence of defendant's intoxication in determining whether the defendant had the necessary mental state to commit "deliberate homicide" under Montana law; while four justices (O'Connor, Breyer, Souter, and Stevens, JJ) concluded that the state *cannot* constitutionally remove from the jury's consideration a category of evidence that is relevant to the consideration of the defendant's mental state when the defendant's mental state is an element of the offense. Justice Ginsburg, who cast the deciding vote, agreed with the dissenters that due process precludes a state from excluding mental state evidence that is relevant to the mens rea of the crime; however, in her view, what *Montana* had actually done was to redefine the mens rea of deliberate homicide to make evidence of voluntary intoxication irrelevant to its proof. This, she concluded, did not deprive the defendant of due process.

Questions about a defendant's mental condition to keep in mind while reviewing the record include:

- Does the record suggest that the defendant suffered from a major mental disease or disorder at the time of the offense? If so:
- Is there any reason to believe that the defendant was incapable of understanding the nature and quality of his or her act or of realizing that the act was morally wrong? (See Pen C §25(b); *People v Skinner* (1985) 39 C3d 765, 782, 217 CR 685.)
- If so, did he or she enter a plea of not guilty by reason of insanity? See Pen C §1026. If not, why not?
- If defendant had a court trial at the sanity phase, did he or she specifically waive jury trial on the question of sanity?
- Does the record suggest that the defendant suffered from a *mental deficiency* so serious that he or she was incapable of knowing or understanding the nature or quality of his or her acts or of distinguishing right from wrong? See *People v Phillips* (2000) 83 CA4th 170, 173, 99 CR2d 448. See also CALCRIM 3455 (mental incapacity as a defense).
- Does the record suggest that the defendant was so impaired at the time of the offense (from a mental disease or disorder, or involuntary intoxication) that he or she did not actually have a mental state necessary for conviction of a specific intent offense? See Pen C §§28-29.
- Did trial counsel defend on this ground?
- Did defense counsel present this defense effectively, *e.g.*, did he or she introduce or attempt to introduce

expert testimony about defendant's condition and its potential effect on whether the defendant actually formed the required mental state? Request instructions?

- Did the trial court permit defense expert(s) to testify? If so, did the court unduly restrict the scope of their testimony? See, *e.g., People v Coddington* (2000) 23 C4th 529, 583, 97 CR2d 528, disapproved on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409 and superseded by statute on other grounds as stated in *Verdin v Superior Court* (2008) 43 C4th 1096, 77 CR3d 287; *People v Nunn* (1996) 50 CA4th 1357, 58 CR2d 294 (proper scope of expert testimony).
- Did the trial court instruct the jury that if, because of mental illness or involuntary intoxication, etc., it had a reasonable doubt about whether the defendant had the required mental state, it must find him or her not guilty? See *People v Coddington* (2000) 23 C4th 529, 584, 97 CR2d 528, disapproved on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. See also CALCRIM 625 (voluntary intoxication: effects on homicide crimes).
- If the record suggests that the defendant was "unconscious" at the time of the offense (*e.g.,* defendant testifies he or she was in a blackout or does not remember committing the offense), did the trial court instruct sua sponte on unconsciousness as a defense? See Pen C §26(4); see also CALCRIM 626 (voluntary intoxication causing unconsciousness: effects on homicide crimes).

- Does the record suggest that due to voluntary intoxication, the defendant was so impaired at the time of the offense that he or she did not actually have a mental state necessary for conviction of a specific intent offense? See Pen C §22.
- Did trial counsel defend on this ground?
- Did trial counsel request instructions on the effects of voluntary intoxication? See *People v Saille* (1991) 54 C3d 1103, 1120, 2 CR2d 364 (trial court not obligated to instruct sua sponte on voluntary intoxication, but must instruct on request in appropriate case). In *People v Balderas* (1985) 41 C3d 144, 196 n24, 222 CR 184, the supreme court found a sua sponte duty to instruct on an appropriate lesser included offense if the evidence supported an inference that the defendant was unconscious due to voluntary intoxication. But see *People v Ricardi* (1992) 9 CA4th 1427, 12 CR2d 364 (*Balderas* no longer reliable authority in light of *Saille*).
- Is there any reason to believe that the defendant was mentally impaired or voluntarily or involuntarily intoxicated when he or she made any statement about the offense or waived any rights (*e.g.*, *Miranda* rights, jury trial, change of plea)? If so, is there reason to believe that because of the impairment, the waiver was not knowing and intelligent?
- Does the record suggest that the defendant was incompetent within the meaning of Pen C §1367, *i.e.,* that he or she was "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner"? If so, were competency proceedings held? See Pen C §§1367.1, 1370.01 (defendants charged with misdemeanors); Pen C §§1368-1370 (defendants charged with felonies); Pen C §1370.1 (defendants with developmental disabilities).

NOTE: A defendant's *Marsden* motion during the pendency of a competency proceeding may invoke the court's duty to hold a hearing on the motion before adjudicating the defendant's competency. For example, in *People v Solorzano* (2005) 126 CA4th 1063, 24 CR3d 735, the trial court's failure to hear the defendant's *Marsden* motion on whether his appointed counsel was rendering effective assistance at his competency hearing ended up in reversal of his conviction.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.14 9. Right to Jury Trial

§4.14 9. Right to Jury Trial

The Sixth Amendment right to trial by jury is considered one of the fundamental rights conferred by the United States Constitution. *Sullivan v Louisiana* (1993) 508 US 275, 281, 124 L Ed 2d 182, 113 S Ct 2078. Therefore, an error that results in a complete or constructive denial of the right to jury trial may be considered a "structural defect in the constitution of the trial mechanism" within the meaning of *Arizona v Fulminante* (1991) 499 US 279, 309, 113 L Ed 2d 302, 111 S Ct 1246, which requires reversal without a finding of prejudice. See also *People v Collins* (2001) 26 C4th 297, 109 CR2d 836 (finding structural error in trial court's statement to defendant that he would obtain "some benefit" from waiving his right to jury trial). In assessing potential issues that affect the defendant's right to jury trial, appellate counsel should bear in mind that such errors may require reversal even if it is not easy or possible to assess their effect on the outcome of the trial. If the normal record suggests the existence of potential issues in the selection of the jury, counsel should augment the record for the reporter's transcript of the jury voir dire, and for any jury questionnaires or written questions submitted by counsel that may shed light on the jury selection proceedings.

Some questions to keep in mind include:

- Was there pretrial publicity about the case? Was a motion for change of venue denied? Does the record provide any reason to believe that the publicity affected the impartiality of the jury? See *People v Howard* (1992) 1 C4th 1132, 1166, 5 CR2d 268.
- Were any *Wheeler/Batson* motions made and denied during jury selection? See *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712; *People v Wheeler* (1978) 22 C3d 258, 283, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 137, 125 S Ct 2410. See also *Snyder v Louisiana* (2008) 552 US 472, 477, 170 L Ed 2d 175, 181, 128 S Ct 1203 (*Batson* error); *People v Salcido* (2008) 44 C4th 93, 141, 79 CR 3d 54 (no *Batson* error); *People v Hutchins* (2007) 147 CA4th 992, 55 CR3d 105 (burden to party opposing peremptory challenge is by preponderance of evidence).
- Did the trial court improperly preclude defense counsel from asking questions of prospective jurors to determine if they harbor bias on something that would be an issue at trial? *People v Cash* (2002) 28 C4th 703, 720, 122 CR2d 545.
- Did any juror read or see press or TV reports about the crime during the trial? Did the trial court examine the juror or permit counsel to examine the juror? Was the juror permitted to remain on the jury?
- Was any juror removed after selection for reasons that appear to be inappropriate? Compare *People v Wilson* (2008) 44 C4th 758, 80 CR3d 211 (juror's comments on race reflective of personal experience and disagreement with majority, not bias, prejudgment, failure to follow instructions or refusal to deliberate) and *People v Cleveland* (2001) 25 C4th 466, 106 CR2d 313 (juror's disagreement with majority was not refusal to deliberate; therefore dismissal was abuse of discretion), with *People v Williams* (2001) 25 C4th 441, 106 CR2d 295 (juror's expressed disagreement with law and refusal to follow court's instructions supported trial court's conclusion that he was unable to discharge duties; therefore dismissal was proper).
- Is there any evidence in the record suggesting jury misconduct, *e.g.,* is there any evidence that any juror considered matters outside the record in reaching its verdict? On juror misconduct and presumption of prejudice, see *In re Stankewitz* (1985) 40 C3d 391, 220 CR 382.
- Did the defendant attempt to present evidence of jury misconduct? On limitations on admissibility of evidence impeaching jury's verdict, see Evid C §1150.
- Did the defendant request a hearing to determine the truth of allegations of misconduct? See *People v Hedgecock* (1990) 51 C3d 395, 272 CR 803.
- Was any juror kept on the jury after an allegation of misconduct that appears to have been well founded?

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§4.15 10. Trial Questions

In a jury trial, errors that took place during trial in the presence of the jury comprise the majority of potentially meritorious issues on appeal. Appellate counsel should pay close attention to evidentiary objections sustained and overruled, jury instructions given and refused, and discussions of legal issues out of the presence of the jury. Counsel should not, however, focus narrowly on matters raised in the trial court. To spot potential issues that may have been overlooked by the court and counsel, appellate counsel must be familiar with the evidence code, the criminal jury instructions (CALCRIM), and the legal issues presented by the case at hand, should know what instructions the trial court must give on its own motion (see, *e.g.,* CALCRIM 200, Bench Notes, Instructional Duty), what instructions the trial court must give on request, what the prosecutor may and may not argue, and, perhaps most important, should approach each record with curiosity and imagination. Reflect on what you are reading as you go along. If something strikes you as unfair, or even just as odd or unusual, make a note of it and look into it further.

As you read the reporter's transcript of the trial proceedings, note as a potential issue every questionable piece of information the jury as a whole or any individual juror received (*e.g.,* hearsay; other crimes evidence; statements blurted out by attorneys or witnesses; conversations overheard in the elevator; ambiguous, inaccurate, or argumentative instructions). You should also make a note of every piece of information you think the jury should have heard that was not presented to it.

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§4.16 a. Errors in Admission or Exclusion of Evidence

Although many rules relating to the admission and exclusion of evidence appear to be bright-line standards, with little room for the exercise of discretion, the trend in California courts is to review the trial court's evidentiary rulings under the deferential abuse of discretion standard. See, *e.g.*, *People v Alvarez* (1996) 14 C4th 155, 201, 58 CR2d 385 ("[B]roadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion"). Specific examples include the following: the trial court's determination that a statement against penal interest is or is not trustworthy (*People v Cudjo* (1993) 6 C4th 585, 606, 25 CR2d 390); the trial court's admission or exclusion of evidence under Evid C §1101 (*People v Kipp* (1998) 18 C4th 349, 369, 75 CR2d 716); the trial court's admission or exclusion of evidence under Evid C §352 (*People v Kipp* (2001) 26 C4th 1100, 1121, 113 CR2d 27; *People v Cudjo* (1993) 6 C4th 585, 609, 25 CR2d 390); a trial court's relevancy determination (*People v Waidla* (2000) 22 C4th 690, 717, 94 CR2d 396); and the admission or exclusion of expert testimony (*People v Davenport* (1995) 11 C4th 1171, 1207, 47 CR2d 800).

NOTE: An exception to use of the deferential abuse of discretion standard applies when the appellate court reviews an evidentiary ruling presenting a mixed question of law and fact that affects a federal constitutional right of the defendant, such as the right to confront witnesses. When the trial court's evidentiary ruling is of constitutional magnitude, independent, de novo review is the proper standard. *People v Cromer* (2001) 24 C4th 889, 103 CR2d 23. Consequently, it is extremely important for appellate counsel to analyze every arguably incorrect evidentiary ruling for its potential impact on the defendant's constitutional rights to confront witnesses, to present a defense, and to fundamental fairness. On reviewing mixed questions of fact and law, see §4.24. On standards of review generally, see §§4.22-4.25. On federalizing, see §4.36.

In assessing a record for evidentiary error, pertinent questions include:

- Did the judge allow the prosecution to introduce testimony of prior misconduct that should have been excluded under Evid C §1101?
- Did the judge perform its duty to weigh probative value against prejudice under Evid C §352 carefully and conscientiously? See *U.S. v LeMay* (9th Cir 2001) 260 F3d 1018, 1031.
- Did the judge unduly restrict defense counsel's broad right of cross-examination, especially any attempts to impeach key prosecution witnesses?
- Did the judge unduly restrict defense counsel's presentation of defense evidence?
- Were the trial court's rulings on expert and opinion testimony correct? Does the record present any issues concerning the reliability of expert testimony? See *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, reaffirming *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144.
- In a joint trial, did the judge permit the prosecution to introduce a confession or admission by a codefendant that incriminated the defendant? See *People v Fletcher* (1996) 13 C4th 451, 53 CR2d 572.
- Did the prosecutor introduce prior testimony of a material witness because that witness was unavailable? If so, did the prosecutor use due diligence to secure the attendance of the witness? *People v Cromer* (2001) 24 C4th 889, 103 CR2d 23.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.17 b. Instructional Error

§4.17 b. Instructional Error

When reviewing the instructions, appellate counsel should keep in mind the observation of the court of appeal in *People v Thompkins* (1987) 195 CA3d 244, 252, 240 CR 516, that "from our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." In evaluating the instructions, it is important to keep in mind that the absence of essential instructions may affect the jury's deliberations as much as the presence of erroneous instructions. Appellate counsel should review both the oral instructions as recorded by the court reporter and the written instructions the jury had with them during deliberations.

Questions to keep in mind include:

- Did the judge give all instructions required to be given sua sponte under the facts of the case?
- Did the judge give any instructions that were unnecessary to the jury's decision? If so, does anything in the record suggest that they could have prejudiced the defendant?
- Did the instructions accurately state the applicable law?
- Did the instructions adequately define all technical terms or "terms of art"?
- Did the judge give any instructions that were ambiguous or confusing? If so, does anything in the record suggest that they could have prejudiced the defendant?
- Did the judge give any special instructions requested by the prosecution or refuse any special instructions requested by the defense? (They should be examined with care.)
- Did the judge give "consciousness of guilt" instructions? If so, was there adequate factual support in the record?
- Did the judge give instructions on any lesser included offenses shown by the evidence? *People v Barton* (1995) 12 C4th 186, 47 CR2d 569. If not, did defense counsel invite the error? See 12 C4th at 198.
- Did the judge instruct adequately on the defense theory of the case? See *U.S. v Zuniga* (9th Cir 1993) 6 F3d 569, 571; *U.S. v Escobar de Bright* (9th Cir 1984) 742 F2d 1196.
- Did the judge give appropriate limiting instructions on request?
- Did the instructions accurately define every element of the offense(s) and any charged enhancements?
- Did any instruction permit the jury to find any fact necessary for conviction on proof less than that required by the constitution?
- Did the jury request supplemental instructions or clarification of the instructions during deliberations? If so:
- Did the trial court honor the request? See Pen C §1138.
- Did all counsel participate in formulating the instructions?
- Were they correct? Even-handed?

NOTE: When trial counsel stipulates to not reporting the oral instructions given to the jury, failure to record them has not been found prejudicial. See *People v DeFrance* (2008) 167 CA4th 486, 494, 84 CR3d 204.

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§4.18 c. Prosecutorial Misconduct

Although prosecutorial misconduct most commonly occurs during argument, it can occur at any phase of a trial and can take numerous forms. Although a few examples of prosecutorial misconduct are unlikely to result in reversal, in a case in which the prosecutor appears to have a tendency to stray over the line of acceptable advocacy, appellate counsel should carefully note each potentially objectionable comment. If the reviewing court is persuaded that the prosecutor's misconduct is pervasive, it is more likely to reverse the judgment, and it may also be more likely to excuse trial counsel's failure to object to each instance of misconduct. See *People v Hill* (1998) 17 C4th 800, 72 CR2d 656, for a summary of state law on prosecutorial misconduct.

Questions to keep in mind include:

- Did the prosecutor disclose all exculpatory evidence, including materials that could be used to impeach prosecution witnesses? *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.
- Did the prosecutor appeal to passion or prejudice?
- Did the prosecutor (intentionally or inadvertently) misstate the facts? The law?
- Did the prosecutor comment on the defendant's failure to testify? See *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229. To explain his or her side of the story after arrest? See *Doyle v Ohio* (1976) 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240.
- Did the prosecutor express a personal belief in the defendant's guilt? In the believability of prosecution witnesses?
- Did the prosecutor disparage defense counsel?
- Did the prosecutor intentionally and without good faith justification argue inconsistent and irreconcilable factual theories in separate trials of two defendants, attributing to each acts that could have been committed by only one person? See *In re Sakarias* (2005) 35 C4th 140, 25 CR3d 265.
- When cross-examining the defendant about his or her testimony that differed from other evidence, did the prosecutor ask the defendant if the witness who offered the other evidence was lying? See *People v Chatman* (2006) 38 C4th 344, 377, 42 CR3d 621; *People v Zambrano* (2004) 124 CA4th 228, 241, 21 CR3d 160.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.19 d. Judicial Misconduct

§4.19 d. Judicial Misconduct

The trial judge has substantial latitude in controlling proceedings in his or her courtroom: the judge may question witnesses and comment on the evidence, and, indeed, has a duty to ensure that the evidence is fully developed and that ambiguities and conflicts in the evidence are resolved to the extent possible. *People v Raviart* (2001) 93 CA4th 258, 269, 112 CR2d 850. The court may not, however, disparage defendant or defense counsel, or show bias in favor of the prosecution. For further discussion of judicial misconduct in general, see *People v Mahoney* (1927) 201 C 618, 627, 258 P 607; *People v Santana* (2000) 80 CA4th 1194, 1206, 96 CR2d 158.

NOTE: While there are, as well, few limits placed on a trial judge's authority to correct his or her own prejudgment rulings, he or she may not, (with a few exceptions) reconsider the orders of another superior court judge, even if well intentioned or correct as a matter of law. To do so places the judge in the role of a "one-judge appellate court." *People v Goodwillie* (2007) 147 CA4th 695, 712, 54 CR3d 601 (trial court erroneously removed advisory counsel appointed by magistrate).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.20 11. Punishment

§4.20 11. Punishment

Because of the ever-increasing number and variety of enhancing provisions, and because of the United States Supreme Court's ruling in *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, that the former version of California's Determinate Sentencing Law was unconstitutional, sentencing error is quite frequent. Important provisions relating to punishment include:

- The Three Strikes Law (Pen C §§667(b)-(i), 1170.12) and other enhancements applicable to repeat offenders (Pen C §§667-667.75);
- The One Strike Sex Crime law (Pen C §667.61);
- Alternative sentencing schemes for sex offenders (Pen C §§667.6(c)-(d), 667.71), and defendants who commit specified gang-related offenses (Pen C §186.22(b)(4));
- Enhancements for conduct, *e.g.,* the use of a firearm, during the commission of an offense (Pen C §§12021.5-12022.95);
- Enhancements for gang-related offenses (Pen C §186.22); and
- The Determinate Sentencing Law (Pen C §§1170-1170.9; Cal Rules of Ct 4.300, 4.401-4.480).

NOTE: The U.S. Supreme Court held California's Determinate Sentencing Law unconstitutional in *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, insofar as it permitted upper-term sentences to be based on facts found by the sentencing judge by a preponderance of the evidence rather than on facts found by the jury beyond a reasonable doubt. Following *Cunningham,* the legislature amended Pen C §1170(b) and the Judicial Council amended the California Rules of Court. The amendments remove most references to "upper," "middle," and "lower" terms. Rather than considering "facts" to elevate the middle term, the sentencing court is now directed to use its "sound discretion" to select one of the three possible prison terms. Pen C §1170(b); Cal Rules of Ct 4.420. The court must state its reasons for imposing any term it selects. Pen C §1170(b).

Additional enhancement provisions are found in other sections of the Penal Code and in other codes that contain penal provisions, for example, the Vehicle Code and the Health and Safety Code. For a discussion about recidivism enhancements and the terms prescribed for each, see California Criminal Law Procedure and Practice ("Crim Law") §§37.31-37.32 (Cal CEB Annual). For a chart listing conduct enhancements, see Crim Law §37.13. For discussion of sentencing rules, see Crim Law, chaps 35-37. For discussion of sentencing errors that favor the defendant, see §2.28.

Some questions to consider in assessing the record for sentencing error include:

- Does Pen C §654, prohibiting multiple punishment for the same conduct, or for different criminal acts committed to further the same objective, apply to any part of the sentence? See *People v Latimer* (1993) 5 C4th 1203, 1207, 23 CR2d 144; *Neal v State* (1960) 55 C2d 11, 9 CR 607. But see, *e.g., People v Murphy* (2001) 25 C4th 136, 105 CR2d 387 (Pen C §654 did not prohibit sentencing defendant as habitual sex offender *and* under Three Strikes Law for each offense of which he was convicted).
- Did a jury find every fact necessary for proof of a conduct-based enhancement that increases the maximum term for the offense? See *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856. Compare *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, with *Monge v California* (1998) 524 US 721, 141 L Ed 2d 615, 118 S Ct 2246. After *Cunningham,* defense counsel is strongly advised to appeal on Sixth Amendment grounds if the court appears to have used "facts" not found true by a jury or admitted by the defendant to increase a sentence above the statutory maximum. See Crim Law §37.1A.
- Did the trial court exercise its discretion over each discretionary aspect of the sentence?
- If trial counsel did not object to sentencing error (see *People v Scott* (1994) 9 C4th 331, 36 CR2d 627), can it be argued that an objection was not required, or that trial counsel's failure to object amounts to ineffective assistance of counsel?

NOTE: In a case in which the trial and sentencing took place before the decision in *Blakely v Washington* (2004) 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 the defendant's Sixth Amendment claim is not forfeited on appeal even if no objection was made in the trial court. *People v Black* (2007) 41 C4th 799, 805, 62 CR3d 569 (*Black II*); *People v Sandoval* (2007) 41 C4th 825, 837 n4, 62 CR3d 588.

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III. BASIC PRINCIPLES OF APPELLATE REVIEW

§4.21 A. Introduction

The classic argument for respondent has three parts: (1) there was no error; (2) any error was forfeited by inadequate objection; and (3) any error was harmless. This formula corresponds to three fundamental principles of appellate review that every appellate practitioner must thoroughly understand.

First, the appellant almost always bears the burden of convincing the court of appeal that error occurred at trial. "The very settled rule of appellate review is a trial court's order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record." *People v Davis* (1996) 50 CA4th 168, 172, 57 CR2d 659. See also *People v Garcia* (1997) 56 CA4th 1349, 1357, 66 CR2d 350 ("[E]rror is never presumed and all intendments are in favor of the judgment on appeal"). The first task facing counsel for appellant in the opening brief is persuading the reviewing court that the ruling or event complained of was error under the applicable standard of review.

Second, it is rare for an appellate court to consider an argument raised for the first time on appeal. See, *e.g., People v Pinholster* (1992) 1 C4th 865, 935, 4 CR2d 765 (failure to object waives issue about admission or exclusion of evidence). But see Pen C §1259 (instructional error that affects substantial rights of defendant may be raised on appeal even if no objection was made at trial). Consequently, counsel for appellant must be able to argue that the error was properly raised in the trial court or that it is appropriate to raise it for the first time on appeal.

Third, with only rare exceptions, error requires reversal only when it was prejudicial. Thus, to prevail on appeal, the appellant must almost always persuade the court that the error had an influence on the judgment, and in the usual case, in which the error is one of state law, counsel for appellant bears the burden of persuading the reviewing court that it is reasonably probable that a more favorable result would have occurred in the absence of the error. See *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243.

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B. Standards of Review

§4.22 1. Findings of Fact

Because the trier of fact has the opportunity to observe the demeanor of witnesses and to judge their credibility, the appellate court reviews findings of fact made in the trial court, whether by the judge or the jury, under the substantial evidence rule. This deferential standard requires the reviewing court to resolve all disputed questions of fact in favor of the challenged judgment or ruling. In determining whether substantial evidence supports a judgment, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia* (1979) 443 US 307, 319, 61 L Ed 2d 560, 99 S Ct 2781; *People v Johnson* (1980) 26 C3d 557, 576, 162 CR 431. See *e.g., McDaniel v Brown* (2010) ___ US ___, 175 L Ed 2d 582, 591, 130 S Ct 665 (lower courts misapplied *Jackson v Virginia*).

Examples of other factual findings subject to the substantial evidence rule include:

- The trial court's order authorizing a state hospital to involuntarily administer antipsychotic medication to a defendant found mentally incompetent to stand trial (*People v O'Dell* (2005) 126 CA4th 562, 570, 23 CR3d 902);
- The trial court's express or implied findings of historical fact on a motion to suppress evidence under Pen C §1538.5 (*People v Kraft* (2000) 23 C4th 978, 1036, 99 CR2d 1);
- The trial court's findings of historical fact as to the circumstances of an admission or confession by a defendant (*People v Waidla* (2000) 22 C4th 690, 731, 94 CR2d 396);
- The trial court's findings as to whether a juror was impartial (*Wainwright v Witt* (1985) 469 US 412, 429, 83 L Ed 2d 841, 105 S Ct 844); and
- The trial court's finding that a defendant was competent to stand trial (*Maggio v Fulford* (1983) 462 US 111, 117, 76 L Ed 2d 794, 103 S Ct 2261).

The substantial evidence rule also applies in other circumstances. A prime example concerns the trial court's sua sponte obligation to instruct on lesser included offenses, which exists whenever there is substantial evidence that the defendant committed an offense less than that charged. *People v Lewis* (2001) 25 C4th 610, 645, 106 CR2d 629.

NOTE: An appellate court conducts an independent review to determine factual issues with First Amendment implications. *In re George T.* (2004) 33 C4th 620, 632, 16 CR3d 61 (reviewing court should independently examine record when defendant charged with making criminal threat raises plausible First Amendment defense).

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§4.23 2. Questions of Law

Pure questions of law are subject to the appellate court's independent (or de novo) review. *People v Lawler* (1973) 9 C3d 156, 160, 107 CR 13; *People v Teroganesian* (1995) 31 CA4th 1534, 37 CR2d 489. As the court explained in *People v Cromer* (2001) 24 C4th 889, 894 n1, 103 CR2d 23 (emphasis in original):

> [A]s an *institution* an appellate court is better suited to the task of deciding difficult legal questions because the time pressures for both counsel and the court are generally less intense in the appellate arena, and also because appellate courts, sitting in panels of three or more, employ collegial and deliberative procedures not available to trial courts, over each of which a single judge presides. In addition, appellate courts, by virtue of their position at or near the top of the judicial hierarchy, are better able to ensure that the law is construed and applied in the same way regardless of the specific case or the parties involved.

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§4.24 3. Mixed Questions of Law and Fact

Determining the standard of review is more difficult when an issue on appeal involves a mixed question of fact and law, one in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v Swint* (1982) 456 US 273, 289 n19, 72 L Ed 2d 66, 102 S Ct 1781. The courts have not adopted an across-the-board rule for determining what standard of review to apply to such a question. The key to this determination in a given case turns on whether the inquiry is essentially factual, in which case deferential review is appropriate, or whether the question requires the court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," in which case concerns of "efficiency, accuracy, and precedential weight" favor independent review. *U.S. v McConney* (9th Cir 1984) 728 F2d 1195, 1202. When the question implicates the federal Constitution, the "predominance of factors favoring de novo review is even more striking." 728 F2d at 1203. In *People v Cromer* (2001) 24 C4th 889, 901, 103 CR2d 23, the California Supreme Court held that the reviewing court should independently review the trial court's determination that the prosecutor used sufficient diligence in attempting to locate a missing witness to enable it to use the witness's preliminary hearing testimony at trial without violating defendant's right to confront witnesses. See also *People v Louis* (1986) 42 C3d 969, 232 CR 110, disapproved on other grounds in *People v Mickey* (1991) 54 C3d 612, 672 n9, 286 CR 801 (same). In *People v Salazar* (2005) 35 C4th 1031, 29 CR3d 16, the court held that *Brady* claims are subject to independent review as they involve conclusions of law or mixed questions of law and fact; however, a referee's findings of fact, although not binding, were entitled to great weight when supported by substantial evidence because the referee observed the demeanor of the witnesses and their manner of testifying.

The United States Supreme Court has held that, with respect to the following mixed questions of fact and law, a reviewing court should independently determine whether:

- An interrogation occurred while the defendant was "in custody" within the meaning of *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602 (*Thompson v Keohane* (1995) 516 US 99, 113, 133 L Ed 2d 383, 116 S Ct 457);
- The police had "reasonable suspicion" or "probable cause" for a search or seizure (*Ornelas v U.S.* (1996) 517 US 690, 696, 134 L Ed 2d 911, 116 S Ct 1657);
- A confession was voluntary within the meaning of the Fifth Amendment (*Miller v Fenton* (1985) 474 US 104, 115, 88 L Ed 2d 405, 106 S Ct 445);
- Defendant's attorney provided effective assistance of counsel (*Strickland v Washington* (1984) 466 US 668, 698, 80 L Ed 2d 674, 104 S Ct 2052);
- Pretrial identification procedures were unduly suggestive (*Sumner v Mata* (1982) 455 US 591, 597, 71 L Ed 2d 480, 102 S Ct 1303);
- An attorney's representation of more than one defendant was a conflict of interest (*Cuyler v Sullivan* (1980) 446 US 335, 341, 64 L Ed 2d 333, 100 S Ct 1708); and
- Defendant knowingly and voluntarily waived the right to counsel (*Brewer v Williams* (1977) 430 US 387, 397, 51 L Ed 2d 424, 97 S Ct 1232).

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§4.25 4. Discretionary Rulings

When the determination of a legal issue is entrusted to the trial court's discretion, the reviewing court will find error only if the court has abused its discretion. Some case law suggests that a court has abused its discretion when it has made a decision that "falls outside the bounds of reason." See, *e.g., People v DeSantis* (1992) 2 C4th 1198, 1226, 9 CR2d 628. Other case law suggests that a court has abused its discretion only when its ruling is arbitrary, whimsical, or capricious. See, *e.g.*, *People v Branch* (2001) 91 CA4th 274, 282, 109 CR2d 870; *People v Linkenauger* (1995) 32 CA4th 1603, 1614, 38 CR2d 868. There is, however, case law that defines the abuse of discretion more broadly. In *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1297, 255 CR 704, the court noted that the use of pejorative terms to define the abuse of discretion is "misleading" since "it implies that in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational. Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion." The court went on to note that the scope of discretion always resides in the particular law being applied and that an action that transgresses the confines of the applicable principles of law is outside the scope of discretion and therefore an abuse of discretion. 207 CA3d at 1297. The court in *People v Jacobs* (2007) 156 CA4th 728, 738, 67 CR3d 615 stated that a court's discretion is subject to the limitations of the legal principles governing the subject of its actions and to reversal where no reasonable basis for the action is shown. In *In re Anthony M*. (2007) 156 CA4th 1010, 1016, 67 CR3d 734, the court stated that a court "abuses its discretion when it acts contrary to law."

Examples of rulings reviewed for abuse of discretion include:

- The trial court's ruling on a discovery motion (*People v Ashmus* (1991) 54 C3d 932, 979, 2 CR2d 112);
- Denial of defendant's motion to empanel new jury for penalty phase of capital trial (*People v Taylor* (2001) 26 C4th 1155, 1169, 113 CR2d 827);
- The trial court's rulings on the admissibility of evidence (*People v Mickey* (1991) 54 C3d 612, 654, 286 CR 801), including:
- Expert testimony (*People v Catlin* (2001) 26 C4th 81, 131, 109 CR2d 31);
- Uncharged crimes (26 C4th at 120);
- Its weighing of probative value against prejudice under Evid C §352 (*People v Kipp* (2001) 26 C4th 1100, 1121, 113 CR2d 27);
- Hearsay (*People v Rowland* (1992) 4 C4th 238, 264, 14 CR2d 377);
- Relevance (*People v Waidla* (2000) 22 C4th 690, 723, 94 CR2d 396);
- The trial court's ruling on a motion to challenge a prospective juror for cause (*People v Weaver* (2001) 26 C4th 876, 910, 111 CR2d 2);
- The trial court's ruling on the admission or exclusion of exhibits (26 C4th at 933);
- The trial court's denial on a motion for severance (*People v Ochoa* (2001) 26 C4th 398, 423, 110 CR2d 324);
- The trial court's decision as to whether or not to instruct a deliberating jury (*People v Waidla* (2000) 22 C4th 690, 745, 94 CR2d 396);
- The trial court's denial of a motion for mistrial (*People v Hayes* (1999) 21 C4th 1211, 1263, 91 CR2d 211); and
- The trial court's granting of a motion for a new trial on grounds of juror misconduct (*People v Ault* (2004) 33 C4th 1250, 1255, 17 CR3d 302) or ineffective assistance of counsel (*People v Callahan* (2004) 124 CA4th 198, 21 CR3d 226).

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C. Procedural Obstacles to Review

1. Failure to Object

§4.26 a. Rationale

As a general rule, trial court errors must be brought to the court's attention during trial to be cognizable on appeal. Typically, forfeiture of appellate issues is caused by the failure to object—or to object adequately or in a timely manner—to evidence or argument or some action of the trial court. In addition, forfeiture can result from the failure to present the court with appropriate reasons for admitting evidence. For examples, see §4.28.

NOTE: Although the loss of the right to appeal because of the failure to object below has long been referred to by lawyers and judges as a "waiver," it is actually a "forfeiture." A waiver is the intentional relinquishment of a known right; a forfeiture is what results from the unintentional failure to preserve a claim. See *In re S.B.* (2004) 32 C4th 1287, 1293, 13 CR3d 786; *People v Simon* (2001) 25 C4th 1082, 1097 n9, 108 CR2d 385; *Cowan v Superior Court* (1996) 14 C4th 367, 371, 58 CR2d 458.

There are many circumstances in which the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal. See Pen C §§1259 (felonies), 1469 (misdemeanors). Reasons given for "[t]raditional objection and waiver principles" are that they "encourage development of the record and a proper exercise of discretion in the trial court" (*People v Welch* (1993) 5 C4th 228, 236, 19 CR2d 520), "reduce the number of errors committed in the first instance and preserve judicial resources otherwise used to correct them" (*People v Scott* (1994) 9 C4th 331, 353, 36 CR2d 627). The contemporaneous objection rule has long been applied to issues relating to the admissibility of evidence. *People v Pinholster* (1992) 1 C4th 865, 935, 4 CR2d 765; *People v Rogers* (1978) 21 C3d 542, 146 CR 732. But see *People v Tuggles* (2009) 179 CA4th 339, 356, 100 CR3d 820 (when trial court later memorializes objection at unreported sidebar conference, objection preserved for review).

NOTE: The appellate court retains discretion to reach a question that has not been preserved for review, unless it relates to the admission or exclusion of evidence (see Evid C §§353-354). *People v Williams* (1998) 17 C4th 148, 161 n6, 69 CR2d 917; *People v Smith* (2003) 31 C4th 1207, 1215, 7 CR3d 559.

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§4.27 b. Exceptions

Not every claim of error requires an objection in the trial court to be reviewable on appeal. "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." *People v Vera* (1997) 15 C4th 269, 276, 62 CR2d 754, disapproved on other grounds by *People v French* (2008) 43 C4th 36, 47 n3, 73 CR3d 605. Among these rights is the right to jury trial. *People v Belmares* (2003) 106 CA4th 19, 27, 130 CR2d 400 (hearing but rejecting defendant's contention that *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, required the state to submit the question of the identity of the person who had committed charged priors to the jury). Similarly, no contemporaneous objection is required to preserve a challenge to the sufficiency of the evidence. *People v Rodriguez* (1998) 17 C4th 253, 262, 70 CR2d 334; *People v Galindo* (2006) 142 CA4th 531, 537, 48 CR3d 241.

In addition, an instructional error that affects the substantial rights of a defendant may be raised on appeal even if no objection was made in the trial court. Pen C §§1259 (felonies), 1469 (misdemeanors). Thus, the failure to object to an erroneous instruction does not forfeit the issue on appeal. *People v Flood* (1998) 18 C4th 470, 550, 76 CR2d 180; *People v Frazer* (2003) 106 CA4th 1105, 1116 n5, 131 CR2d 319, disapproved on other grounds by *People v Scott* (2009) 45 C4th 743, 755, 89 CR3d 213. Similarly, the defendant can assert as error on appeal the trial court's failure to give an instruction that the trial court had a sua sponte duty to give, even though no request for the instruction was made in the lower court. See *People v St. Martin* (1970) 1 C3d 524, 531, 83 CR 166 ("in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence… [*i.e.,*] those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case").

CAUTION: The defendant is entitled to instructions that "pinpoint" the theory of the defense only on request. *People v Saille* (1991) 54 C3d 1103, 1119, 2 CR2d 364; *People v Sears* (1970) 2 C3d 180, 190, 84 CR 711. Thus, a defendant who fails to request a pinpoint instruction forfeits any claim of error on appeal. See also §4.29 on invited error.

A complete failure of the trial court to exercise the discretion vested in it by law is also subject to review on appeal absent an objection. The trial court's failure to exercise discretion conferred and compelled by law denies the defendant a fair hearing and deprives the defendant of fundamental procedural rights. *People v Downey* (2000) 82 CA4th 899, 912, 98 CR2d 627. See, *e.g., In re Sean W.* (2005) 127 CA4th 1177, 26 CR3d 248.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.28 c. Forfeiture

§4.28 c. Forfeiture

Under current California practice, the failure to bring an error to the trial court's attention in a timely manner forfeits the right to appeal in a variety of contexts. Thus, it has been held that:

- The failure to raise a statute of limitations issue, except when the charging document indicates on its face that an action was time barred, forfeits the right to raise the issue on appeal. *People v Thomas* (2007) 146 CA4th 1278, 1282, 53 CR3d 473; *People v Williams* (1999) 21 C4th 335, 87 CR2d 412.
- The failure to renew an in limine motion can, in some circumstances, forfeit the issue. See *People v Morris* (1991) 53 C3d 152, 187, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394.
- When a defendant makes a Pen C §1538.5 motion before the magistrate at the preliminary hearing, the failure to renew the motion in the trial court precludes any appeal from the denial of the motion. See *People v Hinds* (2003) 108 CA4th 897, 134 CR2d 196.
- Defendant's failure to object to irregularities in jury selection forfeits the issue. See, *e.g.*, *People v Holt* (1997) 15 C4th 619, 656, 63 CR2d 782 (impropriety in excusing juror); *People v Gallego* (1990) 52 C3d 115, 276 CR 679 (*Wheeler* violation).
- Defendant's failure to object to prosecutorial misconduct forfeits the issue (*People v Green* (1980) 27 C3d 1, 27, 164 CR 1, overruled on other grounds in *People v Martinez* (1999) 20 C4th 225, 239, 83 CR2d 533) unless the record indicates that a timely objection and admonition would not have cured the harm (27 C3d at 28). See, *e.g., People v Hill* (1998) 17 C4th 800, 72 CR2d 656. Even if an objection is made and sustained, if an admonition would cure the harm, the issue is forfeited on appeal unless the defendant asks the court to admonish the jury to disregard the impropriety. *People v Prieto* (2003) 30 C4th 226, 259, 133 CR2d 18.
- The failure to object to the trial court's discretionary sentencing decisions, *i.e.,* "sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner," forfeits the right to appeal such issues. *People v Scott* (1994) 9 C4th 331, 354, 36 CR2d 627. But see *People v Gonzalez* (2003) 31 C4th 745, 3 CR3d 676 (sentencing error forfeited under *Scott* only if defendant has meaningful opportunity to object).

NOTE: After *Cunningham,* the California Supreme Court held that in a case in which the trial and sentencing took place before the decision in *Blakely v Washington* (2004) 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403*,* the defendant's Sixth Amendment claim is *not* forfeited on appeal even if no objection was made in the trial court. *People v Black* (2007) 41 C4th 799, 805, 62 CR3d 569 (*Black II*); *People v Sandoval* (2007) 41 C4th 825, 837 n4, 62 CR3d 588. See also *People v French* (2008) 43 C4th 36, 46, 73 CR3d 605 (plea of no contest entered before *Blakely* decided did not forfeit Sixth Amendment claim regarding sentencing). For discussion, see Crim Law, chap 37.

- Appellant may not raise for the first time on appeal an argument for the exclusion of evidence that was not presented to the trial court. *People v Mooc* (2001) 26 C4th 1216, 1233 n6, 114 CR2d 482. See also *People v Diaz* (1992) 3 C4th 495, 527, 11 CR2d 353 (appellant could not argue *Kelly/Frye* for first time on appeal); *People v Lopez* (1978) 81 CA3d 103, 108, 146 CR 165 (objection specifying wrong ground is as bad as insufficient general objection).
- A hearsay objection does not preserve for appeal the argument that admission of the evidence violated the defendant's right to confront witnesses under the Sixth Amendment to the United States Constitution. *People v Catlin* (2001) 26 C4th 81, 138 n14, 109 CR2d 31.
- The failure to request clarification or amplification of a legally correct instruction that is warranted by the evidence forfeits argument on appeal that the instruction was too general or incomplete. *People v Lang* (1989) 49 C3d 991, 1023, 264 CR 386; *People v Campos* (2007) 156 CA4th 1228, 1236, 67 CR3d 904.

NOTE: The court in *Campos*, *supra,* warns the Bar that the adoption of the Judicial Council Criminal Jury Instructions does not provide an excuse for advocates to "dust off" and recycle "old, hackneyed arguments" that were previously discredited under similarly worded CALJIC instructions. 156 CA4th at 1239.

- The failure to object to a witness's testimony on the ground of testimonial incompetence forecloses the issue on appeal. *People v Cudjo* (1993) 6 C4th 585, 622, 25 CR2d 390.
- The failure to apprise the trial court of the "substance, purpose, and relevance" of proffered evidence (see Evid C §354(a)) forfeits appellate consideration of a claim that the evidence was erroneously excluded. *People v*

Anderson (2001) 25 C4th 543, 580, 106 CR2d 575.

- Defendant's failure to object to the trial court's comment arguably suggesting that the jury would not need to spend much time deliberating forfeited the issue on appeal. *People v Coddington* (2000) 23 C4th 529, 97 CR2d 528, disapproved on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409.
- Objection to the trial court's in limine ruling that the defendant can be impeached with evidence of prior convictions is forfeited by the defendant's failure to testify. *People v Sims* (1993) 5 C4th 405, 454, 20 CR2d 537.
- The failure to make sure that the trial court actually rules on a motion or other request, or to make sure that the trial court implements the ruling after it is made, may preclude the defendant from raising the issue on appeal. *People v Heldenburg* (1990) 219 CA3d 468, 473, 268 CR 255.
- The failure to object to judicial misconduct forfeits the issue on appeal. *People v Raviart* (2001) 93 CA4th 258, 269, 112 CR2d 850.

NOTE: The forfeiture rules usually affect the appellant, who, in criminal cases, in part because of the limitations on the prosecution's right to appeal, is usually the defendant. When the prosecution does have a right to appeal, the scope of the appeal may be affected by what was or was not done in the trial court. See, *e.g., People v Sanders* (2003) 31 C4th 318, 331, 2 CR3d 630 (on appeal from grant or denial of Pen C §1538.5 motion, prosecution may not advance new justification for search in appellate court).

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§4.29 2. Invited Error

Definition. The term "invited error" describes a principle of estoppel that prevents a party from raising on appeal certain errors induced by that party's actions. See, *e.g., Lorenzana v Superior Court* (1973) 9 C3d 626, 640, 108 CR 585 ("the doctrine of invited error operates to estop a party from asserting an error when the party's own conduct has induced its commission [citation omitted] and from claiming to have been denied a fair trial by circumstances of the party's own making [citation omitted]").

Instructional error. As noted in §4.27, under Pen C §§1259 (felonies) and 1469 (misdemeanors), instructional error that affects the "substantial rights" of the defendant is an exception to the contemporaneous objection requirement. Nevertheless, the doctrine of invited error may bar review of instructional error if the party complaining that an instruction was erroneously given or omitted caused the error. However, the defendant will only be barred from raising the issue on appeal if counsel both intentionally caused the trial court to err and did so for tactical reasons. See *People v Dunkle* (2005) 36 C4th 861, 32 CR3d 23, disapproved on other grounds by *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Coffman* (2004) 34 C4th 1, 39, 17 CR3d 710.

NOTE: Invited error *is* error, even though it may not be argued on appeal. Moreover, the trial court's refusal of defendant's invitation to commit error is *not* error. Thus, for example, no error occurs when, over the defendant's objection, the trial court instructs on a lesser included offense shown by the evidence. *People v Barton* (1995) 12 C4th 186, 198, 47 CR2d 569.

Under current California practice, the circumstances under which a defendant will be considered to have invited error appear to be expanding. Compare, *e.g., People v Lucero* (2000) 23 C4th 692, 723, 97 CR2d 871 (suggesting that whether counsel's "approval" of instruction invites error is unclear) with *People v Graham*, *supra* (indicating that protection of truth-seeking function of trial and defendant's right to due process requires narrow construction of circumstances constituting invited error).

See also *People v Wader* (1993) 5 C4th 610, 657, 20 CR2d 788 (finding invited error because defense counsel "specifically requested" erroneous instruction even though court discerned no rational tactical purpose for request); *People v Macias* (1997) 16 C4th 739, 746 n3, 66 CR2d 659 (requesting instruction invites error; no discussion of tactical purpose); *People v Medina* (1995) 11 C4th 694, 762, 47 CR2d 165 (same); *People v Pinholster* (1992) 1 C4th 865, 951, 4 CR2d 765 (requesting erroneous instruction did not invite error because there was little indication in record of deliberate tactical purpose); *People v Cooper* (1991) 53 C3d 771, 831, 281 CR 90 (finding that defense counsel's request that court not instruct on lesser included offense was invited error, even assuming that stated reason for request was based on misunderstanding of law).

Other examples. Although the invited error doctrine is most frequently applied to claims of instructional error, it may be applicable in a variety of circumstances. Thus, for example, a defendant who requests or acquiesces in instructions on a time-barred lesser offense may not urge the statute of limitations as a ground for reversal on appeal. See, *e.g., People v Beasley* (2003) 105 CA4th 1078, 130 CR2d 717 (declining to find that defendant had forfeited his right to rely on statute of limitations defense on time-barred lesser offense because record did not indicate that defendant had requested or acquiesced in instructions).

It has long been the rule in California that a defendant may not claim ineffective assistance of counsel on the basis of acts or omissions that the defendant requested. See, *e.g., People v Majors* (1998) 18 C4th 385, 409, 75 CR2d 684 (defendant could not complain on appeal that trial counsel was ineffective for failing to request instruction on lesser included offense, when trial counsel recommended instruction but acceded to defendant's all-or-nothing approach); *People v Simmons* (1946) 28 C2d 699, 172 P2d 18 (ineffective assistance claim barred when defendant insisted that trial counsel, against counsel's better judgment, introduce evidence that prejudiced defendant's case). See also *People v McPeters* (1992) 2 C4th 1148, 1183, 9 CR2d 834, superseded by statute as stated in *Verdin v Superior Court* (2008) 43 C4th 1096, 1106, 77 CR3d 287 (defense counsel invited error by introducing evidence claimed to be prejudicial).

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D. Rules for Determining Whether Error Requires Reversal

§4.30 1. Errors Reversible Per Se

Only if an error is so fundamental in nature that it affects the structural integrity of the trial, will the reviewing court reverse the trial court's judgment without a showing that the error has had some impact on the outcome of the proceeding. See *Arizona v Fulminante* (1991) 499 US 279, 309, 113 L Ed 2d 302, 111 S Ct 1246; *Neder v U.S.* (1999) 527 US 1, 8, 144 L Ed 2d 35, 119 S Ct 1827. The United States Supreme Court has characterized these "structural" errors in a variety of ways. See *Arizona v Fulminante* (1991) 499 US 279, 310, 113 L Ed 2d 302, 111 S Ct 1246 (structural error is "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"); *Brecht v Abrahamson* (1993) 507 US 619, 630, 123 L Ed 2d 353, 113 S Ct 1710 (such errors "infect the entire trial process"); *Rose v Clark* (1986) 478 US 570, 577, 92 L Ed 2d 460, 106 S Ct 3101 (they "necessarily render a trial fundamentally unfair" and deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence… and no criminal punishment may be regarded as fundamentally fair").

Examples of errors that are prejudicial per se include:

- Denial of right to counsel (*Gideon v Wainwright* (1963) 372 US 335, 9 L Ed 2d 799, 83 S Ct 792; *Johnson v U.S.* (1997) 520 US 461, 468, 137 L Ed 2d 718, 117 S Ct 1544; see *Cordova v Baca* (9th Cir 2003) 346 F3d 924);
- Trial by biased judge (*Tumey v Ohio* (1927) 273 US 510, 71 L Ed 749, 47 S Ct 437);
- Defective instruction on reasonable doubt (*Sullivan v Louisiana* (1993) 508 US 275, 124 L Ed 2d 182, 113 S Ct 2078);
- Racial discrimination in selection of grand jury (*Vasquez v Hillery* (1986) 474 US 254, 88 L Ed 2d 598, 106 S Ct 617);
- Racial discrimination in selection of trial jury (*Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712);
- Denial of right of self-representation (*McKaskle v Wiggins* (1984) 465 US 168, 79 L Ed 2d 122, 104 S Ct 944);
- Denial of public trial (*Waller v Georgia* (1984) 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210); and
- Failure to conduct a competency hearing when substantial evidence of defendant's incompetence has been introduced (*People v Pennington* (1967) 66 C2d 508, 58 CR 374; *People v Ary* (2004) 118 CA4th 1016, 13 CR3d 482).

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§4.31 2. Errors of Federal Constitutional Law

Most errors that result in a violation of the U.S. Constitution, even errors that infringe a fundamental right, do not result in automatic reversal. See, *e.g., Arizona v Fulminante* (1991) 499 US 279, 309, 113 L Ed 2d 302, 111 S Ct 1246 (holding admission of involuntary confession subject to harmless error analysis); *People v Cahill* (1993) 5 C4th 478, 511, 20 CR2d 582 (same). Constitutional errors that are subject to harmless error analysis are evaluated under the stringent standard enunciated in *Chapman v California* (1967) 386 US 18, 24, 17 L Ed 2d 705, 87 S Ct 824, which requires reversal unless the prosecution can show that the error was harmless beyond a reasonable doubt. As restated in *Neder v U.S*. (1999) 527 US 1, 18, 144 L Ed 2d 35, 53, 119 S Ct 1827, to determine whether constitutional error requires reversal under *Chapman*, the reviewing court must answer this central question: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"

Neder v U.S., supra, held that the trial court's failure to instruct on an element of an offense is subject to harmless error analysis. 527 US at 8. See also *People v Flood* (1998) 18 C4th 470, 490, 76 CR2d 180. But see *Rose v Clark* (1986) 478 US 570, 578, 92 L Ed 2d 460, 106 S Ct 3101 (directed verdict not subject to harmless error analysis). See also *People v Cummings* (1993) 4 C4th 1233, 1312, 18 CR2d 796 (failure to instruct on four out of five elements of offense reversible per se).

NOTE: It is possible that *Neder* will not provide the definitive answer on the reversibility of instructional error on the elements of an offense. As *Cummings* illustrates, there is some distance to cover between the failure to instruct on a single element of an offense and directing a verdict for the prosecution. In addition, a substantial number of jurists in this country, including at least four members of the United States Supreme Court, are very troubled about errors that result in the wrong entity finding the defendant guilty. This viewpoint may well contribute to continuing evolution of the *Chapman* standard, at least as it affects errors that impinged on the defendant's right to jury trial. On the question of how to analyze instructional errors that may have affected the defendant's right to jury trial, see, *e.g., Yates v Evatt* (1991) 500 US 391, 114 L Ed 2d 432, 111 S Ct 1884, overruled on other grounds in *Estelle v McGuire* (1991) 502 US 62, 73 n4, 116 L Ed 2d 385, 399 n4, 112 S Ct 475.

The major exception to the rule that constitutional errors are reviewed under the *Chapman* standard is ineffective assistance of counsel. Although the right to counsel conferred by the Sixth Amendment necessarily entails the right to the effective assistance of counsel, an attorney's error will not be held to deprive a defendant of constitutionally effective assistance of counsel unless the defendant establishes that there is a reasonable probability that the result would have been different if trial counsel's performance had not been deficient. See *Strickland v Washington* (1984) 466 US 668, 694, 80 L Ed 2d 674, 104 S Ct 2052.

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§4.32 3. Errors of State Law

Most errors that occur at trial are considered to be errors of state law. Such errors are, with only a few exceptions, analyzed under the standard enunciated in *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243, which places the burden on the appellant to show that there is a reasonable probability that the result would have been more favorable in the absence of the error. See *People v Breverman* (1998) 19 C4th 142, 164, 77 CR2d 870 (failure to instruct on lesser included offense is *Watson* error).

NOTE: When the reviewing court assesses the effect of state law error at the penalty phase of a capital trial, the court must apply the reasonable possibility standard, *i.e.,* the judgment will be affirmed unless there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. *People v Brown* (1988) 46 C3d 432, 250 CR 604.

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IV. OVERCOMING OBSTACLES TO REVIEW OR REVERSAL

§4.33 A. Arguing Against Forfeiture

Examples of circumstances in which the failure to object may be excused or an imperfect objection may be considered adequate to preserve the issue include:

- When a specific motion to exclude identified evidence is made at an appropriate time before or during trial, and no circumstances intervene to justify reconsideration, the motion need not be renewed when the evidence is introduced. *People v Crittenden* (1994) 9 C4th 83, 127, 36 CR2d 474; *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394.
- A contemporaneous objection is not required to preserve a challenge to sufficiency of evidence. *People v Rodriguez* (1998) 17 C4th 253, 262, 70 CR2d 334; *People v Galindo* (2006) 142 CA4th 531, 537, 48 CR3d 241.
- Defendant is not required to object when an objection would have been futile. *People v Sandoval* (2007) 41 C4th 825, 837 n4, 62 CR3d 588 (California Supreme Court decision was binding on lower courts until it was overruled by United States Supreme Court in *Cunningham v California*, *supra*); *People v Turner* (1990) 50 C3d 668, 703, 268 CR 706; *People v Chavez* (1980) 26 C3d 334, 350 n5, 161 CR 762.
- A reviewing court is more likely to exercise its discretion in favor of review when the question of whether the defendant has preserved the ground for appeal is "close and difficult." *People v Bruner* (1995) 9 C4th 1178, 1183 n5, 40 CR2d 534.
- Unauthorized sentences or sentences entered in excess of jurisdiction, including claims of multiple punishment under Pen C §654, may be corrected at any time even without an objection. *People v Scott* (1994) 9 C4th 331, 354 n17, 36 CR2d 627. See, *e.g., People v Garza* (2003) 107 CA4th 1081, 132 CR2d 831 (claim that trial court erred in imposing consecutive sentence for sex offenses because they did not occur on separate occasions not forfeited by failure to object below).
- When the analysis of an error does not depend on whether the error is characterized as a violation of state law or a violation of the federal constitution, objection on constitutional grounds may not be required. *People v Cudjo* (1993) 6 C4th 585, 611, 25 CR2d 390. But see *People v Kipp* (2001) 26 C4th 1100, 1130, 113 CR2d 27 (objection to prosecutorial misconduct that did not allege that misconduct was federal constitutional error did not preserve constitutional claims on appeal).
- The reviewing court should disregard technical insufficiencies in the form of an objection in a capital case. *People v Frank* (1985) 38 C3d 711, 729 n3, 214 CR 801 (plurality opinion).
- When, despite inadequate phrasing, the trial court understood the objection, the appellate court should review the error. *People v Scott* (1978) 21 C3d 284, 290, 145 CR 876; *People v Boggess* (1924) 194 C 212, 232, 228 P 448. See also *People v Shirley* (1982) 31 C3d 18, 29, 181 CR 243 (by challenging reliability of scientific technique, defendant preserved *Kelly/Frye* issue); *People v Smith* (2003) 31 C4th 1207, 1214, 7 CR3d 559.
- When the trial court completely failed to exercise the discretion vested in it by law, thereby denying the defendant a fair hearing and depriving the defendant of fundamental procedural rights. *People v Downey* (2000) 82 CA4th 899, 912, 98 CR2d 627; *In re Sean W.* (2005) 127 CA4th 1177, 26 CR3d 248.
- When the error appellant wants the court to review is an error under the federal constitution, the adequacy of the state procedural bar (*i.e.*, whether the state procedural rule precludes review of the question) is itself a federal question. *Lee v Kemna* (2002) 534 US 362, 151 L Ed 2d 820, 122 S Ct 877; *Douglas v Alabama* (1965) 380 US 415, 422, 13 L Ed 2d 934, 85 S Ct 1074. In *Lee v Kemna* the United States Supreme Court held that a Missouri rule requiring requests for continuance to be in writing did not bar review of the merits of the defendant's due process claim for several reasons, including the fact that the defendant had clearly presented the basis for the request and the trial court had ruled on it. If the application of the state procedural rule seems fundamentally unfair in a particular case, counsel should consider arguing that it should not bar review of the underlying federal question.
- When the defendant has objected to an alleged error without asserting a federal constitutional basis for the objection, he or she may argue on appeal that the error resulted in a violation of the defendant's constitutional rights when the argument on appeal "merely assert[s] that the trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional *legal consequence* of violating the Constitution." *People v Lewis* (2006) 39 C4th 970, 990 n5, 47 CR3d 467. See *People v Partida* (2005) 37 C4th

428, 35 CR3d 644 (when defendant made Evid C §352 objection at trial, he could argue on appeal that effect of admitting evidence denied him fair trial).

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§4.34 B. Arguing Ineffective Assistance of Trial Counsel

If it appears that trial counsel has forfeited or invited a potentially significant error, appellate defense counsel must consider arguing ineffective assistance of counsel (IAC). See *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052; see *People v Pope* (1979) 23 C3d 412, 152 CR 732.

When there could be no conceivable tactical reason for an act or omission by trial counsel, for example, when trial counsel has failed to preserve a potentially dispositive issue by failing to object or objecting on the wrong ground, it is appropriate to present a claim of ineffective assistance of trial counsel on direct appeal. See, *e.g., People v Belcher* (1974) 11 C3d 91, 96, 113 CR 1 (trial counsel's failure to timely enter plea of former jeopardy constituted denial of effective assistance of counsel). When a serious trial error has arguably been forfeited, combining an argument on the merits with an argument that if trial counsel forfeited the issue, the defendant was denied effective assistance of counsel may persuade the reviewing court to consider the issue on the merits. See, *e.g., People v Rivera* (2003) 107 CA4th 1374, 133 CR2d 176; *People v Marshall* (1996) 13 C4th 799, 825 n1, 55 CR2d 347. But see *People v Mitchell* (2008) 164 CA4th 442, 466, 78 CR3d 855 (the standard for a claim of ineffective assistance of counsel is *not* that counsel forfeited a claim; therefore, counsel must have been deficient).

If the absence of a tactical reason for trial counsel's arguably incompetent act or omission is not evident on the face of the record, it is preferable to raise ineffective assistance of counsel in a petition for a writ of habeas corpus, even if the error and its consequences *are* evident on the face of the record. When considering filing a petition for writ of habeas corpus, the first thing appellate counsel should do is to discuss his or her concerns with trial counsel, who may actually have had a reasonable tactical purpose for an action that struck appellate counsel with the benefit of hindsight as ill-advised. Furthermore, many trial attorneys, especially if approached in a straightforward manner, will frankly admit their errors. Many will also be willing to sign a declaration in support of a petition for habeas corpus. Even if trial counsel is unwilling to cooperate with appellate counsel in preparing an IAC petition, he or she may say something that appellate counsel can use in his or her own declaration to the court, or that can be used as impeachment later.

If trial counsel's arguably incompetent act or omission resulted in the failure to develop an issue in the trial court, appellate counsel will have to investigate the issue to find out whether it will be possible to meet the prejudice prong of the *Strickland* test. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington* (1984) 466 US 668, 694, 80 L Ed 2d 674, 104 S Ct 2052.

PRACTICE TIP: An appointed attorney who has an interest in being compensated should check with the appellate program that recommended the appointment before spending very much time working on a habeas corpus petition. Court policies on compensation for habeas petitions vary widely in different appellate districts. Some courts require preapproval of any work done on a petition, and all courts require some preliminary showing of necessity before they will authorize funds for investigation of potential claims.

The reviewing court may, but is not required to, consolidate the appeal and the writ petition. See, *e.g.*, *People v Bennett* (1998) 17 C4th 373, 381, 70 CR2d 850. For discussion of habeas corpus generally, see chaps 9-10.

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§4.35 C. Requesting the Court to Take Judicial Notice

A motion requesting the court to take judicial notice of facts and events outside the record on appeal provides an avenue for drawing the court's attention to extrinsic information in appropriate situations. See Evid C §§451-452. See also *People v Jurado* (1981) 115 CA3d 470, 482, 171 CR 509. Examples of facts that the court may find appropriate for judicial notice include the transcript of a previous trial in the same case, or the legislative history of a pertinent statute. It should be noted, however, that appellate courts are not by their nature fact-finders and are generally reluctant to take judicial notice of facts that could have been but were not presented in the trial court.

NOTE: The power to take judicial notice of a document or record (see Evid C §§451-452) does not necessarily give the court discretion to accept its contents as true. For example, although a court may take judicial notice of judicial records (Evid C §451(a)), the hearsay in those records is not admissible unless it comes within an exception to the hearsay rule. *People v Woodell* (1998) 17 C4th 448, 455, 71 CR2d 241; *People v Esayian* (2003) 112 CA4th 1031, 1037, 5 CR3d 542.

Appellate counsel should file a motion in the appellate court asking it to take judicial notice of appropriate facts or materials either before or (at the latest) concurrently with the brief in which counsel plans to refer to them. If counsel is asking the court to take judicial notice of documents, they should be attached to the request. Counsel should *not* make the request for judicial notice in the brief. See §4.48, for a sample motion requesting the reviewing court to take judicial notice of legislative materials.

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§4.36 D. Federalizing Issues

Many errors can be characterized as errors of state law and as errors of federal constitutional law. If, for example, the trial court has refused a requested instruction relating the effects of voluntary intoxication to express malice aforethought (intent to kill), the refused instruction undoubtedly presents a state law issue concerning the court's obligation to give pinpoint instructions. See *People v Saille* (1991) 54 C3d 1103, 1120, 2 CR2d 364. Depending on the facts of the case, the refusal may also give rise to a colorable claim that the trial court committed federal constitutional error by refusing to instruct on the defendant's theory of the case. See *U.S. v Escobar de Bright* (9th Cir 1984) 742 F2d 1196. The admission of prejudicial other crimes evidence with low probative value may violate state law *and* also deny the defendant due process if it is particularly emotionally charged. See *McKinney v Rees* (9th Cir 1993) 993 F2d 1378. Prosecutorial misconduct may become a due process violation when, for example, it is pervasive, or when the prosecutor invites the jury to infer guilt from the defendant's silence. See *People v Guzman* (2000) 80 CA4th 1282, 96 CR2d 87. A series of related state law errors may give rise to an argument that their cumulative effect denied the defendant due process.

There are two important reasons for federalizing issues when appropriate. First, if you can persuade the reviewing court that the error was constitutional, the *Chapman* standard offers a better chance of reversal than does *Watson*. Second, arguing federal constitutional error in the direct appeal in state court is necessary to preserve any reviewable issues for presentation to the federal courts either on federal habeas corpus or on petition for certiorari to the United States Supreme Court. On exhaustion of state remedies, see §§14.18-14.40; on petitions for certiorari in the U.S. Supreme Court, see chap 12; on federal habeas corpus, see chaps 13-18.

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§4.37 V. KEEPING UP WITH CHANGES IN THE LAW

To be alert to possible grounds for reversible error, it is important for appellate counsel to keep up with developments in the field of criminal law. It is a good idea to be familiar with the previous year's California Supreme Court decisions, paying particular attention to opinions reversing a conviction, granting a petition for a writ in a criminal case, or dissenting from an affirmance. Counsel should also be aware of the issues currently before the supreme court in pending cases. The supreme court's website, at http://www.courtinfo.ca.gov/courts/supreme/recent.htm, contains weekly summaries of cases accepted for review. The Daily Journal (published in Los Angeles and San Francisco) issues monthly compilations of cases pending in the United States and California Supreme Courts.

By studying recent criminal cases decided by the particular district and division in which an appeal is pending, appellate counsel can familiarize him or herself with the justices who will ultimately decide the case. Recent unpublished decisions (available online) may also be helpful; however, they cannot as a general rule be cited as authority. See Cal Rules of Ct 8.1115.

Counsel should also become familiar with recent Ninth Circuit decisions available on the court's website, at http://www.ca9.uscourts.gov, and United States Supreme Court decisions available on the court's website, at http://www.supremecourtus.gov. Counsel should also become aware of recent statutory amendments, additions, and deletions and check the validity of a rule of law in Shepard's Citations on Lexis or KeyCite on Westlaw.

The various appellate projects—the First District Appellate Project, the California Appellate Project in Los Angeles (second district), the Central California Appellate Program (third and fifth districts), Appellate Defenders, Inc. (fourth district), and the Sixth District Appellate Program—periodically give MCLE programs on criminal appellate practice that usually include materials on recent developments. For phone numbers and addresses of appellate projects, see §2.21.

California Appellate Defense Counsel (CADC), an organization composed primarily of attorneys who accept appointments in the court of appeal and the supreme court, has chapters in a number of cities throughout the state, which meet regularly to discuss issues of importance to appellate practitioners. CADC also sponsors an annual MCLE program that focuses on legal issues of interest to appellate practitioners, and maintains a brief bank on its website for the use of its members. Additional information is available at http://www.cadc.net.

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§4.38 A. Retroactivity

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce v Mathis* (1997) 519 US 433, 439, 137 L Ed 2d 63, 117 S Ct 891. This fundamental concept finds expression in several constitutional provisions, notably in the context of criminal law, the ex post facto clause (US Const art I, §10), which "flatly prohibits retroactive application of penal legislation," and the due process clause, which guarantees meaningful notice of what conduct the law permits. 519 US at 440 n12.

In the seminal case on the ex post facto prohibition, *Calder v Bull* (1798) 3 US (3 Dall) 386, 390, 1 L Ed 648, Justice Chase described four categories of ex post facto law:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

See also *Collins v Youngblood* (1990) 497 US 37, 43, 111 L Ed 2d 30, 110 S Ct 2715 ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts"). The ex post facto clause in the California Constitution (Cal Const art I, §9) is interpreted in the same way as its counterpart in the United States Constitution. *Tapia v Superior Court* (1991) 53 C3d 282, 295, 279 CR 592.

Current interpretations of the ex post facto clause, as it relates to punishment, construe its applicability narrowly. See, *e.g., Kansas v Hendricks* (1997) 521 US 346, 138 L Ed 2d 501, 117 S Ct 2072 (civil commitment under Kansas Sexually Violent Predator Act (SVPA) was not punishment under ex post facto clause); *Hubbart v Superior Court* (1999) 19 C4th 1138, 81 CR2d 492 (California SVPA commitment does not violate ex post facto clause); *People v Castellanos* (1999) 21 C4th 785, 88 CR2d 346 (sex registration requirements are not punishment and do not implicate ex post facto concerns); *Wright v Superior Court* (1997) 15 C4th 521, 63 CR 2d 322 (failure to register as sex offender under Pen C §290 is continuing offense; it could be prosecuted as felony even though it was misdemeanor when defendant initially failed to register).

On the other hand, statutes that decrease criminal punishment, or redefine conduct subject to criminal sanctions to benefit defendants, are presumed to be retroactive. *Tapia v Superior Court* (1991) 53 C3d 282, 301, 279 CR 592; *People v Rossi* (1976) 18 C3d 295, 134 CR 64; *In re Estrada* (1965) 63 C2d 740, 48 CR 172. Ultimately, however, legislative intent is controlling. *People v Nasalga* (1996) 12 C4th 784, 50 CR2d 88.

Rules for determining whether a judicial decision can or should be applied retroactively are analogous to the rules governing the retroactivity of legislation. Due process forbids the application of a judicial decision that "would constitute an unforeseeable retroactive expansion of criminal liability" to conduct that occurred before the decision's finality. *People v Sakarias* (2000) 22 C4th 596, 622, 94 CR2d 17. See *Bouie v City of Columbia* (1964) 378 US 347, 353, 12 L Ed 2d 894, 84 S Ct 1697 ("an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law"). See also *Clark v Brown* (9th Cir 2006) 442 F3d 708, 711, amended (9th Cir 2006) 450 F3d 898 ("the California Supreme Court's retroactive application of a new interpretation of *Green* and of the felony-murder special circumstance statute, on direct review, violated [defendant's] due process right to fair warning that his conduct made him death-eligible"). See also *People v Morante* (1999) 20 C4th 403, 430, 84 CR2d 665 (ruling that decision enlarging state court jurisdiction over out-of-state conspiracies cannot be applied retroactively); *People v Martinez* (1999) 20 C4th 225, 238, 83 CR2d 533 (ruling that decision reinterpreting term "substantial distance" for purpose of kidnapping statute could not be applied retroactively).

Ameliorative rules are ordinarily applied retroactively. Decisions announcing new constitutional rules of criminal procedure are ordinarily fully retroactive to all cases not yet final, even if they represent a clear break with the past. *Griffith v Kentucky* (1987) 479 US 314, 93 L Ed 2d 649, 107 S Ct 708 (retroactively applying *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712). See also *Johnson v U.S.* (1997) 520 US 461, 467, 137 L Ed 2d 718, 117 S Ct 1544 (retroactively applying rule announced in *U.S. v Gaudin* (1995) 515 US 506, 132 L Ed 2d 444, 115 S Ct 2310) (materiality of false statements is jury question in perjury prosecution). But see *People v Reyes* (1998) 19 C4th 743, 754, 80 CR2d 734 (relying on *Griffith* to give retroactive effect to decision *narrowing* scope of the exclusionary rule).

Sentencing decisions that benefit the defendant are also ordinarily retroactive. See *People v Superior Court (Romero)* (1996) 13 C4th 497, 530 n13, 53 CR2d 789 (trial court's discretion under Pen C §1385 to strike prior

convictions fully retroactive); *People v Belmontes* (1983) 34 C3d 335, 348 n8, 193 CR 882.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.39 B. Resources

§4.39 B. Resources

The following are good general resources to consult regarding recent changes in the field of criminal law:

- California Criminal Law Procedure and Practice (Cal CEB Annual).
- Witkin & Epstein, California Criminal Law (3d ed 2000).
- Bell's Compendium on Searches and Seizures; available from http://www.compendiumpress.com.
- LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed 2004).
- Harvard Law Review's November issue (United States Supreme Court developments); see http://www.harvardlawreview.org.
- McGeorge Law Review (annual analysis of significant California legislation, called Greensheets); see http://www.mcgeorge.edu/x762.xml.
- Journal of Criminal Law and Criminology (quarterly review of decisions of the United States Supreme Court); see http://www.law.northwestern.edu/jclc.
- Georgetown Law Journal American Criminal Law Review (quarterly review of United States Supreme Court and courts of appeals decisions concerning criminal law and procedure); see http://www.law.georgetown.edu/journals/aclr.
- Millman, Sevilla, Tarlow, & Holzman, California Criminal Defense Practice (1981).

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VI. PREPARING BRIEFS

§4.40 A. General Drafting Principles

An appellate brief is the vehicle by which counsel conveys the following to the court: the essential facts of the case, the questions of law involved, the law that he or she wishes the court to apply, and the specific application desired. *Bell v Germain* (1910) 12 CA 375, 107 P 630; 9 Witkin, California Procedure, *Appeal* §716 (5th ed 2008). A brief is an exercise in persuasion, and should be written for readers who have only a short time to read it. It should flow simply and clearly and every thought should be easily understood.

Appeals are won by convincing the court that an argument is valid, not by impressing the justices with counsel's brilliance. The 1999 spring issue of the University of South Carolina Law Review, starting at 50 SC L Rev 565, is devoted to the art of appellate advocacy. It includes the following articles discussing appellate briefs: Ginsburg, *Remarks on Appellate Advocacy*, 50 SC L Rev 567 (Spring 1999); Hamilton, *Effective Appellate Brief Writing*, 50 SC L Rev 581 (Spring 1999). For additional suggestions on how to approach appellate brief-writing, see *What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates*, 31 NM L Rev 255 (Winter 2001).

The following basic drafting principles are of key importance:

- State the facts accurately; be complete yet concise;
- Make arguments clear and forceful; respect the court and precedent;
- Write legal arguments that reflect thoughtful and sound analysis;
- Give page references to the record where necessary;
- Confine the statement of the case to matters in the appellate record (see Cal Rules of Ct 8.204(a); *Alicia T. v County of Los Angeles* (1990) 222 CA3d 869, 271 CR 513);
- Do not exaggerate the facts, the law, or the degree of supporting authority;
- Include every arguable issue in the case, particularly federal constitutional issues that may be raised in later federal appeals or habeas proceedings (for federal exhaustion requirements in state court appeals, see §§14.18-14.40);
- Omit theoretical dissertations on abstract principles of law; limit the brief to matters necessary to present the client's case properly;
- Avoid repetition;
- Avoid statements that impugn the motives of a trial judge or anyone else unless absolutely necessary (see *Ramirez v State Bar* (1980) 28 C3d 402, 169 CR 206);
- Have a separate heading for each argument; the reviewing court may consider an argument to have been forfeited if it is set forth in a footnote or otherwise not clearly denoted (*People v Senior* (1995) 33 CA4th 531, 537, 41 CR2d 1; *In re David L.* (1991) 234 CA3d 1655, 1661, 286 CR 398); and
- If possible, do not limit the brief to one issue, no matter how strong the point; counsel should have a fallback argument.

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§4.41 B. Statement of Facts

A statement of facts should be clear and should not contain any argument. It should include all facts, pro and con, as well as those reflecting weakness in the opponent's case. A statement in an appellant's opening brief must include those facts showing that prejudicial error occurred. It is better to avoid writing a statement in the form of witness-by-witness summary. It is appropriate to divide the statement of facts under the headings "Prosecution Evidence (or Case)" and "Defense Evidence (or Case)." If the statement is long, additional subheadings may make it easier to read. Some attorneys find it helpful to begin with a short summary that describes in general fashion the circumstances surrounding the charged offenses. This allows the court to see at a glance what the case is about.

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C. Argument

§4.42 1. Exhaustiveness and Supplementation

Appellant's counsel owes a duty to the client to present all arguable issues to the appellate court. See §2.25. It is important for the argument in an opening brief to be exhaustive because ordinarily a party will not be permitted to raise a new question for the first time in the reply (closing) brief. *Grayson v Grayson* (1955) 132 CA2d 471, 282 P2d 565; *Utz v Aureguy* (1952) 109 CA2d 803, 241 P2d 639. When, as occasionally happens, a new issue must be raised in reply, this is appropriately done by a supplemental brief submitted with an application for permission to file it. The application should explain the necessity for belated presentation of the new argument.

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§4.43 2. Organization

Appellate counsel should organize the argument with two goals in mind; emphasizing his or her own case as opposed to following the opposition's argument pattern, and addressing the points raised by the opposition. It is usually wise to begin with the strongest arguments. The court may give less attention to a strong argument if it comes so late in the brief that the court has already been repelled by earlier weaker arguments. However, sometimes a brief is more persuasive if a different, more logical order is followed.

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§4.44 3. Use of Authority

As a general rule, appellate counsel should not make arguments he or she has no faith in. Moreover, counsel must be mindful that an intermediate appellate court is bound by the doctrine of stare decisis to "accept the law declared by courts of superior jurisdiction." *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 455, 20 CR 321. Counsel, however, should make arguments he or she believes to be sound even if there is current case law solidly against the position. This is how new law is made. But in attacking a well-settled rule, counsel should not deceive the court. Nothing will be gained by pretending that a well-established line of cases does not exist. Instead, that authority should be analyzed rigorously and its flaws demonstrated to the appellate court. If the issue is squarely controlled by a decision of the California Supreme Court, it is appropriate for counsel to acknowledge the precedent and state that the issue will be presented in a petition for review by the supreme court. See *People v Birks* (1998) 19 C4th 108, 77 CR2d 848 (after court of appeal declared itself bound by California Supreme Court precedent, state petitioned for review, asking state supreme court to overrule previous decision); *People v Eastman* (1993) 13 CA4th 668, 674, 16 CR2d 608 (in brief to court of appeal, defendant acknowledged case law was against him and asked court to reexamine question). The court of appeal can critique a California Supreme Court case even when it must follow that case. The court of appeal is "bound but not gagged." *People v Hart* (1999) 74 CA4th 479, 487, 86 CR2d 762.

Counsel may wish to quote from a particularly persuasive case to ensure that the justices read the authority in context. Quotations should be accurate and no longer than necessary. Counsel should not omit unfavorable portions of a quotation that might give a different impression and should indicate any omissions of immaterial matter. When in doubt, quote the whole passage.

In citing legal authority that appears favorable, it is imperative not to exaggerate; overstatements are almost certain to backfire. For the same reason, counsel should avoid citing inexactly or inaccurately. If the authority relied on is dictum, counsel should say so candidly and not leave this for opposing counsel to bring up or for the court to discover. Counsel should not strain to make the facts or language of a cited case appear indistinguishable from the facts of his or her own case. It is better to quote directly from the case or to paraphrase its language with precision, then to demonstrate through argument how the case applies to the facts before the court. When the authority cited is arguably distinguishable, counsel must persuade the court that the controlling principle is the same and that the difference is of no consequence.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/ VII. FORMS/§4.45 A. Form: General Information About Criminal Appeals

VII. FORMS

§4.45 A. Form: General Information About Criminal Appeals

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A criminal appeal is very different from a trial. No evidence is presented. No witnesses are called. Almost the whole appeal is conducted on paper, and when the person who is appealing (called the "appellant" in the appellate courts) gets documents from his/her lawyer, they may be difficult to understand, and may seem to have nothing to do with any of the reasons he or she decided to appeal in the first place. Because of this, I have prepared this explanation to help you better understand the process you set in motion when you filed your notice of appeal. Of course, this information is only general. It may not entirely fit your situation. While I am working on your case, I will keep you informed about the specific issues I am working on in connection with your appeal, and I will be happy to hear from you about what seemed important to you at your trial. Of course, the final decision about what constitutes an "appealable issue" is a professional one that I will have to make myself. Please read this information carefully. It contains important information about your rights.

When a defendant in a criminal case appeals, the case is sent to the Court of Appeal, which reviews the written record of the proceedings in the trial court and the briefs submitted by the parties to determine if any errors were committed at trial or in the pre- or post-trial proceedings. The job of the appellate court is not to decide whether you were guilty or innocent, but rather to decide if the trial proceedings were conducted properly. The appellate court will look at what happened in the proceedings at the trial level and decide whether you received a fair trial at which the law and the procedural rules were applied correctly. As a general rule, the only exception to this involves questions concerning the sufficiency of the evidence (whether there was enough evidence to enable a reasonable judge or jury to find you guilty beyond a reasonable doubt). Even in this situation, which occurs relatively infrequently, the Court of Appeal is bound by the evidence that was presented at trial, and will not make new findings of fact.

My primary job is to review the record in your case and to write an opening brief pointing out to the court any errors in the trial proceedings that in my opinion might warrant a reversal of your conviction or a modification of your sentence. Although the number of possible issues is almost infinite, typical appellate issues involve illegal searches and seizures, coerced confessions, evidence improperly excluded or included, jury instructions that misstated the legal issues applicable to your case, and errors in sentencing. Whether any of these issues, or another issue not included in the list, is applicable to your case is something that, of course, I will not know until I have had a chance to read the record in your case.

Occasionally, I find that something occurred in the trial that should not have happened, but there is insufficient evidence in the record to confirm that it occurred or that it was harmful to your case. In that case, I would try to get evidence of what actually happened, and if appropriate, file a petition for a writ of habeas corpus in addition to the brief. If I intend to do so in your case, I will let you know.

Once I have filed the opening brief in your case, an attorney in the Attorney General's office, which handles criminal appeals for the state, will write and file the respondent's brief. If there is an argument in the respondent's brief that I think needs to be countered, I will file a reply brief on your behalf. As a practical matter, although the appellant is not required to file a reply brief, I almost always file one, if only to say that there is no need to reply to any of the arguments made in respondent's brief.

When all the briefs are in, the court sets the case for oral argument. If I think there is any advantage to be gained by arguing your case before the court, I will request argument. Otherwise, I will waive argument and submit the case for decision on the basis of the briefs and the record. Usually, I orally argue my cases.

The Court of Appeal has several choices in deciding your appeal. It can affirm the judgment of the trial court, in which case your conviction and sentence remain unchanged. This is what happens in the great majority of cases. It also can modify the judgment. This usually means that the verdict remains the same, but some aspect of the decision, such as the sentence, or conditions of probation, is changed. Occasionally, the court will reduce a conviction to a lesser included offense, instead of reversing the judgment. The reviewing court can also send the case back to the trial court with directions that require the trial court to do something further to determine whether the judgment should stand or be reversed or modified. Finally, the reviewing court can also reverse the judgment of the trial court, in part or entirely, but this occurs in fewer than 10 percent of the cases that it decides. Even if you gain a reversal, the case will probably not be over. It is very rare for the

Court of Appeal to dismiss a case outright, even when it reverses the trial court's decision. Usually the case is sent back to the trial court for a new trial. Depending on the circumstances of the reversal, the district attorney's office may decide to retry the case on the original counts of conviction. In other cases, it may offer a plea agreement. On occasion, it will dismiss the charge.

The whole appeal process is very slow. After you file your notice of appeal, the clerk and the court reporter in the trial court prepare the record on appeal. The record consists of a verbatim (word-for-word) account of the trial and other proceedings (motion and sentencing hearings, for example), which is called the Reporter's Transcript, and copies of the pleadings, minute orders, written motions, abstract of judgment, preliminary hearing proceedings, probation officer's report, etc., which is called the Clerk's Transcript. It can take several months for the court reporter to transcribe the reporter's transcript when the trial was a long one.

After I have reviewed the record, I often find that I need some additional information in order to represent you properly, and so I must then file a motion to augment (add to) the record. This causes a further delay while the reporter or clerk prepares the additional material I have requested. The opening brief is due 30 days after the augmented record is filed in the Court of Appeal. Sometimes I need more than 30 days to research the case and write the brief. If so, I will request a 30-day extension, which the court is likely to grant if I show "good cause" for an extension. Sometimes, especially in a case with a very long transcript or very complicated issues, I request more than one extension.

The brief is a written argument in which I state the reasons why I think the trial court's decision should be reversed or modified. In the brief, I draw the court's attention to errors that were committed during the proceedings in the court below. I must also show that any errors were "prejudicial." This is a term the court uses to describe an error that was serious enough to affect the outcome of the trial. The Court of Appeal will not ordinarily reverse a conviction or modify a judgment just because there were errors at the trial. Except in very unusual cases, only "prejudicial errors" will result in a reversal or modification.

The respondent's brief is due 30 days after I file the opening brief. The attorney general almost invariably asks for at least one extension, and the court will almost invariably grant one extension, and possibly more.

If I file a reply brief in your case, and I almost always do file one, I usually will do so within 20 days after the respondent's brief is filed. In rare cases I may need to request an extension of time to file the reply brief.

After all the briefs are in, the court will set your case for oral argument. This will take several months from the time the briefing is complete, and I have known the court to take as much as a year. There is no way to speed up this process. If I decide to argue your case, I will appear along with an attorney from the Attorney General's office, before three judges of the Court of Appeal. The argument is very brief (usually up to 15 minutes). There are no witnesses, and no new evidence may be presented. If you are in custody at the time of the argument, you will not be brought to court. If you are out of custody, you are welcome to attend, but you may not participate. Oral argument is public, so your family and friends may attend if they wish.

After the case is submitted to the court, either at the time of argument or after argument has been waived, the Court of Appeal must decide your case within 90 days. The court will write an opinion stating whether the judgment is affirmed, reversed, or modified, and giving the reasons for its decision. Either it will send a copy directly to you, or it will send an extra copy to me which I will forward to you. I should repeat here that the number of reversals and modifications is very low. Most of the time, the court affirms the trial court's judgment. Pessimism is definitely the only appropriate attitude toward the likelihood of winning on appeal.

Occasionally, in reviewing the record in a case, I do not find any significant errors in the lower court proceedings. If this should happen in your case, I will file what is known as a *Wende* brief. A *Wende* brief sets forth a statement of the procedural history of the case (called the Statement of the Case) and a statement of the facts, and asks the court to make an independent review of the record to determine whether there are any arguable issues. You also have a right in this situation to file your own brief calling the court's attention to any errors you believe affected the outcome of the trial. If I decide to file a *Wende* brief in your case, I will write you explaining in detail what your options are. I will also send you a copy of the brief and return your transcripts to you, so that you will be able to review them if you want to file a brief on your own.

I will keep in touch with you about the progress of your appeal. Please feel free to write or call me at any time. I accept collect telephone calls. If you are in custody, you should be sure to write "Attorney-client mail: Confidential" on the envelope of every letter you send to me. Communications between attorney and client are confidential, and authorities in state institutions are not entitled to read them.

If you are in prison, you are probably aware that telephone calls are monitored. Although you are entitled to talk to your attorney on an unmonitored telephone, I have found that prison officials are not always helpful in arranging unmonitored calls, and it often takes substantial advance planning to set up an unmonitored call. I frequently arrange unmonitored calls for my clients, but because of the difficulties involved in arranging them,

they are not really a satisfactory way to communicate about routine matters. Because of this, a number of my clients like to call me periodically on the monitored line just to keep in touch. There are a number of things, such as the status of the appeal and even some legal issues, that I am comfortable discussing on a monitored telephone.

If you are out of custody, and would like to see me, please call my office for an appointment.

You should be extremely cautious about discussing your case with guards, other inmates, visitors, etc., and about what you say on a monitored telephone. If you divulge incriminating information to anyone other than your attorney, you may find that person appearing as a witness against you in a retrial, if your appeal is successful.

If the Court of Appeal does affirm the trial court's judgment, I will review its opinion carefully to decide if there are any further steps I should take in your case. Although there are further steps that can be taken, you should realize that each step after the first appeal is discretionary with the court. As a practical matter, therefore, if the Court of Appeal affirms your conviction, it is likely that further appellate efforts will not be any more successful.

If a party to an appeal is dissatisfied with the appellate court's decision, he or she may, within 15 days of the date the opinion is filed, petition the Court of Appeal for a rehearing, asking the court to reconsider its decision. It rarely does. I usually do not petition the Court of Appeal for a rehearing, even if I disagree with its decision. Ordinarily, I will file a petition for rehearing in two situations. The first is when the Court of Appeal's ruling is based on an incorrect legal principle. The second is when the Court of Appeal has misstated or omitted a material fact or issue, because a petition for rehearing is necessary in this situation to preserve the right of review in the California Supreme Court. Whether I petition for rehearing or not, the decision of the Court of Appeal becomes final 30 days after it was filed.

A party dissatisfied with the decision of the Court of Appeal may petition the California Supreme Court for review within 10 days after the decision becomes final (between 31 and 40 days after the decision of the Court of Appeal is filed). The Supreme Court rarely grants petitions for review. If I believe your case contains a substantial federal question, such as the violation of a federal constitutional right, I will file a petition for review to preserve your right to seek relief in federal court by means of a petition for a writ of habeas corpus in the federal district court, or a petition for a writ of certiorari in the United States Supreme Court. I also will file a petition for review if your case presents an important issue of state law or an issue on which the Courts of Appeal have issued conflicting decisions.

If I decide not to file a petition for review, I will send you your transcripts and the Court of Appeal opinion in time for you to file a petition for review in the California Supreme Court on your own (in pro per). At that time, I will send you some more information about post-appeal proceedings and filing requirements. When review in the California courts has been exhausted, it is possible to seek federal review if your case presents a federal question (such as the violation of a federal constitutional right). Should this possibility be involved in your case, I will provide you with more information at the appropriate time.

I will do my best to provide you with excellent representation. Although even the best representation cannot guarantee a victory on appeal, I will do my best to make sure that all the available issues are presented to the court as effectively as possible, so that your appeal is not lost because of failure to call some important aspect of the case to the court's attention. I look forward to working with you on your appeal.

Comment: It is a good idea for the appellate practitioner to keep a document such as the one reproduced here, explaining the appellate process, on his or her computer, so that it can be sent to new clients at the start of representation. It should be reviewed periodically to keep up with changes in procedure.

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§4.46 B. Form: Application to Reviewing Court for Release Pending Appeal

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

[*Title of court*]

[*Title of case*]	)	**No.** _ _ _ _ _ _
	)	
	)	**APPLICATION FOR**
	)	_ _[*BAIL/REDUCTION IN BAIL*]_ _ **PENDING APPEAL**
_____	)	

To _ _[*name*]_ _**,** _ _[*presiding Justice, and the associate justices of the Court of Appeal of the State of California,* _ _[*number*]_ _ *Appellate District, Division* _ _[*number*]_ _*/Superior Court of the State of California for the County of* _ _ _ _ _ _*, Appellate Division,* _ _[*name*]_ _*, Judge presiding*]_ _**:**

_ _[*Name of applicant*]_ _**, defendant and appellant, respectfully makes application for** _ _[*release/bail/reduction of bail*]_ _ **pending appeal of the judgment of conviction rendered against** _ _[*him/her*]_ _ **by the Superior Court of the County of** _ _ _ _ _ _**, State of California. That court unjustifiably refused the same for the following reasons:**

[*Give reasons*]

Wherefore, defendant and appellant prays that this Court _ _[*release defendant/fix bail in/reduce bail to*]_ _ _ _[*specify amount*]_ _**.**

I _ _[*declare/certify*]_ _ **under penalty of perjury that the foregoing is true and correct.**

Executed at _ _[*location*]_ _**, California, on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Defendant and Appellant

Comment: An application to the reviewing court for release, bail, or reduction of bail pending appeal is not often successful. For an example of a successful request, see *In re McCaughan* (1956) 142 CA2d 690, 298 P2d 871. A motion for release, bail, or a reduction of bail pending appeal can be made only after proper application for bail or a reduction of bail was made to the trial court and that court unjustifiably denied the application. See Cal Rules of Ct 8.312(b). The application must be served on both the district attorney and the Attorney General. Cal Rules of Ct 8.312(c).

California courts have held that a defendant appealing from a felony conviction is not entitled to a stay or bail as a matter of right but only on a showing that the trial court unjustifiably denied a properly made application. However, if the trial court determines that a defendant is entitled to bail on appeal, it should set bail at a reasonable figure within the defendant's financial means. *People v Remijio* (1968) 259 CA2d 12, 66 CR 91.

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§4.47 C. Form: Application to Reviewing Court for Stay of Execution

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

[*Title of court*]

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**APPLICATION FOR STAY OF**
	)	**EXECUTION OF JUDGMENT**
	)	**PENDING APPEAL**
_____	)	

To _ _[*name*]_ _**,** _ _[*presiding Justice, and the associate justices of the Court of Appeal of the State of California,* _ _[*number*]_ _ *Appellate District, Division* _ _[*number*]_ _*/Superior Court of the State of California for the County of* _ _ _ _ _ _*, Appellate Division, Judge* _ _[*name*]_ _ *presiding*]_ _**:**

_ _[*Name of declarant*]_ _**, the defendant and appellant in this cause, declares:**

1. On _ _[*date*]_ _**, defendant and appellant was convicted of** _ _[*state nature of crime*]_ _ **and was** _ _[*sentenced/granted probation*]_ _ **by** _ _[*name*]_ _**, Judge presiding, Superior Court, County of** _ _ _ _ _ _**, State of California,** _ _[*to imprisonment in the state prison/county jail for the term prescribed by law/on the following terms and conditions*]_ _**:** _ _[*Specify*]_ _**.**

2. Defendant and appellant filed a notice of appeal with the clerk of the Superior Court on _ _[*date*]_ _**.**

3. Defendant and appellant filed a notice of appeal with the clerk of the Superior Court on _ _[*date*]_ _**, which court unjustifiably denied the stay for the following reason(s):** _ _[*Specify*]_ _**.**

4. Defendant and appellant respectfully applies to this Court for a stay of execution of the judgment during the pendency of the appeal.

I _ _[*declare/certify*]_ _ **under penalty of perjury that the foregoing is true and correct.**

Executed at _ _[*location*]_ _**, California, on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: An application to a reviewing court for a stay of execution of judgment pending appeal should show that the defendant applied for a stay to the trial court and that the trial court unjustifiably refused to grant the stay. *People v Sullivan* (1952) 110 CA2d 4, 242 P2d 348. The reviewing court may order interim relief pending a ruling on the application. Cal Rules of Ct 8.312(d).

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§4.48 D. Form: Motion for Judicial Notice

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE _ _ _ _ _ _ APPELLATE DISTRICT

People of the State of California, **Plaintiff and Respondent**	**No. _ _ _ _ _ _**
	Superior Court No. _ _ _ _ _ _
vs	**MOTION FOR JUDICIAL NOTICE**
_ _[*Name(s)*]_ _, **Defendant(s) and Appellant(s)**	

MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _ _ _ _ _ _ APPELLATE DISTRICT:

Appellant _ _[*name*]_ _, through his attorney _ _[*name*]_ _, requests this court to take judicial notice of the attached documents as they relate to the issues set forth in appellant's _ _[*opening/reply*]_ _ brief. Authority for this request is found in California Evidence Code §§450, 451(a), 452(a), (c), 453, and 459(d).

The documents submitted for judicial notice include the following:

[*Describe documents. For example:*

1. EXHIBIT A: California Committee Analysis of Senate Bill No. _ _ (_ _[date]_ _ Regular Session), prepared for hearing by the Assembly Committee of Public Safety, _ _[date]_ _.

2. EXHIBIT B: Senate Journal, _ _[date]_ _, page _ _ _.

3. EXHIBIT C: California Committee Analysis of Senate Bill No. _ _ (_ _[date]_ _ Regular Session), prepared for hearing on the Senate Floor, _ _[date]_ _.]

MEMORANDUM IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

The California Evidence Code allows California courts to take judicial notice of appropriate matters. (§450, *et seq*.) This authority extends to appellate courts as well as to trial courts. (§459(d).)

Section 451, listing those matters of which the court is required to take judicial notice, includes the laws of this state. (§451(a).) Section 452(a) permits the court to take judicial notice of any aspect of the law of the state that is not covered by §452. Section 453 requires the court to take judicial notice of any matter included in §452 at the request of a party to an action if that party gives the opposing party or parties sufficient opportunity to respond.

The Law Revision Commission Comment to §450 indicates that the legislative history materials that appellant is requesting this court to judicially notice are among those matters subject to mandatory judicial notice: "Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. Cf. *People v Sterling Refining Co*. (1927)

86 CA 558, 564, 261 P 1080, 1083 (statutory authority to notice 'public and private acts' of legislature held to authorize examination of legislative history of certain acts)." (Accord *Allen v Superior Court* (1959) 171 CA2d 444, 449-450.) Consequently, this court must take judicial notice of these matters at appellant's request, provided respondent has notice of the request and an opportunity to respond.

THEREFORE, appellant respectfully requests this court to take judicial notice of the materials attached hereto as Exhibits A through E.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: The request should be served on counsel for all parties, and if filed by the attorney for a defendant in the case, it should be served on the client as well. Counsel should check with the court or the local appellate project to find out whether to file an original and one copy or an original and three copies.

Comment: A request for judicial notice is not a substitute for filing a petition for writ of habeas corpus in an appropriate case; the reviewing court is unlikely to grant a request to take judicial notice of information if it considers the request an attempt by appellate counsel to introduce evidence at the appellate level that should have been introduced at trial. Such a request is, however, an appropriate way to present relevant legislative history, to call the court's attention to information relied on by the trial court (an almanac, for example, or diagnostic criteria in the Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association), or to present the factual underpinnings for an argument based on the difference in outcome between the trial at issue and an earlier trial without the error complained of on appeal.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/4 Handling a Criminal Appeal/§4.49 E. Form: Application to Expand Appointment

§4.49 E. Form: Application to Expand Appointment

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE _ _ _ _ _ _ APPELLATE DISTRICT

People of the State of California,	)	**No. _ _ _ _ _ _**
Plaintiff and Respondent	)	**Superior Court No. _ _ _ _ _ _**
	)	**MOTION TO EXPAND**
vs	)	**APPOINTMENT TO INCLUDE**
	)	**FILING OF PETITION FOR**
	)	**WRIT OF HABEAS CORPUS**
_ _[*Name(s)*]_ _,	)	
Defendant(s) and Appellant(s)	)	
_____	)	

MOTION TO EXPAND APPOINTMENT TO INCLUDE FILING OF PETITION FOR WRIT OF HABEAS CORPUS

TO THE PRESIDING JUSTICE OF THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT:

_ _[*Name*]_ _, counsel on appeal for _ _[*name*]_ _, appellant in the above-captioned case, moves this court for an order appointing her as counsel for appellant for the purpose of filing a petition for a writ of habeas corpus. This motion is based on the attached declaration of appellate counsel and the attached memorandum, showing good cause for the order.

THEREFORE, appellant respectfully requests this court to grant this application.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

IT IS SO ORDERED.

_____
PRESIDING JUSTICE

DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO EXPAND APPOINTMENT

I, _ _[*name*]_ _, declare:

1. I was appointed by this court to represent appellant in the above-captioned appeal. In that capacity, I have read the record on appeal, talked to trial counsel, and her investigator, and corresponded with my client concerning the facts of the case and the evidence presented at the jurisdictional hearing.

[*Set forth additional facts showing that information outside the record on appeal exists or may be found with further investigation, which would, if proved, warrant a new trial.*]

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ **Respectfully submitted**

_[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION TO EXPAND APPOINTMENT

A defendant in a criminal matter is entitled, under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, §15 of the California Constitution, to the effective assistance of counsel. (*Strickland v Washington* (1984) 466 U.S. 668; *People v Pope* (1979) 23 Cal.3d 412.) To provide effective assistance, counsel must provide representation equivalent to that which would be provided by "a reasonably competent attorney acting as a diligent, conscientious advocate." (23 Cal.3d at p. 424.)

To prevail on a claim of ineffective assistance, a defendant must show either that his attorney's deficient performance deprived him of a potentially meritorious defense (*id*., at p. 425), or that he was prejudiced by counsel's errors, *i.e*., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v Washington*, *supra,* 466 U.S. at p. 694.) Appellant submits that if he is able to obtain competent evidence of the facts set forth in the attached declaration of appellate counsel, he has met both the incompetence prong and the prejudice prong of the test for constitutionally defective assistance of counsel.

[*Counsel should set forth the facts that if proven would entitle defendant to relief on habeas corpus, including legal argument if necessary.*]

[*Continue*]

The evidence appellant has discussed was not presented to the trial court, and is not a part of the record on appeal. Thus, this court can consider it only in the context of a writ petition. Furthermore, the record discloses no reason why trial counsel failed to present this evidence in the first instance. Offering trial counsel an opportunity to explain her acts or omissions when the trial record sheds no light on counsel's reasons for a course of action, which appellant claims was incompetent, is a primary reason for bringing a claim of ineffective assistance of counsel in a writ petition. *People v Pope, supra,* 23 Cal.3d at 426.

The foregoing facts establish good cause for bringing a writ of habeas corpus on appellant's behalf. This court should grant the within motion, and issue its order authorizing appellate counsel to file a petition for a writ of habeas corpus on appellant's behalf.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: A copy should be served on counsel for each party and on the client of the attorney filing the request. Counsel should check with the court or the local appellate project to find out whether to file an original and one copy or an original and three copies.

Comment: In a district that requires a motion to expand the appointment, appointed appellate counsel will not be compensated for any work done on a habeas corpus petition unless such a motion is filed. The motion should set forth in some detail the facts that in counsel's view would, if proved, entitle defendant to relief or that support the assertion that a potentially significant aspect of the case was not properly developed. Counsel should be aware, however, that an order expanding his or her appointment is not an authorization of funds for investigation. If funds for investigation are going to be necessary, counsel will need to include an itemized request for funds in the motion to expand the appointment or make a separate request to the court.

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Hearing and Determination of Appeal

George Schraer

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I. ORAL ARGUMENT

A. In the Court of Appeal

§5.1 1. Judicial Conferencing and Tentative Opinions

Every district and division of the California Court of Appeal has adopted the conference system. Under that system, when a case is calendared for oral argument, it is assigned to a single justice who will write the opinion if he or she is among the majority. The justice to whom the case is assigned reads the briefs and whatever parts of the record he or she thinks necessary, and supervises the preparation of a calendar memorandum. The memorandum may either be an objective analysis of the case or a proposed opinion. Shortly before the conference, the memorandum is sent to the other two justices who have been assigned to the case. These justices may read the briefs and parts of the record. They may also do independent research on the case. The amount of independent work that the other justices do depends on the case itself and the amount of time between distribution of the calendar memorandum and the conference.

At the conference, each judge explains the cases assigned to him or her. The justices usually make a tentative decision but they may engage in further research and, if necessary, confer again before oral argument. Oral argument takes place the next day or a few days later. If oral argument has been waived, the case is usually decided at the conference. After oral argument, the justice to whom the case has been assigned prepares an opinion, which is circulated among the justices for approval, disapproval, or modification. Only those justices who heard oral argument may participate in the opinion. *Moles v Regents of Univ. of Cal*. (1982) 32 C3d 867, 187 CR 557.

With one exception**,** appellate courts do not issue tentative opinions. In the Fourth District Court of Appeal, Division Two, parties receive a tentative opinion before oral argument. Proponents of this procedure argue that it decreases the number and length of oral arguments and makes them more focused. Hollenhorst*, Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 Santa Clara L Rev 1 (1995). This practice does not interfere with the right to present oral argument as long as counsel is given a fair opportunity in argument to persuade the court that its tentative opinion is incorrect. *People v Pena* (2004) 32 C4th 389, 399, 9 CR3d 107.

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§5.2 2. Procedures

The court of appeal is required to give counsel at least 20 days' written notice of oral argument unless "for good cause" the presiding justice shortens the notice period. Cal Rules of Ct 8.256(b), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals). If the court schedules argument on less than 20 days' notice, the clerk is required to inform counsel of the date of argument by telephone "or other expeditious method." Cal Rules of Ct 8.256(b), 8.366(a).

The content of the notice varies from court to court and reflects whether the court is interested in hearing argument. The standard notice in several courts indicates that waiver is acceptable. In most districts, counsel who request argument must give notice to the other parties and file the request with the court. Counsel may also be asked to give a time estimate. Each side may request up to 30 minutes for oral argument. Cal Rules of Ct 8.256(c)(2), 8.366(a). Counsel receives written notice of the oral argument date and time, as well as the names of the justices hearing the case. The court of appeal oral argument calendars are also available online at http://www.courtinfo.ca.gov/courts/calendars.

NOTE: While the rules of court allow up to 30 minutes for argument, it is rare for any party to request more than 15 minutes. In fact, some courts of appeal limit the time for oral argument to 15 minutes or less. In the majority of criminal appeals, the time estimates range between 5 and 10 minutes.

Generally, the appellant or moving party opens and closes, and if a case has multiple parties represented by separate counsel or amicus curiae, the court sets the order of argument and may apportion or expand the allotted time. Cal Rules of Ct 8.256(c)(1)-(2), 8.366(a). Absent court order or local rule, only one attorney may argue for each separately represented party. Cal Rules of Ct 8.256(c)(3), 8.366(a). Amicus curiae may argue only with permission of the court on written application. Cal Rules of Ct 8.256(c)(2), 8.366(a).

Appellants who wish to make a closing argument should alert the court in opening that they wish to reserve time. This time will be deducted from the time that has been allotted to appellant's argument. Any closing argument should be brief and limited to rebuttal.

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§5.3 3. Obtaining Trial Exhibits for Use at Argument

If counsel intends to refer to a trial exhibit during oral argument, it is necessary to arrange for the transmission of the exhibit to the reviewing court. Under Cal Rules of Ct 8.224(a)(1), a party wanting the reviewing court to consider any exhibit admitted, refused, or lodged with the trial court has 10 days from the date on which the last respondent's brief is or could have been filed in the reviewing court to serve and file a notice with the clerk of the trial court specifying such exhibits for transmission to the reviewing court. A copy of the notice must also be served on the reviewing court. Cal Rules of Ct 8.224(a)(3), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals). The other parties have 10 days from the date of service to request transmission of additional exhibits to the reviewing court. Cal Rules of Ct 8.224(a)(2), 8.366(a).

Within 20 days of receipt of the notice, unless the reviewing court orders otherwise, the clerk of the trial court, or the party in possession of the requested exhibits, if they have been returned by the trial court, must send them to the reviewing court, accompanied by two copies of a list of the exhibits sent. Cal Rules of Ct 8.224(b), 8.366(a).

A party desiring transmission of an exhibit after the time specified in Cal Rules of Ct 8.224(a) has elapsed may apply to the reviewing court for permission to have the exhibit transmitted. Cal Rules of Ct 8.224(c), 8.366(a). The reviewing court itself may direct transmission of exhibits at any time. Cal Rules of Ct 8.224(d), 8.366(a).

Under Rule 8.224, the reviewing court has discretion to countermand a party's request for an exhibit, but only by court order. Presumably, the court will serve any such order on the requesting party so that the party will have an opportunity to apply for permission to have the exhibits transmitted. However, the rule does not specify on whom such an order must be served. In addition, Rule 8.224 does not require either the trial court or the reviewing court to notify the requesting party that the exhibits have been transmitted. Thus, it is incumbent on an attorney who desires the court to consider a trial exhibit to follow up on a request for transmission of an exhibit by checking on its status with the clerk of the trial or reviewing court, or both, in a timely manner.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.4 4. Argument and Waiver

§5.4 4. Argument and Waiver

A criminal appellant has the right to present oral argument in the court of appeal; the court may not affirm any judgment without affording appellant an opportunity to present argument. *People v Brigham* (1979) 25 C3d 283, 289, 157 CR 905. At one time, the standard practice was to request oral argument in almost all cases, but current practice in many reviewing courts discourages oral argument in cases that do not present novel or complex issues.

It is proper for the court to notify counsel that it is prepared to decide the case without oral argument, but the notice should not indicate that oral argument will not be helpful to its decision or improperly discourage counsel from requesting argument. *People v Pena* (2004) 32 C4th 389, 400, 9 CR3d 107. It is also proper for the court to request counsel to focus on specific issues of interest to the court. 32 C4th at 400 n6.

NOTE: On receipt of a notice indicating that the court is prepared to decide the case without argument, counsel should carefully consider whether oral argument will be beneficial. However, the final decision always belongs to counsel.

Some reasons to present argument include the following:

- Argument can distinguish your case from other criminal appeals, and ensures that the whole panel, not just the assigned judge, is familiar with the case and appellant's principal arguments. See *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 874, 187 CR 557, quoting Pound, Appellate Procedure in Civil Cases p 393 (1941) ("Good oral argument… is excellent insurance against one-judge decisions").
- Oral argument can make a difference when either the facts or the equities of the case are particularly strong. Of course, the opposite is also true: in some cases the briefs present the strongest possible case, and oral argument may serve only to underscore weak points of fact or law.
- If new appellate cases have been published since the briefing that could affect the outcome of the case, they should be brought to the attention of the court. Both the court and opposing counsel should be notified (in writing if possible) of any new authority that will be cited at oral argument.
- When novel issues or issues of first impression are presented and oral argument can greatly assist the panel by giving the judges the opportunity to ask counsel questions.
- If some point in the briefing of either appellant or respondent requires additional explanation or clarification, oral argument gives counsel an opportunity to provide clarification. Note that it is not proper to use oral argument to raise issues that were not included in the briefing. *People v Niles* (1964) 227 CA2d 749, 758, 39 CR 11 (noting impropriety, but considering and rejecting argument). See also Govt C §68081 (court may not decide case on issue not proposed by parties without allowing briefing; but see also *People v Neilson* (2007) 154 CA4th 1529, 1531, 66 CR3d 116 (Govt C §68081 applies when party does not have opportunity to brief point decided, not when party fails to provide adequate record on appeal)). However, if the court believes the new matter is of sufficient importance, it may allow supplemental briefing. *People v Boyd* (1979) 24 C3d 285, 294 n6, 155 CR 367.
- If, in a case with multiple appellants, one or more coappellants requests argument, counsel should probably also request argument. Note that in many California reviewing courts, counsel will not be allowed to argue without affirmatively requesting argument even if another party has requested argument.

NOTE: Because appellate court practice differs, read the oral argument notice carefully and strictly comply with any instructions in order to avoid inadvertent waiver of oral argument. It is common practice in the court of appeal for the oral argument notice to state that oral argument will be deemed waived unless affirmatively requested within 10 days.

For a discussion on the value of oral argument, see Martineau, *The Value of Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L Rev 1 (1986). For judicial perspectives on the role of oral argument, see Wolff, *From the Mouth of a Fish: An Appellate Judge Reflects on Oral Argument*, 45 St. Louis LJ 1097 (Fall 2001); Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L Rev 35 (1986).

In criminal appeals, the Attorney General will generally agree to waive oral argument if the appellant does. In a prosecution appeal, it may be wise for defense counsel to waive oral argument if the prosecution briefs do not do much damage, if the appeal has little or no merit, and there is nothing to be gained by appearing. Some attorneys believe appellate courts are more receptive to prosecution appeals, and empirical data suggest the rate of reversal of such appeals is higher than the rate of reversal for defendants' appeals.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.5 5. Telephonic and Video Oral Arguments

§5.5 5. Telephonic and Video Oral Arguments

To reduce costs and offer greater convenience to counsel, several appellate districts (First, Fifth, and Sixth), allow counsel to present oral argument by telephone, as an alternative to personally appearing in court. Written notice of the intention to argue by telephone is required, including the telephone number where counsel can be reached at the scheduled time. Failure to be available when the case is called is considered a failure to appear and may result in waiver of the oral argument. Telephone arguments are heard by the justices on the bench in open courtroom.

Courts ask that counsel consider the expense of a personal appearance to the parties and to the state. The decision whether to present oral argument by telephone or in person rests solely with counsel and the parties, except that the court may direct personal appearance. A determination must be made whether the issue can be satisfactorily argued by telephone or whether the case is one whose closeness or complexity demands arguing in person.

In some multi-division districts, it may also be possible to present oral argument through video conferencing. Under this option, although the matter is from another division, counsel goes to the closest appellate court and presents oral argument in a video-equipped room. It should be possible to see and hear the courtroom proceedings and interact with the justices on the bench. As always, the decision to select this option rests with counsel, who should determine whether video or personal argument will be most beneficial. As with telephone conferencing, written arrangements must be made in advance.

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§5.6 6. Oral Presentation Guidelines

When counsel presents oral argument, certain general principles apply. Time is limited, and the justices will already be familiar with the written arguments. They may have reached a tentative decision. Therefore, counsel has to make the argument count. Argue with a sense of conviction and supply the court with a basis for reversal. Speak clearly, construct an effective opening with a clear, concise statement of the facts and the issues, and be flexible enough to respond to court queries or matters raised by opposing counsel's argument. Do not read your oral presentation. See, *e.g.,* US Sup Ct R 28 (United States Supreme Court looks with disfavor on any oral argument read from a prepared text).

Effective argument requires that counsel be completely familiar with the record and the applicable law. Counsel should be able to supply specific references to the record if necessary. Counsel should also have mastery over the cases cited in all the briefs, both to support appellant's points and to rebut those made by respondent. Good oral argument employs the facts and legal theories raised in counsel's brief to answer doubts in the justices' minds caused by legal precedents, the opponent's brief, or apparent inconsistencies in counsel's case.

The presentation, although based on arguments raised in the briefing, should stress important aspects that merit further consideration or clarification. Do not simply read or regurgitate the brief's written arguments. It is also a waste of court and counsel resources to appear at argument and simply ask if the court has any questions. A far more effective presentation consists of one or two specific points that need further elaboration. If counsel intends to refer to a trial exhibit during argument (often an effective tactic), he or she must arrange for the transmission of the exhibit to the reviewing court. Cal Rules of Ct 8.224. For discussion, see §5.3.

The ability to respond meaningfully to questions at oral argument is crucial. Questions from the bench allow counsel to clarify concerns, dispel lingering doubts, and educate the whole panel, not just the inquiring judge. If the court indicates before argument that certain grounds are of interest, counsel should be prepared to address these points first. Be attentive to questions, and answer them immediately, without regard to the planned outline of argument. When counsel does not know the answer to a question, it may be appropriate to offer to submit supplemental briefing on the issue. Carefully consider the ramifications of conceding any points at argument.

If discussion is particularly lively, counsel may run out of time before covering all the pre-planned points. Consider making a final statement that includes these grounds and the belief they are meritorious. If it becomes apparent that the court is well informed on the facts and understands the argument, counsel should end argument. even if the allotted time has not expired.

Appellant may present a final argument, which rather than being a rehash of the opening, should be limited to rebutting points raised in respondent's oral presentation or giving counsel's views on questions that panel members asked opposing counsel. Rebuttal offers appellant the opportunity to have the last word by succinctly pointing out the errors contained in respondent's argument.

PRACTICE TIP: Consider attending an oral argument calendar with the panel that will hear your case before the argument. Much can be learned about the justices' approach to oral argument by observing their interactions with counsel on other cases. Presenting a mock argument in front of colleagues, especially when the issue is complex or counsel expects aggressive questioning, pinpoints problem areas, focuses the presentation, and builds confidence.

The 1999 spring issue of the University of South Carolina Law Review, devoted to the art of appellate advocacy, includes the following articles discussing oral argument: Ginsberg, *Remarks on Appellate Advocacy*, 50 SC L Rev 567 (Spring 1999); Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments*, 50 SC L Rev 591 (Spring 1999); Seamon, *Preparing for Oral Argument in the United States Supreme Court*, 50 SC L Rev 603 (Spring 1999).

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§5.7 7. Submission of Case for Decision

With rare exceptions, such as when the court states it is deferring submission until the filing of supplemental briefs on specified points, cases pending in a court of appeal are submitted for decision when the court has heard oral argument or has approved waiver of oral argument, and the time has passed for filing all briefs and papers. Cal Rules of Ct 8.256(d), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals). Once submitted, the court generally will not receive further information regarding the merits of the appeal. However, the court can vacate the submission by an order specifying the court's reasons and setting a timetable for resubmission. Cal Rules of Ct 8.256(e)(1), 8.366(a).

When the supreme court transfers a case back to the court of appeal after decision, the parties have the right to file supplemental briefs in any case in which the court of appeal issued a written decision (*i.e.,* any decision other than the summary denial of a writ petition within its original jurisdiction). Cal Rules of Ct 8.200(b). The case is deemed submitted on the date that the last timely supplemental brief is or could be filed. Cal Rules of Ct 8.256(d)(2), 8.366(a). On stipulation of the parties, the court of appeal may order the case submitted at an earlier time. Cal Rules of Ct 8.256(d)(2), 8.366(a).

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§5.7A B. In the Appellate Division of the Superior Court

Unless otherwise ordered, all appeals to the appellate division of the superior court, in which the last reply brief was filed, or the date for filing passed, 45 days before the date of the next regular session, must be placed on the calendar for that session. The presiding judge or the appellate division may order an appeal placed on the calendar for oral argument at any session. Cal Rules of Ct 8.885(a) (misdemeanors), 8.929(a) (infractions).

The clerk sends all parties notification of the time and place of oral argument. The notice must be sent at least 20 days before the date set for oral argument. Cal Rules of Ct 8.885(c) (misdemeanors), 8.929(c) (infractions). A party may waive the right to oral argument. Cal Rules of Ct 8.885(d) (misdemeanors), 8.929(d) (infractions). On the court's own motion or on a motion by a party, the court may order that oral argument be conducted by videoconference. See Cal Rules of Ct 8.885(b) (misdemeanors), 8.929(b) (infractions).

Unless the court orders otherwise, the appellant will generally open and close oral argument. If multiple appellants represented by separate counsel appear, the court will set the order of appearance. Cal Rules of Ct 8.885(e)(1) (misdemeanors), 8.929(e)(1) (infractions). Each side may argue 10 minutes in misdemeanor appeals and 5 minutes in infraction appeals. The appellant may reserve time for a reply argument. The court may apportion or expand the time allotted. Cal Rules of Ct 8.885(e)(2) (misdemeanors), 8.929(e)(2) (infractions). Only one counsel may argue for each separately represented appellant. Cal Rules of Ct 8.885(e)(3) (misdemeanors), 8.929(e)(3) (infractions). An appeal is submitted after the court has heard oral argument or has approved the waiver of oral argument, and the time to file any brief or supplemental brief or papers has passed. Cal Rules of Ct 8.886(a) (misdemeanors), 8.925 (infractions). If the court vacates submission, it must state its reasons and offer a timetable for resubmission. Cal Rules of Ct 8.886(a) (misdemeanors), 8.925 (infractions).

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II. DETERMINATION OF APPEAL

A. Opinions in the Court of Appeal

1. In General

§5.8 a. Opinion Must Address Every Issue Raised in Brief

The California Constitution requires appellate courts to issue written opinions containing a statement of reasons. Cal Const art VI, §14. A court of appeal opinion must identify the judges participating in the decision, including the author of the decision and the authors of any dissenting or concurring opinions. A "by the court" opinion must give the names of the three participating judges. Cal Rules of Ct 8.264(a)(2), 8.366 (applying Rules 8.252-8.272 to criminal appeals). The opinion should address every issue raised in the brief, and if it fails to do so, counsel should file a petition for rehearing in order to preserve the issue for review by the supreme court. Pen C §1252. See Cal Rules of Ct 8.500(c)(2).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.9 b. Opinion May Be Based on Unbriefed Issue

§5.9 b. Opinion May Be Based on Unbriefed Issue

A reviewing court may base its decision on an issue that is neither proposed nor briefed by any party to the proceeding, unless it is the summary denial of a petition for extraordinary writ. Govt C §68081. However, before doing so, the court must give the parties the opportunity to submit supplemental briefing on the issue. Govt C §68081. Failure to provide such an opportunity results in a mandatory rehearing upon the petition of any party. Govt C §68081. But see also *People v Neilson* (2007) 154 CA4th 1529, 1531, 66 CR3d 116 (Govt C §68081 applies when party does not have opportunity to brief point decided, not when party fails to provide adequate record on appeal).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/ 2. Unpublished Opinions/§5.10 a. Majority of Criminal Appeals Unpublished

2. Unpublished Opinions

§5.10 a. Majority of Criminal Appeals Unpublished

The great majority of criminal appellate decisions are not published. For discussion of publication criteria, see §5.13. However, unpublished opinions are an excellent source of current case law and reveal the court's perspective on many issues. Although unpublished decisions may generally not be cited to the court (Cal Rules of Ct 8.1115(a)), counsel can make use of their reasoning. Unpublished decisions are available online on the California Courts website, at http://www.courtinfo.ca.gov/opinions for 120 days after issuance, and on other legal databases.

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§5.11 b. Citation of Unpublished Opinions

An opinion of a court of appeal or an appellate division of the superior court that is not certified for publication or ordered published generally may not be cited or relied on by a court or a party in any other action or proceeding. Cal Rules of Ct 8.1115(a). However, such an opinion may be used when (1) the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or (2) the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same appellant or respondent in another such action or proceeding (Cal Rules of Ct 8.1115(b)).

NOTE: Effective December 1, 2006, Fed R App P 32.1 provides that circuit courts must allow parties to cite to unpublished opinions, orders, judgments, and other dispositions issued after January 1, 2007. The Ninth Circuit has implemented this directive with 9th Cir R 36-3, which continues to provide that unpublished dispositions and orders of the court are not precedent (9th Cir R 36-3(a)) but allows attorneys to cite unpublished dispositions and orders issued on or after January 1, 2007 (9th Cir R 36-3(b)).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.12 3. Superseded Opinions

§5.12 3. Superseded Opinions

When the supreme court assumes jurisdiction over a court of appeal case, *e.g.*, by granting review, the decision of the court of appeal is superseded by the action of the supreme court, and will not remain published or be republished unless the supreme court so orders. Cal Rules of Ct 8.1105(e). For discussion of review in the supreme court, see §§5.41-5.50. For a sample petition for review, see §5.54.

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4. Publication

§5.13 a. Standards for Publication

All opinions of the supreme court must be published in the Official Reports. Cal Rules of Ct 8.1105(a). Under Cal Rules of Ct 8.1105(c), however, an opinion of a court of appeal or an appellate division of the superior court should be published in the Official Reports only if the opinion:

(1) Establishes a new rule of law;
(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
(5) Addresses or creates an apparent conflict in the law;
(6) Involves a legal issue of continuing public interest;
(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

Rule 8.1105(d) provides:

> Factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion.

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§5.14 b. Publication Procedure

An opinion of a court of appeal or an appellate division of the superior court must be published if a majority of the court rendering the opinion certifies, before the decision's finality in that court, that it meets one or more of the standards of Cal Rules of Ct 8.1105(c). Cal Rules of Ct 8.1105(b). The supreme court, however, has ultimate authority over publication of decisions in the lower appellate courts; the high court can certify an opinion for publication even though the court issuing the decision has not certified it, and can order depublication of an opinion the issuing court has certified for publication. Cal Rules of Ct 8.1105(d)(2).

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§5.15 c. Requesting Publication or Depublication

Request for publication. Any person may request publication of an opinion. The request must be made within 20 days after the opinion is filed in a letter to the court issuing the opinion that states the nature of the person's interest and explains concisely why the opinion meets one or more of the publication standards. It must be served on each party to the appeal. Cal Rules of Ct 8.1120(a). If the court does not or cannot grant the request for publication, within 15 days after the decision is final, it must send the request, a copy of the opinion, its recommendation for disposition of the request, and a brief statement of its reasons to the supreme court. The court must also send a copy of its recommendation and statement of reasons to the person or persons who have requested publication and to each party to the action. Cal Rules of Ct 8.1120(b).

NOTE: Appellate counsel may wish to ask the court of appeal to publish a reversal, especially if the decision is on an issue counsel considers significant. However, counsel should keep in mind that if a favorable decision is published it is more likely the Attorney General will petition the Supreme Court to review the case and more likely the Supreme court will grant the petition.

Request for depublication. A request for depublication must be made to the supreme court within 30 days after the decision becomes final in the court of appeal. Cal Rules of Ct 8.1125(a). The request must not exceed 10 pages. It must state the requester's interest and explain concisely why the decision should not remain published. It must be served on the court of appeal and all the parties. Cal Rules of Ct 8.1125(a). The court of appeal or any person may respond within 10 days either by joining the request for depublication or by concisely stating the reasons why the decision should remain published. Cal Rules of Ct 8.1125(b). Like the request, the response is limited to 10 pages, and must be served on the parties to the appeal, the court of appeal, and the person who requested depublication. Cal Rules of Ct 8.1125(b). The supreme court must send notice of its disposition of the request to the court of appeal, the parties to the appeal, and the person who made the request. Cal Rules of Ct 8.1125(c).

NOTE: An order of depublication should not be construed as an expression by the supreme court on the correctness of the result or the reasoning in the decision. Cal Rules of Ct 8.1125(d).

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B. Disposition of Case

1. Dismissal

a. Grounds for Dismissal

§5.16 (1) Irregularities in Proceedings

Although they have the inherent authority to dismiss an appeal they cannot or should not hear, California appellate courts generally dispose of appeals on the merits rather than dismissing for some technical defect. *People v Wrice* (1995) 38 CA4th 767, 773, 45 CR2d 193; *In re Jordan* (1992) 4 C4th 116, 131, 13 CR2d 878; *People v Guerrero* (1943) 22 C2d 183, 185, 137 P2d 21. However, substantial irregularity may cause an appellate court to dismiss an appeal. Pen C §1248. Grounds for dismissal include the following:

- The appeal is taken for sole purpose of delay. *People v Rittger* (1961) 55 C2d 849, 13 CR 406.
- Retrial after decision on prosecution appeal would violate defendant's statutory speedy trial rights. *People v Kerwin* (1972) 23 CA3d 466, 473, 100 CR 240.
- The only error alleged is miscalculation of custody credits. Pen C §1237.1. See also *People v Clavel* (2002) 103 CA4th 516, 127 CR2d 660.
- The appeal is from an order entered on a motion made after judgment that did not conform to the requirements of Pen C §1201.5.
- The appeal is sham, frivolous, or without merit. *People v Sumner* (1968) 262 CA2d 409, 413, 69 CR 15.

CAUTION: Note that failure to file an opening brief may lead to the dismissal of an appeal. See Cal Rules of Ct 8.220(a).

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§5.17 (2) Escape of Defendant

A pending appeal may be dismissed if a defendant escapes from custody. Compare *Estelle v Dorrough* (1975) 420 US 534, 43 L Ed 2d 377, 95 S Ct 1173 (automatically dismissing pending appeal when defendant escaped from custody and did not voluntarily surrender within period specified in statute, notwithstanding defendant's recapture 2 days later), with *People v Mutch* (1971) 4 C3d 389, 399, 93 CR 721 (refusing to dismiss appeal of defendant who escaped but was recaptured same day). Dismissal of the appeal is improper, however, if the appeal was initiated after the appellant was recaptured, unless there is a sufficient connection between the appellant's fugitive status and the appeal to warrant dismissal as a sanction. *Ortega-Rodriguez v U.S.* (1993) 507 US 234, 122 L Ed 2d 581, 113 S Ct 1199.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.18 (3) Death of Defendant

§5.18 (3) Death of Defendant

A defendant's death during the pendency of an appeal permanently abates the appeal including all proceedings on the judgment, and the appellate court should direct the superior court to enter a dismissal order to that effect. *In re Jackson* (1985) 39 C3d 464, 480, 216 CR 760; *People v Dail* (1943) 22 C2d 642, 140 P2d 828, overruled on other grounds in *People v Cook* (1983) 33 C3d 400. The same rule applies in federal court proceedings. *Dove v U.S.* (1976) 423 US 325, 46 L Ed 2d 531, 96 S Ct 579.

NOTE: Appellate counsel should file a written request, including a certified copy of the death certificate, asking the court of appeal to dismiss the appeal, vacate the judgment of conviction, and remand to the trial court with directions to dismiss the information. *In re Jackson, supra*; *People v McCoy* (1992) 9 CA4th 1578, 1587, 12 CR2d 476. Such an order not only removes the stigma of conviction but also may affect the inheritance rights of the client's heirs. See, *e.g.,* Prob C §258.

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§5.19 (4) Mootness

A reviewing court may dismiss an appeal on the grounds of mootness if there is no continuing controversy to resolve. However, the court has inherent discretion to resolve an issue that "is of broad public interest and is likely to recur." *Tracy v Municipal Court* (1978) 22 C3d 760, 763, 150 CR 785. A criminal case does not become moot, even when the defendant is no longer in custody, as long as the conviction subjects him or her to continued legal disabilities. *People v Feagley* (1975) 14 C3d 338, 345, 121 CR 509.

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§5.20 (5) Voluntary Dismissal by Defendant

An appellant may dismiss an appeal at any time by filing a written request asking that the appeal be abandoned. Although Cal Rules of Ct 8.316 provides that the abandonment may be signed either by the appellant or the attorney of record, because any abandonment must be done knowingly and intelligently (*In re Anderson* (1971) 6 C3d 288, 293, 98 CR 825), it is better practice (and required in several appellate districts) for both appellant and the attorney of record to sign the request.

If the record has not yet been filed with the reviewing court, the abandonment should be filed in the trial court, and will result in automatic dismissal. If the record has been filed, the abandonment should be filed in the reviewing court, which may order the dismissal. A reviewing court has the power to reject an attempted dismissal to protect public interests or to resolve an issue of first impression that is likely to arise again. *Lucchesi v City of San Jose* (1980) 104 CA3d 323, 326 n2, 163 CR 700.

When the court of appeal orders a dismissal at the request of a party or by stipulation, the decision is immediately final on filing. Cal Rules of Ct 8.366(b)(2)(B). The clerk of the court in which the abandonment is filed is required to notify the adverse party immediately of the abandonment or order of dismissal. If the defendant abandons the appeal of a felony case, the clerk notifies both the district attorney and Attorney General. Cal Rules of Ct 8.316(c)(1).

While an appellant may choose to dismiss an appeal for a variety of reasons, both personal and legal, counsel should be particularly attentive to any possible adverse consequences that could flow from appellate review (*i.e.*, increased sentence, additional fines). Advise appellant immediately of the risks, and if possible, obtain the client's written instructions before proceeding to file a brief.

For further discussion of adverse consequences, see §2.28. See also Form: Abandonment of Appeal, §2.40.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.21 b. Motion to Dismiss

§5.21 b. Motion to Dismiss

Motions in the reviewing court are governed by Cal Rules of Ct 8.54. As with any other motion, a motion to dismiss an appeal must be in writing, with proof of service on all other parties. It must state the grounds for the motion and the relief requested, and identify the documents, if any, on which it is based. Each copy of the motion must be accompanied by a memorandum (commonly called a memorandum of points and authorities) and, if based on matters outside the record, by declarations or other evidentiary support.

Any opposition must be served and filed within 15 days after the motion is filed. Cal Rules of Ct 8.54(a)(3). Failure of an adverse party to serve and file written opposition to a motion may be deemed consent to the granting of the motion. Cal Rules of Ct 8.54(c).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.22 2. Disposition on the Merits

§5.22 2. Disposition on the Merits

A reviewing court has numerous options when determining an appeal. The court may reverse, affirm, modify, or vacate the judgment or order appealed from; set aside, affirm, or modify any or all of the proceedings subsequent to or dependent on the judgment or order; order a new trial; remand the cause to the trial court for such further proceedings as may be just under the circumstances; reduce the degree of the offense or attempted offense; or reduce the punishment imposed. Pen C §§1260 (appeals in felony cases), 1469 (appeals in misdemeanor and infraction cases).

When a motion to dismiss an appeal is filed before the filing of the record on appeal in the reviewing court, it must be accompanied by a certificate of the clerk of the superior court, a declaration, or both, setting forth the following (Cal Rules of Ct 8.57(a)):

- The nature of the action and the relief demanded by the party bringing the action;
- The names, addresses, and telephone numbers of all attorneys of record, stating whom each represents, and the names, addresses, and telephone numbers of all unrepresented parties;
- A description of the judgment or order appealed from, its entry date, and the service date of any written notice of its entry;
- The factual basis of any extension of the time to appeal under Cal Rules of Ct 8.108;
- The filing dates of all notices of appeal and the courts in which they were filed;
- The filing date of any document necessary to procure the record on appeal; and
- The status of the record preparation process, including any order extending time to prepare the record.

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§5.23 a. Affirmance

Most criminal convictions are affirmed on appeal. On affirmance, the original judgment must be enforced. Pen C §1263. There is no need for further arraignment in the trial court. *In re Stallings* (1970) 5 CA3d 322, 332, 85 CR 96, disapproved on other grounds in *People v Cookson* (1991) 54 C3d 1091, 1100, 2 CR2d 176. The trial court's jurisdiction, and thus its options, may depend on the defendant's punishment status at the time of judgment.

For example, if the defendant was committed to state prison and incarcerated there pending appeal, the original judgment is enforced without change. If the defendant was committed to state prison, but is out on bail, the judge will issue a warrant for defendant's arrest. However, if execution of the sentence or probation order was stayed pending determination of the appeal, the trial court may have jurisdiction to impose a less onerous sentence or less stringent terms of probation. A defendant whose order of probation was not stayed pending appeal merely continues on probation. *In re Stallings* (1970) 5 CA3d 322, 329, 85 CR 96, disapproved on other grounds in *People v Cookson* (1991) 54 C3d 1091, 1100, 2 CR2d 176.

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b. Reversal

§5.24 (1) Retrial Permitted

Outright reversal may take place if the court finds error affecting the fundamental fairness and reliability of the trial proceedings. *People v Minor* (1980) 104 CA3d 194, 199, 163 CR 501. When a judgment against the defendant is reversed, the reversal is deemed an order for a new trial unless the appellate court directs otherwise. Pen C §1262. Reversal of a judgment or order ordinarily leaves a proceeding and the parties in the same position they were in before trial. *Odlum v Duffy* (1950) 35 C2d 562, 219 P2d 785; *People v Welch* (1971) 20 CA3d 997, 98 CR 113. The new trial must be held in the court of the county from which the appeal was taken (Pen C §1261), and must follow the reviewing court's rulings as to evidentiary and other matters discussed in the opinion. *Mears v Superior Court* (1960) 186 CA2d 770, 771, 9 CR 113.

The reviewing court may also reverse with specific instructions. Pen C §1262. Thus, for example, a court may order a trial court to enter a judgment of acquittal (*People v Belton* (1979) 23 C3d 516, 527 n13, 153 CR 195), or give the prosecution the option of retrying a greater offense or accepting a reduction to a lesser offense (*People v Kelly* (1992) 1 C4th 495, 528, 3 CR2d 677).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.25 (a) Double Jeopardy Considerations

§5.25 (a) Double Jeopardy Considerations

What are the sentencing consequences for a defendant who, after being tried and sentenced, receives a reversal and retrial as a result of an appeal, but is subsequently reconvicted? The California Supreme Court has determined that, as a general rule, the free exercise of the right to appeal and the state constitution double jeopardy provision (Cal Const art I, §15) bar a court from penalizing a defendant by imposing a more severe punishment on conviction after retrial. *People v Henderson* (1963) 60 C2d 482, 35 CR 77 (life sentence at first trial; death penalty at second declared unconstitutional). See also *People v Hanson* (2000) 23 C4th 355, 97 CR2d 58 (reaffirming *Henderson* and extending holding to restitution fines). Double jeopardy does not preclude a higher term on a reversed substantive offense if the aggregate term (including enhancements) does not exceed the sentence first imposed. *People v Craig* (1998) 66 CA4th 1444, 78 CR2d 659.

A defendant does run the risk of more severe punishment on conviction after retrial when the original sentence was either illegal or unauthorized. *People v Serrato* (1973) 9 C3d 753, 763, 109 CR 65, disapproved on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855. If only part of a sentence is unauthorized, the sentencing court following remand or retrial may not increase the sentence on all counts. *People v Price* (1986) 184 CA3d 1405, 229 CR 550.

Only a valid guilty plea is entitled to double jeopardy protection. *People v Massie* (1998) 19 C4th 550, 563, 79 CR2d 816; *People v Thomas* (1994) 25 CA4th 921, 31 CR 2d 170. Thus, a defendant who challenges the validity of a guilty plea on appeal runs the risk, if the appeal should succeed, not only of an increased sentence, but of a retrial on any charges that could have been brought initially. *People v Superior Court (Garcia)* (1982) 131 CA3d 256, 258, 182 CR 426 (permitting prosecution to seek death penalty by reinstating special circumstances alleged for first time in amended information filed on remand after court of appeal set aside defendant's guilty plea).

In contrast, federal courts have concluded that double jeopardy does not restrict the length of sentence upon reconviction, although the Due Process Clause of the United States Constitution does forbid the imposition of a harsher sentence on retrial when the second sentence is shown to be a product of vindictiveness. *North Carolina v Pearce* (1969) 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 overruled on other grounds in *Alabama v Smith* (1989) 490 US 794, 104 L Ed 2d 865, 109 S Ct 2201. Also, a prosecutor is forbidden from substituting or adding more serious charges on retrial. *Blackledge v Perry* (1974) 417 US 21, 40 L Ed 2d 628, 94 S Ct 2098. For discussion of prosecutorial vindictiveness, see Note*: Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 Harv L Rev 2074 (Spring 2001); Comment, *Interlocutory Appeals in Criminal Trials: Appellate Review of Vindictive Prosecution Claims*, 51 U Cin L Rev 373 (1982).

For discussion of the double jeopardy prohibition against retrial after reversal for insufficiency of the evidence, see §5.27.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.26 (b) Bail After Decision

§5.26 (b) Bail After Decision

A motion for bail on appeal or for release on defendant's own recognizance (OR) may be appropriate when the decision of the court of appeal reverses the judgment. If the decision calls for the dismissal of all charges and/or the immediate release or retrial of the defendant, the criteria of Pen C §1272.1(c) are automatically fulfilled. An immediate motion for bail or for OR in the appellate court, which retains jurisdiction until its decision becomes final for all purposes (including the denial of any petition for review in the supreme court (see Cal Rules of Ct 8.272, 8.366(a) (applying Rules 8.252-8.272 to criminal appeals)), can prevent the defendant from serving the time in custody needlessly. Absent a motion and subsequent order for bail on appeal, the defendant is not entitled to release until, at the earliest, 60 days after the remittitur is filed in the trial court. See Pen C §1382 (trial court must begin new trial within 60 days after issuance of remittitur after reversal on appeal). On the remittitur generally, see §5.34.

PRACTICE TIP: Even if the Attorney General petitions for review, bail may be appropriate if the grounds of the petition would not affect a reversal and retrial ordered by the court of appeal. In appropriate circumstances, defense counsel should consider asking the Attorney General to stipulate to bail. In such a case, it may also be possible to argue that denial of bail while the supreme court considers the Attorney General's petition for review would cause injustice.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/ (2) Retrial Barred by Double Jeopardy Clause/§5.27 (a) Insufficiency of Evidence

(2) Retrial Barred by Double Jeopardy Clause

§5.27 (a) Insufficiency of Evidence

The double jeopardy clause of the United States Constitution precludes trying a defendant a second time after reversal of the conviction on appeal, if the basis for reversal was the insufficiency of the evidence to sustain the guilty verdict. *Burks v U.S*. (1978) 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141. The rule of *Burks* and its progeny applies to trial in California courts. *People v Guillen* (1994) 25 CA4th 756, 31 CR2d 653. The rule also precludes the prosecution from amending the information to charge a different offense based on the same facts. *Sanders v Superior Court* (1999) 76 CA4th 609, 90 CR2d 481.

However, when the conviction is reversed because evidence was improperly admitted, retrial is permitted even if the remaining evidence was insufficient to support conviction. *Lockhart v Nelson* (1988) 488 US 33, 102 L Ed 2d 265, 109 S Ct 285. New proceedings are also permissible when the reversal is based on the weight, rather than the sufficiency, of the evidence. *Tibbs v Florida* (1982) 457 US 31, 72 L Ed 2d 652, 102 S Ct 2211; *People v Hatch* (2000) 22 C4th 260, 92 CR2d 80.

Moreover, double jeopardy does not bar retrial of prior-conviction enhancements in noncapital cases. *Monge v California* (1998) 524 US 721, 141 L Ed 2d 615, 118 S Ct 2246. See also *People v Barragan* (2004) 32 C4th 236, 9 CR3d 76 (retrial of strike allegation not barred by due process, law of the case, or res judicata). Recent United States Supreme Court decisions holding that facts, other than prior convictions, that increase the defendant's punishment beyond the statutory maximum must be tried to a jury and proven beyond a reasonable doubt (see *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348) suggest that double jeopardy principles would bar retrial of conduct enhancements.

Note, however, that even when double jeopardy principles do bar retrial of a conduct enhancement, what is barred may be quite limited. In *People v Santamaria* (1994) 8 C4th 903, 35 CR2d 624, the jury at defendant's first trial found him guilty of murder, but found untrue an allegation that he had personally used a knife. After reversal on an unrelated issue, both parties agreed that double jeopardy barred retrial of the knife-use allegation. The California Supreme Court held, however, that the prosecution could use the evidence that Santamaria had personally stabbed the victim to prove the murder. The defendant's petition for habeas corpus was denied en banc in *Santamaria v Horsley* (9th Cir 1998) 133 F3d 1242.

For discussion of the limitations the double jeopardy prohibition places on disposition after retrial, see §5.25.

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§5.28 (b) Implied Acquittal

Jeopardy attaches when the jury is sworn. *Crist v Bretz* (1978) 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156. Thereafter, if the trial court discharges the jury before it reaches a verdict, the action is equivalent to an acquittal, and double jeopardy principles prohibit retrial unless (1) the discharge is required for legal necessity, or (2) the defendant consents. *Crist v Bretz, supra*; *Curry v Superior Court* (1970) 2 C3d 707, 717, 87 CR 361.

The erroneous discharge of a single juror without consent or legal necessity does not, however, implicate the prohibition against double jeopardy. *People v Hernandez* (2003) 30 C4th 1, 131 CR2d 514. Thus, if a conviction is reversed owing to the trial court's erroneous discharge of a juror, the defendant may be retried. *People v Hernandez, supra*.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.29 (c) Discharge of Defendant

§5.29 (c) Discharge of Defendant

If the appellate court directs a final disposition of the action in the defendant's favor, the court must, if the defendant is in custody, direct that he or she be discharged; or, if on bail, that the defendant's bail be exonerated; or, if money or other property was deposited instead of bail, that it be refunded to the defendant or to the person or persons found by the court to have deposited the money or other property on behalf of the defendant. If the defendant has paid a fine in the case, the fine, including any penalty assessment, must bereturned to the defendant. Pen C §1262.

NOTE: Counsel should be prepared to verify that defendant gets the benefit of the favorable decision; otherwise, the disposition may be overlooked or ignored.

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§5.30 c. Reduction in Degree of Offense (Noncapital Cases)

When the reviewing court concludes that the evidence is insufficient to sustain the judgment but that it supports a conviction of a lesser degree of the offense or a lesser included offense, it may affirm but modify the conviction to the lesser degree or to a lesser included offense. See, *e.g., People v Johnson* (1980) 26 C3d 557, 576, 162 CR 431 (reducing murder conviction from first to second degree based on insufficient evidence to support original degree); *People v Steger* (1976) 16 C3d 539, 128 CR 161 (same); *People v Matian* (1995) 35 CA4th 480, 41 CR2d 459 (reducing conviction of felony false imprisonment to conviction of misdemeanor false imprisonment because evidence was insufficient to support felony conviction). See also *People v Flores* (1974) 12 C3d 85, 115 CR 225 (modifying judgment to second degree burglary because court failed to fix degree before granting probation).

The reviewing court may also modify the conviction to a lesser degree or lesser included offense because of other prejudicial error. In this situation, however, the appellate court may give the prosecution a specified period of time in which to set the case for retrial on the original charges, with the option that, if it fails to do so, the conviction will stand at the lower degree or lesser offense. See, *e.g., People v Edwards* (1985) 39 C3d 107, 118, 216 CR 397; *People v Ordonez* (1991) 226 CA3d 1207, 277 CR 382; *People v Brooks* (1986) 185 CA3d 687, 697, 230 CR 86. See also *People v Alexander* (1983) 140 CA3d 647, 666, 189 CR 906 (modification suggested by Attorney General).

The reviewing court also may modify a judgment to correct a sentencing error, especially when correction of the error does not require the exercise of discretion, *e.g.,* the failure to impose a mandatory enhancement, the imposition of an improper enhancement, or the failure to stay a term under Pen Code §654 (ban on multiple punishment). See, *e.g., People v Jones* (1998) 17 C4th 279, 310, 70 CR2d 793 (modifying sentence for kidnapping for purpose of robbery from life without possibility of parole to life); *People v Adams* (2001) 93 CA4th 1192, 113 CR2d 722 (modifying judgment to strike enhancement improperly imposed under Pen C §368(b)(3)(A)); *People v Chevalier* (1997) 60 CA4th 507, 70 CR2d 482 (modifying abstract of judgment to reflect correct custody credits).

For discussion of unauthorized sentences, see §§2.5, 2.28, 5.25.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.31 d. Remand With Directions

§5.31 d. Remand With Directions

When a reviewing court finds error, but the determination of the effect of the error requires the trial court to exercise its discretion, the court will remand the case to the trial court for the limited purpose of resolving the issue that was erroneously decided in the light of the views expressed in the court's decision. Remands routinely occur when the reviewing court finds sentencing error. See, *e.g., People v Jones* (2001) 25 C4th 98, 104 CR2d 753 (directing court of appeal to remand for resentencing in light of high court's construction of phrase "single occasion" as used in Pen C §667.61(g) (One Strike Law) and the phrase "in the commission of" as used in Pen C §§667.61 and 12022.3); *People v Superior Court* (*Romero)* (1996) 13 C4th 497, 53 CR2d 789 (remanding to trial court to determine whether to exercise discretion to strike Three Strikes priors under Pen C §1385); *People v McGlothin* (1998) 67 CA4th 468, 478, 79 CR2d 83 (declining "Attorney General's invitation to dictate what sentence the trial court should impose" and remanding for resentencing "in a manner not inconsistent with this opinion").

Appellate courts also use limited remand when additional factual findings are necessary to evaluate the effect of a claimed error on the outcome of the case. *People v Bustamante* (1981) 30 C3d 88, 103, 177 CR 576 (superseded on another point by Proposition 8). As the court of appeal explained in *People v Minor* (1980) 104 CA3d 194, 199, 163 CR 501:

> [W]hen the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made.

Courts have remanded for further evidentiary proceedings in a variety of situations. Examples include:

- Remand for a full hearing concerning the reasons for and necessity of terminating a defendant's right of self-representation due to his out-of-court misconduct. *People v Carson* (2005) 35 C4th 1, 23 CR3d 482.
- Remand for determination of whether prosecution of six out of nine counts of child molestation was time-barred. *People v Terry* (2005) 127 CA4th 750, 26 CR3d 71.
- Remand for in camera discovery hearing. *People v Hustead* (1999) 74 CA4th 410, 423, 87 CR2d 875.
- Remand for inquiry into defendant's request that court appoint new counsel to prepare and argue new trial motion due to ineffective assistance of counsel at trial. *People v Winbush* (1988) 205 CA3d 987, 992, 252 CR 722.
- Remand for hearing on defendant's motion for new counsel under *People v Marsden* (1970) 2 C3d 118, 84 CR 156; *People v Minor, supra.*
- Remand to allow inquiry into a prosecutor's reasons for peremptory jury challenges under *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, overruled in part in *Johnson v California* (2005) 545 US 162, 168, 162 L Ed 2d 129, 137, 125 S Ct 2410, and *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712. *People v Tapia* (1994) 25 CA4th 984, 1031, 30 CR2d 851.
- Remand for evidentiary hearing on defendant's speedy trial motion. *People v McCoy* (1983) 147 CA3d 638, 644, 195 CR 285.
- Remand for in camera hearing to determine if informant's evidence could exonerate defendant. *People v Ingram* (1978) 87 CA3d 832, 843, 151 CR 239.
- Remand for hearing on photographic identification procedures. *People v Vanbuskirk* (1976) 61 CA3d 395, 407, 132 CR 30.

When the reviewing court remands to the trial court for a limited purpose, the court of appeal often directs the trial court to reinstate the judgment if no reversible error is found or to order a new trial if prejudice is demonstrated. See, *e.g., People v Hustead, supra*. The resulting decision is itself reviewable on appeal for abuse of discretion. *People v Superior Court (Romero)* (1996) 13 C4th 497, 532, 53 CR2d 789.

PRACTICE TIP: Both prosecution and defense attorneys should be familiar with the rules the courts use in determining

when such a remand is appropriate. The prosecution, as the representative of the state, has an obvious interest in judicial economy. Although it will seldom be to defendant's advantage to ask for a limited remand rather than outright reversal, in some cases, requesting a limited remedy may increase the chances of obtaining some relief for the client; in others, knowing when remand is appropriate—and when it is not—may enable counsel to prevent the prosecution from overreaching.

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§5.32 e. Summary Reversal

Summary determination of a criminal case is very rare. *People v Geitner* (1982) 139 CA3d 252, 254, 188 CR 486. In *Geitner,* the court granted a motion for summary reversal in a case in which reversal was compelled by a decision of the California Supreme Court, explaining that "this procedure would effect a more 'speedy determination of [the] appeal.'" 139 CA3d at 254. See also *People v Browning* (1978) 79 CA3d 320, 145 CR 45 (same).

In *People v Brigham* (1979) 25 C3d 283, 285, 289, 157 CR 905, the California Supreme Court found error in the court of appeal's summary affirmance of a criminal appeal, holding that the California Constitution, case law, statutory law, and the applicable rules of court preclude the court of appeal from summarily affirming a judgment without affording the defendant the opportunity for oral argument. Whether the court of appeal could, consistent with due process, grant summary affirmance after argument is an unanswered question. Note that in both *Geitner* and *Browning*, the court of appeal afforded the parties the opportunity to argue the case before reversing. *People v Geitner*, *supra*; *People v Browning* (1978) 79 CA3d 320, 322, 145 CR 45.

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III. FINALITY OF DECISIONS

A. In the Supreme Court and Court of Appeal

§5.33 1. Date of Finality

In the court of appeal. A decision of the court of appeal, including an involuntary dismissal of the appeal, ordinarily becomes final as to that court 30 days after filing. Cal Rules of Ct 8.366(b)(1). For discussion of dismissal, see §§5.16-5.21. In the following instances, a decision is final when filed (Cal Rules of Ct 8.366(b)(2)):

- Denial of an application for bail (or reduction of bail) pending appeal and
- Dismissal of an appeal on request or a stipulation.

Notwithstanding Cal Rules of Ct 8.366(b)(1), the court of appeal may order early finality of a decision granting or denying a writ petition after issuing an alternative writ or an order to show cause, if early finality will prevent mootness or frustrate relief granted or otherwise promote the ends of justice. Cal Rules of Ct 8.490(b)(3). Notwithstanding Cal Rules of Ct 8.387(b)(2)(A), the denial of a petition for writ of habeas corpus without issuance of an order to show cause, if filed on the same day as the decision in a related appeal, does not become final in the court of appeal until the date of finality of the related appeal. Cal Rules of Ct 8.387(b)(2)(B). See also *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1024, 269 CR 720 (rule that court of appeal's denial of writ petition within its original jurisdiction is final when filed does not apply to cases in which court hears argument and resolves matter by full, written opinion, even if appellate court never issued alternative writ or order to show cause). If the court of appeal orders a rehearing, the decision denying the writ of habeas corpus is final when its decision on rehearing is final. Cal Rules of Ct 8.387(b)(2)(B).

The court may modify a decision until the decision becomes final. Cal Rules of Ct 8.264(c)(1), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals).

NOTE: If the date of finality falls on a day that the clerk's office is closed, the decision may be modified or rehearing granted or denied until the close of business on the next day the clerk's office is open. Cal Rules of Ct 8.264(c)(1), 8.366(a).

A modification of the decision without change to the judgment during the rehearing period does not change the date of finality. However, if the judgment is modified during that time, the 30-day period begins to run anew from the date of modification. Cal Rules of Ct 8.264(c)(2), 8.366(a). The order modifying the opinion must state whether it changes the judgment. Cal Rules of Ct 8.264(c)(2), 8.366(a). If the court orders publication of a decision it issued as an unpublished decision, the finality period runs from the date on which the publication order was filed. Cal Rules of Ct 8.264(b)(3), 8.366(a).

The finality of a decision is determined by the California Rules of Court and is not affected by the possibility that the United States Supreme Court might grant certiorari. *In re Edgerly* (1982) 131 CA3d 88, 91 n1, 182 CR 235.

In the supreme court. Supreme court decisions ordinarily become final 30 days after filing unless the court orders a shorter time, or, before the expiration of the 30-day period or any extension, it orders one or more additional periods not to exceed a total of 60 additional days. Cal Rules of Ct 8.532(b)(1). The following supreme court decisions are final when filed (Cal Rules of Ct 8.532(b)(2)):

- An order denying a petition for review of a court of appeal decision;
- An order dismissing review (see Cal Rules of Ct 8.528(b));
- An order transferring the case to the court of appeal without decision but with instructions for further proceedings (see Cal Rules of Ct 8.528(d) (when review granted), 8.528(e) (when case transferred to supreme court before decision in court of appeal);
- The denial of a writ petition within the supreme court's original jurisdiction if no alternative writ or order to show cause is issued; and

- The denial of a petition for writ of supersedeas.

The supreme court may modify a decision or grant rehearing until a decision becomes final in that court under the rules applicable to modification and rehearings in the court of appeal. Cal Rules of Ct 8.532(c), 8.536(a). See Cal Rules of Ct 8.264(c) (modification), 8.268(a) (rehearing), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals).

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§5.34 2. Remittitur

After final determination of an appeal, the reviewing court issues a remittitur (called a "certificate of the judgment" in Pen C §1265(a)), a document that returns jurisdiction to the court or other tribunal that had original jurisdiction in the case. Issuance of the remittitur divests the reviewing court of jurisdiction in the matter; all orders necessary to carry the judgment into effect will be made by the court or other tribunal to which the certificate is remitted. If, however, a judgment has been affirmed on appeal, a petition for a writ of error coram nobis or a motion to vacate the judgment must be made in the court that affirmed the judgment on appeal. Pen C §1265(a).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.35 a. Issuance

§5.35 a. Issuance

In the court of appeal. The court of appeal must issue a remittitur after a decision on appeal. Cal Rules of Ct 8.272(a), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals).

If the case is not reviewed in the supreme court, the clerk of the court of appeal issues the remittitur when the supreme court denies review or dismisses review, or when the time for granting review expires. Cal Rules of Ct 8.272(b)(1), 8.366(a). If the supreme court grants review, the clerk of the court of appeal issues the remittitur immediately on receiving the supreme court's remittitur (see Cal Rules of Ct 8.540) unless there will be further proceedings in the court of appeal. Cal Rules of Ct 8.272(b)(2)(A).

For good cause, the court of appeal may stay the issuance of a remittitur (or may recall a remittitur that has already issued) (Cal Rules of Ct 8.272(c)(2), 8.366(a)):

- By stipulation;
- At the request of a party; or
- On its own motion.

The court may order immediate issuance of a remittitur only if the parties stipulate to its immediate issuance or if the appeal is dismissed by stipulation or voluntarily by the appellant (see Cal Rules of Ct 8.244(c)(2)). Cal Rules of Ct 8.272(c)(1), 8.366(a).

NOTE: Counsel should be aware of the time limitations for bringing a successful criminal appellant back to trial after issuance of a remittitur. Penal Code §1382 requires that a criminal appellant be brought to trial within 60 days after the filing of the remittitur in the trial court, subject to waiver and the other exceptions relating to statutory speedy trial rights. *Gallenkamp v Superior Court* (1990) 221 CA3d 1, 270 CR 346. Also, if the appeal has resulted in a reversal entitling the appellant to release, counsel should consider seeking a stipulation from the Attorney General for the immediate issuance of the remittitur.

In the supreme court. The supreme court must issue a remittitur after decision in (Cal Rules of Ct 8.540(a)):

- A case on review after decision in the court of appeal;
- An appeal from a judgment of death; or
- A case transferred from the court of appeal to the supreme court for decision under Cal Rules of Ct 8.552.

The supreme court may stay the issuance of a remittitur or recall a remittitur already issued for good cause, either on its own motion or on the motion of a party. Cal Rules of Ct 8.540(c)(2). It may direct the immediate issuance of a remittitur for good cause or on the parties' stipulation. Cal Rules of Ct 8.540(c)(1).

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§5.36 b. Transmission

To issue the remittitur, the clerk of the court of appeal (1) enters the remittitur into the record of the case; (2) sends a copy of the remittitur and a file-stamped copy of the court of appeal opinion (plus the supreme court's remittitur and a file-stamped copy of the supreme court's opinion if they exist) to the lower court or tribunal; and (3) immediately notifies the parties. See Cal Rules of Ct 8.272(b)(2), (d)(1), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals in court of appeal). If the decision on appeal directly modifies a sentence, custody credits, or the maximum term of confinement of a Division of Juvenile Justice inmate, the clerk must notify the Department of Corrections and Rehabilitation or the Division of Juvenile Justice. Cal Rules of Ct 8.268(d)(2), 8.366(a).

For duties of the clerk of the supreme court in issuing the remittitur and notifying the parties of its issuance, see Cal Rules of Ct 8.272(d), 8.540(b).

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§5.37 c. Grounds for Recall

An appellate court has discretion to order recall of the remittitur and reinstate the appeal in certain situations. Because this is a step rarely taken, the extent of the court's discretion in this area is poorly defined. Typical cases involve fraud or a mistake in fact that resulted in a miscarriage of justice. See *In re Martin* (1962) 58 C2d 133, 139, 23 CR 167 (appellant did not know attorney had abandoned appeal); *People v Bartges* (1954) 128 CA2d 496, 497, 275 P2d 518 (reviewing court mistakenly affirmed prior convictions that had been stricken); *In re Rothrock* (1939) 14 C2d 34, 92 P2d 634. A remittitur can also be recalled on the ground of ineffective assistance of appellate counsel. *People v Valenzuela* (1985) 175 CA3d 381, 391, 222 CR 405, overruled on other grounds in *People v Flood* (1998) 18 C4th 470, 490 n12, 76 CR2d 180.

In *People v Kang* (2003) 107 CA4th 43, 131 CR2d 447, the court of appeal granted the defendant's motion to recall the remittitur and reinstated his appeal, which had been dismissed after the defendant fled the country. The court suggested that, in these circumstances, when the court does have the power to reinstate an appeal, that power "'should only be exercised in those cases where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong upon the appellant.'" 107 CA4th at 49, quoting from *People v Clark* (1927) 201 C 474, 479, 259 P 47.

An appellate court order recalling a remittitur and setting the appeal for further hearing does not supersede the opinion or affect its publication status. Cal Rules of Ct 8.272(c)(3) (court of appeal), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals in court of appeals), 8.540(c)(3) (supreme court). This permits the appellate court simply to vacate its order of recall instead of redeciding the case on the merits if the remittitur was recalled in error. See *People v Randazzo* (1957) 48 C2d 484, 310 P2d 413.

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§5.38 B. In the Appellate Division of the Superior Court

Unless a new trial is to take place in superior court, after the time period for a transfer has passed, the clerk of the appellate division of the superior court remits a certified copy of the judgment of the appellate division and of its opinion, if any, to the court from which the appeal was taken. The appellate division clerk also returns to the trial court all the original records, exhibits, orders, affidavits, papers, and documents (except for the certification for transfer, the transcripts or statement on appeal, briefs, and the notice of appeal) that were sent to the appellate division in connection with the appeal. Cal Rules of Ct 8.890(a)-(b) (misdemeanors and infractions). See also Cal Rules of Ct 8.870(e) (misdemeanors), 8.921(e) (infractions).

After the certified copy of the judgment has been remitted to the lower court, the appellate division has no further jurisdiction in the case; the lower court will make all orders necessary to carry its judgment or order into effect or otherwise proceed in conformity to the decision on appeal. *Gallenkamp v Superior Court* (1990) 221 CA3d 1, 10, 270 CR 346 (appellate court loses jurisdiction on issuance of remittitur and inferior court regains jurisdiction).

The appellate division may direct the immediate issuance of the remittitur only on stipulation of the parties or on dismissal of the appeal by request or stipulation of the parties. Cal Rules of Ct 8.890(c)(1). The appellate court may recall or stay the issuance of a remittitur for a reasonable period of time, for good cause, on a party's or its own motion, or on stipulation. Cal Rules of Ct 8.890(c)(2). See also Cal Rules of Ct 8.855(b) (misdemeanors), 8.904(b) (infractions) on appeal abandonment and its affect on jurisdiction. After issuance of an opinion, an order recalling a remittitur does not supersede the opinion or affect its publication status. Cal Rules of Ct 8.890(c)(3).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/ IV. PETITION FOR REHEARING/§5.39 A. In Supreme Court and Court of Appeal

IV. PETITION FOR REHEARING

§5.39 A. In Supreme Court and Court of Appeal

A reviewing court may order rehearing of any decision that is not final in that court on filing. Cal Rules of Ct 8.268(a)(1) (court of appeal), 8.366 (applying Rules 8.252-8.272 to criminal appeals in court of appeals), 8.536(a) (supreme court). For decisions that are final on filing, see Cal Rules of Ct 8.366(b) (court of appeal), 8.532(b)(2) (supreme court). On finality, see §5.32.

Rule 8.268 governs the procedures for filing petitions for rehearing in both the court of appeal and the supreme court. See Cal Rules of Ct 8.366(a), 8.536(b). A party seeking rehearing in either court must serve and file a petition within 15 days after the filing of (Cal Rules of Ct 8.268(b)(1)):

- The decision;
- An order for publication of a previously unpublished court of appeal opinion, if the party has not already filed a petition for rehearing; or
- A modification order that changes the judgment.

An answer to a petition for rehearing is allowed in the court of appeal only at the request of the court. Cal Rules of Ct 8.268(b)(2), 8.366(a). Ordinarily, the court will not grant a rehearing unless it requests an answer. Cal Rules of Ct 8.268(b)(2), 8.366(a). Any answer is due within 8 days of the filing date of the court order requesting an answer unless the court orders otherwise. Cal Rules of Ct 8.268(b)(2), 8.366(a).

In the supreme court, a party may file an answer to a petition for rehearing without the court's permission. Any answer must be served and filed within 8 days after the petition for rehearing is filed. Cal Rules of Ct 8.536(b).

In both courts, the petition and any answer should conform to the general requirements for appellate briefs in Cal Rules of Ct 8.204, 8.366(a). Cal Rules of Ct 8.268(b)(3), 8.366(a), 8.536(b).

For good cause and before the decision is final, either the court of appeal or the supreme court may grant a party leave to file a late petition for rehearing. Cal Rules of Ct 8.268(b)(4), 8.366(a), 8.536(b). If the reviewing court does not rule on a petition for rehearing before the decision is final, the petition is deemed denied. Cal Rules of Ct 8.268(c), 8.366(a), 8.536(b).

NOTE: The court of appeal has no authority to extend the time for ruling on a petition for rehearing. Cal Rules of Ct 8.268(c), 8.366(a). The supreme court may extend the date of finality up to a maximum of 90 days after filing. Cal Rules of Ct 8.532(b)(1), 8.536(c).

An order granting the petition vacates the decision and sets the case "at large" before the court. Cal Rules of Ct 8.268(d), 8.366(a), 8.536(e); *Miller & Lux, Inc. v James* (1919) 180 C 38, 179 P 174. Despite this expansive language, the courts often grant rehearing and modify the opinion (or the judgment) without ordering argument or additional briefs.

PRACTICE TIP: As a practical matter, rehearing is rarely granted. The practice of some appellate practitioners of firing off an irate petition for rehearing to the court of appeal explaining in detail why the court was wrong rarely provides any material benefit to the client.

Counsel should, however, file a petition for rehearing in the court of appeal if:

- The court renders a decision based on an issue that was not proposed or briefed by any party to the proceeding and did not give the parties an opportunity to present their views on the matter through supplemental briefing;
- The court's opinion omits or misstates an issue argued in the briefs;
- The court's opinion omits or misstates a material fact; or
- The court's opinion rules in the client's favor on an issue but fails to order all the relief that flows from the ruling (*e.g.,* reversing a strike for lack of proof but failing to reverse an enhancement that was based on the same prior conviction);

- A recent case, decided after the reply brief was filed, comes to a different result then the court of appeal.

Under Govt C §68081, the court may rest its decision on an issue the parties did not brief, but unless it has asked for supplemental briefing on the question, it must order rehearing on the timely petition of any party. If the decision of the court of appeal omits or misstates an issue or a material fact, the aggrieved party must have brought the omission or misstatement to the attention of the court of appeal in a petition for rehearing to argue the omission or misstatement in the supreme court. Cal Rules of Ct 8.500(c)(2).

Courts will not grant rehearings on points of law that were not presented in the original brief or argument unless the ground for the rehearing is a subsequent development that could not previously have been brought to the court's attention. *People v Payne* (1977) 75 CA3d 601, 605, 142 CR 320.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.40 B. In Appellate Division of the Superior Court

§5.40 B. In Appellate Division of the Superior Court

At any time before a judgment of an appellate division becomes final, on a party's petition or on the court's own motion, the appellate court may vacate the judgment and order a rehearing. Cal Rules of Ct 8.889(a) (misdemeanors and infractions). A petition for a rehearing must be served on all adverse parties before filing and filed, with proofs of service, within 15 days after (Cal Rules of Ct 8.889(b)):

- The decision is filed;
- A publication order is filed, which restarts the finality period as outlined in Cal Rules of Ct 8.888(a)(2);
- A modification changing the appellate judgment is filed, which restarts the finality period as outlined in Cal Rules of Ct 8.888(b)(2).

An answer to the petition may be filed only on specific request of the appellate division. The clerk must immediately send copies of any order requesting an answer and notify the parties as well by telephone or other "expeditious" method. The answer should be served on the petitioning party and filed, accompanied by proof of service, within 8 days after service of the petition. A petition for rehearing generally will not be granted unless the court has requested an answer. Cal Rules of Ct 8.889(b)(2) (misdemeanors and infractions). The petition and answer must comply with procedures set forth in Cal Rules of Ct 8.883, governing the content and form of briefs. Cal Rules of Ct 8.889(b)(3) (misdemeanors and infractions). For good cause and before the decision is final, the presiding judge may relieve a party from a failure to file a timely petition or answer. Cal Rules of Ct 8.889(b)(4) (misdemeanors and infractions). Nonetheless, if the court does not rule on the petition for rehearing before the decision is final, the court has lost jurisdiction and the petition is deemed denied. Cal Rules of Ct 8.889(b)(5) (misdemeanors and infractions). If a rehearing is ordered, the appellate division may place the case on the calendar for further argument or submit it for decision. Cal Rules of Ct 8.889(d) (misdemeanors and infractions).

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V. PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT

§5.41 A. Grounds for Review

The California Supreme Court may review a decision of the court of appeal either on a petition for review filed by a party or on its own motion. Cal Const art VI, §12; Cal Rules of Ct 8.500, 8.512(c). Review is discretionary. The supreme court may order review (Cal Rules of Ct 8.500(b)):

- To secure uniformity of decision or settle an important question of law;
- When the court of appeal was without jurisdiction;
- When the decision of the court of appeal lacks the concurrence of sufficient qualified judges; or
- To transfer the case back to the court of appeal with instructions for further proceedings.

A petition for rehearing is ordinarily not a prerequisite for a petition for review, but it is a necessity if the petitioner wants to challenge the court of appeal's statement of the facts or issues. See Cal Rules of Ct 8.500(c), discussed in §5.39.

WARNING: If the court of appeal affirms the judgment of conviction and denies a related petition for writ of habeas corpus without issuing an order to show cause, a party seeking review of both decisions must file two separate petitions for review unless the court of appeal has formally consolidated the two proceedings.

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§5.42 B. Factors to Consider in Deciding Whether to Seek Review

The decision to file a petition for review is discretionary. Therefore, counsel needs to evaluate, upon receipt of the court of appeal opinion, not only whether the opinion contains grounds for review, but whether such a petition will benefit the client. While a straight affirmance generally poses no risks, there may be situations in which the appellant has partially benefited from a court of appeal opinion (*e.g.,* sentence reduction) and could suffer an adverse consequence if the supreme court grants review. It is not possible to guarantee that the court will limit its review to a particular issue because the court has the authority to hear the entire cause. Cal Rules of Ct 8.516(a)(2). Therefore, counsel should consider all possible ramifications and inform the appellant of any negative possibilities before filing such a petition.

Defense counsel should make the decision of whether or not to petition for review promptly upon receiving the decision of the court of appeal. An attorney who decides not to petition for review should immediately notify the defendant, so that he or she has time to file a pro per petition. On time limits for filing the petition, see §5.43.

When appellant's claims on appeal assert violation of the United States Constitution or laws, appellate counsel must exhaust state remedies to preserve the client's right to pursue federal court review by way of writ of habeas corpus. *Rose v Lundy* (1982) 455 US 509, 71 L Ed 2d 379, 102 S Ct 1198; *Reiger v Christensen* (9th Cir 1986) 789 F2d 1425, 1427. To exhaust state remedies, the defendant must "fairly present" each federal claim to the highest court in the state with jurisdiction to hear it. *Duncan v Henry* (1995) 513 US 364, 365, 130 L Ed 2d 865, 868, 115 S Ct 887. To exhaust state remedies in California felony cases, it is necessary to present each potential federal issue to the California Supreme Court in a petition for review. Often, these federal issues do not meet the California Supreme Court's criteria for granting review. See Cal Rules of Ct 8.500(b), discussed in §5.41. On federalizing issues on appeal, see §4.36. Exhaustion of state remedies is discussed in §§14.18-14.40.

When the sole purpose of filing a petition for review is to preserve the client's right to federal review of such issues, counsel may file an abbreviated petition for review under Cal Rules of Ct 8.508. For further discussion of the exhaustion petition, see §5.44.

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C. Procedural Rules

§5.43 1. Petition

When to file. A party seeking review must serve and file a petition within 10 days after the decision of the court of appeal becomes final as to that court, *i.e.,* within 40 days of the issuance of the opinion. Cal Rules of Ct 8.500(e). Note that Rule 8.500(e)(1) states explicitly that finality of the court of appeal decision is *not* extended if the 30th day after its filing falls on a Saturday, Sunday, holiday, or other day the clerk's office is closed. The ordinary rules, extending the filing deadline to the next day when the clerk's office is open, do, however, apply if the 40th day after decision is a day on which the clerk's office is closed. The supreme court clerk must accept a petition for review submitted for filing before the decision of the court of appeal is final and must file it on the day after the decision becomes final as to the court of appeal. Cal Rules of Ct 8.500(e)(3).

The time for filing a petition for supreme court review of a court of appeal decision may not be extended. The Chief Justice may relieve a party from a default for failure to file a timely petition for review if the time within which the court could order review on its own motion has not expired. Cal Rules of Ct 8.60(d), 8.500(e)(2). Such relief is, however, rarely granted.

PRACTICE TIP: Even if undecided about whether to file a petition, calendar the petition due dates upon receipt of the court of appeal opinion (31 to 40 days from date of issuance) to avoid rejection of a late-filed petition.

Service and filing. An original and 13 copies of the petition must be filed. Cal Rules of Ct 8.44(a)(1). The petition must name each party and must be served on the attorney representing every party to the appeal, on the clerk of the trial court, and on the clerk of the court of appeal that rendered the decision. Cal Rules of Ct 8.500(f). If the petition is filed on behalf of a defendant, it should be served on counsel's client. See Cal Rules of Ct 8.360(d).

Form and contents of petition. The petition should generally conform to the requirements for appellate briefs set forth in Cal Rules of Ct 8.204. Cal Rules of Ct 8.504(a). If the petition seeks review of a court of appeal opinion or order, that opinion or order must be attached to the back of the original petition and each copy filed with the supreme court. The date that the opinion or order was filed and entered must be shown and any opinion or order that modifies or publishes the opinion or order to be appealed must be also attached. Cal Rules of Ct 8.504(b)(4)-(5). The title of the case and designation of parties on the cover of the petition must be identical to the title and designation of parties in the court of appeal decision or order. Cal Rules of Ct 8.504(b)(6). If a petition for rehearing could have been filed in the court of appeal, the petition must state whether one was filed and, if it was, how the court ruled. Cal Rules of Ct 8.504(b)(3).

The body of the petition should start with a "concise, nonargumentative statement of the issues presented for review" and should clearly explain why the case is appropriate for review under Cal Rules of Ct 8.500(b). Cal Rules of Ct 8.504(b). Although the issue statement should frame the issues in terms of the facts of the case, it should not go into unnecessary detail. Cal Rules of Ct 8.504(b)(1). If produced on a computer, the petition must not exceed 8400 words and the petitioner must include a certificate stating the number of words in the petition. Cal Rules of Ct 8.504(d)(1). A typewritten petition may not exceed 30 pages. Cal Rules of Ct 8.504(d)(2). The word or page limit does not include tables, the court of appeal opinion, attachments, or the word-count certification. Cal Rules of Ct 8.504(d)(3).

NOTE: Counsel may rely on the word count generated by the word processing program used to produce the document. Cal Rules of Ct 8.504(d)(1).

The only attachments allowed are (Cal Rules of Ct 8.504(e)(1)):

- The opinion or order (including date filed and entered) that is the subject of the petition.
- Any order or opinion modifying or publishing the appealed opinion or order.
- Exhibits or orders of the trial or appellate court that the petitioner considers to be of unusual significance. (These may not exceed 10 pages.)

- Copies of relevant citable materials that are not readily available, *e.g.,* local, state, or federal rules and regulations, or out-of-state statutes.

The petition may incorporate by reference arguments or authorities cited in a petition for review, answer, or reply by another party in the same case, or in a connected case in which a petition for review is also pending or has been granted. Incorporation by reference is not otherwise allowed. Cal Rules of Ct 8.504(e)(3).

For good cause, the Chief Justice may permit a longer petition, answer, reply, or attachment on written application. Cal Rules of Ct 8.504(d)(4).

A sample form for petition for review is included in §5.54. See also California Criminal Law Forms Manual §42.2 (2d ed Cal CEB 2005).

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§5.44 2. Petition for Review to Exhaust State Remedies

The California Rules of Court provide a procedure for filing a petition for review when the sole reason for filing the petition is to exhaust state remedies. Under Cal Rules of Ct 8.508, an exhaustion petition must include:

- The words "Petition for Review to Exhaust State Remedies," featured prominently on its cover;
- A statement that the case presents no grounds for review under Rule 8.500(b) and that the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;
- A brief statement of the procedural history of the case, including the nature of the conviction and the punishment imposed; and
- A brief statement of the factual and legal bases of the petitioner's claim or claims.

A petition filed for the sole purpose of exhausting state remedies does not need to contain a statement of the issues presented or the reasons for review. Cal Rules of Ct 8.508(b)(3). See also Cal Rules of Ct 8.504(b)(1)-(2). Only an original and eight copies must be filed in the supreme court. Cal Rules of Ct 8.44(a)(4). The exhaustion petition should be served on the attorneys for all the parties, and on the clerk of the court of appeal, but it does not need to be served on the trial court judge. Cal Rules of Ct 8.500(f), 8.508(c).

An attorney considering whether to file an exhaustion petition to preserve the client's right to file a federal habeas corpus petition should bear in mind that whether a petition for review satisfies the "fair presentation" component of the exhaustion requirement is a question of federal law, not state law. To exhaust state remedies with respect to an issue, the statement of the issue to the state's highest court must include explicit reference to the provision of the United States Constitution on which the claim is based and a summary of the facts that support that claim. *Gray v Netherland* (1996) 518 US 152, 135 L Ed 2d 457, 116 S Ct 2074. On the "fair presentation" requirement, see §14.21; on exhaustion generally, see §§14.18-14.40.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.45 3. Answer and Reply

§5.45 3. Answer and Reply

The answer of a party opposing review must be served and filed within 20 days after the petition is filed. Cal Rules of Ct 8.500(e)(4). The answer may raise additional issues for review. If so, it must include a concise, nonargumentative statement of the issues. Cal Rules of Ct 8.504(c).

NOTE: When a party has prevailed only in part and the court of appeal adversely determined another issue on which review may be appropriate, and when the party has chosen not to file a petition for review but the opposing party has filed such a petition, an answer to the petition raising that additional issue should be filed to ensure that issue will not be foreclosed if review is granted. See *Stroud v Superior Court* (2000) 23 C4th 952, 963, 98 CR2d 677.

Like a petition, an answer composed on a computer may not exceed 8400 words or 30 pages if typewritten. Cal Rules of Ct 8.504(d)(1)-(2). Any reply must be served and filed within 10 days after the filing of the answer and may not exceed 4200 words, if composed on a computer, or 15 pages if typewritten. Cal Rules of Ct 8.500(e)(5), 8.504(d)(1)-(2).

The requirements of Cal Rules of Ct 8.504 about formatting, attachments, incorporation by reference, and certifying word-count also apply to any answer or reply. See §5.43.

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§5.46 4. Ordering Review

The supreme court initially has 60 days after the last petition for review is filed to order review, and it has the option of extending the period to a date not later than 90 days after the last petition was filed. Cal Rules of Ct 8.512(b)(1).

The court may also order review on its own motion within 30 days after the court of appeal decision becomes final as to that court. Cal Rules of Ct 8.512(c). The court may order the time extended to a date not later than 90 days after the decision was final as to the court of appeal. Cal Rules of Ct 8.512(c). It is rare for the supreme court to order review in a criminal case on its own motion.

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§5.47 D. Determination of Petition

After a petition for review is submitted, it is assigned to the criminal or civil central staff, as appropriate, which receives a copy of the complete record as well as the petition. A memorandum or statement on the merits of the petition is prepared, summarizing the contentions of the parties, discussing the authorities, and making any recommendations. This memorandum is circulated to the justices, and then a conference is held on the case. The purpose of the conference is for the supreme court to determine whether it should hear the case.

If the time for granting review expires with no ruling from the court, review is deemed denied. Cal Rules of Ct 8.512(b)(2). An order granting review must be signed by at least four justices; an order denying review may be signed by the Chief Justice alone. Cal Rules of Ct 8.512(d)(1). An order denying a petition for review of a court of appeal decision is final on filing. Cal Rules of Ct 8.532(b)(2).

The court frequently grants review in cases that present an issue that is already pending before the court. This practice, known as a "grant and hold" is authorized by Cal Rules of Ct 8.512(d). Occasionally (typically when a grant and hold case appears to be a better vehicle for addressing the issue the court wants to reach than the case the court originally decided to review), the court will order full briefing in a case that was originally taken as a grant and hold.

The court may also grant review for the purpose of transferring the case back to the court of appeal with instructions for further proceedings. Cal Rules of Ct 8.500(b)(4). These instructions can range from a direction to the lower court to reconsider its decision in light of another case to an order to grant an alternative writ or an order to show cause.

PRACTICE TIP: If a case does not present any of the other grounds for review set out in Cal Rules of Ct 8.500(b), counsel should consider asking the court to grant review under Cal Rules of Ct 8.500(b)(4), especially if it appears that the court of appeal erred in applying controlling supreme court authority.

Even when the supreme court orders review with the intention of deciding the case, it has wide discretion over what to do with it. When the court orders review, it usually specifies what issues it wants the parties to brief and argue. See Cal Rules of Ct 8.516(a)(1). The parties must limit their briefs and arguments to these issues "and any issues fairly included in them" unless the court orders otherwise. Cal Rules of Ct 8.516(a)(1).

The court is not, however, limited to these issues. On reasonable notice to the parties, it may modify its initial order while the case is pending and order argument on fewer or additional issues. Cal Rules of Ct 8.516(a). Furthermore, the court may decide any issue the case presents, even one that has not been briefed or argued by the parties, if it gives them reasonable notice of its intent and an opportunity to brief and argue the issue. Cal Rules of Ct 8.516(b)(2). See, *e.g., People v Braxton* (2004) 34 C4th 798, 809, 22 CR3d 46. The court may also refrain from deciding issues that the parties raise, even issues that the court has specified. Cal Rules of Ct 8.516(b)(3).

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§5.48 E. Briefs on the Merits

The parties have the option of filing new briefs in the supreme court or of relying on the briefs filed in the court of appeal. Cal Rules of Ct 8.520(a)(1)-(3). A party who relies on the brief filed in the court of appeal must attach to the cover of the brief a notice of intent to rely on the brief in the supreme court. Cal Rules of Ct 8.520(a)(4).

If the court has made an order specifying the issues to be briefed, the body of the petitioner's brief on the merits must begin by quoting the order or, if there is no order, the statement of issues in the petition for review and (if any) the answer. Cal Rules of Ct 8.520(b)(2). Argument must be confined to these issues and "issues fairly included in them." Cal Rules of Ct 8.520(b)(3).

The petitioner's opening brief is due within 30 days after the order granting review is filed; the respondent's brief is due within 30 days after the petitioner files the opening brief; the petitioner's reply brief is due 20 days after the respondent files its brief. Cal Rules of Ct 8.520(a)(1)-(3). Extensions of time may be requested by application to the Chief Justice under Cal Rules of Ct 8.60(b). Cal Rules of Ct 8.520(a)(5).

An original and 13 copies of each brief must be filed in the supreme court. Cal Rules of Ct 8.44(a)(1). All briefs must conform to the form and content requirements of Cal Rules of Ct 8.204. Cal Rules of Ct 8.520(b)(1). If produced on a computer, the petitioner's opening brief and the respondent's brief may not exceed 14,000 words, and the reply brief may not exceed 8400 words and must contain a certificate by counsel (or pro se petitioner) stating the number of words in the document. Cal Rules of Ct 8.520(c)(1). A typewritten opening or answering brief on the merits may not exceed 50 pages and a typewritten reply brief on the merits may not exceed 30 pages. Cal Rules of Ct 8.520(c)(2). The length limitations exclude tables, quotation of issues, and word-count certificate. Cal Rules of Ct 8.520(c)(3).

Either party may file a supplemental brief discussing "new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." Cal Rules of Ct 8.520(d)(1). A supplemental brief may not exceed 2800 words (10 pages) and must be served and filed at least 10 days before oral argument. Cal Rules of Ct 8.520(d)(2).

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§5.49 F. Oral Argument

Argument before the supreme court usually takes place in San Francisco, Los Angeles, or Sacramento, where the court holds regular sessions, but the court may hold special sessions elsewhere. Cal Rules of Ct 8.524(b). Ordinarily, the clerk will notify all parties of the time and place of oral argument at least 20 days before the scheduled date, but the Chief Justice may shorten the notice period for good cause. Cal Rules of Ct 8.524(c).

Each side is allowed 30 minutes for argument, except in capital cases, in which each side is allowed 45 minutes. Cal Rules of Ct 8.524(e), 8.638(b)(2). The petitioner has the right to open and close. If there is more than one petitioner (or none), the court will set the order of argument. Cal Rules of Ct 8.524(d). For discussion of petitions for review, see §§5.41-5.50, 5.54.

Only one counsel may be heard on each side—even if there is more than one party on each side—unless the court orders otherwise. A request to divide oral argument among two or more counsel must be filed no later than 10 days after the date of the order setting the case for oral argument. Cal Rules of Ct 8.524(f).

NOTE: The need for thorough preparation before argument in the supreme court cannot be overemphasized. The justices will be thoroughly familiar with the facts and the law, and also concerned with any policy ramifications of their decision. Counsel should anticipate incisive and assertive questioning. For a general overview of oral argument principles, see §5.6.

The failure, without adequate justification, either to appear for oral argument or to notify the court that you will not be appearing is punishable as contempt. See, *e.g., In re Aguilar* (2004) 34 C4th 386, 18 CR3d 874.

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§5.50 G. Opinion

The case is submitted for decision at the close of oral argument. Cal Rules of Ct 8.524(h). Immediately after argument, the justices discuss the case at a conference and vote on its possible disposition. Although members may not be ready to express a definite conclusion on the issues, they will likely express tentative conclusions. The Chief Justice then assigns the case to a justice who expressed the view of the majority to prepare a written opinion.

Within a prescribed time after submission, the assigned justice circulates the proposed majority opinion. Thereafter, all dissenting and concurring opinions circulate. If the author of the proposed majority opinion wishes to respond by change or by memorandum to one of the latter opinions, he or she must do so promptly after their circulation. The authors of the dissenting and concurring opinions then have a prescribed time to respond.

Unless the court vacates the submission, the court's decision will be filed on or before the 90th day after submission. See California Supreme Court Internal Operating Practices and Procedures §§VIII-X. An order vacating the submission must state the reasons and set a timetable for resubmission. Cal Rules of Ct 8.524(h)(2).

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§5.51 VI. DUTIES OF APPELLATE COUNSEL AFTER TERMINATION OF APPEAL

Normally, an attorney's representation of a particular client ends with the termination of the appeal, which comes with the issuance of the remittitur. See §5.34. However, an attorney may have a continuing duty of care regarding conflict of interest and confidentiality. *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537; *Damron v Herzog* (9th Cir 1995) 67 F3d 211. Although the State Bar Rules of Professional Conduct do not speak to this issue, an attorney's assistance after the conclusion of formal representation can often have a significant effect on the sentence served by the defendant and the ultimate outcome of a case.

Because decisions of the court of appeal are not self-executing, counsel may, for example, wish to communicate with the client and/or trial counsel to ensure that any relief ordered by the court is actually put into effect. The county clerk will often overlook or ignore a court order modifying a judgment in the defendant's favor.

Although there is no provision compensating counsel for the preparation of a petition for federal habeas corpus relief, this may be an extremely important step for a state prisoner. Many prisoners are illiterate or lack the skills to draft a persuasive petition and often resort to jailhouse lawyers. As a result, valid federal claims may go unheard for failure to adequately frame a state appellate court issue in federal constitutional terms. For examples of claims that may be arguable in a federal habeas corpus petition, see §§13.23-13.84. Counsel has two major options here: (1) to draft the petition and have the prisoner sign it in pro per, thus relieving him or her of any obligation to represent the prisoner through subsequent briefing and evidentiary hearings, unless and until the district court appoints counsel, or (2) to prepare the federal habeas petition on a pro bono basis.

Appellate counsel may be the inmate's counsel of choice for the first parole eligibility hearing. Appointed counsel is entitled to compensation for representing clients at these hearings. For discussion of parole eligibility hearings, see California Criminal Law Procedure and Practice, chap 47 (Cal CEB Annual).

Additionally, if the prisoner is either terminally ill (*i.e.,* expected to die within 6 months) or permanently and severely physically incapacitated, counsel may help an inmate apply for release to the Director of Corrections or the Board of Prison Terms. To be released, a prisoner must also show that he or she will not pose a threat to public safety. Pen C §1170(e)(2).

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VII. FORMS

§5.52 A. Form: Transmission of Exhibits

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for _ _[*e.g., plaintiff and respondent*]_ _, _ _[*name*]_ _

Superior Court, State of California, _ _ _ _ _ County

People of the State of California,	)	**Superior Court No. _ _ _ _ _ _**
Plaintiff	)	**REQUEST FOR**
	)	**TRANSMISSION OF EXHIBITS**
vs	)	**TO REVIEWING COURT**
	)	
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	
_____	)	

To the Clerk of the above-entitled court:

Under California Rules of Court 8.224, it is requested that you transmit to the Court of Appeal, _ _[*number*]_ _ Appellate District, Division _ _[*number*]_ _, the following exhibits designated for inclusion in the record:

1. **Defendant's Exhibit _ _[*e.g., A*]_ _.**

2. **People's Exhibit _ _.**

Date: _ _ _ _ _ _ __[*Signature of attorney or pro per defendant*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original filed with superior court clerk; one copy for appellate court clerk; one for Attorney General; one for client; one office copy.

Comment: Within 10 days of the date on which the last respondent's brief has been or could have been filed, any party may file with the superior court clerk a notice specifying the original exhibits admitted, rejected, or lodged with the trial court that the party wants the court to transmit to the reviewing court. Cal Rules of Ct 8.224(a)(1) (courts of appeal), 8.870(b)(1) (misdemeanors), 8.921(b)(1) (infractions). Other parties may request additional exhibits within 10 days after appellant's notice designating exhibits. Cal Rules of Ct 8.224(a)(2) (courts of appeal), 8.870(b)(2) (misdemeanors), 8.921(b)(2) (infractions). The exhibits must be transmitted to the reviewing court within 20 days of the first request unless the reviewing court orders otherwise. Cal Rules of Ct 8.224(b) (courts of appeal), 8.870(d)(1) (misdemeanors), 8.921(d)(1) (infractions). In the appellate division, the request for exhibits may be combined with the appellant's oral record election designating a statement on appeal. Because the reviewing court may order the trial court not to transmit the requested exhibits, it is incumbent on appellate counsel to keep apprised of the status of any request, so that he or she has ample time to apply to the reviewing court for an order to transmit the exhibit, if necessary. Cal Rules of Ct 8.224(c) (courts of appeal).

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§5.53 B. Form: Petition for Rehearing

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No. _ _ _ _ _

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ District, Division _ _ _ _ _

People of the State of California,	)
Plaintiff and Respondent	)
	)
vs	)
	)
_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ ,	)
Defendant and Appellant	)
_____	)

PETITION FOR REHEARING

Appeal From the Superior Court of California,
_ _ _ _ _ _ County, Case No. _ _ _ _ _ _
Honorable _ _ _ _ _ _ _ _ _ _ _ _ _, Judge

_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for Appellant, _ _[*name*]_ _
No. _ _ _ _ _

PETITION FOR REHEARING

To the Honorable Presiding Justice of the Court of Appeal, _ _ _ _ Appellate District, Division _ _ _ _ _:

Pursuant to Rules 8.268, 8.366(a) of the California Rules of Court, Appellant, _ _[*name*]_ _, petitions for rehearing following the unpublished decision of this court filed on _ _[*date*]_ _.

I. [*Argument Heading*]

[*Here the Petition succinctly sets out error of law or misstatement of fact*]

II. [*Second Argument Heading*]

CONCLUSION

For the reasons stated, this petition for rehearing should be granted.

Date: _ _ _ _ _ _ **Respectfully Submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Appellant, _ _[*name*]_ _

Copies: Original and four copies to be filed in the court of appeal; one copy each for service on trial court judge, district attorney, Attorney General, and counsel for each coappellant. If the petition is filed on behalf of a defendant, counsel must also serve the client. If counsel includes an extra copy of the petition (or the cover) and a stamped self-addressed envelope with the petitions sent to the court of appeal, the court clerk will file-stamp it and return it to appellate counsel.

Comment: Covers for petitions for rehearing should be orange. Cal Rules of Ct 8.40(b). The petition should not simply repeat prior arguments. It should be succinct and clearly identify the basis for the request. A petition for rehearing must be filed to preserve certain issues for review in the supreme court. See Cal Rules of Ct 8.500(c). For discussion, see §5.39. Petitions for rehearing also may be made in the appellate division under Cal Rules of Ct 8.889 (misdemeanors and infractions). The petition and answer must comply with procedures set forth in Cal Rules of Ct 8.204 (court of appeal and supreme court), 8.883 (appellate division), governing the content and form of briefs, and must include a word-count certificate. Cal Rules of Ct 8.268 (court of appeal and supreme court), 8.889(b)(3) (misdemeanors and infractions). See word-count certificate in §5.54.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/5 Hearing and Determination of Appeal/§5.54 C. Form: Petition for Review

§5.54 C. Form: Petition for Review

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California, Plaintiff and Respondent	)	**No. _ _ _ _ _**
vs	)	
_ _ _ _ _ _ _ _ _, Defendant and Appellant	)	

PETITION FOR REVIEW

Appeal From the Superior Court of California,
_ _ _ _ _ _ County, Case No. _ _ _ _ _ _
Honorable _ _ _ _ _ _ _ _ _ _ _ _ _, Judge

_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Attorney for Appellant, _ _[*name*]_ _

PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

_ _[*Name*]_ _**, defendant and appellant, respectfully petitions this court for review following the decision of the Court of Appeal,** _ _[*number*]_ _ **Appellate District, Division** _ _[*number*]_ _**, filed on** _ _[*date*]_ _**, affirming** _ _[*his/her*]_ _ **conviction for** _ _[*state nature of crime*]_ _**. A copy of the opinion of the Court of Appeal is attached to this petition. A petition for rehearing** _ _[*was/was not*]_ _**filed by appellant in the Court of Appeal** _ _[*and denied on* _ _[*date*]_ _]_ _**.**

QUESTIONS PRESENTED

This case presents the following questions for review:

[*List and number questions if more than one question is presented. State questions concisely, without repetition or argument. Frame them as broadly as possible to show their significance under Cal Rules of Ct 8.500(b)(1).*]

NECESSITY FOR REVIEW

[*In this section, petitioner should explain for each issue why the case is within one of the criteria of Cal Rules of Ct 8.500(b). If there is a conflict between decisions of the court of appeal, stress the importance of resolving the conflict. If the case presents an important question of law, explain why it is important, e.g., discuss the effect of the issue on the administration of justice or on broad social issues. If the issue is already before the supreme court in another case, request a "grant and hold" under Cal Rules of Ct 8.512(d)(2).*]

STATEMENT OF THE CASE AND FACTS

[*If the facts and procedural posture of the case are fairly set forth in the court of appeal's opinion, say so here. Add facts that were omitted or misstated in the opinion of the court of appeal that were brought to the court's attention in a petition for rehearing. See Cal Rules of Ct 8.500(c).*]

ARGUMENT

I. [*Argument Heading*]

[*State your arguments concisely. The purpose of the petition for review is to persuade the supreme court to hear the case, not to persuade it to decide in your favor. If the court grants review, there will be an opportunity to brief the issues more thoroughly.*]

II. [*Second Argument Heading*]

III. CONCLUSION

For the reasons stated, this petition for review should be granted, and this cause should be set for argument.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Defendant and Appellant

Word-Count Certificate

I hereby certify, under penalty of perjury, that the attached petition for review contains _ _ _ _ words, as determined by the computer program used to prepare this document.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Defendant and Appellant

Copies: Original and 13 copies to be filed in the supreme court. One copy each for service on the trial court judge, the district attorney, the Attorney General, the court of appeal, counsel for each party; if filed by a defendant, one copy for service on the client. Cal Rules of Ct 8.44(a)(1), 8.360(d). If the petition is an exhaustion petition, as defined in Cal Rules of Ct 8.508, an original and 8 copies are required. Cal Rules of Ct 8.44(a)(4). An exhaustion petition does not need to be served on the trial court judge. Cal Rules of Ct 8.508(c).

The Attorney General must serve two copies of a petition for review on counsel for each defendant and one copy on the district appellate project. See Cal Rules of Ct 8.360(d)(3).

Comment: Covers of petitions for review should be white. Cal Rules of Ct 8.40(b). The original and copies of the petition sent to the supreme court should include as an appendix a copy of the decision of the court of appeal, showing its date, and any order of modification or publication. Cal Rules of Ct 8.504(b)(4). For the convenience of the clerk who files the petition, the word-count certificate should be at the end of the document, immediately preceding the proof of service. For additional discussion, see §5.43. A sample petition for review is also included in California Criminal Law Forms Manual §42.2 (2d ed Cal CEB 2005).

If the sole purpose of the petition is to exhaust state remedies, it does not need to contain a statement of the issues presented or the reasons for review. See Cal Rules of Ct 8.508, discussed in §5.44. On the federal requirements for exhaustion, see §§14.18-14.40.

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6

Postconviction Review in Death Penalty Cases

Therene Powell

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I. INTRODUCTION

§6.1 A. Scope of Chapter

This chapter covers procedural and substantive aspects of postconviction review in capital cases that distinguish them from appeals in noncapital cases. It does not cover topics discussed in other parts of this book that are relevant to both capital and noncapital appeals. Topics discussed include:

- The scope of the defendant's right to counsel on direct appeal and collateral proceedings;
- Qualifications of counsel for appointment to represent a capital defendant on direct appeal and on habeas corpus;
- Available resources;
- Responsibilities of appointed counsel on appeal and in collateral proceedings;
- Policies and procedures adopted by the California Supreme Court to ensure timeliness in capital cases;
- Briefs in capital cases; and
- Eighth Amendment issues and other legal issues unique to capital cases.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.2 B. Differences Between Capital Appeals and Noncapital Appeals

§6.2 B. Differences Between Capital Appeals and Noncapital Appeals

It has long been recognized that the punishment of death is fundamentally different from other punishments. See *Woodson v North Carolina* (1976) 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978; *Gardner v Florida* (1977) 430 US 349, 357, 51 L Ed 2d 393, 97 S Ct 1197. Because of the finality of the death penalty, and the consequently greater need for accurate decision making, death penalty appeals differ from other appeals in a number of ways:

- The entire appeal is before the California Supreme Court, instead of a court of appeal.
- The record is typically much longer than that in the ordinary appeal—usually several thousand pages at minimum.
- All conferences and proceedings, whether in the courtroom or in chambers, are conducted on the record with a court reporter present. Pen C §190.9(a)(1).

NOTE: Although an incomplete record violates Pen C §190.9, no presumption of prejudice arises from the absence of materials from the appellate record. When the record is incomplete the defendant bears the burden of demonstrating that the record is inadequate to permit meaningful appellate review. *People v Harris* (2008) 43 C4th 1269, 1280, 78 CR3d 295 (declining to reconsider rule placing burden on defendant); *People v Samayoa* (1997) 15 C4th 795, 820, 64 CR2d 400. In *People v Wilson* (2005) 36 C4th 309, 30 CR3d 513, the supreme court found the record adequate for meaningful review despite the absence of various transcripts by giving the defendant "the benefit of the doubt as to the substance of [the] missing transcripts."

- Counsel is expected to take special care to ensure that the record in a capital appeal is complete and accurate. Among the obligations of capital counsel in a direct appeal is the duty to file all appropriate motions and attend all proceedings necessary to ensure that a complete and accurate record is prepared and certified. *Marks v Superior Court* (2002) 27 C4th 176, 115 CR2d 674. See Supreme Court Policies Regarding Cases Arising From Judgments of Death (effective June 6, 1989, as amended Sept. 28, 1989-Jan. 1, 2008) (hereinafter Supreme Ct Policies), Policy 3, std 2-1. These policies are available on the Judicial Council website at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm, and from commercial publishers in both online and print formats.
- Typically, the opening brief in a death penalty appeal raises many more issues than are raised in an ordinary appeal; the brief in a case with an average-length record (approximately 8000 pages) will contain 10 to 30 fully briefed issues. Representation in Capital Appeals, p J-1 (California Appellate Project) (hereinafter sometimes "CAP").
- Issues in capital cases are often more complex than typical issues in noncapital cases.
- The briefs in a capital appeal are typically much longer than those filed in an ordinary appeal. See Cal Rules of Ct 8.630(b) (without permission from the Chief Justice, maximum length for opening and respondent's briefs in capital appeal is 102,000 words if produced on a computer or 300 pages if typewritten (excluding tables and indexes); maximum length for reply brief is 47,600 words (140 pages if typewritten)). No length limits apply to petitions for writs of habeas corpus or, in capital cases, the accompanying memoranda of points and authorities.
- A capital appeal usually presents a number of issues relating to penalty that are unique to capital cases.
- Capital appeals ordinarily involve the filing of more briefs than are filed in an ordinary appeal. Because of the length of time between the filing of appellant's reply brief and oral argument, the capital appellant commonly files supplemental briefing—opening and reply.
- Because a defendant whose death judgment is affirmed on direct appeal will almost invariably seek relief in federal court, decisions made during the course of the appeal must take into account the current (and probable future) state of federal habeas law. Decisions such as whether an issue should be raised on appeal or in habeas corpus, whether a petition for rehearing or certiorari should be filed and, if a petition is filed, what issues should be included therein, involve complex and delicate tactical considerations and require substantial consultation with the assisting attorney or organization. Penal Code §§190.6-190.8, enacted in 1997 to expedite appeals in capital

cases, create special time pressures for the filing of appellant's opening brief in capital cases. See §§6.29, 6.44.

A capital appellate counsel's job is complicated by the wide-ranging scope and fast-changing nature of capital jurisprudence, as well as the length of the time over which the litigation will continue. In addition, the magnitude of the undertaking, including the severity of the consequences of losing the case, create a unique set of pressures. Other potential sources of stress for the attorney handling a capital appeal are the difficulties inherent in working with clients who are strained by the tension of living on death row, and who are often emotionally and cognitively challenged, as well.

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§6.3 II. AUTOMATIC APPEAL AND STAY OF EXECUTION

When a judgment of death is rendered, either by guilty plea or jury verdict, an automatic appeal is taken from the judgment without the need for any action on the part of the defendant or trial counsel. Pen C §1239. Execution of the judgment is also stayed automatically during the pendency of the direct appeal. Pen C §1243. Moreover, a defendant sentenced to death is not permitted to waive or abandon this automatic appeal. *People v Massie* (1998) 19 C4th 550, 566, 79 CR2d 816. Bail is not available to a defendant sentenced to death. Pen C §1272.

Once the California Supreme Court has affirmed a death sentence on direct appeal and issued its remittitur, the trial court must "forthwith" schedule a public hearing at which it must set a date for execution of the sentence within 60 to 90 days. Pen C §1193(a); Cal Rules of Ct 4.315.

The California Supreme Court routinely grants stays of execution pending action by the United States Supreme Court on a petition for certiorari following affirmance on automatic appeal. The California Supreme Court will consider a motion for a stay of execution only if it is made in connection with a petition for a writ of habeas corpus filed in that court, or to permit certiorari review by the United States Supreme Court. Supreme Ct Policies, Policy 1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

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III. APPOINTMENT OF COUNSEL FOR AUTOMATIC APPEAL AND HABEAS CORPUS PROCEEDINGS

§6.4 A. Right to Appointed Counsel

As a matter of policy, "to protect the interests of defendants and promote the cause of justice," the California Supreme Court will appoint counsel to represent indigent defendants in capital cases in automatic appeals to the supreme court *and* in the following proceedings between the termination of their state appeals and their execution:

- Proceedings in the California Supreme Court for postconviction (habeas corpus) review;
- Proceedings for appellate or other postconviction review of state court judgments in the United States Supreme Court (certiorari review) subject to the power of that court to appoint counsel;
- Proceedings in the trial court to set execution dates under Pen C §§1193 and 1227;
- Sanity hearings when indicated (see Pen C §§3700-3704.5; *Ford v Wainwright* (1986) 477 US 399, 91 L Ed 2d 335, 106 S Ct 2595); and
- Executive clemency proceedings before the Governor of California.

See Pen C §1240(b); *In re Anderson* (1968) 69 C2d 613, 633, 73 CR 21; Supreme Ct Policies, Policy 3, std 2-1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

Statutory provisions authorizing the appointment of counsel in capital cases include:

- Government Code §15421(a)-(b), which authorizes the State Public Defender, on appointment by the court or at the defendant's request, to represent an indigent defendant who has received a death sentence in his or her automatic appeal to the California Supreme Court;
- Penal Code §1240(a)(4), which authorizes the California Supreme Court to appoint counsel other than the State Public Defender in death penalty cases;
- Government Code §68662, which requires the California Supreme Court to offer to appoint counsel to represent all state prisoners subject to capital sentences in state postconviction proceedings;
- Government Code §68661(a), which authorizes the California Habeas Corpus Resource Center to employ up to 34 attorneys who may be appointed to represent indigent defendants sentenced to death in habeas corpus proceedings in both state and federal courts and in executive clemency proceedings.

NOTE: Government Code §68663 mandates that no attorney appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

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§6.5 B. Appointment of State Public Defender

Government Code §15421 authorizes the State Public Defender to represent any defendant sentenced to death, who is financially unable to hire counsel, in his or her automatic appeal to the California Supreme Court and in his or her petition for writ of certiorari to the United States Supreme Court following affirmance of the death judgment by the California Supreme Court.

The court must appoint private counsel to represent an indigent appellant when the State Public Defender has refused to represent a defendant for any reason, and it has discretion to appoint an attorney other than the State Public Defender in other cases. Pen C §1240(a)(1), (4).

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C. Appointment of Private Counsel

§6.6 1. Appellate Counsel

Counsel may accept an appointment limited to the direct appeal or to the related state habeas corpus proceedings. Counsel may accept an appointment for both purposes only if the client agrees. See Govt C §68663.

Appellate counsel appointed to represent a person under sentence of death has the following responsibilities:

- Preparation of pleadings and participation in proceedings related to preparation and certification of the appellate record for accuracy;
- Representation in the direct appeal before the California Supreme Court;
- Preparation and filing of a petition for a writ of certiorari, or an answer, in the United States Supreme Court;
- If certiorari is granted, preparation and filing of a brief or briefs on the merits, and preparation and presentation of oral argument; and
- Representation in the trial court in proceedings under Pen C §1193 (setting of execution date).

Supreme Ct Policies, Policy 3, std 2-1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

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§6.7 2. Habeas Corpus Counsel

The California Supreme Court's policies on capital appeals require it to appoint habeas corpus counsel for a person under a sentence of death at the same time it appoints appellate counsel or as soon thereafter as practicable. Supreme Ct Policies, Policy 3, std 2-1.

When the supreme court appoints habeas counsel for a person under sentence of death, the appointment includes the following:

- Investigating, preparing, and filing a habeas corpus petition in the California Supreme Court, including any informal briefing or evidentiary hearing ordered by the court, and any petition to exhaust state remedies;
- Representation in the trial court in proceedings under Pen C §1227 (setting of execution date); and
- Representation in executive clemency proceedings before the Governor of California.

Supreme Ct Policies, Policy 3, std 2-1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

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§6.8 D. Criteria for Appointment of Counsel in Capital Appeals and Habeas Corpus Proceedings

The overarching criterion for appointment as postconviction counsel in a capital case is competence. The supreme court will appoint an attorney only if, after reviewing the attorney's experience, writing samples, references, and evaluations, it determines that "the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant." Cal Rules of Ct 8.605(b). In addition, the attorney must be willing to cooperate with an assisting attorney designated by the court. Cal Rules of Ct 8.605(b). This will ordinarily be an attorney from the San Francisco office of the California Appellate Project. See §6.17.

The State Public Defender is eligible for appointment as counsel in capital appeals, the California Habeas Corpus Resource Center is eligible for appointment as counsel in capital habeas corpus proceedings, and the California Appellate Project is eligible for appointment in both direct appeal and habeas proceedings. Cal Rules of Ct 8.605(j).

In addition, the California Supreme Court may appoint an attorney who is already under appointment by a federal court in a California capital case, to handle state habeas corpus proceedings necessary to exhaust state remedies and for all subsequent state proceedings in the case (*e.g.,* clemency), if the court finds that the attorney "has the commitment, proficiency and knowledge necessary to represent the defendant competently in state proceedings." Cal Rules of Ct 8.605(k).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.9 1. Qualifications for Appointment of Appellate Counsel

§6.9 1. Qualifications for Appointment of Appellate Counsel

Under Cal Rules of Ct 8.605(d)(1)-(5), to be appointed as lead or associate counsel in the direct appeal in a capital case, an attorney must:

- Have been engaged in the active practice of law in California for at least 4 years;
- Have been counsel of record for a defendant in either:
- Seven completed felony appeals, including one murder; or
- Five completed felony appeals and must have served as supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed;
- Be familiar with the practices and procedures of the supreme court, including those specifically related to death penalty appeals;
- Have completed at least 9 hours of supreme court-approved study in appellate criminal defense, including at least 6 hours relating to death penalty appeals, within 3 years before appointment (this requirement may also be met by recent capital case experience);
- Demonstrate proficiency in issue identification, research, analysis, writing, and advocacy, as demonstrated by:
- Two writing samples (ordinarily appellate briefs) involving analysis of complex legal issues;
- The evaluation of the California Appellate Project, the Habeas Corpus Resource Center, or the assisting attorney in any previous death penalty appointment;
- Recommendations from two attorneys; and
- If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the court of appeal, the evaluation of the administrator responsible for those appointments.

NOTE: When more than one attorney is appointed to represent the same defendant jointly, whether in the direct appeal, in related habeas corpus/executive clemency proceedings, or in both classes of proceedings, one attorney will be designated as lead counsel for each separate appointment. Lead counsel is responsible for the overall conduct of the case and for supervising the work of appointed associate counsel and any nonappointed, supervised counsel. Cal Rules of Ct 8.605(c)(2).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.10 2. Qualifications for Appointment as Habeas Corpus Counsel

§6.10 2. Qualifications for Appointment as Habeas Corpus Counsel

Under Cal Rules of Ct 8.605(e)(1)-(5), to be appointed as lead or associate counsel to prepare the state habeas corpus petition in a capital case, an attorney must:

- Have been engaged in the active practice of law in California for at least 4 years;
- Have represented a defendant in either:
- Five completed felony appeals or writ proceedings, including one murder, and three jury trials or three habeas corpus proceedings involving serious felonies as counsel of record; or
- Five completed felony appeals or writ proceedings as counsel of record, and in two supreme court death penalty-related habeas corpus proceedings in which the petition has been filed as supervised counsel;
- Be familiar with the practices and procedures of the California Supreme Court and the federal courts in capital habeas corpus proceedings;
- Have completed at least 9 hours of supreme court-approved study in appellate criminal defense or habeas corpus defense, including at least 6 hours relating to capital habeas corpus proceedings, within 3 years before appointment (this requirement may also be met by recent capital case experience);
- Have proficiency in issue identification, research, analysis, writing, and advocacy, as demonstrated by:
- Three writing samples (ordinarily two appellate briefs and one habeas corpus petition) involving analysis of complex legal issues;
- The evaluation of the California Appellate Project, the California Habeas Corpus Resource Center, or the assisting attorney in any previous death penalty appointment;
- Recommendations from two attorneys; and
- If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the court of appeal, the evaluation of the administrator responsible for those appointments.

If an evidentiary hearing is ordered in the habeas corpus proceeding, habeas counsel must associate an attorney with experience in conducting trials or evidentiary hearings, unless he or she has such experience. Cal Rules of Ct 8.605(g).

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§6.11 3. Alternate Qualifications

Under Cal Rules of Ct 8.605(f), the supreme court may appoint as counsel, in either the direct appeal or on habeas corpus, an attorney who does not meet the experience requirements described in Cal Rules of Ct 8.605(d)-(e), if that attorney demonstrates the proficiency in issue identification, research, analysis, writing, and advocacy required by those provisions, and:

- The court finds that the attorney has substantially equivalent experience in complex cases as an attorney qualified under one of those provisions because he or she has had at least 4 years of extensive experience in another jurisdiction or in a different type of practice (*e.g.,* civil trials or appeals, academic work, or work for a court or prosecutor);
- Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court; and
- The attorney has completed at least 18 hours of supreme court-approved training in appellate criminal defense or habeas corpus practice, including at least 9 hours relating to death penalty proceedings, within 2 years of the appointment (this requirement may also be met by recent capital case experience).

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§6.12 4. Use of Supervised Counsel

An attorney who has been appointed as lead or associate counsel in a capital case may be assisted by an attorney who does not meet these qualifications, but any such attorney must work under the immediate supervision and direction of lead or associate counsel. Cal Rules of Ct 8.605(h).

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§6.13 5. Dual Appointment

An attorney may be appointed to represent a defendant in both a death penalty appeal and related habeas corpus proceedings only if he or she meets the minimum qualifications set forth in Cal Rules of Ct 8.605(d)-(e), or if he or she qualifies for the appointment under Cal Rules of Ct 8.605(f). The California Supreme Court may, however, appoint two attorneys to represent a defendant jointly in both a death penalty appeal and related habeas corpus proceedings if it finds that their qualifications in the aggregate satisfy the full provisions of Cal Rules of Ct 8.605(d)-(e), or of (f). Cal Rules of Ct 8.605(i).

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§6.14 E. Withdrawal of Counsel

In the absence of exceptional circumstances (*e.g.,* appointed counsel becomes mentally or physically incapacitated), the supreme court will consider a motion to withdraw as attorney of record in a capital case only if appropriate replacement counsel is ready and willing to accept appointment for the balance of the representation. Supreme Ct Policies, Policy 2, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

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§6.15 F. Compensation of Counsel

Counsel may be appointed on either an hourly compensation basis or an alternate fixed fee payment option. The benefit of the latter is that it significantly reduces administrative paperwork and provides counsel with greater predictability and control over payment. The hourly rate of compensation is $145 per allowable hour. For the court's traditional time-and-costs benchmarks, see Section II of Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court (Dec. 22, 1993, as amended Sept. 1, 1995-Aug. 27, 2008) (hereinafter "Payment Guidelines"). For the court's methods of determining fixed fees, see Guidelines for Fixed Fee Appointments, On Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court (effective Jan. 1, 1994, as amended Sept. 1, 1995-Jan. 1, 2008) (hereinafter "Fixed Fee Appointment Guidelines"). Both publications are available on the Judicial Council's website at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

In hourly fee cases, expenses are paid in addition to attorney fees, but prior approval is required for extraordinary expenses. Counsel may submit a request for payment of compensation and expenses every 90 days. The compensation rate of $145 per hour is multiplied by the number of allowable hours under the court's benchmarks to determine a reasonable amount for compensation. See Payment Guidelines, II-A, II-B, & II-H.

In fixed fee cases, ordinary expenditures (photocopying, postage, telephone charges, computerized legal research, travel (other than for habeas corpus investigation), and services of law clerks and paralegals (other than for habeas corpus investigation)) are included in the fee. Fixed Fee Appointment Guidelines, 2. Under the fixed-fee payment option, counsel appointed to represent the defendant in the appeal or with a dual appointment receives six payments over the course of a case; counsel appointed only for the habeas corpus proceedings receives five payments over the course of the case. These payments are made at fixed stages. See Fixed Fee Appointment Guidelines, 5. In limited circumstances, the Fixed Fee Guidelines permit advances of portions of some of the progress payments on completion of a specified portion of the relevant tasks.

Expenses for investigation of habeas corpus claims are reimbursed separately whether counsel is appointed on a fixed fee or hourly basis. The Supreme Court Policies Regarding Cases Arising From Judgments of Death were amended to provide increased funding for habeas corpus investigations pursuant to Assembly Bill 1248 (Stats 2007, ch 738), effective January 1, 2008, and to increase amounts in the payment guidelines, effective October 7, 2007. The amended policies are available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

Under the amended policies, if the habeas petition was not filed by January 1, 2008, and the date for filing a presumptively timely petition had not passed by then, counsel may be reimbursed for up to $50,000 for investigative expenses incurred on or after January 1, 2008. The $50,000 limit also applies to expenses incurred after January 1, 2008, in cases where a presumptively timely petition was filed before that date but petitioner's reply to the informal response was not filed by January 1, 2008, and the time to file the reply (with any extensions of time) had not passed by January 1, 2008. (Although the $50,000 limit applies only to expenses incurred after January 1, 2008, it also represents the total amount allowed, for expenses incurred both before and after January 1, 2008.) In all other cases, counsel is authorized to spend up to $25,000 before issuance of an order to show cause, without the need for separate authorization from the court. Supreme Ct Policies, Policy 3, std 2-2.1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. The court will not, however, authorize expenditures of more than $25,000 before issuance of the order to show cause. Supreme Ct Policies, Policy 3, std 2-2.1.

NOTE: The reasonable cost of photocopying defense counsel's trial files is no longer considered a habeas corpus investigative expense; it will be separately reimbursed in addition to the investigative expenses set forth in Supreme Ct Policies, Policy 3, std 2-2.1.

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§6.16 G. No Right to Self-Representation

There is no federal or state right to self-representation on appeal, in either capital or noncapital cases. See *In re Barnett* (2003) 31 C4th 466, 473, 3 CR3d 108 (Sixth Amendment right to counsel is only source of right of self-representation and it does not extend past conviction).

The California Supreme Court does not accept pro se briefs or arguments related to the legality of the judgment from represented defendants in capital cases. *People v Clark* (1992) 3 C4th 41, 173, 10 CR2d 554. In *In re Barnett* (2003) 31 C4th 466, 475, 3 CR3d 108, the court extended this rule to capital habeas proceedings. The court will, however, consider pro se motions relating to representation. 31 C4th at 473.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/ IV. RESOURCES/§6.17 A. California Appellate Project

IV. RESOURCES

§6.17 A. California Appellate Project

The California Appellate Project (CAP), located in San Francisco, is a nonprofit corporation established by the State Bar of California to assist private counsel with automatic appeals. CAP is funded through the Administrative Office of the Courts. Its address and telephone number are:

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105
(415) 495-0500
http://www.capsf.org

Every attorney appointed to represent a capital defendant on direct appeal or in related habeas corpus proceedings receives assistance from CAP, or in the event of a conflict of interest, from the State Public Defender, the Habeas Corpus Resource Center, or an experienced private capital appellate and/or habeas corpus practitioner. See Memorandum, Supreme Court of California, Appendix of Appointed Counsel's Duties, at p. 3. This document is sent to all attorneys who apply for or accept appointment in a capital case. It can also be obtained from the California Supreme Court's Automatic Appeals Monitor, at the California Supreme Court, 350 McAllister Street, San Francisco, CA 94102, and is available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. The assistance provided includes advice and consultation about supreme court procedures, client relations, record correction and completion, possible issues on appeal, possible areas of habeas corpus investigation, drafting of pleadings (including record correction and completion motions), appellant's opening, reply and supplemental briefs, petitions for rehearing, petitions for writ of certiorari, petitions for writ of habeas corpus, compensation and reimbursement for expenses, and other matters relating to direct appeal and habeas corpus litigation.

Typically, a CAP assisting attorney will:

- Help appointed counsel develop and implement a timeline for the timely filing of appellant's opening brief;
- Help appointed counsel develop and implement a plan for the timely filing of a petition for writ of habeas corpus;
- Review portions of the record, including jury instructions, guilt phase closing arguments, and penalty phase proceedings in order to assist appellate counsel in formulating possible appellate issues and avenues for habeas corpus investigation;
- Review draft pleadings and briefs; and
- Assist counsel to prepare for oral argument.

NOTE: CAP periodically schedules a 2-day orientation program. Every private attorney should attend this program at the first opportunity after receiving a capital appointment. It will help counsel get off to a good start in providing strong representation and make efficient use of time and resources. The California Supreme Court expects appointed counsel to attend this orientation program and reimburses counsel for travel, meal, and lodging expenses according to the usual State Board of Control guidelines. The court will also compensate counsel for 10 hours of billable time to attend the orientation if counsel is being paid on an hourly basis.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.18 B. California Habeas Corpus Resource Center

§6.18 B. California Habeas Corpus Resource Center

Established in 1998 as part of a legislative effort to reduce the number of prisoners on death row without counsel, the California Habeas Corpus Resource Center (HCRC) is a state-funded agency authorized to employ up to 34 attorneys eligible to receive appointments in capital cases. Govt C §68661. In addition to providing representation for indigents convicted and sentenced to death in habeas corpus proceedings in state and federal courts and in clemency petitions to the governor, the HCRC is charged with developing and maintaining a roster of private attorneys qualified to represent defendants in capital postconviction proceedings and providing administrative and case services to attorneys on the roster. Govt C §68661. In its role as postconviction counsel administrator, the HCRC evaluates cases and recommends appointment of attorneys, provides assistance and case progress monitoring to appointed counsel, reviews case billings, and makes recommendations to the court for compensation of appointed counsel. Govt C §68661.

The HCRC is also authorized to:

- Establish and maintain a roster of experienced investigators and experts qualified to assist appointed counsel;
- Employ investigators and experts on its own staff who are qualified to provide services to appointed counsel;
- Develop a brief bank of pleadings and related materials on significant, recurring issues that arise in postconviction proceedings in capital cases and to make those documents available to appointed counsel;
- Provide legal and other appropriate advice or assistance to appointed counsel in postconviction proceedings.

For discussion of petitions for writ of habeas corpus in state court, see chaps 9-10. For discussion of petitions for writ of habeas corpus in federal court, see chaps 13-18.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.19 C. Other Resources

§6.19 C. Other Resources

A substantial number of resources are available to assist appointed counsel in capital appeals and habeas corpus proceedings, including:

- RECAP, a monthly newsletter published jointly by the California Appellate Project (CAP) and the Capital Habeas Unit of the Office of the Federal Public Defender for the Central District of California. It contains a detailed summary of the latest significant developments in capital litigation, both nationwide and in California. Also included are the most recent developments in California death penalty cases in the California Supreme Court, the United States Supreme Court, the Ninth Circuit, and the various federal district courts.
- The Death Penalty Information Bank and Index, a computerized database of death penalty information, containing significant case law and pleadings and indexed by subject matter. Hard copies of many of the pleadings are stored at CAP.
- CAP and HCRC websites. Both CAP and the Habeas Corpus Resource Center (HCRC) maintain websites that contain a wide variety of practice guides, articles, and sample pleadings relating to capital appeals and habeas corpus proceedings. Access to these sites is limited, and counsel should contact CAP and HCRC for information about gaining access.
- Capital Case Defense Seminar, sponsored jointly by the California Public Defenders Association (CPDA) and California Attorneys for Criminal Justice (CACJ). This comprehensive 4-day seminar is held every February in Monterey, California. It includes presentations from knowledgeable practitioners from across the country. The program, which includes topics of interest to both trial and appellate/habeas corpus counsel, always includes a summary of the most significant procedural and substantive capital developments during the past year. Attendance is limited to criminal defense attorneys and "associated professionals."
- CAP and HCRC programs. Both the California Appellate Project and the Habeas Corpus Resource Center hold informal workshops on capital appellate and habeas corpus representation. These programs provide an opportunity for appointed counsel to learn the latest substantive and procedural developments in death penalty litigation, to discuss issues of common concern, and to earn MCLE credit. In addition, HCRC conducts a "Habeas College" for attorneys appointed to their first capital habeas case. This program provides both general information on capital habeas litigation and an opportunity for the newly-appointed attorneys to brainstorm about specific issues in their individual cases with more experienced practitioners from CAP and HCRC.
- Handling Death Penalty Appeals and/or Related Habeas Corpus/Executive Clemency Proceedings in the California Supreme Court (Videotape, 2d ed, California Supreme Court), a 2½-hour instructional videotape, created under the aegis of the supreme court by several accomplished and experienced appellate lawyers. It contains a comprehensive overview of appointed counsel's procedural responsibilities at each stage of the postconviction capital process, including highlights of the difference between capital representation and other types of criminal appeals, and it is approved for MCLE credit. It can be obtained on request from the California Supreme Court's Automatic Appeals Monitor, at the California Supreme Court, 350 McAllister Street, San Francisco, CA 94102-4797.

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V. RESPONSIBILITIES OF COUNSEL FOR DEFENDANTS SENTENCED TO DEATH

A. General Duties and Supreme Court Standards

§6.20 1. Ongoing Duties of Trial Counsel

An attorney owes a duty of complete fidelity to the client and the interests of the client. See *Clancy v The State Bar* (1969) 71 C2d 140, 77 CR 657; California State Bar Formal Opinion No. 84-83. The attorney's duty to his or her client survives the termination of the attorney-client relationship. California State Bar Formal Opinion No. 92-127. The Rules of Professional Conduct impose a duty on trial counsel to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel. California State Bar Formal Opinion No. 92-127.

Trial counsel also has an ethical duty to turn over all papers and property in his or her client's file to the client or to successor counsel. *Finch v The State Bar* (1981) 28 C3d 659, 665 170 CR 629; California State Bar Formal Opinion No. 92-127. This includes the entire contents of the file, not just the pleadings, depositions, and exhibits in the file, and includes correspondence and work product reasonably necessary to the client's defense. California State Bar Formal Opinion No. 92-127.

Furthermore, because an attorney's obligation upon withdrawal is "to avoid reasonably foreseeable prejudice to the rights of the client" (Cal Rules of Prof Cond 3-700(A)(2)), the attorney must provide the client with items generated during the representation so that the client does not have to hire new counsel to regenerate these same items. "The attorney's impressions, conclusions, opinions, legal research, and legal theories prepared in the client's underlying case ordinarily are 'reasonably necessary to the client's representation.'" California State Bar Formal Opinion No. 92-127. See also Cal Rules of Prof Cond 3-700(D)(1) (attorney who has withdrawn from case must deliver to client all papers and property to which client is entitled). When an attorney is no longer representing the client, the attorney's work product belongs to the client, regardless of the circumstances under which counsel withdrew and regardless of whether the client has paid the attorney for his services. *Kallen v Delug* (1984) 157 CA3d 940, 950, 203 CR 879; *Academy of California Optometrists, Inc. v Superior Court* (1975) 51 CA3d 999, 1005, 124 CR 668.

An attorney who refuses to deliver case files to a former client or substituted counsel is subject to discipline (*Finch v State Bar*, *supra*) or to a court order directing him to deliver the files (*Academy of California Optometrists, Inc. v Superior Court*, *supra*).

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§6.21 2. Duties of Appellate Counsel

Appointed appellate counsel is responsible for preparing pleadings and initiating proceedings required to complete preparation and certification of the record; representing the defendant in the direct appeal before the California Supreme Court; preparing or responding to a petition for writ of certiorari in the United States Supreme Court; representing the defendant in any proceedings on writ of certiorari; and, if the judgment of death is affirmed, representing the defendant in proceedings in the trial court under Pen C §1193 to set an execution date. Supreme Ct Policies, Policy 3, std 2-1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

The California Supreme Court expects appellate counsel to take and maintain detailed and understandable computerized transcript notes, not simply for his or her own use, but for the use of habeas corpus counsel as well. Supreme Ct Policies, Policy 3, std 1-1.

PRACTICE TIP: Because even a "short" record in a capital case is likely to be several thousand pages in length, the transcript notes will themselves be lengthy. Counsel should take advantage of the computer's search capabilities by taking the time at the outset of record review to develop a standardized system to refer to potential issues in the case and by using the system consistently to mark portions of the record that may be useful in arguing the issue.

Appellate counsel must also compile and maintain a detailed list of potentially meritorious habeas corpus issues that have come to counsel's attention. Moreover, appellate counsel whose appointment does not include related state habeas corpus/executive clemency representation has a duty to preserve any evidence that comes to his or her attention that appears relevant to a potential habeas corpus investigation until habeas corpus counsel is appointed. Supreme Ct Policies, Policy 3, std 1-1.

After habeas corpus counsel is appointed, appellate counsel must deliver to habeas corpus counsel copies of the list of potentially meritorious habeas corpus issues, copies of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation. Thereafter, appellate counsel must update the issues list and the computerized transcript notes as warranted. Moreover, appellate counsel must consult with and work cooperatively with habeas corpus counsel to facilitate a timely investigation and the timely preparation and filing (if warranted) of a habeas corpus petition by appointed habeas corpus counsel. Supreme Ct Policies, Policy 3, std 1-1.

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3. Duties of Habeas Corpus Counsel

§6.22 a. Scope of Representation

Appointed habeas corpus counsel's scope of representation includes the investigation, and (if warranted) preparation and filing, of a habeas corpus petition in the California Supreme Court. This includes preparing informal briefing, if it is ordered by the court; representing the petitioner at any evidentiary hearing ordered by the court; and filing any petition for habeas corpus that is necessary to exhaust state remedies. Supreme Ct Policies, Policy 3, std 2-1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. Habeas counsel is also responsible for representation of the defendant in proceedings in the trial court under Pen C §1227 to set an execution date, and representation of the defendant in executive clemency proceedings before the Governor of California. Supreme Ct Policies, Policy 3, std 2-1.

The duty to investigate factual and legal grounds for a petition for writ of habeas corpus is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of:

- Reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs; and
- Making reasonable efforts to discuss the case with the defendant, trial counsel, and appellate counsel.

Supreme Ct Policies, Policy 3, std 1-1.

In postconviction proceedings, a defendant sentenced to death is entitled to discovery of materials in the possession of the prosecution and law enforcement authorities to which the defendant was, or would have been, entitled at trial. Pen C §1054.9. See *In re Steele* (2004) 32 C4th 682, 693, 10 CR3d 536. Habeas corpus counsel should first try to obtain these discovery materials from trial counsel. Pen C §1054.9(a). If this is unsuccessful, counsel may obtain an order from the trial court directing the prosecution and law enforcement authorities to provide reasonable access to those materials. Pen C §1054.9(c). See *In re Steele,* 32 C4th at 692. Penal Code §1054.9 does not require defense counsel to prove the actual existence (or a good faith belief in the actual existence) of specified materials in order to obtain a discovery order. *People v Superior Court (Maury)* (2006) 145 CA4th 473, 485, 51 CR3d 670.

The duty to investigate does not impose an obligation to conduct, nor does it authorize the expenditure of public funds for, "an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment" of death. Supreme Ct Policies, Policy 3, std 1-1. Habeas corpus counsel has a duty to investigate potential habeas corpus claims only if "counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim." Supreme Ct Policies, Policy 3, std 1-1.

NOTE: There has historically been some tension between the bench and the bar about the scope of capital counsel's duty to investigate potential habeas corpus issues. The supreme court does not approve requests for reimbursement of expenditures on investigations that it considers unfocused. Many attorneys who have represented capital defendants in postconviction proceedings believe the court has sometimes refused to reimburse expenses for habeas investigation that was necessary to provide adequate representation.

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§6.23 b. Importance of Meeting Timeliness Standards

An attorney representing a defendant in collateral proceedings in state court after a judgment of death must be aware at all times of the timeliness standards adopted by the California Supreme Court. A habeas corpus petition filed within the later of (1) 180 days after the final due date of appellant's reply brief in the direct appeal, or (2) 36 months after the appointment of habeas corpus counsel is presumed to have been filed "without substantial delay." Supreme Ct Policies, Policy 3, std 1-1.1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. A later-filed petition will be considered to have been filed without substantial delay if it "alleges with specificity" facts showing that it was filed within a reasonable time after petitioner or counsel knew or should have known the factual and legal basis of the claim. Supreme Ct Policies, Policy 3, std 1-1.2. If a petition is filed after substantial delay, the petitioner must show good cause for the delay. Good cause in this context is defined as "particular circumstances sufficient to justify substantial delay." Supreme Ct Policies, Policy 3, std 1-2.

Note that the court may toll the 180-day period of presumptive timeliness for the habeas petition when it authorizes the appellant to file supplemental briefing in the direct appeal. Supreme Ct Policies, Policy 3, std 1-4. Ordinarily, the court will authorize such tolling only when the capital appellant is represented by the same attorney on appeal and in the related habeas proceedings. The court will not toll before the 180-day period begins to run or after it has finished. Supreme Ct Policies, Policy 3, std 1-4.

CAUTION: A petition filed after substantial delay without good cause will undoubtedly be denied on procedural grounds as untimely or "for lack of diligence," a phrase the California Supreme Court frequently uses. See Supreme Ct Policies, Policy 3, std 1-3. A procedural default for untimeliness may bar consideration of the defendant's habeas corpus claims in federal court. In *Bennett v Mueller* (9th Cir 2003) 322 F3d 573, the Ninth Circuit held that California's untimeliness bar, as stated in *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153, and *In re Clark* (1993) 5 C4th 750, 21 CR2d 509, is independent (*i.e.,* free from entanglement with federal law). The court remanded the case to the district court to determine whether the untimeliness bar was adequate (*i.e.,* regularly and consistently applied). On procedural default in federal habeas corpus practice and the California Supreme Court's summary denials in habeas cases, see §§15.22-15.26.

If habeas counsel is appointed before final certification of the record, counsel should make every effort to comply with the timelines described in the following sections. At whatever time habeas counsel is appointed, he or she should begin work promptly and keep detailed, dated records of the steps taken in connection with the petition in case it becomes necessary to explain to the supreme court why the habeas corpus petition should be considered timely.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.24 4. Duty of All Postconviction Counsel to Cooperate With Assisting Organization or Attorney

§6.24 4. Duty of All Postconviction Counsel to Cooperate With Assisting Organization or Attorney

As a condition of the appointment to represent a defendant sentenced to death in postconviction proceedings, appellate counsel and habeas corpus counsel must cooperate with the assisting organization or attorney designated by the supreme court to provide outside consultation and resource assistance to appointed counsel. Organizations that may be designated to assist appointed capital counsel include the State Public Defender (SPD), the Habeas Corpus Resource Center (HCRC), and the California Appellate Project (CAP). See Cal Rules of Ct 8.605(c)(5). Ordinarily, CAP will be designated to assist both appellate counsel and habeas counsel, although it is anticipated that when the HCRC is fully staffed and functional, it will take over many of the responsibilities CAP now assumes with respect to collateral proceedings. If there is a conflict of interest, the supreme court will designate an alternative organization or an experienced private capital appellate and/or habeas corpus practitioner, as appropriate.

NOTE: The supreme court requires the organization or attorney assisting appointed counsel to report to it periodically in detail on counsel's progress on the case. The court places considerable weight on these reports in determining compensation and future appointments in capital cases.

Appointed counsel's obligation to cooperate with the assisting organization (or attorney) includes the following duties:

- Appellate counsel must promptly provide computerized transcript notes, a list of potential appellate issues, and a detailed list of potential habeas corpus issues to the assisting organization.
- On request, and after consultation with the automatic appeals monitor, appellate counsel must either copy relevant portions of the record for the assisting organization to review or permit the assisting organization to photocopy the record.
- Appellate counsel must maintain ongoing communication with the assisting organization about possible appellate issues, briefs and other pleadings, and oral argument.
- Habeas corpus counsel must provide the assisting organization with a detailed outline of potential habeas corpus issues to be investigated and a proposed investigation plan.
- Both appellate and habeas corpus counsel must promptly initiate and maintain communication with the defendant, trial counsel, and any separately appointed counsel.
- Both appellate and habeas corpus counsel must carefully review all manuals, newsletters, and other materials distributed by any assisting organization, and make appropriate use of the resources available in brief and information banks.
- Both appellate and habeas corpus counsel are expected to attend postappointment training programs presented by the assisting organizations.
- Both appellate and habeas corpus counsel must consult with the assisting organization about the amount of time to be spent researching the direct appeal or conducting a habeas corpus investigation and must also be guided by the court's compensation guidelines (see Supreme Ct Policies, Policy 3, stds 2.1-2.8 (compensation standards)), available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.
- Both appellate and habeas corpus counsel must allow sufficient time for the assisting organization or attorney to review and make suggestions about all motions, pleadings, briefs, petitions and replies, investigation plans, etc., and must allow sufficient time for incorporation of appropriate changes into final drafts.
- Both appellate and habeas corpus counsel must provide the assisting organization with copies of all court orders, motions, pleadings, briefs, petitions, replies and responses, etc., filed either by appointed counsel or by respondent.

Memorandum, Supreme Court of California, Appendix of Appointed Counsel's Duties. This document is sent to all attorneys who apply for or accept appointment in a capital case. It can also be obtained from the California Supreme Court's Automatic Appeals Monitor, at the California Supreme Court, 350 McAllister Street, San Francisco, CA 94102 or online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

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§6.25 5. Duty to Determine Defendant's Citizenship Status

Counsel should promply determine whether defendant is a citizen of the United States. If the defendant is not a citizen, the case may present issues that would not otherwise arise. See, *e.g.*, *Sanchez-Llamas v Oregon* (2006) 548 US 331, 165 L Ed 2d 557, 126 S Ct 2669 (holding that suppression of evidence was not an available remedy for violation of the Vienna Convention on Consular Rights). Determining defendant's nationality is especially important for habeas counsel. Issues arising from defendant's status as a noncitizen may not have been raised at trial, and hence can be raised later only to show ineffective assistance of trial counsel. See *Osagiede v U.S.* (7th Cir 2008) 543 F3d 399. In addition, the government of the defendant's country of origin (usually acting through its local consulate) may be able to provide valuable assistance in the preparation of the habeas petition. Such assistance can include aiding counsel in the investigation of defendant's background in his country of origin, arranging for witnesses from that country to come to the United States to testify at an evidentiary hearing, and suggesting relevant experts.

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§6.26 B. Certification of the Record for Completeness and Accuracy

The record on appeal in a case in which a judgment of death has been imposed consists of a clerk's transcript containing every document filed or lodged in the case (including questionnaires of all prospective jurors) and a reporter's transcript of all oral proceedings in all courts in the case, including transcripts of prior proceedings in the same case that resulted in a mistrial or an order granting a motion for new trial. Pen C §190.7; Cal Rules of Ct 8.610(a)(1)-(2).

For cases in which trial began on or after January 1, 1997, record certification in a capital case consists of two stages—certification for completeness and certification for accuracy. Pen C §190.8; Cal Rules of Ct 8.619-8.622. Trial counsel, both defense and prosecuting attorneys, are required to participate in the certification of the record for completeness. Appellate counsel is charged with the responsibility of ensuring that the transcript is accurate. For cases in which trial began before January 1, 1997, see Cal Rules of Ct 8.625.

NOTE: All documents filed confidentially under Pen C §987.3 or §987.9 will be sealed and copies provided only to the reviewing court and to defense counsel.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.27 1. Duties of Trial Counsel

§6.27 1. Duties of Trial Counsel

All proceedings in a case in which the prosecution is seeking the death penalty, including conferences, must be conducted on the record with a court reporter present. Pen C §190.9(a). This includes grand jury proceedings. *Dustin v Superior Court* (2002) 99 CA4th 1311, 1323, 122 CR2d 176 (defendant in capital case entitled to transcript of entire grand jury proceeding). The court reporter is required to prepare and certify daily transcripts of all proceedings from the preliminary hearing to judgment. Pen C §190.9(a)(1). See also Pen C §190.9(a)(2) (transcription and certification of proceedings before preliminary hearing). When a judgment of death is imposed, the trial court clerk is required to provide all trial counsel with copies of the clerk's transcript within 30 days and must deliver copies of the reporter's transcript to trial counsel as they are received. Pen C §190.8(b). Trial counsel must review the docket sheets and minute orders to determine whether the reporter's transcript is complete, consult with opposing counsel to determine whether any additional proceedings or discussions should have been transcribed, and review the superior court file to determine whether the clerk's transcript is complete. Cal Rules of Ct 8.619(b).

No later than 30 days after receiving copies of the transcripts, trial counsel must file with the superior court (Cal Rules of Ct 8.619(c)):

- A declaration stating that he or she has performed the tasks required by Cal Rules of Ct 8.619(b) or that they have been performed under counsel's supervision;
- A request to include additional materials in the record and to correct any errors that have come to counsel's attention; or
- A statement that counsel does not request any additions or corrections.

An application to extend the time for record review must be filed within the 30-day period allotted. If the combined clerk's and reporter's transcripts exceed 10,000 pages, the court may grant an additional 3 days for each 1000 pages over 10,000, but any extension must state the reasons that justify the extension, and the trial court clerk must promptly send a copy of the order to the supreme court. Cal Rules of Ct 8.619(f).

If either the prosecutor or defense counsel files a request for additional materials or corrections, the trial court must hold a hearing and order any necessary additions or corrections within 15 days after the last request. Cal Rules of Ct 8.619(d).

CAUTION: Although the court may not certify the record as complete because of trial counsel's failure to comply with Cal Rules of Ct 8.619(b)-(c), if counsel fails to file a timely declaration or extension request, the court must set the matter for hearing, require the attorney to show cause why he or she has not complied, and fix a date for compliance. Cal Rules of Ct 8.619(c)(3).

When all trial counsel certify that the record is complete, or when the record has been completed and corrected in accordance with the court's order, the court will certify the record as complete and redeliver the transcripts to the clerk. The record must be certified as complete within 90 days of the imposition of the death sentence. Cal Rules of Ct 8.619(d)(7); Pen C §190.8(d).

When the record has been certified as complete, the clerk must deliver a paper copy of the entire record and a computer-readable copy of the reporter's transcript to (Cal Rules of Ct 8.619(g)):

- Each defendant's appellate attorney and each defendant's postconviction attorney, if counsel has been retained or appointed;
- The Attorney General;
- The California Appellate Project in San Francisco; and
- The Habeas Corpus Resource Center.

When the record is delivered to the defendant's appellate counsel, the clerk of the superior court must notify the clerk of the supreme court. Cal Rules of Ct 8.619(h).

NOTE: In practice, a delay of up to 2 to 3 years often elapses before counsel is appointed for a death penalty defendant. The trial court clerk retains counsel's copies of the record until the appointment. See Cal Rules of Ct 8.619(g)(1).

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§6.28 2. Duties of Appellate Counsel

Appellate counsel is responsible for filing all pleadings and participating in all hearings necessary to certify the record for accuracy. *Marks v Superior Court* (2002) 27 C4th 176, 115 CR2d 674, 683. Habeas corpus counsel, if appointed, may participate in record correction by making suggestions for correction or augmentation to appellate counsel, but the role of habeas counsel is subordinate to that of appellate counsel during this phase of the proceedings. *Marks v Superior Court, supra*.

In death penalty cases in which trial began on or after January 1, 1997, the record is certified for accuracy in accordance with Pen C §190.8(g) and Cal Rules of Ct 8.622, which require appellate counsel to file a request for corrections or additions within 90 days of delivery of the record. Cal Rules of Ct 8.622(a)(1). A request for additions to the reporter's transcript must include the nature and date of the proceedings, and the name of the reporter, if known. Cal Rules of Ct 8.622(a)(2).

The trial court may extend the time for filing a request for corrections or additions for good cause. Cal Rules of Ct 8.622(d)(1). An application for an extension of time must be served and filed before the expiration of the 90-day deadline. In cases in which the clerk's and reporter's transcripts combined contain more than 10,000 pages, the court may grant an additional 15 days for every 1000 pages of combined transcript over 10,000. Cal Rules of Ct 8.622(d)(2).

When appellate counsel requests corrections or additions, the trial court must comply with the procedures and deadlines of Rule 8.619(d)(1)-(5). Cal Rules of Ct 8.622(b)(1). The trial court must certify the record as accurate within 120 days after it has been delivered to appellate counsel unless time has been extended. Cal Rules of Ct 8.622(b)(3). On settling the record, see §§3.10-3.13.

CAUTION: In cases in which trial began before January 1, 1997, requests for augmentation or correction of the record are filed in the trial court, while requests for extensions of time are filed in the California Supreme Court. In order to prevent premature certification of the record, counsel should notify the clerk of the superior court within the initial 90-day period of his or her intent to seek an extension of time and serve all requests for extension of time on the appeals clerk of the superior court and the trial court. If premature certification does occur, counsel should file an application for relief from default under Cal Rules of Ct 8.60(d) in the California Supreme Court as soon as possible.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.29 C. Timeline of Specific Tasks for Postconviction Counsel

§6.29 C. Timeline of Specific Tasks for Postconviction Counsel

The preparation of a death penalty appeal is a massive undertaking, entailing hundreds of hours of attorney time to review an extremely large record and to research and draft numerous guilt and penalty phase issues. It is essential that counsel begin this task by preparing a realistic timeline for completing each step of the appeal. The need for a realistic timeline is even greater for habeas corpus counsel representing a defendant in a capital proceeding, where the investigation of potential habeas claims will require an equally substantial expenditure of time, typically extending over 2 or more years. In cases in which separate appellate and habeas corpus counsel are appointed, both attorneys should make a substantial effort to coordinate their timelines.

The checklists of tasks contained in the following sections were derived from a checklist the court provides to counsel on appointment. In addition, the CAP manual, Representation in Capital Appeals (California Appellate Project), contains an excellent timeline listing the various actions necessary for both appellate and habeas corpus counsel at all stages of these proceedings.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/ 1. Before Certification of the Record for Accuracy/§6.30 a. Appellate Counsel

1. Before Certification of the Record for Accuracy

§6.30 a. Appellate Counsel

On receipt of the record, appellate counsel should do the following:

- Read the record, and prepare detailed and understandable notes on a computer, remembering that these notes will be used by habeas corpus counsel;
- Obtain and review records of related cases (*e.g.,* prior offenses used in aggravation; codefendant's severed trial; previous trial proceedings if retrial);
- Review court files and trial exhibits;
- Provide relevant portions of the record on appeal to the assisting organization;
- Meet with trial counsel to discuss possible issues;
- Create timetable for completing appellate tasks;
- Prepare motion requesting correction, augmentation, settlement, and completion of record;
- Monitor progress of record completion in trial court;
- Prepare preliminary list of issues on appeal;
- Begin research on potential appellate issues; and
- Begin drafting statement of facts and statement of the case.

If no attorney has been appointed to handle the state habeas corpus petition before the record is certified for accuracy, appellate counsel should also perform the habeas-related tasks listed in §6.31 that are necessary to facilitate preparation of a timely habeas corpus petition once counsel is appointed and to preserve habeas corpus issues. On timeliness rules for the habeas corpus petition, see §6.23.

NOTE: It is expected that counsel will use the record correction period to work on the preparation of appellant's opening brief (AOB). The court, in reviewing requests for extension of time to file the AOB, will take note of the length of the record correction period. For current supreme court policies on extensions of time in capital cases, see §6.44.

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§6.31 b. Habeas Corpus Counsel

If appointed before the record has been certified for accuracy, habeas corpus counsel should perform the following tasks before certification of the record:

- Read the record;
- Review trial court files and trial exhibits;
- Obtain and review confidential court files relating to the payment of trial counsel (see Pen C §§987, 987.2-987.3) and confidential court files relating to the payment of investigators and experts (see Pen C §987.9);
- Prepare and complete the release of information authorizations that will be necessary to obtain records and files;
- Obtain and review trial counsel's files;
- Obtain and review files of trial investigator, experts, and consultants;
- Meet with trial counsel to discuss possible issues;
- Prepare detailed, typed index and summary of trial files;
- Provide relevant portions of trial files and other extra-record materials to assisting organization;
- Create timetable for completing habeas corpus tasks;
- Prepare preliminary list of issues on habeas corpus;
- Prepare preliminary "to do" list and habeas corpus investigation plan;
- Prepare a witness inventory, including identifying information and last known address and telephone number;
- Identify and locate witnesses to be interviewed;
- Begin gathering records relevant to potential habeas corpus claims;
- Begin research on potential habeas corpus issues.

If habeas corpus counsel is not appointed until after the record is certified for accuracy, he or she must get started on the tasks listed in this section promptly to comply with the supreme court's timeliness standards. See §6.23. If the timing of separate appellate and habeas corpus appointments permits, habeas corpus counsel should coordinate the timing of the habeas investigation with appellate counsel's review of the record and preparation of the briefing on appeal. In any event, habeas investigation should be done in cooperation with appellate counsel.

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2. Before Appellant's Opening Brief Is Filed

§6.32 a. Appellate Counsel

In a capital case with a combined clerk's and reporter's transcript of 10,000 pages or fewer, in which the trial began on or after January 1, 1997, appellant's opening brief is due 210 days after the record is certified for *completeness* or appellate counsel receives the completed record, whichever is later. Pen C §190.6(b); Cal Rules of Ct 8.630(c)(1)(A). The deadline is automatically extended 15 days for each 1000 pages of record over 10,000. Cal Rules of Ct 8.630(c)(1)(C).

The supreme court may grant an extension of time for good cause. Cal Rules of Ct 8.630(c)(3). For standards for granting extensions of time, see Cal Rules of Ct 8.63. For supreme court policies on extensions of time in capital cases, see §6.44.

Cases in which the trial began before January 1, 1997, are governed by Cal Rules of Ct 8.360(c); *i.e.,* appellant's opening brief (AOB) is due 40 days after the record is filed in the California Supreme Court, *i.e.,* after record correction. See Cal Rules of Ct 8.630(c)(2). The adoption of new statutes and rules governing the time for filing briefs in capital cases signals the court's desire to expedite appellate review in capital cases. Under current practice, the court expects capital counsel to devote a substantial amount of time to a capital case from the beginning of the appointment. To obtain an extension of time, counsel must demonstrate both progress and justification, and as time passes, the court expects greater showings of both progress and justification for additional extensions. Eventually, the court will inform counsel when it believes he or she has had enough time to complete the opening brief. Counsel will first receive an order stating, "No further extensions of time are contemplated." This means that at most, one further 30-day extension of time can be expected. This order will be followed, if another 30-day extension of time is requested and granted, with an order stating, "No further extensions of time will be granted." This means that counsel has reached the end of the line; no further extensions will be granted absent some dire emergency.

NOTE: Rule 8.220(a) notices, giving counsel a 30-day grace period after the due date to file briefs (see §3.21), are not issued in capital appeals. If counsel misses the final due date, counsel will be in default and will need to seek relief from default to file the AOB once the brief is submitted for filing.

By the time the record has been certified for accuracy, appellate counsel should be well into the process of preparing appellant's opening brief. Researching and writing the opening brief in a capital case differs significantly from performing the same tasks in a noncapital case. Foremost, perhaps, is the requirement that appellate counsel work closely with an assisting attorney.

NOTE: An attorney thinking about taking his or her first capital case should seriously consider whether he or she will be able to work comfortably with an assisting attorney. On one hand, having a knowledgeable and experienced consultant available as a resource can make assuming the responsibilities of handling a death penalty appeal less daunting. On the other hand, to an attorney who has been accustomed to making case decisions on his or her own for a long time, the assistance provided in a capital case may seem like uncomfortably close supervision.

In addition, the standard of practice in capital cases requires counsel to brief issues that he or she might not argue in a noncapital appeal, perhaps because counsel believes the error was waived or invited, or that it would be difficult to establish prejudice; to state issues in a variety of ways when appropriate; and to federalize issues (*i.e.,* call attention to their federal constitutional dimensions) whenever possible. There are also a number of potential issues unique to capital cases (*e.g.,* death qualification issues; penalty phase issues).

In preparing appellant's opening brief in a capital case, appellate counsel is expected to:

- Complete the detailed list of issues to be argued on appeal begun before certification of the record for accuracy;
- Consult with CAP and habeas corpus counsel, if appointed, about the issues to be argued;
- Research appellate issues;

- Submit a draft of the opening brief that includes the statement of the case, the statement of facts, the table of contents, and all arguments to the assisting attorney; and
- Incorporate the suggestions of the assisting attorney into the brief before serving and filing it.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.33 b. Habeas Corpus Counsel

§6.33 b. Habeas Corpus Counsel

Between the certification of the record and the filing of the opening brief, habeas corpus counsel should:

- Continue developing habeas corpus issues list;
- Provide materials relevant to habeas corpus issues to CAP or other assisting organization or attorney;
- Continue research on potential habeas corpus issues;
- Consult with CAP and appellate counsel about habeas corpus issues;
- Continue gathering records and, if necessary, prepare and file a motion for post-trial discovery pursuant to Pen C §1054.9;
- Continue additional habeas corpus investigation;
- Evaluate the need for consultation with experts; and
- Consult with appellate counsel about timetables for filing AOB and habeas corpus petition and the division of issues between the two pleadings.

At whatever stage in the appellate proceedings habeas corpus counsel is appointed, he or she must complete the tasks listed in this section and in §6.31 promptly in order to comply with the supreme court's timeliness standards. See §6.23. If the timing of separate appellate and habeas corpus appointments permits, habeas corpus counsel should coordinate the timing of the habeas investigation with appellate counsel's review of the record and preparation of the briefing on appeal. In any event, habeas investigation should be done in cooperation with appellate counsel.

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3. Before the Reply Brief Is Filed

§6.34 a. Appellate Counsel

In cases in which the trial began on or after January 1, 1997, respondent's brief is due 120 days (plus 15 days for each thousand pages of record in excess of 10,000, plus any extensions of time granted by the supreme court) after appellant's opening brief is filed. Cal Rules of Ct 8.630(c)(1)(B)-(C), (c)(3). In cases in which the trial began before January 1, 1997, respondent's brief is due 30 days after the AOB is filed; however, respondent usually requests and receives several 30-day extensions of time. See Cal Rules of Ct 8.630(c)(2)-(3). For current supreme court policies on extensions of time in capital cases, see §6.44.

In cases in which the trial began on or after January 1, 1997, appellant's reply brief is due 60 days after service and filing of respondent's brief. Cal Rules of Ct 8.630(c)(1)(D). The supreme court may grant an extension of time to file the reply brief for good cause. Cal Rules of Ct 8.630(c)(3). In cases in which the trial began before January 1, 1997, the reply brief is due 20 days after service and filing of respondent's brief. In these cases, appellate counsel frequently requests and receives a small number of 30-day extensions of time.

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§6.35 b. Habeas Corpus Counsel

By the time the reply brief in the direct appeal is filed, habeas corpus counsel (if appointed promptly after entry of the judgment) should be in the final stages of preparing the petition. To accomplish this, between the filing of the opening brief and the filing of the reply brief, habeas counsel should:

- Complete development of habeas corpus issues list;
- Continue research on potential habeas corpus issues;
- Consult with CAP and appellate counsel about habeas issues;
- Begin drafting habeas corpus claims;
- Begin preparation of declarations in support of habeas corpus claims;
- Continue gathering records;
- Continue habeas corpus investigation;
- Consult with experts as necessary; and
- Provide experts with specific referral questions and necessary background information.

At whatever stage in the appellate proceedings habeas corpus counsel is appointed, he or she must complete the tasks listed in this section and in §§6.31 and 6.33 promptly to comply with the supreme court's timeliness standards. See §6.23. To the extent possible, habeas corpus counsel should coordinate the habeas corpus investigation with appellate counsel's work and should, no matter when appointed, work cooperatively with appellate counsel.

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4. Between the Reply Brief and Decision

a. Habeas Corpus Counsel

§6.36 (1) Filing the Habeas Corpus Petition

The habeas corpus petition will be considered timely if it is filed within 180 days of the final due date for the reply brief in the direct appeal, or (if later) within 36 months of habeas corpus counsel's appointment. Supreme Ct Policies, Policy 3, std 1-1.1, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. A later-filed petition must have a timeliness explanation attached. See §6.23. In preparation for filing the petition, habeas corpus counsel must:

- Finish drafting claims, jurisdictional allegations, timeliness explanation, if necessary, and prayer for relief;
- Submit draft petition to assisting organization for review and comment;
- Compile documentary evidence to be attached to petition in support of habeas corpus claims and submit to assisting organization for review; and
- Evaluate the need for requesting additional funds to complete investigation.

NOTE: It is essential for habeas counsel to allow sufficient time in his or her schedule for rewriting or obtaining additional documentation after submission of the petition and the documentary evidence to the assisting attorney for review.

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§6.37 (2) Informal Briefing on Habeas Corpus Petition

Before deciding whether to issue an order to show cause, the California Supreme Court may give the Attorney General an opportunity to respond informally. Cal Rules of Ct 8.385(b). In this situation, habeas corpus counsel should research the issues respondent raises in the informal response and draft a reply. Habeas counsel should also consider whether supplemental factual support for petitioner's claims would be helpful.

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§6.38 (3) Order to Show Cause

If an order to show cause is issued, habeas corpus counsel must consult with the assisting organization or attorney about legal issues, further development of facts, the necessity of additional legal briefing, and strategies for any evidentiary hearing.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.39 b. Appellate Counsel

§6.39 b. Appellate Counsel

Under Pen C §190.6, applicable to all cases in which a sentence of death has been imposed after January 1, 1997, the express goal of the legislature is that the appeal will be decided and an opinion will be filed within 210 days of the completion of briefing. If the appeal and the petition for writ of habeas corpus are heard at the same time, the petition should be decided and an opinion reaching the merits should be filed within 210 days of the completion of briefing on the petition. Pen C §190.6(c).

NOTE: Whether this goal, which represents a substantial acceleration of the process, is realistic remains to be seen. The failure of the supreme court to meet this goal is not a ground for relief from the judgment or sentence. Pen C §190.6(d).

Between filing the reply brief and oral argument, appellate counsel should:

- Review the briefing;
- Research legal developments since briefing was completed;
- Consider supplemental briefing;
- Select issues to address at oral argument; and
- Consult with CAP about preparation for oral argument.

PRACTICE TIP: It is strongly recommended that counsel arrange to hold a moot court session with the assisting attorney before argument.

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5. After Decision

§6.40 a. Petition for Rehearing

The rules for rehearing are the same in the court of appeal and the supreme court. See Cal Rules of Ct 8.536. The supreme court may grant rehearing of any decision that is not final on filing, *i.e.,* after decision in the direct appeal or on denial of the petition for writ of habeas corpus after issuance of an order to show cause. Cal Rules of Ct 8.268(a), 8.366(a) (applying Rules 8.252-8.272 to criminal appeals in the court of appeals), 8.536(a).

A petition for rehearing is due in the California Supreme Court within 15 days after the court files its decision or issues a modification changing the judgment. Cal Rules of Ct 8.536(b). Any answer must be served and filed within 8 days of the filing of the petition. Cal Rules of Ct 8.536(b).

It is especially important to file a petition for rehearing to preserve for federal review new federal constitutional issues, previously unbriefed, that were generated by the California Supreme Court's opinion itself. See *Missouri ex rel Missouri Ins. Co. v Gehner* (1930) 281 US 313, 320, 74 L Ed 870, 875, 50 S Ct 326 (holding that when a constitutional issue arises only because of the way the appellate court decided the case, an assertion of the constitutional right made for the first time in a petition for rehearing is timely); *Brinkerhoff-Faris Trust & Sav. Co. v Hill* (1930) 281 US 673, 677, 74 L Ed 1107, 1111, 50 S Ct 451 (same); *Styers v Schriro* (9th Cir 2008) 547 F3d 1026, 1034 (same). When the court decides an issue not previously briefed by either party, the losing party is also entitled to the grant of rehearing under Govt C §68081.

Whether a petition for rehearing should be filed and what issues should be included in any petition that is filed are sensitive tactical decisions that should be made only after consultation with the assisting attorney or organization. Whether counsel should file an answer to the respondent's petition for rehearing after a reversal is likewise an issue that should be discussed with the assisting attorney or organization. Postaffirmance tasks thus include reviewing the court's opinion, researching legal issues raised by the opinion, deciding whether a petition for rehearing should be filed, and, perhaps, drafting a rehearing petition and providing it to the assisting organization for review.

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§6.41 b. Petition for Writ of Certiorari

If the judgment is affirmed, appellate counsel should consider filing a petition for writ of certiorari in the United States Supreme Court. Habeas corpus counsel should consider petitioning for writ of certiorari if the habeas corpus petition is denied. If the California Supreme Court simultaneously decides the automatic appeal and the state habeas corpus petition but does not consolidate the two actions, counsel should file two petitions for writ of certiorari, cross-referencing the two petitions to advise the United States Supreme Court of the procedural posture. Like the decision to petition for rehearing, the decision to seek certiorari is a sensitive tactical decision, and consultation with the assisting organization or attorney is essential.

A petition for writ of certiorari must be filed within 90 days after the California Supreme Court files its decision. US Sup Ct R 13.1, 13.3. If any party files a petition for rehearing, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time for filing the petition for writ of certiorari runs from the date the petition for rehearing is denied or the date of entry of judgment after rehearing. US Sup Ct R 13.3. A cross-petition for writ of certiorari may be filed either within the initial 90-day period, or within 30 days after receipt of the opposing party's petition. US Sup Ct R 13.5. For discussion of petitions for writ of certiorari, see chap 12.

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§6.42 6. After Conclusion of Federal Postconviction Proceedings

If after pursuing all available state and federal remedies, the judgment of death is affirmed, it is the responsibility of habeas corpus counsel to represent the defendant in clemency proceedings before the Governor. Tasks involved in representing a capital defendant in clemency proceedings include identifying clemency themes; preparing an investigation plan and conducting the investigation; preparing the clemency petition; and appearing at the clemency hearing.

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VI. SUPREME COURT POLICIES AND PROCEDURES TO ENSURE TIMELINESS IN CAPITAL CASES

§6.43 A. Status Reports

Appointed appellate counsel must file a status report with the California Supreme Court every 60 days from the date of appointment until he or she files the opening brief; appointed habeas corpus counsel must also file status reports every 60 days until the habeas corpus petition is filed. See, *e.g.,* Fixed Fee Appointment Guidelines, 5, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. Status reports should be sent to the attention of the court's Automatic Appeals Coordinator.

NOTE: A copy of counsel's most recent status report must accompany every fee request until the opening brief and habeas corpus petitions are filed.

These confidential ex parte reports must include the following information:

- The current status of the case, including a good faith estimate of the percentage of work accomplished to date on each uncompleted task;
- A summary of the progress during the last 60 days;
- An account of any problems encountered and a statement of reasons for any delay; and
- Future plans, including a good faith estimate of the amount of time it will take for the remaining work to be done as to each pending uncompleted task, and a proposed target date for completion of each such task.

Section I(B) of Addendum, Procedures and Policies (Cal Supreme Ct, adopted Aug. 22, 2001, effective date Oct. 1, 2001), available online at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR54-01.HTM. The court may request counsel to submit supplemental confidential status reports.

In drafting a status report, it is important to be reasonably detailed and realistic in explaining the progress being made and any impediments to progress. The purpose of these reports is to provide the court with a basis for determining whether any obstacles are impeding the expeditious preparation of the record on appeal or, later, the AOB or the habeas petition, and whether counsel is making steady progress. These reports can be used to alert the court to any problems that may affect the timetable for the case and to seek the court's assistance in resolving any such problems. It is important to file these reports promptly. Failure to timely file status reports may be interpreted by the court as an indication of possible lack of progress.

NOTE: Because status reports are not served on the Attorney General, they can contain information that counsel would not consider appropriate to include in a request for extension of time.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.44 B. Extensions of Time

§6.44 B. Extensions of Time

Although the legislature has established a goal of having capital appeals decided as expeditiously as possible (see Pen C §190.6), the length of the record in the average capital case and the number and complexity of the issues often presented limit the degree to which the process can be expedited. A capital case of average length has a 5000- to 8000-page record. Appellant's opening brief (AOB) in such a case is likely to contain 10 to 30 fully briefed issues. Simply reading the record in such a case will take approximately 125 attorney hours; researching and writing the AOB will take another several hundred hours. See Payment Guidelines, §II(I)(3)(i), available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. (benchmark for preparation of capital AOB is 260-600 hours). If counsel spends 500 hours to research and write the AOB, it will take him or her more than 3 months at 40 hours a week, with no allowance for any other work responsibilities. At the rate of 1 week a month devoted solely to preparing the AOB, counsel will require a year to complete the brief in addition to the time required to review and correct the record. The California Supreme Court may, and undoubtedly will, continue to grant extensions of time (EOT) to file a brief for good cause in accordance with the standards set forth in Cal Rules of Ct 8.63. Cal Rules of Ct 8.630(c)(3).

Extensions of time for briefs in the direct appeal are usually provided in 60-day increments. Extensions of time for habeas corpus informal briefing (informal response to a habeas corpus petition, or reply to an informal response to a habeas corpus petition) are provided in 30-day increments. Section I(D) of Addendum, Procedures and Policies (Cal Supreme Ct, Aug. 22, 2001, adopted Aug. 22, 2001, effective Oct. 1, 2001), available online at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR54-01.HTM.

A declaration submitted in support of an EOT request must include the following:

- The original due date for the uncompleted matter for which an EOT is sought, the amount of time that has elapsed since that date, and the number of prior extensions requested and granted or denied;
- The number of pages in the record, listed as (1) the number of pages in the combined record (clerk's and reporter's transcripts), including juror questionnaires, and (2) the number of pages in the combined record, excluding juror questionnaires;
- A good faith estimate of the percentage of work accomplished to date;
- A good faith estimate of the amount of time required for the remaining work to be done; and
- A proposed target date for filing the brief for which additional time is sought.

Section I(A) of Addendum, Procedures and Policies (Cal Supreme Ct.

The court may ask counsel to submit a supplemental declaration to establish good cause for any requested EOT. Section I(C) of Addendum, Procedures and Policies (Cal Supreme Ct).

An application for an EOT must be filed before the date on which the brief for which additional time is being sought is due. The court prefers to receive such requests 5 to 7 days before the due date. In addition to the required contents of a declaration in support of an extension request, it is important for counsel to:

- Include a genuine reason why more time is needed.
- Inform the court with specificity of the progress being made on the case. Counsel should, for example, note the number of issues identified, the number of arguments drafted, the number needing further editing, and the number currently being researched or drafted.
- Be realistic, even conservative, in reporting progress and estimating when the task will be completed. An overly optimistic estimate can seriously backfire if counsel fails to meet the proposed timetable.
- Inform the court of any special difficulties, *e.g.*, complex or unusual issues, or difficulty in accessing supporting authority.
- Inform the court of any outside circumstances that are impeding progress, *e.g.,* deadlines in other cases, a trial, illness, or unusual personal or family commitments.
- Ask for all the time counsel anticipates will be needed to complete the task. The court will tell counsel when he or she has had enough time.

Applications for extension of time to request correction of the record should be served on the Attorney General's office, the District Attorney's office, trial counsel, the client, the assisting organization or attorney, the superior court, and any associate counsel. Applications for extension of time to file the briefs (opening, reply, supplemental) should be served on the Attorney General's office, the assisting organization or attorney, and any associate counsel.

NOTE: The supreme court permits counsel to personally serve documents on the client if service is made within 30 days of the date of filing, if the proof of service states that service will be made by a specified date, and if, after service, the attorney notifies the court in writing that the client has been served. Supreme Ct Policies, Policy 4, available online at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm. Alternatively, counsel is not required to serve the client with any particular document if counsel attaches to the proof of service (1) defendant's declaration waiving service of that document, and (2) counsel's declaration stating that counsel has explained the substance and purpose of the document to the defendant. Supreme Ct Policies, Policy 4.

Because requests for extension of time, unlike status reports, are served on the Attorney General, care must be taken to avoid including confidential information in the request. If there are confidential reasons why an extension of time is needed, counsel can refer to, and incorporate by reference, matters contained in a current confidential status report simultaneously provided to the California Supreme Court. Supreme Ct Policies, Policy 4. The court considers a request for an extension to be a routine application, which requires filing an original and one copy. See Cal Rules of Ct 8.50, 8.44(a)(6).

NOTE: The California Supreme Court issues warnings that signal when time is running out. "No further extensions are contemplated" means that counsel must show a real need for any further extensions. "No further extensions will be granted" means exactly that—only a dire emergency would be considered as reason to support another extension.

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§6.45 C. Sanctions

If counsel exhausts his or her extensions of time without filing the required brief, counsel will be in default. If the brief is submitted within 30 days after the last due date, counsel will need to seek relief from default, but the court will not likely issue an order to show cause (OSC) or impose sanctions. If the brief is not submitted within that 30-day period, the court will likely issue an order to show cause and schedule the matter for a contempt hearing on its next calendar. The court will probably discharge the OSC if the brief is filed before the hearing. If the brief is not filed, counsel will have to appear at the hearing and show cause why he or she should not be held in contempt. The court may (1) continue the hearing to the next calendar to see whether the brief has been filed by that time; (2) hold counsel in contempt; or (3) in those extreme cases where it does not appear that the brief will be filed even with additional time, vacate the appointment and impose sanctions.

Attorneys who have practiced before the court for some time believe that the court has become more likely to vacate appointments or to impose monetary sanctions on attorneys who are seriously delinquent in filing appellant's opening brief. In one case, the court ordered counsel to return over $40,000 paid in fees. In another very extreme instance, the court sentenced counsel to a very short county jail term.

The California Supreme Court has not yet employed its contempt power for failure to timely file a habeas corpus petition, but it has, on occasion, vacated counsel's appointment.

CAUTION: Habeas corpus timeliness defaults can potentially bar consideration of the defendant's habeas claims in federal court. See *Bennett v Mueller* (9th Cir 2003) 322 F3d 573 (California's *Robbins-Clark* timeliness bar is independent of federal law; case remanded to determine whether bar is regularly and consistently applied). On procedural default as a bar to federal habeas corpus relief, see §§15.12-15.36.

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VII. DRAFTING APPELLANT'S OPENING BRIEF

§6.46 A. Length

A brief in a capital case may not exceed 102,000 words if produced on a computer (300 pages if typewritten), excluding introductory matter and appendices. Cal Rules of Ct 8.630(b). The Chief Justice may, however, for good cause, permit a longer brief (Cal Rules of Ct 8.630(b)), but counsel should comply with the word limit whenever it is possible to do so without compromising the interests of the client. See *In re S.C.* (2006) 138 CA4th 396, 400, 41 CR3d 453. A request to file a longer brief is a routine application governed by Cal Rules of Ct 8.50. See §3.27.

A computer-produced brief must include a certificate by appellate counsel stating the number of words. See Cal Rules of Ct 8.630(b)(2).

For form and format requirements for briefs, see §§3.26-3.42.

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§6.47 B. Organization

Because of the sheer number of issues usually advanced in a capital brief, it is essential to give serious thought to organization of the arguments to avoid a disjointed presentation. There are three commonly used methods of organization. The method counsel chooses depends on which is the most effective way to present the issues in his or her particular case.

Chronological approach. This approach separates issues according to the phase of the trial proceedings in which they arose, *e.g.,* pretrial issues, jury selection issues, guilt phase issues, special circumstance issues, sanity phase issues, penalty phase issues, and postverdict issues. The supreme court almost always uses this approach in its capital case opinions. The chronological approach is probably the easiest to use and is applicable in every case that follows the normal course of proceedings. Although it has the disadvantage of not emphasizing those issues that are most important, counsel can convey the importance of an issue by the length and tone of the briefing.

Hierarchical approach. This approach organizes the issues according to their importance, beginning with the strongest and most important. This method has the advantage of emphasizing those issues that counsel believes are the most important but has the disadvantages of de-emphasizing the issues discussed at the end of the brief, juxtaposing arguments that are not connected, and presenting issues outside their usual chronological order in the trial.

Substantive approach. This approach organizes the issues according to subject matter. For example, one cluster of arguments might center around issues concerning the defendant's arrest and statements to the police; another cluster might center around jury selection and composition; and another cluster might center around the erroneous exclusion of defense mitigating evidence, the erroneous introduction of prosecution aggravating evidence, and erroneous jury instructions concerning the jury's consideration of penalty phase evidence. Obviously, a brief organized according to this method would likely need to include a catchall section of other issues—those issues that are not easily connected according to substance. This method has the advantage of showing how one error impacts another and how the errors in a cluster combine to create cumulative prejudice. The disadvantage here, as in the hierarchical approach, is the de-emphasis of certain arguments.

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§6.48 C. Briefing Previously Rejected Issues

Many potential issues dealing with the constitutionality of the California death penalty statutes and with the constitutionality of the penalty phase procedures and jury instructions used to implement those statutes have already been rejected by the California Supreme Court in prior cases. In *People v Schmeck* (2005) 37 C4th 240, 303, 33 CR3d 397, the supreme court noted that it often receives briefs containing lengthy arguments apparently submitted primarily to preserve those "routine or generic" constitutional claims for later federal review. It declared that it would deem such issues fairly presented "so long as the claim is stated in a straightforward manner accompanied by a brief argument" which (1) identified the claim in the context of the facts; (2) noted that the court had previously rejected the same claim or a similar claim in a prior decision; and (3) asked the court to reconsider the prior decision. 37 C4th at 304.

Whether a federal claim has been preserved for federal review is itself a federal question to be decided by the federal courts. Thus, there is no guarantee that an issue which the California Supreme Court has deemed "fairly presented" will subsequently be deemed adequately preserved when the case reaches federal court. On exhaustion of state remedies, see chap 14. This is particularly true in capital litigation, in which issues are constantly updated, expanded, and refined, so that, for example, an argument that a given procedure violates federal due process in one brief is likely to contain more, and better, subarguments and authorities than a superficially similar due process challenge to the same procedure in a brief filed in another case 5 years earlier. This raises the possibility that a federal court will determine that the newer points were not actually addressed in the decision in the earlier case and therefore have not been preserved for federal review. Consequently, to ensure that all available constitutional claims are properly preserved, counsel should also state briefly *all* of the reasons why a particular statute, procedure, or jury instruction violates each applicable constitutional provision and cite authority for each point. In addition, with regard to the vast majority of errors that are not reversible per se, counsel must present a thorough discussion of prejudice resulting from the error, tailored to the facts of the individual case.

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§6.49 D. Statement of the Case and Statement of Facts

Statement of the case. As in any appeal, the purpose of the statement of the case in a capital appeal is to provide the court with a concise procedural history that will enable the court to understand the nature of the case and what happened at trial. Because there are often a number of charges and special circumstances and other enhancement allegations, it is particularly important in a capital appeal to carefully identify each charge and allegation and its eventual disposition.

Because of the large number of motions and other proceedings in the typical capital case, counsel is often tempted to include much more information than the court needs to understand the issues presented in the appeal. One suggested method for avoiding excessive detail in the statement of the case is to begin with a bare bones draft, including only the minimum procedural facts (charges, pleas, type of trial and when it began, verdicts, when penalty phase began and penalty phase verdict, proceedings on motion for new trial, and sentencing/pronouncement of sentence), and while or after drafting the arguments, add the procedural facts necessary for the court to understand the arguments presented in the AOB. On the contents of the statement of the case generally, see §3.31.

Statement of facts. As with the statement of the case, being concise is a major challenge in drafting the statement of facts in a capital appeal. In a case with an average-length record, counsel should strive for a statement of facts that does not exceed 20 to 30 pages. Given the factual complexity of capital cases, it is essential that counsel refrain from writing a witness-by-witness account. Instead, counsel should provide a coherent narrative, broken into logical, chronological parts divided by subheadings. The facts of the offense(s) are likely to be extremely adverse. Counsel should not shy away from presenting all of the important facts of the offense, pro and con, but should refrain from using unnecessarily inflammatory language. It is advisable to wait to do the final revisions to the statement of facts until all of the arguments are drafted.

It is also advisable to provide a summary introduction to the statement of facts. Such an introduction can provide the reader with a good overview of all of the evidence, both prosecution and defense, as well as a preview of the problem factual areas from which appellant's arguments flow. When counsel includes an introduction, it is essential to follow with a very accurate and explicit summary of both prosecution and defense evidence with adequate and accurate references to the record. See Cal Rules of Ct 8.204(a)(1)(C).

NOTE: Counsel should limit the statement of facts to the evidence presented at trial. If facts presented at a pretrial or other hearing outside the presence of the jury provide the evidentiary basis for one of the arguments presented on appeal, those facts are better summarized in a preliminary factual introduction to the argument.

For additional discussion of the statement of facts, see §§3.33, 4.41.

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E. Argument

§6.50 1. Identifying Issues

In selecting issues to argue in a capital appeal, counsel should always err on the side of inclusion of a borderline issue. This is especially true when a potential issue is cognizable under existing federal constitutional law or can colorably be characterized as a violation of the federal Constitution. Such an argument should be briefed, even if the California Supreme Court has ruled adversely on the issue, because:

- The frequent and sometimes sudden changes in capital litigation, especially in federal capital litigation, warrant the preservation of all colorable claims of federal constitutional error if the United States Supreme Court has not explicitly rejected the precise issue;
- Failure to exhaust an issue in state court waives the claim for federal review (see §§14.18-14.40);
- In light of the prohibition against the creation of new rules in federal habeas corpus proceedings (see 28 USC §2254(d)(1); *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060), presenting an argument on direct appeal so that it may be included in a petition for writ of certiorari to the United States Supreme Court may be a defendant's only opportunity to seek the creation of a new rule of law; and
- Appellate counsel's failure to raise an issue on direct appeal may constitute ineffective assistance of counsel, even when the state court has previously rejected the argument, if federal circuit precedent supported the claim (see *Freeman v Lane* (7th Cir 1992) 962 F2d 1252).

Appellate counsel should not discard a potentially meritorious issue merely because there is a possibility that the supreme court will find the issue has been forfeited through application of the doctrines of waiver, procedural default, or invited error. Instead, counsel should determine, in consultation with the assisting organization or attorney and habeas counsel (if habeas counsel has been appointed), whether the issue is best raised in the AOB as a substantive error or in the petition for writ of habeas corpus as an instance of ineffective assistance by trial counsel. If the issue is raised in the AOB, counsel should advance all applicable arguments against forfeiture. See §§4.26-4.29, 4.33. The California Supreme Court has announced that, when the question of preservation is "close and difficult," it will assume that the issue has been preserved and address the merits. *People v Champion* (1995) 9 C4th 879, 908 n6, 39 CR2d 547.

NOTE: The case of *Smith v Murray* (1986) 477 US 527, 91 L Ed 2d 434, 106 S Ct 2661, illustrates why it is so important to err on the side of over-inclusion. In *Smith*, the defendant's appellate attorney decided not to argue that a psychiatrist's penalty phase testimony about another offense was inadmissible because the state supreme court had ruled such testimony admissible. Thereafter, a federal appellate court ruled that the admission of such evidence violated the federal Constitution. However, when Mr. Smith attempted to raise the claim in his federal habeas corpus petition, the United States Supreme Court held that the claim could not be considered because it was waived by appellate counsel's failure to raise it in the state court.

In addition, certain penalty phase arguments about the constitutionality of California's death penalty scheme should be raised in every case in which they might arguably apply as long as the United States Supreme Court has not expressly rejected the precise argument. Such arguments can be raised without extended discussion but must be supported by some legal argument and citation of authorities for each point made. On arguing issues previously raised and rejected, see §6.48. Counsel can obtain a list of current penalty phase issues and suggested briefing from his or her assisting organization or attorney.

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§6.51 2. Drafting the Arguments

It is impossible to overstate the importance of beginning work on researching and drafting arguments during record correction and continuing to work steadily until the opening brief is filed. Capital appeals typically differ from other cases in the number and complexity of issues. It is not unusual for the opening brief in a capital case to contain 10 to 30 fully briefed issues, several of which may be 30 to 50 pages in length. Preparation of such a brief requires steady work over a period of many months. Attorneys who wait for a due date to begin drafting arguments are jeopardizing both their health and the quality of the final product. It is not possible to prepare an entire capital opening brief of high quality in 30 or 60 days.

In addition, it is important to set aside a substantial period of time for revising and polishing the brief at the end of the process. Because capital appeals are written over a period of several months (or longer), and because capital appellate law is continually in flux, the final version of the opening brief will likely require extensive revisions. Because most capital appeals contain a number of "cluster arguments" (*i.e.,* arguments that interconnect due to the source of error or because of their cumulative prejudicial effect), the drafting of arguments frequently involves extensive cross-referencing. As revisions are made and more arguments are drafted, counsel must take care to make the relationships between such arguments explicit and update the cross-references already made. Accordingly, in setting a timetable for drafting the arguments, it is essential to factor in the last-minute crunch, remembering that it takes much more time to polish a 300- to 500-page brief than a 50- to 75-page brief.

PRACTICE TIP: It is a good idea to adopt a consistent method of referring to the record, witness names, the defendant, trial counsel, the prosecutor, etc., at the outset. Finding and correcting internal inconsistencies in matters of form such as this can take a substantial amount of time.

Although somewhat abbreviated briefing is permissible when presenting "routine or generic" constitutional issues that have previously been rejected by the supreme court (see §6.48), all other issues should be fully briefed. The supreme court continues to reject, without discussion, claims that are presented "perfunctorily" without supporting argument. See *People v Zambrano* (2007) 41 C4th 1082, 1188, 63 CR3d 297, disapproved on other grounds by *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209. An attempt to preserve issues, without argument, by "incorporating" into the opening brief all of the issues raised by oral and written motions in the trial court will likewise fail. See *People v Abilez* (2007) 41 C4th 472, 536, 61 CR3d 526.

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§6.52 3. Arguing Prejudice

As is the case in noncapital appeals, a well-formulated discussion of prejudice is an essential component of almost every argument because, except for the few errors which are reversible per se, error alone will not justify reversal; prejudice must also be shown. Errors at the guilt and sanity phases of a capital trial are subject to the same standards of prejudice that apply in noncapital cases. See §§4.30-4.32.

However, an error of state law at the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict. *People v Brown* (1988) 46 C3d 432, 448, 250 CR 604. This standard is "the same, in substance and effect," as the standard for federal constitutional error announced in *Chapman v California* (1967) 386 US 18, 24, 17 L Ed 2d 705, 87 S Ct 824, which requires reversal unless the prosecution can show that the error was harmless beyond a reasonable doubt. *People v Ashmus* (1991) 54 C3d 932, 965, 2 CR2d 112.

NOTE: An error that occurs during the guilt phase of the trial may affect not only the ensuing guilt and special circumstances determinations but also the later penalty determination. Even if such an error is harmless as to guilt, it may be prejudicial as to penalty. See, *e.g., In re Hardy* (2007) 41 C4th 977, 1031, 63 CR3d 845 (trial counsel's deficient performance, which included failure to discover and present third party culpability evidence, was prejudicial as to penalty, but not as to guilt).

The penalty jury's consideration of an invalid special circumstance is not federal constitutional error if at least one other valid special circumstance remains to make the defendant eligible for death and the evidence admitted to establish the invalid circumstance was admissible and properly considered by the jury under other sentencing factors. *Brown v Sanders* (2006) 546 US 212, 163 L Ed 2d 723, 126 S Ct 884. See *People v Mungia* (2008) 44 C4th 1101, 1139, 81 CR3d 614; *People v Morgan* (2007) 42 C4th 593, 67 CR3d 753. However, consideration of an invalid special circumstance will render the death sentence unconstitutional if none "of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances" whose consideration was permitted by the invalid special circumstance. 546 US at 220.

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§6.53 VIII. ORAL ARGUMENT

Generally, when a case is ready for oral argument, the court notifies counsel and sets a tentative argument date approximately 2 months in advance. Each side in a capital appeal is allowed 45 minutes for oral argument. Cal Rules of Ct 8.638(b)(2). Two attorneys may argue on each side, if they notify the court within 10 days after the order setting the case for argument. Cal Rules of Ct 8.638(b)(3). The California Supreme Court expects counsel to argue the case and to use all of their allotted time to do so.

NOTE: The supreme court allows only 30 minutes for each side to argue in a habeas corpus proceeding, even in a capital case. See Cal Rules of Ct 8.524(e), 8.368.

If counsel wants to refer to exhibits at oral argument, a notice designating exhibits should be filed promptly after the order setting the case for argument. See Cal Rules of Ct 8.634, 8.224(a). Although all exhibits, whether admitted, lodged, or refused, are considered part of the record, they may be transmitted to the Supreme Court only as provided in Rule 8.224. Cal Rules of Ct 8.634(a). No party may file a notice until the Supreme Court has set the time and place of oral argument. Cal Rules of Ct 8.634(b).

Preparation for oral argument in a capital case is especially difficult because of the number and complexity of issues presented. Counsel must not only choose a few issues to argue out of the many that were briefed but must also be prepared to discuss any other issues the court wants counsel to address.

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IX. ISSUES UNIQUE TO CAPITAL CASES

§6.54 A. The Eighth Amendment

The foundation for capital jurisprudence is the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution. See, *e.g., Robinson v California* (1962) 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417 (applying Eighth Amendment to states through Fourteenth Amendment); *Trop v Dulles* (1958) 356 US 86, 100*,* 78 S Ct 590, 2 L Ed 2d 630 (plurality opinion) (Eighth Amendment derives meaning from "evolving standards of decency"). The United States Supreme Court has identified four fundamental values of the Eighth Amendment as general standards for evaluating constitutional claims in capital cases: (1) uniformity or non-arbitrariness, (2) individualization, (3) reliability, and (4) proportionality.

Two major themes, derived from these fundamental values, run through the high Court's capital jurisprudence:

(1) The mandate of *Furman v Georgia* (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, that jury discretion be channeled to avoid arbitrary and capricious capital sentencing; and

(2) The mandate of *Lockett v Ohio* (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, that the defendant be allowed to present and the jury be allowed to consider all relevant evidence in mitigation of punishment, regardless of the heinousness of the aggravation proven by the state.

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§6.55 1. Uniformity (Non-Arbitrariness)

The first requirement of the Eighth Amendment is uniformity, or non-arbitrariness, in the imposition of the death penalty. *Furman v Georgia* (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (holding death penalty statutes of Georgia and Texas unconstitutional, because they permitted arbitrary and unguided imposition of death sentence). The death penalty cannot be imposed if sentencing procedures create "substantial risk that [death] will be inflicted in an arbitrary and capricious manner." *Gregg v Georgia* (1976) 428 US 153, 188, 49 L Ed 2d 859, 96 S Ct 2909 (upholding Georgia statute providing for separate penalty phase; requiring sentencing judge or jury to find at least one of ten statutory aggravating circumstances beyond reasonable doubt, to consider any additional mitigating or aggravating evidence, and to specify aggravating circumstance(s) found; and providing for direct review by state supreme court of appropriateness of all death sentences).

See also *Maynard v Cartwright* (1988) 486 US 356, 100 L Ed 2d 372, 384, 108 S Ct 1853 (aggravating circumstance must channel and narrow sentencer's discretion); *Godfrey v Georgia* (1980) 446 US 420, 433, 64 L Ed 2d 398, 100 S Ct 1759 (sentencing scheme must provide principled way to distinguish case in which death penalty imposed from cases in which it is not); *Spaziano v Florida* (1984) 468 US 447, 460, 82 L Ed 2d 340, 104 S Ct 3154; *Zant v Stephens* (1983) 462 US 862, 877, 77 L Ed 2d 235, 103 S Ct 2733 (standards must channel discretion to avoid "pattern of arbitrary and capricious sentencing").

The requirement of uniformity, or non-arbitrariness, can be used to challenge any part of the sentencing process, or any piece of evidence, that introduces an element of capriciousness into the process.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/6 Postconviction Review in Death Penalty Cases/§6.56 2. Individualization

§6.56 2. Individualization

The Eighth Amendment requires the sentencer to make an "individualized determination" of whether death is the appropriate punishment in light of all the circumstances of the case and characteristics of the defendant. See *Sumner v Shuman* (1987) 483 US 66, 97 L Ed 2d 56, 107 S Ct 2716; *Skipper v South Carolina* (1986) 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669; *Eddings v Oklahoma* (1982) 455 US 104, 112, 71 L Ed 2d 1, 102 S Ct 869; *Roberts (Harry) v Louisiana* (1977) 431 US 633, 52 L Ed 2d 637, 97 S Ct 1993; *Roberts (Stanislaus) v Louisiana* (1976) 428 US 325, 49 L Ed 2d 974, 96 S Ct 3001; *Woodson v North Carolina* (1976) 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978.

The individualization principle precludes sentencing schemes that provide for mandatory death sentences upon conviction for certain crimes. See *Woodson v North Carolina, supra* (mandatory death penalty for first degree murder unconstitutional); *Roberts (Stanislaus) v Louisiana, supra* (mandatory death penalty for felony-murder unconstitutional); *Roberts (Harry) v Louisiana, supra* (mandatory death penalty for murder of police officer unconstitutional); *Sumner v Shuman, supra* (mandatory death sentence for murders committed by inmates serving life sentences without possibility of parole unconstitutional).

The Eighth Amendment does not prohibit a capital sentencing scheme that requires the sentencer to impose the death penalty on finding certain circumstances, if the relevant enactments do not preclude the sentencer from considering evidence of mitigation or create a presumption that death is the appropriate punishment. See *Kansas v Marsh* (2006) 548 US 163, 165 L Ed 2d 429, 126 S Ct 2516 (upholding Kansas statute requiring imposition of death penalty when jury determines aggravating and mitigating evidence is of equal weight); *Walton v Arizona* (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, overruled on other grounds in *Ring v Arizona* (2002) 536 US 584, 609, 153 L Ed 2d 556, 576, 122 S Ct 2428 (upholding Arizona statute making death penalty mandatory if sentencer finds one or more aggravating circumstances and finds mitigating circumstances insufficient for leniency); *Blystone v Pennsylvania* (1990) 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078 (upholding Pennsylvania statute mandating death sentence if jury finds at least one aggravating circumstance and no mitigating circumstances or finds that aggravating circumstances outweigh mitigating circumstances); *Boyde v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 (upholding former California instruction requiring jury to impose death sentence if it finds that aggravating circumstances outweigh mitigating circumstances). See also *Baldwin v Alabama* (1985) 472 US 372, 86 L Ed 2d 300, 105 S Ct 2727 (upholding former Alabama statute requiring jury to impose death sentence for certain crimes, but also requiring judge to consider and weigh aggravating and mitigating circumstances independently in sentencing to death or life imprisonment).

The individualization principle also requires that the sentencer be permitted to consider all relevant mitigating evidence. *Lockett v Ohio* (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954; *Eddings v Oklahoma* (1982) 455 US 104, 71 L Ed 2d 1, 102 S Ct 869. In *Skipper v South Carolina* (1986) 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669, the high court held that under the Eighth Amendment's individualized determination standard, the sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See also *Penry v Lynaugh* (1989) 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934, overruled on other grounds in *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242 (trial judge must instruct jury that it may consider nonstatutory mitigating evidence); *Hitchcock v Dugger* (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821 (death sentence unconstitutional because penalty instructions limited jury's consideration of mitigating evidence to statutorily enumerated factors). But see *Buchanan v Angelone* (1998) 522 US 269, 139 L Ed 2d 702, 118 S Ct 757 (jury need not be instructed specifically on particular statutory mitigating factors so long as it is instructed that all mitigating evidence should be considered); *Delo v Lashley* (1993) 507 US 272, 122 L Ed 2d 620, 113 S Ct 1222 (when neither defendant nor prosecutor offered any evidence on defendant's prior criminal activity, trial court did not err in refusing to give instruction that jury could consider lack of criminal history in mitigation); *Boyde v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 (former California instruction that allowed jury to consider extenuating circumstances, but defined "extenuate" as "lessen the seriousness of a crime as by giving an excuse," did not prevent jury consideration of mitigation evidence related to background and character).

The individualization principle also requires that the sentencer be permitted to give full effect to all relevant mitigating evidence. See *Mills v Maryland* (1988) 486 US 367, 100 L Ed 2d 384, 393, 108 S Ct 1860 (resentencing required when reviewing court unsure whether jury interpreted instructions to mean that it could not consider mitigating factor unless it was unanimous that the factor was present).

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§6.57 3. Proportionality

The United States Supreme Court has rejected the argument that the death penalty itself is unconstitutional as a disproportionate penalty in all cases. *Gregg v Georgia* (1976) 428 US 153, 188, 49 L Ed 2d 859, 96 S Ct 2909. However, the Court has found the death penalty to be a disproportionate penalty under the Eighth Amendment for certain classes of crimes. See *Coker v Georgia* (1977) 433 US 584, 53 L Ed 2d 982, 97 S Ct 2861 (rape of adult woman); *Eberheart v Georgia* (1977) 433 US 917, 53 L Ed 2d 1104, 97 S Ct 2994 (kidnapping); *Tison v Arizona* (1987) 481 US 137, 95 L Ed 2d 127, 107 S Ct 1676 (felony-murder, when accomplice did not kill and did not intend to kill, unless he or she was major participant in felony and acted with reckless disregard for life); *Kennedy v Louisiana* (2008) ___ US ___, 171 L Ed 2d 525, 540, 128 S Ct 2641 (rape of child when crime did not result in death). The Court has also held that the death penalty may be disproportionate based on the individual characteristics of the defendant. See *Roper v Simmons* (2005) 543 US 551, 161 L Ed 2d 1, 125 S Ct 1183 (Eighth Amendment does not permit execution of defendant who was under 18 at time of crime); *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242 (Eighth Amendment does not permit execution of the mentally retarded); *Ford v Wainwright* (1986) 477 US 399, 91 L Ed 2d 335, 106 S Ct 2595 (Eighth Amendment does not permit execution of insane).

The federal Constitution does not require state courts to ensure that the death penalty is appropriate in a particular case by comparing the punishment imposed in the case under review with the punishment imposed for similar crimes (comparative proportionality review). *Pulley v Harris* (1984) 465 US 37, 79 L Ed 2d 29, 104 S Ct 871. See *People v Jablonski* (2006) 37 C4th 774, 837, 38 CR3d 98. Although the Court in *Harris* upheld a California statute that does not require comparative proportionality review, it also recognized that a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review. 465 US at 51. The federal Constitution may require a state to follow its own statutory proportionality requirements (465 US at 41), but federal habeas review of state proportionality review is limited to the question of whether the state court engaged in a good faith examination. *Walton v Arizona* (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, overruled on other grounds in *Ring v Arizona* (2002) 536 US 584, 609, 153 L Ed 2d 556, 564, 122 S Ct 2428.

The California Supreme Court will not conduct "intercase" proportionality review, *i.e.*, it will not compare the sentence defendant received to the sentences imposed in other cases on those who committed similar crimes. It will, however, conduct "intracase" proportionality review, determining if the death sentence imposed on defendant is disproportionate to his or her personal moral culpability or to the sentences imposed on the other principals (if any) in the same capital crime. *People v Stanley* (2006) 39 C4th 913, 966, 47 CR3d 420. Therefore, if the facts of the case warrant it, an argument on intracase proportionality should be included in the appellant's opening brief.

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§6.58 4. Reliability

Because of the finality of death, the Eighth Amendment proscription of cruel and unusual punishment requires heightened reliability in decision making. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment.'" *Johnson v Mississippi* (1988) 486 US 578, 584, 100 L Ed 2d 575, 585, 108 S Ct 1981. The United States Supreme Court has consistently emphasized the need to eliminate the constitutionally impermissible "risk that the death sentence was imposed despite factors which call for a less severe penalty" *Lockett v Ohio* (1978) 438 US 586, 605, 57 L Ed 2d 973, 98 S Ct 2954. See also *Thompson v Oklahoma* (1988) 487 US 815, 101 L Ed 2d 702, 108 S Ct 2687 (concurring opinion of O'Connor, J.) ("Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction").

Any error that diminishes the reliability of the sentence can be challenged as a violation of the Eighth Amendment. See, *e.g., Johnson v Mississippi, supra* (death sentence based in part on invalid prior conviction reversed as unreliable); *Caldwell v Mississippi* (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (prosecutor's argument to jury that its penalty determination was subject to appellate review violated Eighth Amendment's requirement of reliability); *Gardner v Florida* (1977) 430 US 349, 51 L Ed 2d 393, 97 S Ct 1197 (sentencer may not impose death penalty on basis of confidential information not disclosed to defendant or counsel).

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B. Other Capital Case Issues

§6.59 1. Jury Selection

A defendant in a capital case is entitled to be tried by jurors who do not have views on capital punishment that will prevent or substantially impair their ability to perform their duties as jurors. *Wainwright v Witt* (1985) 469 US 412, 424, 83 L Ed 2d 841, 105 S Ct 844; *People v Crittenden* (1994) 9 C4th 83, 121, 36 CR2d 474. See also *Morgan v Illinois* (1992) 504 US 719, 729, 119 L Ed 2d 492, 112 S Ct 2222 (trial court must permit inquiry into whether prospective jurors would automatically impose death penalty without regard to facts).

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2. Jury Instructions

§6.60 a. Guilt Phase

A capital defendant is entitled under the federal Constitution to an instruction on lesser included offenses if the evidence could support a finding of guilt on such offenses. *Beck v Alabama* (1980) 447 US 625, 65 L Ed 2d 392, 100 S Ct 2382 (statute precluding jury from considering any lesser included offenses impermissibly skewed fact-finding process and violated due process in capital case). The following cases indicate that the rule set forth in *Beck* is subject to a number of limitations:

- *Hopper v Evans* (1982) 456 US 605, 72 L Ed 2d 367, 102 S Ct 2049 (lesser included offense instructions not required when defendant's own evidence negates possibility of lesser offense; lesser included offense instruction required only when evidence supports instruction);
- *Spaziano v Florida* (1984) 468 US 447, 460, 82 L Ed 2d 340, 104 S Ct 3154 (trial court's failure to instruct on lesser included offenses not error because conviction of lesser offenses barred by statute of limitations, and defendant refused to waive statute);
- *Schad v Arizona* (1991) 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (jury instruction that includes second-degree murder as lesser included offense provides sufficient "third option" to withstand *Beck* challenge to trial court's refusal to instruct on robbery as lesser included offense of robbery felony-murder); and
- *Hopkins v Reeves* (1998) 524 US 88, 141 L Ed 2d 76, 118 S Ct 1895 (*Beck* did not require instructions on second-degree murder and manslaughter in felony-murder case because these crimes are not lesser included offenses under state law; moreover, guilty verdict here did not automatically require imposition of death penalty, which was responsibility of separate three-judge sentencing panel).

See also *People v Rundle* (2008) 43 C4th 76, 141, 74 CR3d 454, overruled on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209, suggesting that the California Supreme Court will not apply *Beck* in *any* capital case because, in contrast to the situation in Alabama at the time of *Beck*, in California a guilt-phase verdict of capital murder (first-degree murder with one or more special circumstances) does not require the imposition of a death sentence but instead leads to a penalty phase and a choice between death or life without possibility of parole.

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§6.61 b. Penalty Phase

Although the *federal* Constitution permits a state capital sentencing jury to be instructed that a sentence of life imprisonment without the possibility of parole (LWOP) can be commuted by the Governor to a sentence that includes the possibility of parole (*California v Ramos* (1983) 463 US 992, 77 L Ed 2d 1171, 103 S Ct 3446), the *California* Constitution does not. *People v Ramos* (1984) 37 C3d 136, 207 CR 800. The trial court should never advise a jury of the Governor's power of commutation unless a juror raises the issue, or the defendant makes the request. In either situation, the court must also instruct the jury that it would be a violation of their oaths as jurors to consider the possibility of commutation in assessing penalty. 37 C3d at 159 n12.

When the state puts a defendant's future dangerousness in issue and LWOP is the only available alternate to death, federal due process requires that the sentencing jury be told, by either argument or instruction, that the defendant is ineligible for parole. *Simmons v South Carolina* (1994) 512 US 154, 129 L Ed 2d 133, 114 S Ct 2187. See also *Kelly v South Carolina* (2002) 534 US 246, 151 L Ed 2d 670, 122 S Ct 726. Note that *Simmons* announced a new rule within the meaning of *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, and therefore may not be used on federal habeas to invalidate a death sentence that was already final when *Simmons* was decided. *O'Dell v Netherland* (1997) 521 US 151, 138 L Ed 2d 351, 117 S Ct 1969.

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§6.62 3. Due Process at Sentencing

A capital sentencing proceeding must comply with due process, just as the trial itself must, because the sentencing phase is a critical stage in the criminal proceeding. See *Gardner v Florida* (1977) 430 US 349, 51 L Ed 2d 393, 97 S Ct 1197. The following cases illustrate important due process principles applicable to capital sentencing:

- *Gardner v Florida, supra* (due process does not permit sentencer to impose death penalty on basis of information not disclosed to defendant or counsel);
- *Skipper v South Carolina* (1986) 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669 (due process entitles capital defendant to introduce evidence of good conduct in custody to rebut evidence of future dangerousness);
- *Simmons v South Carolina* (1994) 512 US 154, 129 L Ed 2d 133, 114 S Ct 2187 (when prosecutor argues future dangerousness, due process requires that jury be informed that defendant not eligible for parole when life without parole is only alternative to death penalty);
- *Lankford v Idaho* (1991) 500 US 110, 114 L Ed 2d 173, 111 S Ct 1723 (due process does not permit imposition of death penalty after state has given notice that it will not recommend death, and defendant has no notice that death penalty still at issue);
- *Payne v Tennessee* (1991) 501 US 808, 115 L Ed 2d 720, 111 S Ct 2597 (due process prevents introduction of victim impact evidence that is so unduly prejudicial that it renders trial fundamentally unfair);
- *Caldwell v Mississippi* (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (due process does not permit imposition of death penalty by sentencer led to believe that responsibility for determining appropriateness of sentence rests elsewhere);
- *People v Loker* (2008) 44 C4th 691, 729, 80 CR3d 630 (due process requires admission of hearsay evidence at penalty phase if "(1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of the trial,' and (2) there are substantial reasons to assume the reliability of the evidence." (Citing *People v Kaurish* (1990) 52 C3d 648, 704, 276 CR 788, quoting *Green v Georgia* (1979) 442 US 95, 60 L Ed 2d 738, 99 S Ct 2150));
- *Clark v Brown* (9th Cir 2006) 442 F3d 708, amended (9th Cir 2006) 450 F3d 898 (retroactive application of new interpretation of felony-murder special circumstance statute violated due process right to fair notice that conduct made defendant death-eligible).

Due process does not entitle a capital defendant to notice of the *evidence* the prosecution will present at the sentencing proceeding. *Gray v Netherland* (1996) 518 US 152, 135 L Ed 2d 457, 116 S Ct 2074. State law gives the capital defendant a statutory right to notice, "within a reasonable period of time" before trial, of the aggravating evidence to be introduced by the prosecution. Pen C §190.3. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation (Pen C §190.3), but the defendant is entitled, on request, to discovery of the proposed rebuttal evidence. *People v Gonzalez* (2006) 38 C4th 932, 955, 44 CR3d 237.

The United States Supreme Court has rejected vagueness challenges to three of California's sentencing factors: (1) the circumstances of the crime; (2) the presence or absence of prior criminal activity; and (3) the age of the defendant at the time of the crime. *Tuilaepa v California* (1994) 512 US 967, 129 L Ed 2d 750, 114 S Ct 2630. At the same time, the Court held that California's unitary list of sentencing factors is not flawed because of its failure to instruct the sentencer how to weigh the facts in deciding the sentence. 512 US at 978.

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§6.63 4. Automatic Motion to Modify the Penalty

Unique to death penalty cases is the automatic motion for modification of the penalty verdict established by Pen C §190.4(e). The motion is heard at the time set for imposition of sentence, before any motion for new trial. See California Criminal Law Procedure and Practice §54.53 (Cal CEB Annual). "In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict." *People v Steele* (2002) 27 C4th 1230, 1267, 120 CR2d 432. The court must state on the record the reasons for its findings. Pen C §190.4(e). On appeal, the California Supreme Court will independently review the trial court's ruling, after itself reviewing the record, but it will not make a de novo determination of penalty. *People v Steele*, *supra,* 27 C4th at 1267. If a defendant fails to object to the trial court's ruling at a modification hearing conducted after the supreme court decision in *People v. Hill* (1992) 3 C4th 959, 1013, 13 CR2d 475, the claim is forfeited. *People v Mungia* (2008) 44 C4th 1101, 1140, 81 CR3d 614.

Claims that the trial court overlooked, ignored, or unfairly discounted some or all of defendant's mitigating evidence usually founder on the record. See, *e.g., People v Berryman* (1993) 6 C4th 1048, 1107, 25 CR2d 867, overruled on other grounds by *People v Hill* (1998) 17 C4th 800, 72 CR2d 656. The trial court is not required to recite every item of potentially mitigating evidence it considered in the course of its review. *People v Osband* (1996) 13 C4th 622, 727, 55 CR2d 26; *People v Frierson* (1991) 53 C3d 730, 752, 280 CR 440. Unless there is an indication to the contrary in the record, the supreme court will assume that the trial court's failure to mention all the evidence presented in mitigation means only that the trial court concluded that the unmentioned evidence had no appreciable mitigating weight. *People v Samayoa* (1997) 15 C4th 795, 860, 64 CR2d 400; *People v Osband*, *supra*.

Other appellate challenges to the trial court's denial of the motion include the following claims:

- The trial court did not exercise its independent judgment in weighing the evidence and evaluating the credibility of witnesses. *E.g.*, *People v Bonillas* (1989) 48 C3d 757, 801, 257 CR 895; *People v Rodriguez* (1986) 42 C3d 730, 794, 230 CR 667.
- The trial court failed to state any reasons for denying the motion. *E.g., People v Sheldon* (1989) 48 C3d 935, 962, 258 CR 242; *Rodriguez,* 42 C3d at 794.
- The trial court stated inadequate or improper reasons for the denial. *E.g., People v Rogers* (2006) 39 C4th 826, 909, 48 CR3d 1; *Bonillas,* 48 C3d at 801.
- The trial court improperly relied on extraneous evidence (*i.e.,* evidence not presented to the jury at the trial) in making its determination. *E.g., People v Lewis* (1990) 50 C3d 262, 287, 266 CR 834 (reliance on information in probation officer's report).

However, even if prejudicial error is found, the remedy is not reversal of the death sentence but rather remand for a new hearing on the automatic motion to modify. *Rodriguez*, 42 C3d at 794.

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§6.64 5. Method of Execution

Challenges to the method of execution are not cognizable on direct appeal, both because such challenges do not relate to the validity of the underlying judgment and hence do not provide grounds for reversal and because attacks on defects in the execution process that may or may not exist at the time the death sentence is to be carried out are premature. *People v Rogers* (2006) 39 C4th 826, 911, 48 CR3d 1; *People v Cornwell* (2005) 37 C4th 50, 105, 33 CR3d 1, overruled in part on other grounds by *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209. As the time for execution nears, the defendant may challenge the execution process in federal court by filing (depending on the precise nature of the challenge) either a civil rights action under 42 USC §1983 or a petition for writ of habeas corpus under 28 USC §2254. *Hill v McDonough* (2006) 547 US 573, 165 L Ed 2d 44, 51, 126 S Ct 2096.

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7

Writs of Mandate and Prohibition Defined

Susan Horst
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§7.1 I. OVERVIEW OF WRITS IN CRIMINAL CASES

The three principal writs used in criminal law practice are prohibition, mandate (also called mandamus), and habeas corpus. These writs, sometimes called "extraordinary writs" or "prerogative writs," originated in England, and were used by the King's Bench, England's supreme common law court, "to supervise inferior officers and tribunals." Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum L Rev 1515, 1533 (2001); see *Pulliam v Allen* (1984) 466 US 522, 532, 80 L Ed 2d 565, 573, 104 S Ct 1970; *Lewis v Superior Court* (1999) 19 C4th 1232, 1245, 82 CR2d 85.

Petitions for writs of prohibition and mandate, discussed in this chapter and in chap 8, are used to request review of rulings made by the trial court or the magistrate during the course of criminal proceedings. The writ of prohibition is used to stop proceedings that are in excess of jurisdiction. CCP §1102. The writ of mandate is used to compel the trial court to perform an act that it is required by law to perform. CCP §1085. Mandate and prohibition are available to both prosecution and defense when the prerequisites for relief are met. See generally, CCP §§1086-1097 (mandate) and 1102-1105 (prohibition).

This chapter will discuss the threshold requirements a petitioner must meet to obtain writ relief; the common uses of mandate and prohibition; and will compare the purposes of the two writs to assist counsel in determining which writ is appropriate in a particular situation. Chapter 8, "Preparing and Opposing Petition for Mandate or Prohibition," provides guidelines for preparing and opposing writ petitions, and includes a number of sample provisions to assist counsel in drafting a petition for extraordinary relief.

The writ of habeas corpus, available only to the defendant, challenges the legality of custody. It can be used pretrial, to challenge excessive bail for example, but its primary purpose is to collaterally attack a judgment or sentence. Habeas corpus in state court is discussed in chaps 9-10. Federal habeas corpus is discussed in chaps 13-18.

The nonstatutory writ of error coram nobis is the equivalent of a motion to vacate the judgment, which is authorized by Pen C §1201.5. See, *e.g., People v Kelly* (1939) 35 CA2d 571, 96 P2d 372. It can be used in circumscribed circumstances to vacate a judgment of conviction after it has been affirmed on appeal when no other remedy is available. Coram nobis is discussed in chap 11.

Another writ that is rarely utilized in criminal cases, certiorari (review) is discussed in California Civil Writ Practice §§4.10-4.16, 15.27-15.38 (4th ed Cal CEB 2008).

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§7.2 II. JURISDICTION OF COURTS TO CONSIDER WRIT PETITIONS

The courts derive their authority from the constitution, as supplemented by statutes, rules of court, and general principles of law developed in appellate decisions. The California Constitution provides that the California Supreme Court, courts of appeal, and superior courts have original jurisdiction in mandate and prohibition proceedings. Cal Const art VI, §10. Because writs of mandate and prohibition can be issued only to inferior tribunals (CCP §§1085(a) (mandate), 1103(a) (prohibition)), the superior court exercises its jurisdiction by issuing a writ to an inferior tribunal, typically a magistrate. A magistrate is a statutory judicial officer whose authority is limited to preliminary matters and whose duties are entirely defined by statute. See Pen C §§806-829, 858-883. A superior court judge sitting as a magistrate is not acting as a judge of the superior court. *People v Toney* (2004) 32 C4th 228, 230 n2, 8 CR3d 577; *People v Randall* (1973) 35 CA3d 972, 975, 111 CR 590. He or she is an "inferior tribunal" to the superior court, which may properly issue writs directed to a magistrate. *People v Superior Court (Chico Feminist Women's Health Ctr.)* (1986) 187 CA3d 648, 655, 232 CR 165. Therefore, a writ petition directed to the magistrate who presided at a preliminary hearing in a felony case may be filed in superior court even though the magistrate is a superior court judge. *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 803, 123 CR2d 31.

The appellate division of the superior court has original jurisdiction in mandate, and prohibition proceedings in causes subject to its appellate jurisdiction (*i.e.,* cases such as misdemeanors, infractions, and limited civil cases that were tried in municipal court before trial court unification). Cal Const art VI, §10. See also CCP §§1068(b), 1085(b), 1103(b) (defining superior court as "inferior tribunal" to appellate division for purposes of writs of review (certiorari), mandate, and prohibition).

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III. MANDATE AND PROHIBITION COMPARED

§7.3 A. Difference in Function

Because mandate and prohibition have similar functions, it can sometimes be difficult to determine whether mandate or prohibition is the proper writ to use in a given situation. For example, when the petitioner wants the court to dismiss a case or a count, it is possible to characterize the relief requested as prohibiting the court from proceeding, or compelling the court to dismiss. See, *e.g., Stanton v Superior Court* (1987) 193 CA3d 265, 271, 239 CR 328 (mandate issued to compel trial court to vacate order denying motion to dismiss). Furthermore, writs of mandate and prohibition have sometimes been used interchangeably.

In some situations, statutes specifically provide that only mandate or prohibition should be used. See, *e.g.,* Pen C §999a (prohibition used to challenge denial of Pen C §995 motion for lack of probable cause). Case law may also be helpful in identifying the appropriate writ. The true use of a writ of prohibition is to terminate all proceedings in a pending case. See *McClellan v Superior Court* (1971) 18 CA3d 311, 95 CR 590; *Jackson v Superior Court* (1980) 110 CA3d 174, 178, 167 CR 749. When the petition seeks only to arrest the proceedings at their present state without questioning the propriety of further proceedings, the preferred remedy usually is a writ of mandate. For example, in *Bunnell v Superior Court* (1975) 13 C3d 592, 601, 119 CR 302, the defendant sought a writ of prohibition to restrain the court from charging him with first-degree murder at his retrial for second-degree murder.

One important procedural difference between the two writs is that issuance of an alternative writ of prohibition or order to show cause automatically stays the proceedings in the trial court. *Guardianship of Walters* (1951) 37 C2d 239, 244, 231 P2d 473. A stay of proceedings pending determination of a petition for mandate requires a separate request and order. See, *e.g., Miller v Superior Court* (2002) 101 CA4th 728, 737, 124 CR2d 591. It is good practice, however, to always separately request a stay in a petition for writ of prohibition.

Normally, the prayer for relief should be stated alternatively, allowing the reviewing court to fashion the appropriate remedy. See *McCulloch v Superior Court* (*Liguori*) (1949) 91 CA2d 641, 642, 205 P2d 689. For example, in *Owens v Superior Court* (1980) 28 C3d 238, 168 CR 466 (involving a speedy trial violation), a petition for writ of prohibition/mandate was filed and the court directed a peremptory writ of mandate to issue.

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§7.4 B. Mislabeling of Writ Will Not Cause Denial of Relief

A petition for extraordinary writ that mislabels the remedy will not be denied if the petition is otherwise meritorious. *Neal v State* (1960) 55 C2d 11, 15, 9 CR 607 (mandate unavailable; habeas corpus proper); *Powell v Superior Court* (1957) 48 C2d 704, 705, 312 P2d 698 (prohibition sought; mandate granted); *Jackson v Superior Court* (1983) 140 CA3d 526, 189 CR 491 (mandate sought; habeas corpus issued); *Jackson v Superior Court* (1980) 110 CA3d 174, 178, 167 CR 749 (mandate sought; prohibition issued); *In re Geer* (1980) 108 CA3d 1002, 1004, 166 CR 912 (prohibition, mandate, and habeas corpus sought; mandate issued).

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§7.5 C. Concurrent Use of Mandate and Prohibition

It is proper to combine different claims in a single writ petition, and to request different kinds of relief if the facts warrant it. See, *e.g., Bunnell v Superior Court* (1975) 13 C3d 592, 119 CR 302 (prohibition on double jeopardy ground; mandate to compel venue change); *McCarthy v Superior Court* (1958) 162 CA2d 755, 328 P2d 819 (prohibition to restrain trial after denial of right to counsel at preliminary hearing; mandate to order production and inspection of defendant's statement to police after arrest).

In some situations, it may be appropriate to issue both mandate and prohibition to provide relief on a single claim. See *Gomez v Superior Court* (1958) 50 C2d 640, 328 P2d 976 (prohibition to restrain court from proceeding with trial; mandate to compel court to transfer the case to appropriate court). See also *Bryan v Superior Court* (1972) 7 C3d 575, 102 CR 831 (prohibition to restrain prosecution of minor in adult court; mandate to compel juvenile court to reconsider minor's amenability to its treatment).

When motions to set aside the information (see Pen C §995) and to suppress evidence (see Pen C §1538.5) raise the same legal issue of unlawful search or seizure and are denied concurrently, it is permissible to combine a petition for writ of prohibition to review the Pen C §995 denial and a petition for writ of mandate or prohibition to review the Pen C §1538.5 denial. Penal Code §999a requires that the petition be filed within 15 days; under Pen C §1538.5(i), the petition for mandate or prohibition may be filed within 30 days. Therefore, to be timely, a petition seeking joint relief should be filed within 15 days. *Gallik v Superior Court* (1971) 5 C3d 855, 857 n1, 97 CR 693; *Amacher v Superior Court* (1969) 1 CA3d 150, 155, 81 CR 558. Procedural difficulties can arise from the failure to distinguish the separate motions under Pen C §§995 and 1538.5 to litigate a search and seizure issue. See *People v Haybron* (1980) 108 CA3d 31, 35, 166 CR 264; *People v Superior Court* (*Kusano*) (1969) 276 CA2d 581, 584, 81 CR 42.

Although courts occasionally review, by use of a writ, search and seizure issues on denial of a Pen C §995 motion, the California Supreme Court, to avoid reviewing evidentiary rulings of a magistrate, has expressed a preference for reviewing such issues after denial of the renewed suppression motion at a de novo Pen C §1538.5 hearing. *Theodor v Superior Court* (1972) 8 C3d 77, 104 n15, 104 CR 226. If the validity of a search or seizure will be attacked by separate Pen C §§995 and 1538.5 motions, it is essential that the §1538.5 motion be made within 60 (felony) or 45 (misdemeanor) days of the arraignment to preserve the right to seek pretrial writ review under Pen C §1538.5(i). Pen C §1510; *People v Cruz* (1980) 109 CA3d Supp 18, 167 CR 363 (misdemeanor); *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109 (felony).

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§7.6 D. Either Writ May Be Proper When Challenging Speedy Trial Violations

Following the rule set forth in *People v Wilson* (1963) 60 C2d 139, 149, 32 CR 44, the California Supreme Court has favored mandate when the constitutional or the statutory right to a speedy trial in felony prosecutions has been denied. See *Sykes v Superior Court* (1973) 9 C3d 83, 106 CR 786 (prayer in alternative; mandate issued directing dismissal); *Rice v Superior Court* (1975) 49 CA3d 200, 122 CR 389; *Huerta v Superior Court* (1971) 18 CA3d 482, 95 CR 748. Prohibition will also lie "to prevent the trial court from taking any further action in the criminal proceeding other than to order its dismissal." *Wilson,* 60 C2d at 149.

However, some courts of appeal have granted prohibition for speedy trial violations in misdemeanor cases. See *Castaneda v Municipal Court* (1972) 25 CA3d 588, 102 CR 230; *Caputo v Municipal Court* (1960) 184 CA2d 412, 7 CR 435. The supreme court has also recognized that, although a petition for mandate or prohibition is the preferred pretrial remedy for denial of a speedy trial under Pen C §1382, relief may also be available by writ of habeas corpus in exceptional cases. See *People v Johnson* (1980) 26 C3d 557, 162 CR 431; *In re Smiley* (1967) 66 C2d 606, 58 CR 579. On the availability of mandate to raise speedy trial issues, see §7.18.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.7 IV. STATUTES AND RULES OF COURT AUTHORIZING REVIEW BY PETITION FOR WRIT OF MANDATE OR PROHIBITION

§7.7 IV. STATUTES AND RULES OF COURT AUTHORIZING REVIEW BY PETITION FOR WRIT OF MANDATE OR PROHIBITION

Review by petition for writ of mandate or prohibition is authorized by statute or court rule in the following circumstances:

- Review of grant or denial of motion to suppress evidence (Pen C §1538.5(i) and (o));
- Review of denial of motion to dismiss under Pen C §995 (including enhancements) (Pen C §999a; see *People v Superior Court (Mendella)* (1983) 33 C3d 754, 191 CR 1; on People's right to correction of minor errors without dismissal, see Pen C §999a discussed in §7.25; on People's right to seek reinstatement of complaint after dismissal, see Pen C §871.5, discussed in §1.28);
- Review of Welf & I C §707 orders (Cal Rules of Ct 5.770(i) and 5.772(j) (must be filed within 20 days after arraignment in adult court); on People's right, see *People v Superior Court (Jones)* (1998) 18 C4th 667, 679, 76 CR2d 641);
- Review of denial of disqualification motion under CCP §170.1 (for cause) or §170.6 (peremptory) (CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 2 CR2d 526; but see *People v Brown* (1993) 6 C4th 322, 332, 24 CR2d 710 (may raise due process right to unbiased judge on appeal); see also *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 123 CR2d 31 (defendant's Pen C §1538.5(p) right to have original judge hear renewed suppression motion after dismissal and refiling precludes prosecution from peremptorily challenging judge under CCP §170.6);
- Writ of mandate (or prohibition) to compel trial setting within Pen C §1049.5 time period (Pen C §1511);
- Review by People of orders granting severance or discovery (Pen C §1512(a));
- Review by People or defendant of allegedly improper setting or continuance of preliminary hearing (Pen C §871.6);
- Review by defendant when People's motion to reinstate complaint under Pen C §871.5 is granted (Pen C §871.5(f); on time limits, see *Los Angeles Chem. Co. v Superior Court* (1990) 226 CA3d 703, 709, 276 CR 647);
- Review of adverse child custody order in case in which an individual has been arrested for alleged violation of Pen C §278 or §278.5 (taking or concealing child from lawful custodian) (Pen C §279.6(d));
- Review of adverse ruling on motion to exclude public from portion of criminal proceeding in which trade secret might be revealed (Evid C §1062(d));
- Review by People of order granting motion to return property (Health & S C §11488.4(h));
- Review by People of probation grant (Pen C §1238(d) (felony); Pen C §1466(1)(H) (misdemeanor));
- Review of order recusing district attorney (Pen C §1424(a)(1); see *People v Superior Court (Greer)* (1977) 19 C3d 255, 137 CR 476, superseded by statute on other grounds as stated in *People v Cannedy* (2009) 176 CA4th 1474, 1481 n5, 98 CR3d 596; *People v Conner* (1983) 34 C3d 141, 193 CR 148); and
- Grant or denial of defendant's motion for DNA testing under Pen C §1405 (Pen C §1405(j)).

For a list of statutory time limits for seeking writ relief, see §7.13.

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V. PREREQUISITES TO RELIEF BY WRIT OF MANDATE OR PROHIBITION

§7.8 A. Appellate Remedy Inadequate

The availability of direct appellate review of a trial court order or judgment in a criminal case is determined by statute. In a criminal case, appeal is available as a matter of right for the defendant under Pen C §§1237, 1237.5, 1239, 1466(2), and 1538.5(j), (m), and for the prosecution under Pen C §§1238, 1466(1), and 1538.5(j). See chap 1. The right of direct review is supplemented by the constitutional and statutory power vested in the courts to grant writ relief when there is no immediate right to appeal, when the remedy on appeal is inadequate, or when the issue is one of great public importance and it requires prompt resolution. *Powers v City of Richmond* (1995) 10 C4th 85, 113, 40 CR2d 839. See also *Morse v Municipal Court* (1974) 13 C3d 149, 155, 118 CR 14 (writ review appropriate to resolve constitutional challenge to statutory program (diversion) of widespread concern). The petitioner bears the burden of demonstrating that the remedy of appeal is inadequate. *People v Superior Court (Miller)* (1956) 140 CA2d 510, 295 P2d 464.

If there is a right to appeal, the major procedural obstacle to writ relief is persuading the reviewing court that the ordinary remedy of appeal is inadequate. When pretrial relief is sought, statutory and case law require a showing that there is no plain, speedy, and adequate remedy in the ordinary course of the law. CCP §§1086 (mandate), 1103 (prohibition). See *Shuford v Superior Court* (1974) 11 C3d 903, 114 CR 601; *Moore v Municipal Court* (1959) 170 CA2d 548, 339 P2d 196.

Review by mandate or prohibition is often sought before or during trial to avoid the effect of a trial court's order or other ruling that will affect the conduct of the proceedings and that could not otherwise be challenged until after judgment is rendered. However, when the issue involved is one that can be raised on appeal from the final judgment, the court will presume that appeal is an adequate remedy. *Arrow Sand & Gravel, Inc. v Superior Court* (1985) 38 C3d 884, 887 n3, 215 CR 288. If, however, the court has no jurisdiction to proceed with the case and no appeal is available until final judgment, the remedy on appeal is generally considered to be inadequate. *Providence Baptist Church v Superior Court* (1952) 40 C2d 55, 60, 251 P2d 10.

When the petitioner has a right of appeal from the final judgment and waiting to decide the issue raised by the writ petition will have no adverse effect on the remedy obtained (*e.g.,* the denial of a motion to suppress evidence), a reviewing court has discretion to deny the petition without deciding the merits. See *People v Medina* (1972) 6 C3d 484, 493, 99 CR 630 (dictum). See also *Powers v City of Richmond* (1995) 10 C4th 85, 113, 40 CR2d 839. Note, however, that when writ review is the only means of appellate review of a final order or judgment, the appellate court may not deny a timely, formal, procedurally sound petition for a writ that appears to have merit simply because that petition "presents no important issue of law" or because the court believes other matters are more worthy of its attention. *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839.

Determining the adequacy of the remedy on appeal is in the discretion of the reviewing court, although that discretion is not absolute and is subject to review for abuse. The issuance of an alternative writ is ordinarily treated as a determination that appeal is inadequate. *People v Superior Court (Hartway)* (1977) 19 C3d 338, 344 n3, 138 CR 66.

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§7.9 1. Defendant's Appellate Remedy Inadequate

Ordinarily, when the defendant seeks writ relief before or during trial, the issue to be addressed in the writ is one that can be addressed later on appeal from a final judgment. In this situation, the petition should "show some special reason why the remedy afforded by appeal is rendered inadequate by the particular circumstances of the case." *Conway v Municipal Court* (1980) 107 CA3d 1009, 1016, 166 CR 246. Some of the factors a court may consider in determining whether the appellate remedy is adequate include the following (*Hogya v Superior Court* (1977) 75 CA3d 122, 128, 142 CR 325):

> the expense of proceeding with trial, prejudice resulting from delay, inordinate pretrial expenses, the possibility the asserted error might not infect the trial, and the possibility the asserted error might be corrected in a lower tribunal before or during trial. A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of an extraordinary writ.

See also *Shuford v Superior Court* (1974) 11 C3d 903, 907, 114 CR 601 (granting pretrial relief because of "personal hardships" for defendant and "waste of public time and funds" entailed in trial and appeal).

It is not possible to enumerate all the circumstances that might make the remedy on appeal inadequate in a particular case, but some examples of situations in which California courts have deemed the remedy inadequate follow:

- *People v Pompa-Ortiz* (1980) 27 C3d 519, 528, 165 CR 851 (appellate remedy for denial of Pen C §995 motion inadequate because defendant entitled to pretrial writ without showing prejudice, but would not be entitled to relief on appeal after judgment without showing prejudice);
- *Rubio v Superior Court* (1979) 24 C3d 93, 97, 154 CR 734 (appellate remedy inadequate because of seriousness of charge and desirability of trying case before properly selected jury);
- *Shuford v Superior Court* (1974) 11 C3d 903, 907, 114 CR 601 (pretrial writ of prohibition appropriate to restrain court from retrying indigent defendant until it provided him with free transcript of first trial);
- *Bravo v Cabell* (1974) 11 C3d 834, 837 n1, 114 CR 618 (writ relief appropriate when claims involved scope of pretrial discovery); and
- *State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 432, 304 P2d 13 (appellate remedy inadequate when trial court's consolidation order would have prejudiced petitioner before jury).

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§7.10 2. Prosecution's Appellate Remedies Inadequate

The prosecution has the right of direct appeal in the specific circumstances designated in Pen C §1238. See also Pen C §1466(1) (misdemeanors). When there is a direct right to appeal an order of the trial court, the prosecution, like the defendant, must show that the remedy of appeal is inadequate. See, *e.g., People v Superior Court (Ghilotti)* (2002) 27 C4th 888, 900 n4, 119 CR2d 1 (prosecution had right to appeal dismissal of sexually violent predator petition, but remedy was inadequate because dismissal would result in release of potentially dangerous individual).

Because the prosecution's right of direct appeal is limited to the specific issues and orders enumerated in Pen C §§1238 and 1466, there are a number of circumstances in which the prosecution has no right of appeal and review of the trial court's order will be available, if at all, only by writ review.

California courts have, however, been reluctant to give the prosecution the right of writ review in every situation in which there is no right to appeal. The courts have held that statutory restriction on the state's right to appeal "is not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs but is a substantive limitation on review of trial court determinations in criminal trials." *People v Superior Court (Howard)* (1968) 69 C2d 491, 498, 72 CR 330.

Thus, if the prosecution has not been granted a right of appeal by statute, writ review of alleged error may be sought only when (1) a trial court has acted in excess of its jurisdiction, and (2) the need for review outweighs the risk of harassment of the accused. *People v Superior Court (Stanley)* (1979) 24 C3d 622, 156 CR 626 (judge granted change of venue motion; such orders not appealable, and mandate denied because it was ordinary judicial error at most).

What actions are "in excess of jurisdiction" in this context is not completely settled. *People v Superior Court (Maldonado)* (2006) 137 CA4th 353, 364, 40 CR3d 365. Compare *People v Superior Court (Levy)* (1976) 18 C3d 248, 133 CR 624 (order disclosing identity of confidential informer not in excess of jurisdiction), with *People v Superior Court (Manuel G.)* (2002) 104 CA4th 915, 919, 128 CR2d 794 (question whether court correctly interpreted constitutional, statutory, and case law makes issue presented question of whether court acted in excess of jurisdiction).

Examples of situations in which the courts have concluded the prosecution was entitled to writ review because the lower court's action was in excess of jurisdiction include the following:

- *People v Superior Court (Jones)* (1998) 18 C4th 667, 676, 76 CR2d 641 (fitness order that incorrectly vests juvenile court with jurisdiction subject to writ review);
- *People v Superior Court (Bell)* (2002) 99 CA4th 1334, 1338, 121 CR2d 836 (prosecution entitled to pretrial writ review of trial court's ruling on Pen C §995 motion); and
- *People v Superior Court (Rowland)* (1987) 194 CA3d 11, 239 CR 257 (prosecution entitled to pretrial writ review of trial court's pretrial order authorizing separate juries).

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§7.11 B. Petitioner Must Be Beneficially Interested

To have standing to petition for writ relief, the petitioner must be "beneficially interested" in the order or ruling complained of; in other words, the petitioner must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 1086, 40 CR2d 402 (citations omitted). See *Dix v Superior Court* (1991) 53 C3d 442, 279 CR 834 (crime victim did not have standing to challenge trial court's sentencing order by petition for writ of mandate or prohibition); *Wells v Municipal Court* (1981) 126 CA3d 808, 179 CR 128 (absence of beneficial interest precluded public defender from seeking relief from allegedly mandatory sentencing policy).

Ordinarily, neither the trial court nor the judges of the trial court have a beneficial interest in the outcome of legal proceedings, even when the petition challenges the trial court's ruling. *Ng v Superior Court* (1997) 52 CA4th 1010, 1016, 61 CR2d 49, disapproved on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751. But see *James G. v Superior Court* (2000) 80 CA4th 275, 95 CR2d 135 (superior court had standing to oppose petition for writ of mandate, because all proceedings were filed ex parte under seal and court was only party that could meaningfully oppose petition).

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§7.12 C. Petitioner Must Perfect or Exhaust Lower Court Remedies

A general prerequisite for writ relief is that the same relief was sought first in the lower court, by way of motion, objection, or other request, and was denied by that court. The requested relief must have been made on the same ground that is urged in the petition. *Schaeffer v Municipal Court* (1968) 260 CA2d 819, 67 CR 479; *Shaffer v Justice Court* (1960) 185 CA2d 405, 8 CR 269; *In re Hillery* (1962) 202 CA2d 293, 294, 20 CR 759. Moreover, if writ review is requested on several issues, relief must first have been sought on each issue in the trial court. *Cooper v Superior Court* (1981) 118 CA3d 499, 511, 173 CR 520 (writ court considering error in denial of Pen C §1538.5 motion refused to address propriety of joinder of unrelated crimes until defendant moved for severance in trial court).

However, this rule is not absolute. It is "merely a rule adopted by reviewing tribunals as a matter of respect for and consideration of the lower court and to aid in minimizing, if not preventing, unnecessary litigation." *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349; see *Citizens Utils. Co. v Superior Court* (1963) 59 C2d 805, 814, 31 CR 316. The petitioner may be excused from complying with this requirement if he or she can show that there was no appropriate opportunity to make a timely objection in the lower court or that objection would have been futile. *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349. See *In re Berry* (1968) 68 C2d 137, 146, 65 CR 273 (failure to bring jurisdictional defect to lower court's attention did not bar relief by writ (habeas corpus) because issue could not have been raised under circumstances of case). In *Sobiek v Superior Court* (1972) 28 CA3d 846, 106 CR 516, compliance with this rule was excused when an absolute defense (statute of limitations) appeared on the face of the record.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/ D. Petition Must Be Timely/§7.13 1. Petitioner Must Comply With Applicable Statutory Time Limits

D. Petition Must Be Timely

§7.13 1. Petitioner Must Comply With Applicable Statutory Time Limits

When a statute provides authority for seeking writ relief, the statute may specify time limits within which a petition for extraordinary relief must be filed. Examples include:

- CCP §170.3(d) ("within 10 days after service of written notice of entry of the court's order determining the question of disqualification"; see *People v Hull* (1991) 1 C4th 266, 2 CR2d 526);
- Pen C §999a (within 15 days of order denying Pen C §995 motion if challenge is to sufficiency of the evidence);
- Pen C §1538.5(i) (within 30 days after denial of motion to suppress evidence);
- Pen C §1538.5(o) (within 30 days after grant of motion to suppress evidence; notice of intent to file petition must be filed under certain circumstances);

NOTE: Under Pen C §1510, the denial of a Pen C §995 motion or the denial of a Pen C §1538.5 motion may be reviewed by petition for extraordinary relief *only* if the motion was made within 60 days of the defendant's arraignment on the information or indictment.

- Health & S C §11488.4(h) (within 15 days of order granting defendant's motion to return property in conjunction with forfeiture proceeding);
- Pen C §1238(d) (within 60 days of order granting probation); and
- Pen C §1405(j) (within 20 days of order granting or denying defendant's motion for DNA testing).

Statutes authorizing writ relief in specific situations are listed in §7.7.

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§7.14 2. Petitioner Must Exercise Diligence in Seeking Relief

The absence of a specific statutory time limit for filing a writ petition does not mean that a petitioner can delay unreasonably in seeking relief. See, *e.g., Maine v Superior Court* (1968) 68 C2d 375, 381, 66 CR 724 (defendant should seek writ after denial of change of venue before jury empaneled); *People v Wilson* (1963) 60 C2d 139, 148, 32 CR 44 (remedy for speedy trial violation is to seek writ of mandate before trial begins).

A writ ordinarily will not lie to obtain review of an appealable order when the petitioner has failed to file a timely notice of appeal from the order. *Adoption of Alexander S.* (1988) 44 C3d 857, 865, 245 CR 1. The courts have occasionally made exceptions in "special circumstances constituting an excuse for failure to employ that remedy." 44 C3d at 865. These circumstances have been narrowly construed. *Mauro B. v Superior Court* (1991) 230 CA3d 949, 953, 281 CR 507. "The underlying facts cannot provide a basis for allowing use of an extraordinary writ to review an appealable judgment or order after the time for an appeal has expired. The required special circumstances must relate to the delay and justify the petitioner's failure to employ the appeal remedy." 230 CA3d at 954. Examples include situations in which the petitioner did not receive actual notice of the order (see *Grinbaum v Superior Court* (1923) 192 C 528, 556, 221 P 635) and situations in which the law was unclear about whether an appeal would lie (see *Drum v Superior Court* (2006) 139 CA4th 845, 852, 43 CR3d 279).

Even when no appeal lies, timeliness is an important consideration. Petitioner may be required to justify the delay if a petition is filed after the date on which a notice of appeal would be required, even if petitioner has no remedy on appeal. Courts routinely apply the deadline that would be applicable to filing a notice of appeal to writ petitions as a benchmark for determining whether unreasonable delay has occurred. See, *e.g.*, *People v Municipal Court (Mercer)* (1979) 99 CA3d 749, 752, 160 CR 455; *Scott v Municipal Court* (1974) 40 CA3d 995, 996, 115 CR 620.

If the reviewing court considers the delay in filing the petition unreasonable, it may decline to hear the petition on the merits under the equitable doctrine of laches if the opposing party has been prejudiced by the delay. See *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784 (laches "requires an unreasonable delay in filing the petition plus prejudice to real party"). See also *Wagner v Superior Court* (1993) 12 CA4th 1314, 1317, 16 CR2d 534 (no absolute deadline for mandate petition but laches may apply if unreasonable delay prejudices opposing party).

In *People v Superior Court (Clements)* (1988) 200 CA3d 491, 596, 246 CR 122, the court of appeal exercised its discretion to hear a petition for writ of mandate despite unexcused delay because the issue was one of general importance that might have escaped review if not addressed in the petition. In *Irwin Memorial Blood Ctrs. v Superior Court* (1991) 229 CA3d 151, 156, 279 CR 911, the court agreed to hear a petition for writ of prohibition on the merits, despite finding unexcused delay *and* prejudice to the opposing party because petitioner was seeking to protect privacy rights of third persons who did not cause the delay and were not before the reviewing court.

Laches is an affirmative defense; because it does not reach the merits of the case, the burden is on the party asserting laches to show that it should be applied to bar consideration of the petitioner's claims. *Conti v Board of Civil Serv. Comm'rs* (1969) 1 C3d 351, 361, 82 CR 337.

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§7.15 3. Mootness

Ordinarily, courts will deny a petition that is moot. *Bruce v Gregory* (1967) 65 C2d 666, 670, 56 CR 265. If the case involves an important, recurring issue, likely to evade review in the future, the court may decide the merits of the case. *In re William M.* (1970) 3 C3d 16, 23, 89 CR 33.

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VI. WRIT OF MANDATE: SPECIFIC USES

§7.16 A. Overview

The writ of mandate, also called a writ of mandamus (see *e.g., Bravo v Cabell* (1974) 11 C3d 834, 114 CR 618), has common law origins. Both CCP §§1084-1097 and Pen C §1538.5 use the term mandate. Consistent with modern usage, this book uses the term "writ of mandate." The writ of mandate lies generally to *compel* a court or its officer to perform an act that the law imposes as a duty when no plain, speedy, and adequate remedy at law is available. CCP §§1085-1086; *Payne v Superior Court* (1976) 17 C3d 908, 925, 132 CR 405; *Loder v Municipal Court* (1976) 17 C3d 859, 863, 132 CR 464. Thus, mandate will lie when the court's acts are in excess of its jurisdiction. See *People v Turner* (2004) 34 C4th 406, 417, 20 CR3d 182 (court of appeal had authority to issue mandate vacating sentence resulting from court's illegal plea bargain with defendant). Although it has been said that mandate cannot be used to control the exercise of discretion, mandate can issue to correct an abuse of the court's discretion. *Hays v Superior Court* (1940) 16 C2d 260, 265, 105 P2d 975. Thus, in *Owens v Superior Court* (1980) 28 C3d 238, 253, 168 CR 466, the court issued a peremptory writ of mandate compelling the court to dismiss a prosecution for delay not excused by good cause.

Historically, mandate has been used to accomplish two objectives:

- To require the court to exercise its power to decide a controversy when it has refused or failed to do so and to hear and rule on the merits of all matters properly within its jurisdictional discretion (*Burnett v Superior Court* (1974) 12 C3d 865, 117 CR 556; *Robinson v Superior Court* (1950) 35 C2d 379, 218 P2d 10); and
- To set aside an order or judgment that is in excess of the court's jurisdiction or exceeds or abuses the discretion vested in the court (*People v Superior Court (Howard)* (1968) 69 C2d 491, 72 CR 330; *Gray v Superior Court* (2005) 125 CA4th 629, 641, 23 CR3d 50; *People v Municipal Court (Kong)* (1981) 122 CA3d 176, 175 CR 861; *Parks v Superior Court* (1971) 19 CA3d 188, 96 CR 645).

Decisions in criminal cases emphasize the use of mandate to rectify error "before a constitutionally defective trial is undertaken." *Smith v Superior Court* (1968) 68 C2d 547, 558, 68 CR 1. As explained in *Maine v Superior Court* (1968) 68 C2d 375, 378, 66 CR 724, the "common thread woven through the foregoing examples of mandamus antedating trial is the responsiveness of appellate tribunals when initiative is required to protect a defendant's fundamental right to a fair trial." Failure to allege and prove a duty of the respondent to act can defeat the petitioner's right to relief. *Bradshaw v Duffy* (1980) 104 CA3d 475, 481, 163 CR 559.

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B. Pretrial Uses

§7.17 1. Discovery

Mandate is available to both the prosecution and the defendant to enforce a right to pretrial discovery. *Hill v Superior Court* (1974) 10 C3d 812, 112 CR 257 (defendant); *Joe Z. v Superior Court* (1970) 3 C3d 797, 91 CR 594 (defendant); *Reid v Superior Court* (1997) 55 CA4th 1326, 1332 n3, 64 CR2d 714 (same, citing this text); *People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 23 CR2d 403 (prosecution). See also *Hinojosa v Superior Court* (1976) 55 CA3d 692, 127 CR 664 (mandate granted after trial court denied defendant's *Pitchess* motion; see *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897); *Griffin v Municipal Court* (1977) 20 C3d 300, 142 CR 286 (mandate granted after trial court denied defendant's motion for discovery of records that might establish discriminatory law enforcement practices; see *Murgia v Municipal Court* (1975) 15 C3d 286, 124 CR 204); *Honore v Superior Court* (1969) 70 C2d 162, 74 CR 233 (mandate granted after trial court denied motion to disclose the identity of confidential informant).

Either mandate or prohibition may be used to challenge an improper discovery order in favor of the prosecution. *Posner v Superior Court* (1980) 107 CA3d 928, 166 CR 123, disapproved on other grounds in *Baqleh v Superior Court* (2002) 100 CA4th 478, 499 n5, 122 CR2d 673. See also Pen C §1512 (prosecution may use mandate or prohibition to review trial court's order granting discovery).

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§7.18 2. Denial of Speedy Trial Rights

Under California law, both the defendant and the prosecution have a right to a speedy trial. Cal Const art I, §§6 (defendant), 29 (prosecution). The defendant's right to a speedy trial is also guaranteed by statute (Pen C §§1381, 1381.5, 1382) and by the United States Constitution (US Const amend VI, XIV).

Mandate is ordinarily the remedy for a violation of the statutory right to speedy trial. See *People v Wilson* (1963) 60 C2d 139, 148, 32 CR 44. Specific prejudice need not be shown. See *Owens v Superior Court* (1980) 28 C3d 238, 168 CR 466. The remedy on appeal is not considered adequate in this circumstance because the defendant must show prejudice to succeed in a postconviction challenge to the denial of a motion to dismiss based on the statutory right to a speedy trial. See *People v Johnson* (1980) 26 C3d 557, 574, 162 CR 431.

NOTE: In addition to factors that impair the defendant's ability to defend against the charges (*e.g.,* death or disappearance of witnesses, impairment of memory, loss of evidence), prejudice exists when dismissal would terminate the action; *e.g.,* when refiling would be barred by the statute of limitations (60 C2d at 152) or Pen C §1387. *People v Wilson* (1963) 60 C2d 139, 152, 32 CR 44.

When the state Constitution's speedy trial right is at issue, "a showing of specific prejudice is required to establish a violation," whether the issue is raised before trial or after judgment. *People v Martinez* (2000) 22 C4th 750, 756, 94 CR2d 381.

The federal Constitution's right to speedy trial poses still different considerations, because the threshold showing required to establish a violation also creates a presumption of prejudice. See *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182; *Doggett v U.S.* (1992) 505 US 647, 651, 656, 120 L Ed 2d 520, 112 S Ct 2686.

In deciding whether to seek pretrial review of the denial of the defendant's speedy trial motion, it is important to consider whether the defendant is likely to plead guilty or no contest if the motion is denied. The weight of authority in California holds that a speedy trial claim, whether based on statutory or constitutional grounds, does not survive a plea of guilty or nolo contendere. See, *e.g.*, *People v Aguilar* (1998) 61 CA4th 615, 71 CR2d 411; *People v Egbert* (1997) 59 CA4th 503, 512, 68 CR2d 913. Because "[t]he essence of a defendant's speedy trial or due process claim in the usual case is that the passage of time has frustrated his ability to establish his innocence," the issue does not survive a guilty plea, which admits every element of the offense. *People v Hayton* (1979) 95 CA3d 413, 419, 156 CR 426. See *People v DeVaughn* (1977) 18 C3d 889, 895, 135 CR 786.

For discussion of the defendant's right to a speedy trial, see California Criminal Law Procedure and Practice, chap 19 (Cal CEB Annual).

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3. Ruling on Pen C §1538.5 Motion to Suppress Evidence

§7.19 a. Availability in Felony Cases

Another important use of mandate specifically authorized by statute is to contest an adverse ruling by the superior court on a motion to suppress evidence claimed to be the product of an unlawful search or seizure. See Pen C §1538.5. Mandate as a remedy for pretrial review of such rulings is available to both defense and prosecution. Pen C §§1538.5(i) (defense), 1538.5(o) (prosecution). The remedy is expressly authorized by statute, although the defendant enjoys the right to raise the identical issue on appeal from the final judgment, even after a plea of guilty. Pen C §1538.5(m). See Cal Rules of Ct 8.304(b)(4); *People v West* (1970) 3 C3d 595, 91 CR 385. This remedy must be exercised by filing the writ petition in the court of appeal within 30 days of the denial of the suppression motion. Pen C §1538.5(i). If unable to go forward without the suppressed evidence, however, the prosecution may elect to appeal from a pretrial order of dismissal. Pen C §§1238(a)(8), 1466(1)(B). If the prosecution does appeal, the defendant has an additional 30 days within which to file a writ application. Pen C §1238.5.

In felony cases, direct appellate review by the prosecution of a magistrate's suppression order at a preliminary hearing is not permitted. The prosecution may file a new complaint (Pen C §1538.5(j); *People v Randall* (1973) 35 CA3d 972, 111 CR 590; *Cash v Superior Court* (1973) 35 CA3d 226, 110 CR 612) or may make a noticed motion in the superior court within 15 days after a felony complaint has been dismissed for reinstatement of the complaint (Pen C §871.5(a)). If the superior court grants the motion, the magistrate must resume proceedings. If the defendant is held to answer, he or she may seek review of the ruling on this motion only by a Pen C §995 motion, and may challenge its denial by seeking a writ of prohibition under Pen C §999a. Pen C §871.5(f). The prosecution may obtain pretrial writ review of the court's ruling on a Pen C §995 motion (*People v Superior Court (Bell)* (2002) 99 CA4th 1334, 1338, 121 CR2d 836) or may appeal after trial (Pen C §1238(a)(9)).

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§7.20 b. Availability in Misdemeanor Cases

In misdemeanor cases, both the defendant and the prosecution have an unqualified right to an immediate appeal in the appellate division of the superior court from an adverse ruling on a pretrial motion to suppress evidence under Pen C §1538.5. Pen C §1538.5(j); *People v Laiwa* (1983) 34 C3d 711, 718, 195 CR 503. Thus, a writ of mandate cannot ordinarily be used to challenge such a ruling. *Macias v Municipal Court* (1975) 49 CA3d 259, 122 CR 590.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.21 c. Substantial Evidence Standard [Deleted]

§7.21 c. Substantial Evidence Standard [Deleted]

The material in this section has been deleted.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.22 d. Time Limitations for Pretrial Relief: Pen C §§1538.5, 1510

§7.22 d. Time Limitations for Pretrial Relief: Pen C §§1538.5, 1510

In cases involving writs of mandate under Pen C §1538.5, there are restrictions comparable to those placed on pretrial review of denial of a Pen C §995 motion (see §7.35). Two time limitations control:

- The petition for writ of mandate must be filed within 30 days after the motion to suppress is denied (see Pen C §1538.5(i)—defendant's petition) or granted (see Pen C §1538.5(o)—prosecution's petition). *Clifton v Superior Court* (1970) 7 CA3d 245, 86 CR 612 (no jurisdiction to consider untimely petition). Moreover, if a motion to suppress is granted and trial is set for less than 30 days thereafter, the prosecution, if unable to file the petition before the trial date, must file a notice of intention to file such a petition. This notice must be filed in the superior court by the trial date or within 10 days after the suppression hearing, whichever occurs later. Pen Code §1538.5(o); *People v Superior Court (Abrahms)* (1976) 55 CA3d 759, 765, 127 CR 672. But see *People v Superior Court (Sandoval)* (1972) 29 CA3d 135, 105 CR 268. The applicable time periods are jurisdictional. Time begins to run when the motion to suppress is actually granted or denied, not when the order is entered in the minutes. *Gomes v Superior Court* (1969) 272 CA2d 702, 77 CR 539.
- Denial of a Pen C §1538.5 motion may be reviewed in a pretrial petition for writ in felony cases only if the motion is made by the defendant not later than 60 days following arraignment on the information or indictment (felony cases), unless within this time limit the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. See *People v Dianda* (1986) 178 CA3d 174, 178, 223 CR 635 (motion "made" when written notice filed). See also *Ghent v Superior Court* (1979) 90 CA3d 944, 950, 153 CR 720 (applying "no opportunity" exception when Pen C §995 motion made 3 days too late because there had been lengthy delay in providing counsel with preliminary hearing transcript). In misdemeanor cases, the Pen C §1538.5 motion must have been made not later than 45 days following arraignment on the complaint unless the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. See *People v Cruz* (1980) 109 CA3d Supp 18, 167 CR 363 (defining "arraignment" as time defendant is asked for his or her plea, not when plea is entered, and dismissing appeal as untimely under Pen C §1510). An oral statement at arraignment noticing or reserving a Pen C §1538.5 motion for a subsequent date does not constitute compliance with Pen C §1510, because it does not indicate that the suppression motion will in fact be made nor the grounds for the motion. *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109. Although Pen C §1510 does not require that the §1538.5 motion be heard within the 60- or 45-day periods, in light of *Smith,* defense counsel should give timely notice to the court and prosecutor (in writing if required by local court rule) that the defendant is moving to suppress evidence under Pen C §1538.5, specifying what evidence he or she seeks to suppress and the grounds for suppression.

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§7.23 e. Mandate Not Available to Challenge Pretrial Rulings on Admissibility of Evidence Not Involving Unlawful Search or Seizure

The statutory authorization for the use of mandate to challenge pretrial rulings on motions to suppress evidence under Pen C §1538.5 is an exception to the ordinary rule that pretrial rulings on the admissibility of evidence are not reviewable by extraordinary writ. See *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 117 CR 20; *Sledge v Superior Court* (1974) 11 C3d 70, 113 CR 28; *People v Superior Court (Scott)* (1980) 112 CA3d 602, 169 CR 412; *Childress v Municipal Court* (1970) 8 CA3d 611, 87 CR 383; *Van Halen v Municipal Court* (1969) 3 CA3d 233, 83 CR 140.

The rationale for this rule is that pretrial rulings are binding on neither the judge nor the parties and can be reconsidered during trial. *People v Superior Court (Zolnay)* (1975) 15 C3d 729, 734, 125 CR 798, overruled on other grounds by *People v Crittenden* (1994) 9 C4th 83, 129, 36 CR2d 474; *People v Rawlings* (1974) 42 CA3d 952, 956, 117 CR 651, disapproved on another ground in *People v Chacon* (2007) 40 C4th 558, 565 n7, 53 CR3d 876; *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257, 61 CR 510.

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§7.24 4. Denial of Motion to Disqualify Judge

Under CCP §170.3(d), the trial court's ruling on a motion to disqualify a judge may be reviewed only by writ of mandate. The petition must be filed in the appropriate court of appeal "within 10 days after service of written notice of entry of the court's order determining the question of disqualification." Only a party to the proceeding may bring the motion. CCP §170.3(d). This provision is applicable to rulings on challenges for cause under CCP §170.1 and to peremptory challenges under CCP §170.6. *People v Carter* (2005) 36 C4th 1215, 1243, 32 CR3d 838; *People v Hull* (1991) 1 C4th 266, 2 CR2d 526.

The defendant can raise a due process claim on appeal based on actual bias despite the provisions of CCP §170.3(d). *People v Brown* (1993) 6 C4th 322, 333, 24 CR2d 710. In *Brown*, the supreme court held that CCP §170.3(d) bars appeal from the denial of a statutory disqualification motion but does not bar postjudgment claims that the judgment is invalid because of judicial bias. 6 C4th at 335. The court suggested, however, that the negligent failure to seek to resolve such issues by statutory means (*i.e.,* through writ review) might result in forfeiture of the constitutional claim on appeal. 6 C4th at 336. But see *Catchpole v Brannon* (1995) 36 CA4th 237, 42 CR2d 440, disapproved on other grounds by *People v Freeman* (2010) 47 C4th 993, __ n4, 103 CR3d 723 (judge's asserted gender bias could be raised on appeal despite lack of objection in trial court).

NOTE: Although a showing of actual bias is not required for judicial disqualification under the due process clause, the mere appearance of bias is insufficient. *Freeman, supra*. See *Caperton v A.T. Massey Coal Co.* (2009) __ US __, 173 L Ed 2d 1208, 129 S Ct 2252.

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§7.25 5. Erroneous Orders Under Pen C §999a(b)

Under Pen C §999a(b), the superior court, instead of granting a motion under Pen C §995, can remand the case to the magistrate for correction of minor errors of omission, ambiguity, or technical defect. However, this does not allow the superior court to return a case to the magistrate to correct major errors. In such cases, mandate will issue to require the superior court to rule on the §995 motion without sending the matter back to the magistrate. *Tharp v Superior Court* (1984) 154 CA3d 215, 201 CR 131; *Loverde v Superior Court* (1984) 162 CA3d 102, 208 CR 134.

In addition, a remand order is not permitted if the motion to set aside an information is not authorized by Pen C §995 but is a nonstatutory *Stanton* motion (a motion based on events not shown by the preliminary hearing transcript and thus not cognizable in a §995 motion). *Stanton v Superior Court* (1987) 193 CA3d 265, 239 CR 328; *Currie v Superior Court* (1991) 230 CA3d 83, 89, 281 CR 250. For more information on *Stanton* motions, see §7.38.

For further discussion of motions to set aside the accusatory pleading under Pen C §995, see California Criminal Law Procedure and Practice, chap 13 (Cal CEB Annual).

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§7.26 6. Change of Venue

Defendant. Under Pen C §1033(a), the defendant may compel a change of venue by showing before trial that there is a "reasonable likelihood" that he or she will not receive fair trial in the county in which the alleged offense was committed. Mandate is an appropriate way for the defendant to challenge the trial court's denial of a motion for change of venue. *Frazier v Superior Court* (1971) 5 C3d 287, 95 CR 798; *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724.

Principles of judicial economy favor challenging venue orders by mandate rather than on appeal because writ review allows the reviewing court to determine the place of trial before trial. In addition, the standard of review is more favorable to the defendant seeking pretrial writ relief: When the venue issue is raised before trial, doubts are to be resolved in favor of granting the motion. To prevail on appeal, the defendant must show that the error was prejudicial. Compare *Fain v Superior Court* (1970) 2 C3d 46, 84 CR 135, with *People v Harris* (1981) 28 C3d 935, 948, 171 CR 679.

Prosecution. The prosecution has no parallel right to compel a change of venue. See Pen C §1033(b) (prosecution may compel change of venue only when all jury panels have been exhausted and it appears that it will be impossible to empanel jury). In addition, the prosecution has no statutory right to appeal from the trial court's ruling on a motion for change of venue. See Pen C §1238. Thus, ordinarily the prosecution may not use mandate either to challenge the trial court's order granting a change of venue or to compel a change of venue. See *People v Superior Court* (*Stanley*) (1979) 24 C3d 622, 156 CR 626 (restriction on prosecution's right to appeal required court to deny prosecution's petition for writ of mandate challenging trial court's order for change of venue); *Jackson v Superior Court* (1970) 13 CA3d 440, 91 CR 565 (trial court order granting prosecution's application for change of venue vacated by mandate because it was beyond court's statutory and inherent powers).

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§7.27 7. Other Pretrial Issues

Other important uses for which mandate is appropriate for pretrial purposes are:

- **Right to counsel.** Used to secure the appointment or substitution of counsel and to rectify violations of that right. *Harris v Superior Court* (1977) 19 C3d 786, 140 CR 318 (refusal to appoint attorney selected by defendant for retrial of case when that attorney represented defendant at first trial); *Smith v Superior Court* (1968) 68 C2d 547, 68 CR 1 (court-appointed counsel was improperly removed over defendant's objection); *Craig S. v Superior Court* (1979) 95 CA3d 568, 157 CR 285 (public defender was improperly removed over defendant's objection); *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 102 CR 45 (refusal to appoint counsel for indigent in misdemeanor case); *Williams v Superior Court* (1964) 226 CA2d 666, 38 CR 291 (refusal to appoint counsel when defendant released on bail). See also *Uhl v Municipal Court* (1974) 37 CA3d 526, 112 CR 478 (public defender sought to be relieved for conflict of interest).
- **Obtaining funds for investigation and preparation.** Used to compel allocation of public funds to an indigent defendant for investigators, experts, and others necessary for preparing and presenting the defense. *Smithson v Superior Court* (1981) 116 CA3d 32, 171 CR 808 (reasonable rate for investigator's services is lowest present rate in community); *Anderson v Justice Court* (1979) 99 CA3d 398, 160 CR 274 (test of indigency to obtain investigators and experts under Pen C §987.9 (capital case) is defendant's financial ability to secure those services).
- **Pretrial lineup.** Used to compel the court to order the prosecution to conduct a pretrial identification lineup. *Evans v Superior Court* (1974) 11 C3d 617, 114 CR 121.
- **Severance.** Used to correct a refusal to sever or a misjoinder of offenses (see *Coleman v Superior Court* (1981) 116 CA3d 129, 172 CR 86; *Walker v Superior Court* (1974) 37 CA3d 938, 112 CR 767) or of defendants (see *Dove v Superior Court* (1974) 39 CA3d 960, 114 CR 889; see also *People v Ortiz* (1978) 22 C3d 38, 148 CR 588).
- **Prejudicial publicity.** Used to protect against prejudicial pretrial publicity and preserve the defendant's right to a fair trial. *Cromer v Superior Court* (1980) 109 CA3d 728, 167 CR 671; *Allegrezza v Superior Court* (1975) 47 CA3d 948, 121 CR 245.
- **Gag order.** Used to vacate an improper gag order. *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225.
- **Recusal of prosecutor's office.** Both the defense and the prosecution may use mandate to review a trial court's abuse of discretion in granting or denying the defendant's motion to recuse a prosecutor. *Love v Superior Court* (1980) 111 CA3d 367, 168 CR 577; *Chadwick v Superior Court* (1980) 106 CA3d 108, 164 CR 864; *People v Superior Court* (Martin) (1979) 98 CA3d 515, 159 CR 625.
- **Felony reduced to misdemeanor.** Used to compel the trial court to treat as a misdemeanor an offense that had been reduced from a felony to a misdemeanor by the magistrate at the preliminary hearing under Pen C §17(b)(5). See *Esteybar v Municipal Court* (1971) 5 C3d 119, 95 CR 524.
- **Daily preliminary hearing transcripts.** Used to compel the court to grant a motion for daily preliminary hearing transcripts to a defendant charged with murder with a special circumstance allegation making the defendant eligible for the death penalty. *Abernathy v Superior Court* (2007) 157 CA4th 642, 68 CR3d 726; Pen C §190.9(a)(1).
- **Transcript of prior trial.** Used to obtain a partial or complete transcript of a prior trial when an indigent defendant has a particularized need for it in preparing for retrial. See *People v Hosner* (1975) 15 C3d 60, 123 CR 381 (need presumed); *Shuford v Superior Court* (1974) 11 C3d 903, 114 CR 601.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.28 C. Sentencing and Related Postconviction Problems

§7.28 C. Sentencing and Related Postconviction Problems

Use of writ of mandate is occasionally appropriate to raise sentencing and related postconviction issues not traditionally within the scope of habeas corpus relief. In misdemeanor cases, however, writs based on postconviction claims have been denied on the ground that such errors ordinarily should be raised on direct appeal from the judgment rather than in writ proceedings. *Mendieta v Municipal Court* (1980) 109 CA3d 290, 168 CR 1 (denial of motion to vacate guilty plea); *Gilliam v Municipal Court* (1979) 97 CA3d 704, 159 CR 74 (condition of probation).

Writ review was allowed in the following circumstances:

- **Striking probation report.** In *People v Municipal Court* (*Lopez*) (1981) 116 CA3d 456, 172 CR 140, judgment for the prosecution on a writ action to compel the trial court to vacate an order granting the defendant's motion for a new probation report was reversed. The appellate court concluded that a trial judge has jurisdiction to strike a probation report. Because this case permitted the prosecution to obtain writ review of such a ruling in favor of the defense, a defendant whose motion to strike is improperly denied should also be entitled to writ relief before sentencing.
- **Sentence representations made to defendant.** Used to order the trial court to hold a hearing to determine what representations or promises of sentencing were made to the defendant and whether the defendant's reasonable reliance on such representations requires that he or she be sentenced accordingly or have his or her conviction set aside. *Martinez v Superior Court* (1973) 36 CA3d 683, 111 CR 678.
- **Order granting probation.** Penal Code §1238(d) states that "[n]othing contained in this section shall be construed to authorize an appeal from an order granting probation" but that the prosecution "may seek appellate review of any grant of probation… by means of a petition for writ of mandate or prohibition." The review must include "any order underlying the grant of probation." Most courts have interpreted §1238(d) to mean that the prosecution may not appeal from a grant of probation but must secure review through mandate or prohibition. See *People v Superior Court (Frietag)* (1988) 204 CA3d 247, 250 CR 912; *People v Superior Court* (*Du*) (1992) 5 CA4th 822, 7 CR2d 177. The court in *People v Vessell* (1995) 36 CA4th 285, 42 CR2d 241, deviated from this path and allowed the prosecution to appeal a probation grant under the authority of Pen C §1238(a)(10). The court in *People v Bailey* (1996) 45 CA4th 926, 53 CR2d 198, declined to follow *Vessell,* noting that the application of §1238(d) had not been fully considered by the *Vessell* court, and that the *Vessell* opinion effectively gave the prosecution an appellate remedy that had been precluded by the legislature. Also, it is unclear what "underlying" orders may be reviewed. One case interpreted the term very broadly: In *People v Superior Court* (*Alvarado*) (1989) 207 CA3d 464, 255 CR 46, the prosecution was permitted to challenge a trial court order denying a motion to amend the accusatory pleading to allege a prior felony conviction. The court of appeal stated that, although such orders generally did not underlie a grant of probation, the trial court had denied the motion in order to avoid sentencing the defendant to prison, which the court of appeal found "rendered the trial court's denial of the motion a sentencing order for all practical purposes." 207 CA3d at 469.
- **Terminating probation.** In *Pompi v Superior Court* (1982) 139 CA3d 503, 189 CR 52, the court of appeal issued a writ of mandate compelling the superior court to terminate the defendant's probation because the court had lost jurisdiction under Pen C §1203.2a (requiring a probation officer to report to the court the fact of the probationer's incarceration elsewhere within 30 days of notice). See also *In re Hoddinott* (1996) 12 C4th 992, 50 CR2d 706 (probation officer's 30-day reporting requirement is triggered by written notification of probationer's subsequent state prison commitment; valid request for absentee sentencing not required); *In re Flores* (1983) 140 CA3d 1019, 190 CR 388 (issue raised by habeas).
- **Expungement of conviction.** Used to direct the trial court to perform its mandatory duty under Welf & I C §1772 of setting aside and dismissing the guilty verdict of an honorably discharged youth authority ward despite his or her subsequent crimes. *Parks v Superior Court* (1971) 19 CA3d 188, 96 CR 645. See also *Andrews v Superior Court* (1946) 29 C2d 208, 174 P2d 313 (expungement of invalid judgment of conviction).
- **Postconviction discovery.** Used to challenge a ruling by the trial court on the defendant's motion for

postconviction discovery under Pen C §1054.9.

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§7.29 D. Perfecting Right of Appeal

To aid the defendant in perfecting the right of appeal, mandate is available in two important areas:

- **Reporter's transcript.** Used to obtain a partial or complete transcript of a reported trial in a misdemeanor or infraction case on an indigent defendant's showing of a colorable need when a settled statement is not sufficient for appeal. *March v Municipal Court* (1972) 7 C3d 422, 102 CR 597.
- **Certificate of probable cause.** Used to obtain a certificate of probable cause, required under Pen C §1237.5, for an appeal after a plea of guilty in superior court. See also Cal Rules of Ct 8.304(b)(1)-(3); *In re Brown* (1973) 9 C3d 679, 683, 108 CR 801, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301. On certificates of probable cause, see §§1.12-1.13, 2.8. For sample forms, see §§2.33-2.35. Note that an appeal from a plea of guilty to a misdemeanor or infraction is regulated by Pen C §1466, which does not require a certificate of probable cause. *People v Woods* (1978) 84 CA3d 149, 154, 148 CR 312.

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§7.30 E. Declaration of Rights (Class Action Relief)

Although employed sparingly in reported criminal decisions, one of the potentially most significant uses for the writ of mandate is to obtain a declaration of rights for other defendants similarly situated to the named petitioner. This is particularly true concerning the rights of prisoners. See *Reaves v Superior Court* (*Patterson*) (1971) 22 CA3d 587, 99 CR 156; *In re Brindle* (1979) 91 CA3d 660, 670, 154 CR 563; *Bradshaw v Duffy* (1980) 104 CA3d 475, 482, 163 CR 559. See also *In re Walters* (1975) 15 C3d 738, 126 CR 239 (habeas corpus).

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§7.31 F. Collateral Matters

A writ of mandate lies to adjudicate numerous matters collateral to criminal proceedings. Examples include:

- **Attorney fees.** Used to compel the trial court to award reasonable attorney fees to appointed counsel for representation in extraordinary writ proceedings. Pen C §987.2; *Polakovic v Superior Court* (1972) 28 CA3d 69, 104 CR 383. But see *Pedlow v Superior Court* (1980) 112 CA3d 368, 169 CR 326 (relief denied because record inadequate; Pen C §987.3, added in 1973, said to replace criteria in prior case law for determining reasonable compensation).
- **Denial of voluntary mental health services.** Under Pen C §4011.8, a person in custody who has been charged with or convicted of an offense may apply for voluntary mental health services. The applicant may challenge the denial of such services by writ of mandate. Pen C §4011.8.
- **Return of defendant's property.** Used to seek return of a defendant's property confiscated by the police. *People v Beck* (1994) 25 CA4th 1095, 31 CR2d 44 (return of firearms after conviction of offense unrelated to firearm use); *Espinosa v Superior Court* (1975) 50 CA3d 347, 123 CR 448 (return of firearms after acquittal). See also *People v Superior Court* (*Loar*) (1972) 28 CA3d 600, 104 CR 876 (writ of prohibition).
- **Sealing of records.** Used to require the trial court to entertain a motion to seal the record of arrest. *Scott A. v Superior Court* (1972) 27 CA3d 292, 293 n1, 103 CR 683; *McMahon v Municipal Court* (1970) 6 CA3d 194, 85 CR 782.
- **Delegation of judicial function.** Used to order the superior court not to delegate to the prosecution its judicial responsibilities for processing prisoners' habeas corpus writs. *Reaves v Superior Court* (*Patterson*) (1971) 22 CA3d 587, 99 CR 156.
- **Challenge sex offender registration.** Used to challenge the requirement to register as a sex offender after judgment final. *People v Pickelsimer* (March 15, 2010, S165680) 2010 Cal Lexis 1893. See also *Lewis v Superior Court* (2008) 169 CA4th 70, 86 CR3d 565 (post-judgment "motion" inappropriate); *In re Stier* (2007) 152 CA4th 63, 61 CR3d 181 (habeas corpus petition inappropriate).
- **Failure to lift stay of Pen C §12022.1 enhancement.** Used to challenge the failure of the "primary offense court" to lift the stay of a Pen C §12022.1 enhancement. *People v Meloney* (2003) 30 C4th 1145, 1150, 135 CR2d 602.

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§7.32 VII. WRIT OF PROHIBITION: SPECIFIC USES

Prohibition is used to *restrain* a court or its officer when no plain, speedy, and adequate remedy at law is available and when the threatened judicial action is outside or in excess of the court's jurisdiction. CCP §§1102-1103; *Rockwell v Superior Court* (1976) 18 C3d 420, 427, 134 CR 650; *Rescue Army v Municipal Court* (1946) 28 C2d 460, 171 P2d 8; *Castaneda v Municipal Court* (1972) 25 CA3d 588, 102 CR 230.

A writ of prohibition "arrests the proceedings of any tribunal… or person exercising judicial functions." CCP §1102. Consequently, issuance of an alternative writ of prohibition "amounts to a stay of proceedings by operation of law pending determination of the application for a peremptory writ." *Guardianship of Walters* (1951) 37 C2d 239, 241, 231 P2d 473.

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§7.33 A. Overview

Prohibition is considered "a preventive rather than a corrective remedy." *Traffic Truck Sales Co. v Justice's Court* (1923) 192 C 377, 380, 220 P 306. It "issues only to restrain the commission of a future act and not to undo an act already performed." 192 C at 380. Thus, prohibition is not available to review or annul a completed judicial proceeding. *Baker v Municipal Court* (1961) 198 CA2d 556, 17 CR 642 (appeal from denial of writ of prohibition moot when petitioner had been tried, convicted, and sentenced before appeal was heard). However, when the record before the reviewing court justifies relief, the fact that the petition was incorrectly labeled will not prevent the court from granting relief. See *Traffic Truck Sales,* 192 C at 381 (although prohibition did not lie, record presented sufficient case for consideration as request for writ of review).

In addition to the traditional uses of prohibition to prevent judicial acts in excess of the court's jurisdiction, a number of specific statutes authorize the use of prohibition. See, *e.g.,* Pen C §999a, which provides for filing a petition for a writ of prohibition after the denial of a Pen C §995 motion to set aside an information or an indictment for lack of reasonable or probable cause. For further discussion of motions to set aside an accusatory pleading under Pen C §995, see California Criminal Law Procedure and Practice, chap 13 (Cal CEB Annual).

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B. Common Uses of Prohibition

§7.34 1. Challenge to Denial of Pen C §995 Motion

The most frequent use of prohibition is to prevent further proceedings, including trial, after denial of a motion under Pen C §995 to set aside the information or indictment. Although filing a Pen C §995 motion preserves the defendant's right to appeal preliminary hearing irregularities (Pen C §996; *People v Harris* (1967) 67 C2d 866, 870, 64 CR 313), it is usually preferable to take a writ of prohibition from denial of a Pen C §995 motion because on most issues prejudice is presumed before trial but must be affirmatively shown by the defendant on appeal. See *People v Pompa-Ortiz* (1980) 27 C3d 519, 529, 165 CR 851.

The grounds that can be raised in a motion to set aside the information or indictment are as follows (Pen C §995):

- That the admissible evidence before the committing magistrate or the grand jury does not furnish a rational ground to establish probable cause to believe that the defendant committed the crime of which he or she is accused (see *Rideout v Superior Court* (1967) 67 C2d 471, 62 CR 581; *Ghent v Superior Court* (1979) 90 CA3d 944, 153 CR 720); or
- That the defendant was not legally committed by the magistrate, *i.e.,* there was a denial of a constitutional, statutory, or other important right at the preliminary hearing, in the grand jury proceedings, or in connection with filing the information or indictment. See *People v Pompa-Ortiz, supra*; *Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289; *Jennings v Superior Court* (1967) 66 C2d 867, 874, 880, 59 CR 440; *Herbert v Superior Court* (1981) 117 CA3d 661, 172 CR 850.

The writ petition must seek relief on the ground or grounds that were presented to the trial court in the Pen C §995 motion.

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§7.35 a. Time Limitations for Pretrial Relief: Pen C §§999a, 1510

As a prerequisite to filing a petition on either of the grounds specified in §7.34, the defendant must move to set aside the information or indictment under Pen C §995. See also Pen C §§996-997. If the basis of the motion is lack of probable cause, the following time limits apply:

- The Pen C §995 motion must have been made by the defendant not later than 60 days following arraignment on the information or indictment, unless the defendant was unaware of the issue or had no opportunity to raise it within this time limit (Pen C §1510; *Ghent v Superior Court* (1979) 90 CA3d 944, 153 CR 720; *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109); and
- The petition must be filed within 15 days after the Pen C §995 motion was denied if the basis for the petition is that the defendant was held to answer or was indicted without reasonable or probable cause (Pen C §999a; *Aydelott v Superior Court* (1970) 7 CA3d 718, 86 CR 713; *Guerin v Superior Court* (1969) 269 CA2d 80, 75 CR 923). Unlike Pen C §1510, Pen C §999a permits no exceptions.

Even if the Pen C §999a 15-day time limit does not apply (*e.g.,* because the grounds are that the defendant was illegally committed or denied a substantial right; see discussion in §7.36), under Pen C §1510, the Pen C §995 motion still must have been made within 60 days of arraignment in order to urge its erroneous denial in a petition for writ of prohibition unless the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. The 60-day limit may not bar a defendant from making a Pen C §995 motion in the trial court after it has expired. It may only be raised as a bar in the appellate court when the defendant challenges denial of his or her Pen C §995 motion by petitioning for a writ of prohibition; *Ghent v Superior Court* (1979) 90 CA3d 944, 950, 153 CR 720.

The prescribed time limitation in Pen C §999a runs from the day the Pen C §995 motion is denied to the day the defendant files the petition for pretrial writ. See *Magee v Superior Court* (1973) 34 CA3d 201, 109 CR 758, disapproved on other grounds in *People v Norris* (1985) 40 C3d 51, 56, 219 CR 7. By contrast, the prescribed limitation in Pen C §1510 runs from the day the defendant is arraigned to the day he or she makes the Pen C §995 or §1538.5 motion. See *People v Cruz* (1980) 109 CA3d Supp 18, 167 CR 363 (arraignment is completed in misdemeanor case, for both Pen C §§1510 and 1382 purposes, when defendant is asked to enter plea, not when plea is entered); *Chartuck v Municipal Court* (1975) 50 CA3d 931, 123 CR 816.

Relief is not foreclosed simply because the Pen C §995 motion was heard and denied more than 60 days after arraignment. In practice, the Pen C §1510 requirement is considered to be satisfied by filing or making the motion within 60 days; the trial court has discretion to decide when to hear and rule on the motion. If the motion is not made until after the 60-day period has elapsed and the defendant challenges an order denying the Pen C §995 motion by filing a petition for extraordinary relief under Pen C §999a, he or she bears the burden of showing that the case fits one of the two exceptions established by Pen C §1510, the existence of which is a question of fact to be determined by the appellate court. *Ghent v Superior Court, supra* (lengthy delay in providing counsel with preliminary hearing transcript came within "no opportunity" exception, excusing delay of 3 days in making motion).

For discussion of when a motion is "made" for purposes of Pen C §1510, see §7.37.

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§7.36 b. When §995 Motion Is Based on Illegal Commitment or Denial of Substantial Right

The Pen C §999a time limitation does not apply if the grounds for the Pen C §995 motion pertain solely to illegal commitment by the magistrate or denial of any substantial right in the preliminary hearing or grand jury proceedings. *Ondarza v Superior Court* (1980) 106 CA3d 195, 164 CR 892; *Penney v Superior Court* (1972) 28 CA3d 941, 105 CR 162; *McGonagill v Superior Court* (1963) 214 CA2d 192, 29 CR 485. This same rule applies to a petition for writ of mandate brought by the people contesting the *granting* of a §995 motion. *People v Superior Court* (*Calamaras*) (1986) 181 CA3d 901, 226 CR 636.

In *Ondarza v Superior Court, supra,* the magistrate dismissed a narcotics charge and held the defendant to answer for solicitation and attempt to receive stolen property; the information contained all of the original charges, including the dismissed count. The defendant then challenged the dismissal by a Pen C §995 motion under *Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289, on the grounds that (1) the magistrate's refusal to hold the defendant to answer was a binding factual determination, and (2) the drug charge was not transactionally related to the charges for which he was committed. The court of appeal held that filing the petition for prohibition 20 days after denial of the Pen C §995 motion was timely because these contentions fell within the "illegal commitment" category and thus were not subject to Pen C §999a. However, it must be stressed that the usual 60-day "laches" period for seeking relief from superior court rulings will still apply to such petitions for writ. See §7.14.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.37 c. Determining When Motion Has Been Made for Purposes of Pen C §1510

§7.37 c. Determining When Motion Has Been Made for Purposes of Pen C §1510

Questions occasionally arise about when a motion has been "made" for the purpose of Pen C §1510. A written motion will probably be considered "made" at the time it is served and filed. See CCP §1005.5. See also *People v Dianda* (1986) 178 CA3d 174, 223 CR 635 (holding that prosecution's motion to reinstate felony complaint under Pen C §871.5 was "made" when notice of motion was served and filed). In *Los Angeles Chem. Co. v Superior Court* (1990) 226 CA3d 703, 712, 276 CR 647, the court held that timely filing of a Pen C §871.5 motion on the last day of the filing period, followed by personal service on the following day, was "substantial compliance" with the statutory filing deadline.

CAUTION: A Pen C §995 motion may be made orally, without formal written notice. If counsel intends to seek pretrial writ relief from the denial of an *oral* §995 motion, the motion should be made in time to ensure that it will actually be heard within the 60-day period set forth in Pen C §1510. Making a formal *written* motion within the 60-day period will probably avoid litigation about when the motion was made.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.38 d. Time Limitations on Nonstatutory Motion to Dismiss for Errors Committed During Preliminary Hearing Not Appearing on Face of Transcript

§7.38 d. Time Limitations on Nonstatutory Motion to Dismiss for Errors Committed During Preliminary Hearing Not Appearing on Face of Transcript

The court of appeal has authorized the use of a nonstatutory motion to dismiss for errors committed during a preliminary hearing that do not appear on the face of the transcript. *Stanton v Superior Court* (1987) 193 CA3d 265, 239 CR 328. Because the motion is "nonstatutory," no statutory time limits apply to it. Thus, if such a motion is brought, there appears to be no bar to writ review under Pen C §1510, even if the motion is delayed, and no limits under Pen C §999a. The only time limit that seems applicable is the general requirement that writ petitions from the superior court be filed within 60 days of the superior court's order.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.39 e. Review of Pen C §871.5 Ruling

§7.39 e. Review of Pen C §871.5 Ruling

Penal Code §871.5 provides that the prosecution can seek review of a magistrate's ruling dismissing all or part of a complaint by filing a motion to reinstate the dismissed matter in the superior court. The prosecution *may* appeal the denial of a motion for reinstatement under Pen C §1238; the defendant *may not* appeal the reinstatement order. Pen Code §871.5(f). The only way for a defendant to obtain review is with a motion to dismiss under Pen C §995 and a petition for writ of prohibition in the court of appeal if the Pen C §995 motion is denied. Pen Code §871.5(f). For further discussion of Pen C §871.5, see §1.28.

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2. Other Uses of Prohibition

§7.40 a. Pre-Preliminary Hearing Issues

Prohibition is a proper vehicle for deciding whether a preliminary hearing may be conducted over a defendant's protest or, conversely, whether it must be conducted on a defendant's request in the face of a refusal to conduct a hearing. In *Leaming v Municipal Court* (1974) 12 C3d 813, 117 CR 657, the petitioner unsuccessfully used prohibition to test whether the alleged felony was only a misdemeanor for which there was no jurisdiction to hold a preliminary hearing. In *Hale v Superior Court* (1975) 15 C3d 221, 124 CR 57, the defendant successfully sought to restrain the holding of competency proceedings (see Pen C §§1367-1376) until a probable cause determination was made at a preliminary hearing or by a grand jury. Similarly, a defendant who wanted a preliminary hearing and therefore did not want the charge against him reduced to a misdemeanor under Pen C §17(b)(5) (see California Criminal Law Procedure and Practice §7.12 (Cal CEB Annual)) was successful in *Larson v Municipal Court* (1974) 41 CA3d 360, 116 CR 1. A defendant was unsuccessful, however, in his attempt to invoke Pen C §17(b) to compel the prosecutor to file a Pen C §270 misdemeanor complaint as a felony in *Metcalf v Municipal Court* (1981) 125 CA3d 303, 178 CR 47. The court reasoned that Pen C §17(b)(4) did not apply because the conduct charged was solely a misdemeanor.

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§7.41 b. Double Jeopardy

Since *Jackson v Superior Court* (1937) 10 C2d 350, 74 P2d 243, prohibition has been recognized as the proper remedy to prevent retrial after a defendant has been once in jeopardy. See *Curry v Superior Court* (1970) 2 C3d 707, 87 CR 361; *Paulson v Superior Court* (1962) 58 C2d 1, 22 CR 649. The defendant must have sought leave to enter a plea of former jeopardy (see *Bunnell v Superior Court* (1975) 13 C3d 592, 119 CR 302) or have entered the plea under Pen C §§1016-1017 in order to obtain writ review of the issue. *Gonzalez v Municipal Court* (1973) 32 CA3d 706, 108 CR 612.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/7 Writs of Mandate and Prohibition Defined/§7.42 c. Multiple Prosecution

§7.42 c. Multiple Prosecution

Prohibition lies to restrain proceedings in violation of the bar against multiple prosecutions for the same act under the doctrine of *Kellett v Superior Court* (1966) 63 C2d 822, 48 CR 366. Pen C §654. Similarly, the writ can be used to prevent trial for an offense previously dismissed under Pen C §1387 that is not subject to further prosecution. See *Malone v Superior Court* (1975) 47 CA3d 313, 120 CR 851.

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§7.43 d. Statute Unconstitutional; Offense Is Not Crime

Prohibition is available to terminate a prosecution for violation of a statute or ordinance that is unconstitutional. *Rockwell v Superior Court* (1976) 18 C3d 420, 427, 134 CR 650. A pleading that does not state a public offense may be restrained by a writ of prohibition. Some examples are:

- The charged criminal statute or ordinance is alleged to be unconstitutional on its face, *e.g.,* under the free speech or assembly provisions of US Const amend I and Cal Const art I, §§2-3. See *Pryor v Municipal Court* (1979) 25 C3d 238, 158 CR 330; *Dulaney v Municipal Court* (1974) 11 C3d 77, 112 CR 777; *Hunter v Justice's Court* (1950) 36 C2d 315, 223 P2d 465; *Rescue Army v Municipal Court* (1946) 28 C2d 460, 171 P2d 8.
- The complaint (or other accusatory pleading) does not state a public offense. *Sobiek v Superior Court* (1972) 28 CA3d 846, 106 CR 516 (statute of limitations). A typical example occurs when the local ordinance for which the defendant is being prosecuted conflicts with and has been preempted by state legislation rendering it void under Cal Const art XI, §7. *Whitney v Municipal Court* (1962) 58 C2d 907, 27 CR 16. See *Lancaster v Municipal Court* (1972) 6 C3d 805, 100 CR 609. But see *Yuen v Municipal Court* (1975) 52 CA3d 351, 125 CR 87 (ordinance found constitutional).

Even if the ordinance or statute is valid in some aspects, prohibition lies if the defendant's conduct was not within the scope of the ordinance or statute. *Kelly v Municipal Court* (1958) 160 CA2d 38, 324 P2d 990; *Cleland v Superior Court* (1942) 52 CA2d 530, 126 P2d 622 (state hospital superintendent not "officer" under Pen C §71). Inasmuch as this type of case involves a statute valid on its face, the objection in the trial court by way of demurrer or motion to dismiss and the petition for writ must include factual allegations that do not appear in the charging document and are not contested by opposing counsel. See *Mandel v Municipal Court* (1969) 276 CA2d 649, 81 CR 173 (crime report attached to complaint). If such facts are disputed, a triable issue is ordinarily presented and pretrial review usually will be denied. See *Dickenson v Municipal Court* (1958) 162 CA2d 85, 328 P2d 32. Compare *Ross v Municipal Court* (1975) 49 CA3d 575, 122 CR 807 (writ denied), with *Rice v Superior Court* (1975) 49 CA3d 200, 122 CR 389 (writ granted).

The petition for writ may be based on the dual grounds of unconstitutionality and failure to state a cause of action. *Mandel v Municipal Court, supra* (loitering under former Pen C §653g); *Moore v Municipal Court* (1959) 170 CA2d 548, 339 P2d 196 (regulations promulgated by fire district).

Petitioner may seek review in the United States Supreme Court of denial of a pretrial writ petition challenging an unconstitutional statute. See, *e.g., Camara v Municipal Court* (1967) 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727. On procedures for seeking review in the United States Supreme Court by writ of certiorari, see chap 12.

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§7.44 3. Miscellaneous Uses

Examples of some other grounds for which a writ of prohibition may issue are:

- **Improper prosecutorial discovery.** Used to block a court order requiring the defendant to give the prosecution unauthorized or unenforceable discovery. *Allen v Superior Court* (1976) 18 C3d 520, 134 CR 774; *Reynolds v Superior Court* (1974) 12 C3d 834, 117 CR 437.
- **Material informer unavailable.** Used to compel dismissal when the prosecution fails to make reasonable effort to locate an informer who is a material witness. See *Eleazer v Superior Court* (1970) 1 C3d 847, 83 CR 586.
- **Violation of attorney-client relationship by state.** An undercover police officer posing as a codefendant attended confidential attorney-client meetings. Such intrusion through trickery violated the defendants' constitutional right to communicate privately with counsel. *Barber v Municipal Court* (1979) 24 C3d 742, 157 CR 658.
- **Challenge jury panel.** Used to challenge the unconstitutional composition of a grand or petit jury panel. *Montez v Superior Court* (1970) 10 CA3d 343, 88 CR 736. But see *Ganz v Justice Court* (1969) 273 CA2d 612, 78 CR 348 (writ available only in "unusual cases").
- **Contempt.** Contempt orders are final, nonappealable orders. CCP §1222. They are often challenged by petition for writ of habeas corpus (see *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248) or petition for writ of certiorari (*Boysaw v Superior Court* (2000) 23 C4th 215, 96 CR2d 531); however, they may also be challenged by petition for writ of prohibition. *Hanson v Superior Court* (2001) 91 CA4th 75, 80 n1, 109 CR2d 782; *Bellas v Superior Court* (2000) 85 CA4th 636, 642 n5, 102 CR2d 380 (petitioner sought habeas corpus; court issued writ of prohibition).
- **Compel election between appeal and new prosecution.** Used to force the prosecution to elect between pursuing an appeal from dismissal on a Pen C §995 motion or to proceed by a new information or indictment. See Pen C §1387 (Pen C §995 dismissal terminates action). See also *Anderson v Superior Court* (1967) 66 C2d 863, 59 CR 426.
- **Certification of juvenile to adult court.** Used to block an order of a juvenile court finding a minor accused of a crime under Welf & I C §602 unfit for treatment within juvenile court facilities and certifiable for criminal proceedings as an adult (see Welf & I C §707). Such an order is reviewable only by immediate application for a writ of prohibition or mandate. The order cannot be challenged either by motion in superior court under Pen C §995 or on appeal after conviction. *People v Chi Ko Wong* (1976) 18 C3d 698, 135 CR 392, disapproved on other grounds in *People v Green* (1980) 27 C3d 1, 34, 164 CR 1. The petition for such writ must be filed within 20 days *after* arraignment on the first accusatory pleading (a felony complaint or grand jury indictment) based on the allegations leading to the unfitness determination. Cal Rules of Ct 5.770(i), 5.772(j). Corollary review of a finding of fitness is permitted to the prosecution in a proper case of abuse of discretion, before jeopardy attaches, on commencement of the Welf & I C §602 hearing. *People v Superior Court (Steven S.)* (1981) 119 CA3d 162, 173 CR 788. See *In re Richard C.* (1979) 89 CA3d 477, 484, 152 CR 787.
- **Unconstitutionally vague pleadings.** Prohibition was used to compel the prosecution to give adequate notice of what act or acts the prosecution intended to rely on to prove charges of practicing psychology without a license and related offenses. *Peer v Municipal Court* (1982) 128 CA3d 733, 180 CR 137.

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8

Preparing and Opposing a Petition for Mandate or Prohibition

Adrian G. Driscoll

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.1 I. GOVERNING RULES

§8.1 I. GOVERNING RULES

The rules of practice in civil cases generally apply to the preparation of a petition of prohibition or mandate. CCP §1109. Issuance of writs of prohibition and mandate and the hearings involved are covered by CCP §§1084-1108. Counsel must also be familiar with the procedural requirements of the appellate rules set out in Title 8 of the California Rules of Court (Cal Rules of Ct 8.1-8.1125), particularly, Rules 8.200, 8.204, and 8.485-8.493, which apply to original writ proceedings instituted in the courts of appeal and the California Supreme Court. Cal Rules of Ct 8.4(2), 8.485. Counsel should pay attention to Cal Rules of Ct 8.485-8.488, which address the form and content of the petition and memorandum (commonly called a memorandum of points and authorities), service, return, and the Certificate of Interested Entities or Persons. Comparable rules exist for original proceedings in mandate or prohibition filed in the appellate division of the superior court. See Title 8 of the California Rules of Court, Division 2, chap 6 (Cal Rules of Ct 8.800-8.819, 8.883, 8.930-8.936).

NOTE: Counsel is strongly advised to consult the California Rules of Court at the Judicial Council website at http://www.courtinfo.ca.gov/rules to check for any further amendments or new rules that become effective after publication of this volume.

Despite the civil nature of writ proceedings, when the underlying litigation is a criminal action, all the constitutional and statutory imperatives of criminal procedure apply. *Bravo v Cabell* (1974) 11 C3d 834, 114 CR 618. But see *People v Superior Court (Laff)* (2001) 25 C4th 703, 723, 107 CR2d 323 (attorney suspected of criminal conduct, but no criminal action filed). Prerogative writs in criminal cases have the objective of correcting or preventing error. *Thomas v Superior Court* (1976) 54 CA3d 1054, 1060, 126 CR 830.

All supporting documents accompanying a petition must comply with Cal Rules of Ct 8.486(b)-(c) (court of appeal and supreme court), 8.931(b)-(c), 8.932(a) (appellate division). Both the petition and any memorandum must support any reference to a matter in the record by a citation to its index tab and page. See Cal Rules of Ct 8.204(a)(1)(C) and 8.486(c)(1)(B) (court of appeal and supreme court); 8.931(c)(1)(B)-(C), 8.932(a) (appellate division). The petition must be accompanied by a certified transcript of the oral proceedings that resulted in the ruling being challenged. In the appellate division, an electronic recording may be substituted for the certified transcript. Cal Rules of Ct 8.931(b)(1)(D), 8.932(a).

If a transcript (or recording) is not available, the record must include a declaration explaining why the transcript is not then available. Cal Rules of Ct 8.486(b)(1)(D), (b)(3) (court of appeal and supreme court), 8.931(b)(3), 8.932(a) (appellate division). The declaration must either explain why the transcript was unavailable and fairly summarize the proceedings, including the parties' arguments and any statement by the court supporting its ruling, or state that the transcript has been ordered and give the date it was ordered and the expected date of filing (which must be a date before the time action, other than a temporary stay, is requested). The declaration does not have to include a full summary of the proceedings if the petitioner is indigent, part of the relief sought is an order requiring preparation of the transcript and the declaration indicates the petitioner's need for and entitlement to a transcript. Cal Rules of Ct 8.486(b)(3) (court of appeal or supreme court), 8.931(b)(3), 8.932(a) (appellate division). Failure to submit the required record or explanations, or failure to present facts sufficient to excuse the omission, may result in summary denial of a stay request, the petition, or both. Cal Rules of Ct 8.486(b)(4), 8.931(b)(4), 8.932(a).

Special rules govern writs that challenge the juvenile court's order setting a dependency case for a hearing that can result in the termination of parental rights. See, *e.g.,* Cal Rules of Ct 8.400, 8.450-8.456 (amended effective July 1, 2010); see also Welf & I C §366.26. For discussion of these writs, see California Juvenile Dependency Practice, chap 10 (Cal CEB Annual).

For helpful insight into the manner of processing writ applications, see First Appellate District Internal Operating Practices and Procedures (2007), available on the Judicial Council's website at http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/iopp.htm and Internal Operating Practices and Procedures for the Fourth Appellate District, Division One (2008), available at

http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/iopp.htm.

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§8.2 II. GENERAL GUIDELINES FOR DRAFTING THE PETITION

The issuance of an extraordinary writ is within the discretion of the reviewing court. Therefore, it is essential for the attorney drafting a writ petition to try to capture the court's attention. The courts consider the equities of a case, so the attorney should include all favorable information about his or her client.

When the attorney represents the defendant, he or she should include all erroneous and unjust rulings or actions and should point out all of the ways that the defendant has been treated unfairly, in addition to detailing why the particular legal ruling being challenged was wrong.

When the defendant is in custody, the defendant's attorney should be sure to point out this fact to the reviewing court because it strongly supports the inadequacy of subsequent appellate review. When possible, counsel should indicate how the fairness of the trial and the defendant's ability to defend himself or herself will be affected by the court's failure to grant the relief requested.

Sometimes the presumptions for appellate review are different for pretrial writs than they are for appeals. For example, pretrial review of denial of a statutory speedy trial motion does not require that the defendant show prejudice, although postconviction appellate review does. *People v Johnson* (1980) 26 C3d 557, 574, 162 CR 431; *In re Chuong D.* (2006) 135 CA4th 1303, 1311, 38 CR3d 351. The defendant should point out instances when prejudice would be impossible to show on appeal.

Finally, courts may refuse to hear a writ because of the possibility that the defendant will plead guilty, thus precluding the need for review. When the defendant has demanded a jury trial, the attorney should inform the court of the likelihood that the issue in question will have to be decided. If the defendant has a valid legal point, it may save time and money for the appellate court to settle the issue before a costly trial that may be reversed on appeal.

For further discussion of specific arguments to make, see §§7.8-7.10 (inadequacy of appeal).

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§8.3 III. NO FILING FEE REQUIRED

No fee is required in a criminal case for filing a petition for a writ of prohibition or mandate in a court of appeal or in the appellate division of the superior court, although such a proceeding is civil in nature for some purposes. *Bravo v Cabell* (1974) 11 C3d 834, 838, 114 CR 618. See CCP §§22-23. Nor is a fee required to petition the California Supreme Court for review in a writ action. It has been held that proceedings for extraordinary writs should be exempted from civil filing fees because they are considered part of the underlying criminal actions to which they refer. *Bravo v Cabell*, *supra*. The decision in *Bravo* obviated the cost advantage of habeas corpus petitions, for which a fee is prohibited by statute. Govt C §6101. The choice of relief may now be made without regard to financial considerations. See also *Marler v Municipal Court* (1980) 110 CA3d 155, 163, 167 CR 666 (ordering superior court clerk to refund petitioner's filing fee in accordance with *Bravo v Cabell* in action seeking writ of prohibition). In those situations in which habeas corpus or prohibition or mandate may lie, tactical considerations may favor filing a petition for mandate or prohibition rather than a habeas petition in a misdemeanor or infraction case, because the petition for mandate or prohibition may go to the three-judge appellate division, while a habeas petition will go to a single-judge writ court. Cal Const art VI, §10; CCP §§1085(b), 1103(b); Cal Rules of Ct 4.552(d); see *Brant v Superior Court* (2003) 108 CA4th 100, 104, 132 CR2d 783 (prohibition and mandate); *In re Ramirez* (2001) 89 CA4th 1312, 1319, 108 CR2d 229 (habeas corpus). But see *Fuller v Superior Court* (2004) 125 CA4th 623, 626, 23 CR3d 204 (practice of assigning habeas petition challenging denial of motion to dismiss misdemeanor complaint to same judge who denied motion was improper).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.4 IV. REQUESTING A STAY OF LOWER COURT PROCEEDINGS

§8.4 IV. REQUESTING A STAY OF LOWER COURT PROCEEDINGS

When possible, an application for a stay of the underlying proceedings or the order to be challenged in the writ petition should first be made in the trial court. If the trial court is unable or unwilling to stay its proceedings or order, the stay request can be made in conjunction with a petition for writ of prohibition or mandate simply by requesting in the petition that proceedings in the lower court be stayed pending determination of the petition. Cal Rules of Ct 8.486(a)(7) (court of appeal and supreme court). See also Cal Rules of Ct 8.932(b)(7) (appellate division, noting the required content of a petition if it "requests a temporary stay").

WARNING: The filing of a writ petition does not automatically stay proceedings in the lower court. *In re Brandy R.* (2007) 150 CA4th 607, 609, 58 CR3d 456.

The circumstances necessitating the stay and its urgency should be explained in the petition and the request ("STAY REQUESTED") should be noted on the cover of the petition. Cal Rules of Ct 8.486(a)(7)(A)-(B). See also Cal Rules of Ct 8.932(b)(7) (requiring an explanation of urgency if stay requested in the appellate division). The cover of the petition must also identify the nature and date of the proceeding or act for which the stay is requested. Cal Rules of Ct 8.486(a)(7)(B). The trial court and department and the name and telephone number of the judge whose order the petitioner seeks to stay must also appear either on the cover of the petition or at the beginning of the text. Cal Rules of Ct 8.486(a)(7)(C). If the petitioner fails to provide the information required by Cal Rules of Ct 8.486(a)(7), the court may decline to consider the stay request. Cal Rules of Ct 8.486(a)(7).

In the event a temporary stay is not requested in the original writ petition, a stay may subsequently be requested from the reviewing court, subject to the same procedural rules as a request for temporary stay made in the original petition. See Cal Rules of Ct 8.116.

In prohibition cases, issuance of the alternative writ or order to show cause operates as a stay. CCP §1104; *Guardianship of Walters* (1951) 37 C2d 239, 244, 231 P2d 473. Thus, in such cases, the stay request, if allowed, may cover only the period of time while the court has the petition under consideration and before the court acts on the petition.

PRACTICE TIP: Counsel should be careful to request an appropriate stay from the reviewing court and not rely on the effect of the issuance of an alternative writ of prohibition. Alternative writs of mandate and orders to show cause do not automatically stay proceedings.

Proceedings in the appellate division are automatically stayed when a misdemeanor appeal is transferred or certified from the superior court to the court of appeal. Cal Rules of Ct 8.1014. A temporary stay is also expressly mandated by statute when a Pen C §1538.5 motion is granted or when, in a misdemeanor case, the defendant intends to file a motion to return property or suppress evidence. Pen C §1538.5(*l*).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/ V. WHERE TO FILE/§8.5 A. General Rule

V. WHERE TO FILE

§8.5 A. General Rule

Although all courts in California have original jurisdiction in mandamus and prohibition, not all courts have jurisdiction in every case. Prohibition and mandate can only be issued to an "inferior tribunal." CCP §§1085(a), 1103(a). Furthermore, as a practical matter, it is rare for a court to exercise its original jurisdiction to hear a writ petition if that petition could have been brought in a lower court and there is insufficient reason for extraordinary action by the higher court. See Cal Rules of Ct 8.486(a)(1) (petition that could have been made to lower court must explain why reviewing court should issue the writ as an original matter). See *In re Hillery* (1962) 202 CA2d 293, 20 CR 759. Compare *In re Darlice C.* (2003) 105 CA4th 459, 467, 129 CR2d 472, with *Simmons v Municipal Court for San Francisco Judicial Dist.* (1980) 108 CA3d 295, 23 CR3d 204.

NOTE: If a reviewing court declines to exercise jurisdiction over a petition that could have been filed in a lower court, it may transfer it to the proper court (*Holt v Superior Court* (1950) 100 CA2d 403, 404, 223 P2d 881, disapproved on other grounds in *Environmental Planning & Info. Council v Superior Court* (1984) 36 C3d 188, 194 n6, 203 CR 127) or summarily deny it (*In re Rose* (2000) 22 C4th 430, 445, 93 CR2d 298). In this situation, summary denial is not a decision on the merits and it does not have the force of res judicata.

Consequently, as a general rule, a petitioner seeking mandamus or prohibition should file the petition in the court directly above the court to which he or she wants the order directed. A petition challenging an order of the superior court in a felony proceeding should ordinarily be filed in the court of appeal. Note that a felony proceeding includes any matter in which the defendant has been charged with a felony, even if combined with misdemeanor or infraction charges (Pen C §691(f)), and even if it is a "wobbler" (a crime with sentencing options of both county jail and state prison). *People v Douglas* (1999) 20 C4th 85, 90, 82 CR2d 816 (court of appeal to hear appeal involving wobbler).

A petition challenging an order of a judge in a misdemeanor or infraction case is properly addressed to the appellate division of the superior court. See Information on Proceedings for Writs in the Appellate Division of the Superior Court (Judicial Council Form APP-150-INFO), p. 10; but see also Advisory Committee Comment to Cal Rules of Ct 8.850, 8.900 (appeals in misdemeanor and infraction cases). Under CCP §§1085(b) and 1103(b), the superior court is an "inferior tribunal" to the appellate division for the purpose of issuing mandamus and prohibition in cases within the appellate division's appellate jurisdiction (see Cal Const art VI, §10). However, absent agreement of the parties, the superior court judge or magistrate who made the challenged ruling or order may not also review it in the superior court. See Pen C §859c. See also *People v Konow* (2004) 32 C4th 995, 12 CR3d 301 (superior court review of prior superior court order to magistrate allowed).

A petition challenging the order of a magistrate in a felony case is properly addressed to the superior court. Preliminary matters in felony cases are typically heard by magistrates, statutory judicial officers whose authority is limited to preliminary matters and whose duties are entirely defined by statute. See Pen C §§806-829, 858-883; but see also Advisory Committee Comment to Cal Rules of Ct 8.850, 8.900 (appeals in misdemeanor and infraction cases). When a superior court judge sits as a magistrate, *i.e.,* carries out the statutory functions assigned to magistrates, he or she is acting as an "inferior" tribunal with respect to the superior court. *People v Superior Court (Chico Feminist Women's Health Ctr.)* (1986) 187 CA3d 648, 655, 232 CR 165. See *People v Toney* (2004) 32 C4th 228, 230 n2, 8 CR3d 577. Thus, a superior court may properly direct an order to a magistrate, and a party seeking such an order may file a petition for mandamus or prohibition in the superior court. *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 123 CR2d 31; *Abernathy v Superior Court* (2007) 157 CA4th 642, 645, 68 CR3d 726. As always, the petition should follow the rules of the court in which it is filed. Counsel should pay particular attention to the procedures of the courts before which he or she practices and observe not only the differences between writs sought in superior court and those in the court of appeal, but also variances among the different superior court local rules and policies and those of the various districts and divisions of the court of appeal. Court clerks can often provide guidance about specific problems or questions.

NOTE: The Rules of Court provide for the filing of most types of documents in civil proceedings in the trial courts by facsimile machine (fax) when permitted by local court rules. See Cal Rules of Ct 2.300-2.306. Petitions for writ of prohibition or mandate are civil actions even when they arise in the context of a criminal case.

For discussion of proper venue in writ proceedings, see *Griggs v Superior Court* (1976) 16 C3d 341, 128 CR 223; Marer, *Effective Criminal Appellate Advocacy: Seeking Reversal by Concurrent Collateral and Direct Attacks in the Appellate Court*, 27 Hastings LJ 333, 360 (1975).

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§8.6 B. Original Filing in Supreme Court

Despite the general requirement that litigants not bypass lower courts, a number of petitions for writs of prohibition or mandate are filed directly in the California Supreme Court every year because the attorneys believe the issues involved are extremely important and thus deserve immediate attention by the higher court. Except in very rare and exceptional circumstances, however (see, *e.g., Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 219, 149 CR 239), the supreme court almost invariably transfers such petitions directly to the appropriate court of appeal, without directions, for initial consideration. The high court generally adheres to this procedure even if the court of appeal is likely to deny the petition, and a petition for review to the supreme court is sure to follow.

Although filing the petition in the court of appeal may be a futile step, there is a risk in starting directly in the supreme court. If the supreme court transfers the case to a lower appellate court, extra time is consumed and there may not be sufficient time to return to the supreme court after the lower appellate court acts. The supreme court may issue a stay when the writ petition is filed there in the first instance, but it is more likely to do so on a petition for review after the court of appeal has acted on the writ. Even when the supreme court grants review following summary denial of the petition by the court of appeal, the supreme court may retransfer the cause to the court of appeal with directions to issue an alternative writ and decide the case. See §8.78.

NOTE: The procedures of the California Supreme Court suggest a possible method of relief should counsel miss the 10-day period for filing a petition for review after the summary denial of a petition for writ. See Cal Rules of Ct 8.366 (finality of decision in court of appeal in criminal cases), 8.500(e) (petitions for review). Although the supreme court is very reluctant to grant relief from default under such circumstances, a litigant is still able to file an original petition for writ in that court. However, a new petition must explain why the writ could not first have been filed in a lower court. Cal Rules of Ct 8.486(a)(1); see also *Hagan v Superior Court* (1962) 57 C2d 767, 769, 22 CR 206. As noted above, the court may simply transfer such a petition to the court of appeal. Although it is likely that the court of appeal will again issue a summary denial, a petition for review could then be timely filed from that *newly* denied petition.

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VI. FORMAT OF PETITION

A. Cover or Title Page

§8.7 1. Court of Appeal and Supreme Court

The formal requirements for a petition seeking relief by way of writ of mandate or prohibition in the supreme court and court of appeal are set forth in Cal Rules of Ct 8.486. The following information must appear on the cover of the petition (see Cal Rules of Ct 8.204(b)(10), 8.486(a)):

- The title of the petition;
- The title, trial court number, and court of appeal number of the case;
- The names of the trial court and each participating trial judge;
- The name, address, state Bar number, and telephone number of each attorney filing or joining in the petition; and
- The name of the party that each attorney on the brief represents.

The cover of an original petition should be red (Cal Rules of Ct 8.40(b)) and should "preferably" be on recycled paper (Cal Rules of Ct 8.204(b)(10)). The cover need not state the bar number of any supervisor of the attorney responsible for the brief. Cal Rules of Ct 8.204(b)(10)(D).

When a stay is requested, the cover must prominently state that and must include the nature and date of the order or action the petitioner seeks to stay. Cal Rules of Ct 8.116(a), 8.486(a)(7)(B). The name and department of the trial court and the name and telephone number of the judge whose order the petitioner seeks to stay must be included either on the cover or at the beginning of the text of the petition. Cal Rules of Ct 8.116(b), 8.486(a)(7)(B).

If the petition seeks review of a trial court proceeding that is also the subject of a pending appeal, the notice, "Related Appeal Pending" must appear on the cover. Cal Rules of Ct 8.486(a)(3).

For sample writ cover, see §8.10.

For information about the Certificate of Interested Entities or Persons that must appear after the cover and before the tables, see §8.41.

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§8.8 2. Appellate Division

In general, the rules governing the form of writ papers filed in the appellate division of the superior court are set out in Cal Rules of Ct 8.883 and 8.931-8.932. Cal Rules of Ct 8.930(a). These rules lay out the requirements for binding petitions filed in the appellate division (see Cal Rules of Ct 8.883(c)(8)) but, with the exception of a prominently displayed notice where necessary of a "Related Appeal Pending" (see Cal Rules of Ct 8.932(b)(3)), are silent about what should appear on the cover. It is good practice for an attorney filing a petition in the appellate division to comply with the formal requirements for briefs set out in Cal Rules of Ct 8.204(b), incorporating Cal Rules of Ct 8.40. Thus, an original petition and supporting brief filed in the appellate division of the superior court should have a red cover that includes all of the information required by Cal Rules of Ct 8.40. It should be bound on the left side, unless local rules provide otherwise. If the brief is stapled, the staples and edge must be covered by tape. Cal Rules of Ct 8.883(c)(8), 8.930(a). The use of recycled paper is required. Cal Rules of Ct 8.883(c)(1), 8.930(a). The sample writ cover in §8.10 can be used in the appellate division.

The Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case (Judicial Council Form APP-151) must be used by a defendant who is not represented by an attorney and may be used by counsel. Cal Rules of Ct 8.931(a), 8.932(a), (b)(1). The court may grant leave to an unrepresented party to file a petition that is not on Form APP-151 on a showing of good cause. Cal Rules of Ct 8.931(a).

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§8.9 3. Superior Court

California Rules of Court 2.100-2.119 set forth in detail the form and format to be used in all documents filed in the superior court. A cover is not required, but the title page of the petition should comply with the content and format requirements of Cal Rules of Ct 2.111. See §8.11.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.10 4. Form: Cover for Use in the Appellate Courts

§8.10 4. Form: Cover for Use in the Appellate Courts

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8.10.1 Cover for use in the appellate courts

[*Use if applicable*]

[*Title of court*]

_ _[*PETITIONER'S NAME/PEOPLE OF THE STATE OF CALIFORNIA*]_ _, **Petitioner**	_ _[*Number of court of appeal district*]_ _ **Civil No.** _ _[*number of case in court of appeal*]_ _
	[Add if applicable]
vs	**Related** _ _[*appeal or petition*]_ _ **Pending No.** _ _[*number of related or pending case*]_ _
_ _ _ _ _ _ **COUNTY SUPERIOR COURT,** **Respondent**	[*Continue*] **IMMEDIATE STAY REQUESTED** *[Identify the type and date of proceeding or act sought to be stayed. Identify trial court and department involved and name and telephone of judge who issued order to which stay request pertains either on cover or at beginning of text]*
_ _[*DEFENDANT'S NAME/PEOPLE OF THE STATE OF CALIFORNIA*]_ _, **Real Party in Interest.**	

_ _[*REQUEST FOR STAY*]_ _,
PETITION FOR WRIT OF _ _[*SPECIFY TYPE(S) OF WRIT SOUGHT*]_ _,
MEMORANDUM
_ _[*, AND APPENDIX*]_ _

From Orders of the _____ Court of the State of California
County of _____
Case No. _____
The Honorable _____, Presiding
Tel.:_____

_ _[*Attorney's name*]_ _
SBN _ _[*attorney's State Bar number*]_ _
_ _[*Attorney's address*]_ _
Telephone: _ _[*attorney's phone number, including area code*]_ _

Representing _ _[*name*]_ _, _ _[*Petitioner/Respondent/Real Party in Interest*]_ _

Comment: Counsel may want to ask, in the petition, that the court select the form of writ if unsure of the correct one. Counsel might request, *e.g.,* "PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE

RELIEF." See *Peck's Liquors, Inc. v Superior Court* (1963) 221 CA2d 772, 775, 34 CR 735.

This cover can be used in the appellate division of the superior court, the court of appeal, or the supreme court by changing the title of the court. The papers should be bound on the left side, unless a local rule governing filings in the appellate division of the superior court requires otherwise. Cal Rules of Ct 8.204(b)(8), 8.485(a) (court of appeal and supreme court), 8.883(c)(8), 8.930(a) (appellate division). If filed in the court of appeal, the title of the court should include the district, and the division if known; if the division is not known, the clerk fills in the division when the petition is filed.

If a related appeal or petition is pending, the cover must so indicate, stating "Related Appeal Pending." Cal Rules of Ct 8.486(a)(3) (court of appeal and supreme court), 8.932(b)(3) (appellate division). In the appellate division of the superior court, the first paragraph of the petition must state the related appeal's title and any appellate division docket number. Cal Rules of Ct 8.932(b)(3).

When a stay is requested, include a conspicuous cover notation "STAY REQUESTED" and identify the nature and date of the proceeding for which the stay is sought. Cal Rules of Ct 8.486(a)(7)(A)-(B). On either the cover or the first page of text, provide the trial court and department involved and the name and telephone number of the trial judge whose order the request seeks to stay. Cal Rules of Ct 8.486(a)(7)(C).

Counsel may want to list all the items included with the petition on the cover. The rules governing supporting documents for petitions filed in the appellate and supreme court are set out in Cal Rules of Ct 8.486. In the appellate division, requirements for supporting documents are set out in Cal Rules of Ct 8.931(b)-(c). Supporting documents may be bound together at the end of the petition or in separate volumes containing no more than 300 pages each. Cal Rules of Ct 8.486(c)(1)(A) (appellate and supreme court) 8.931(c)(1) (appellate division). If the exhibits are bound separately, they should not be listed on the cover of the petition.

In the supreme court and court of appeal, a Certificate of Interested Entities or Persons must appear after the cover and before the tables. Cal Rules of Ct 8.488(c)(3). See §8.41.

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§8.11 5. Form: Title Page in the Superior Court

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8.11-1 Title page; parties

_ _[*Name of attorney or pro per party*]_ _
_ _[*State Bar no.*]_ _
_ _[*Address*]_ _
_ _[**Telephone**]_ _

_____ COUNTY SUPERIOR COURT

_ _[*Petitioner's Name/People of the State of California*]_ _, **Petitioner**	**No.** _ _ _ _ _ _
vs	**PETITION FOR WRIT OF** _ _[*e.g., MANDATE/PROHIBITION; MEMORANDUM; APPENDIX*]_ _
_ _[*Respondent court*]_ _, **Respondent**	
_ _[*Defendant's Name/People of the State of California*]_ _, **Real Party in Interest.**	

Comment: The title page of a petition for writ of mandate or prohibition filed in the superior court should comply with the formatting requirements of Cal Rules of Ct 2.100-2.119.

Papers separately filed should be separately captioned so they can be identified. All papers presented for filing in the superior court must be two-hole-punched at the top. Cal Rules of Ct 2.115.

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§8.12 B. Table of Contents; Table of Authorities

A petition for extraordinary relief filed in the court of appeal or the supreme court must include a table of contents and a table of authorities. Cal Rules of Ct 8.204(a)(1)(A), 8.485(a). In the appellate division, if the court grants permission to file a brief that exceeds the maximum 6,800 words (or 20 typewritten pages) (Cal Rules of Ct 8.883(b)(1)-(2), 8.930), it may require a table of contents and a table of authorities. Cal Rules of Ct 8.883(b)(4), 8.930. A table of contents and a table of authorities are required for petitions filed in superior court when the supporting memorandum exceeds ten pages. Cal Rules of Ct 3.1113(f). No memorandum may exceed 15 pages without leave of court. Cal Rules of Ct 3.1113(d)-(e).

If the exhibits accompanying the petition are included as an appendix and bound with the petition, they should be listed in the table of contents by exhibit number and page number.

The table of authorities must separately list cases, constitutions, statutes, court rules, and other authorities. Cal Rules of Ct 3.1113(l), 8.204(a)(1)(A).

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§8.13 1. Form: Table of Contents

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TABLE OF CONTENTS

Page

Table of Authorities

Request for Stay

Petition for Writ of _ _[*Prohibition/Mandate*]**_ _**

Verification

EXHIBIT _ _[*give number or letter*]**_ _**

EXHIBIT _ _[*give number or letter*]**_ _**

Memorandum

I. Statement of Material Facts

II. Questions Presented

III. Argument

A. _

1. _

2. _

B. _

IV. Conclusion

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.14 2. Form: Table of Authorities

§8.14 2. Form: Table of Authorities

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TABLE OF AUTHORITIES

Page

Cases

Statutes

Court Rules

Constitutional Provisions

Other Authorities

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C. Request for Stay

§8.15 1. May Be Included in Petition

An application for a stay may be included with the petition. Cal Rules of Ct 8.486(a)(7) (court of appeal or supreme court). See Cal Rules of Ct 8.932(b)(7) (applicable to attorneys filing petitions in the appellate division). See also Petition for Writ (*Misdemeanor, Infraction, or Limited Civil Case* (Judicial Council Form APP-151), filed by unrepresented petitioners (Cal Rules of Ct 8.931(a)). In the court of appeal and the supreme court, the court may decline to consider the request for a temporary stay if (Cal Rules of Ct 8.486(a)(7)):

- The petition does not explain the urgency;
- The words "Stay Requested" and identification of the nature and date of the proceeding or act sought to be stayed do not appear prominently on the cover; or
- Neither the cover of the petition nor the beginning of the text includes the trial court and department involved and the name and telephone number of the trial judge whose order the request seeks to stay.

If not included in the verified petition, or if additional facts are needed or advisable in support of the stay application, the request for a stay should be accompanied by a declaration, usually by counsel, reciting the facts that support its issuance, and a proposed stay order. Whichever method is used, counsel should not wait until the last moment before requesting "urgent" relief.

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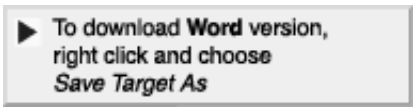
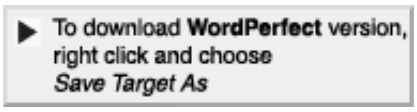
§8.16 2. Form: Allegation Concerning Request for Stay





By reason of the _ _[*order/judgment*]_ _ described _ _[*above and*]_ _ in Allegations _ _[*give numbers*]_ _ of the within petition for writ of mandate, and in Allegations _ _[*give numbers*]_ _ of the declaration of counsel attached hereto as Exhibit _ _, _ _[*respondent*]_ _ threaten(s) to _ _[*describe action to be taken if no stay is granted*]_ _ and will do so unless restrained by order of this Court. A declaration that supports the request for a stay and a proposed order are attached at pages _ _.

Comment: This allegation must be included in the body of the petition, and should be highlighted in the Table of Contents. It is good practice to place this allegation at the beginning or the end of the petition so that it is readily noticeable by the court.

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§8.17 D. Petition

A petition filed to request issuance of writ of mandate or prohibition initiates a form of civil action, and under CCP §1109, the general rules of pleading and practice prescribed in CCP §§307-1062.10 apply except as specifically provided by the statutes governing writ petitions. CCP §§1063-1110b. Like a complaint, it must allege facts that if proved would entitle the petitioner to the relief sought.

Although the term "petition" is sometimes used broadly to include the petition and all the supporting documents filed in conjunction with it, such as the memorandum, exhibits, and declaration of service, in this section and those that follow, it is used narrowly here to refer only to the formal document seeking writ relief. In this narrow sense the petition consists only of the allegations, the prayer, or request for relief, and the verification. The formal petition's allegations establish what relief is desired, the grounds for that relief, and the facts establishing that the requirements for obtaining a writ have been met. The petition closes with a prayer requesting specific relief; it is then verified, and accompanied by proof of service.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.18 1. Form: Salutation

§8.18 1. Form: Salutation

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[*Superior Court*]

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF _ _ _ _ _ _, HONORABLE _ _[*NAME*]_ _, PRESIDING:

[*Court of Appeal*]

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _ _[*e.g., FOURTH*]_ _ APPELLATE DISTRICT:

[*Supreme Court*]

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Comment: A formal salutation to the court is not required, but it is traditional.

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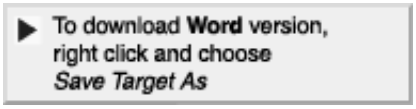
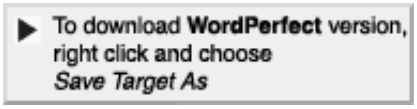
Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.19 2. Form: Opening Paragraph

§8.19 2. Form: Opening Paragraph





Petitioner, _ _[*name/the People of the State of California*]_ _, petitions this Court for a writ of _ _[*prohibition/mandate*]_ _ _ _[*and stay of proceedings*]_ _ directed to respondent Court, and by this verified petition represents that:

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§8.20 3. Introductory Allegations

The petition must allege all facts necessary to demonstrate entitlement to relief. This means that in addition to alleging facts that support the petitioner's substantive claim, the petition must allege facts that establish the jurisdictional prerequisites for writ relief, *i.e.,* that the petitioner has no right to appeal or that the remedy on appeal is inadequate; that the petitioner is beneficially interested in the proceedings; that the petitioner has exhausted lower-court remedies; and that the petitioner has met the required time limits for filing the petition or has been diligent in seeking relief.

The allegations in the petition are usually numbered. Each numbered allegation should allege a single fact or set of related facts that supports the petitioner's entitlement to relief. Some attorneys number these allegations with Roman numerals and others use Arabic numerals. Either is acceptable.

The paragraphs in §§8.21-8.26 are sample allegations for use in petitions for writs of prohibition and writs of mandate. They can be used for both types of petition unless otherwise specified. It is important to tailor each petition, however, to the specific facts, procedural background, legal issues and argument, and relief sought in the particular case. In addition, all appropriate requirements for petitions filed in the supreme court, courts of appeal, and superior courts should be observed, as well as any local rules and procedures in the various district and superior courts. There is no substitute for individualizing each case; the purpose is to attract the reviewing court's attention and to demonstrate why this particular matter is deserving of a higher court's favorable consideration.

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§8.21 a. Form: Allegation Concerning Beneficial Interest of Petitioner and Capacity of Respondent and Real Party in Interest

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1. Petitioner, _ _[*name/the People of the State of California*]_ _**,** _ _[*is/are*]_ _ _ _[*a/the*]_ _ _ _[*plaintiff/defendant*]_ _ **in an action** _ _[*now pending*]_ _ **in respondent Court, entitled** _ _[*title of action*]_ _**, No.** _ _[*specify*]_ _**. The** _ _[*name of defendant(s)/the People of the State of California/*]_ _ **in that action** _ _[*is/are*]_ _ **named in this petition as real** _ _[*party/parties*]_ _ **in interest.**

Comment: The petition should name all parties beneficially interested. CCP §§1086, 1103(a); Cal Rules of Ct 8.486(a)(2); see *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1296, 80 CR3d 464 (petition naming lower court as respondent must name real party in interest or the real party is not a party to the proceedings); §7.11. This allegation is usually the first one. It ordinarily suffices as an allegation that the respondent court is or was exercising judicial functions (see §8.22), a fundamental requirement for prohibition. CCP §1102. Even if a codefendant is not an interested party, a copy of the petition should be served on his or her attorney as a matter of courtesy. See Cal Rules of Ct 8.25, 8.486(e), 8.931(d), 8.932(a).

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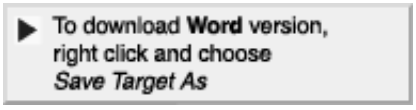
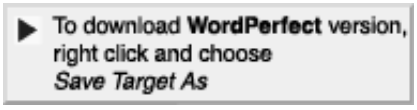
§8.22 b. Form: Allegation Concerning Respondent





[2.] Respondent, the Superior Court of _ _ _ _ _ _ _, is now and at all times mentioned in this petition has been exercising judicial functions in connection with the _ _[*action/cause/proceeding*]_ _ described in Paragraph _ _.

Comment: If the petition challenges the actions or orders of a superior court judge sitting as a magistrate in connection with preliminary matters in a felony prosecution, or if it challenges the actions or orders of a judge hearing a misdemeanor or infraction case, this allegation can be modified to include that information. If the petition is filed in the court next above respondent court, this allegation informs the reviewing court that it is the appropriate court to entertain the petition.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.23 c. Form: Allegation Concerning Venue

§8.23 c. Form: Allegation Concerning Venue

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[3.] All the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent Court and of the Court of Appeal of the State of California, _ _[*e.g., Fourth*]_ _ **Appellate District.**

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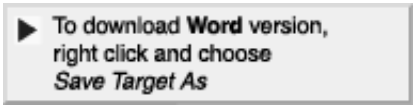
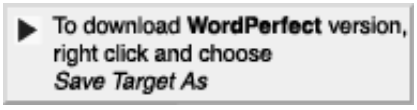
§8.24 d. Form: Prior Petitions





[*Alternative 1*]

[4.] No other petition for writ of _ _[*prohibition/mandate*]**_ _ has been made by or on behalf of this petitioner relating to this matter.**

[*Alternative 2*]

[4.] A petition for writ of _ _[*prohibition/mandate*]**_ _ was filed in _ _**[*name and location of court, e.g., the Alameda County Superior Court Appellate Division*]**_ _ on _ _**[*date*]**_ _. That court _ _**[*state action taken, e.g., denied relief without reaching the merits of the case*]**_ _. _ _**[*If an opinion was written, state: Their opinion is attached as Exhibit _ _*[*e.g., A*]**_ _**]**_ _.**

[*Continue*]

Comment: Denial of writ relief in a previous application in the same court ordinarily precludes further review of the same order by a subsequently filed petition, absent a showing of unusual or changed circumstances. *Hagan v Superior Court* (1962) 57 C2d 767, 22 CR 206. When denial of the initial petition is not on the merits, however, the doctrine of res judicata does not bar the court from considering a subsequent identical petition. See *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728. But see *Leone v Medical Bd.* (2000) 22 C4th 660, 669, 94 CR2d 61 (when writ review is only authorized mode of appellate review, summary denial is denial on merits). See also *Fink v Shemtov* (2010) 180 CA4th 1160, 1172, 103 CR3d 509.

In circumstances where a writ is denied by the first court in which it is filed and the petitioner may file a petition in the next highest court, Alternative 2 should be used to inform the court that the prior petition was summarily denied. See §8.77.

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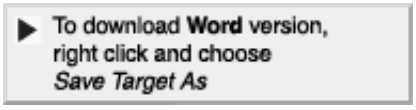
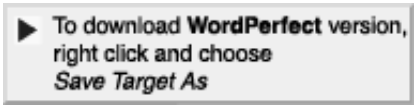
§8.25 e. Form: Allegation Explaining Why Petition Not Brought in Lower Court





[5.] Petitioner(s) seek(s) extraordinary relief from this Court in the first instance because, in addition to the matters set out _ _[*above/below*]_ _ **in Paragraph(s)** _ _[*specify*]_ _**, the following circumstances make it proper and necessary that a writ issue from this Court:** _ _[*Specify compelling reasons in detail, e.g.*, *that the matters involved are of public and general interest to the People of the State of California and that they require speedy resolution; they present questions of law not previously decided in the state; there is an urgent need for uniformity of decision within the state*]_ _**.**

Comment: On rare occasions, it may be appropriate to bypass the court that would ordinarily hear the writ petition and go straight to a higher court, usually the California Supreme Court. It is, however, exceedingly unusual for the supreme court to exercise its original jurisdiction to hear a writ petition that could have been brought in a lower court. Even if the supreme court does not summarily deny the petition, it is likely to transfer the petition to the court of appeal for decision. Therefore, counsel should carefully consider whether the circumstances favoring review by the supreme court are sufficiently compelling before deciding to bypass a lower court that also has jurisdiction over the matter. For further discussion, see §8.6.

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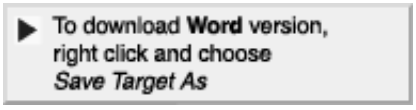
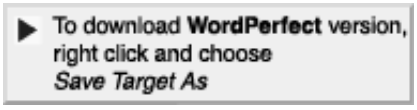
§8.26 f. Form: Allegation Explaining Why Relief Previously Sought in Higher Court





[5.] Petitioner(s) previously sought extraordinary relief from the _ _[*Court of Appeal of the State of California/California Supreme Court*]_ _ **in a cause entitled** _ _[*name(s) of petitioner(s)*]_ _ **v** _ _[*name(s) of respondent(s)*]_ _**, No.** _ _[*specify*]_ _**.** _ _[*Add facts concerning petitioner's justification for again seeking extraordinary relief*]_ _**. The** _ _[*respondent(s)*]_ _ **in that action** _ _[*is/are*]_ _ **named in this petition as** _ _[*respondent(s)*]_ _**.**

Comment: If the petitioner has unsuccessfully attempted to bypass a lower court, and received a summary denial of the petition, this allegation should be added to the petition. The summary denial of a writ petition without a written opinion is ordinarily regarded as a refusal of the court to exercise jurisdiction over the matter; it is not res judicata and does not constitute the law of the case. *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728. But see *Leone v Medical Bd.* (2000) 22 C4th 660, 669, 94 CR2d 61 (when writ review is only authorized mode of appellate review, summary denial is denial on merits). See also *Varian Medical Systems, Inc. v Delfino* (2005) 35 C4th 180, 200, 25 CR3d 298 (rejecting exception to the general rule where party had agreed that the court had no discretion to deny relief). On summary denials, see §§8.62-8.63.

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4. Allegations Specifying Grounds for Relief

§8.27 a. Prima Facie Case for Relief

The designation of the error and the allegation of the facts underlying the ground or grounds for relief are the crux of all petitions seeking extraordinary relief. The petition must allege that the judicial act or failure to act from which the petitioner seeks relief is one that is susceptible to correction by extraordinary writ: for prohibition, an act without or in excess of jurisdiction; for mandate, the failure to perform a mandated duty or an order that abuses the court's discretion. The petition must also contain sufficient facts, with respect to each asserted ground for relief, to state a prima facie case that the petitioner is entitled to relief. It is recommended that the petitioner's statement of the grounds for relief summarize the procedural facts concerning the underlying judicial acts or failure to act from which the petitioner seeks relief.

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§8.28 b. Factual and Legal Basis for Claim

The allegations should also include a statement of the underlying facts of the case that relate to the claim for relief and a sufficient statement of the underlying legal issues to show that the claim is meritorious.

For example, a claim that a prosecution violates the ex post facto clauses of the federal and state constitutions might begin with the assertion that the petitioner moved to dismiss on the ground that the statute under which the petitioner is charged or will be punished was not in effect when the alleged crime was committed. The following procedural facts would be relevant to this claim and should be included:

- The date on which the motion to dismiss was heard;
- The date on which the motion was denied;
- The date on which the statute in question was enacted; and
- The date on which the crime with which the petitioner is charged was allegedly committed.

To establish a prima facie case that the statutory provision in question violates the ex post facto clause, the petition must also allege facts that show that the statute either makes unlawful conduct that was previously lawful, or retroactively increases the punishment for the offense with which the petitioner is charged.

It may also be necessary to describe the acts constituting the crime with which the petitioner was charged in enough detail to make a prima facie showing that the acts the petitioner allegedly committed were not unlawful at the time. It may also be appropriate to cite the state or federal constitution or a seminal case that shows that if the petitioner's factual allegations are correct, the claim that the law is ex post facto with respect to the petitioner may be meritorious.

The factual story should be told simply and directly, in whatever sequence provides the maximum force and continuity. The petitioner should avoid excessive formalism. It is recommended that the factual allegations in the petition be in the ultimate-fact style characteristic of a complaint, and that counsel reserve his or her efforts to be persuasive to the factual portion of the memorandum.

Some practitioners include separate grounds for relief in a single numbered paragraph called "Grounds for Relief." Others number each ground separately. Either procedure is acceptable, as is the use of subheadings. Whatever system of numbering is adopted, it is recommended that each factual allegation included in each ground for relief be separately numbered or lettered. This greatly simplifies cross-referencing the factual allegations in other parts of the petition.

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§8.29 5. Allegation Concerning Exhaustion of Remedies

Before filing a petition for an extraordinary writ, the petitioner is ordinarily required to seek relief in the trial court, *e.g.,* by objecting or filing a motion requesting the appropriate relief. The petition should establish that the petitioner has done everything that was needed in the trial court to avoid a procedural default. See *People v Superior Court (Dorsey)* (1996) 50 CA4th 1216, 1222, 58 CR2d 165. The objection or other request for relief should have been made on the same grounds as those urged in the petition for extraordinary relief. For additional discussion, see §7.12.

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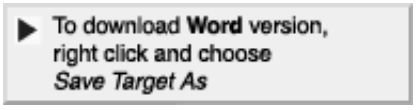
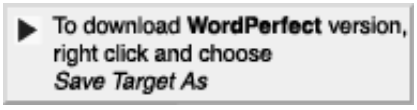
Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.30 a. Form: Allegation When Objection Raised Below and Rejected or Not Ruled on

§8.30 a. Form: Allegation When Objection Raised Below and Rejected or Not Ruled on





[6.] In petitioner's(s') _ _[*state method used for raising objection, e.g., motion to dismiss/demurrer/memorandum in opposition*]**_ _ (Exhibit _ _), petitioner(s) objected to respondent Court's jurisdiction to _ _**[*entertain/proceed with/proceed to enforce/make*]**_ _ the challenged _ _**[*action/cause/proceeding/order/judgment/decision*]**_ _ on the _ _**[*ground(s) set forth in Paragraph _ _ above/following grounds: _ _*[*Specify*]**_ _]_ _. The court _ _**[*ruled that _ _*[*state ruling*]**_ _/refused to rule*]**_ _.**

Comment: The petition must allege how and when the petitioner sought relief in the lower court and state the court's response to the request. *Ballard v Superior Court* (1966) 64 C2d 159, 167, 49 CR 302, superseded by statute on other grounds as stated in *Verdin v Superior Court* (2008) 43 C4th 1096, 1104, 77 CR3d 287; *People v Anderson* (2001) 25 C4th 543, 580, 106 CR2d 575 (appeal). Moreover, if writ review is requested on several issues, relief must first have been sought on each issue in the trial court. *Cooper v Superior Court* (1981) 118 CA3d 499, 511, 173 CR 520. For discussion of the exhaustion requirement, see §7.12.

Often, the facts underlying this allegation have been stated in the section of the petition stating the grounds for relief. If so, it may not be necessary to include a separate allegation asserting exhaustion of remedies. If a separate allegation is included, it is appropriate to refer to the paragraph in which the facts underlying the allegation are stated. If used, the exhaustion allegation should be numbered sequentially.

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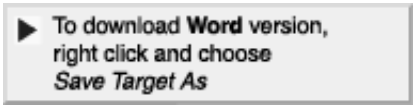
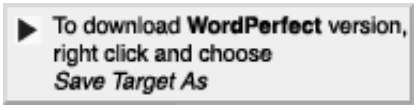
Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.31 b. Form: Allegation When Objection Impossible or Futile

§8.31 b. Form: Allegation When Objection Impossible or Futile





[6.] Petitioner had no opportunity to object to respondent Court's jurisdiction to _ _[*e.g., entertain/proceed with*]_ _ **the challenged** _ _[*e.g., action/cause/proceeding*]_ _ **because** _ _[*state reasons*]_ _**.**

Comment: See Comment in §8.30. For discussion of the contemporaneous-objection requirement as it relates to writ petitions, and exceptions to that requirement, see §7.12.

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§8.32 6. Allegation of Diligence

A petition for writ relief should be filed promptly after the issuance of the order that will be the subject of the request for relief. Writs are intended to be used in circumstances that require immediate relief, and any substantial delay between the order and the filing of the writ petition is likely to create doubts in the eyes of the court about the petitioner's need for immediate relief—even when the petition is filed within any applicable time limit.

Some statutes authorizing writ relief set mandatory filing deadlines. See §7.13 for a list of statutes that set time limits for seeking writ relief. Such special time limits are jurisdictional in nature. See, *e.g., People v Superior Court (Sandoval)* (1972) 29 CA3d 135, 139, 105 CR 268 (regarding Pen C §1538.5 time limit). When the order complained of is an appealable order, a writ petition filed after the deadline for filing a notice of appeal may be denied unless there are extraordinary circumstances excusing the delay in seeking relief. *Adoption of Alexander S.* (1988) 44 C3d 857, 865, 245 CR 1. But see *People v Munoz* (1975) 51 CA3d 559, 563, 124 CR 322 (tardy appeal from constitutional claim of ineffective assistance of counsel allowed); *In re Harris* (1993) 5 C4th 813, 825, 21 CR2d 373 (constitutional challenges, fundamental jurisdictional defects, and miscarriage of justice claims do not become irremediable when judgment of conviction is final if proper showing made); *In re Crockett* (2008) 159 CA4th 751, 758, 71 CR3d 632.

When there is no statutory deadline for seeking writ relief and no right to appeal the challenged order, California courts use the traditional equitable approach of laches, in which the court determines timeliness by assessing whether the petitioner has been diligent in seeking relief and whether the real party in interest has been prejudiced by any delay. See *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784; *People v Superior Court (Clements)* (1988) 200 CA3d 491, 495, 246 CR 122. The courts frequently use the statutory deadline for filing a notice of appeal as the standard for determining whether the petitioner has been diligent. See, *e.g., Peterson v Superior Court, supra*; *People v Superior Court (Clements), supra*. But see *Good v Superior* Court (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (petition filed after 60 days will not be denied unless respondent can show prejudice). See also *People v Superior Court (Lopez)* (2005) 125 CA4th 1558, 1562, 24 CR3d 66 (writ petition filed more than 60 days after trial court's order not dismissed where respondent not prejudiced and petition presented question of first impression and issue of public importance). The time limit for filing a notice of appeal in misdemeanor and infraction cases is 30 days after the judgment or appealable order. If the defendant is committed for insanity or narcotics before judgment is final, the 30 days runs from the date of commitment. Cal Rules of Ct 8.853(a) (misdemeanors), 8.902(a) (infractions). In felony cases, the time is 60 days after rendition of the judgment or order. Cal Rules of Ct 8.308.

On the need for diligence in pursuing writ relief, see §7.14.

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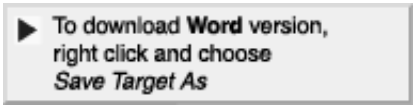
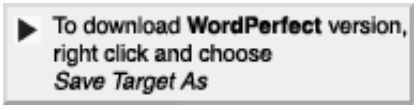
Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.33 a. Form: Allegation When Time for Appeal Has Expired

§8.33 a. Form: Allegation When Time for Appeal Has Expired





[7.] The order at issue in this proceeding is an appealable order. It was issued on _ _[*date*]**_ _. The time for filing a notice of appeal from that order expired on _ _**[*date*]**_ _. Petitioner had no opportunity to file an appeal within the applicable time limit because _ _**[*e.g., petitioner relied on trial counsel's representation that _ _*[*he/she*]**_ _** *would file a notice of appeal from the challenged order and was not aware that trial counsel had failed to file the notice of appeal until _ _*[*date*]**_ _**, *five days after the notice of appeal should have been filed*]**_ _. Petitioner's reliance on trial counsel's promise was reasonable because _ _**[*state reasons reliance was reasonable*]**_ _. Since that time, petitioner has been diligent in preparing the within petition _ _**[*state what petitioner has done to prepare the petition*]**_ _.**

Comment: Failure to advance any extraordinary reason or circumstance to explain or justify the delay in seeking writ relief from an appealable order may result in denial. See *People* v *Municipal Court* (*Mercer*) (1979) 99 CA3d 749, 752, 160 CR 455.

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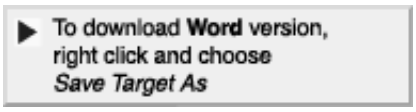
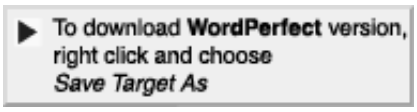
§8.34 b. Form: Allegation When Petition Challenges Nonappealable Order





[7.] The order at issue in this proceeding is a nonappealable order, issued on _ _[*date*]_ _**. This Petition is filed within a reasonable time because** _ _[*e.g., the reporter's transcript of the hearing in which the challenged order was made was not available until* _ _ *days after the challenged order was issued and petitioner has referred extensively to the reporter's transcript in this petition/the legal issues are complex*]_ _**. Furthermore, the real party in interest has not been prejudiced by delay, because** _ _[*state reasons*]_ _**.**

Comment: When there has been a delay in filing, some practitioners recommend addressing the question of diligence proactively without waiting for the real party in interest to bring it up, because the Court may decide to summarily deny the writ. On summary denial, see §§8.62-8.63.

An allegation that the petitioner has been diligent should be accompanied by a declaration stating the relevant facts.

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7. Allegations Concerning Absence or Inadequacy of Other Remedies and Need for Relief

§8.35 a. Form: No Right of Appeal

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[8.] A. Petitioner has no right of appeal from respondent's _ _[*order/judgment/decision of* _ _[*date*]_ _]_ _ **(Exhibit** _ _**) and does not have a plain, speedy, or adequate remedy at law other than the relief sought in this petition.**

[*If prosecution is petitioner, add*]

B. Respondent's _ _[*order/judgment/decision of* _ _[*date*]_ _]_ _ **(Exhibit** _ _**) is in excess of the court's jurisdiction** _ _[*for the reasons stated above in Paragraph* _ _*/because*_ _[*state reasons*]_ _]_ _**.**

[*Continue*]

C. The need for review outweighs the danger of harassment of the Real Party in Interest because _ _[*e.g., respondent's order releasing real party with no determination of the underlying facts of the SVP petition, poses a potential danger to the community*]_ _**.**

Comment: Because the defendant has the right to a review of most orders of the trial court on a direct appeal from a judgment of conviction, this allegation will most commonly be used by the prosecution. It is important to allege facts that there is a need for review of the trial court's action that transcends the legislative limit on appeals by the prosecution. See *People v Superior Court (Stanley)* (1979) 24 C3d 622, 625, 156 CR 626; but see also *People v Superior Court (Maldonado)* (2006) 137 CA4th 353, 364, 40 CR3d 365. See §7.10.

In some situations, relief by way of petition for writ of mandate or prohibition is expressly allowed by statute. See, *e.g.,* Pen C §999a (authorizing use of writ of prohibition to set aside indictment or information on grounds of lack of reasonable or probable cause). It may be argued that the enactment of such a statute constitutes a legislative determination that the remedy on appeal is inadequate. For a list of statutes authorizing writ relief in particular situations, see §7.7.

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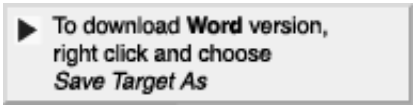
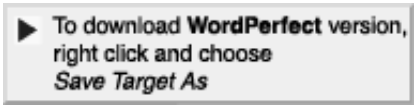
§8.36 b. Form: Remedy on Appeal Inadequate





[8.] Petitioner(s) _ _[*has/have*]_ _ **no plain, speedy, or adequate remedy at law other than the relief sought in this petition. The right of appeal from** _ _[*respondent's(s')/real* _ _[*party/parties*]_ _ *in interest's*]_ _ _ _[*order/judgment/decision*]_ _ **is wholly inadequate in that** _ _[*state reason(s) direct appeal is inadequate*]_ _**.**

Comment: For factors found sufficient to render the remedy of appeal inadequate, see *People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 1112, 257 CR 678; *People v Superior Court (Vidal)* (2007) 40 C4th 999, 1011 n5, 56 CR3d 851. In certain cases, a writ is required. See, *e.g.*, Pen C §§1238(d) and 1466(1)(H) (writ of mandate or prohibition required for prosecution challenge to order granting probation). See generally California Criminal Law Procedure and Practice §42.6 (Cal CEB Annual). For discussion of circumstances in which courts have deemed the right of appeal inadequate, see §§7.9-7.10.

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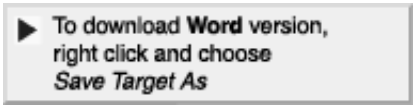
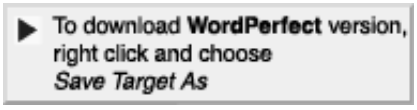
§8.37 c. Form: Allegation Concerning Need for Relief





[*Add one of the following alternatives*]

[*Alternative 1: Prohibition]*

[9.] Petitioner will be irreparably injured because _ _[*specify injury or damage, e.g., the petitioner will be forced to defend against a charge of which he/she has been previously acquitted*]_ _ **if respondent Court is not restrained and prohibited from** _ _[*e.g., taking any further action in the above-described matter*]_ _**.**

[*Alternative 2: Mandate]*

[9.] Petitioner will be irreparably injured because _ _[*specify injury or damage*]_ _ **if respondent Court is not compelled to perform its legal** _ _[*duty/duties*]_ _ **and** _ _[e.g., *issue its order*]_ _ _ _[*describe order*]_ _**.**

[*If appropriate, add*]

This Court should consider this case _ _[*because of the grave nature of the issue(s) presented/because of its significant legal impact/to review questions of first impression and general importance to the bench and bar so that general guidelines can be laid down for future cases*]_ _**.**

Comment: This paragraph may be combined with the allegation in §8.35 or §8.36 alleging that there is no right to appeal or appeal would provide an inadequate remedy. Because the granting of extraordinary relief is discretionary, an allegation explaining the harm that will result if relief is not granted is essential because it usually contains the information with the greatest potential to persuade the court to entertain the writ.

This allegation should be adapted to the facts set out in the exhibits and declarations and the other allegations of the petition. In the court of appeal, it may be sufficient to allege the harm the petitioner will suffer if the relief sought is not granted. The California Supreme Court, on the other hand, will be much more interested in the potential impact of the lower courts' action on the administration of justice. See generally *Hogya v Superior Court* (1977) 75 CA3d 122, 128, 142 CR 325. For further discussion, see §8.6.

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8. Closing Matters

§8.38 a. Prayer

Because the petition is to all intents and purposes a complaint, the petition traditionally closes with a prayer or request for relief. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1296, 80 CR3d 464 (filing of writ of mandate in the court of appeal is an original proceeding). The prayer should specifically request all the relief that the petitioner deems to be appropriate in the case. In a case in which the petitioner is in doubt about what writ should appropriately issue, the petitioner may ask for relief in the alternative. *Peck's Liquors, Inc. v Superior Court* (1963) 221 CA2d 772, 775, 34 CR 735; see *People v Superior Court (Manuel G.)* (2002) 104 CA4th 915, 924, 128 CR2d 794 (appeal impliedly requested court to treat it as writ petition if order deemed nonappealable); but see *Marriage of Lafkas* (2007) 153 CA4th 1429, 1434, 64 CR3d 100 (discretion to treat imperfect appeal as writ petition should be only exercised in unusual circumstances).

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§8.39 b. Form: Prayer

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WHEREFORE, petitioner prays that:

[*If applicable, include the following option*]

[1.] This Court immediately stay _ _[*describe what is to be stayed,* e.g., *all proceedings in case number _ _*[*specify*]*_ _*]*_ _* **until further order of this Court; and that**

[*If applicable, add one or more of the following options*]

[*Option 1: Use if the petitioner is requesting issuance of peremptory writ of prohibition in the first instance*]

[2.] This Court issue a peremptory writ of prohibition in the first instance, restraining the respondent Court, its officers and agents, and all persons acting by and through its orders from taking any further steps or proceedings, including trial

[*If seeking to restrain proceedings on specific counts, add appropriate counts*]

on counts _ _[e.g., *I and III*]*_ _*

in case number _ _[*specify*]*_ _*; **and that**

[*Option 2: Use if the petitioner is requesting issuance of peremptory writ of mandate in the first instance]*

[2.] This Court issue a peremptory writ of mandate in the first instance commanding respondent Court to _ _[*set out acts or duties court should be ordered to perform,* e.g., *to vacate its order denying petitioner's motion to sever and to make a new and different order severing counts 1 and 2 in the above described action*]*_ _*; **and that**

[*Continue*]

[*Alternative 1: Use if the petitioner is requesting issuance of an alternative writ of prohibition*]

[3.] This Court issue an alternative writ of prohibition directing and requiring respondent Court to refrain from taking any further action in case number _ _[*specify*]*_ _* **until further order of this Court or to show cause before this Court, at a specified time and place, why it has not done so and why a peremptory writ should not issue; and that**

[4.] On the return of the alternative writ and hearing on the order to show cause, this Court issue a peremptory writ of prohibition restraining respondent absolutely and forever from taking any further proceedings in this _ _[*action/matter*]*_ _*; **and that**

[*Alternative 2: Use if the petitioner is requesting issuance of an alternative writ of mandate*]

[3.] This Court issue an alternative writ of mandate directing and requiring the respondent Court to _ _[*set out acts or duties court should be ordered to perform*]*_ _* **or to show cause before this Court, at a specified time and place, why it has not done so and why a peremptory writ should not issue; and that**

[4.] On the return of the alternative writ and hearing on the order to show cause, the Court issue a peremptory writ of mandate compelling respondent Court to _ _[*set out acts or duties to be performed*]*_ _*; **and**

that

[*Continue*]

[5.] This Court grant petitioner such other and further relief as may be appropriate and just.

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of petitioner or attorney*]__
_ _[*Typed name*]_ _

Comment: An alternative writ demands that the respondent do the act required or show cause why he or she should not be required to do so.

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§8.40 c. Form: Verification

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[*Use one of the following alternatives*]

[*Alternative 1: By affidavit*]

State of California, County of _ _ _ _ _ _:

I, the undersigned, being first sworn, say:

I am the petitioner in this action. All facts alleged in the above document not otherwise supported by citations to the record, exhibits, or other documents are true of my own personal knowledge.

Date: _ _ _ _ _ _ __[*Signature of affiant*]__
_ _[*Typed name*]_ _

STATE OF CALIFORNIA)
COUNTY OF _ _[*Name of county*]_ _ **) ss**
)
)
_____)

Subscribed and sworn to (or affirmed) before me on this _ _[*number*]_ _ **day of** _ _[*month*]_ _**, 20**_ _**, by** _ _[*name(s)*]_ _**, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.**

WITNESS my hand and official seal.

__[*Signature of officer*]__ [*Officer's seal*]

[*Alternative 2: By declaration under penalty of perjury*]

I am the petitioner in this action. All facts alleged in the above document not otherwise supported by citation to the record, exhibits, or other documents are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _ _ _ _ _**, California.**

__[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: The verification must be filed with the petition by the party beneficially interested. CCP §§1086, 1103; Cal Rules of Ct 8.486(a)(4) (court of appeal and supreme court), 8.932(b)(4) (appellate division). See *Magee v Superior Court* (1973) 34 CA3d 201, 211 n3, 109 CR 758, disapproved on other grounds in *People v Norris* (1985) 40 C3d 51, 56, 219 CR 7. A defectively verified petition may result in denial of relief. *Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870. An unverified petition or answer is subject to a motion to strike, although leave to amend the verification may be requested. *Perlman v Municipal Court* (1979) 99 CA3d 568, 575, 160 CR 567. See *Mezzetti v Superior Court* (1979) 94 CA3d 987, 993, 156 CR 802.

A verification by the petitioner based only on "information and belief" may be fatally defective. *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721; *Perlman,* 99 CA3d at 574. See also *Yamada Bros. v ALRB* (1979) 99 CA3d 112, 116 n1, 159 CR 905 (facts on information and belief are hearsay and must be

disregarded). In such cases, the court may accept declarations and exhibits filed in support of the petition in satisfaction of the verification requirement. See *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 470, 255 CR 46; *Perlman*, 99 CA3d at 574.

The petitioner's attorney may sign the verification on the petitioner's behalf when the petitioner is unavailable, for example, because he or she is in custody, or because the facts are within the attorney's knowledge, as when counsel is more familiar with what occurred in the trial court. CCP §446; *League of Women Voters v Eu* (1992) 7 CA4th 649, 656, 9 CR2d 416. See *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 706, 32 CR 288. If the sole basis for an attorney verification is the unavailability of the client, the attorney verification must be made on information and belief. See *League of Women Voters,* 7 CA4th at 656. This requires some other evidentiary support for the petition. Attorney verifications on information and belief that are based on the unavailability of a client are discouraged and the provisions authorizing attorney verification may be strictly construed. See *DeCamp v First Kensington Corp.* (1978) 83 CA3d 268, 275, 147 CR 869.

Attorney verifications based on counsel's own knowledge avoid the hearsay problems associated with verifications on information and belief, but should be used with caution because the attorney may be deemed a witness to the facts so verified. Although an attorney verifying a pleading should state in the verification why it was not verified by a party, the court may permit it to stand without a sufficient explanation when the petition is otherwise supported by the record. *Perlman v Municipal Court* (1979) 99 CA3d 568, 574, 160 CR 567.

There is a split of authority about whether CCP §446, which exempts public agencies from the requirement of verifying pleadings, applies to petitions for extraordinary relief. Compare *Municipal Court v Superior Court (Sinclair)* (1988) 199 CA3d 19, 25 n1, 244 CR 591 (verification required), and *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 470, 255 CR 46 (same), with *Los Angeles County DCFS v Superior Court* (1998) 62 CA4th 1, 9 n7, 72 CR2d 369 (verification not required), *Fremont Union High Sch. Dist. v Santa Clara Board of Educ.* (1991) 235 CA3d 1182, 1188, 286 CR 915 (same), and *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1221, 279 CR 421 (same). In light of these conflicting decisions, the best practice for prosecutors is to include an adequate verification in a petition for extraordinary writ.

PRACTICE TIP: Under the rules of court for the filing and service of papers by facsimile machine (fax) in the trial courts (see Cal Rules of Ct 2.300-2.306), a party may file a document containing a faxed signature, which is considered an original signature. Cal Rules of Ct 2.305(d). Note that the fax filing procedure is available *only* in the trial courts. A party who files a signed facsimile document represents that the original signed document is in his or her possession or control. Cal Rules of Ct 2.305(a).

In limited circumstances, an appellate attorney preparing a petition for writ of mandate or prohibition may be able to rely on faxed declarations to establish facts. The attorney with knowledge of the facts can prepare a declaration and fax it to the appellate attorney, who can incorporate the document as an exhibit. The rule may also permit the appellate attorney to fax the petition itself to the attorney, who then can sign the verification and fax the document back to the appellate attorney. However, these uses of the rules allowing fax filing in the trial court are limited to cases in which the "party" has "possession or control" of the original, signed documents faxed for filing (Cal Rules of Ct 2.305(a)), such as when both attorneys are members of the same firm, are co-counsel, or continue to represent the client.

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§8.41 d. Certificate of Interested Entities or Persons

Under Cal Rules of Ct 8.488(b), any entity that is a defendant in a criminal case must comply with Cal Rules of Ct 8.208, which requires the serving and filing of a "certificate of interested entities or persons" in proceedings before the supreme court and court of appeal. The Judicial Council has created an optional form, APP-008, for this purpose. Rule 8.208 requires the identification of entities or persons who may have an interest in the outcome of the proceeding, and the parties are under a duty to provide supplemental information should they learn of a change or additional information that should have been disclosed. Cal Rules of Ct 8.208(e)-(f). If a party wishes to remain confidential, that party may seek to separately file its certificate under seal. Cal Rules of Ct 8.488(c)(4), 8.208(d)(2). If the application to seal the certificate is granted by the court, the party must file the sealed certificate within 10 days after that court order. Cal Rules of Ct 8.208(d)(2). A party's insurer does not have a financial interest in the outcome solely on the basis of its status as an insurer. Cal Rules of Ct 8.208(e)(2)(C).

The writ petitioner's certificate must be included in the petition. Cal Rules of Ct 8.488(c)(1). But see Cal Rules of Ct 8.488(c)(4). The certificate of the respondent must be included in the preliminary opposition or in the return. Cal Rules of Ct 8.488(c)(2). In both cases, the certificate must appear after the cover of the writ and before the tables. Cal Rules of Ct 8.488(c)(3).

If an entity who is a criminal defendant fails to file the certificate, the clerk will notify him or her that he or she must file the certificate within 10 days or the court may strike the petition or other document filed by that party. If no timely response is made, the court in its discretion may strike the petition. Cal Rules of Ct 8.488(d).

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E. Exhibits

§8.42 1. Contents of Record

The burden is on the petitioner seeking writ relief to plead a sufficient case to justify relief and to support it with documentation that enables the appellate court to understand why the lower court erred. See *Krueger v Superior Court* (1979) 89 CA3d 934, 938, 152 CR 870. An unexplained failure to file an adequate record may result in summary denial of the petition. *Lantz v Superior Court* (1994) 28 CA4th 1839, 1847 n8, 34 CR2d 358. Copies of those portions of the trial court record that are essential to the reviewing court's understanding of the proceedings and the issues presented by the petition must accompany the writ when the petition is filed. Cal Rules of Ct 8.486(b)(1) (court of appeal and supreme court), 8.931(b), 8.932(a) (appellate division). See *Sherwood v Superior Court* (1979) 24 C3d 183, 186, 154 CR 917 (petitioner must provide appellate court with record sufficient to permit review); *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 151 CR 721 (writ petition *not* supported by adequate trial court record and verified on "information and belief" fatally defective because factual contentions were hearsay). The record should be verified by specific reference in the verified petition, by separate declaration, or by certificates. There are exigent circumstances that might excuse the filing of a full, complete record. Cal Rules of Ct 8.486(b)(2). See §8.45.

The record accompanying a petition for a writ that seeks review of a trial court ruling must include the following:

- A copy of the order or judgment from which relief is sought (Cal Rules of Ct 8.486(b)(1)(A) (court of appeal and supreme court), 8.931(b)(1)(A), 8.932(a) (appellate division));
- Copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position (Cal Rules of Ct 8.486(b)(1)(B) (court of appeal and supreme court), 8.931(b)(1)(B), 8.932(a) (appellate division));
- Any other documents necessary to understand the case and the ruling (Cal Rules of Ct 8.486(b)(1)(C) (court of appeal and supreme court), 8.931(b)(1)(C), 8.932(a) (appellate division)); and
- A reporter's transcript of the oral proceedings resulting in the ruling for which review is requested (Cal Rules of Ct 8.486(b)(1)(D) (court of appeal and supreme court), 8.931(b)(1)(D), 8.932(a) (may use electronic recording as well in appellate division)). If a transcript is unavailable, the record must include a declaration by counsel or unrepresented petitioner setting forth the facts required by Cal Rules of Ct 8.486(b)(3) (court of appeal) and 8.931(b)(3), 8.932 (appellate division). See §8.45.

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§8.43 2. Facts Outside the Record

If the record of the proceedings in the court below does not contain all the facts the petitioner wants the appellate court to know, such facts may be presented through affidavits or declarations of individuals who would be competent witnesses to the facts asserted, or by request for judicial notice. Reviewing courts may receive evidence in the exercise of their original jurisdiction in writ proceedings, but reviewing courts ordinarily "will not consider evidence arising after the trial court ruling, involving facts open to controversy which were not placed in issue or resolved by the trial court." *BGJ Assocs. v Superior Court* (1999) 75 CA4th 952, 958, 89 CR2d 693. See also *Guardado v Superior Court* (2008) 163 CA4th 91, 95 n1, 77 CR3d 149.

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§8.44 3. Format of Exhibits

Exhibits may be bound together at the end of the writ petition itself or in separate volumes not exceeding 300 pages each. Cal Rules of Ct 8.486(c)(1)(A) (court of appeal and supreme court), 8.931(c)(1)(A), 8.932(a) (appellate division). There are advantages to filing the exhibits in separate volumes: In the court of appeal, an original and four copies of the petition must be filed, but only one set of separately bound documents need be lodged. See Cal Rules of Ct 8.44(b). See Cal Rules of Ct 8.44(a) for the number of copies of documents to be filed when the petition is filed in the supreme court in the first instance. Cal Rules of Ct 8.486(c)(3). In the appellate division, only one copy of any separately bound supporting documents needs to be filed with a petition, answer, opposition, or reply, unless local rules or orders provide otherwise. Cal Rules of Ct 8.931(c)(3), 8.932.

Supporting documents must be consecutively paginated. Each exhibit must be separately designated by letter or number, and they must be separated by index tabs. A table of contents preceding the exhibits must list each exhibit by title and by the number or letter of its tab. If a document has attachments, each attachment must be listed separately in the table of contents, with a brief description of its contents. Cal Rules of Ct 8.486(c)(1) (court of appeal and supreme court), 8.931(c), 8.932(a) (appellate division).

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§8.45 4. Procedures When Required Record Unavailable

Exigent circumstances. In exigent circumstances, the petition may be filed without the documents described in Cal Rules of Ct 8.486(b)(1)(A)-(C) (court of appeal and supreme court), 8.931(b)(1)(A)-(C) (appellate division). The petition must be accompanied by a declaration of counsel or unrepresented petitioner that explains the urgency, sets forth the reasons why the documents are unavailable, and fairly summarizes their contents. Cal Rules of Ct 8.486(b)(2) (court of appeal and supreme court), 8.931(b)(2), 8.932(a) (appellate division). If a transcript under Cal Rules of Ct 8.486(b)(1)(D) (court of appeal and supreme court) or a transcript or electronic recording required under Cal Rules of Ct 8.931(b)(1)(D) (appellate division) is unavailable, the supporting record must include a declaration by counsel or unrepresented petitioner either (a) explaining why the transcript or recording is unavailable and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling, or (b) stating that the transcript or recording has been ordered and the date it is expected to be filed, which must be a date before any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record. Cal Rules of Ct 8.486(b)(3) (court of appeal and supreme court), 8.931(b)(3), 8.932(a) (appellate division). Thus, counsel is not required to summarize the proceedings if the transcript will be available before the petitioner requests the reviewing court to take any action other than issuance of a stay supported by other parts of the record. Note that exigent circumstances are not required before implementing the procedure under Cal Rules of Ct 8.486(b)(3) or 8.931(b)(3).

Relief sought includes production of reporter's transcript. When the petitioner is an indigent criminal defendant, and part of the relief sought is an order requiring preparation of the transcript, and the declaration demonstrates that the petitioner needs and is entitled to the transcript, counsel is not required to provide a full summary of the proceedings. Cal Rules of Ct 8.486(b)(3)(A) (court of appeal and supreme court), 8.931(b)(3)(A), 8.932(a) (appellate division). Of course, sufficient facts must be included to show that the petitioner is entitled to relief. In *Herrera v Superior Court* (1985) 172 CA3d 1159, 218 CR 742, the court of appeal ruled that to be entitled to an order from a reviewing court requiring production of a transcript, the petitioner must have filed a *written* motion in the trial court, supported by a declaration setting forth the need for the transcript. If counsel is retained, facts supporting the defendant's inability to pay for transcription must be alleged. Note that in the appellate division, instead of a transcript, defendant may use an electronic recording. Cal Rules of Ct 8.931(b)(1)(D), 8.931(a).

WARNING: A request for a stay or petition or both that does not include the documents specified in Cal Rules of Ct 8.486(b)(1)(A)-(D) (court of appeal and supreme court) and 8.931(b)(1)(A)-(D) (appellate division) and does not include sufficient facts to excuse the failure to submit them may be summarily denied. Cal Rules of Ct 8.486(b)(4) (court of appeal and supreme court), 8.931(b)(4), 8.932(a) (appellate division).

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§8.46 5. Form: Sample Request for Preparation of Transcript for Pretrial Writ Petition

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, _ _ _ _ _ _ _ County

People of the State of California,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	**REQUEST FOR PREPARATION OF**
vs	)	**TRANSCRIPT FOR PRETRIAL**
	)	**WRIT PETITION**
_ _[*Name*]_ _,	)	
Defendant	)	
_____	)	

Defendant _ _[*name*]_ _**, by and through his attorney** _ _[*name*]_ _**, hereby requests this court to direct that transcripts of the proceedings taken on** _ _[*date*]_ _ **in Department** _ _[*number*]_ _ **of this court be prepared without cost to defendant for the purpose of supplying an adequate record for review by means of pretrial writ. In support thereof, counsel,** _ _[*name*]_ _**, declares as follows:**

Defendant intends to file a petition for extraordinary relief contesting this court's order made _ _[*date*]_ _**.**

Such a petition must be supported by a record adequate to show this court's action, including a Reporter's Transcript.

Defendant is _ _[*represented by the public defender, and is thus presumptively unable to afford preparation of such transcripts at his own expense/state facts showing that defendant is unable to afford preparation of transcript*]_ _**.**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _ _[*date*]_ _**, at** _ _[*location*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.47 6. Filing or Unsealing Confidential Documents

§8.47 6. Filing or Unsealing Confidential Documents

Issues pertaining to the sealing or unsealing of trial records in a reviewing court arise in writ proceedings in three main contexts:

- A party might need to refer to documents or records of proceedings that have been sealed by the trial court;
- A party who unsuccessfully opposed the sealing of records in the trial court might wish to renew that opposition in the reviewing court; or
- A party might wish to present confidential documents in the reviewing court that were not before the trial court.

NOTE: A party might also want to seal trial court records that were filed or lodged publicly and not ordered sealed in the trial court, but the rules explicitly prohibit sealing such records in the reviewing court. Cal Rules of Ct 8.46(d) (court of appeal and supreme court), 8.819 (appellate division).

California Rules of Court 8.46 sets forth procedures for sealed records. Cal Rules of Ct 8.46(a) (court of appeal and supreme court), 8.819 (appellate division); see Cal Rules of Ct 8.486(d). These rules apply to any record or thing filed or lodged with the court, but do not govern records that must be kept confidential by law. See also Comment to Rule 8.46 and *NBC Subsidiary KNBC-TV, Inc. v Superior Court* (1999) 20 C4th 1178, 86 CR2d 778; *Champion v Superior Court* (1988) 201 CA3d 777, 247 CR 624. See Cal Rules of Ct 2.550-2.551 for rules applicable to records sealed or proposed to be sealed in the trial court.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.48 a. Filing Records Sealed by Trial Court

§8.48 a. Filing Records Sealed by Trial Court

If a party wants the reviewing court to consider records that were ordered sealed in the lower court, these records must be filed under seal in the reviewing court and must remain under seal unless the reviewing court orders otherwise. Cal Rules of Ct 8.46(c)(1) (court of appeal and supreme court), 8.819 (appellate division). If any portion of the record in the reviewing court was sealed by the trial court, the party designating the record must also include the following (see Cal Rules of Ct 8.46(c) (court of appeal and supreme court), 8.819 (appellate division)):

- The sealing order;
- The motion or application to seal the record; and
- All documents filed in the trial court supporting or opposing the sealing of the record.

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§8.49 b. Requesting Reviewing Court to File Records Under Seal

When a party requests that a record that was not filed in the trial court be filed under seal in the reviewing court, the party must file a motion or application in the reviewing court, accompanied by a declaration stating facts sufficient to justify the sealing under Cal Rules of Ct 2.550(d)-(e), 8.46(e) (court of appeal and supreme court), 8.819 (appellate division). The record that is the subject of the request must be lodged at the same time unless there is "good cause" for not lodging it. Cal Rules of Ct 8.46(e)(2) (court of appeal and supreme court), 8.819 (appellate division). The record should be in a sealed envelope or other appropriate container with an attached cover sheet that contains all the information required for a caption page under Cal Rules of Ct 8.40 and 8.204(b)(10)(D), and labels the contents as "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 8.46(e)(3) (court of appeal and supreme court), 8.819 (appellate division).

The publicly filed papers (*i.e.,* the motion, opposition, reply, and any supporting documents) should not disclose any confidential information. If necessary, the papers must be redacted before filing, and the complete version lodged as a record conditionally under seal, pending determination of the motion or application. Cal Rules of Ct 8.46(e)(4) (court of appeal and supreme court), 8.819 (appellate division).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.50 c. Findings Required to Seal Record

§8.50 c. Findings Required to Seal Record

The court may not place a record under seal unless it makes the following express findings (Cal Rules of Ct 2.550(d), 8.46(e)(6) (court of appeal and supreme court), 8.819 (appellate division)):

- An overriding interest in confidentiality overcomes the right of public access to the record;
- The overriding interest supports the sealing of the record;
- There is a substantial probability of prejudice to the overriding interest if the record is not sealed;
- The proposed sealing is narrowly tailored; and
- There is no less restrictive means available to protect the overriding interest.

The order itself must specifically set forth the factual findings that support the sealing of the record; it must not encompass materials that do not need to be sealed. Cal Rules of Ct 2.550(e)(1)(B), 8.46(e)(8) (court of appeal and supreme court), 8.819 (appellate division).

CAUTION: The rules do not permit the court to seal a record solely by stipulation of the parties. Cal Rules of Ct 8.46(e)(1) (court of appeal and supreme court), 8.819 (appellate division).

If the court denies the request to seal the records, the clerk must return the lodged record to the moving party and must not file the record in the case file unless the submitting party notifies the clerk within 10 days after the order of denial that the record is to be filed. Cal Rules of Ct 8.46(e)(7) (court of appeal and supreme court), 8.819 (appellate division).

NOTE: Although Cal Rules of Ct 8.486(b) (court of appeal and supreme court), 8.931(b)(1) (appellate division) require the petitioner to provide the reviewing court with an "adequate record," neither they nor Cal Rules of Ct 8.46 (court of appeal and supreme court), 8.819 (appellate division) explain how to get a sealed record before the reviewing court when petitioner does not have access to the confidential information (*e.g.,* an in-chambers examination of an informant). One suggestion is for the petitioning party to request the trial court to forward the documents to the reviewing court under seal and include an allegation in the petition that such a request has been made.

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§8.51 d. Moving to Unseal Records Sealed by the Trial Court

A request to the reviewing court to unseal a record may be made by motion, application, or petition in accordance with the requirements of Cal Rules of Ct 8.46(f) (court of appeal and supreme court), 8.819 (appellate division). It should be noted, though, that the reviewing court may examine the sealed record even if it does not order it unsealed. Cal Rules of Ct 8.46(c)(3) (court of appeal and supreme court), 8.819 (appellate division). Thus, any such request should specify why the reviewing court's in-chambers examination of the record will not provide adequate relief.

The publicly filed portion of a motion to unseal a record should not disclose confidential information. If the disclosure of confidential information is necessary for proper consideration of the request, two versions of the motion should be filed: a redacted, public version, and a complete, sealed version. Cal Rules of Ct 8.46(f)(2) (court of appeal and supreme court), 8.819 (appellate division). If the reviewing court proposes on its own motion to unseal a record, it must give the parties notice. A party has 10 days or "as the court specifies" to file opposition to the unsealing. Cal Rules of Ct 8.46(f)(3) (court of appeal and supreme court), 8.819 (appellate division).

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§8.52 F. Memorandum of Points and Authorities

A writ petition filed in the court of appeal or the supreme court should comply with the requirements of Cal Rules of Ct 8.204 unless Rule 8.486 provides otherwise. Cal Rules of Ct 8.485(a), 8.486(a)(6). The memorandum should follow the organization and style of a brief in a direct appeal from the judgment. For general discussion of form and content requirements for briefs in the court of appeal and supreme court, see §§3.26-3.40.

The appellate division rules applicable to writ petitions are found in Cal Rules of Ct 8.930-8.936, and Rule 8.883 (Cal Rules of Ct 8.930). Absent leave of court, an unrepresented petitioner must use the Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case (Judicial Council Form APP-151); the form is optional for counsel. Cal Rules of Ct 8.931(a) (in pro per rules), 8.932(a), (b)(1) (attorney rules)). For general discussion of the form and content requirements for briefs in the appellate division of the superior court, see §§3.15-3.20.

If counsel has questions concerning the form and contents of the petition or the accompanying memorandum of points and authorities, the court clerks of the individual appellate divisions may be consulted. Briefs in the appellate division of the superior court are also discussed in §§3.43-3.44.

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1. Form and Content

§8.53 a. In the Court of Appeal and the Supreme Court

The rules pertaining to format and contents of appellate briefs are contained in Cal Rules of Ct 8.204. Counsel should be thoroughly familiar with its requirements. See §§3.26-3.40.

The memorandum in support of a writ petition should begin with a brief statement of the nature of the action, describing the order from which the petition seeks relief, summarizing the procedural facts necessary to enable the court to understand the context of the order and the substance of the petitioner's claim, and briefly explaining why writ relief is appropriate. This statement should be followed by a statement of the facts in the record underlying the claim. See Cal Rules of Ct 8.204(a)(1), 8.485(a).

The memorandum should contain a table of contents and a table of authorities and each point should be argued separately under a heading or subheading summarizing the point. See §§8.12-8.14. References to matters in the record should be supported by references to the volume and page number of the record where the matter appears. Cal Rules of Ct 8.204(a)(1), 8.485(a)). For California conventions in citing to the record, see §3.30. On the required record, see Cal Rules of Ct 8.486(b) and §8.42.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.54 b. In the Appellate Division of the Superior Court

§8.54 b. In the Appellate Division of the Superior Court

A petitioner who is not represented by an attorney must file a writ petition on the Judicial Council's Petition for Writ (*Misdemeanor, Infraction, or Limited Civil Case*) (Form APP-151) unless leave of court is obtained on a showing of good cause. Cal Rules of Ct 8.931(a). Any supporting documents included with the petition are governed by Cal Rules of Ct 8.931(b)-(c). The rules do not require a memorandum in support of the petition.

An attorney-drafted writ petition, however, must be accompanied by a memorandum. Cal Rules of Ct, 8.932(b)(5). See Cal Rules of Ct 932(b)(5) (petition filed by an attorney). It appears that an in pro per party who is an attorney must comply with Cal Rules of Ct 8.932. The memorandum does not need to repeat facts alleged in the petition. Cal Rules of Ct 8.932(b)(5). The memorandum must (Cal Rules of Ct 8.883, 8.931-8.932):

- Contain headings and subheadings stating argument points with citation of authority;
- Refer to facts and issues by noting volume and page number of the record;
- Explain the nature of the action, the relief sought, and the judgment or order being appealed;
- Explain that judgment is final or order is properly appealable;
- Summarize significant facts as contained in the supporting documents.

The format requirements of a memorandum in the appellate division are set forth in Cal Rules of Ct 8.883, unless otherwise provided in Cal Rules of Ct 8.931-8.933. Cal Rules of Ct 8.930. A memorandum should (Cal Rules of Ct 8.883):

- Use recycled, 8½ by 11 inch, white paper.
- Show case names as italicized or underlined.
- Use roman typeface no smaller than 13 points.
- Be spaced at 1½ spaces in text.
- Contain margins at least 1½ inches on left and right and 1 inch on bottom and top.
- Be bound at the left margin, unless otherwise required by local rule and if stapled, the bound edge and staples must be covered by tape.
- Be numbered consecutively.
- A memorandum may (Cal Rules of Ct 8.883):
- Be printed on both sides of the paper, so long as brief is not bound at the top.
- Be proportionally spaced or monospaced.
- Use italics and bold fonts for emphasis.
- Use single spacing for headings, footnotes, and quotations, with block indenting for quotations.
- Be signed or not.

Separate rules under Cal Rules of Ct 8.883(c)(10) apply to typewritten briefs.

If a memorandum in the appellate division does not comply with Cal Rules of Ct 8.883(a)-(c), the clerk may chose not to file it and return it to the party with a notice "received but not filed." Cal Rules of Ct 8.883(d)(1), 8.930. If the clerk files the nonconforming brief, the judge has the option, with or without notice, of (Cal Rules of Ct 8.883(d)(2), 8.930):

- Ordering the return of the brief so that noncompliance may be corrected and allow refiling by a specified date;
- Striking the brief with leave to refile a new brief by a specified date; or
- Ignoring the noncompliance.

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§8.55 2. Drafting Considerations

Because the facts are already alleged in the verified petition, it may not be necessary to state the underlying facts of the case at length in the memorandum in support of the petition, but the statement of facts in the memorandum should mention every fact relevant to the argument and permit the drafter to later argue how the law applies to the operative facts.

The attorney should spend a substantial portion of the time he or she has allocated to preparing the memorandum on the statement of facts. Writing a persuasive statement of facts is something of an art, and it differs from writing a persuasive argument. The statement of facts must above all be accurate—omitting facts that are unfavorable to petitioner's petition can impair or destroy counsel's credibility with the court. A good way to organize a persuasive statement of facts is to begin with the conclusion you want the court to draw from the facts and then arrange the facts into an order that will make it easy for the court to draw the conclusion. Do not simply recite what happened in chronological order unless that is the most effective way to present the facts.

Some attorneys also include a statement of issues or a summary of argument. This is not mandatory and will not make up for inadequate pleading in the petition itself. A summary of argument can be useful to the reviewing court if the issues presented are numerous or complex. It should present the issues fairly and candidly. The issues may be cast as questions or assertions of the conclusions urged. Each issue should incorporate enough facts to make clear the specific setting in which it arises.

In drafting the argument, the attorney should take care to support all issues pertinent to the writ by both argument and, when possible, citation of legal authority. See Cal Rules of Ct 8.204(a)(1)(B) (court of appeal), 8.883, 8.930 (appellate division). Issues not raised or supported by authority may be deemed waived. See *Jones v Superior Court* (1994) 26 CA4th 92, 99, 31 CR2d 264. Arguments in support of the writ petition should discuss why writ relief is necessary and appropriate, including important or unique questions of law raised by the petition or the effect on other cases or lower court procedures.

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3. Length

§8.56 a. In the Court of Appeal and the Supreme Court

If produced on a computer, a petition and supporting brief filed in the court of appeal or the supreme court is limited to 14,000 words, including footnotes, and must include a certificate by counsel (or pro se petitioner) stating the number of words. Cal Rules of Ct 8.204(c)(1). If produced on a typewriter, a brief must not exceed 50 pages. Cal Rules of Ct 8.204(c)(2). Tables, attachments (supporting documents), and the required certificate are excluded from the limits. Cal Rules of Ct 8.204(c)(3).

NOTE: In computing word or page count for the memorandum in support of a petition for extraordinary relief, the petition is included in the maximum word count, but the tables, certificate of interested parties, verification, and any supporting documents are excluded. Cal Rules of Ct 8.486(a)(6).

Counsel should make every effort to comply with the word and page limitations of Rule 8.204(c) in drafting the memorandum. See Cal Rules of Ct 8.485(a). Permission to exceed the word or page limitation may be requested by application to the presiding justice. Cal Rules of Ct 8.204(c)(5). The application must show good cause and should explain in some detail why, for example, a uniquely complex fact pattern or intricate argument requires a more lengthy argument than the rule permits.

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§8.57 b. In the Appellate Division of the Superior Court

Rule 8.883(b) governs the length of briefs filed in the appellate division of the superior court. Cal Rules of Ct 8.932(b)(6). A brief produced on a computer may not exceed 6800 words, including footnotes. Cal Rules of Ct 8.883(b)(1), 8.930. A typewritten brief must not exceed 20 pages. Cal Rules of Ct 8.883(b)(2). A certificate stating the word count of the brief, must be attached. Cal Rules of Ct 8.883(b)(1), 8.932(b)(6). The verification, the word count certificate, and any supporting documents are excluded from the limits. Cal Rules of Ct 8.883(b)(3), 8.932(b)(6). Counsel should make an effort to keep the memorandum in support of the writ petition within the limit. Cal Rules of Ct 8.883(b). On a showing of good cause, the court may grant an application to file a longer brief. Cal Rules of Ct 8.883(b)(4), 8.930.

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G. Procedure

1. Filing and Service of Petition

§8.58 a. Copies

The petitioner should file the required number of copies of the petition as follows:

- In the appellate division of the superior court, counsel is advised to file the original petition and one set of supporting documents, unless local rules or orders provide otherwise. See Cal Rules of Ct 8.882(e)(2). See also Information on Proceedings for Writs in the Appellate Division of the Superior Court (Judicial Council Form APP-150-INFO), p. 8, item 10. In any event, counsel should consult local rules about the need for additional "courtesy copies" for delivery to the appellate department.
- In the court of appeal, an original and four copies. Cal Rules of Ct 8.44(b).
- In the California Supreme Court, an original and ten copies. Cal Rules of Ct 8.44(a)(2).

NOTE: Original papers and copies must be on *recycled* paper, whether the documents are filed with the court or served on other parties. See Cal Rules of Ct 8.204(b)(1), 8.883(c)(1), 8.930.

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§8.59 b. Method of Service

Code of Civil Procedure §1107 provides that service of an application for writ shall be the same as ordinary service of notices and papers under CCP §§1010-1020. Note that if service is made by mail, any prescribed time limits for response are extended by certain time periods, depending on whether the place of address or the place of mailing is within or outside of the State of California, or both. CCP §1013(a). When the petition seeks an immediate stay, personal service or hand delivery is advisable and may be required by local rules or the rules of practice and procedure in the courts of appeal. If only a peremptory writ is sought in the trial court, service may be made in the same manner as a summons in a civil action. CCP §§1088.5, 1107.

The real party in interest must be served with both the petition and one set of supporting documents. Cal Rules of Ct 8.486(e)(1) (court of appeal and supreme court), 8.931(d)(1), 8.932(a) (appellate division). In the appellate division, the respondent is served only with the petition. Cal Rules of Ct 8.931(d)(1), 8.932(a). In the court of appeal or the supreme court, if the respondent is not the superior court or a judge of that court, the respondent must also be served with both the petition and one set of supporting documents. If the respondent is the superior court or a judge of that court, only the petition, but not the supporting documents, must be served on the court. Cal Rules of Ct 8.486(e)(1)-(2). See Comment to Cal Rules of Ct 8.29. In criminal practice, the petition should always be served on the Attorney General. Cal Rules of Ct 8.29, 8.486(e)(4) (court of appeal and supreme court), 8.931(d)(3), 8.932(a) (appellate division). Service of a petition for writ of prohibition must be made at least 5 days before an alternative writ is issued after a motion under Pen C §995 is denied. Pen C §999a.

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§8.60 c. Proof of Service

Proof of service must accompany the petition when it is filed, unless the petition is filed under CCP §1088.5. However, if good cause is shown, the court may grant the application ex parte without notice or service. CCP §1107. See the sample declarations of service by mail in California Civil Litigation Forms Manual §§9.10-9.12 (Cal CEB 1980). Proof of personal service can be typed on the last page of the court's copy of each set of papers before filing with the court. The proof of service must give the telephone number of each attorney served and name each party represented by each attorney. Cal Rules of Ct 8.486(e)(3) (court of appeal and supreme court), 8.931(d)(2), 8.932(a) (appellate division). The clerk must file the petition even if its proof of service is defective, but if the petitioner fails to file a corrected proof of service within 5 days after the clerk gives notice of the defect, the court may strike the petition or impose a lesser sanction; the court may allow the petition to be filed without proof of service. Cal Rules of Ct 8.486(e)(4)-(5) (court of appeal and supreme court), 8.931(d)(5)-(6), 8.932(a) (appellate division).

NOTE: If no alternative writ is requested, a party can file the petition without proof of service, but the court can take no action on the petition until it receives proof of service. CCP §1088.5. See also CCP §1107.

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§8.61 2. Stay of Proceedings

It is common practice for the reviewing court to extend a stay granted during the pendency of the proceeding until its decision becomes final. See, *e.g., Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1191, 15 CR3d 154. This practice gives the losing party an opportunity to seek review and a further stay in the supreme court before the case recommences in the trial court. If the client wants to seek review of the decision, counsel might suggest by letter to the court of appeal that it continue any stay order it has issued in the proceedings until its decision is final. For further discussion of stays and writs of supersedeas, see §8.4.

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3. First Action on Petition

a. Summary Denial

§8.62 (1) When Direct Appeal Available

After the petition has been presented, the court may summarily deny the petition (*i.e.,* without issuing an order to show cause or alternative writ). Cal Rules of Ct 8.487(a)(4) (court of appeal and supreme court), 8.933(a)(4) (appellate division). The summary denial of a writ petition is final immediately upon filing. Cal Rules of Ct 8.490(b)(1) (court of appeal), 8.532(b)(2)(C) (supreme court), 8.935(a)(2) (appellate division). The court may issue a summary denial and need not request or consider a preliminary opposition or reply. See Cal Rules of Ct 8.487(a)(4) (court of appeal and supreme court), 8.933(a)(4) (appellate division); *Powers v City of Richmond* (1995) 10 C4th 85, 114 n19, 40 CR2d 839.

When a petitioner seeks pretrial writ review as an alternative to appeal, the reviewing court is not required to consider the merits of the petition. In deciding whether to consider the petition on the merits, the court may look at factors such as the importance of the issue raised or whether it is a question of first impression. *People v Medina* (1972) 6 C3d 484, 491, 99 CR 630.

The summary denial of a writ petition without a written opinion is not res judicata and does not constitute the law of the case. *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728. Such a denial is regarded as a refusal of the court to exercise jurisdiction over the matter. 3 C4th at 897.

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§8.63 (2) When No Direct Appeal Available

Although it has often been said that review of writ petitions is discretionary, this aspect of writ review "comes into play primarily when the petitioner has another remedy by appeal and the issue is whether the alternative remedy is adequate." *Powers v City of Richmond* (1995) 10 C4th 85, 113, 40 CR2d 839. "When an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted." 10 C4th at 113.

When the petition is brought to enforce or protect a substantial right, "and there is no other plain, speedy and adequate remedy in the ordinary course of law, he or she is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to deny it." 10 C4th at 114, quoting *Potomac Oil Co. v Dye* (1909) 10 CA 534, 537, 102 P 677. Therefore, "when writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." 10 C4th at 114.

Powers does not require the appellate court to treat a writ petition challenging a nonappealable order with the same degree of formality it is required to apply to an appeal. *Landau v Superior Court* (1998) 81 CA4th 191, 199, 97 CR2d 657. In *Landau*, the court of appeal rejected petitioner's argument that when there is no statutory right of appeal, *Powers* requires the reviewing court to issue an alternative writ or an order to show cause in every instance in which a procedurally adequate and timely petition for extraordinary relief is filed. *Landau* held that *Powers* does not preclude the court from issuing a summary denial of an apparently meritless petition. 81 CA4th at 200.

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§8.64 b. Alternative Writ or Order to Show Cause

If the court decides to hear the petition on its merits, the usual procedure is to issue an alternative writ or an order to show cause. See Cal Rules of Ct 8.487(a)(4) (court of appeal and supreme court), 8.933(a)(4) (appellate division). An alternative writ commands the lower tribunal or a party to do or refrain from doing something or, in the alternative, show cause why it should not be ordered to do so. The order to show cause commands the tribunal or party to show cause why it should not be ordered to do or refrain from doing something. Whether denominated an alternative writ or order to show cause, the order issued by the reviewing court in proceedings on a writ of prohibition must order "the party to whom it is directed to desist or refrain from further proceedings… until the further order of the court" (CCP §1104). See *Guardianship of Walters* (1951) 37 C2d 239, 244, 231 P2d 473 (issuance of alternative writ of prohibition amounts to stay pending determination of matter).

When the court issues a peremptory writ or when a return is made to an alternative writ, the writ proceeding becomes a "cause" within the meaning of Cal Const art VI, §14, giving the petitioner the right to a decision in writing with reasons stated. *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728; *People v Medina* (1972) 6 C3d 484, 489, 99 CR 630.

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§8.65 c. Peremptory Writ "In First Instance"

In certain situations, the court may issue a peremptory writ "in the first instance," *i.e.*, without issuing an alternative writ. CCP §§1088 (prohibition), 1105 (mandate); *Lewis v Superior Court* (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626. When the circumstances warrant the issuance of a peremptory writ in the first instance, the court is not required to give the parties an opportunity for oral argument. *Lewis v Superior Court* (1999) 19 C4th 1232, 1260, 82 CR2d 85.

The California Supreme Court has repeatedly stressed that such writs should be issued "only in truly exceptional cases—primarily those in which a compelling temporal urgency requires an immediate decision." 19 C4th at 1261. The court may also issue a peremptory writ in the first instance when a right to relief is conceded, or when the right to relief is clear under well-settled principles of law and undisputed facts. However, if there is any reasonable countervailing argument and there is no compelling need for an expedited decision, "the court must follow the usual writ procedure and issue an alternative writ or order to show cause." 19 C4th at 1261. See also *Brown, Winfield & Canzoneri v Superior Court* (2010) 47 C4th 1233, 1237, 104 CR3d 145.

Before issuing a peremptory writ in the first instance, the court must inform opposing parties that such an order is being sought or considered and must provide them with an opportunity to file opposition. These notices are referred to as "*Palma* notices." Cal Rules of Ct 8.487(b)(1) (court of appeal and supreme court), 8.933(b)(1) (appellate division). See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626; *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856; *Ricki J. v Superior Court* (2005) 128 CA4th 783, 786, 27 CR3d 494.

In *Brown, Winfield & Canzoneri, supra,* the California Supreme Court approved the use of "suggestive *Palma* notices" (sometimes called "coercive" or "speaking" *Palma* notices), where a reviewing court issues notice that it is considering granting a peremptory writ in the first instance, discusses the merits of the writ petition with a suggestion that the trial court erred in the manner claimed by the petitioner, grants power and jurisdiction to the trial court to allow it to change its disputed order and replace it with a new one consistent with the view of the reviewing court (in which case the petition will be vacated as moot), and solicits opposition to the issuance of the peremptory writ should the trial court not follow the reviewing court's recommendation. The supreme court held suggestive *Palma* notices valid provided that the trial court informs the parties of its intent to revisit its disputed order in response to the notice and provides the parties with an opportunity to be heard. The trial court is not bound by a suggestive *Palma* notice.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/8 Preparing and Opposing a Petition for Mandate or Prohibition/§8.66 4. Form: Alternative Writ (Superior Court)

§8.66 4. Form: Alternative Writ (Superior Court)

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[*Title of court*]

[*Title of case*]	)	**No.** _ _ _ _ _ _
	)	
	)	**ALTERNATIVE WRIT OF**
	)	_ _[*PROHIBITION/*
_____	)	*MANDATE*]_ _

To: _ _[*Set out in full the title of respondent court as it appears in the case caption; if respondent is a ministerial officer, state his or her name as in the case caption.*]_ _

The verified petition of _ _[*prohibition/mandate*]_ by _ _[*name of petitioner*]_ _ **having been filed, it is hereby ordered that:**

The _ _[*name of respondent court*]_ is commanded _ _[*immediately on receipt of this writ or on or before* _____]_ _ **to** _ _[*state action to be prohibited or commanded, e.g., dismiss the information in People v* _ _ _ _ _ _, *No.* _ _ _ _ _ _]_ _**, or, in the alternative,**

To show cause before this Court at _ _[*address of court*]_ _ **in** _ _[*city*]_ _ **on** _ _[*date*]_ _**, at** _ _**.m., or as soon thereafter as counsel may be heard, why you should not be** _ _[*e.g., absolutely and permanently restrained from taking any further proceedings against or making any other orders affecting the petitioner in the proceedings described*]_ _**; and**

It is further ordered that you are hereby directed, pending further order of this Court, _ _[*e.g., to desist and refrain from taking any further proceedings in the actions described except* _ _[*state exceptions*]_ _]_ _**.**

The writ shall be served on respondent and real party in interest on or before _ _[*date*]_ _**.**

_ _[*The written return, if any, to this writ shall be filed and served by respondent or real party in interest on or before* _ _[*date*]_ _]_ _**.**

Witness the Honorable _ _[*name*]_ _**, Presiding** _ _[*Judge/ Justice*]_ _ **of the** _ _ _ _ _ _ **Court.**

Date: _ _ _ _ _ _

__[*Signature*]__
By _ _[*typed name of deputy clerk*]_ _
Deputy Clerk

[*Some courts require or prefer the following to be included as the final portion of the writ (after the clerk's signature)*]

Let the foregoing writ issue

_____
Judge of the Superior Court

[*Seal*]

Comment: The alternative writ is the equivalent of an order to show cause, and the effect of the issuance is to set the matter for hearing and decision by the reviewing court much as if the matter were to be heard and decided on appeal. If an alternative writ is issued, it must be served on the respondent and the real party in interest in the same

manner as a summons in a civil action unless the court orders otherwise. CCP §§1096, 1105. For additional alternative writ forms, see California Civil Writ Practice (4th ed Cal CEB 2008).

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5. Opposing Party's Response to Petition

§8.67 a. Preliminary Opposition

The respondent or any real party in interest may serve and file a preliminary opposition, sometimes referred to as informal opposition, within 10 days after the petition is filed. Cal Rules of Ct 8.487(a)(1) (court of appeal and supreme court), 8.933(a)(1) (appellate division). Preliminary opposition may be filed even if not requested by the court and may persuade the court not to issue an alternate writ.

In cases in which a peremptory writ may issue, filing a preliminary opposition may be the only opportunity available to the respondent or real party in interest to be heard in opposition. On the other hand, filing a preliminary opposition may suggest that a petition has more merit than is actually the case. See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 179, 203 CR 626. A preliminary opposition must contain a memorandum and a statement of any material fact not included in the petition. Cal Rules of Ct 8.487(a)(2) (court of appeal and supreme court), 8.933(a)(2) (appellate division). Although termed "preliminary" or "informal," the opposition must comply with the rules for briefs on appeal. See, *e.g.*, Cal Rules of Ct 8.40(b) (red cover required). See Cal Rules of Ct 8.4(a). In the appellate division, the rules for the form and content of briefs are found in Cal Rules of Ct 8.883. Cal Rules of Ct 8.930. Under Cal Rules of Ct 8.488(b), any entity that is a defendant in a criminal case must also comply with Cal Rules of Ct 8.208, which requires the serving and filing of a "certificate of interested entities or persons" in proceedings before the supreme court and court of appeal. The certificate of the respondent and real party in interest must be included in their preliminary opposition and, if no such opposition is filed, then in their return, if any. Cal Rules of Ct 8.488(c)(2). For further details on certificates of interested entities and parties, see §8.41. Service may be by any method permitted by the Code of Civil Procedure. Cal Rules of Ct 8.25(a), 8.486(e)(3). See Cal Rules of Ct 8.931(d), 8.932(a) (appellate division). Service on a governmental party may be required under Cal Rules of Ct 8.29. Cal Rules of Ct 8.486(e)(4) (court of appeal and supreme court), 8.931(d)(3), 8.932(a) (appellate division). On form and content requirements for briefs in the court of appeal and supreme court generally, see §§3.26-3.40 and for the appellate division, see §§3.15-3.20.

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§8.68 b. Return

If the court issues an alternative writ or order to show cause, the respondent or real party in interest may file a written return. The return is a pleading and it should conform to the rules of pleading in civil cases. The return may be a verified answer, a demurrer, or both. Cal Rules of Ct 8.487(b)(1) (court of appeal and supreme court), 8.933(b)(1) (appellate division). If the return is by demurrer alone and the demurrer is overruled, the writ court has discretion to issue a peremptory writ without granting leave to file an answer. Cal Rules of Ct 8.487(b)(4) (court of appeal and supreme court), 8.933(b)(4) (appellate division).

NOTE: Although the court that issued the order under review is usually the named respondent in mandamus and prohibition proceedings, ordinarily the court will not (and should not) file a return. See *Howard Gunty Profit Sharing Plan v Superior Court* (2001) 88 CA4th 572, 576 n6, 105 CR2d 896. But see *James G. v Superior Court* (2000) 80 CA4th 275, 279, 95 CR2d 135 (when only superior court could meaningfully oppose petition, court's response permitted). For discussion, see §7.11.

Unless the court orders otherwise, the return must be served and filed within 30 days after the court issues the alternative writ or order to show cause. Cal Rules of Ct 8.487(b)(2) (court of appeal and supreme court), 8.933(b)(2) (appellate division). An extension of time to file the return may be formally requested, but once the court has scheduled the date for oral argument it may be reluctant to permit a delay that will require a later hearing date.

One suggested approach to answering a petition is to number the allegations in the return to conform with the numbered paragraphs of the petition, admitting or denying each of the petition's allegations sequentially and setting forth affirmative allegations when appropriate. Failure to answer the petition is considered an admission of the truth of the allegations. *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45. Moreover, if the return fails to contradict the petition's allegations in any material way, the petition's allegations will be accepted as true. *Rice v Superior Court* (1975) 49 CA3d 200, 202, 122 CR 389.

Any entity that is a defendant in a criminal case must also comply with Cal Rules of Ct 8.208, which requires the serving and filing of a "certificate of interested entities or persons" in proceedings before the supreme court and court of appeal. Cal Rules of Ct 8.488(b). The certificate of the respondent and real party in interest must be included in their return, if not filed with a preliminary opposition. Cal Rules of Ct 8.488(c)(2). See §8.67. For further details on certificates of interested entities and parties, see §8.41.

As in the case of a petition, there is a division of authority in the courts of appeal on whether CCP §446 (permitting public agencies and officials to file unverified pleadings) exempts a prosecutor's pleadings from the verification requirement. Compare *Verzi v Superior Court* (1986) 183 CA3d 382, 385, 228 CR 299 (CCP §446 public officers exempt from verification requirements), with *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 255 CR 46 (verification required). The prudent course is to file a verified return.

The return, like the writ petition, should contain a memorandum supporting the position taken based on the factual matters alleged. Failure to provide such a memorandum may result in a waiver of issues not briefed. See *Woods v Horton* (2008) 167 CA4th 658, 677, 84 CR3d 332 (court need not consider issue where reasoned, substantial argument and citation to authorities are lacking); *Addam v Superior Court* (2004) 116 CA4th 368, 373, 10 CR3d 39. See also Cal Rules of Ct 8.485(a) and 8.930(a), applying Cal Rules of Ct 8.204 (court of appeal and supreme court) and 8.883 (appellate division), to the form and content of briefs in writ proceedings.

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§8.69 c. Opposition to Issuance of Peremptory Writ in First Instance

If the court notifies the parties that it is considering issuing a peremptory writ in the first instance (see §8.65), the respondent or any real party in interest may serve and file an opposition. Unless the court orders otherwise, the opposition must be filed within 30 days after the court issues its notification. Cal Rules of Ct 8.487(b)(2) (court of appeal and supreme court), 8.933(b)(2) (appellate division).

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§8.70 d. Reply

Within 10 days after a preliminary opposition is filed, the petitioner may serve and file a reply. Cal Rules of Ct 8.487(a)(3) (court of appeal and supreme court), 8.933(a)(3) (appellate division). However, the court may act without awaiting the reply. See Cal Rules of Ct 8.487(a)(4) (court of appeal and supreme court), 8.933(a)(4) (appellate division). Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the formal return or opposition is filed. Cal Rules of Ct 8.487(b)(3) (court of appeal and supreme court), 8.933(b)(3) (appellate division). The reply should include a memorandum, and should follow the same formatting rule as required for the petition. See Cal Rules of Ct 8.485(a) applying Cal Rules of Ct 8.204 on the form and content of briefs to writ proceedings in the courts of appeal and supreme court. See Cal Rules of Ct 8.930(a) applying Cal Rules of Ct 8.883 on the form and content of briefs to writ proceedings in the appellate division. The petitioner may file a replication denying any averments in the return or may controvert them by proof. See CCP §§1091, 1105; see also *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656; *Lotus Car Ltd. v Municipal Court* (1968) 263 CA2d 264, 268, 69 CR 384. If a petitioner makes no reply either by replication or proof, then the allegations of the verified return may be taken as true. See *Astourian v Superior Court* (1990) 226 CA3d 720, 723 n2, 276 CR 657 (uncontroverted allegations contained in opposition to writ of prohibition may be deemed as answer and considered as evidence); *Kahn v East Bay Mun. Utils. Dist.* (1974) 41 CA3d 397, 414, 116 CR 333.

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H. Proceedings on Petition

§8.71 1. Hearing

If issues of fact are raised by the petition or answer, those issues may be tried by the court or, in the court's discretion, by a jury. CCP §§1090-1091. In practice, superior court judges usually decide factual matters. Higher appellate courts do not take testimony and weigh evidence. When the purpose of the petition is to obtain review of a lower court's ruling, it is not the function of the reviewing court to take *new* or *additional* evidence. See *Serna v Superior Court* (1985) 40 C3d 239, 245, 219 CR 420. Factual hearings in the reviewing court on a petition for writ are limited to determinations of what record was actually submitted to the trial court and what arguments were actually made, if there is a dispute regarding these facts. The higher court's review is limited to the record made in the lower court, with no opportunity for a trial de novo. *Winton v Municipal Court* (1975) 48 CA3d 228, 236, 121 CR 561.

When an appellate court does find it necessary to make factual findings, the usual practice is to remand the matter to the superior court, often with a superior court judge acting as a referee. The referee's findings are not binding on the reviewing court but are entitled to great weight if supported by ample, credible evidence. *People v Ledesma* (1987) 43 C3d 171, 219, 233 CR 404. See *Mash v Superior Court* (1923) 192 C 258, 259, 219 P 742.

A petition for prohibition or mandate may be considered even when conflicts in evidence or other fact issues are raised. *Dulaney v Municipal Court* (1974) 11 C3d 77, 82, 112 CR 777 (no issue of fact affected substantial rights of parties); *Dillon v Municipal Court* (1971) 4 C3d 860, 865, 94 CR 777 (writ granted; disputed facts in pleadings immaterial).

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§8.72 2. Effect of Failure to File Return

A writ cannot be granted by default. CCP §1088. The court may not enter judgment for the petitioner simply because the respondent fails to file a return, but must hear the case on the pleadings and papers submitted. CCP §§1094, 1105; *County of San Bernardino v Superior Court* (1994) 30 CA4th 378, 382 n6, 35 CR2d 760. Failure to file a return denying the material allegations of the petition, however, may be considered an admission of their truth. See *Block v Superior Court* (1998) 62 CA4th 363, 368 n2, 72 CR2d 610; *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45.

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§8.73 3. Right to Argument

Before issuance of an alternative writ or order to show cause, a petition for extraordinary relief can be summarily denied without oral argument. See *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 45, 24 CR2d 337. Oral argument is required when the court issues an alternative writ or order to show cause. See *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728; *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1024, 269 CR 720. However, there is no right to oral argument when a peremptory writ is granted in the first instance. CCP §1088; *Lewis v Superior Court* (1999) 19 C4th 1232, 1260, 82 CR2d 85.

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§8.74 4. Burden of Proof

The petitioner has the burden of proving his or her contentions except those that are admitted. *In re Paul W.* (2007) 151 CA4th 37, 71, 60 CR3d 329; *Lotus Car Ltd. v Municipal Court* (1968) 263 CA2d 264, 270, 69 CR 384; *Franklin v Superior Court* (1950) 98 CA2d 292, 294; *In re Merkle* (1960) 182 CA2d 46, 48, 5 CR 745 (habeas corpus). A writ petition is civil in nature; therefore the applicable standard of proof is preponderance of the evidence. See Evid C §115.

When the court has issued an alternative writ of mandate to review an order and the petitioner has made a prima facie showing of abuse of discretion or possible abuse, the respondent has the burden of rebutting this prima facie showing by filing a written return to the writ, showing sufficient basis to sustain the order. *Coy v Superior Court* (1962) 58 C2d 210, 221, 23 CR 393; *Chevron Stations, Inc. v Alcoholic Beverage Control Appeals Bd.* (2007) 149 CA4th 116, 131, 57 CR3d 6. See also *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45. For further discussion of the return, see §8.68.

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§8.75 5. Standard of Review

The reviewing court applies the substantial evidence test to the trial court's factual findings, but exercises its independent judgment on questions of law. See, *e.g.*, *Womack v San Francisco Community College Dist.* (2007) 147 CA4th 854, 858, 54 CR3d 558; *Kreeft v City of Oakland* (1998) 68 CA4th 46, 53, 80 CR2d 137. The trial court's judgments and orders are presumed correct, "and a reviewing court will not disturb factual determinations expressly or impliedly made as an incident to a judgment or order, if they are supported by any substantial evidence." *People v Superior Court* (*Hartway*) (1977) 19 C3d 338, 350 n6, 138 CR 66, quoting *Winton v Municipal Court* (1975) 48 CA3d 228, 236, 121 CR 561.

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§8.76 6. Superior Court: Findings; Statement of Decision

A writ petition challenging an order of a magistrate is heard in the superior court. Cal Const art VI, §10. Under Cal Rules of Ct 3.1590(a), the superior court first announces a tentative decision orally or in writing.

Any party appearing in the proceeding can make a request for a written statement of decision explaining the factual and legal basis for the decision. When the trial is concluded within 1 calendar day or in less than 8 hours over more than a calendar day, the request must be made before the matter is submitted for decision and then the statement of decision may be made orally on the record before all parties. Cal Rules of Ct 3.1590(n). In all other cases, the request must be made within 10 days after the announcement or service of a tentative decision. Cal Rules of Ct 3.1590(d). The request must specify the controverted issues on which a statement of decision is desired. Cal Rules of Ct 3.1590(d). If a statement of decision is requested, the other side has 10 days to submit proposals concerning its content. Cal Rules of Ct 3.1590(e); CCP §632.

California Rules of Court 3.1590(f) specifies a schedule for the preparation and service of a proposed statement of decision and judgment. Objections may then be filed. Cal Rules of Ct 3.1590(g). Provision is made for the preparation and filing of a written judgment when a statement of decision has not been requested (Cal Rules of Ct 3.1590(h)) or has been deemed waived (Cal Rules of Ct 3.150(i)). The court may order a hearing on proposals or objections to a proposed statement of decision or judgment. Cal Rules of Ct 3.1590(j)-(k).

If a written judgment is required, the court must sign and file the judgment within 50 days after announcement or service of the tentative judgment, whichever is later, or, if a hearing was held, within 10 days after the hearing. Cal Rules of Ct 3.1590(*l*).

Finally, the court has discretion to extend time for any of the above acts and to grant relief from noncompliance for good cause shown. Cal Rules of Ct 3.1590(m).

Of course, if the superior court follows the procedure of issuing a peremptory writ without allowing a hearing, it might be difficult to request a statement of decision before the matter is submitted for decision. A litigant who is given notice that the superior court is considering issuing a writ without a hearing and who wants to have a statement of decision should consider making such a demand in the opposition or reply brief.

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I. Appellate Review of Denial of Prohibition and Mandamus Writs

§8.77 1. From Order of Superior Court

Pursuant to statute, review of a judgment of the appellate division of the superior court granting or denying a petition for writ of mandate or prohibition directed to the superior court or a judge thereof in misdemeanor or infraction cases or in cases decided by a magistrate, is by writ petition to the court of appeal, where consideration is discretionary. CCP §904.3; *Baluyut v Superior Court* (1996) 12 C4th 826, 829 n3, 50 CR2d 101. See CCP §1068(b) (the appellate division of the superior court may grant a writ of mandate directed to the superior court in a misdemeanor or infraction case). Other statutes may also direct review by way of writ petition in certain circumstances. See *People v Alice* (2007) 41 C4th 668, 682, 61 CR3d 648 (under Pen C §1238(d), review of order granting probation is by petition for writ).

The statutory rule applying to review of superior court judgments in a writ case other than a misdemeanor or infraction case (or a case decided by magistrate) would be the same as that generally applicable in civil cases, where (except as provided by statute) review of a judgment or order granting or denying a petition for writ of prohibition or mandate by the superior court is reviewable by appeal to the court of appeal. CCP §§904.1(a)(1), 1068, 1110; *Daggs v Personnel Comm'n of Modesto* (1969) 1 CA3d 925, 930, 82 CR 157; *Save the Welwood Murray Mem. Library Comm. v City Council of the City of Palm Springs* (1989) 215 CA3d 1003, 1011, 263 CR 896 (appeal lies from the judgment directing issuance of writ, not from the writ itself).

Note that CCP §904.3 does not mention petitions for writ of certiorari. Thus, the grant or denial of a petition for writ of certiorari by the superior court is an order subject to appeal as of right to the court of appeal. *Bermudez v Municipal Court* (1992) 1 C4th 855, 4 CR2d 609 (appeal from superior court's denial of writ of certiorari following lower court's contempt order).

NOTE: When a party files a petition for writ of mandamus or prohibition in the court of appeal seeking review of the grant or denial of a petition for mandamus or prohibition by a lower court, the proper respondent is the court that granted or denied the writ—not the court that made the order that is the subject of the writ petition. CCP §904.1; *Davis v Municipal Court* (1988) 46 C3d 64, 72 n4, 249 CR 300.

It is critical that the reviewing court be given a complete and adequate record for review that includes all the documents presented to the lower court as well as all briefs filed in that court and orders of that court. Additional evidence cannot be presented for the first time in the court of appeal. See *Serna v Superior Court* (1985) 40 C3d 239, 245, 219 CR 420.

On the need for diligence in seeking writ relief, see §§7.14 and 8.32. Some statutes set the deadline for specific writs. For those deadlines, see §7.13. For deadlines in filing appeals, see §3.21.

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§8.78 2. From Order of Court of Appeal

The losing party in the court of appeal may file a petition for review in the California Supreme Court. The rules for such petitions are generally the same as the rules for petitions for review of decisions on appeal. Cal Rules of Ct 8.500, 8.504. See *Hagan v Superior Court* (1962) 57 C2d 767, 769, 22 CR 206. On petitions for review generally, see §§5.41-5.50.

If counsel intends to file a petition for review, he or she should consider filing a petition for rehearing in the court of appeal if there are any potential questions about the court's statement of the issues or resolution of the facts. Cal Rules of Ct 8.268. As a policy matter, the supreme court normally accepts the court of appeal's written statement of the issues and facts unless the party has called the court of appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing. Cal Rules of Ct 8.500(c)(2).

WARNING: Under Cal Rules of Ct 8.500(e)(1), a petition for review from any decision of a court of appeal must be filed within 10 days of the date the decision is final in the issuing court. The date of finality is not extended if it falls on a day on which the clerk's office is closed. Cal Rules of Ct 8.500(e)(1). Further, the denial of a writ petition without issuance of an alternative writ or order to show cause becomes final immediately after filing, unlike a decision on appeal, which does not become final until 30 days after it is filed. Cal Rules of Ct 8.366(a), 8.490(b)(1).

The rule of immediate finality does not apply to cases in which the court of appeal sets the matter for oral argument, hears oral argument, and resolves the matter by full written opinion, even if the court does not issue an alternative writ or order to show cause. See Cal Rules of Ct 8.490(b)(2)-(3). See also *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1024, 269 CR 720 (supreme court treated appellate court's order setting matter for oral argument as equivalent to alternative writ or order to show cause for purposes of determining date of finality).

When the supreme court grants review from the summary denial of a pretrial writ, it may not decide the case itself but instead transfers the matter back to the court of appeal with directions to issue an alternative writ or order to show cause. The court of appeal will then hear argument and decide the matter by opinion, granting or denying the writ.

When a court of appeal has issued an alternative writ at the direction of the supreme court, the prevailing view is that the latter's determination does not conclusively entitle the petitioner to the relief sought. *Charlton v Superior Court* (1979) 93 CA3d 858, 861, 156 CR 107. Although the high court's order requires the court of appeal to calendar the matter for hearing on the alternative writ, the petition may still be denied on the merits. In particular, fatal pleading defects in the petition are not cured merely because the supreme court has granted review and retransferred the writ proceedings to the court of appeal for decision. See *Pedlow v Superior Court* (1980) 112 CA3d 368, 370, 169 CR 326 (court refused to reach merits because petitioner submitted neither adequate record nor other documentation of events in trial court, thereby failing to fulfill his pleading burden).

On decision by the appellate court, another petition for review may be filed by the losing side. See, *e.g., Owens v Superior Court* (1980) 28 C3d 238, 243, 168 CR 466.

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9

Habeas Corpus: Scope of Writ

Lynda A. Romero

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I. OVERVIEW OF HABEAS CORPUS

§9.1 A. Role of Habeas Corpus Proceedings

The Great Writ is the "highest safeguard of liberty." *Smith v Bennett* (1961) 365 US 708, 712, 6 L Ed 2d 39, 43, 81 S Ct 895. It is "regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release." *People v Villa* (2009) 45 C4th 1063, 1068, 90 CR3d 344; *In re Clark* (1993) 5 C4th 750, 764, 21 CR2d 509; see also *In re Sanders* (1999) 21 C4th 697, 703, 87 CR2d 899.

Habeas corpus is an extraordinary and collateral action that lies to review a claim of denial of substantive constitutional rights that may have affected the integrity of the fact finding process. *In re Reed* (1983) 33 C3d 914, 918 n2, 191 CR 658, overruled on other grounds in *In re Alva* (2004) 33 C4th 254, 292, 14 CR3d 811. Further, the remedy of habeas corpus "permits an examination not only of the actual evidence introduced at a petitioner's trial but of any necessary additional evidence bearing upon the infringement of [the] petitioner's constitutional rights." *In re Bell* (1942) 19 C2d 488, 501, 122 P2d 22 (citations omitted). Habeas corpus is not a substitute for appeal. See *U.S. v Braswell* (9th Cir 2007) 501 F3d 1147, 1150.

The role of the writ of habeas corpus is well defined by Justice Tobriner's description in *In re Jackson* (1964) 61 C2d 500, 503, 39 CR 220 (all citations omitted):

> Historically the function of the writ has been hugely expanded. Its original limited purpose of releasing a person imprisoned or restrained as a result of a void proceeding or jurisdictional defect in the imprisoning authority… has been extended to review the constitutionality of statutes… as well as trial procedure.
>
> … Nor have the decisions confined the review to the face of the trial court proceedings; such reexamination has embraced the entire course of the proceedings, including additional evidence taken either directly or under an order of reference.… The cases do not limit the writ to the procurement of the release of one wrongfully imprisoned but enlarge its scope to the protection of the rights of prisoners while incarcerated.
>
> The decisions have thus broadened the compass of the writ not by an expansion of the concept of jurisdiction but by a proliferation of its availability in situations in which the trial court in a strict sense could exercise "jurisdiction."
>
> … Finally, the decisions have many times stated that the writ may be granted under exceptional circumstances to review a matter that cannot otherwise be reached and to present a question of law that is sufficiently important to justify this extraordinary remedy.

However, "despite the expanded scope of the great writ in California, the principle endures that habeas corpus will not lie to correct procedural error which is not of fundamental jurisdictional character." *In re Sands* (1977) 18 C3d 851, 857, 135 CR 777. *Sands* illustrates how the relief available through collateral attack by habeas corpus on a conviction is narrower than that through direct appeal. In an almost identical case, *People v McGee* (1977) 19 C3d 948, 140 CR 657, the supreme court a few months later reversed a judgment through an appeal based on the state's failure to adhere to the statutory requirement that restitution be sought before instituting criminal charges for welfare fraud, but in *Sands* those same grounds did not so avail the defendant. The supreme court in *Sands* said that such a failure does not constitute a fundamental jurisdictional or constitutional defect. It is a mere error of procedure because restitution is not a defense to welfare fraud and thus "can hardly create in the guilty party a right to overturn the conviction by collateral attack." *In re Sands, supra*.

Practically speaking, habeas corpus is the only effective way to present matters of fundamental interest to your client, yet outside the appellate record, to a court for resolution. Often defendants complain to their appellate attorneys regarding matters never placed on the record or matters that have come to the appellate attorney's attention that cannot be raised on appeal. In these circumstances, habeas corpus is the only alternative.

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§9.2 B. No Constitutional Right to Counsel

Both the federal and state constitutions recognize and guarantee the defendant's right to petition for a writ of habeas corpus. See US Const art I, §9, cl 2; Cal Const art I, §11. However, there is no federal constitutional right to the assistance of counsel in making a collateral attack on the judgment. *Coleman v Thompson* (1991) 501 US 722, 752, 115 L Ed 2d 640, 671, 111 S Ct 2546; *Pennsylvania v Finley* (1987) 481 US 551, 555, 95 L Ed 2d 539, 545, 107 S Ct 1990 (noncapital cases); *Murray v Giarratano* (1989) 492 US 1, 10, 106 L Ed 2d 1, 11, 109 S Ct 2765 (plurality opinion) (capital cases); *In re Barnett* (2003) 31 C4th 466, 474, 3 CR3d 108; *In re Sanders* (1999) 21 C4th 697, 716, 87 CR2d 899. Under Cal Rules of Ct 4.551, the superior court must appoint counsel for "any unrepresented petitioner who desires but cannot afford counsel." Cal Rules of Ct 4.551(c)(2).

NOTE: An indigent defendant in a capital case has a *statutory* right to the appointment of counsel under Govt C §68662, which codifies a longstanding practice of the California Supreme Court. *In re Barnett* (2003) 31 C4th 466, 474, 3 CR3d 108.

An attorney appointed to represent an indigent defendant on appeal in a noncapital case has no duty to investigate possible grounds for a collateral attack on the judgment. *In re Clark* (1993) 5 C4th 750, 783 n20, 21 CR2d 509. However, while appointed noncapital counsel has no obligation to conduct an investigation to discover if facts outside the record on appeal would support a petition for writ of habeas corpus, if counsel learns of such facts in the course of their representation, they have an ethical obligation to advise their client of the course to follow to obtain relief. 5 C4th at 783 n20.

Many appointed appellate attorneys do file habeas corpus petitions on behalf of indigent clients in conjunction with the direct appeal, recognizing that their clients are ill equipped to do so. Appointed appellate attorneys are generally authorized to file habeas corpus petitions. However, each district sets its own policies on appointment of appellate counsel to seek collateral relief. On district policies, see §9.36; on using habeas corpus in conjunction with direct appeal, see §§9.35-9.38, 10.28.

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C. Custody Requirement

§9.3 1. Actual Custody Not Required

The statutory purpose of the writ is to inquire into the lawfulness of a person's imprisonment or other restraint of his or her liberty. Pen C §1473. The requirement of actual physical custody has long been discarded. *In re Petersen* (1958) 51 C2d 177, 181, 331 P2d 24. Habeas corpus may be sought by a petitioner released on bail or on his or her own recognizance because such restraints are sufficient to constitute constructive custody. *In re Catalano* (1981) 29 C3d 1, 8, 171 CR 667; *In re Smiley* (1967) 66 C2d 606, 612, 58 CR 579. See also *Hensley v Municipal Court* (1973) 411 US 345, 36 L Ed 2d 294, 93 S Ct 1571 (defendant released on own recognizance); *In re Sturm* (1974) 11 C3d 258, 265, 113 CR 361 (prisoner released on parole); *In re Hochberg* (1970) 2 C3d 870, 874 n3, 87 CR 681 (stay of execution of sentence). But see *In re Stier* (2007) 152 CA4th 63, 82, 61 CR3d 181 (habeas corpus relief unavailable; petitioner no longer on probation and sex offender registration does not amount to constructive custody).

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§9.4 2. Restraint or Loss of Liberty Sufficient

"The thrust of these cases is that a person is in custody constructively if he may later lose his liberty and be eventually incarcerated." *In re Wessley W.* (1981) 125 CA3d 240, 246, 181 CR 401. The appellate court in *Wessley W.* reversed an order of the superior court granting the petition for writ of habeas corpus of a defendant convicted in 1965 who was no longer subject to being placed in custody because his probation had terminated 15 years earlier. The court rejected the defendant's assertion that the listing of his name with various law enforcement agencies (*i.e.,* their possession of his "rap sheet") constituted "constructive custody" because it had jeopardized his ability to obtain employment.

In *In re Catalano* (1981) 29 C3d 1, 8, 171 CR 667*,* the supreme court determined that habeas corpus was available to a defendant not in custody but "subject to restraints not shared by the public generally," *i.e.,* a fine of $100 (plus $30 assessment) payable in 30 days. Because the defendant could be immediately arrested once the 30-day period had elapsed, refusal to issue the writ if otherwise meritorious would only result in delay; therefore, this was sufficient custodial restraint to permit seeking relief.

The court noted in *In re Smiley* (1967) 66 C2d 606, 612, 58 CR 579*,* that the court to which a habeas corpus petition is addressed has the power to admit the petitioner to bail or to release him or her on his or her own recognizance pending its determination of the petition. 66 C2d at 613. Similarly, a minor improperly detained in connection with juvenile court proceedings may be released by the reviewing court pending action on an application for habeas corpus. *In re William M.* (1970) 3 C3d 16, 23, 89 CR 33.

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§9.5 3. Relief May Not Be Available If Petitioner Not in Actual or Constructive Custody When Petition Filed

In *Maleng v Cook* (1989) 490 US 488, 492, 493, 104 L Ed 2d 540, 109 S Ct 1923, the United States Supreme Court held that a petitioner, who is currently in custody on a sentence enhanced by an allegedly unlawful conviction, satisfies the "in-custody" requirement of 28 USC §2254 even though the petitioner is no longer in custody on the allegedly unlawful conviction. However, in a pair of companion cases decided in 2001, the United States Supreme Court held that, as a matter of policy, a prisoner may not use the federal courts to mount a collateral attack on a current sentence on the ground that it was enhanced by an unlawful prior conviction, if the prior conviction "is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully)." *Daniels v U.S.* (2001) 532 US 374, 149 L Ed 2d 590, 600, 121 S Ct 1578 (28 USC §2255); *Lackawanna County Dist. Attorney v Coss* (2001) 532 US 394, 149 L Ed 2d 608, 617, 121 S Ct 1567 (28 USC §2254).

In *In re Azurin* (2001) 87 CA4th 20, 25, 104 CR2d 284, the court of appeal relied on *Maleng v Cook, supra,* to dismiss a state habeas corpus petition challenging the legality of a California felony conviction on which the Immigration and Naturalization Service relied to initiate deportation proceedings. Noting that the parole period for defendant's California conviction had long been over, the court rejected petitioner's claim that he was in constructive state custody because the federal deportation proceedings were based solely on the California conviction. 87 CA4th at 25. In *Mendez v Superior Court* (2001) 87 CA4th 791, 104 CR2d 839, the court of appeal relied on *Maleng* and *Azurin* to conclude that habeas corpus is not available to an individual no longer in prison or on probation or parole, even though "lingering non-custodial collateral consequences are still attached to his conviction." 87 CA4th at 796.

Agreeing with *Azurin,* the California supreme court in *People v Villa* (2009) 45 C4th 1063, 1074, 90 CR3d 344, held that habeas corpus relief was not available to a petitioner who had served his sentence and was no longer on parole years before federal immigration authorities detained him in Alabama. The Court noted that the critical factor in determining whether an individual is in actual or constructive custody of the state for habeas corpus jurisdictional purposes is whether the custody is currently authorized in some way by the state of California.

NOTE: The dismissal of Azurin's petition, which was grounded in counsel's failure to advise him that deportation was a possible consequence of his guilty plea, was without prejudice to his right to pursue relief in a petition for writ of error coram nobis. *In re Azurin* (2001) 87 CA4th 20, 27 n7, 104 CR2d 284. In *Mendez*, on the other hand, petitioner alleged that a prosecution witness had committed perjury; the court held that coram nobis does not lie to correct irregularities in trial proceedings. *Mendez v Superior Court* (2001) 87 CA4th 791, 796, 104 CR2d 839. On writs of error coram nobis and coram vobis generally, see chap 11.

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§9.6 4. Mootness Not Necessarily a Bar to Relief

Mootness does not necessarily foreclose court action on a petition for habeas corpus. *In re Walters* (1975) 15 C3d 738, 744, 126 CR 239. A petitioner's subsequent release from unlawful detention does not prevent the court from considering whether the detention was proper. The court retains inherent discretion to reach the issue presented by the petition despite its mootness when it is of substantial public importance and may recur or when other petitioners probably will be raising the same issue. 15 C3d at 743; *In re Bye* (1974) 12 C3d 96, 99 n2, 115 CR 382 (revocation of outpatient status); *In re Franklin* (1972) 7 C3d 126, 133 n3, 101 CR 553 (release from insanity commitment); *In re William M.* (1970) 3 C3d 16, 23, 89 CR 33 (detention of juvenile before hearing); *In re Robin M.* (1978) 21 C3d 337, 341 n6, 146 CR 352 (detention of juvenile; court specifically noted that case met dual criteria of (a) involving important recurring problem and (b) being incapable of appellate review).

The court in *In re Walters, supra,* held that all persons in custody on misdemeanor charges are entitled to pretrial probable cause determinations. *In re Walters* (1975) 15 C3d 738, 746, 126 CR 239. The court rejected mootness as a bar to deciding the case on two grounds: (1) the case presented "an issue of statewide importance" generally affecting the rights of all misdemeanor arrestees detained in custody, and (2) although the petitioner was no longer in custody, any petitioner raising the issue of pretrial detention would not be in custody by the time the court acted on the petition and the issue would never be reached. Accordingly, exercising its power to supervise the administration of criminal justice, the court articulated the procedural rights of all persons detained under similar conditions. 15 C3d at 743.

It appears that a petitioner's release on parole does not render moot a habeas corpus proceeding challenging the length of his or her sentence when the parole period would have already expired but for the action challenged in the petition. See *In re Flodihn* (1979) 25 C3d 561, 571 n1, 159 CR 327 (dissenting opinion of Bird, C.J.) (pointing out that by deciding petition on merits, court necessarily rejected respondent's argument that case was moot because petitioner was on parole).

Under federal law, a habeas corpus petition filed while petitioner is actually or constructively "in custody" will be decided even if the defendant is released before it is decided; the presumed collateral consequences of the conviction are sufficient to prevent the petition from being considered moot. *Sibron v New York* (1968) 392 US 40, 55, 20 L Ed 2d 917, 88 S Ct 1889.

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§9.7 D. Statutory Procedure

Habeas corpus procedures are set forth in Pen C §§1473-1508, and are supplemented by state and local rules of court. See Cal Rules of Ct 4.551 (superior court rules), 8.380-8.388 (appellate rules). Rule 4.551 establishes a number of procedures for superior court habeas corpus proceedings. It creates a timetable for the proceedings, places limitations on ex parte communications concerning the petition, substitutes the term "denial" for the traditional term "traverse," and requires a brief statement of reasons when the petition is denied.

Because there is no appeal from the denial of a habeas corpus petition, the doctrines of res judicata and law of the case are not applicable; thus, the denial of the writ in one court does not bind a subsequent court. Pen C §1475; *Matter of Ring* (1865) 28 C 247, 251. Furthermore, by its nature, habeas corpus does not lend itself to strict time limits. Therefore, the courts have promulgated a number of procedural rules limiting the availability of habeas corpus. The California Supreme Court's current formulations of the most important procedural default rules in capital cases can be found in *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153, *In re Clark* (1993) 5 C4th 750, 21 CR2d 509, and *In re Harris* (1993) 5 C4th 813, 21 CR2d 373. See also *People v Romero* (1994) 8 C4th 728, 35 CR2d 270; *People v Duvall* (1995) 9 C4th 464, 37 CR2d 259, and *In re Serrano* (1995) 10 C4th 447, 41 CR2d 695, for an overview of the procedural history of habeas corpus in California. Procedural defaults are covered in more detail in §§9.9-9.14.

Section 9.8 provides a brief summary of the stages of a habeas corpus proceeding. Procedural aspects of each stage are discussed in greater detail in chap 10.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/9 Habeas Corpus: Scope of Writ/§9.8 E. Stages of Habeas Corpus Proceedings

§9.8 E. Stages of Habeas Corpus Proceedings

There are major procedural differences between habeas corpus and pretrial writs, such as mandamus and prohibition, that stem from the nature of the relief sought. In mandamus and prohibition, the writ itself is the relief: the petitioner asks a higher court to issue a writ directing the lower court (or other state or local agency) to do (or not to do) something. In habeas corpus, the petitioner asks the reviewing court to inquire into the legality of an actual or constructive restraint on the petitioner's liberty; the writ itself merely authorizes the inquiry. It does not grant relief.

In *People v Romero* (1994) 8 C4th 728, 737, 35 CR2d 270, the California Supreme Court identified the procedural stages of a habeas corpus petition as follows:

- **The petition.** To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition. Pen Code §1474(2). A petition for writ of habeas corpus must be verified. It must allege that the petitioner is unlawfully restrained, name the person who is restraining the petitioner, and state the facts supporting the petitioner's claim. Pen C §1474. The petition serves two purposes. It "launches a judicial inquiry into the legality of the restraints" and it frames the issues for that inquiry. 8 C4th at 738. It is not, however, a pleading in the cause of action it initiates. 8 C4th at 739. For further discussion of the petition, see §§10.2-10.4; for sample forms, see §§10.33-10.34.

NOTE: An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. *In re Clark* (1993) 5 C4th 750, 769 n9, 21 CR2d 509; *In re Lawler* (1979) 23 C3d 190, 194, 151 CR 833. "If no prima facie case for relief is stated, the court will summarily deny the petition." *People v Duvall* (1995) 9 C4th 464, 475, 37 CR2d 259.

- **Informal opposition and reply.** Under Cal Rules of Ct 4.551(b) (superior court) and 8.385(b)(1) (appellate court), the court to which a habeas petition is addressed may request informal opposition from the respondent. The response is due as specified in the order or in 15 days. Cal Rules of Ct 4.551(b)(2) (superior court), 8.385(b)(2) (appellate court). If the court requests an informal opposition, the petitioner has the opportunity to file a reply. Cal Rules of Ct 4.551(b)(3) (superior court), 8.385(b)(3) (appellate court). These informal "pleadings" perform a "screening function" and are *only* for the purpose of assisting the court in determining whether the petition states a prima facie case. The court may deny relief on the basis of these informal documents, but it is not proper for the court to grant relief without issuing a writ or an order to show cause. *People v Romero* (1994) 8 C4th 728, 741, 35 CR2d 270.

NOTE: The districts have differing policies on informal briefing. Some courts will issue an order asking for informal briefing, others send a letter from the clerk of the court, while others have a clerk telephone the parties. If the order is not clear, for example, if there is a request for informal opposition without mention of an informal reply, do not hesitate to seek clarification.

PRACTICE TIP: The word informal refers to responding in a letter rather than a brief. A full argument on the merits should be included.

- **The writ or order to show cause (OSC).** The Penal Code calls for the issuance of a writ of habeas corpus, which commands the petitioner's custodian to bring him or her before the court, if the petition states a prima facie case for relief and if the claim is not procedurally barred. Pen C §1476. As a practical matter, however, the order to show cause has taken the place of the writ in most, if not all, courts because "appellate courts are not equipped to have prisoners brought before them." *In re Hochberg* (1970) 2 C3d 870, 873, 874 n2, 87 CR 681. "Issuance of an OSC signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." *People v Duvall* (1995) 9 C4th 464, 474, 37 CR2d 259. The writ or OSC directs the petitioner's custodian to file a written return and initiates a judicial proceeding within the meaning of Cal Const art VI, §14. *People v Romero* (1994) 8 C4th 728, 740, 35 CR2d 270.

PRACTICE TIP: If the petition is filed in the court of appeal or the supreme court, the appellate court will likely make the OSC returnable in the superior court. Pen C §1508(a)-(b); *People v Romero, supra*. The order must be read very carefully. Often, the order effectively transfers the action to the superior court, which then will hear and dispose of the case as if it had been filed in the superior court in the first instance. However, the court of appeal will occasionally ask the superior court to hold a hearing and issue a report with the final determination to be made by the appellate court. The court of appeal may also issue an OSC, which triggers the filing of a return in the court of appeal, without ordering a hearing. If a hearing is subsequently determined to be necessary, the court of appeal will order a hearing in superior court. Because habeas matters are extraordinary proceedings, each order will be crafted to fit the parameters of the individual case.

WARNING: Appointed appellate counsel must consider the matter of representation in superior court should a hearing be granted. Many of the appellate courts will expand the appointment to include superior court representation or appellate counsel may apply to the superior court for appointment. If appointed appellate counsel is not equipped to represent the petitioner at the hearing in superior court, appellate counsel must assist the petitioner in securing appointment of counsel. Appellate counsel should consult the appellate project regarding the policies of the court of appeal and county in which the case originates. For a list of the various California appellate projects, see §2.21.

- **The return.** The return is the first and principal pleading in a habeas corpus proceeding. It is filed by the respondent after the court issues the OSC. When an order to show cause issues, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues. The return must state whether the respondent has the petitioner in his or her custody and, if so, must set forth the legal basis for the restraint. Pen C §1480. The return should be responsive to the allegations of illegality made in the petition. *People v Romero* (1994) 8 C4th 728, 738, 35 CR2d 270. It may not raise issues not raised in the petition. *Board of Prison Terms v Superior Court* (2005) 130 CA4th 1212, 1235, 31 CR3d 70. See also §§10.18-10.21.
- **The traverse.** The traverse, called a "denial" in superior court (Cal Rules of Ct 4.551(e)), is the petitioner's answer to the return. In it, the petitioner may deny or controvert any facts or other matters alleged in the return, may object to the sufficiency of respondent's allegations, and may allege additional relevant facts. Pen C §1484. Petitioner may reallege the allegations made in the petition. *People v Romero* (1994) 8 C4th 728, 739, 35 CR2d 270. Although additional relevant facts may be alleged, additional *issues* may not be raised in the traverse. *Board of Prison Terms v Superior Court* (2005) 130 CA4th 1212, 1235, 31 CR3d 70. The petitioner and the respondent may stipulate that the petition be treated as a traverse. *People v Duvall* (1995) 9 C4th 464, 477, 37 CR2d 259. See also §10.22.

PRACTICE TIP: Should counsel determine additional issues must be raised after issuance of an OSC or filing of the return, counsel might consider seeking leave to amend the petition.

CAUTION: Although, technically speaking, the traverse is not a required pleading, the decision whether to file one should be made with care because it is potentially dispositive. "[I]f a habeas corpus petitioner fails to reassert factual allegations in the traverse, stipulate that the petition should serve as a traverse, or except to the sufficiency of the return, 'the allegations of the return are deemed admitted, and relief will be denied.'" *People v Duvall, supra* (quoting 6 Witkin & Epstein, California Criminal Law §3331(a) (3d ed 2000)).

- **Evidentiary hearing.** If, from the pleadings, it appears that petitioner's right to relief is contingent on the resolution of disputed factual issues, the court should order an evidentiary hearing. *People v Romero* (1994) 8 C4th 728, 35 CR2d 270. If the court of appeal has issued an OSC for a hearing and recommendation, in determining whether to grant or deny relief, the reviewing court is not bound by the referee's findings of fact, but it does give them "great weight" when they are supported by substantial evidence. The referee's resolution of legal issues or mixed questions of facts and law is subject to independent review. *In re Sakarias* (2005) 35 C4th 140, 151, 25 CR3d 265; *In re Avena* (1996) 12 C4th 694, 710, 49 CR2d 413.

NOTE: If the return was filed in an appellate court, that court will typically appoint a referee to hear evidence and make recommended factual findings to the court. *People v Romero* (1994) 8 C4th 728, 740, 35 CR2d 270.

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II. EXHAUSTION AND OTHER PROCEDURAL REQUIREMENTS

§9.9 A. Significance of Procedural Rules

Because the doctrines of res judicata and law of the case do not apply in habeas corpus (see §9.7), a petitioner could in theory bring the same claim again and again in an attempt to obtain relief. The courts have therefore fashioned a number of procedural rules in an attempt to bring finality to the process. See generally *In re Clark* (1993) 5 C4th 750, 21 CR2d 509. A petitioner's failure to comply with these rules relieves the reviewing court from considering the petition on the merits.

In addition, federal law precludes consideration on federal habeas corpus of claims that were procedurally barred in the state court if the state's procedural bar constitutes an adequate and independent state law ground for denial of the petitioner's federal claim. *Harris v Reed* (1989) 489 US 255, 103 L Ed 2d 308, 109 S Ct 1038. Consequently, failure to comply with California's procedural rules may foreclose relief in both state and federal court. On the procedural default doctrine in federal habeas corpus practice, see §§15.12-15.36.

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§9.10 B. Exhaustion of Appellate Remedies

Some petitions for habeas corpus are based on grounds (*e.g.*, review of bail orders (see §§9.15-9.18), extradition proceedings (see §9.19), pardon conditions (see §9.20), and contempt orders (see §9.21)) for which there is no statutory right of appeal and writ review is thus the sole remedy.

Habeas corpus is not a substitute for appeal. See *U.S. v Braswell* (9th Cir 2007) 501 F3d 1147, 1150. The vast majority of habeas corpus petitions seek postconviction relief. Because there is a statutory right of appeal from a judgment of conviction (Pen C §1237), the rule has evolved that contentions that could have been, but were not, raised on appeal ordinarily cannot be renewed in a petition for habeas corpus. *In re Dixon* (1953) 41 C2d 756, 264 P2d 513. This procedural bar is sometimes known as the *Waltreus* rule. See *In re Waltreus* (1965) 62 C2d 218, 42 CR 9; see also *In re Harris* (1993) 5 C4th 813, 21 CR2d 373. The availability of appeal notwithstanding, habeas corpus is proper if special circumstances are present. *In re Antazo* (1970) 3 C3d 100, 107, 89 CR 255. For example, when a defendant will have practically served his term if he or she prevails, habeas corpus is proper. *In re Newbern* (1960) 53 C2d 786, 789, 3 CR 364.

In addition, contentions that could not be raised on appeal because of a failure to raise them in the trial court (see §4.26-4.28) cannot be considered in a habeas corpus proceeding. *In re Seaton* (2004) 34 C4th 193, 199, 17 CR3d 633.

Prisoners bringing claims about the conditions of confinement must show they have unsuccessfully sought and exhausted available administrative remedies. *In re Dexter* (1979) 25 C3d 921, 925, 160 CR 118; *In re Muszalski* (1975) 52 CA3d 500, 125 CR 286.

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§9.11 1. Claim Rejected on Appeal

Claims that were raised and rejected on appeal may not be raised on habeas corpus. *In re Waltreus* (1965) 62 C2d 218, 225, 42 CR 9; see also *In re Harris* (1993) 5 C4th 813, 21 CR2d 373.

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§9.12 2. Exceptions to *Dixon* and *Waltreus*

The rules precluding the use of habeas corpus as a second appeal or as a substitute for appeal have four limited exceptions. *In re Harris* (1993) 5 C4th 813, 21 CR2d 373. Consequently, postconviction state habeas review that would be barred by the strict application of these limitations may nevertheless be available if:

- The claimed constitutional error is both clear and fundamental and strikes at the heart of the trial process (5 C4th at 829);
- The court lacked fundamental (*i.e.,* personal or subject matter) jurisdiction (5 C4th at 836);
- The trial court committed acts in excess of jurisdiction that do not require a redetermination of the facts (5 C4th at 838); or
- A change in the law affecting the defendant occurred after the appeal (5 C4th at 841).

Note that denial of a fundamental constitutional right does not by itself justify a postappeal collateral attack on an issue that was rejected or not raised on appeal. *In re Harris, supra.*

The *Dixon* and *Waltreus* rules do not apply to issues that cannot be raised on appeal because their resolution depends on facts outside the record. 5 C4th at 827 n7. They operate principally when no appeal was filed, when an issue that should have been raised on appeal was omitted, or when an appeal was filed but no petition for review was filed in the California Supreme Court.

PRACTICE TIP: In cases in which *Harris* bars direct assertion of an issue, counsel may want to consider whether it is possible to raise the issue indirectly by means of a claim that trial or appellate counsel was ineffective for permitting the issue to become procedurally defaulted. As *Harris* pointed out, in the wake of the constitutional standards for judging the competence of trial counsel enunciated in *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 793, 104 S Ct 2052 (United States Constitution), and *People v Ledesma* (1987) 43 C3d 171, 215, 233 CR 404 (California Constitution), "in the vast majority of cases, claims of 'fundamental' constitutional error come to this court clothed in 'ineffective assistance of counsel' raiment." *In re Harris* (1993) 5 C4th 813, 833, 21 CR2d 373. When considering this approach, counsel should also bear in mind the Ninth Circuit's decision in *Davis v Grigas* (9th Cir 2006) 443 F3d 1155, 1158, which noted that since *Strickland,* the Supreme Court has not delineated a standard that should apply to ineffective assistance of counsel claims in noncapital sentencing cases and concluded that there is no clearly established federal law as determined by the Supreme Court in this context.

NOTE: The Ninth Circuit has held that the *Dixon* and *Waltreus* rules as construed in *In re Harris* do not constitute an independent state bar to relief because determining the applicability of the *Harris* exception for constitutional errors is interwoven with federal law. *Park v California* (9th Cir 2000) 202 F3d 1146, 1152. See also *Bribiesca v Galaza* (9th Cir 2000) 215 F3d 1015, overruled on other grounds in *Kane v Garcia Espitia* (2005) 546 US 9, 163 L Ed 2d 10, 13, 126 S Ct 407.

In *Bennett v Mueller* (9th Cir 2003) 322 F3d 573, however, the Ninth Circuit held that California's untimeliness bar, as defined in *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153, and *In re Clark* (1993) 5 C4th 750, 21 CR2d 509, is an independent state procedural rule but remanded to the district court for determination of whether the bar was adequate, *i.e.,* whether it has been consistently applied since the decision of the California Supreme Court in *Clark*. See §§9.13-9.14 for further discussion of *Robbins.* See §§15.12-15.36 for further discussion of federal rules on procedural default. For discussion of the California Supreme Court's summary denials of habeas corpus petitions, see §§15.22-15.26.

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§9.13 C. Second or Successive Petition

When a writ of habeas corpus has once been denied, a new application based on the same grounds will be denied unless there has been a change in the facts or the law. Newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment may also be rejected. *In re Martinez* (2009) 46 C4th 945, 956 95 CR3d 570; *In re Swain* (1949) 34 C2d 300, 209 P2d 793. See also *In re Lynch* (1972) 8 C3d 410, 439 n26, 105 CR 217; *In re Miller* (1941) 17 C2d 734, 112 P2d 10.

Before a court will consider the merits of a second or successive habeas corpus petition, it must first ask whether there has been an adequate explanation for the failure to present in a previous petition the claims underlying the new petition and whether that explanation justifies the piecemeal presentation of the petitioner's claims. *In re Clark* (1993) 5 C4th 750, 774, 21 CR2d 509. For example, "where the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible." *In re Clark,* 5 C4th at 775. Another exception to the general rule that "absent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied" are "petitions which allege facts which, if proven, would establish that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence." *In re Clark* at 797. See also *In re Martinez,* 46 C4th at 956.

NOTE: The bar on successive petitions in combination with the untimeliness bar (see §9.14) presents habeas counsel in capital cases with something of a quandary in situations in which some potentially meritorious grounds are fully developed and others require further investigation. Filing a petition that includes only those claims that have been fully developed risks having the unpresented claims barred by the rule against successive petitions. Delaying presentation of the developed claims until additional claims can be investigated risks having all claims barred by the timeliness requirement. Although *In re Robbins* (1998) 18 C4th 770, 780, 77 CR2d 153 (ongoing investigation of at least one potentially meritorious claim constitutes "good cause" for delay in filing petition), appears to suggest that it is better to present all claims in a single petition, *Robbins* provides no guarantee that a habeas corpus petition filed more than 180 days after the due date of defendant's reply brief in the direct appeal will be considered timely.

An unjustified successive petition will not be entertained on its merits unless it alleges facts demonstrating that a *fundamental* miscarriage of justice has occurred. A "fundamental miscarriage of justice" occurs when it can be demonstrated (5 C4th at 797):

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; (4) that the petitioner was convicted or sentenced under an invalid statute.

For further discussion of the "fundamental miscarriage of justice exception" see §15.36.

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§9.14 D. Delay in Seeking Relief

Unjustified delay in seeking relief is also a bar to consideration of the merits of the claims in a petition for a writ of habeas corpus. *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153; *In re Clark* (1993) 5 C4th 750, 774, 21 CR2d 509.

In a capital case, a habeas corpus petition is entitled to a presumption of timeliness if it is filed within 180 days of the due date of defendant's reply brief in the direct appeal or within 36 months after habeas counsel is appointed, whichever is later. Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, std 1-1.1 (effective June 6, 1989, as amended Sept. 28, 1989-Jan. 1, 2008) (hereinafter, Supreme Ct Policies). These policies are available on the Judicial Council website at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm, and from commercial publishers in both online and print formats. A claim presented in a petition filed after this initial period will not be considered on its merits unless the petitioner establishes one of the following: (1) the absence of substantial delay; (2) good cause for the delay; or (3) that the claim falls into an exception to the timeliness requirement. Supreme Ct Policies, Policy 3, std 1.1-1—1.1-4; *In re Robbins*, 18 C4th at 780.

"Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." 18 C4th at 780. Good cause for delay may be established by demonstrating that counsel was conducting an ongoing investigation of one or more potentially meritorious claims.

As with successive petitions, an untimely habeas corpus petition will be considered on its merits only if petitioner can show (18 C4th at 780):

> (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.

The first three exceptions are judged exclusively by reference to state law. Only in applying the fourth exception will the supreme court apply federal law to federal constitutional claims. 18 C4th at 780.

NOTE: The timeliness rules promulgated in *Robbins* and *Clark* apply in capital cases. In *In re Sanders* (1999) 21 C4th 697, 703, 87 CR2d 899, the California Supreme Court determined time limits apply in noncapital habeas petitions as well. Counsel in a noncapital case should investigate claims promptly, file the petition as soon as practicable, and be prepared to demonstrate diligence. When counsel determines a habeas petition must be filed in conjunction with an appeal, counsel might consider requesting extensions of time in order to file the appeal and petition concurrently. Appointed counsel is generally required to consult the appellate project prior to filing a habeas petition and may inform the court of appeal in any extension request that the appellate project has been informed of the basis for the extension and concurs if such is true. For a list of the California appellate projects, see §2.21.

The dismissal of a state habeas petition on the ground that it is untimely may be a bar to consideration of the petitioner's claims in federal court. For discussion, see §15.24. In addition, a state habeas corpus petition rejected by the state court as untimely is not "properly filed" so as to toll the 1-year limitations period for filing a federal habeas corpus petition. See *Pace v DiGuglielmo* (2005) 544 US 408, 161 L Ed 2d 669, 125 S Ct 1807.

If counsel has been appointed to pursue habeas relief for a client, failure to file a timely petition may be grounds for a claim of abandonment. See *Sanders*, 21 C4th at 716 (capital case).

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III. APPROPRIATE USES OF HABEAS CORPUS

§9.15 A. Bail

The trial court's refusal to set bail, or fixing of bail in an excessive amount, may be challenged in a pretrial petition for writ of habeas corpus. See Cal Const art I, §12 (formerly §6); Pen C §§1270-1271. Any issue concerning bail is moot after conviction. See also *People v Norman* (1967) 252 CA2d 381, 394, 60 CR 609, overruled on another ground in *McDermott v Superior Court* (1972) 6 C3d 693, 100 CR 297 (appellant should have challenged trial court's denial of bail on habeas corpus). The question on review is whether the trial court abused its discretion. 252 CA2d at 398. The reviewing court is unlikely to grant relief itself; if it finds an abuse of discretion, it will remand the case to the trial court with directions. See, *e.g.*, *In re Christie* (2001) 92 CA4th 1105, 112 CR2d 495 (directing trial court to set forth its reasons for setting bail in amount far in excess of amount specified in bail schedule); *In re Boyle* (1974) 11 C3d 165, 113 CR 99 (trial court ordered to hold bail hearing); *In re Underwood* (1973) 9 C3d 345, 107 CR 401 superseded by statute on other grounds as stated in *In re York* (1995) 9 C4th 1133, 40 CR2d 308 (same).

A defendant who is appealing a misdemeanor conviction that includes a jail term is entitled to bail as a matter of right. Pen C §1272(2). In felony cases, bail is discretionary; however, no bail is available in death penalty cases. Pen C §1272. The discretionary aspect of bail on appeal in felony cases has been held to be constitutional. *In re Podesto* (1976) 15 C3d 921, 127 CR 97.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/9 Habeas Corpus: Scope of Writ/§9.16 1. Bail on Pending Appeal of Felony Conviction

§9.16 1. Bail on Pending Appeal of Felony Conviction

After judgment, the superior court's denial of bail pending appeal may be challenged by writ of habeas corpus or by a motion for bail on appeal. The discretionary aspect of bail on appeal in felony cases has been held to be constitutional. *In re Podesto* (1976) 15 C3d 921, 127 CR 97. Under Pen C §1272.1, the court must order release on bail pending appeal in a *felony* case if the following criteria are met:

- The defendant must show by clear and convincing evidence that he or she is not likely to flee (the court is to consider community ties, previous appearances or failures to appear, and severity of sentence);
- The defendant must show by clear and convincing evidence that he or she is not a danger to the safety of any other person or the community (the court must consider for this purpose, among other things, whether the crime is a violent felony as defined by Pen C §667.5); and
- The appeal is not for the purpose of delay and it presents a "close question" (*i.e.,* a higher standard than "not frivolous") that, if decided in the defendant's favor, is likely to result in reversal).

NOTE: The court of appeal in *People v McGuire* (1993) 14 CA4th 687, 702, 18 CR2d 12, found that the trial court had not abused its discretion in fixing bail because the defendant's appeal raised a *substantial* legal question that, if decided in his favor, would likely result in reversal. The *McGuire* court did not address the issue of whether the appeal presented a "close question." What constitutes a "close question" appears to be vague and may arguably be an insufficient guide to the exercise of discretion. In addition, the statute's standard might conflict with bail standards under state and federal constitutional law. See *In re Podesto* (1976) 15 C3d 921, 936, 127 CR 97.

PRACTICE TIP: To satisfy Pen C §1272.1, it is recommended that the opening brief be filed before or concurrently with the filing of a motion for bail on appeal or habeas petition.

When a defendant has been sentenced to state prison, the trial court's refusal to set bail or to reduce bail pending appeal will not be reversed unless it is shown that the denial or the amount of bail was unreasonable and an abuse of discretion. *In re Podesto, supra*; *In re Scaggs* (1956) 47 C2d 416, 303 P2d 1009; *In re Brumback* (1956) 46 C2d 810, 299 P2d 217; *People v Turner* (1974) 39 CA3d 682, 114 CR 372. See also *People v Remijio* (1968) 259 CA2d 12, 66 CR 91 (excessive bail). The court in *Podesto,* however, adopted the requirement that a trial court must provide a brief statement of reasons for denying a motion for bail on appeal in order to facilitate meaningful appellate review of the denial, and it set forth three principal criteria to be considered: (1) the likelihood that the defendant would flee; (2) the potential danger to society posed by the defendant's release; and (3) the frivolousness or lack of diligence in prosecuting the appeal. The decisions in *Brumback* and *Scaggs* involved habeas corpus relief under Pen C §1490; in *Turner,* application for bail on appeal was made under former Cal Rules of Ct 32(b) (now Rule 8.312). Applications for bail on habeas corpus or on appeal are considered "parallel and consistent remedies." *In re Brumback* (1956) 46 C2d 810, 815 n3, 299 P2d 217. See also *In re Pipinos* (1982) 33 C3d 189, 187 CR 730.

An important exception exists concerning bail on appeal for a defendant who has been convicted of a felony but granted probation on the condition that he or she be confined in the county jail. Such a defendant is entitled to bail on appeal as a matter of right. *In re McCaughan* (1956) 142 CA2d 690, 298 P2d 871; *In re Torres* (1947) 80 CA2d 579, 182 P2d 573. The court in *People v McNiff* (1976) 57 CA3d 201, 127 CR 604, however, held that the decisions in *Torres* and *McCaughan* do not establish an absolute right to be applied mechanically in every case. The court in *McNiff* found that the trial court did not abuse its discretion by denying bail on appeal when the defendant was ordered to serve additional jail time for violating probation, and the judge believed that the defendant's intentional and continuing misconduct necessitated prompt incarceration. Release on one's own recognizance while an appeal is pending is governed by the decision in *In re Brumback, supra. In re Robinson* (1971) 16 CA3d 539, 94 CR 148. The court in *Robinson* ordered the defendant's release on his own recognizance after finding that there was no danger of his fleeing or committing similar offenses and that the appeal was not frivolous.

A parolee detained on a parole hold pending determination of parole revocation proceedings has no right to bail. *In*

re Law (1973) 10 C3d 21, 109 CR 573.

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§9.17 2. Bail on Pending Appeal of Misdemeanor Conviction

Although the appellant in a misdemeanor case is entitled to bail as a matter of right, the reasonableness of the amount of bail is subject to the trial court's discretion and the order will not be reversed unless that discretion has been abused. *In re Newbern* (1961) 55 C2d 500, 11 CR 547. Consequently, a convicted misdemeanant without funds may serve the entire sentence before the appeal can be finally determined. Two approaches have been adopted by reviewing courts to avert this hardship in misdemeanor appeals:

- Habeas corpus has been held to be a proper appellate remedy when recourse to normal appellate review will not be available before sentence has been served. *In re Newbern* (1960) 53 C2d 786, 789, 3 CR 364 (6-month sentence; excessive bail); *In re Solis* (1969) 274 CA2d 344, 78 CR 919 (60-day jail term condition of reinstating probation). This approach is worthwhile when an important constitutional issue is at stake (see, *e.g., In re Newbern, supra*), but, carried to its logical extreme, the use of appeal as the remedy of choice would be abrogated whenever time in custody is imposed. Widespread use of habeas corpus in typical misdemeanor cases would frustrate the clear-cut intention of the governing statute. See Pen C §1471.
- The other approach used by superior courts when appeal is inadequate because of a time factor is to release the defendant on bail (see Pen C §1476) or on his or her own recognizance (see Pen C §1318) pending the habeas corpus proceedings. See *In re Smiley* (1967) 66 C2d 606, 58 CR 579. In such case, a timely notice of appeal must have been filed and all necessary steps to perfect the appeal must have been taken. See §2.6. This procedure permits the superior court to decide the appeal by means of exercising de novo jurisdiction over the reasonableness of bail through a collateral habeas corpus proceeding, thus avoiding the abuse-of-discretion restriction on review of the bail fixed by the trial judge.

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§9.18 3. Detention Without Bail in Juvenile Proceedings

The constitutionality of detaining minors in juvenile court proceedings without bail has been upheld. *Aubry v Gadbois* (1975) 50 CA3d 470, 123 CR 365. Nevertheless, habeas corpus is proper when a minor in a wardship proceeding wishes to enforce the right to a hearing on the issue of custody pending adjudication. *In re Colar* (1970) 9 CA3d 613, 88 CR 651.

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§9.19 B. Extradition

Habeas corpus has long been used to review extradition proceedings. *In re Russell* (1974) 12 C3d 229, 115 CR 511. See *In re Morgan* (1966) 244 CA2d 903, 53 CR 642. The permissible areas of inquiry are (a) whether a crime is substantially charged in the demanding state; (b) whether the petitioner is the person charged; and (c) whether the petitioner was in the demanding state at the time of the crime. *In re McBride* (1953) 115 CA2d 538, 254 P2d 117. The third element has been the subject of much litigation. In *In re Russell, supra,* a writ of habeas corpus had been issued discharging the petitioner because he was not in the demanding state when the alleged crime was committed. Nevertheless, the court held that the writ did not bar a second extradition proceeding for the same offense. See also *In re Brewer* (1943) 61 CA2d 388, 143 P2d 33.

The constitutionality or validity of the demanding state's law is not ordinarily reviewable by courts in the asylum state through habeas corpus proceedings. Review is permitted, however, if it clearly appears that the statute being challenged has been held void on its face by the highest court of the demanding state or by the United States Supreme Court. *In re Cooper* (1960) 53 C2d 772, 3 CR 140. See also *Michigan v Doran* (1978) 439 US 282, 58 L Ed 2d 521, 99 S Ct 530; *South Dakota v Brown* (1978) 20 C3d 765, 144 CR 758.

Also, a defendant fighting extradition cannot use habeas corpus to attack the sufficiency of the charges against him or her in the demanding state. *California v Superior Court* (*Smolin*) (1987) 482 US 400, 96 L Ed 2d 332, 107 S Ct 2433. *Smolin* concerned an extradition warrant issued in Louisiana, charging the defendant with kidnapping for removing his child, the subject of a custody dispute, from that state. The defendant received sole custody in California proceedings, however, and the California courts determined that the order was binding in Louisiana. Moreover, the California Supreme Court decided that the fact that the defendant was not guilty of the crime charged could be considered in a habeas corpus petition. See *People v Superior Court* (*Smolin*) (1986) 41 C3d 758, 225 CR 438. Overruling that determination, the United States Supreme Court held that the courts of the state from which the person is sought to be extradited have no right to question the validity of the charges against that person in the demanding state. The only inquiry that can be made about the validity of charges is whether the accusatory pleading, on its face, charges a crime in the demanding state. *California v Superior Court* (*Smolin*) (1987) 482 US 400, 407, 96 L Ed 2d 332, 340, 107 S Ct 2433.

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§9.20 C. Pardon; Commutation

Habeas corpus is the proper remedy to determine whether conditions attached to a gubernatorial pardon or commutation are reasonable. *In re Collie* (1952) 38 C2d 396, 240 P2d 275. But see *Green v Gordon* (1952) 39 C2d 230, 246 P2d 38 (mandate issued). The courts in *Collie* and *Green* allowed conditions precluding the possibility of parole in life sentences. After the court in *People v Anderson* (1972) 6 C3d 628, 100 CR 152 superseded by statute on other grounds as stated in *Carlos v Superior Court* (1983) 35 Cal 3d 131, 197 CR 79, declared the death penalty unconstitutional, the maximum permissible penalty for first-degree murder was life imprisonment with the possibility of parole. Accordingly, the court in *In re Walker* (1974) 10 C3d 764, 790, 112 CR 177, held that a prisoner convicted of first-degree murder whose sentence has been commuted to life imprisonment without the possibility of parole "may seek habeas corpus to have the sentence modified to life imprisonment [with the possibility of parole] if the judgment is final." The court reasoned that it would be inequitable to treat those whose death sentence has been modified by gubernatorial pardon differently from those whose sentences have been reduced as a result of judicial decision. But see *Schick v Reed* (1974) 419 US 256, 42 L Ed 2d 430, 95 S Ct 379 (President's pardon of federal prisoner on no-parole condition upheld).

Habeas corpus also has been used to restrict a governor's commutation of sentence when the commutation was made on the condition that successive governors could not make further modifications. *In re Collie, supra*. Relief was denied to a petitioner who challenged a condition that restored the remainder of the original sentence on conviction of a subsequent felony. *Ex parte Kelly* (1908) 155 C 39, 99 P 368. Another approach for review of clemency conditions is to apply to a new governor for relief.

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§9.21 D. Contempt

Habeas corpus is used to review contempt orders of attorneys (*In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121; *In re Carrow* (1974) 40 CA3d 924, 115 CR 601; see CCP §1209 (automatic stay)); and of defendants and witnesses (*In re McKinney* (1968) 70 C2d 8, 73 CR 580; *In re Keller* (1975) 49 CA3d 663, 123 CR 223; *In re Jasper* (1973) 30 CA3d 985, 106 CR 754). Contempt orders may also be reviewed by the common law writ of certiorari (also called a writ of review). For discussion, see California Civil Writ Practice §§15.37, 15.41, 16.130-16.137, 28.21 (4th ed Cal CEB 2008).

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§9.22 E. Challenging Length or Conditions of Confinement; Protecting or Declaring Rights

Length or Conditions of Confinement. Habeas corpus may be used when the petitioner, though lawfully imprisoned, wishes to challenge the length or conditions of incarceration. *In re Jackson* (1964) 61 C2d 500, 39 CR 220. See also *In re Kapperman* (1974) 11 C3d 542, 114 CR 97 (statute giving credit for presentence time in custody made retroactive); *In re Ferguson* (1961) 55 C2d 663, 12 CR 753 (legality of restraints on prisoner's activities). The court might reject the petitioner's prayer for outright release but issue a declaration of the circumstances under which his or her confinement would be unlawful. *In re Davis* (1973) 8 C3d 798, 106 CR 178 (commitments for incompetency to stand trial upheld; procedures for controlling duration given); *In re Ward* (1964) 227 CA2d 369, 38 CR 650 (petitioner entitled to earlier parole consideration).

In *In re Faucette* (1967) 253 CA2d 338, 343, 61 CR 97, the court held that habeas corpus was proper for obtaining "declaratory and injunctive relief" against an administrative body threatening to act unlawfully (parole revocation).

Protecting or Declaring Rights. A prisoner lawfully in custody may seek habeas corpus to protect fundamental basic rights while imprisoned. *In re Jordan* (1972) 7 C3d 930, 103 CR 849 (confidential correspondence with attorney); *In re Harrell* (1970) 2 C3d 675, 87 CR 504 (legal assistance, access to courts and published materials); *In re Riddle* (1962) 57 C2d 848, 22 CR 472 (humane treatment by prison guards). More recent cases have dropped the limitation of the protection solely of "fundamental" rights, stating that the writ of habeas corpus can be used by inmates to address a deprivation of "rights" while in confinement. See, *e.g., In re Arias* (1986) 42 C3d 667, 678, 230 CR 505, superseded by statute on other grounds as stated in *Thompson v Department of Corrections* (2001) 25 C4th 117, 130, 105 CR2d 46); *In re Davis* (1979) 25 C3d 384, 387, 158 CR 384. Moreover, in *In re Bode* (1999) 74 CA4th 1002, 88 CR2d 536, the court was willing to entertain a habeas corpus writ alleging a violation of inmate statutory rights, without discussing the appropriateness of such relief. Thus, the petition for writ of habeas corpus may serve as a means of obtaining a declaration of the petitioner's rights and the rights of others similarly situated. *In re Walters* (1975) 15 C3d 738, 126 CR 239; *In re Fluery* (1967) 67 C2d 600, 63 CR 298. The order to show cause is often sufficient to serve this function; after declaring the petitioner's rights, the order to show cause is discharged and the writ denied. See also §14.16 on pretrial relief in the federal courts.

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F. Common Pretrial Uses of Habeas Corpus

§9.23 1. Statute Unconstitutional; Offense Not a Crime

Although the writ of prohibition is used frequently before trial to challenge the constitutionality of statutes and ordinances and to test whether the accusatory pleading on its face has stated a public offense (see §§7.34-7.39, 7.43), habeas corpus is also a proper remedy to accomplish either purpose. *In re Berry* (1968) 68 C2d 137, 145, 65 CR 273. Habeas corpus was granted in *In re Allen* (1962) 59 C2d 5, 27 CR 168, to restrain trial under a county gambling ordinance because the complaint did not charge a public offense (bridge game).

A good example of the scope of pretrial writ review is given in *In re Cox* (1970) 3 C3d 205, 90 CR 24. In deciding the constitutionality of a shopping center trespass ordinance, the court examined three grounds of possible invalidity: The ordinance (1) conflicted with a state law forbidding discrimination by public accommodations; (2) was preempted by state criminal statutes; and (3) was void because of vagueness. The court resolved these legal questions but refused to decide whether the defendant's particular conduct was protected by US Const amend I and referred the matter to the trial court for initial decision of this issue. In a misdemeanor contempt prosecution, however, a First Amendment claim was considered on pretrial habeas corpus because the facts were not disputed. *In re Berry, supra*. It is noteworthy that in *Berry* the challenged court order was never made part of the complaint; thus, no demurrer to the complaint raising the constitutional objection was possible in the trial court. Therefore, the failure to first seek relief in the lower court was excused, and, because the language of the court order was set out in the petition for the writ, the court order was properly before the reviewing court.

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§9.24 2. Determination of Probable Cause

The filing of a petition for writ of prohibition is the sole pretrial remedy to challenge a magistrate's ruling on the sufficiency of an information or indictment under the procedures specified in Pen C §§995-999a. For discussion, see §§7.34-7.39. Nevertheless, in *In re Kowalski* (1971) 21 CA3d 67, 98 CR 444, the court held that habeas corpus was proper in the following situation: A motion under Pen C §995 was erroneously granted and the defendant was discharged from custody. A second judge vacated the dismissal and set bail and a new trial date. The court held that the second judge lacked jurisdiction to correct the first judge's error and released the petitioner.

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§9.25 3. Speedy Prosecution and Trial

The writ of habeas corpus has been recognized as an appropriate remedy for pretrial review of delays in violation of statutory rights to a "speedy" preliminary examination (see *Simmons v Municipal Court* (1980) 109 CA3d 15, 23, 167 CR 608; Pen C §859b (10-court-day rule)) and speedy trial (*People v Johnson* (1980) 26 C3d 557, 573 n18, 162 CR 431; see Pen C §1382). The court in *Johnson* indicated that a petition for mandate or prohibition is the preferred remedy to raise speedy trial denial, but habeas corpus is appropriate when the defendant's trial counsel fails to assert the speedy trial right. Note that the decision in *Simmons* was based on the former rule barring the preliminary hearing magistrate from dismissing the case even when Pen C §859b was violated and may no longer be sound law now that the magistrate has such power. See also Pen C §§871.5, 1387; *Landrum v Superior Court* (1981) 30 C3d 1, 177 CR 325.

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G. Common Postconviction Uses of Habeas Corpus

§9.26 1. Absolute Defenses

Occasionally it appears on the face of the record that a lower court lacked jurisdiction to try the defendant. In such cases, habeas corpus is proper even if the defense was not asserted in the trial court. *In re Demillo* (1975) 14 C3d 598, 121 CR 725 (statute of limitations); *In re Dick* (1966) 64 C2d 272, 49 CR 673 (multiple convictions barred by statute); *In re Ayala* (1957) 155 CA2d 807, 318 P2d 698 (conduct not prohibited by charged statute).

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§9.27 2. Denial of Fundamental Rights

Certain constitutional rights are considered so fundamental that their denial or impairment in the trial court furnishes grounds for habeas corpus relief. Fundamental rights afford protection in the following areas:

- **Right to counsel.** *In re Hochberg* (1970) 2 C3d 870, 875, 87 CR 681; *In re Lopez* (1970) 2 C3d 141, 84 CR 361; *In re Smiley* (1967) 66 C2d 606, 625, 58 CR 579; *In re Dellasala* (1977) 66 CA3d 453, 136 CR 99. Habeas corpus is an appropriate vehicle to assert violation of the right to counsel even if the issue was not raised at trial and prejudice is not affirmatively shown. *In re Johnson* (1979) 24 C3d 769, 157 CR 674.
- **Suppression of material evidence by prosecution constituting denial of a fair trial.** *In re Miranda* (2008) 43 C4th 541, 76 CR3d 172 (nondisclosure of exculpatory information entitled defendant to relief from both sentence of death and conviction by guilty plea for second degree murder); *In re Ferguson* (1971) 5 C3d 525, 96 CR 594; *In re Chol Soo Lee* (1980) 103 CA3d 615, 163 CR 204.
- **Right to speedy trial.** *In re Crow* (1971) 4 C3d 613, 622 n9, 94 CR 254. But see *In re Yurko* (1974) 10 C3d 857, 866, 112 CR 513.
- **Imprisonment of indigent unable to pay fine.** *In re Antazo* (1970) 3 C3d 100, 89 CR 255.
- **Guilty plea made without waiver of constitutional rights or knowledge of collateral consequences.** *In re Yurko, supra*. But see *In re Ronald E.* (1977) 19 C3d 315, 137 CR 781 (habeas corpus relief denied for claimed noncompliance with *Boykin-Tahl* requirements, partly because petitioner failed to allege his lack of awareness of such rights when appeal was available).
- **Application of proof-beyond-reasonable-doubt standard.** *In re Foss* (1974) 10 C3d 910, 930, 112 CR 649.
- **Defendant's conduct was constitutionally protected.** *In re Bushman* (1970) 1 C3d 767, 774, 83 CR 375, disapproved on another ground in *People v Lent* (1975) 15 C3d 481, 486 n1, 124 CR 905. But see *In re Wagner* (1981) 119 CA3d 90, 102, 173 CR 766.
- **Right to public trial.** *In re Wagner* (1981) 119 CA3d 90, 107, 173 CR 766.
- **Jury instructions involving constitutional issues.** *In re Wagner* (1981) 119 CA3d 90, 109, 173 CR 766.
- **Effective assistance of counsel.** *In re Darr* (1983) 143 CA3d 500, 191 CR 882 (defendant's trial counsel represented prosecution witness and no inquiry was made regarding conflict). See also *In re Avena* (1996) 12 C4th 694, 49 CR2d 413 (defense counsel's inadequate investigation and minimal nature of representation, but error was not deemed prejudicial).

WARNING: Many of the cases cited in this section predate the limitations on the "fundamental constitutional right" category enunciated in *In re Harris* (1993) 5 C4th 813, 21 CR2d 373, and *In re Seaton* (2004) 34 C4th 193, 17 CR3d 633. After *Harris*, a claim of deprivation of a fundamental right that could have been, but was not, raised on direct appeal (or was raised and denied) is no longer cognizable on state habeas unless petitioner can also show that the violation is clear and strikes at the heart of the trial process. 5 C5th at 829.

PRACTICE TIP: In a noncapital case, appellate counsel should seek review in the California Supreme Court of all substantial federal constitutional claims that are rejected on appeal. If the supreme court denies review, the claim will be exhausted and ripe for review in the Ninth Circuit. On exhaustion of state remedies, see §§14.18-14.40. The *Harris* bar should not preclude consideration on the merits of a claim grounded on ineffective assistance of appellate counsel if a substantial federal constitutional claim was forfeited because it was not raised or was inadequately presented on appeal, or because appellate counsel failed to exhaust state remedies by failing to file a petition for review.

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§9.28 3. Changes in Law With Retroactive Effect

When changes in case law expanding a defendant's rights are given retroactive effect, a person previously convicted may use habeas corpus to obtain relief. See *In re Cortez* (1971) 6 C3d 78, 98 CR 307; *In re Johnson* (1970) 3 C3d 404, 90 CR 569 (retroactivity of *Leary v U.S.* (1969) 395 US 6, 23 L Ed 2d 57, 89 S Ct 1532); *In re Montgomery* (1970) 2 C3d 863, 87 CR 695 (relief under *Barber v Page* (1968) 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318); *In re Caffey* (1968) 68 C2d 762, 69 CR 93 (applying California cases interpreting decision in *Gideon v Wainwright* (1963) 372 US 335, 9 L Ed 2d 799, 83 S Ct 792); *In re Walker* (2007) 147 CA4th 533, 538, 54 CR3d 411 (in light of developments in law, reasonable probability exists that results of trial would have been different if expert testimony regarding intimate partner battering had been presented); *In re Grossi* (1967) 248 CA2d 315, 320, 56 CR 375 (multiple prosecution bar). See also *Kellett v Superior Court* (1966) 63 C2d 822, 48 CR 366. Moreover, the court in *In re Morse* (1969) 70 C2d 702, 76 CR 385, held that the petitioner was entitled to habeas corpus relief when a postconviction decision by the California Supreme Court expanded a previous ruling by the United States Supreme Court, which had been made before the petitioner's conviction but which did not initially affect him. The court granted relief because the petitioner could not reasonably have anticipated the California decision. 70 C2d at 704; *People v Stanworth* (1974) 11 C3d 588, 114 CR 250.

Changes in statutory law that repeal crimes or that reduce or eliminate punishment usually apply to all cases in which there has not been a final judgment at the time of enactment, unless a showing of contrary legislative intent is made. Although this ground may be raised by appeal (see *People v Rossi* (1976) 18 C3d 295, 134 CR 64; *People v Francis* (1969) 71 C2d 66, 75 CR 199), habeas corpus also is an appropriate remedy to obtain relief. *In re Estrada* (1965) 63 C2d 740, 48 CR 172; *In re Pine* (1977) 66 CA3d 593, 136 CR 718 (finality for retroactivity purposes measured by when period to apply for writ of certiorari from United States Supreme Court ended); *In re May* (1976) 62 CA3d 165, 133 CR 33.

Government Code §9608 states:

> The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.

The statute seems to require an express statement of intent not to permit punishment for a crime despite repeal of the law making the act criminal. The courts, however, have given the statute quite a different interpretation. In *People v Collins* (1978) 21 C3d 208, 213, 145 CR 686, the court held that the purpose of Govt C §9608 is to prevent a defendant from escaping punishment when his or her conduct has been and remains within the condemnation of the law. The statute is most commonly applied when the legislature has inadvertently repealed a criminal provision and then reenacted it. Under such circumstances, offenses committed before the repeal can still be prosecuted under the reenacted law. See *People v Levels* (1989) 209 CA3d 410, 416, 257 CR 232. See also *People v Flora* (1991) 228 CA3d 662, 279 CR 17 (conviction for felony violation of child custody order upheld despite repeal of statute subdivision on which conviction was based; subdivision of statute unaffected by repeal continued to proscribe defendant's conduct). Nonetheless, as stated, the repeal of a criminal statute generally vitiates all prosecutions under that law.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/9 Habeas Corpus: Scope of Writ/§9.29 4. Invalid or Excessive Sentences

§9.29 4. Invalid or Excessive Sentences

Habeas corpus will always issue to review the validity of a sentence when the face of the record shows that it was imposed in excess of the court's jurisdiction. *In re Estrada* (1965) 63 C2d 740, 750, 48 CR 172; *In re May* (1976) 62 CA3d 165, 133 CR 33. See also *In re Huffman* (1986) 42 C3d 552, 229 CR 789. This principle has been applied in several contexts, among which are:

- ***Romero* error.** In *People v Superior Court* (*Romero*) (1996) 13 C4th 497, 53 CR2d 789, the California Supreme Court ruled that the trial court has discretion under Pen C §1385 to dismiss a prior conviction found true under the "Three Strikes" law (Pen C §§667(b)-(i), 1170.12). When the record is silent as to whether the trial court understood the scope of its discretion, habeas corpus is the appropriate vehicle to obtain review. *People v Fuhrman* (1997) 16 C4th 930, 944, 67 CR2d 1.
- **Sentence augmented by invalid prior conviction.** *People v Sumstine* (1984) 36 C3d 909, 206 CR 707; *In re Rogers* (1980) 28 C3d 429, 169 CR 222; *In re Bartlett* (1971) 15 CA3d 176, 93 CR 96; but see *Garcia v Superior Court* (1997) 14 C4th 953, 59 CR2d 858.
- **Sentence violated multiple punishment bar under Pen C §654.** *In re Adams* (1975) 14 C3d 629, 633, 122 CR 73; *Neal v State* (1960) 55 C2d 11, 9 CR 607.
- **Sentence increased by amendment to final judgment.** *In re Candelario* (1970) 3 C3d 702, 91 CR 497.
- **Sentence violated constitutional rights.** See *In re Hawthorne* (2005) 35 C4th 40, 24 CR3d 189 (postconviction claim of mental retardation by defendant under sentence of death); *In re Dewing* (1977) 19 C3d 54, 136 CR 708 (ex post facto); *In re Kapperman* (1974) 11 C3d 542, 114 CR 97 (equal protection); *In re Foss* (1974) 10 C3d 910, 112 CR 649 (cruel or unusual punishment). See also *People v Landers* (1976) 59 CA3d 846, 131 CR 522 (cruel or unusual punishment claim under indeterminate sentence law must be raised on habeas corpus, not on direct appeal).

NOTE: In *In re Gomez* (2009) 45 C4th 650, 88 CR3d 177, the California supreme court held that *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d, 856, 127 S Ct 856 applies on collateral review of a judgment that became final before *Cunningham* but after *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531, was decided. See also *Chioino v Kernan* (9th Cir 2009) 581 F3d 1182, 1186 (once it found *Cunningham* error, district court should have remanded to trial court for resentencing).

- **Violation of *Estrada* rule.** *In re Kirk* (1965) 63 C2d 761, 48 CR 186; *In re Estrada* (1965) 63 C2d 740, 750, 48 CR 172 (statutory amendment reducing punishment enacted before judgment final). See also *In re Griffin* (1965) 63 C2d 757, 48 CR 183 (rule not applied because statutory amendment increased sentence). When criminal sanctions are completely repealed before a criminal conviction is final, the principles set out in *Estrada* apply a fortiori. *People v Rossi* (1976) 18 C3d 295, 134 CR 64. The *Estrada* rule also may be invoked to correct action by the Board of Prison Terms or prison officials that results in fixing an invalid or excessive sentence. See *In re Pine* (1977) 66 CA3d 593, 136 CR 718.
- **Erroneous computation of term and denial of credit.** *In re Haygood* (1975) 14 C3d 802, 122 CR 760.
- **Improper administration of indeterminate sentence law.** *In re Rodriguez* (1975) 14 C3d 639, 122 CR 552 (failure to set term at less than maximum); *People v Wingo* (1975) 14 C3d 169, 183, 121 CR 97 (failure to fix term within reasonable time).
- **Retroactive application of determinate sentence law.** *In re Caudillo* (1980) 26 C3d 623, 164 CR 692; *In re Dexter* (1979) 25 C3d 921, 160 CR 118; *In re Flodihn* (1979) 25 C3d 561, 159 CR 327.

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§9.30 5. Invalid Orders Affecting Probation

The following orders granting, modifying, or revoking probation have been subject to collateral attack by habeas corpus if invalid on their face or in excess of the court's jurisdiction:

- **Restraint under invalid condition of probation.** *In re Bushman* (1970) 1 C3d 767, 776, 83 CR 375, disapproved on another ground in *People v Lent* (1975) 15 C3d 481, 486 n1, 124 CR 905; *In re Martinez* (1978) 86 CA3d 577, 150 CR 366; *In re Mannino* (1971) 14 CA3d 953, 92 CR 880, disapproved on another ground in *People v Welch* (1993) 5 C4th 228, 237, 19 CR2d 520.
- **Probation modified to impose more onerous conditions when no factual changes.** *In re Clark* (1959) 51 C2d 838, 337 P2d 67; *In re Bine* (1957) 47 C2d 814, 306 P2d 445. See *In re Stallings* (1970) 5 CA3d 322, 85 CR 96, disapproved on other grounds in *People v Cookson* (1991) 54 C3d 1091, 1100, 2 CR2d 176 (modification after affirmance on appeal); California Criminal Law Procedure and Practice §38.36 (Cal CEB Annual) (invalid conditions of probation).
- **Probation revoked after expiration of probationary term.** *In re Griffin* (1967) 67 C2d 343, 62 CR 1; *In re Dupper* (1976) 57 CA3d 118, 128 CR 898; *People v Amsbary* (1975) 51 CA3d 75, 125 CR 546. But see *In re Daoud* (1976) 16 C3d 879, 129 CR 673.
- **Constitutional or jurisdictional defect in probation revocation proceedings.** *In re Coughlin* (1976) 16 C3d 52, 127 CR 337; *In re Duran* (1974) 38 CA3d 632, 113 CR 442.

WARNING: The rule permitting habeas corpus challenges to invalid probation conditions developed when no objection to the condition was necessary to preserve the issue for review. However, in *People v Welch* (1993) 5 C4th 228, 19 CR2d 520, the supreme court held that to challenge an invalid condition of probation on appeal, the defendant now must object to and litigate that condition in the trial court. This rule may well also preclude a collateral attack on the probation condition when no objection was made unless the petitioner can establish the trial counsel's failure to object to the challenged condition of probation constituted ineffective assistance of counsel.

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§9.31 6. Improper Parole and Probation Revocation

Habeas corpus has been used to challenge parole revocation and analogous proceedings following the decision in *Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593. *In re Shapiro* (1975) 14 C3d 711, 122 CR 768 (California parole violator in federal custody); *In re Winn* (1975) 13 C3d 694, 119 CR 496 (right to prerevocation hearing); *In re La Croix* (1974) 12 C3d 146, 115 CR 344 (no showing of prejudice by delay in revocation proceedings); *In re Valrie* (1974) 12 C3d 139, 115 CR 340 (delay in revocation proceedings); *In re Bye* (1974) 12 C3d 96, 115 CR 382 (revocation of outpatient status of committed narcotics addict); *In re Love* (1974) 11 C3d 179, 113 CR 89 (right to counsel at revocation hearing); *In re Prewitt* (1972) 8 C3d 470, 105 CR 318 (rescission of parole date). See also *In re Wagner* (2005) 127 CA4th 138, 25 CR3d 201 (revocation of probation); *In re Armstrong* (1981) 126 CA3d 565, 178 CR 902.

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§9.32 7. Prisoners' Rights and Conditions of Imprisonment

The use of habeas corpus to protect the fundamental rights of prisoners is well settled. *In re Arias* (1986) 42 C3d 667, 230 CR 505, superseded by statute on other grounds as stated in *Thompson v Department of Corrections* (2001) 25 C4th 117, 105 CR2d 46 (microphone monitoring of chapel at Youth Authority); *In re Cummings* (1982) 30 C3d 870, 180 CR 826 (overnight visitation by nonspouse denied); *In re Davis* (1979) 25 C3d 384, 158 CR 384 (inmates held in administrative segregation 33 to 83 days without disciplinary hearing; denied due process rights); *In re Brandt* (1979) 25 C3d 136, 157 CR 894 (correspondence between inmate and union official who was paroled prisoner); *In re Reynolds* (1979) 25 C3d 131, 157 CR 892 (prisoner's right to wear union button); *In re Jordan* (1972) 7 C3d 930, 103 CR 849 (confidential correspondence between inmate and attorney); *In re Van Geldern* (1971) 5 C3d 832, 97 CR 698 (inmate-author's right to royalties); *In re Harrell* (1970) 2 C3d 675, 87 CR 504 (right to mutual legal assistance, personal access to courts, and reading materials); *In re Riddle* (1962) 57 C2d 848, 22 CR 472 (cruel punishment by prison officials); *In re Carr* (1981) 116 CA3d 962, 172 CR 417 (reclassification of prisoner to maximum security without hearing); *In re Muszalski* (1975) 52 CA3d 500, 125 CR 286 (inspection of prison records; administrative remedies must be exhausted); *In re Olson* (1974) 37 CA3d 783, 112 CR 579 (attorney's inspection of inmate's files). See *In re Cirino* (1972) 28 CA3d 1009, 105 CR 194 (conditions of confinement at state hospital). But see *In re Boag* (1973) 35 CA3d 866, 111 CR 226 (use of prison law library for inmate meetings denied); *In re Price* (1979) 25 C3d 448, 158 CR 873 (upholding prohibition of prisoner union meetings attended by outsiders); *In re Bell* (1980) 110 CA3d 818, 168 CR 100 (restrictions on contact visits). Note that the supreme court reaffirmed the ruling in *In re Muszalski, supra,* that prisoners with grievances ordinarily must exhaust administrative remedies before seeking judicial relief. *In re Dexter* (1979) 25 C3d 921, 925, 160 CR 118.

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§9.33 8. Preservation of Rights on Appeal

Although habeas corpus cannot be used as a substitute for appeal, habeas corpus lies to determine that an appeal is pending and to require preparation of the record to perfect the appeal. *In re Gonsalves* (1957) 48 C2d 638, 311 P2d 483. Habeas corpus is available to establish compelling circumstances excusing compliance with the strict time requirements for filing the notice of appeal. See §2.7. Such compelling circumstances can be grounds for constructively treating a notice of appeal as timely filed. *In re Benoit* (1973) 10 C3d 72, 109 CR 785 (felony); *In re Hernandez* (1974) 40 CA3d 893, 115 CR 495 (misdemeanor); *In re Arthur N.* (1974) 36 CA3d 935, 112 CR 89 (juvenile). When time limits are not jurisdictional, relief from other aspects of default in perfecting an appeal can be sought by writ. *In re Parker* (1968) 68 C2d 756, 69 CR 65 (delay in filing proposed statement in misdemeanor). But see *In re Ridenour* (1973) 33 CA3d 792, 109 CR 370. On trial counsel's duty to assist a defendant with filing a notice of appeal, see §1.3.

Deprivation of the right to effective assistance of counsel on appeal may also be reviewed by a petition for a writ of habeas corpus. *In re Banks* (1971) 4 C3d 337, 93 CR 591; *In re Smith* (1970) 3 C3d 192, 90 CR 1; *In re Martin* (1962) 58 C2d 133, 23 CR 167; *In re Greenfield* (1970) 11 CA3d 536, 89 CR 847. On appellate counsel's responsibility to consider filing a petition for writ of habeas corpus, see §2.29.

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§9.34 9. Appellate Remedy Inadequate

When the remedy on appeal is inadequate, habeas corpus will lie to redress the deprivation of a fundamental right. Thus, it has been held that the writ is properly invoked when petitioner's sentence will be served before the appeal is decided. See *In re Newbern* (1960) 53 C2d 786, 789, 3 CR 364 (6-month term); *In re Fry* (1971) 19 CA3d 177, 96 CR 418; *In re Solis* (1969) 274 CA2d 344, 347, 78 CR 919 (60-day jail term as condition of probation). In *In re Bine* (1957) 47 C2d 814, 306 P2d 445, the California Supreme Court granted habeas corpus relief to a petitioner because it was not clear at the time whether there was a right to appeal the challenged order.

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§9.35 10. Using Habeas Corpus in Conjunction With Appeal to Go Outside Appellate Record

A petition for habeas corpus filed in conjunction with a direct appeal from conviction permits appellate counsel to raise issues and present further evidence outside the appellate record of proceedings before the trial court when important constitutional issues are presented. By far the most common ground for such a petition is ineffective assistance of trial counsel. For example, on appeal, counsel may raise an issue regarding the trial court's failure to read an instruction, arguing there was a sua sponte duty to do so. On habeas, counsel may allege ineffective assistance of counsel for failure of trial counsel to request the instruction.

In cases in which trial counsel's reasons for acts or omissions are not clear from the record on direct appeal, habeas corpus is an appropriate vehicle to raise those issues. *People v Ledesma* (1987) 43 C3d 171, 218, 233 CR 404. See also *People v Mendoza Tello* (1997) 15 C4th 264, 266, 62 CR2d 437 (ineffective assistance of counsel appropriately brought by way of habeas corpus).

The prosecutor's failure to disclose material evidence is another claim that usually requires the presentation of information not contained in the trial record and, consequently, must be made in a habeas corpus petition. See *In re Miranda* (2008) 43 C4th 541, 76 CR3d 172; *People v Westmoreland* (1976) 58 CA3d 32, 36, 129 CR 554.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/9 Habeas Corpus: Scope of Writ/§9.36 a. Procedure

§9.36 a. Procedure

The petition must be complete and independent of the brief in the direct appeal. Neither the petition itself nor the supporting memorandum should attempt to incorporate parts of the brief by reference. See *In re Ronald E.* (1977) 19 C3d 315, 322 n3, 137 CR 781.

PRACTICE TIP: Counsel should also be careful not to base any arguments in the direct appeal on facts outside the record.

There is, however, no prohibition against repeating relevant portions of the brief. Counsel may also ask the court to take judicial notice of the record in the pending appeal. See §§4.35, 4.48. This makes it possible to rely on facts that are part of the record without attaching record excerpts to the petition.

Unless there are tactical or practical reasons indicating otherwise, the petition should request the appellate court to consolidate the appeal and habeas corpus proceedings. See *People v Apodaca* (1978) 76 CA3d 479, 489 n3, 142 CR 830, disapproved on other grounds in *People v Davis* (1994) 7 C4th 797, 804, 30 CR2d 50; *People v Tomas* (1977) 74 CA3d 75, 78, 141 CR 453. (Note that the supreme court no longer consolidates.) See also Marer, *Effective Criminal Appellate Advocacy: Seeking Reversal by Concurrent Collateral and Direct Attacks in the Appellate Court*, 27 Hastings LJ 333 (1975). Specific reasons for consolidation should be provided. Consolidation is discretionary and may be denied.

There is no set time limit for filing a habeas corpus petition in a noncapital case. However, in *In re Sanders* (1999) 21 C4th 697, 703, 87 CR2d 899, the California Supreme Court stated that time limits apply in noncapital habeas petitions as well as in capital cases. Counsel should start investigating the facts and assembling documentation as soon as he or she discovers the existence of a potential habeas issue, and should be prepared to file the petition promptly when all the evidentiary materials are assembled. Undue delay in filing allows the respondent an opportunity to argue that "substantial delay" between discovery of the claim and filing of the petition should bar consideration of the claim on its merits. See, *e.g., In re Gallego* (1998) 18 C4th 825, 77 CR2d 132. At best, litigating the issue of procedural default sidetracks the litigation; at worst, it can foreclose consideration of the client's claims in state court, and, perhaps, in federal court as well. See *Bennett v Mueller* (9th Cir 2003) 322 F3d 573 (holding that California's untimeliness bar is an independent state ground, but remanding on the question of whether it is consistently applied).

The Third and Fifth Districts rarely, if ever, exercise their original jurisdiction to hear habeas corpus petitions, even in conjunction with a pending appeal. Consequently, attorneys representing appellants in these districts serve their clients better by filing any habeas corpus petition in the appropriate superior court. See *In re Carpenter* (1995) 9 C4th 634, 38 CR2d 665 (superior court may hear habeas corpus petition while appeal pending; because habeas petition involves issues that cannot be raised on appeal, determination of such issues cannot interfere with jurisdiction of appellate court).

In other districts, the court of appeal may consolidate the petition with the appeal and decide the petition itself, especially if there are no contested facts, *e.g.*, the petition alleges ineffective assistance of counsel, and trial counsel signs a declaration denying any tactical purpose for the alleged error. In cases involving disputed factual issues, the court of appeal may consolidate the petition with the appeal, but will most likely appoint a referee (usually a judge of the superior court) to hold an evidentiary hearing and make findings of fact. See, *e.g., In re Weber* (1974) 11 C3d 703, 114 CR 429. In still other situations, the court of appeal will issue an order to show cause returnable in the superior court. *In re Hochberg* (1970) 2 C3d 870, 873, 87 CR 681. The court may deny consolidation, yet stay the appeal while the habeas is pending in superior court.

PRACTICE TIP: Appointed appellate counsel should consult with the appellate project operating in the district where the case is pending before filing a habeas corpus petition. For a list of appellate projects, see §2.21. Many of the projects require consultation before the filing of a habeas petition as part of their appointment guidelines. In addition, project staff will be familiar with the appropriate procedures in the court in which the appeal is pending. The procedures and local rules of court vary from district to district. Some courts will not compensate appointed counsel for filing a habeas petition unless the court has approved expansion of the appointment.

Appellate attorneys trying to establish a prima facie case for relief through written statements when no record of the error is available should present the necessary factual allegations by means of sworn declarations or affidavits. Factual statements should be made by a person competent to testify to the facts alleged; a statement made on information and belief is not adequate. See *People v Madaris* (1981) 122 CA3d 234, 241, 175 CR 869.

For further discussion and an illustrative petition for use in a consolidated proceeding, see §10.34.

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§9.37 b. The Contention Cannot Be Adequately Raised on Appeal

Habeas corpus in conjunction with an appeal is a proper procedure for a collateral attack on constitutional grounds when the issue cannot be adequately raised on appeal because the record before the appellate court is inadequate to decide the issue. It is also appropriate when related issues are being raised on appeal. For example, when ineffectiveness of trial counsel is an issue on appeal, it is often necessary for appellate counsel to file a habeas petition because the trial record may not show the reasons for trial counsel's action. *People v Ledesma* (1987) 43 C3d 171, 218, 233 CR 404. Counsel might also consider filing a habeas petition when trial counsel's failure to object or failure to litigate a particular issue in the trial court poses an issue regarding waiver or forfeiture. Issues concerning conflicts might appear on the appellate record yet require a concurrent habeas if additional grounds for the conflict are uncovered outside of the record. Jury misconduct issues might also require habeas proceedings. See *In re Carpenter* (1995) 9 C4th 634, 646, 38 CR2d 665. There are many situations in which an issue might be cognizable on appeal but a habeas petition is required to fully address it.

Habeas corpus in conjunction with an appeal is also appropriate to raise an issue wholly absent from the appellate record. For example, claims of newly discovered evidence, the introduction of false evidence, or the failure to disclose exculpatory evidence might be issues requiring a habeas petition in conjunction with the appeal.

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§9.38 c. Claims of Inadequate Representation

Constitutional standards. To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, *i.e.*, that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. *Strickland v Washington* (1984) 466 US 668, 687, 80 L Ed 2d 674, 693, 104 S Ct 2052; *People v Waidla* (2000) 22 C4th 690, 718, 94 CR2d 396; *In re Cudjo* (1999) 20 C4th 673, 687, 85 CR2d 436. In determining whether trial counsel fell below the standard of reasonableness, the court employs a strong presumption of competence. *Strickland v Washington,* 466 US at 689, 80 L Ed 2d at 694. A reviewing court generally defers to trial counsel and avoids second guessing counsel as to matters of strategy and tactics. However, a claim of strategy and tactics is irrelevant if an action is taken without benefit of substantial inquiry, is based on ignorance of the law, or if there could be no satisfactory explanation for the action. See *People v Frierson* (1979) 25 C3d 142, 162, 158 CR 281; *People v Bess* (1984) 153 CA3d 1053, 1061, 200 CR 773; *People v Guizar* (1986) 180 CA3d 487, 491, 225 CR 451. Accordingly, if there is any possibility the record may be construed to reflect a tactical reason for counsel's failing or if trial counsel will provide a sworn declaration that no tactical reason existed for the failing, a habeas petition must be filed.

NOTE: *Strickland,* a capital sentencing case, declined to "'consider the role of counsel in an ordinary sentencing, which… may require a different approach to the definition of constitutionally effective assistance.'" 466 US at 686. Consequently, the Ninth Circuit has determined there is no clearly established Supreme Court precedent governing ineffective assistance of counsel claims in the noncapital sentencing context. See *Davis v Grigas* (9th Cir 2006) 443 F3d 1155, 1158 (petitioner alleged ineffective assistance of counsel at sentencing based on counsel's failure to investigate or present mitigating evidence); *Cooper-Smith v Palmateer* (9th Cir 2005) 397 F3d 1236, 1244.

Duties of trial counsel. Trial attorneys have a duty to cooperate with successor counsel. This duty includes turning over written materials generated during the representation of the client (including work product) as well as all pleadings, reports, and correspondence regarding the case. Trial counsel also has a duty to candidly discuss matters relating to the representation with appellate counsel even if this would disclose that trial counsel failed to provide adequate representation. California State Bar Formal Opinion No. 92-127.

As to communication with respondent, trial counsel has a duty to preserve the client's secrets. Bus & P C §6068(e). The client is a holder of the attorney-client privilege (Evid C §953), and the attorney has the duty to claim the privilege. Evid C §955. However, there is no privilege for communications relevant to a breach of duty arising out of the attorney-client relationship. Evid Code §958. Consequently, a claim of ineffective assistance of counsel in a habeas petition waives the attorney-client privilege as to the matters put in issue by the petition for the purposes of that proceeding. *People v Ledesma* (2006) 39 C4th 641, 691, 47 CR3d 326. See also *In re Gray* (1981) 123 CA3d 614, 176 CR 721; *Bittaker v Woodford* (9th Cir 2003) 331 F3d 715, 716.

PRACTICE TIP: Communication with trial counsel should take place prior to filing a habeas petition to determine the validity or absence of tactical reasons for counsel's actions or omissions.

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§9.39 11. Excess of Court's Jurisdiction

Habeas corpus is available when the jurisdiction of the court has been exceeded. Pen C §1487(1); *In re Brown* (1973) 9 C3d 612, 624, 108 CR 465; *People v Roe* (1983) 148 CA3d 112, 118, 195 CR 802.

There is no further right of review of misdemeanor convictions beyond that provided in the appellate division. However, a published opinion is automatically transmitted to the court of appeal, and the appellate division can certify an unpublished opinion to the court of appeal. In either case, the court of appeal has discretion to transfer the matter to itself for decision. Cal Rules of Ct 8.1005, 8.1008(a). If the appellate division refuses to certify a question that should be certified, habeas corpus relief may be available. *In re Wallace* (1970) 3 C3d 289, 90 CR 176. If the appellate division's ruling fails to follow binding precedent, or otherwise exceeds its jurisdiction, a petition for writ of mandate or certiorari may lie. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 20 CR 321; *Dvorin v Appellate Department* (1975) 15 C3d 648, 649, 125 CR 771. Even if the appellate division has not exceeded its jurisdiction, the court of appeal has discretion to review the decisions of that court upon a petition for writ of mandate if they are of importance. *Loska v Superior Court* (1986) 188 CA3d 569, 574 n4, 233 CR 213.

Moreover, habeas corpus provides relief when it appears on undisputed facts that the misdemeanor statute under which the petitioner was convicted did not prohibit his or her conduct. *In re Zerbe* (1964) 60 C2d 666, 36 CR 286 (trespass); *In re Catalano* (1981) 29 C3d 1, 171 CR 667; *In re Brown* (1973) 9 C3d 612, 108 CR 465 (unlawful assembly); *In re Smith* (1972) 7 C3d 362, 102 CR 335 (nude sunbathing not indecent exposure); *In re Wallace* (1970) 3 C3d 289, 90 CR 176 (trespass); *In re Murdock* (1968) 68 C2d 313, 66 CR 380 (driving with license suspended); *In re Perlman* (1971) 18 CA3d 178, 95 CR 599 (obscenity).

Habeas corpus does not lie in either misdemeanor or felony cases if the prosecution's error is not a crucial element necessary to establish guilt of the crime. In *In re Sands* (1977) 18 C3d 851, 135 CR 777, the state failed to comply with the requirement to seek restitution; the court held that this failure was not a jurisdictional bar to a welfare fraud charge. In *In re Anders* (1979) 25 C3d 414, 158 CR 661, a writ was denied without prejudice to seeking relief in the trial court when the record was unclear on whether the lewd-conduct statute as interpreted by the court in *Pryor v Municipal Court* (1979) 25 C3d 238, 158 CR 330, applied to the defendant's conduct. In *In re Crumpton* (1973) 9 C3d 463, 106 CR 770, the defendant pleaded guilty to kidnapping for the purpose of robbery (Pen C §209) after his arrest in 1968. One year later, the California Supreme Court, in *People v Daniels* (1969) 71 C2d 1119, 80 CR 897, limited that statute's interpretation. Mr. Crumpton filed a petition for writ of habeas corpus in the California Supreme Court asking that his plea of guilty be set aside, the judgment vacated, and that he be released from custody because his conduct was not prohibited by Pen C §209 as it was construed by the court in *Daniels.* The court rejected the Attorney General's argument that habeas corpus relief was not available because Mr. Crumpton pleaded guilty, and the facts were not undisputed concerning the crime's commission. See also *In re Culver* (1968) 69 C2d 898, 73 CR 393 (escape; undisputed facts concerning conduct under statute).

In felonies, a defendant who is unsuccessful on appeal has the option of applying for recall of the remittitur to the highest appellate court that decided his or her case. The remedy of recall of the remittitur is an adjunct to the writ of habeas corpus and implements the defendant's right to habeas corpus. *People v Mutch* (1971) 4 C3d 389, 396, 93 CR 721. The remedy has been applied to criminal cases where the appellate judgment is shown to result from the ineffective assistance of appellate counsel. See *In re Serrano* (1995) 10 C4th 447, 458, 41 CR2d 695; *In re Martin* (1962) 58 C2d 133, 137, 23 CR 167; *In re Grunau* (2008) 169 CA4th 997, 86 CR3d 908.

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§9.40 12. Newly Discovered Evidence

Newly discovered evidence is a basis for relief if it undermines the entire case of the prosecution. *In re Hardy* (2007) 41 C4th 977, 1016, 63 CR3d 845; *In re Clark* (1993) 5 C4th 750, 765, 21 CR2d 509; *In re Weber* (1974) 11 C3d 703, 724, 114 CR 429. To warrant issuance of a writ, the new evidence must create fundamental doubt in the accuracy of the proceedings and "point unerringly to innocence or reduced culpability." *In re Lawley* (2008) 42 C4th 1231, 74 CR3d 92; *People v Gonzalez* (1990) 51 C3d 1179, 1246, 275 CR 729; *In re Hall* (1981) 30 C3d 408, 417, 179 CR 223. "Pointing unerringly to innocence" does not mean a "hypertechnical requirement" exists that requires that each piece of prosecutorial evidence be specifically refuted. 30 C3d at 423. Additionally, petitioner need not meet the "impossible burden" of proving that no conceivable basis exists on which the prosecution might have succeeded. That "would be unconscionable." 30 C3d at 423.

Normally, if evidence can be discovered by diligent investigation before trial, it is not newly discovered evidence. 30 C3d at 420. However, due diligence must be determined in the "peculiar circumstances" involved in each case. *People v Williams* (1962) 57 C2d 263, 273, 18 CR 729. In addition, "it is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure [due to lack of due diligence] at trial to present exculpatory evidence." *Hall*, 30 C3d at 420, quoting *In re Branch* (1969) 70 C2d 200, 214, 74 CR 238.

Other cases that discuss evidence of innocence include *In re Branch* (1969) 70 C2d 200, 74 CR 238 (denied); *In re Kirschke* (1975) 53 CA3d 405, 125 CR 680 (denied); *In re Imbler* (1963) 60 C2d 554, 35 CR 293 (conviction based on perjured testimony; denied); *In re Pratt* (1980) 112 CA3d 795, 862, 170 CR 80 (denied); *In re Wright* (1978) 78 CA3d 788, 802, 144 CR 535 (stricter standard applies for obtaining relief on ground of newly discovered evidence than for false evidence; denied). But see *In re Lee* (1980) 103 CA3d 615, 163 CR 204, in which a habeas corpus order by the superior court discharging the defendant from custody under a murder conviction because crucial information from an eyewitness to the shooting had been withheld from the defense to its prejudice was affirmed by the appellate court despite the argument that the witness's testimony was inherently improbable.

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§9.41 13. False Evidence Was Introduced in Court or Was Material to Guilty Plea

A prisoner is entitled to relief by writ of habeas corpus when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against [him] at any hearing or trial relating to his incarceration." Pen C §1473(b)(1). See *In re Malone* (1996) 12 C4th 935, 965, 50 CR2d 281; *In re Sassounian* (1995) 9 C4th 535, 546, 37 CR2d 446; see also *Mooney v Holohan* (1935) 294 US 103, 113, 79 L Ed 791, 55 S Ct 340.

Under Pen C §1473, the introduction of false evidence is a ground for habeas corpus relief when (a) false evidence that is substantially material or probative on the issue of guilt or punishment was introduced at any hearing or trial relating to the petitioner's incarceration, or (b) false physical evidence that the petitioner believed to be factual, probative, or material on the issue of guilt was a material factor directly related to his or her plea of guilty. Pen C §1473(b). It is not necessary for the petitioner to establish that the prosecution knew or should have known the evidence was false. Pen C §1473(c). Although discovery of perjured testimony almost always results from discovery of new evidence, it constitutes a distinct ground for habeas corpus relief subject to different legal standards. *In re Pratt* (1980) 112 CA3d 795, 862, 170 CR 80; *In re Wright* (1978) 78 CA3d 788, 144 CR 535.

The habeas petitioner has the burden of proving that the evidence is false and that it affected the outcome of his trial. 78 CA3d at 807. The petitioner must establish by a preponderance of the evidence that false testimony was adduced at his trial. *In re Imbler* (1963) 60 C2d 554, 560, 35 CR 293. Section 1473 does not require the petitioner to prove that the false evidence was perjured or that the prosecutor or his or her agents knew of its falsity. Pen C §1473(b)(1), (c); *People v Marshall* (1996) 13 C4th 799, 830, 55 CR2d 347.

In *In re Sassounian* (1995) 9 C4th 535, 544, 37 CR2d 446, the California Supreme Court adopted in the Pen C §1473 context the definition of materiality used to determine whether the prosecutor's failure to disclose exculpatory evidence deprived the defendant of due process under *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. See *U.S. v Bagley* (1985) 473 US 667, 682, 87 L Ed 2d 481, 494, 105 S Ct 3375; *In re Malone* (1996) 12 C4th 935, 965, 50 CR2d 281. Consequently, to show that false evidence is material, the petitioner must show a reasonable probability that but for its introduction, the result would have been different. *In re Sassounian, supra.* The result is that when a petitioner shows that the prosecution introduced evidence that was both false and material, he or she "necessarily establishes at one stroke what in other contexts are separately considered under the rubrics of 'error' and 'prejudice.'" 9 C4th at 545 n7. In other words, any error is necessarily prejudicial. 9 C4th at 545. See *Bagley,* 473 US at 678. See also *People v Kasim* (1997) 56 CA4th 1360, 1386, 66 CR2d 494.

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§9.42 14. Lawfulness of Civil Commitments

Penal Code §1473(a) provides that "every person unlawfully imprisoned or restrained in his liberty, *under any pretense whatever*, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment." (Emphasis added.) Consequently, a defendant committed under civil proceedings as the result of a criminal conviction or an acquittal after a plea of not guilty by reason of insanity may use habeas corpus to test the legality of confinement. See, *e.g., People v Talhelm* (2000) 85 CA4th 400, 102 CR2d 150 (involuntary commitment under Sexually Violent Predator Act (Welf & I C §§6600-6609.3)); *People v Minor* (1991) 227 CA3d 37, 277 CR 615 (extension of commitment after NGI acquittal); *In re Marks* (1969) 71 C2d 31, 77 CR 1 (postconviction commitment to California Rehabilitation Center (CRC) as narcotics addict under Welf & I C §§3000-3058). The writ also lies to attack the legality of statutory civil commitment procedures and conditions of detention. *In re Michael E.* (1975) 15 C3d 183, 123 CR 103 (Lanterman-Petris-Short Act); *In re Watson* (1979) 91 CA3d 455, 154 CR 151 (commitment as "mentally retarded" person under former Welf & I C §6500.1; now see Welf & I C §6500); *In re Walker* (1969) 71 C2d 54, 77 CR 16 (civil commitment to CRC as narcotics addict under Welf & I C §§3100-3150). See also *In re Hop* (1981) 29 C3d 82, 171 CR 721, in which the supreme court found the requisite "exceptional circumstances" to give the public defender standing as "next friend" to challenge by habeas corpus the commitment by her mother and hospital staff of a person under the adult developmentally disabled laws.

NOTE: Under Welf & I C §5358.7, a petition for writ of habeas corpus under Pen C §1473 or Welf & I C §7250 challenging the placement or the conditions of placement of a conservatee can be filed either in the county where the conservatorship was established or in the county where the conservatee is placed or confined.

A petition on behalf of a person committed due to incompetency to stand trial (Pen C §§1367-1376) must be filed in the superior court of the county in which the person was found incompetent. Welf & I C §7250.

For a discussion of habeas corpus procedure for persons committed under the Lanterman-Petris-Short Act (Welf & I C §§5000-5550), see California Conservatorship Practice, chap 23 (Cal CEB 2005).

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10

Preparing and Opposing Petition for Writ of Habeas Corpus

Lynda A. Romero

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.1 I. CHAPTER OVERVIEW

§10.1 I. CHAPTER OVERVIEW

This chapter provides a basic description of preparing, filing, and opposing a petition for a writ of habeas corpus.

For a thorough review of the procedural aspects of habeas corpus, see *People v Duvall* (1995) 9 C4th 464, 37 CR2d 259; *People v Romero* (1994) 8 C4th 728, 35 CR2d 270.

California Rules of Court 4.551 establishes a procedure and timetable for filing habeas corpus petitions in superior court.

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II. PREPARING AND FILING PETITION

§10.2 A. Pro Se Petition by Incarcerated Person

A pro se petition for an incarcerated petitioner must be on the official form approved by the Judicial Council. Cal Rules of Ct 8.380(a). This form (Petition for Writ of Habeas Corpus (Judicial Council Form MC-275)) is reproduced in §10.33, in the California Criminal Law Forms Manual §42.3 (2d ed Cal CEB 2005), and at the end of the California Rules of Court. It can be downloaded from the Judicial Council's website at http://www.courtinfo.ca.gov/forms. Copies are also available in most state correctional facilities and from many court clerks. The court may, for good cause, accept a petition that is not on the form. Cal Rules of Ct 8.380(a).

An incarcerated petitioner is not required to type the petition (see Cal Rules of Ct 2.135), but it must be legible. It is important to follow the instructions carefully, and provide all the requested information. If the petition relies on facts outside the record on appeal, it must be accompanied by supporting documents, such as declarations from prospective witnesses.

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§10.3 B. Attorney-Drafted Petition

An attorney submitting a habeas corpus petition is not required to use the Judicial Council form (Petition for Writ of Habeas Corpus (Judicial Council Form MC-275)). Cal Rules of Ct 4.551(a)(2) (superior court), 8.384(a)(1) (reviewing court). Although an attorney is not bound by the *format* of the Judicial Council habeas form, an attorney-drafted petition must contain the *information* required by the form. Cal Rules of Ct 4.551(a)(2) (superior court), 8.384(a)(1) (reviewing court). An attorney-drafted habeas corpus petition filed in the superior court should comply with the form and formatting requirements of Cal Rules of Ct 2.100-2.119. If filed in the California Supreme Court or the court of appeal, it should follow the requirements of Cal Rules of Ct 8.384(a), 8.40(b)-(c), and 8.204(a)-(b). Cal Rules of Ct 8.384(a). Any memorandum accompanying the petition must comply with Cal Rules of Ct. 8.204(a)-(c). However, a memorandum filed in habeas corpus proceedings related to sentence of death need not comply with Cal Rules of Ct 8.240(c). Cal Rules of Ct 8.384(a)(2). Supporting documents accompanying attorney-filed habeas petitions must comply with Cal Rules of Ct 8.486(c)(1)-(2). Cal Rules of Ct 8.384(b)(3). For additional information regarding supporting documents see §8.44. A sample of an attorney-drafted habeas corpus petition can be found in §10.34 and in California Criminal Law Forms Manual §42.4 (2d ed Cal CEB 2005).

Appointed appellate counsel representing an indigent defendant does not have a duty to investigate possible grounds for a collateral attack on the judgment. *In re Clark* (1993) 5 C4th 750, 783 n20, 21 CR2d 509. However, an attorney who learns of such facts in the course of the representation, has an ethical obligation to advise his or her client of the course to follow to obtain relief. 5 C4th at 783 n20. Many appointed appellate attorneys do file habeas corpus petitions on behalf of indigent clients in conjunction with the direct appeal. Appointed appellate attorneys are generally authorized to file habeas corpus petitions. However, whether the court of appeal considers filing a habeas corpus petition to be within the scope of appellate counsel's appointment varies from district to district. In some districts consultation with the appellate project is mandatory prior to filing a petition. At minimum, it is good practice to do so. For a list of appellate projects, see §2.21. In some districts, appellate counsel can file a petition for writ of habeas corpus in conjunction with the direct appeal and expect to be compensated for the work. In others, it is necessary to request the court to expand the scope of appellate counsel's appointment. In all districts, counsel is required to obtain advance authorization from the court to obtain reimbursement for funds for experts or investigators. Such request should be submitted, after consultation with the appellate project, in an ex parte letter or motion. For further discussion, see §2.29.

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§10.4 C. Contents of Petition

A petition for writ of habeas corpus is a pleading, analogous to a complaint in a civil action. It must state "fully and with particularity the facts on which relief is sought." *People v Duvall* (1995) 9 C4th 464, 474, 37 CR2d 259. "Conclusory allegations made without any explanation of the basis for the allegations" will not support the issuance of an order to show cause, much less the relief sought. *People v Duvall, supra.* The petition must also include "copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." *People v Duvall, supra.* Documentary evidence must be provided, if available. If documentary evidence is not available, the petition should include an explanation of why such evidence has not been included with the petition.

PRACTICE TIP: The petition itself is a relatively short document that sets out the essential elements of the claim in a uniform format. The required elements are set forth in the rules of court and relevant case law. See Cal Rules of Ct 8.384(a); *People v Duvall*, *supra*; *People v Romero* (1994) 8 C4th 728, 35 CR2d 270. They include the location where the petitioner is in custody, a statement of the procedural facts, a statement of the facts of the offense, a statement of the facts of the issues in the petition, and the constitutional provisions relied on. Petition for Writ of Habeas Corpus (Judicial Council Form MC-275) includes all the necessary elements. A verification must be included. Detailed argument and analysis is reserved for the memorandum of points and authorities.

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III. SELECTING COURT IN WHICH TO FILE PETITION

§10.5 A. Trial Courts and Reviewing Courts Have Habeas Corpus Jurisdiction

A petition for writ of habeas corpus may be filed in the superior court, the court of appeal, or the supreme court. *In re Roberts* (2005) 36 C4th 575, 582, 31 CR3d 458. Each court has jurisdiction to entertain petitions in the first instance. Cal Const art VI, §10; *People v Romero* (1994) 8 C4th 728, 737, 35 CR2d 270; *In re Van Heflin* (1976) 58 CA3d 131, 135, 128 CR 257. See *Griggs v Superior Court* (1976) 16 C3d 341, 344, 128 CR 223. However, if the petition could have been filed in a lower court, the petition must explain why it is being filed in the reviewing court. Cal Rules of Ct 8.380(a), 8.384(a)(1). See Petition for Writ of Habeas Corpus (Judicial Council Form MC-275), item 18.

When the petitioner has not first sought relief in the superior court, and demonstrates no compelling reason for the reviewing court to exercise its original habeas corpus jurisdiction, the reviewing court may refuse to entertain the petition on the ground that it should have been brought in the superior court. See *In re Hillery* (1962) 202 CA2d 293, 294, 20 CR 759 (court of appeal).

The reviewing courts are particularly likely to refuse to exercise their original habeas corpus jurisdiction when it appears that an evidentiary hearing will be necessary; the courts of appeal and the California Supreme Court are reviewing courts and are not designed to resolve evidentiary questions. Even when the reviewing court concludes that the petitioner acted reasonably in bypassing the lower court, it may transfer the petition to a lower court for consideration. See *People v Seijas* (2005) 36 C4th 291, 307, 30 CR3d 493.

A petition filed in these courts that requires the taking of evidence can be made returnable before the superior court. *In re Hochberg* (1970) 2 C3d 870, 873, 87 CR 681.

If the petition is unrelated to an appeal, filing should ordinarily be in the superior court. If the petition concerns issues related to a pending appeal, the petition may be filed in the court of appeal in the first instance. If the petition is being filed solely to preserve or exhaust issues for federal review, filing in the supreme court in the first instance might also be considered.

Petitioners should file in the county and district where they are held if they are challenging conditions of confinement or in the county and district where they were tried if challenging the grounds for confinement. *In re Roberts* (2005) 36 C4th 575, 583, 31 CR3d 458; *Griggs v Superior Court* (1976) 16 C3d 341, 347, 128 CR 223; *In re Lumbert* (1980) 113 CA3d 310, 311, 169 CR 927.

NOTE: Practices vary among counties regarding assignment of writ petitions for hearing and review. When considering whether to file the petition in the superior court, counsel should determine if the petition will be assigned to the trial judge on the case, a panel of judges assigned on a rotating basis, or a single writ judge.

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§10.6 B. Procedures in Court of Appeal and Supreme Court

Denial of relief on habeas corpus cannot be appealed. *In re Crow* (1971) 4 C3d 613, 621 n8, 94 CR 254. If the superior court rules adversely on an issue presented by a petition, an original petition for a writ of habeas corpus must be filed in the court of appeal. If relief is denied by the court of appeal, petitioner may either ask the supreme court to review the denial of the petition (Cal Rules of Ct 8.388) or file a new, original petition for writ of habeas corpus in the California Supreme Court. The supreme court has stated a preference for a petition for review. *In re Reed* (1983) 33 C3d 914, 918 n2, 191 CR 658, overruled on other grounds in *In re Alva* (2004) 33 C4th 254, 292, 14 CR3d 811.

Denial of the writ by the superior court after an order to show cause was issued may be reviewed by another petition for a writ of habeas corpus to the court of appeal, followed by a petition for review in the California Supreme Court. *In re Hochberg* (1970) 2 C3d 870, 873 n2, 87 CR 681; *In re Michael E.* (1975) 15 C3d 183, 193 n15, 123 CR 103.

In some instances, however, the appellate court may appoint a referee who, after a hearing, files a report from which the appellate court writes an opinion. See, *e.g., In re Sakarias* (2005) 35 C4th 140, 151, 25 CR3d 265; *In re Weber* (1974) 11 C3d 703, 114 CR 429. This procedure eliminates the necessity of filing another petition in the court of appeal if the superior court renders an adverse decision.

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§10.7 C. Venue

Although neither the California Constitution nor the habeas corpus statutes set territorial limits to habeas corpus jurisdiction, the courts have adopted venue rules in habeas cases. The general rule is that petitions challenging a judgment or sentence should be heard in the county in which the trial and sentence took place, and those challenging conditions of confinement should be heard in the county where the petitioner is being held. See *In re Roberts* (2005) 36 C4th 575, 582, 31 CR3d 458; *Griggs v Superior Court* (1976) 16 C3d 341, 347, 128 CR 223.

When a habeas corpus petition challenging the terms of the judgment is filed in superior court, the court has discretion to transfer the petition to the county in which the judgment was rendered; when such a petition challenges conditions of confinement, the court may transfer the petition to the county in which the petitioner is confined. Cal Rules of Ct 4.552(b). When a habeas corpus petition is filed in the Court of Appeal, the court may deny the petition without prejudice if it challenges (1) a judgment or order made by a court not within its appellate district, or (2) conditions of confinement or conduct of correctional officials outside its district. The court must explain the basis of the denial and must identify the appropriate court in which to file the petition. Cal Rules of Ct 8.385(c)(3).

The court that rendered the original judgment must be given the first opportunity to rule on a petition challenging the denial of parole or a finding of unsuitability for parole. Cal Rules of Ct 8.385(c)(2); *In re Roberts, supra*. When such a petition is filed in a superior court other than the one that rendered the judgment, the court must transfer it to the court that rendered the judgment. Cal Rules of Ct 4.552(c). When such a petition is filed in the court of appeal, the reviewing court must deny it without prejudice. Cal Rules of Ct 8.385(c)(2).

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D. Filing Requirements

§10.8 1. In the Superior Court

The rules of court do not specify the number of copies of the petition that should be filed in superior court; however, many courts permit the petitioner to file the original without any additional copies and a single copy of any supporting documents. An attorney representing a habeas corpus petitioner should check local rules and practices to determine whether additional copies should be filed.

PRACTICE TIP: Many counties employ writs clerks or writs attorneys who staff the writs judge or writs panel. If your county has such clerks or attorneys, they can be of tremendous assistance in answering questions about process or procedures.

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§10.9 2. In the Court of Appeal

Habeas corpus proceedings in the court of appeal are governed by Cal Rules of Ct 8.380-8.388. When filing a habeas corpus petition in the court of appeal, a pro se, incarcerated petitioner must use the judicial council form. Cal Rules of Ct 8.380(a). However, for good cause, a court may permit the filing of a petition that is not on that form. Cal Rules of Ct 8.380(a). The petitioner must file the original and one set of any supporting documents. Cal Rules of Ct 8.380(c). An attorney filing a petition and memorandum in the court of appeal must file an original and four copies of the petition and memorandum and one set of any separately bound supporting documents. Cal Rules of Ct 8.44(b), 8.384(c). The petition and memorandum must comply with the requirements of Cal Rules of Ct 8.204(a)-(c) regarding such items as format, tables, and length. Cal Rules of Ct 8.384(a). Rule 8.204 regarding the length of briefs does not apply to memoranda accompanying petitions related to sentences of death. Cal Rules of Ct 8.384(a)(2). Documents submitted to support a petition are governed by Cal Rules of Ct 8.384(b) and 8.486(c).

Supporting documents may either be bound together at the end of the petition or bound in a separate volume. If bound separately, only one copy of the exhibits need be filed. Cal Rules of Ct 8.44(b)(5), 8.486(c)(3). The documents must be consecutively numbered and index tabbed by number or letter and cannot exceed 300 pages. There must be a table of contents listing each exhibit. Cal Rules of Ct 8.486(c)(1).

Returns filed in the court of appeal are governed by Cal Rules of Ct 8.386.

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§10.10 3. In the Supreme Court

Whether filed pro se or by counsel, an original and 10 copies of the petition plus an original and two copies of separately bound supporting documents must be filed in the supreme court unless the court orders otherwise. Cal Rules of Ct 8.44(a)(2)-(3), 8.380(c), 8.384(c). An attorney filed petition and memorandum must comply with the requirements of Cal Rules of Ct 8.204 and 8.40 regarding such items as format, tables, and supporting documents. Cal Rules of Ct 8.384(a). Rule 8.204 regarding the length of briefs does not apply to memoranda accompanying petitions related to sentences of death. Cal Rules of Ct 8.384(a)(2). Supporting documents must comply with the requirements of Cal Rules of Ct 8.384(b)-(c) and 8.486(c)(1)-(2).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.11 E. Service Requirements

§10.11 E. Service Requirements

Superior court. Under Cal Rules of Ct 4.551(a)(1), a habeas corpus petition filed in the superior court must be served in accordance with Pen C §1475, which provides:

> Whenever the person applying for a writ of habeas corpus is held in custody or restraint by any officer of any court of this state or any political subdivision thereof, or by any peace officer of this state, or any political subdivision thereof, a copy of the application for the writ must in all cases be served upon the district attorney of the county wherein the person is held in custody or restraint at least 24 hours before the time at which said writ is made returnable and no application for the writ can be heard without proof of service in cases where the service is required.

Due to the lack of clarity concerning who should be served, counsel is advised to consult local rules or the superior court clerk's office to ensure correct compliance.

Reviewing courts. Although not specifically required by the rules of court, the ordinary practice when filing the habeas corpus petition in conjunction with an appeal is to serve the petition and exhibits on all parties entitled to receive service of the appellant's briefs. See Cal Rules of Ct 8.25, 8.212(c). When ineffective assistance of counsel is alleged, the attorney who is the subject of the challenge should also be served. Counsel may consult with the court clerk about service requirements before filing the petition. If counsel has been appointed to represent the defendant on appeal, the appellate project that recommended the appointment may be able to provide assistance. For a list of appellate projects, see §2.21.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.12 IV. HABEAS CORPUS PROCEDURES IN SUPERIOR COURT

§10.12 IV. HABEAS CORPUS PROCEDURES IN SUPERIOR COURT

California Rules of Court 4.551 regulates habeas corpus procedure in the superior court. The rule establishes a timetable for handling habeas corpus petitions, places limitations on certain "ex parte communications," substitutes the term "denial" in place of the outdated term "traverse," and requires the court to issue a brief statement of the reasons for denying a petition.

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§10.13 A. Assignment to Superior Court Judge

The court must rule on a petition for a writ of habeas corpus within 60 days after the petition is filed; if the court fails to rule within 60 days of its filing, then the petitioner may file a "notice and request for ruling." Cal Rules of Ct 4.551(a)(3). A declaration accompanying this notice must state that the petitioner has not received a ruling on the petition, and must include the date on which the petition was filed and the date of the notice and request for ruling. A copy of the petition must be attached. Cal Rules of Ct 4.551(a)(3). On receipt of this notice, the presiding judge or designee must assign the petition to a judge and place it on the nonappearance calendar for decision within 30 days. Cal Rules of Ct 4.551(a)(3). For purposes of this rule, the court will be deemed to have ruled on the petition if it issues an order to show cause, requests an informal response, or denies the petition. Cal Rules of Ct 4.551(a)(4).

Under Pen C §859c, a petition for a writ of habeas corpus should not be assigned to the trial court judge whose ruling is the subject of the petition. *Fuller v Superior Court* (2004) 125 CA4th 623, 23 CR3d 204. In Los Angeles County, the superior court rules provide for assignment of a habeas petition to a judge other than the judge whose order or ruling is sought to be reviewed. LA Sup Ct R 6.32.

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§10.14 B. Informal Response

Before ruling on the petition, the court may request an informal response from the respondent or real party in interest or it may request the custodian of any record pertaining to the petitioner's case to produce the record or a certified copy of the record and file it with the court clerk. Cal Rules of Ct 4.551(b)(1). The court must send a copy of the request to the petitioner. Cal Rules of Ct 4.551(b)(2). Any informal response must be served on the petitioner and filed within 15 days. Cal Rules of Ct 4.551(b)(2). Copies of any records or documents filed with the court must be served on the petitioner. Cal Rules of Ct 4.551(b)(2). For good cause shown, the court may shorten or extend the time for complying with any request it makes under Rule 4.551. Cal Rules of Ct 4.551(h).

A request for informal response is *not* a substitute for granting the writ or issuing an order to show cause. The response and reply are intended as aids to the court in determining whether the petition states a prima facie case, and should be directed to this issue. The reviewing court may not grant relief without first issuing the writ or an order to show cause. *People v Romero* (1994) 8 C4th 728, 35 CR2d 270.

The word informal refers to responding in a letter rather than a brief. However, the informal response in superior court is usually in motion format, which contains cursory denials and briefing on the merits. Counsel should keep in mind that each county has its own local practices regarding format and procedures, including page limits, presentation of exhibits, extension requests, etc. The appellate project, the local public defender, or the writs staff of the superior court can be helpful sources of information about local practice. For a list of the appellate projects, see §2.21.

PRACTICE TIP: When the petition is filed in the superior court, the District Attorney's Office normally responds.

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§10.15 C. Reply to Informal Response

Any reply to the informal response must be filed within 15 days of the date of service of the informal response. Cal Rules of Ct 4.551(b)(2).

The court must issue an order to show cause or deny the petition for writ of habeas corpus within 45 days after receipt of the informal response. Cal Rules of Ct 4.551(a)(5). The court may not, however, deny the petition until after it has received the petitioner's reply to the informal response or the 15-day response period has elapsed. Cal Rules of Ct 4.551(b)(3).

Even if the informal response is inadequate or does not fully address the petition, the petitioner should include a full argument on the merits in the informal reply. The petitioner should always be cognizant that he or she has the burden in habeas petitions and that the petition can be denied at any stage of the proceedings.

PRACTICE TIP: Issuance of a request for informal briefing should be considered an indication that the court is interested in the petition, *i.e.,* petitioner has his or her foot in the door; but it does not indicate that the door is open. Consequently, in the informal reply petitioner must convince the court to take a further step by issuing an order to show cause. Do not save anything for later. There may be no later.

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§10.16 D. Issuance of Order to Show Cause

If the petitioner states a prima facie case for relief, the court must issue an order to show cause. Cal Rules of Ct 4.551(c); *Durdines v Superior Court* (1999) 76 CA4th 247, 249, 90 CR2d 217. "An order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition." Cal Rules of Ct 4.551(c)(3); see *People v Romero* (1994) 8 C4th 728, 740, 35 CR2d 270. In determining whether a prima facie case exists, the court accepts the facts stated in the petition as true and "makes a preliminary assessment" whether the petitioner would be entitled to relief if those facts were established. Cal Rules of Ct 4.551(c)(1).

NOTE: Historically and under the statutory procedures, the writ of habeas corpus issues when the petitioner states a prima facie case for relief. Pen C §1476. The writ does not grant relief, it merely orders the petitioner's custodian to bring the petitioner before the court. In modern practice, both the superior court and the appellate courts have deviated from the statutory procedure by substituting the order to show cause procedure for issuing the writ. The only practical difference is that the order to show cause does not require the petitioner to be brought before the court. See generally *Romero,* 8 C4th at 738. If counsel determines, the presence of the defendant is critical to the proceeding, counsel should inform the trial court and request that the defendant be transported to local custody.

NOTE: The order to show cause in a habeas case is somewhat analogous to the issuance of an alternative writ of mandate or prohibition. There is no peremptory writ in habeas corpus. *People v Romero* (1994) 8 C4th 728, 742, 35 CR2d 270.

The court does not have authority to issue an OSC that requires the respondent to respond to claims not expressly raised by the petitioner in the petition for writ of habeas corpus. *Board of Prison Terms v Superior Court* (2005) 130 CA4th 1212, 1235, 31 CR3d 70.

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§10.17 E. Discovery

Unless the defendant has received the death penalty or a sentence of life without the possibility of parole (see Pen C §1054.9), discovery is not available in a habeas proceeding until an OSC has been issued. "The nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis." *In re Scott* (2003) 29 C4th 783, 814, 129 CR2d 605. By analogy to the reciprocal discovery provisions of Pen C §§1054-1054.10, it is appropriate for the court to order the petitioner to provide discovery to the respondent. 29 C4th at 814.

In the rare case in which no party has requested discovery and the court believes discovery is necessary to ensure a full and fair hearing and a determination of the case, the court has the discretion to order discovery on its own motion. *Board of Prison Terms v Superior Court* (2005) 130 CA4th 1212, 1241, 31 CR3d 70. In addition, exculpatory evidence should be provided regardless of the issuance of an OSC. *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194; *People v Garcia* (1993) 17 CA4th 1169, 22 CR2d 545.

Under Pen C §1054.9, discovery may be available in death penalty cases and cases involving life without the possibility of parole even before the defendant files a habeas corpus petition. To be eligible for prepetition discovery, the defendant must first make a good faith effort to obtain discovery materials from trial counsel. Pen C §1054.9(a). On a showing that such efforts were made and were unsuccessful, the court must give the defendant access to materials in the possession of the prosecution and law enforcement officials that would have been available to the defendant at trial. Pen C §1054.9(a)-(b); *Hurd v Superior Court* (2006) 144 CA4th 1100, 1106, 50 CR3d 893.

NOTE: Penal Code §1054.9 does not require defense counsel to prove the actual existence (or a good faith belief in the actual existence) of specified materials in order to obtain a postconviction discovery order. *People v Superior Court (Maury)* (2006) 145 CA4th 473, 485, 51 CR3d 670.

On the scope of discovery materials made available by Pen C §1054.9, see *In re Steele* (2004) 32 C4th 682, 10 CR3d 536; *People v Superior Court (Maury)* (2006) 145 CA4th 473, 51 CR3d 670; *Hurd v Superior Court* (2006) 144 CA4th 1100, 1106, 50 CR3d 893 (defendant entitled to *Pitchess* discovery (see *Pitchess v Superior Court* (1974) 11 C3d 531, 535, 113 CR 897)) even though trial counsel did not make *Pitchess* motion).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.18 F. Return to Petition

§10.18 F. Return to Petition

The person on whom the order to show cause is served may, within 30 days of issuance of the order, file a return justifying restraint of the defendant. Cal Rules of Ct 4.551(d). The return "must allege *facts* tending to establish the legality of the petitioner's detention." *People v Duvall* (1995) 9 C4th 464, 476, 37 CR2d 259 (emphasis in original; citation and internal quotation marks omitted). See also *People v Romero* (1994) 8 C4th 728, 737, 35 CR2d 270; *In re Lewallen* (1979) 23 C3d 274, 277, 152 CR 528. The purposes of this requirement are to (1) assist the court by narrowing the facts that must be decided to those actually in dispute, and (2) enable the petitioner to further focus the facts in the traverse. *People v Duvall, supra*.

The supreme court explained the function of the return in *In re Lawler* (1979) 23 C3d 190, 194, 151 CR 833, as follows:

> The return to the order to show cause… becomes the principal pleading, analogous to a complaint in a civil proceeding. The factual allegations of the return will be deemed true unless the petitioner in his traverse denies the truth of the respondent's allegations and either realleges the facts set out in his petition, or by stipulation the petition is deemed a traverse. (*In re Saunders* (1970) 2 Cal.3d 1033, 1047-1048 [88 Cal.Rptr. 633, 472 P.2d 921].) The issues are thus joined, and if there are no disputed material factual allegations, the court may dispose of the petition without the necessity of an evidentiary hearing.

The statutory requirements for the return are set forth in Pen C §1480. They are "not very extensive." *People v Duvall* (1995) 9 C4th 464, 475, 37 CR2d 259. The respondent must state whether he or she has custody of the petitioner, state the authority under which the petitioner is restrained, attach a copy of any written authority for the restraint, and provide detailed information about any transfer of the custody of the petitioner that may have taken place. Pen C §1480. As "the function of habeas corpus has evolved to permit judicial inquiry into a variety of constitutional and jurisdictional issues," the courts have "required more of the return than mere compliance with the literal language of section 1480." 9 C4th at 476.

The return should therefore allege facts that tend to show that the petitioner is lawfully in custody. More than the existence of a judgment and sentence are required. The factual allegations in the return must be responsive "to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful." 9 C4th at 476. The return should also incorporate documentary evidence, affidavits or declarations, and any other materials that will enable the court to determine what facts are actually in dispute. 9 C4th at 476.

NOTE: Prosecutors and other government officials should take note of Pen C §§4750-4758, which authorize reimbursement from the state for costs associated with state prisoners, including preparation for habeas corpus hearings. District attorneys rely on Pen C §4750(c) to bill the state for costs in preparing returns to petitions for writs of habeas corpus.

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§10.19 1. General Denial of Petition's Allegations Ordinarily Insufficient

In *People v Duvall* (1995) 9 C4th 464, 37 CR2d 259, the California Supreme Court disapproved the practice of simply denying the truth of petitioner's factual allegations in the return, holding that such a "general denial" is insufficient to place the facts alleged in the petition in dispute. 9 C4th at 480.

WARNING: If the return contains only a general denial, the facts alleged in the petition will be deemed to have been admitted. *People v Duvall* (1995) 9 C4th 464, 480, 37 CR2d 259. See also *In re Lewallen* (1979) 23 C3d 274, 278, 152 CR 528 (by offering only general denial of petitioner's claims, return indicated willingness to rely on trial record; hence evidentiary hearing unnecessary).

Under Cal Rules of Ct 4.551(d), "[a]ny material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding."

In *In re Serrano* (1995) 10 C4th 447, 455, 41 CR2d 695, the court warned: "If the People do not file a return, they forego the opportunity to participate in the court's determination of the merits of the petitioner's claim. [Citation.]… Under these circumstances, it would be proper for the court to *accept as true* the petitioner's undisputed factual allegations in the absence of a reference hearing, and to decide the merits of the case accordingly." (Emphasis added.) The court may not, however, *reject* the uncontested factual allegations of the petitioner without first conducting an evidentiary hearing unless the trial record (including the court's own internal documents) contradicts petitioner's factual assertions. 10 C4th at 456.

PRACTICE NOTE: If the respondent fails to file a return, the petitioner is left in a difficult position; he or she cannot file a denial when no return is filed. After the period for filing a return is well past, petitioner might consider filing a motion to grant the petition, asserting that respondent failed to allege facts tending to establish the legality of petitioner's detention. See Pen C §1480; *People v Duvall* (1995) 9 C4th 464, 478, 37 CR2d 259 (by failing to dispute facts, respondent "effectively admitted" them); *In re Sixto* (1989) 48 C3d 1247, 1252, 259 CR 491 (when respondent failed to dispute facts, court granted petition without evidentiary hearing).

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§10.20 2. When Affirmative Pleading Not Required

Affirmative pleading is not required in certain situations in which information to controvert the petitioner's allegations is not readily available. In such a situation, the respondent "can allege: (i) he or she has acted with due diligence; (ii) crucial information is not readily available; and (iii) that there is good reason to dispute certain alleged facts or question the credibility of certain declarants." *People v Duvall* (1995) 9 C4th 464, 485, 37 CR2d 259. Thus, affirmative pleading will not be required when, for example, the petition alleges ineffective assistance of counsel and trial counsel cannot or will not speak to respondent or when resolution of the factual allegations of the petition depends on assessment of witness credibility. 9 C4th at 484. In addition, when the petition relies on the declaration of an expert, respondent need not present counterdeclarations "at this early stage in the proceedings" but may instead inform the court that he or she intends to dispute the expert's credibility. 9 C4th at 485.

In such cases, "the return should set forth with specificity: (i) why information is not readily available; (ii) the steps that were taken to try to obtain it; and (iii) why a party believes in good faith that certain alleged facts are untrue." 9 C4th at 485. If such allegations are made, the court evaluating the matter "should endeavor to determine whether there are facts legitimately in dispute that may require holding an evidentiary hearing." 9 C4th at 485.

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§10.21 3. Return Must Be Responsive to Allegations of Petition

The petition frames the issues that will be heard in the habeas corpus proceeding. In determining whether the petition states a prima facie case for relief, the court will consider only those grounds actually alleged in the petition. When the court issues an OSC, it directs respondent to address only the grounds specified in the OSC. *In re Clark* (1993) 5 C4th 750, 781, 21 CR2d 509. The return, therefore, must be responsive to the allegations of the petition. *People v Duvall* (1995) 9 C4th 464, 477, 37 CR2d 259; *In re Connor* (1940) 16 C2d 701, 711, 108 P2d 10. See, *e.g.*, *People v Green* (1980) 27 C3d 1, 43 n28, 164 CR 1, overruled on other grounds in *People v Martinez* (1999) 20 C4th 225, 239, 83 CR2d 533 (in concurrent appeal and habeas corpus proceeding, respondent used return to offer evidence undermining one of defendant's contentions on appeal; court struck prejudicial affidavit from return as not responsive to habeas petition).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.22 G. Denial (Traverse)

§10.22 G. Denial (Traverse)

Within 30 days after the respondent serves and files the return, the petitioner may file a denial. Cal Rules of Ct 4.551(e). This pleading, historically known as the traverse, is analogous to the answer in civil actions. *In re Lewallen* (1979) 23 C3d 274, 277, 152 CR 528.

The denial is an exceedingly important part of the habeas corpus proceedings, because any material fact alleged in the return and not controverted in the denial will be deemed true. Cal Rules of Ct 4.551(e); see *In re Lawler* (1979) 23 C3d 190, 194, 151 CR 833. Thus, unless the petitioner and the respondent stipulate that the petition be treated as the denial, the petitioner should file a denial that denies the factual allegations in the and realleges the facts set out in the petition. 23 C3d at 194.

The denial may

- Deny and controvert any facts in the return;
- Raise questions of law;
- Object to the sufficiency of the return; or
- Allege facts to show that the defendant is entitled to the relief sought.

The denial should follow the general form of the petition. See generally *In re Saunders* (1970) 2 C3d 1033, 88 CR 633, for discussion of the procedures involved.

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§10.23 H. Evidentiary Hearing

The court must grant or deny the petition or hold an evidentiary hearing within 30 days after the denial is filed or the time for filing the denial has expired. Cal Rules of Ct 4.551(f). After considering the pleadings and documentary evidence submitted in the case, the court must hold an evidentiary hearing if "the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact." Cal Rules of Ct 4.551(f). "The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise." Cal Rules of Ct 4.551(f).

The main reason for holding an evidentiary hearing in a habeas matter, rather than deciding factual issues on declarations and affidavits, is to obtain credibility determinations. *In re Scott* (2003) 29 C4th 783, 824, 129 CR2d 605. If the matter is referred to a referee for determination of the disputed factual issues, the referee's factual findings are entitled to great weight if they are supported by substantial evidence. *In re Visciotti* (1996) 14 C4th 325, 345, 58 CR2d 801. A referee's conclusions of law or resolution of mixed questions of fact and law are reviewed independently. 14 C4th at 345.

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§10.24 I. Release Pending Decision

After conviction there is no right to release on bail; however, the court has discretion to set bail or release the petitioner on his or her own recognizance pending determination of the writ. See *In re Smiley* (1967) 66 C2d 606, 613, 58 CR 579; *In re Newbern* (1960) 53 C2d 786, 788, 3 CR 364.

It should be noted that in connection with release generally a habeas corpus writ may discharge the prisoner from the excess portion of the restraint without releasing the prisoner from all restraint. *Neal v State* (1960) 55 C2d 11, 9 CR 607.

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§10.25 J. Denial of Petition

An order denying the petition must include a brief statement of the reasons for the denial. Cal Rules of Ct 4.551(g).

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V. HABEAS CORPUS PROCEEDINGS IN REVIEWING COURTS

A. In Court of Appeal

§10.26 1. After Denial in Superior Court

There is no direct appeal from the denial of a habeas corpus petition, and no discretionary review of the denial of a habeas petition by the superior court. There is, however, a standard procedure followed by petitioners and California courts: If the superior court denies the petition, a new petition for writ of habeas corpus can be filed in the court of appeal for the appellate district in which the superior court is located. Although the new petition is technically an "original petition," the court of appeal will in effect review the decision of the superior court. Thus, if an evidentiary hearing has been held in the superior court, the court of appeal will deferentially review the lower court's factual findings. See, *e.g., In re Wright* (1978) 78 CA3d 788, 801, 144 CR 535. On California's distinctive review procedures in habeas corpus proceedings, see generally *Carey v Saffold* (2002) 536 US 214, 221, 153 L Ed 2d 260, 268, 122 S Ct 2134.

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§10.27 2. Filing Original Petition

A habeas corpus petitioner may also file an original petition in the court of appeal in the first instance. However, in this situation, the court of appeal has discretion to deny the petition on the ground that it was not presented first to the lower court. *In re Ramirez* (2001) 89 CA4th 1312, 1316, 108 CR2d 229; *In re Hillery* (1962) 202 CA2d 293, 294, 20 CR 759.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.28 3. Filing Petition in Conjunction With Appeal

§10.28 3. Filing Petition in Conjunction With Appeal

Appellate counsel may file a habeas petition in conjunction with an appeal when the issues in the petition relate to issues raised in the direct appeal or rely on the appellate record. Often, a petition is filed in conjunction with an appeal when direct appeal is procedurally unsatisfactory or when it is necessary to utilize facts outside the record. A petition for habeas corpus filed in conjunction with a direct appeal from conviction permits appellate counsel to raise issues and present further evidence outside the appellate record.

PRACTICE NOTE: If the petition is being filed in conjunction with an appeal, the cover to the petition should contain the notice "Related Appeal Pending" and the first paragraph should state the title of the case and the trial and appellate docket numbers. See Cal Rules of Ct 8.380(a), 8.384(a)(1); Petition for Writ of Habeas Corpus (Judicial Council Form MC-275), item 17 requiring notification of any pending petition, appeal, or other matters. See also Cal Rules of Ct 8.486(a)(3) (writs of mandate, certiorari, and prohibition in the courts of appeal and supreme court). In addition, if the appellate record is necessary to resolve the petition, a request for judicial notice must be filed. See §§4.35, 4.48.

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§10.29 4. Evidentiary Hearings

If the court of appeal concludes that an evidentiary hearing is necessary, the hearing will be held in the superior court. The order to show cause may make the petition returnable in the reviewing court after a reference hearing in superior court. More frequently, however, the order to show cause will make the petition returnable in the superior court. See also §§10.5-10.6.

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§10.30 B. In California Supreme Court

No appeal lies from the denial of a petition for writ of habeas corpus. *In re Clark* (1993) 5 C4th 750, 778 n7, 21 CR2d 509; *In re Hochberg* (1970) 2 C3d 870, 87 CR 681. If it has been filed in the superior court, another original petition for a writ of habeas corpus may be filed in the court of appeal. *In re Clark, supra.* Review of denial of the petition by the court of appeal may be sought by filing a petition for review in the California Supreme Court (Pen C §1506; *In re Michael E.* (1975) 15 C3d 183, 193 n15, 123 CR 103) or by filing an original petition for habeas corpus in that court (*In re Catalano* (1981) 29 C3d 1, 171 CR 667). The supreme court has stated a preference for a petition for review. *In re Reed* (1983) 33 C3d 914, 918 n2, 191 CR 658, overruled on other grounds in *In re Alva* (2004) 33 C4th 254, 292, 14 CR3d 811.

NOTE: Penal Code §1237 authorizes the defendant in a criminal case to appeal from a final judgment (§1237(a)) and from an "order made after judgment, affecting the substantial rights" of the defendant (§1237(b)). Although it might appear that the denial of a petition for writ of habeas corpus is an order made after judgment affecting the substantial rights of the defendant, denial of a habeas corpus petition is not an appealable order. See *People v Gallardo* (2000) 77 CA4th 971, 986, 92 CR2d 161 (criticizing *People v Wax* (1972) 24 CA3d 302, 304, 101 CR 289, which held without analysis that defendant could appeal denial of habeas corpus); *People v Garrett* (1998) 67 CA4th 1419, 79 CR2d 803.

Note also that, although in *Gallardo* Division Four of the First Appellate District exercised its discretion to treat a purported appeal from the denial of a petition for writ of habeas corpus as a new writ petition, the court warned litigants that in the future it would not be so accommodating. *People v Gallardo* (2000) 77 CA4th 971, 976, 92 CR2d 161.

The petition for habeas should set forth whether any prior application for the writ has been made. Pen C §1475. A second application for a writ to a court that has already denied an earlier petition ordinarily will be denied unless there has been an intervening change in the facts or law.

When a petition for writ of habeas corpus has been denied by the superior court after an evidentiary hearing and a new application for habeas corpus based on the transcript of that hearing is made in the court of appeal, the latter will apply the same standard of review as used by a writ court that has appointed a referee. The appellate court will independently evaluate the evidence and make its own factual determinations, but will accord great weight to the superior court's findings, especially concerning witnesses' credibility. *In re Wright* (1978) 78 CA3d 788, 801, 144 CR 535.

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§10.31 C. Habeas Corpus Review in Death Penalty Cases

The California Supreme Court has adopted and maintains published standards for timely preparation and filing of habeas corpus petitions and for compensation of appointed counsel in death penalty cases. See Supreme Ct Policies Regarding Cases Arising From Judgments of Death (effective June 6, 1989, as amended Sept. 28, 1989-Jan. 1, 2008) (hereinafter, Supreme Ct Policies), Policy 3. These policies are available on the Judicial Council website at http://www.courtinfo.ca.gov/courts/supreme/dpenalty.htm.

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§10.32 VI. Prosecution's Appeal From Order Granting Writ

The state may appeal to the court of appeal from an order of the superior court made on the return of a writ of habeas corpus discharging a defendant or granting all or any part of the relief sought. Pen C §1506; see Cal Rules of Ct 8.388. See, *e.g., In re Chol Soo Lee* (1980) 103 CA3d 615, 163 CR 204; *In re Garcia* (1977) 67 CA3d 60, 136 CR 461; *In re Fain* (1976) 65 CA3d 376, 135 CR 543. As with other appeals to courts of appeal from superior court judgments, the losing party in the court of appeal may petition the supreme court for review. See, *e.g., In re Earley* (1975) 14 C3d 122, 120 CR 881; *In re Walker* (1974) 10 C3d 764, 112 CR 177; *In re Berry* (1968) 68 C2d 137, 65 CR 273. In cases in which judgment of death has been imposed and a superior court grants the defendant habeas corpus relief, the prosecution's appeal under Pen C §1506 is directly to the California Supreme Court. Cal Const art VI, §11.

Pending hearing on the state's appeal from an order of the superior court granting the defendant relief, the defendant will be admitted to bail or released on his or her own recognizance subject to the same conditions applicable to persons awaiting trial. Pen C §1506. See *People v Huff* (1975) 46 CA3d 361, 120 CR 210 (petitioner released before appeal). Note also the procedure followed by the supreme court in *In re Caudillo* (1980) 26 C3d 623, 629, 164 CR 692, staying an immediate release order of the court of appeal before its hearing on the merits of the habeas corpus claim. While the appeal is pending, the trial court lacks jurisdiction to enter any further order on the merits. *People v Superior Court (Gregory)* (2005) 129 CA4th 324, 28 CR3d 276.

On appeal from an order granting the writ, the appellate court can set aside the relief granted by the superior court, as illustrated by the courts in *Earley, Walker, Garcia,* and *Fain.* However, if the order granting the writ is affirmed on the prosecution's appeal or if no appeal is taken by the state under Pen C §1506, the doctrine of res judicata applies to the issues decided when the superior court ruling becomes final. *People v Amsbary* (1975) 51 CA3d 75, 78, 125 CR 546; *In re Crow* (1971) 4 C3d 613, 622, 94 CR 254. Note that an order to show cause does not constitute a final appellate court decision on questions of law in favor of the petitioner under the law of the case doctrine. *In re Hochberg* (1970) 2 C3d 870, 875 n4, 87 CR 681.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/ VII. FORMS/§10.33 A. Form: Petition for Writ of Habeas Corpus (Judicial Council Form MC-275)

VII. FORMS

§10.33 A. Form: Petition for Writ of Habeas Corpus (Judicial Council Form MC-275)

Name: _____

Address: _____

_____

_____

CDC or ID Number: _____

_____

_____

(Court)

_____

Petitioner

vs.

_____

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Form Approved for Optional Use
Judicial Council of California
MC-275 [Rev. January 1, 2010]

CEB

Penal Code, § 1473 at seq.;
Cal. Rules of Court, rule 8.380
www.courtinfo.ca.gov

This petition concerns:

- ☐ A conviction
- ☐ Parole
- ☐ A sentence
- ☐ Credits
- ☐ Jail or prison conditions
- ☐ Prison discipline
- ☐ Other *(specify)*: _____

1. Your name: _____
2. Where are you incarcerated? _____
3. Why are you in custody? ☐ Criminal conviction ☐ Civil commitment

   Answer items a through i to the best of your ability.

   a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

   _____

   _____

   b. Penal or other code sections: _____

   c. Name and location of sentencing or committing court: _____

   _____

   d. Case number: _____

   e. Date convicted or committed: _____

   f. Date sentenced: _____

   g. Length of sentence: _____

   h. When do you expect to be released? _____

   i. Were you represented by counsel in the trial court? ☐ Yes ☐ No *If yes, state the attorney's name and address:*

   _____

   _____

4. What was the LAST plea you entered? *(Check one)*:

   ☐ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

   ☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

b. Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. **Ground 2 or Ground** _____ *(if applicable):*

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

   b. Result: _____ c. Date of decision: _____
   d. Case number or citation of opinion, if known: _____
   e. Issues raised: (1) _____
      (2) _____
      (3) _____
   f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:
   a. Result: _____ b. Date of decision: _____
   c. Case number or citation of opinion, if known: _____
   d. Issues raised: (1) _____
      (2) _____
      (3) _____
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

   b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
      Attach documents that show you have exhausted your administrative remedies.

Print

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes If yes, continue with number 13. ☐ No If no, skip to number 15.

13. a. (1) Name of court: _____

(2) Nature of proceeding (for example, "habeas corpus petition"): _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

_____

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

_____

16. Are you presently represented by counsel? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

_____

_____

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No If yes, explain:

_____

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

_____

_____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

▶ _____

(SIGNATURE OF PETITIONER)

Comment: Use of this form is mandatory for pro se petitioners, but optional for attorneys. See §10.3. For a sample

attorney-drafted petition, see California Criminal Law Forms Manual §42.4 (2d ed Cal CEB 2005).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/10 Preparing and Opposing Petition for Writ of Habeas Corpus/§10.34 B. Form: Sample Petition for Writ of Habeas Corpus to Appellate Court

§10.34 B. Form: Sample Petition for Writ of Habeas Corpus to Appellate Court

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ APPELLATE DISTRICT, _ _[*DIVISION* _ _ _ _]_ _

_ _[*Name*]_ _,	**)**	**No. _ _ _ _ _ _**
	)	**(Related Appeal Pending,**
Petitioner,	**)**	**No. _ _ _ _ _ _)**
	)	**PETITION FOR WRIT OF**
On Habeas Corpus.	**)**	**HABEAS CORPUS**
_____)		

_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for _ _[name of client*]_ _]_ _

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

_ _[*Name*]_ _,	**)**	**No. _ _ _ _ _ _**
Petitioner,	**)**	
	)	**PETITION FOR WRIT OF**
On Habeas Corpus	**)**	**HABEAS CORPUS**
	)	
_____)		

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _ _ APPELLATE DISTRICT _ _[*, DIVISION* _ _ _ _]_ _:

Petitioner, _ _[*name*]_ _, by and through his attorney, _ _[*name*]_ _, petitions for a writ of habeas corpus and by this verified petition states as follows:

I

Petitioner is unlawfully incarcerated and restrained at _ _[*name and location of prison*]_ _, California, by _ _[*name*]_ _, Director of the California Department of Corrections, pursuant to a judgment pronounced by the _ _ _ _ _ _ County Superior Court, in Case No. _ _ _ _.

II

By information filed _ _[*date*]_ _, in the _ _ _ _ _ _ County Superior Court, petitioner was charged with _ _[*e.g., auto theft (Veh C §10851)*]_ _. (CT _ _-_ _) At arraignment on _ _[*date*]_ _, petitioner pled not guilty. (CT _ _ _ _.)

III

Petitioner was convicted of _ _[*e.g., auto theft*]_ _ after a jury trial, and judgment of conviction and sentence to state prison were imposed on _ _[*date*]_ _. (CT_ _, _ _.)

IV

The judgment of conviction is presently on appeal before this Court in Case No. _ _ _ _. Petitioner's opening brief was filed on _ _[*date*]_ _.

V

Petitioner's imprisonment is unlawful because:

Ground 1:

[*State legal basis of first claim*]

Petitioner was deprived of his right under the Sixth Amendment to the Constitution of the United States and article I, section 15 of the California Constitution to the effective assistance of counsel before trial, and was thereby prejudiced. Trial counsel was ineffective in that he failed to _ _[*e.g., file a motion to suppress evidence pursuant to Penal Code §1538.5*]**_ _. It is reasonably probable that a result more favorable to petitioner would have occurred if trial counsel had _ _**[*e.g., filed a motion to suppress the evidence*]**_ _ because _ _**[*e.g., the only evidence linking petitioner to the charged crime was obtained during a warrantless search of defendant's home that was not justified by any exception to the warrant requirement*]**_ _.**

The facts supporting the above ground for relief are as follows:

[*State factual basis of claim.*]

[*To avoid summary denial, the petitioner's factual allegations must, if proved, be sufficient to entitle the petitioner to relief. All factual allegations should be supported by evidence, to the extent it is available. Documentary evidence and declarations supporting the claims should be attached to the petition as exhibits, and factual allegations should refer to the exhibits. When the petition is factually related to a pending appeal, it is appropriate to ask the court to take judicial notice of the record on appeal, and, as was done here, to cite to the record in the petition.*]

[*If necessary evidence is unavailable, include a declaration summarizing what you expect it to show, and explaining why the evidence is unavailable and what steps you have taken to obtain it. If an evidentiary hearing will be necessary to determine the truth of the allegations in the petition, set forth the facts you expect to establish in the evidentiary hearing.*]

Ground 2:

[*State legal basis of claim*]

[*It is likely that most or all grounds will be predicated on a claim of ineffective assistance of counsel, by far the most common allegation in habeas corpus petitions. All known grounds for relief should be included in the petition. A later petition alleging as a ground for relief a claim that could have been included in the original petition will likely be deemed procedurally barred. There is no limit on the number of grounds for relief a petitioner may allege.*]

The facts supporting the above ground for relief are as follows:

[*State factual basis of claim*]

VI

Petitioner has not previously presented the ground(s) set forth in paragraph V to this or any other court, state or federal, in any petition, motion, or application, except insofar as presented in petitioner's direct appeal pending before this Court in Case No. _ _ _ _. Appellant's _ _[*opening brief/reply brief*]**_ _ _ _**[*was filed/is due*]**_ _ on _ _**[*date*]**_ _.**

VII

Petitioner has no plain, speedy, or adequate remedy at law. The issues presented in this habeas corpus petition cannot be fairly considered on direct appeal, because facts necessary to a determination of the issues are outside the record on appeal and cannot be obtained by augmentation of the record.

VIII

This petition is being presented in the first instance to this Court, under its original habeas corpus jurisdiction, because petitioner's direct appeal and accompanying record on appeal are presently pending before this Court.

IX

Petitioner moves that this petition be heard and decided concurrently with his direct appeal in Case No. _ _ _ _.

X

Petitioner hereby incorporates by reference the accompanying memorandum and the declarations contained in the appendices attached hereto. Petitioner's claims in this petition will be based on the petition, the accompanying memorandum, the attached declarations, and all records, documents, and pleadings on file with this Court in petitioner's direct appeal and any further material to be developed at any future hearing that may be ordered.

XI

Petitioner hereby requests that this Court take judicial notice of the record on appeal and the briefs filed and lodged with this court in Case No. _ _ _ _, currently pending in this Court (Evidence Code §§452, 459). Reproducing the record for use in connection with this petition would entail unnecessary expense since this Court and counsel for respondent already have a copy of the record and all pleadings.

WHEREFORE, petitioner respectfully requests that this Court:

1. Consolidate this habeas corpus proceeding with Case No. _ _ _ _;

2. Take judicial notice of the record and pleadings in the above-mentioned appeal;

3. Order respondent to show cause why petitioner is not entitled to the relief sought;

4. Conduct an evidentiary hearing to answer the factual questions necessary to determine the merits of petitioner's claim;

5. After full consideration of the issues raised by this petition, grant the petition, vacate the _ _[*date*]_ _ judgment of conviction of the _ _ _ _ _ _ County Superior Court in Case No. _ _ _ _; and

6. Grant such other and further relief as may seem just under the circumstances.

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature*]__
_ _[*Name of attorney*]_ _
Attorney for Petitioner

[*Start on new page*]

VERIFICATION

_ _[*Name of attorney*]_ _ **declares as follows:**

I am an attorney admitted to practice law in the State of California. _ _[*E.g., I have been appointed by this Court to represent petitioner in his direct appeal to this Court and have been authorized by this Court, in an order dated* _ _[*date*]_ _*, to prepare the accompanying petition for a writ of habeas corpus.*]_ _

I make this verification because petitioner is incarcerated at the California State Prison in _ _ _ _ _ _, California, which is outside the county in which my office is located, and because the matters stated in the petition for writ of habeas corpus are more within my knowledge than his.

I have read the foregoing petition for writ of habeas corpus, and declare that the contents of the petition are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this _ _ day of _ _ _ _ at _ _ _ _ _ _, California.

Respectfully submitted,
__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

MEMORANDUM

ARGUMENT

I

HABEAS CORPUS IS A PROPER VEHICLE FOR THE PRESENTATION OF PETITIONER'S CLAIM

The claim asserted in this petition is that the petitioner was deprived of his constitutional right to the effective assistance of counsel. This constitutional claim cannot be presented as strongly on appeal as it is herein because its factual basis rests in part on evidence in addition to that contained in the record on appeal. (See *In re Hochberg* (1970) 2 Cal.3d 870, 875.) Although habeas corpus cannot serve as a second appeal, denial of the right to counsel is a claim cognizable on habeas corpus whether or not it was raised on appeal. Id. Because trial counsel failed to bring a motion to suppress evidence, evidence necessary to determine the merits of such a motion was not developed at trial and therefore is not a part of the record on appeal.

Furthermore, as stated in *People v. Pope* (1979) 23 Cal.3d 412, 426:

> **"Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of… For example, counsel may explain why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence."**

Trial counsel's declaration, in which he states that he had no tactical reason for failing to bring a motion to suppress evidence is attached to this petition as Exhibit A.

II

THIS HABEAS CORPUS PETITION SHOULD BE CONSOLIDATED WITH PETITIONER'S DIRECT APPEAL

This habeas corpus petition contests the legality of the judgment of conviction and sentencing order entered _ _[*date*]_ _, in _ _[*name and number of case*]_ _. Petitioner has appealed his conviction to this Court and petitioner's direct appeal is pending in case number _ _ _ _.

When, as here, a petitioner seeks habeas corpus relief in conjunction with a pending direct appeal, it is appropriate for the reviewing court to consolidate the two proceedings so that all claims may be heard and resolved at one time in a single forum. (*In re Baker* (1988) 206 Cal.App.3d 493, 496; *People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 17.)

III

TRIAL COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS EVIDENCE UNDER PENAL CODE §1538.5 DEPRIVED PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL

A defendant in a criminal matter is entitled, under the Sixth and Fourteenth Amendments to the United States Constitution and under article I, §15 of the California Constitution, to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 US 668; *People v Pope* (1979) 23 Cal.3d 412.) To provide effective assistance counsel must provide representation equivalent to that which would be provided by a "reasonably competent… attorney acting as [a] diligent conscientious advocate." (*People v Pope, supra,* 23 Cal.3d at p. 423, italics omitted) Reasonableness is measured under "prevailing professional norms." (*Strickland v Washington, supra,* 466 U.S. at p. 688.)

To prevail on a claim of ineffective assistance, petitioner must show that his trial attorney's representation fell below prevailing professional norms, and that he was prejudiced by this failure, *i.e.,* that it is reasonably probable that the result would have been different but for counsel's error. (*Strickland v Washington, supra,* 466 U.S. at p. 694; *People v Fosselman* (1983) 33 Cal.3d 572, 584.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v Washington, supra,* 466 U.S. at p. 694.)

[*Continue with factual and legal argument that supports the assertion that the error petitioner complains of was one that a reasonably competent advocate would not have made, and show what effect trial counsel's error had on the outcome of the trial.*]

[*The petitioner must not attempt to incorporate arguments from the appeal brief into the petition. However, pertinent portions of the argument in appellant's brief may simply be copied into the petition.*]

CONCLUSION

For the foregoing reasons, petitioner's present confinement pursuant to his conviction in Case No. _ _ _ _ _ _ is illegal, and a writ of habeas corpus should issue.

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature*]__
_ _[*Name of attorney*]_ _
Attorney for Petitioner

WORD-COUNT CERTIFICATE

In accordance with Cal Rules of Ct 8.384(a)(1)-(2) and 8.204(c)(1), I hereby certify that the memorandum in support of the attached petition for writ of habeas corpus contains _ _[*number*]_ _ words, as ascertained by the word-count function of the computer program used to prepare the memorandum.

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature*]__
_ _[*Name of attorney*]_ _
Attorney for Petitioner

[*Note, this word-count certificate need not be filed for memoranda accompanying petitions in habeas corpus proceedings related to death sentences. Cal Rules of Ct 8.384(a)(2).*]

[*Start on new page*]

EXHIBIT A

DECLARATION OF _ _[*Trial Counsel*]_ _

I, _ _[*Trial Counsel*]_ _, declare as follows:

1. I am an attorney at law, and I represented _ _[*name of petitioner*]_ _ at his trial in _ _ _ _ _ _ County Superior Court Case No. _ _ _ _. In that case, Mr. _ _[*name*]_ _ was convicted after a jury trial of a felony, a violation of Vehicle Code §10851.

2. I was the second attorney to represent Mr. _ _[*name*]_ _. He was previously represented by assistant Public Defender Ian Brown. On _ _[*date*]_ _, just two weeks before the trial the court relieved the public defender and appointed me to represent Mr. Jones, Mr. Brown advised me that all pre-trial investigation and preparation were complete. I did not undertake or have sufficient opportunity to fully investigate and explore all possible pre-trial motions and defenses. I relied on the representations made to me by Mr. Brown.

3. Specifically, because of the shortness of time, the representations of Mr. Brown, and the need to prepare for trial, I failed to investigate and request a motion to suppress evidence pursuant to Penal Code section 1538.5. The motion would have been based on the illegality of the inspection and search of the subject automobile by Officer E. Green and would, if granted, have resulted in the suppression of his testimony and its "fruits," including the DMV documents found in the car and the testimony of Officer Black and the car owner, Mr. Blue.

4. My failure to bring such a motion was not based on any tactical considerations. Because of the immediate need for trial preparation, I never considered the possibility of bringing the motion.

5. I now believe that a pretrial motion to suppress evidence under Penal Code §1538.5 was potentially meritorious and should have been made. Had such a motion been granted, the People's case most likely would have been dismissed.

I declare under penalty of perjury that the foregoing is true and correct. Executed at _ _ _ _ _ _, California, on _ _[*date*]_ _.

__[*Signature*]__
Trial Attorney
Declarant

Comment: All habeas corpus petitions, no matter where filed, must be verified, and must include certain essential allegations. The petition must assert a wrongful infringement of a liberty interest, although actual confinement is not necessary. See, *e.g., In re Martinez* (1978) 86 CA3d 577, 150 CR 366 (habeas corpus used to challenge condition of probation); *In re Kristin H.* (1996) 46 CA4th 1635, 54 CR2d 722 (habeas corpus used to challenge parent's loss of custody in dependency action). It must allege facts that, if proved, establish both error and prejudice. It must allege facts demonstrating that there is no other adequate remedy. In addition, it must include information about the legal proceedings that establish either (1) the absence of procedural default or (2) the existence of an adequate excuse for any default. See Cal Rules of Ct 4.551(a)(2) (attorney-drafted petition "must contain the pertinent information specified in Judicial Council Form MC-275 (Petition for Writ of Habeas Corpus), including the information required regarding other petitions, motions, or applications filed in any court with respect to the conviction, commitment, or issue"). See also Cal Rules of Ct 8.384(a)-(b).

The sample petition contains all the necessary parts of a petition submitted to a reviewing court. It must be bound in red manuscript covers, and must include a table of contents and a table of authorities. Cal Rules of Ct 8.40, 8.204, 8.384. The sample petition also contains a number of clauses for use in a petition filed in conjunction with a pending appeal.

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§10.35 C. Form: Order to Show Cause Re Writ of Habeas Corpus

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

[*Title of court*]

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER TO SHOW CAUSE RE**
_____	)	**WRIT OF HABEAS CORPUS**

It is hereby ordered that the Sheriff of the County of _ _ _ _ _ _ show cause before Department _ _ _ _ _ _ of this Court, in Room No. _ _, _ _[*address*]_ _, __ __[*city*]_ _ on _ _[*date*]_ _, at _ _ _.m., why a writ of habeas corpus should not issue commanding the Sheriff to have the body of _ _[*name*]_ _, imprisoned and detained, before the Honorable _ _[*name*]_ _, Judge of the Superior Court for the County of _ _ _ _ _ _, State of California.

A copy of petition for writ of habeas corpus is attached.

_ _[*The prisoner is to be released on _ _[the posting of bail in the amount of _ _[dollar amount*]_ _/_ _[*his/her*]_ _ *own recognizance*]_ _ *pending disposition of the order to show cause.*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

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11

Writs of Error Coram Nobis and Coram Vobis

Morgan Prickett

I. NATURE OF WRIT §11.1
- A. Petitioner Must Not Be Seeking Relief That Could Be Obtained From a Statutory Remedy §11.2
- B. Petitioner Must Be Diligent in Presenting Petition §11.3
- C. Motion to Vacate Judgment Considered Writ of Coram Nobis or Coram Vobis §11.4

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Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.1 I. NATURE OF WRIT

§11.1 I. NATURE OF WRIT

The terms "coram nobis" and "coram vobis" refer to the same type of writ. However, the writ of coram nobis is addressed to the trial court; coram vobis is the name commonly used at the appellate level. The origins of the writ trace back to an era in England before direct appeals and new trial motions were available. The grounds for relief via a writ of coram nobis or coram vobis are narrower than on habeas corpus. The purpose of the writ is to obtain relief from errors of fact that were not presented to the court and that if known would have prevented the rendition and entry of the judgment. Though available in civil as well as criminal cases, the writ is used almost exclusively to attack judgments in criminal cases.

The writ of error coram nobis or coram vobis will lie only on the concurrence of all the following conditions:

- At the time of judgment, an error of fact existed;
- The fact does not appear in the record and does not involve the merits of issues already tried or admitted by the defendant;
- The fact was not introduced at trial either
- Because it was not discovered at the time of trial, without the fault or negligence of the defendant, or
- Because of duress, fraud, or excusable mistake;
- Knowledge of the fact would have prevented the rendition of the judgment; and
- No other remedy, particularly a statutory remedy, exists to correct the error.

See *People v Kim* (2009) 45 C4th 1078, 1091, 90 CR3d 355; *People v Shipman* (1965) 62 C2d 226, 230, 42 CR 1; *People v Banks* (1959) 53 C2d 370, 378, 1 CR 669; *People v McElwee* (2005) 128 CA4th 1348, 27 CR3d 448; *People v Carty* (2003) 110 CA4th 1518, 1523 n4, 2 CR3d 851.

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§11.2 A. Petitioner Must Not Be Seeking Relief That Could Be Obtained From a Statutory Remedy

Although coram nobis has a limited codification (see Pen C §1265), it is fundamentally a common law remedy. It operates only to the extent it is not in conflict with statutory remedies. When the legislature provides a statutory remedy that supplants the common-law scope of coram nobis, its availability is reduced accordingly. *People v Reid* (1924) 195 C 249, 255, 232 P 457, overruled on other grounds by *People v Hutchinson* (1969) 71 C2d 342, 347, 78 CR 196; *People v Mooney* (1918) 178 C 525, 529, 174 P 325. Errors of fact that were, could have been, or should have been reviewed using any statutory remedy are excluded. *People v Kim* (2009) 45 C4th 1078, 1091, 90 CR3d 355; *In re Sprague* (1951) 37 C2d 110, 114, 230 P2d 633. But see *People v Thomas* (1959) 52 C2d 521, 528, 342 P2d 889 (coram nobis available when claim is that judgment is void).

The principle of statutory exclusion is properly understood as primarily one of timing and explanation. It is not the abstract availability of a statutory remedy that is dispositive, but the time at which the defendant obtained the information upon which the coram nobis petition is based. If the information comes to the defendant when a statutory remedy is available, but it is not used, the information cannot thereafter be used in coram nobis. *Kim*, 45 C4th at 1093. Conversely, the fact that a statutory remedy was available has no preclusive effect if the defendant was unaware of the decisive fact at a time when the statutory remedy was available.

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§11.3 B. Petitioner Must Be Diligent in Presenting Petition

The petitioner must allege and prove diligence in (1) discovering the facts and (2) presenting the petition. The most common reason for denial of the writ of coram nobis, aside from failing to make out a prima facie case for relief, is delay in filing the petition.

The petitioner must set forth in the petition and accompanying affidavits the probative facts on which the petitioner bases his or her claim. The petitioner must show that the new facts presented were not known to him or her and that he or she could not, in exercising due diligence, have discovered them at any time substantially earlier than the time of the petitioner's motion for the writ. *People v Shipman* (1965) 62 C2d 226, 230, 42 CR 1. In so doing, the petitioner should include "*the time and circumstances under which the facts were discovered*," so that "the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient." *People v Kim* (2009) 45 C4th 1078, 1096, 90 CR3d 355 (emphasis added by court) quoting *People v Shorts* (1948) 32 C2d 502, 513, 197 P2d 330. See also *People v Welch* (1964) 61 C2d 786, 40 CR 238.

The petition must be brought within a reasonable time after the judgment has been rendered. *People v Vernon* (1935) 9 CA2d 138, 49 P2d 326. An unexplained delay of 8 months was too long in *People v Krout* (1949) 90 CA2d 205, 202 P2d 635. In *People v Butterfield* (1940) 37 CA2d 140, 99 P2d 310, a delay of 10 months was adequately explained, inter alia, by the fact that the defendant was transferred to prison within 2 days after judgment. In *People v Shipman* (1965) 62 C2d 226, 230, 42 CR 1, a delay of 10 months was said not to show a lack of diligence. In *People v Welch* (1964) 61 C2d 786, 793, 40 CR 238, the court accepted the petition, saying that

> Although [defendant] first became aware of his brain damage more than a year before his petition was filed, defendant spent the intervening period bolstering his case, filling the gaps in his medical history, and securing assistance. We recognize his difficulty in establishing facts such as those at issue here while imprisoned in San Quentin. Promptly after securing a psychiatric evaluation of such facts, defendant instituted this proceeding.

However, a nearly 2-year delay in instituting coram nobis proceedings following appeal was criticized in *People v Brady* (1973) 30 CA3d 81, 105 CR 280. Responding to the argument that medical reports before the trial court that showed the petitioner's low level of intelligence required the court to suspend proceedings to determine his present sanity, the appellate court declared that this fact was known "from the very beginning" to the petitioner, trial counsel, and appellate counsel. 30 CA3d at 86. See also *People v Kim, supra,* (filing petition 7 years after INS first attempted to deport petitioner fails to demonstrate due diligence).

NOTE: The court in *People v Kim,* 45 C4th at 1101, analogizing to a long standing rule regarding writs of habeas corpus, identified another procedural barrier to bringing a writ of coram nobis. The court stated that a petitioner seeking relief via coram nobis "may not attack a final judgment in a piecemeal fashion, in proceedings filed seriatim, in the hopes of finally convincing a court to issue the writ." A petition for coram nobis that is successive and improperly raises claims piecemeal will fail as procedurally defective.

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§11.4 C. Motion to Vacate Judgment Considered Writ of Coram Nobis or Coram Vobis

An attack on a judgment by motion to vacate will be treated as a proceeding for a writ of error coram nobis, whether it is called by that name or not. *People v Griggs* (1967) 67 C2d 314, 316, 61 CR 641; *People v Williams* (1965) 238 CA2d 585, 587, 48 CR 67. See *People v Kim* (2009) 45 C4th 1078, 1096, 90 CR3d 355. Penal Code §1265 appears to treat a motion to vacate the judgment and a petition for a writ of error coram nobis as equivalent, and either title appears to be correct. At the trial level, the preferable title is "petition for a writ of error coram nobis." *People v Wade* (1959) 53 C2d 322, 339, 1 CR 683, disapproved on another ground in *People v Carpenter* (1997) 15 C4th 312, 381, 63 CR2d 1.

When the same remedy is sought in the court of appeal or appellate division of the superior court (*i.e.,* the court that affirmed the judgment on appeal), the title of the writ is coram vobis. "The conventional language of this writ in the King's Bench makes reference to the record 'which remains before us' [the king], *quae coram nobis resident."* In the Common Pleas the form of the writ was *coram vobis,* "'before you' (the judges)." *People v Reid* (1924) 195 C 249, 254, 232 P 457, overruled on other grounds by *People v Hutchinson* (1969) 71 C2d 342, 347, 78 CR 196. See *People v Welch* (1964) 61 C2d 786, 40 CR 238; *In re Wessley W.* (1981) 125 CA3d 240, 181 CR 401.

In *People v Brady* (1973) 30 CA3d 81, 105 CR 280, the defendant had previously been convicted in three separate cases and the judgments had been affirmed on appeal. The defendant filed a petition for writ of error coram nobis in the trial court, which was denied. On appeal, the court of appeal held that the trial court did not have jurisdiction to act on the petition under Pen C §1265 and treated the appeal as an original proceeding before it for a writ of error coram vobis because "the writ of *coram vobis* is essentially identical to the writ of *coram nobis* except the latter is addressed to the court in which the petitioner was convicted." 30 CA3d at 83.

If the trial court judgment was never appealed, the petition for a writ of coram nobis should be lodged in the trial court. *People v Esquibel* (1975) 44 CA3d 591, 118 CR 748. After a notice of appeal has been filed, however, the trial court loses jurisdiction and application must be made to the appellate court, even if the appeal is still pending. *People v Haynes* (1969) 270 CA2d 318, 75 CR 800.

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II. USES OF WRIT

§11.5 A. Used After Judgment to Withdraw Guilty Plea Wrongfully Induced

A motion to withdraw a plea of guilty before judgment and sentence is a statutory proceeding under Pen C §1018 and traditionally has been more liberally construed than coram nobis.

A defendant who pleads guilty and is sentenced usually does not appeal when he or she seeks a change in the judgment. Instead, he or she seeks to withdraw the plea. Technically, a plea cannot be withdrawn after judgment, but the writ of error coram nobis has become a popular method of vacating the plea of guilty. If issued, the writ vacates the judgment and the order issuing the writ also vacates the plea of guilty. The defendant is restored to the procedural position of having been arraigned and is now asked how he or she pleads to the charge, the same posture he or she would have been in had he or she been able to withdraw the plea.

Customarily, a defendant seeking to withdraw his or her guilty plea alleges that the plea was wrongfully induced. In *People v Gilbert* (1944) 25 C2d 422, 154 P2d 657, the court recognized the right to a writ of coram nobis in this situation. The court set forth four requirements for issuance of the writ:

- Unqualified factual representation of lesser punishment or immunity;
- Apparent substantial corroboration by acts or statements of a responsible state officer;
- Good faith reliance by the defendant; and
- A showing that the representation resulted in a substantial deprivation of the defendant's exercise of free will and judgment.

In *Gilbert,* the defendant's attorney made the false representation of a plea bargain. A comparable rule applies to representations made by "responsible public officials." *People v Wadkins* (1965) 63 C2d 110, 45 CR 173. In *Wadkins,* the court stated (63 C2d at 114):

> Whether the proceeding should be treated as one in *coram nobis* or as one arising out of a motion to vacate a judgment the right to relief is clear. Appellant has alleged that his decision to plead guilty was predicated solely upon his reliance on a promise of probation made to him by three responsible public officials, one of whom was the law enforcement officer in charge of the investigation and prosecution of his case. He has alleged that that promise was not kept. He has also alleged that he is innocent of the crime charged, and that he can prove that fact on a new trial. Although he may fail in his attempt to prove any or all of these allegations, there is no denial of them in the record, nor was there at the time his motion was denied.

In *People v Delles* (1968) 69 C2d 906, 73 CR 389, the court held that a defendant must be allowed to withdraw a guilty plea based on a plea bargain that included a grant of probation if the probation is revoked.

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§11.6 B. Other Uses

The following cases suggest other possible grounds for issuance of writs of error coram nobis:

- To reinstate a plea of not guilty by reason of insanity. See *People v Welch* (1964) 61 C2d 786, 40 CR 238. But see *People v Tucker* (1957) 154 CA2d 359, 316 P2d 417.
- To vacate a judgment of conviction when the underlying plea of guilt was based on duress, fraud, or other fact overcoming the defendant's free will. *People v Wadkins* (1965) 63 C2d 110, 114, 45 CR 173; *People v Goodrum* (1991) 228 CA3d 397, 400, 279 CR 120.
- To vacate a judgment of guilt because the defendant was insane at the time of trial but this fact was not known to court and counsel. *People v Vaughn* (1966) 243 CA2d 730, 52 CR 690.
- To vacate a judgment after a guilty plea based on error about the age of the prosecutrix on a statutory rape charge. See *People v Gourdin* (1938) 26 CA2d 494, 79 P2d 782.
- To vacate a judgment of guilt when a defendant was under age and this fact was not known at trial. See *People v Thompson* (1949) 94 CA2d 578, 211 P2d 1.
- To vacate a judgment after a guilty plea was entered under a threat of mob violence. See *People v Perez* (1908) 9 CA 265, 98 P 870.
- To vacate a judgment when the police suppressed material evidence, *e.g.,* the confession of another. *People v Tate* (1955) 136 CA2d 31, 288 P2d 149 (ordering hearing on unchallenged allegations in petition).
- To vacate a judgment after a guilty plea because the trial court failed to advise the defendant of the immigration consequences of the plea as required by Pen C §1016.5. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 199, 96 CR2d 463. But see *People v Carty* (2003) 110 CA4th 1518, 1523 n4, 2 CR3d 851 (affirming denial of coram nobis petition but remanding to trial court for further consideration as motion to vacate authorized by Pen C §1016.5).
- To vacate a judgment when the prosecution suppressed evidence that was favorable to the defense or that was ordered to be produced at trial by the court, or when there was perjury by the prosecution. See *In re Rosoto* (1974) 10 C3d 939, 112 CR 641.
- To vacate a judgment vulnerable to challenge for fundamental jurisdictional defects. *People v Thomas* (1959) 52 C2d 521, 528, 342 P2d 889.

Note that, in most of the cases cited above, appellate courts upheld the trial court's denial of relief. A hearing on the merits in the trial court was ordered in the remaining cases.

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III. LIMITATIONS ON RELIEF

§11.7 A. Rules

Coram nobis is not intended to be used to authorize a court to review its opinion nor to obtain an adjudication of issues or errors that could have been remedied or corrected on a motion for new trial or on an appeal from the judgment; nor is it a catchall by which those convicted may endlessly relitigate the legality of their convictions. See *People v Lempia* (1956) 144 CA2d 393, 301 P2d 40.

The writ of error coram nobis will not lie when an error of law occurred. *People v Kim* (2009) 45 C4th 1078, 1093, 90 CR3d 355; *People v Reid* (1924) 195 C 249, 258, 232 P 457, overruled on other grounds by *People v Hutchinson* (1969) 71 C2d 342, 347, 78 CR 196 (coram nobis "never issues to correct an issue of law"); see *People v Ibanez* (1999) 76 CA4th 537, 544, 90 CR2d 536.

Furthermore, although coram nobis will lie when it is alleged that a fact that was unknown at the time of the trial or plea would have changed the outcome of the proceeding, relief will not be available in the following situations:

- Failure to present the fact to the court was due to the negligence of the defendant. *People v Ingles* (1950) 97 CA2d 867, 870, 218 P2d 987 (appellant pled guilty to wrong charge, but punishment was same for both charges, and error could easily have been discovered by defendant or counsel);
- The fact was or should have been discovered in time for a motion for new trial; or
- The fact was not presented to the court because of fraud to which the defendant was a party (*In re De La Roi* (1946) 28 C2d 264, 275, 169 P2d 363; *People v Gilbert* (1944) 25 C2d 422, 440, 154 P2d 657).

Furthermore, relief will be denied when the fact, if known to the court, would not have produced a different result, *i.e.,* it does not "point unerringly to innocence or reduced culpability." *In re Clark* (1993) 5 C4th 750, 766, 21 CR2d 509; *In re Kirschke* (1975) 53 CA3d 405, 414 n1, 125 CR 680. See also *In re De La Roi* (1946) 28 C2d 264, 269, 169 P2d 363 (third party confession did not point unerringly to defendant's innocence). *People v Knight* (1946) 73 CA2d 532, 535, 166 P2d 899 (same). But see *People v Tate* (1955) 136 CA2d 31, 288 P2d 149 (uncontradicted allegation in petition that police suppressed third party confession was sufficient to warrant hearing).

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§11.8 B. Examples of Insufficient Allegations

Examples of allegations deemed insufficient to warrant coram nobis relief include:

- Defendant faced possible imprisonment for refusing military service on religious grounds if deported as result of plea and conviction. *People v Kim* (2009) 45 C4th 1078, 90 CR3d 355.
- Conviction was obtained by the use of false testimony. *In re Imbler* (1963) 60 C2d 554, 560, 35 CR 293; *Mendez v Superior Court* (2001) 87 CA4th 791, 104 CR2d 839; *People v Adamson* (1949) 34 C2d 320, 327, 210 P2d 13.
- The defendant was the victim of an illegal arrest or search. *People v Sharp* (1958) 157 CA2d 205, 320 P2d 589; *People v Parseghian* (1957) 152 CA2d 1, 312 P2d 81; *People v Cahan* (1955) 135 CA2d 287, 287 P2d 6.
- The defendant was denied the effective aid of counsel. *People v Kim* (2009) 45 C4th 1078, 1104, 90 CR3d 355; *People v Adamson* (1949) 34 C2d 320, 328, 210 P2d 13; *People v Miranda* (2004) 123 CA4th 1124, 1132 n6, 20 CR3d 610.
- The defendant entered his or her plea of guilty under the threat that otherwise the prosecution would seek the death penalty. *People v Hodge* (1957) 147 CA2d 591, 305 P2d 957.
- The defendant faced double jeopardy. *People v Blalock* (1960) 53 C2d 798, 3 CR 137.
- The failure to appeal was due to the unfulfilled promise of counsel to file a notice of appeal. *People v Cowen* (1953) 118 CA2d 106, 257 P2d 79. But see §§2.7-2.8.
- The defendant discovered new evidence too late to present on a motion for a new trial. *People v Cox* (1936) 18 CA2d 283, 63 P2d 849.
- A witness was willing to repudiate his or her previous testimony and exonerate the defendant. *People v Sutton* (1953) 115 CA2d 751, 252 P2d 633.
- Defense counsel gave false advice, assurances, or promises. See *People v Odlum* (1949) 91 CA2d 761, 205 P2d 1106.

In *People v Whitton* (1952) 112 CA2d 328, 246 P2d 60, the court ruled that habeas corpus, not coram nobis, was the proper way to attack the validity of a prior conviction. In *People v Kim*, *supra,* the court noted, however, that defendants who have completely served their sentence and who are no longer on probation or parole may not use habeas corpus petitions to challenge the prior conviction. 45 C4th at 1107. The court further refused the invitation to expand coram nobis to create a generalized common law postconviction, postcustody remedy.

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IV. Filing Petition

§11.9 A. Procedure

A writ of coram nobis (or vobis) is an order of the court correcting its own judgment. Thus, the petition ordinarily should be filed in the court that entered the judgment. *People v Superior Court* (*Eid*) (1938) 28 CA2d 442, 82 P2d 718. However, while an appeal is pending from a defendant's conviction, jurisdiction to vacate the judgment or grant other relief by way of coram vobis rests exclusively with the appellate court. *People v Haynes* (1969) 270 CA2d 318, 75 CR 800. Thus, the trial court's order granting a writ of error coram nobis was reversed but the appellate court did so "without prejudice to defendant's applying to this court for *coram nobis* relief while his appeal from the judgment of conviction is pending." 270 CA2d at 322. (The court mistakenly used the term coram nobis instead of coram vobis.)

A petition for writ of error coram nobis requires filing the original with the trial court and serving one copy on the prosecuting attorney. It is good practice to have one copy for office files and one for the client.

A petition for writ of error coram vobis requires filing the original with the appellate court, four copies if to a court of appeal (Cal Rules of Ct 8.44(b)), and 13 copies if to the California Supreme Court. Cal Rules of Ct 8.44(a). Copies should also be served on the prosecuting attorney and the Attorney General. One copy is needed for office files and one for the client. See §11.24 on filing fees.

The attorney should consult local court rules and Cal Rules of Ct 2.100-2.119 on the form and content of papers presented for filing in the superior court, and Cal Rules of Ct 8.204 and 8.486 for the proper form of papers presented for filing in the appellate courts. In addition, local rules should be consulted to determine whether a petition for writ of coram nobis or coram vobis is treated as a civil matter.

NOTE: Penal Code §1201.5 requires written notice of motion served on the prosecution at least 3 days before the hearing, together with copies of the petition and any affidavits in support of the motion.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.10 B. Form: Court and Cause in Trial Court

§11.10 B. Form: Court and Cause in Trial Court

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_ _[*Name of attorney and State Bar no., or pro per party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

[*Title of court*]

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. _ _ _ _ _ _**
Plaintiff and Respondent,	)	**PETITION FOR WRIT OF ERROR CORAM NOBIS**
vs	)	
_ _[*Name*]_ _, **Defendant and Petitioner.**	)	

To _ _[*name*]_ _, Clerk of the Superior Court; to _ _[*name*]_ _, Judge of the Superior Court in and for the County of _ _ _ _ _ _, State of California, Department _ _[*number*]_ _; and to _ _[*name*]_ _, District Attorney of the County of _ _ _ _ _ _:

Comment: If no appeal from the judgment was taken, an application for relief by coram nobis must first be made to the trial court in which judgment was rendered. *People v Superior Court (Eid)* (1938) 28 CA2d 442, 82 P2d 718. The petition is addressed to the trial judge in the trial court.

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§11.11 C. Filing in Court of Appeal

After appeal from the judgment, the writ must be initiated in the court that affirmed the judgment on appeal. Pen C §1265. *People v Allenthorp* (1966) 64 C2d 679, 51 CR 244. In the appellate court, the petitioner's appellate heading may be used with the appellate case number as the reference.

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D. Pleadings—Trial Court or Appellate Court

§11.12 E. Form: Opening Paragraphs

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11.12-1 Opening paragraphs

Petition for Writ of Error Coram _ _[*Nobis/Vobis*]_ _ __ to vacate a judgment rendered against petitioner and entered on or about _ _[*date*]_ _, in the Superior Court of the State of California for the County of _ _ _ _ _ _, Superior Court Case No. _ _ _ _ _ _

Petitioner respectfully represents that:

1. Petitioner was arraigned on _ _[*date*]_ _, under an _ _[*information/indictment voted by the Grand Jury of _ _ _ _ _ _ County*]_ _, alleging that _ _[*he/she*]_ _ violated Penal Code §_ _[*e.g., 487 (grand theft)*]_ _ of the State of California in that petitioner did unlawfully

[*Insert wording of indictment or information*]

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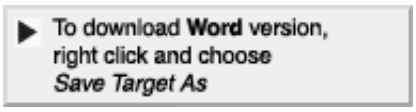
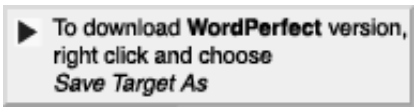
§11.13 1. Form: Common Facts and Grounds





11.13-1 Common facts and grounds

2. Thereafter on or about _ _[*date*]_ _, defendant entered a plea of "not guilty" to the charge in the _ _[*information/indictment*]_ _, and the cause was set for trial on _ _[*date*]_ _, in Department _ _[*number*]_ _ Superior Court; thereafter the cause was continued for trial on the following dates: To _ _[*date*]_ _, to _ _[*date*]_ _.

3. On or about _ _[*date*]_ _, petitioner withdrew _ _[*his/her*]_ _ plea of not guilty to the charge and entered a plea of guilty. The court granted leave to file a written application for probation and, time for sentence being waived, hearing on the report of the probation department and sentence was continued to _ _[*date*]_ _.

4. On _ _[*date*]_ _, the court pronounced judgment and sentence as follows: "Probation is denied, and the defendant is sentenced to state prison for the term prescribed by law." Petitioner is presently incarcerated in _ _[*name of correctional institution*]_ _ under this judgment.

[*State briefly any subsequent proceedings*]

Comment: This section and the following sections set forth typical facts in a common situation in which coram nobis would be used.

In addition to comprehensive recitals of all pertinent circumstances, such as times, persons, conditions, statements, identification of persons, and the like, strict showings of causality are required. Insufficient allegations may be deemed failure to make out a prima facie case, warranting summary denial of the petition. *People v Shipman* (1965) 62 C2d 226, 230, 42 CR 1; see *People v Sumner* (1968) 262 CA2d 409, 415, 69 CR 15 (dismissing for failure to state claims with particularity); *People v Stonom* (1956) 139 CA2d 408, 410, 293 P2d 807 (same); *People v Hemphill* (1968) 265 CA2d 156, 159, 71 CR 397 (dismissing for failure to show facts on which petition relied were unknown substantially earlier than motion to vacate). Moreover, the defendant should include allegations explaining why statutory remedies were not, or could not have been, used. See *In re Sprague* (1951) 37 C2d 110, 114, 230 P2d 633.

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§11.14 2. Form: Grounds for Writ—Misrepresentation and Corroboration

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11.14-1 Grounds for writ—misrepresentation and corroboration

5. The consent to the entry of the plea of guilty by petitioner, the forgoing of a jury trial, and the failure to protest resulted from petitioner's free will and judgment being overcome by certain untrue representations told to petitioner by petitioner's trial attorney, in substance as follows: "That the district attorney had agreed that if petitioner would waive his right to trial by jury and plead guilty, the district attorney would recommend to the court that he be given probation and a suspended sentence, and the court always follows the recommendation."

6. The untrue representations were apparently corroborated by the acts and omissions of the responsible representative of the State of California in that, immediately before the petitioner's plea and before judgment, in the presence of petitioner, petitioner's trial counsel, the arresting officers, and the alleged victim, the district attorney stated, in substance: "All that the court, the district attorney's office, and the victim want is the return of the stolen merchandise."

7. All the representations made to petitioner by the trial attorney were untrue as far as they relate to any alleged promises by the district attorney on leniency of sentence, but at the time petitioner believed the representations to be true and, relying thereon, and not otherwise, petitioner agreed to forgo a trial by jury and entered a plea of guilty.

Comment: The petition must demonstrate by clear, credible, and convincing evidence that the petitioner was deprived of substantial legal rights by extrinsic causes. See *People v Wadkins* (1965) 63 C2d 110, 45 CR 173; *People v Tucker* (1957) 154 CA2d 359, 316 P2d 417.

When misrepresentation is the basis for the writ, the specific facts must be alleged, including the facts showing the acts of the public official who apparently corroborated the misrepresentation. See *In re Nunez* (1965) 62 C2d 234, 42 CR 6; *People v Martinez* (1948) 88 CA2d 767, 199 P2d 375.

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§11.15 3. Form: Diligence of Petitioner

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11.15-1 Diligence of petitioner

8. Petitioner did not learn that these representations were untrue until after judgment and sentence had been imposed. On or about _ _[*date*]_ _, _ _[*number*]_ _ days following pronouncement of judgment, petitioner was removed from the County Jail and was sent to _ _[*name of correctional institution*]_ _, where he immediately wrote to trial counsel and the deputy district attorney, reminding them of the promise of probation and suspended sentence. On or about _ _[*date*]_ _, approximately 1 week before the filing of this petition, petitioner received the deputy district attorney's denial that any promise had been made or suggested. _ _[*That letter is attached as Exhibit _ _.*]_ _

Comment: Because lack of diligence is the most common ground for denying coram nobis (see, *e.g., People v Bobeda* (1956) 143 CA2d 496, 501, 300 P2d 97), particular attention must be paid to making the most complete and detailed showing possible.

See discussion in §11.3 concerning the diligence requirement.

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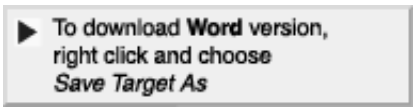
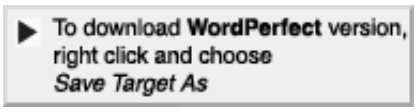
Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.16 4. Form: Petitioner's Free Will Overcome

§11.16 4. Form: Petitioner's Free Will Overcome





11.16-1 Petitioner's free will overcome

9. Long before and at the time of the purported prearrangement with the district attorney, petitioner wished to have a full trial on the merits before a jury. Petitioner's trial counsel continuously told petitioner that a judge or a jury would never believe _ _[*his/her*]_ _ defense; only after repeated delays of the trial proceedings and after constant and insistent pressures and promises were made to petitioner by _ _[*his/her*]_ _ trial attorney and others did petitioner capitulate to the demands of _ _[*his/her*]_ _ trial attorney and agree to assent to the purported prearrangement whereby petitioner would plead guilty and be granted leniency.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.17 5. Form: Existence of Meritorious Defense

§11.17 5. Form: Existence of Meritorious Defense

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11.17-1 Existence of meritorious defense

10. Petitioner has at all times and does now maintain _ _[*his/her*]_ _ innocence to the charges in the indictment; petitioner avers that _ _[*he/she*]_ _ has a good and meritorious defense to the charges in the indictment, which is in substance _ _[*briefly state defense*]_ _, and as set forth in _ _[*his/her*]_ _ affidavit, which is attached and incorporated by reference.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.18 6. Form: Reliance on Misrepresentation

§11.18 6. Form: Reliance on Misrepresentation

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11.18-1 Reliance on misrepresentation

11. Petitioner believed and relied on the representations and the seemingly corroborating acts and omissions of the parties and, but for this, petitioner would not have waived _ _[*his/her*]_ _ right to trial by jury and would not have entered a plea of guilty to the charge.

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§11.19 7. Form: Facts Not Appearing of Record; Reference to Accompanying Affidavits

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11.19-1 Facts not appearing of record; reference to accompanying affidavits

12. None of the substantial facts relating to the representations made by petitioner's trial attorney appear of record and the trial court was not aware of them when judgment was entered. Affidavits of _ _[*name*]_ _ and _ _[*name*]_ _, which contain matters in support of and in proof of the facts alleged here by petitioner, are attached and incorporated by reference; petitioner can produce the sworn testimony of the parties whose affidavits are so attached.

Comment: The petition should be accompanied by affidavits that set forth the specific facts on which the claimed error, fraud, or duress is based, the basis of a meritorious defense, and the facts that excuse any delay in bringing the petition. *People v Bailey* (1951) 105 CA2d 150, 232 P2d 518.

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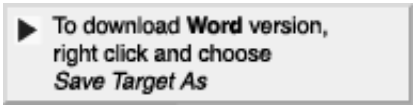
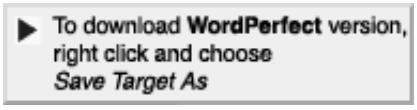
Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.20 8. Form: Exhaustion of Remedies; No Other Remedy Available

§11.20 8. Form: Exhaustion of Remedies; No Other Remedy Available





11.20-1 Exhaustion of remedies; no other remedy available

[*Add one of the following alternatives*]

[*Alternative 1]*

13. No appeal was taken from the judgment _ _[*nor other proceedings had to vacate the judgment*]**_ _, the time for appeal has passed, and petitioner has no other plain, speedy, or adequate remedy available except a Writ of Error Coram Nobis.**

[*Alternative 2]*

13. An appeal was taken from the judgment by petitioner on _ _[*date*]**_ _. Said judgment was affirmed by _ _**[*court*]**_ _and became final on _ _**[*date*]**_ _. Petitioner has no other plain, speedy, or adequate remedy available except a Writ of Error Coram Vobis.**

Comment: If other avenues of appellate relief were not attempted, the petitioner should state the reason for failing to take other action.

Although seeking relief in the trial court may not be required to exhaust remedies, if the petitioner *has* sought other relief in the trial court, for example, by filing motions or other writs to overturn the judgment, the petition should describe these proceedings and their disposition.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.21 9. Form: Prayer

§11.21 9. Form: Prayer

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11.21-1 Prayer

WHEREFORE, petitioner prays that a Writ of Error Coram _ _[*Nobis/Vobis*]_ _ be issued directing that the judgment and sentence in case number _ _ _ _ _ _ be vacated or, in the alternative, that respondent show cause, if any, why the judgment and sentence should not be set aside, and for such other and further relief as the Court may deem just and equitable.

__[*Signature of affiant*]__
_ _[*Typed name*]_ _

Comment: For filing and service information, see §11.24.

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§11.22 10. Form: Verification

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11.22-1 Verification

[*Alternative 1: By affidavit*]

State of California, County of _ _ _ _ _ _:

I, the undersigned, being first sworn, say:

I am the petitioner in this action. All facts alleged in the above document, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge.

__[*Signature of affiant*]__
_ _[*Typed name*]_ _

Subscribed and sworn to before me on _ _[*date*]_ _, at _ _[*state and county*]_ _.

__[*Signature of notary or officer*]__
_ _[*Typed name*]_ _
_ _[*Title, e.g., Notary Public*]_ _
_ _[*Notary's or officer's seal*]_ _

[*Alternative 2: By declaration under penalty of perjury*]

I am the petitioner in this action. All facts alleged in the above document, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge.

I declare under penalty of perjury that the above is true and correct and that this declaration was executed on _ _[*date*]_ _, at _ _ _ _ _ _, California.

__[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: The petition should always be verified. See Cal Rules of Ct 8.486(a)(4). Verification only on information and belief may be fatally defective.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/11 Writs of Error Coram Nobis and Coram Vobis/§11.23 F. Memorandum

§11.23 F. Memorandum

As a matter of good practice, a legal memorandum should accompany all petitions for writs.

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§11.24 G. Service and Filing

No fees are required in any court to file a petition for coram nobis or an appeal from the order denying it. Service of the petition may be made by mail with an affidavit of service appended. Three days' written notice of motion is required before a hearing may be held on a coram nobis petition. See Pen C §1201.5.

Coram nobis proceedings are civil in nature. *In re Paiva* (1948) 31 C2d 503, 505, 190 P2d 604; *People v Fowler* (1959) 175 CA2d 808, 810, 346 P2d 792, disapproved on other grounds in *In re Estrada* (1965) 63 C2d 740, 748, 48 CR 172. Rules of court permit documents in civil actions heard in the superior court to be served and filed by facsimile machine (fax), when permitted by local rule. See Cal Rules of Ct 2.300-2.306. In particular, a party can file a document containing a faxed signature, including the verification, which will be treated as an original. Cal Rules of Ct 2.305(d).

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V. HEARING AND DETERMINATION OF WRIT

§11.25 A. When Hearing and Counsel Not Required

When the petition shows that the requirements for coram nobis have not been met or the court's records demonstrate that the petition is without merit, the court may deny the petition summarily. The court has no duty to appoint counsel in the absence of factual allegations stating a prima facie case. See *People v Shipman* (1965) 62 C2d 226, 42 CR 1.

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§11.26 B. When Hearing and Counsel Required

When the coram nobis petition alleges facts with sufficient particularity to show that there are substantial legal or factual issues on which the availability of the writ turns, the court must set the matter for hearing and must appoint counsel for an indigent petitioner. *People v Shipman* (1965) 62 C2d 226, 232, 42 CR 1.

At the hearing, the court may require the presence of the petitioner and witnesses and conduct the hearing like an ordinary court trial. Or the court may decide the matter on the basis of the petition, affidavits, points and authorities, and other written reports. *People v Shipman, supra.* There is no right to a jury trial. *People v Francisco* (1966) 240 CA2d 436, 439, 49 CR 603.

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§11.27 C. Burden of Proof at Hearing

In a coram nobis hearing, the petitioner has the burden of producing clear and convincing evidence of the facts that constitute legal grounds for setting aside the judgment. *People v Grgurevich* (1957) 153 CA2d 806, 315 P2d 391. Because the petitioner is now presumed guilty (*People v Shorts* (1948) 32 C2d 502, 197 P2d 330), he or she must clearly demonstrate that, but for the error, he or she would have been acquitted or at least would have received a more favorable judgment. *People v Hayman* (1956) 145 CA2d 620, 623, 302 P2d 810. The petitioner must overcome a strong presumption of the validity of the judgment, the presumption of official duty regularly performed (see Evid C §664), and the presumption of regularity and verity in the court record. *People v Thomas* (1955) 45 C2d 433, 290 P2d 491; *People v Crouch* (1968) 267 CA2d 64, 67, 72 CR 635.

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§11.28 D. Effect of Issuance of Writ

If the court rules in favor of the petitioner, it may order the petitioner's counsel to prepare an order issuing the writ or simply vacating the judgment. The order should state the specific relief granted by the court. Issuing the order restores the parties to the positions they occupied immediately before the entry of the plea or verdict of guilty. *People v Odlum* (1949) 91 CA2d 761, 205 P2d 1106.

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VI. REVIEW OF ORDER DENYING PETITION

§11.29 A. Appeal From Order

The usual method of review of an order denying a writ of error coram nobis is to appeal through conventional channels, *e.g.,* to file a notice of appeal from denial of the petition in the superior court in the court of appeal. See *People v Wadkins* (1965) 63 C2d 110, 45 CR 173. The appeal is from the order granting or denying the petition. Entry of the order is necessary to make the granting or denial of the petition a final judgment from which an appeal may be taken. See *People v Berger* (1955) 44 C2d 459, 282 P2d 509. A writ of error coram nobis is reviewed under the standard of abuse of discretion. *People v McElwee* (2005) 128 CA4th 1348, 27 CR3d 448. No material not presented to the trial court can be considered on appeal. *People v Crouch* (1968) 267 CA2d 64, 67, 72 CR 635.

The grant or denial of a petition for writ of error coram nobis by the superior court is generally an appealable order. *People v Allenthorp* (1966) 64 C2d 679, 682, 51 CR 244. However, the reviewing court may summarily dismiss the appeal if it concludes that the petition failed to state a prima facie case for relief (*People v Totari* (2002) 28 C4th 876, 885 n4, 123 CR2d 76; *People v Kraus* (1975) 47 CA3d 568, 575 n4, 121 CR 11) or when the petition raised issues that were or could have been raised in other proceedings (*People v Vaitonis* (1962) 200 CA2d 156, 159, 19 CR 54).

The order granting a petition is appealable by the People. Pen C §1238(a)(5); *People v Gilbert* (1944) 25 C2d 422, 444, 154 P2d 657.

Appellate review of a petition for writ of coram nobis in a misdemeanor or infraction case lies in the appellate division of the superior court. No further review of the denial of a petition is available by appeal to the courts of appeal or by petition for review in the California Supreme Court (*People v Allenthorp* (1966) 64 C2d 679, 51 CR 244) unless the court of appeal orders the case transferred to itself for hearing because the court of appeal determines, or the superior court certifies, that transfer of the case to the court of appeal is necessary to secure uniformity of decision or settle important questions of law. See Pen C §1471; Cal Rules of Ct 8.1000-8.1018. If the appellate division grants the writ, it appears that the same rules apply: The prosecution may not seek review by petition for review in the California Supreme Court unless the court of appeal has first transferred the case to itself and decided the matter. Absent a statute authorizing direct appeal of the appellate division's decision, there is no provision for further review as a matter of right. But see *In re Schiering* (1979) 92 CA3d 429, 433, 154 CR 847 (order granting habeas corpus held appealable under Pen C §1506).

After a judgment has been affirmed on appeal by the appellate division of the superior court, coram vobis relief must be sought in the appellate division of the superior court rather than in the superior court generally. Pen C §1265; see *People v Allenthorp* (1966) 64 C2d 679, 682, 51 CR 244.

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§11.30 B. Certificate of Probable Cause Not Required

The requirement that a certificate of probable cause be obtained to perfect an appeal from a judgment of conviction on a plea of guilty in the superior court (Pen C §1237.5; Cal Rules of Ct 8.304(b); see §§1.12-1.13, 2.8, 2.33-2.35) does not apply to an appeal from the denial of a motion to set aside the judgment or the denial of a writ of error coram nobis. This is true even though the relief is sought to attack the validity of the guilty plea. *People v Kraus* (1975) 47 CA3d 568, 121 CR 11.

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§11.31 C. Right to Counsel on Appeal

When a hearing on the merits was required in the trial court, the appellate court must appoint counsel on appeal. See *People v Shipman* (1965) 62 C2d 226, 42 CR 1; *In re Nash* (1964) 61 C2d 491, 39 CR 205.

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§11.32 D. Presumptions on Appeal

The usual rule on appeal applies: All intendments favor the judgment of the lower court. See *People v Crawford* (1959) 176 CA2d 564, 1 CR 811. The presumption of regularity and validity exists in favor of the lower court's action (see *In re Stafford* (1958) 160 CA2d 110, 324 P2d 967) and the evidence must be considered most strongly in support of the order appealed from (*In re Gutierrez* (1954) 122 CA2d 661, 265 P2d 16). The granting or the denial of the writ is within the sound discretion of the trial court and is not to be disturbed on appeal unless an abuse of discretion is shown. *People v Blevins* (1963) 222 CA2d 801, 805, 35 CR 438, overruled on other grounds in *People v Shipman* (1965) 62 C2d 226, 233 n3, 42 CR 1.

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§11.33 E. Petition for Review in California Supreme Court

A petition to the California Supreme Court is used when the court of appeal denies an original writ of error coram vobis or affirms on appeal the judgment of the superior court denying a writ of error coram nobis. See Cal Rules of Ct 8.500. On petitions for review generally, see §§5.41-5.50.

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Review in the United States Supreme Court

Neoma D. Kenwood

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§12.1 I. SCOPE OF CHAPTER

This chapter is about discretionary review of state court judgments in the United States Supreme Court using the statutory writ of certiorari authorized by 28 USC §1257(a). The statutory writ of certiorari is available to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had" when a violation of the United States Constitution or of a federal treaty or statute is alleged. 28 USC §1257(a). Note that the statutory writ of certiorari, through which the court receives most of its caseload, is not related to the common law writ of certiorari.

Federal courts, including the U.S. Supreme Court, are authorized under 28 USC §1651 to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This empowers the court to issue the extraordinary common law writs of mandamus, prohibition, certiorari, and habeas corpus, as well as injunctions. However, it is very rare for the Supreme Court to exercise its original jurisdiction to issue one of these writs. See US Sup Ct R 20.1, 20.4(a).

Only the fundamental aspects of U.S. Supreme Court procedures are covered in this chapter. The most thorough treatment of U.S. Supreme Court procedures is Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice (9th ed 2007), hereafter cited in this chapter as Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice. Another resource is Moore's Federal Practice, chaps 401-409 (jurisdiction and practice), 505-549 (Supreme Court rules) (3d ed 1997). United States Supreme Court Rules are abbreviated in this chapter as "US Sup Ct R."

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§12.2 II. ATTORNEY AND PRO SE RESOURCES

Counsel who have questions about matters of U.S. Supreme Court procedure may wish to consult the U.S. Supreme Court Clerk's Office. The address is: Supreme Court of the United States, 1 First St., N.E., Washington, D.C. 20543; telephone: (202) 479-3011 (William K. Suter, Clerk). This number also provides access to an automated voice response system, through which callers may obtain information about the status of cases pending before the U.S. Supreme Court and may order applications for admission to the U.S. Supreme Court bar. The system is available at all times except between 3:30 a.m. and 7:30 a.m. Eastern Time, when the database is updated.

The same information and a great deal more is available through the U.S. Supreme Court's website, http://www.supremecourtus.gov. The site contains the text of Supreme Court opinions within hours after their release; orders and current docket information; current oral argument calendars; transcripts of recent oral arguments; selected merits briefs (via link to the American Bar Association); bar admission forms; the text of the U.S. Supreme Court's rules; and other matters of public information, including opinions from previous terms. The website also offers copies of the court's "Guide for Prospective Indigent Petitioners for Writs of Certiorari" ("Guide to IFP Cases"), "Guide for Counsel in Cases to be Argued" ("Guide for Counsel") and its "Electronic Merits Briefs Submission Guidelines," a memorandum regarding the format of petitions prepared in booklet format ("Guide to Paid Cases"), a memorandum regarding recent changes to the Supreme Court rules ("Memorandum to Counsel—Revisions to Rules"), and a "Paid Cases Brief Chart," listing specific information, such as page length and applicable rules for each possible pleading. The names in parentheses are used as links to the documents on the Supreme Court website. Other helpful websites are:

(1) http://www.law.cornell.edu/, the site for Cornell Law School's Legal Information Institute, which contains much of the same information available on the Supreme Court site as well as an archive of decisions by topic, author, and party; a glossary of legalese contained in decisions; and a biography and decision list for each of the justices;

(2) http://www.oyez.org, the site for the Oyez Project, which provides audio files of oral arguments of selected Supreme Court cases in MP3 or Real Audio format, an archive of decisions that can be browsed by topic or term with links to briefs, oral argument audio files, written opinions, and a virtual tour of the Supreme Court Building;

(3) http://www.supremecourthistory.org, the site for the Supreme Court Historical Society, which includes profiles of justices, historical sketches, teaching materials, and a guide entitled "Researching the Court"; and

(4) http://supreme.lp.findlaw.com, FindLaw's Supreme Court Center, which includes the current docket listing pending Supreme Court cases by oral argument date, the Supreme Court's official practice guides, biographies of justices, court history, orders, rules, opinions, summaries of cases by topic for each term dating back to 2000, and for cases on the current year's docket, a list of counsel of record, subject, questions presented, docket sheet, decisions of Supreme Court and lower courts, and briefs.

Counsel who wish to examine printed petitions, briefs, or records filed in Supreme Court cases can do so at designated law library depositories, including the Los Angeles County Law Library and the San Francisco Law Library. Some libraries subscribe to a microfiche service, which can be useful in researching material in past Supreme Court cases. For recent cases, it is now possible to access briefs (including petitions and amicus briefs) online, either at the websites of the Supreme Court (via ABA), FindLaw, or the Oyez Project, or through online services such as Lexis and WestLaw.

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§12.3 III. SUMMARY OF WAYS CASE CAN REACH UNITED STATES SUPREME COURT

If the defendant loses his or her direct appeal (as distinct from collateral relief, such as habeas corpus) in the state appellate court (the court of appeal if a felony; the superior court, appellate division if a misdemeanor) and if the state court of last resort (the supreme court in a felony case, the court of appeal in a misdemeanor or infraction case) denies discretionary review or affirms the judgment, the defendant may seek review in the U.S. Supreme Court by petition for certiorari. If a conviction is reversed by the highest court, the prosecution may seek review in the U.S. Supreme Court.

If the defendant is "in custody," he or she may file a petition for writ of habeas corpus in the state trial or appellate courts (see chaps 9-10). If the request is unsuccessfully pursued to the highest state court possible, review may be sought in the U.S. Supreme Court. Alternatively, once the petitioner has exhausted state remedies, he or she may file a petition for habeas corpus in the federal district court. If it is denied, the petitioner may appeal to the U.S. Court of Appeals and, if unsuccessful there, seek review in the U.S. Supreme Court by petition for certiorari.

It may be possible to seek review of the same federal issues in the same case in the U.S. Supreme Court more than once. For example, certiorari in the U.S. Supreme Court may be sought after unsuccessfully appealing through the state appellate courts. If certiorari is denied, it may again be sought after unsuccessfully pursuing a federal habeas corpus petition. See *Townsend v Sain* (1963) 372 US 293, 9 L Ed 2d 770, 83 S Ct 745, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 118 L Ed 2d 318, 112 S Ct 1715, in which the petitioner returned four times to the U.S. Supreme Court over an 8-year period.

Petitioners should be aware that the U.S. Supreme Court grants review in very few cases. According to the Supreme Court's website, approximately 8000 petitions are filed with the Court in the course of a term. Plenary review, with oral arguments by attorneys, is granted in about 100 cases per term, and formal written opinions are delivered in 80-90 cases.

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§12.4 IV. WHEN UNITED STATES SUPREME COURT REVIEW SHOULD BE SOUGHT

Assuming that there is a federal issue in the case that has been properly raised in the state courts (see §§14.18-14.40), U.S. Supreme Court review may be considered. There is no constitutional right to appeal to the U.S. Supreme Court after affirmance of a state court judgment of conviction and no constitutional right to have counsel appointed to assist an indigent in so appealing. *Ross v Moffitt* (1974) 417 US 600, 41 L Ed 2d 341, 94 S Ct 2437. Nonetheless, under Govt C §15421(a), the California state public defender is authorized to represent any person who is financially unable to employ counsel in appellate proceedings, including a petition for certiorari to the U.S. Supreme Court. Note that 9th Cir R §4-1(e) requires that, in the appeal of a *federal* court decision, appointed counsel prepare a petition for certiorari at the defendant's request if—but only if—"in counsel's considered judgment sufficient grounds exist for seeking Supreme Court review."

If, in the appeal of a state conviction, the client wants the case so pursued and appointed counsel declines to do so, counsel should inform the client of the time limitations and the general procedures involved so that the client can decide whether to seek such appellate review in propria persona. Counsel may also wish to provide the client with the Supreme Court's "Guide to *In Forma Pauperis* Cases," which contains helpful forms and which can easily be downloaded from the Supreme Court's website. For discussion of trial counsel's appellate obligations in capital cases, see California Criminal Law Procedure and Practice §54.59 (Cal CEB Annual).

It is unwise to seek U.S. Supreme Court review when the facts of a case are controverted or the legal issues are ill-defined. If the record is unclear in any significant way, it is wiser to resolve the loose ends through habeas corpus petitions in the state (see chaps 9-10) or federal (see chaps 13-18) courts before proceeding to the U.S. Supreme Court. Sometimes, for example, the U.S. Supreme Court may grant a petition for certiorari only to discover later when reading the briefs on the merits that the record is not clear. In such a situation, the court will dismiss the petition for certiorari as improvidently granted. See *Smith v Mississippi* (1963) 373 US 238, 10 L Ed 2d 321, 83 S Ct 1265.

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§12.5 V. EFFECT OF PETITION FOR CERTIORARI ON FEDERAL HABEAS CORPUS TIME LIMITS

The filing of a petition for certiorari may affect the time within which a federal habeas corpus petition may be filed. The effect of a pending petition for certiorari in the U.S. Supreme Court differs, depending on the procedural posture of the case in state court. Under 28 USC §2244(d)(1)(A), with rare exceptions, a federal habeas petition must be filed within 1 year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The period of direct review specified in 28 USC §2244(d)(1)(A) includes the period during which a petition for certiorari is pending in the U.S. Supreme Court. *Clay v U.S.* (2003) 537 US 522, 527, 155 L Ed 2d 88, 94, 123 S Ct 1072. Thus, if a petition for certiorari is timely filed after denial of a petition for review in the California Supreme Court on direct review, the limitations period will not begin until the U.S. Supreme Court has completed its review.

The situation is different, however, when the petition for certiorari challenges the denial of relief on state collateral review. Under 28 USC §2244(d)(2), the limitations period is tolled while "a properly filed application for State post-conviction or other collateral review… is pending." A petition for certiorari is not part of state postconviction proceedings and does not toll the limitations period. *Lawrence v Florida* (2007) 549 US 327, 329, 166 L Ed 2d 924, 929, 127 S Ct 1079.

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VI. ADMISSION TO UNITED STATES SUPREME COURT BAR

§12.6 A. Requirement

Admission to the U.S. Supreme Court bar is the prerequisite both for counsel to appear before the Court and for counsel by himself or herself to litigate a case to completion. The Court gives recognition in its official reports almost exclusively to attorneys who are members of its bar. Every party in a U.S. Supreme Court case, except those appearing in pro per, must be represented by at least one attorney in good standing with the U.S. Supreme Court bar. Clerk's Comment to US Sup Ct R 9.1. Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice, chap 6. Admission to the U.S. Supreme Court bar, however, is not required for an attorney appointed under the Criminal Justice Act of 1964 (18 USC §3006A(d)(6)) or under any other applicable federal statute. US Sup Ct R 9.1.

An attorney who is not a member of the U.S. Supreme Court bar may prepare and file documents and may have his or her name listed on the covers of documents. However, all such documents, even those filed before docketing the case (*e.g.,* bail applications or stays), must also contain the name, office address, e-mail address, and telephone number of a member of the U.S. Supreme Court bar. This person becomes "counsel of record" for the party concerned. See US Sup Ct R 9.1, 34.1(f).

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§12.7 B. Qualifications and Procedure

The only formal qualifications required for admission to the U.S. Supreme Court bar are that the applicant has been admitted to practice before a state court of last resort for 3 years immediately preceding application, and has not been the subject of adverse disciplinary action, pronounced or in effect, during that 3-year period. The applicant also "must appear to the Court to be of good moral and professional character." US Sup Ct R 5.1.

Admission may be handled entirely by mail. California applicants must submit a certificate in good standing from the California Supreme Court, which may be obtained by mailing a written request to that court along with a stamped, self-addressed envelope and a fee of $1.00. In addition, the application must include completed forms provided by the U.S. Supreme Court clerk, whose address is set out in §12.2. These forms may also be downloaded from the Supreme Court's website at http://www.supremecourtus.gov/bar/baradmissions.html. See §12.2. They include statements by members of the U.S. Supreme Court bar who are not related to the applicant that attest to his or her character. US Sup Ct R 5.2.

The fee for admission to the bar, including a certificate, is currently $200. US Sup Ct R 5.5.

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§12.8 C. Admission Pro Hac Vice

It is possible for an attorney not admitted to the U.S. Supreme Court bar to be admitted pro hac vice so that he or she may participate in oral argument in a particular case. However, this is allowed only on motion of the attorney of record for the party on whose behalf the request is sought. The request must be in the usual motion form and filed no later than the date on which the respondent's or appellee's brief is due to be filed. US Sup Ct R 6. Admission pro hac vice is most often used when an attorney has worked on the case and wishes to orally argue it but has not been admitted to the state bar for the requisite 3 years.

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VII. STAYS

§12.9 A. Requirements for Stay

Before review by the U.S. Supreme Court, individual Justices in their capacity as Circuit Justices are authorized by US Sup Ct R 23 and 28 USC §2101(f) to grant stays of lower court judgments under certain extraordinary circumstances, *e.g.,* a pending execution date in a capital case or a district court order declaring an act of Congress to be unconstitutional. See, *e.g., Bowen v Kendrick* (1987) 483 US 1304, 97 L Ed 2d 787, 108 S Ct 1 (Rehnquist, Cir J.). The state may wish to file for a stay, *e.g.,* when a lower court has reversed a conviction in a case that has extensive and immediate application to numerous other cases. See, *e.g., California v Braeseke* (1980) 444 US 1309, 62 L Ed 2d 720, 100 S Ct 742 (Rehnquist, Cir J.).

The following criteria primarily determine the issuance of a stay:

- The applicant must at least show that "the judgment of the lower court was erroneous on the merits" and that "irreparable injury" will result "if the judgment is not stayed." *Whalen v Roe* (1975) 423 US 1313, 1316, 46 L Ed 2d 18, 96 S Ct 164 (Marshall, J., in chambers). Additionally, the applicant must show that the harm done to him or her if the stay were not granted would be greater than the harm done to the opponent if the stay were granted. *Holtzman v Schlesinger* (1973) 414 US 1304, 38 L Ed 2d 18, 94 S Ct 1 (Marshall, J., in chambers).
- The applicant must show that there is a "reasonable probability" that four justices will vote to hear the case. *Wise v Lipscomb* (1977) 434 US 1329, 1334, 54 L Ed 2d 41, 46, 98 S Ct 15 (Powell, J., in chambers). Another more stringent standard, however, has sometimes been stated: The Justice must be persuaded that "five Justices are likely to conclude that the case was erroneously decided below." *Graves v Barnes* (1972) 405 US 1201, 1203, 30 L Ed 2d 769, 771, 92 S Ct 752 (Powell, J., in chambers).
- Of course, all of the normal Supreme Court jurisdictional requirements must be met. For example:
- The case or controversy requirement (see *Barthuli v Board of Trustees* (1977) 434 US 1337, 54 L Ed 2d 52, 98 S Ct 21 (Rehnquist, J., in chambers));
- Preservation of the issues in the lower courts (see *Bloeth v New York* (1962) 7 L Ed 2d 780, 82 S Ct 661 (Harlan, Cir J.));
- Standing (see *Russo v U.S.* (1971) 404 US 1209, 30 L Ed 2d 13, 92 S Ct 4 (Douglas, J., in chambers)); and
- For a state appeal, a federal question presented, and a final judgment (see *National Broadcasting Co. v Niemi* (1978) 434 US 1354, 54 L Ed 2d 742, 98 S Ct 705 (Rehnquist, J., in chambers)).

Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice, chap 17 analyzes several substantial obstacles that must be overcome before a stay is issued, as well as specific considerations that have been cited in various opinions with regard to issuing or denying stays.

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§12.10 B. Procedure

Before filing an application for a stay addressed to a Justice of the Supreme Court, the petitioner must have first applied for the stay to "the appropriate court or courts below." US Sup Ct R 23.3. The motion must be "addressed to the Justice allotted to the Circuit within which the case arises." US Sup Ct R 22.3. Any Justice to whom an application for a stay is submitted may refer the matter to the entire U.S. Supreme Court for determination. US Sup Ct R 22.5.

Applications for stays are "motions to individual justices" for the purposes of US Sup Ct R 22. An application for a stay must comply with the form and content requirements of Rules 22 and 33.2. US Sup Ct R 23.3. See §12.12 for a sample stay of execution. An original and two copies must be filed and must be accompanied by proof of service as required by Rule 29. US Sup Ct R 22.2.

Once a stay has been granted, the entire Court may alter or vacate it. Jurisdiction arises from 28 USC §1651(a) and from the Court's role as the ultimate arbiter of the issues being affected by the stay. *Rosenberg v U.S.* (1953) 346 US 273, 286, 97 L Ed 1607, 1615, 73 S Ct 1152.

After an application for stay has been denied, a party can renew the application before another Justice by sending to the Clerk of the Court a letter designating that Justice, to which must be attached 10 copies of the original application, with proof of service. US Sup Ct R 22.4. However, unless the denial was without prejudice, such renewed application is "not favored." US Sup Ct R 22.4.

Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice, chap 17 discusses in detail the procedure for applications for stays.

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§12.11 C. Examples

Stay applications from California must be addressed to the Circuit Justice for the Ninth Circuit, presently the Honorable Anthony M. Kennedy, who replaced Justice Sandra Day O'Connor when she retired on January 31, 2006. The responses of a Circuit Justice to past stay requests should be instructive to counsel seeking a stay.

In *San Diegans for the Mt. Soledad Nat'l War Mem. v Paulson* (2006) 548 US 1301, 1302, 165 L Ed 2d 941, 944, 126 S Ct 2856, Justice Kennedy, as Circuit Justice for the Ninth Circuit, granted the city of San Diego's application to stay a district court order requiring the city to remove a prominent Latin cross at a veteran's memorial while appeal was pending in the Ninth Circuit. The Ninth Circuit had denied the city's stay application. Although "a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted," Justice Kennedy concluded that a stay was appropriate because (1) the equities supported preserving the status quo while the city's appeal proceeded; (2) a recent Act of Congress, deeming the monument a national memorial, evidenced its desire to preserve the monument; (3) San Diego voters approved a ballot proposition authorizing donation of the monument to the United States; and (4) pending state litigation which could allow the memorial to become federal law would moot the district court's injunction based on a violation of the state Constitution. *San Diegans v Paulson, supra*.

In *Kenyeres v Ashcroft* (2003) 538 US 1301, 155 L Ed 2d 301, 123 S Ct 1386, Justice Kennedy denied an application for a stay of an alien's removal from the United States. Justice Kennedy noted that the applicant raised an important issue that had divided the Courts of Appeals: whether aliens subject to removal must satisfy a stringent "clear and convincing evidence" standard to obtain a stay pending appeal or whether the lesser, traditional stay standard (likelihood of success, taking account of equity interests) should govern. Although observing that an excessively stringent standard may impede access to the courts in meritorious cases, Justice Kennedy also observed that the more lenient standard could frustrate Congressional effort to reform immigration law. Justice Kennedy found it unnecessary to decide the issue because the factual findings of the immigration judge made it unlikely that the applicant would prevail under either standard. Justice Kennedy emphasized the need to resolve this significant issue in an appropriate case.

United States Supreme Court Rule 22.3 provides that, if the assigned Circuit Justice is unavailable, the application will be distributed to the available Justice "who is next junior." In the case of Justice Kennedy, the next junior Justice would be Justice David H. Souter.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/12 Review in the United States Supreme Court/§12.12 D. Form: Motion for Stay of Execution

§12.12 D. Form: Motion for Stay of Execution

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SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _,	)	**No. _ _ _ _ _ _**
Petitioner,	)	
	)	
vs	)	
	)	
THE STATE OF CALIFORNIA,	)	
Respondent.	)	
_____	)	

APPLICATION FOR STAY OF EXECUTION

To the Honorable _ _[*name*]_ _, Associate Justice of the U.S. Supreme Court and Circuit Justice for the Ninth Circuit:

Petitioner _ _[*name*]_ _ prays that an order be entered, under 28 USC §2101(f), staying the execution of _ _[*his/her*]_ _ death sentence, scheduled for after sunrise on _ _[*date*]_ _, pending a final disposition in this Court of _ _[*his/her*]_ _ petition for a writ of certiorari. In support of this application, petitioner respectfully shows:

1. At a jury trial in the _ _ _ _ _ _ Superior Court in and for _ _ _ _ _ _ County, California, petitioner was convicted of capital murder; affirmative findings were returned regarding the special circumstances determinative of sentence in California capital cases; and a judgment was entered fixing _ _[*his/her*]_ _ punishment at death.

2. By opinion dated _ _[*date*]_ _, reported at _ _[*give official citation*]_ _, attached as Appendix A, petitioner's conviction and sentence were affirmed by the California Supreme Court.

3. Petitioner's petition for rehearing was denied _ _[*without written order*]_ _ by the California Supreme Court on _ _[*date*]_ _.

[*If there was a written order, attach a copy as Appendix B and make reference to it in this form*]

4. On _ _[*date*]_ _, petitioner filed a motion in the California Supreme Court requesting the court to stay issuance of its remittitur pending final disposition of _ _[*his/her*]_ _ petition to this Court for a writ of certiorari. On _ _[*date*]_ _, the state Supreme Court denied the motion, and instead granted only a _ _[*number*]_ _-day stay of issuance of the remittitur. A copy of the court's order is annexed as Appendix _ _.

5. Absent the granting of a stay of execution by this Court, petitioner will be _ _[*e.g., brought before the _ _ _ _ _ _ County Superior Court, and an execution date will be set on expiration of the 30-day stay granted by the California Supreme Court*]_ _.

6. The opinion of the California Supreme Court affirming petitioner's conviction and sentence raises federal constitutional claims that petitioner will ask this Court to review, including _ _[*briefly summarize the strongest constitutional issues to be raised*]_ _.

7. Petitioner is presently in the custody of the Warden of _ _[*name of prison*]_ _ Prison, in _ _ _ _ _ _ County, California. A stay of execution would neither prejudice the State of California nor interfere with petitioner's custodial status, but is necessary to ensure that petitioner is not executed before this Court can hear and determine the issues to be raised in _ _[*his/her*]_ _ petition for a writ of certiorari.

WHEREFORE, petitioner respectfully requests an order staying _ _[*his/her*]_ _ execution pending further order of this Court.

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature of attorney or petitioner*]__

_ _[*Typed name*]_ _

Copies: Original and two copies (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party if typewritten, three copies for each attorney of record and unrepresented party if printed); office copies.

Comment: See §§12.9-12.11 for discussion of required contents of the application for a stay. The application shall be prepared under Rule 33.2 (8-1/2 by 11-inch paper format) and must comply with the general document preparation requirements set forth in Rule 34. The application must be accompanied by proof of service on all parties. See US Sup Ct R 29; §12.24. For discussion of format of documents, filing, and service, see §§12.19-12.21.

It is important in determining the best timing and content of such a stay in a capital case to consult with the assisting attorney from the California Appellate Project or the Habeas Corpus Resource Center. For contact information, see §§6.17-6.18.

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§12.13 VIII. PROCEEDING IN FORMA PAUPERIS

By making an affidavit of indigency, any person may begin legal action in any federal court "without prepayment of fees or security therefor." 28 USC §1915. Only natural "persons" are eligible to bring proceedings in forma pauperis under 28 USC §1915. Prisoners' associations may not do so. *Rowland v California Men's Colony* (1993) 506 US 194, 121 L Ed 2d 656, 113 S Ct 716.

Other major differences for parties proceeding in forma pauperis are that:

- They do not have to employ 6-1/8 by 9-1/4 inch typeset process booklet format (see US Sup Ct R 33.1(a), 39.3);
- If the party is an unrepresented inmate, only the original of each document must be filed with the Court (US Sup Ct R 39.2); and
- The brief on the merits may be printed under the Supreme Court Clerk's supervision at public expense. See US Sup Ct R 39.6.

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§12.14 A. Procedure

In the U.S. Supreme Court, in forma pauperis proceedings are governed by US Sup Ct R 39. The in forma pauperis motion should be filed contemporaneously with the party's substantive document and be attached to it. US Sup Ct R 39.2.

When counsel files the client's pleading in forma pauperis, an original and ten copies of the motion are required. Only one copy of the in forma pauperis motion need be filed if the petitioner is confined and unrepresented. Counsel seeking to proceed in forma pauperis must file the following three documents along with the appropriate substantive document (*e.g.,* petition for writ of certiorari) (US Sup Ct R 39.2):

- A motion for leave to proceed in forma pauperis (see the sample in §12.16).
- An affidavit of indigency as required by 28 USC §1915 (see the sample in §12.17). However, if the party has counsel appointed by a federal district court or court of appeal under 18 USC §3006A, no affidavit of indigency is required, but the motion must cite the statute under which counsel was appointed. The parties must, in any event, specify in the motion whether they have sought leave to proceed in forma pauperis in any other court and whether leave was granted. US Sup Ct R 39.1.
- A proof of service (see the sample in §12.18).

The Court keeps a separate docket for in forma pauperis petitions. Some practitioners erroneously believe that, because a greater percentage of cases on the paid docket have petitions granted (see §12.3), there is a statistical advantage in not filing in forma pauperis. However, the higher acceptance statistics for paid cases are deceptive because all cases brought by states' attorneys general and the Solicitor General go on the pay docket. The U.S. Supreme Court as a practical matter is more likely to accept their petitions, which more often address what are determined to be "important" questions of law.

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§12.15 B. Denial of Leave to Proceed In Forma Pauperis When Petition Is "Frivolous" or "Malicious"

United States Supreme Court Rule 39.8 authorizes the Court to deny leave to proceed in forma pauperis if the Court is satisfied that a petition for writ of certiorari, jurisdictional statement, or petition for an extraordinary writ "is frivolous or malicious." The Court's accompanying statement observed that the current rule "applies only to those filings that the Court determines would be denied in any event" and stated that the rule is especially directed at "those few persons whose filings are repetitive with the obvious effect of burdening the office of the Clerk and other members of the Court staff." *In re Amendment to Rule 39* (1991) 500 US 13, 114 L Ed 2d 15, 111 S Ct 1572. Three justices dissented from promulgation of the rule, expressing the view that its costs outweigh any administrative benefit and that, because it applies to nonpaying litigants only, the rule would invidiously deprive indigents of determinations on the merits of their petitions.

The amendment followed a series of rulings in which the Court had denied in forma pauperis status to indigents who had filed repeated, frivolous petitions for extraordinary relief. *In re Demos* (1991) 500 US 16, 114 L Ed 2d 20, 111 S Ct 1569; *In re Sindram* (1991) 498 US 177, 112 L Ed 2d 599, 111 S Ct 596; *In re McDonald* (1989) 489 US 180, 103 L Ed 2d 158, 109 S Ct 993. In each of those cases, the Court also had prohibited the filing of further extraordinary writ petitions in forma pauperis by the litigant. Dissenting opinions in each case had questioned both the authority for and the wisdom of the rulings.

The Court first invoked US Sup Ct R 39.8 in *Zatko v California* (1991) 502 US 16, 116 L Ed 2d 293, 112 S Ct 355, denying in forma pauperis status to two petitioners who had each filed dozens of frivolous petitions in the past. The Court noted that it had not applied Rule 39.8 to frivolous in forma pauperis petitions in general, "although the Rule might technically apply to them." 502 US at 18, 116 L Ed 2d at 299. The petitioners in *Zatko,* however, were unique because of their frequency in filing. One had filed 73 petitions with the Court within the last 10 years and 34 petitions within the last 2 years. The other had filed over 45 petitions within the last 10 years and 15 within the last 2. Two justices dissented, stating that, although denial of leave to proceed in forma pauperis has the same effect as denial of a petition, the former disposition conveys a symbolic message of unequal access to justice between rich and poor. 502 US at 20, 116 L Ed 2d at 300.

The Court has since invoked US Sup Ct R 39.8 in several dozen cases, including petitions for certiorari as well as petitions for extraordinary writs. These denials of forma pauperis status have not been limited to frequent filers. See *Head v Thornburg* (1992) 503 US 904, 117 L Ed 2d 488, 112 S Ct 1259 (second filing). Justice Stevens has continued to dissent from all such dispositions, stating he instead would deny relief on the merits.

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§12.16 C. Form: Motion for Leave to Proceed In Forma Pauperis

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SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _,	**No. _ _ _ _ _ _**
Petitioner,	
vs	
THE STATE OF CALIFORNIA,	
Respondent.	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, _ _[*name of petitioner*]_ _, asks leave to file the attached Petition for a Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis, under Rules 12.2 and 39 of the U.S. Supreme Court Rules, and 28 USC §1915(a).

[*Add one of the following alternatives*]

[*Alternative 1]*

Petitioner has previously been granted leave to proceed in forma pauperis in the following courts: _ _[*Specify*]_ _

[*Alternative 2]*

Petitioner has not previously been granted leave to proceed in forma pauperis in any other court.

[*Continue*]

The petitioner's affidavit in support of this motion is attached.

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature of attorney or petitioner*]__
_ _[*Typed name*]_ _

Copies: Original and 10 copies if filed by counsel (filed with court clerk with proof of service); the original only if filed by unrepresented inmate (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party if typewritten, three copies for each attorney of record and unrepresented party if printed); office copies.

Comment: Although the above form is provided for ease of use, the petitioner may choose to use the form motion provided by the Supreme Court on its website at http://www.supremecourtus.gov/casehand/casehand.html (click on "Guide to Filing In Forma Pauperis Cases"). The instructions, useful guidelines, and forms found on the website are issued by the Office of the Clerk of the United States Supreme Court, and are intended to assist petitioners proceeding in forma pauperis and without the assistance of counsel. The website link also provides a form affidavit or declaration in support of the motion. See §12.17.

This motion must be typed on unglazed paper 8 1/2 by 11 inches. US Sup Ct R 21.2(c), 33.2(a), 39.2.

When filed in conjunction with a petition for writ of certiorari or other documents, the motion for leave to proceed in forma pauperis and supporting affidavit must "precede and be attached to the petition." US Sup Ct R 12.2, 39.2.

For further discussion of format of documents, filing, and service, see §§12.13, 12.19-12.21.

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§12.17 D. Form: Affidavit or Declaration in Support of Motion to Proceed In Forma Pauperis

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SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _, Petitioner, vs THE STATE OF CALIFORNIA, Respondent.	**No. _ _ _ _ _ _ AFFIDAVIT/DECLARATION IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS**

Complete all questions in this application and then sign it. Do not leave any blanks; if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

I, _ _[*name*]_ _, am the petitioner in the above-entitled case. In support of my motion to proceed in forma pauperis, I swear or affirm under penalty of perjury that, because of my poverty, I cannot pay the costs of this case or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 USC §1746; 18 USC §1621.)

Signed: _____
Date: _____

Have you sought leave to proceed *in forma pauperis* in any other court?

_____

_____

If so, was leave to proceed *in forma pauperis* granted?

_____

If so, please identify the court and case by docket number.

_____

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, _____, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child Support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

Print

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

Print

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____

Print

	You	Your spouse
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$_____	$_____
Installment payments		
Motor Vehicle	$_____	$_____
Credit card(s)	$_____	$_____
Department store(s)	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

Print

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☐ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☐ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: _____, 20___

_____

(Signature)

Copies: Original and 10 copies if filed by counsel (filed with court clerk with proof of service); the original only if filed by unrepresented inmate (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party if typewritten, three copies for each attorney of record and unrepresented party if printed); office copies.

Comment: This is the form affidavit provided by the U.S. Supreme Court on its website at http://www.supremecourtus.gov/casehand/casehand.html (click on "Guide to Filing In Forma Pauperis Cases"). The instructions, useful guidelines, and forms found on the website are issued by the Office of the Clerk of the United States Supreme Court, and are intended to assist petitioners proceeding in forma pauperis and without the assistance

of counsel. The website link also provides a form motion for leave to proceed in forma pauperis. See §12.16.

The form of the affidavit is prescribed by Fed R App P, Appendix of Forms, Form 4. See US Sup Ct R 39.1.

Although this document may be submitted as a notarized "affidavit," it is more conveniently presented, as shown, as a declaration under penalty of perjury. US Sup Ct R 39.1; 28 USC §1746. For further discussion of format of documents, filing, and service, see §§12.13, 12.19-12.21.

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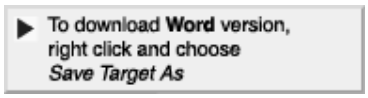
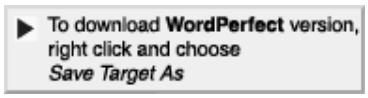
§12.18 E. Form: Certificate of Service





SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _,	**No. _ _ _ _ _ _**
Petitioner,	
vs	
THE STATE OF CALIFORNIA,	
Respondent.	

CERTIFICATE OF SERVICE

I hereby certify that on _ _[*date*]_ _, one copy of the Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis were mailed, first-class postage prepaid, to _ _[*name*]_ _, Attorney General of the State of California, _ _[*address and telephone number*]_ _, Counsel for Respondent. I further certify that all parties required to be served have been served.

__[*Signature of attorney or petitioner*]__
_ _[*Typed name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party if typewritten, three copies for each attorney of record and unrepresented party if printed); office copies.

Comment: Although the above form is provided for ease of use, the petitioner may also choose to use the form available through the U.S. Supreme Court's website at http://www.supremecourtus.gov/casehand/casehand.html (click on "Guide to Filing *In Forma Pauperis* Cases").

When the certificate is executed by a person who is neither a member of the U.S. Supreme Court bar nor appointed under 18 USC §3006A(d)(6) or a comparable federal statute, it must be attested by notarized affidavit or declaration under penalty of perjury. US Sup Ct R 29.5(c). For the form of the requisite declaration under penalty of perjury, see §12.17.

For further discussion of format of documents, filing, and service, see §§12.13, 12.19-12.21.

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IX. PETITIONING FOR CERTIORARI

§12.19 A. Format of Documents

Unless the party is proceeding in forma pauperis (see US Sup Ct R 33.1(a), 39), the documents must be in booklet format, 6⅛ by 9¼ inches in size, and produced on opaque, unglazed paper (US Sup Ct R 33.1(a), (c)). If proceeding in forma pauperis, the party may submit paper 8-1/2 by 11 inches. See US Sup Ct R 39.3. Petitions for writs of certiorari may be no longer than 9000 words and must be accompanied by a certificate signed by the attorney or preparer of the document stating that the brief complies with the word limitations. US Sup Ct R 33.1(h). Reply briefs on the merits may not exceed 6000 words. US Sup Ct R 33.1(g)(vii). The word limits include footnotes. US Sup Ct R 33.1(d).

If the petitioner is proceeding in forma pauperis (and the paper is 8-1/2 by 11 inches), the petition may be no longer than 40 pages. US Sup Ct R 33.1(d), (g), 33.2(b). For good cause, the Court or a Justice may grant leave to file a document that exceeds the word limits, but application for such leave is not favored. US Sup Ct R 33.1(d). An application to exceed the word limit must comply with US Sup Ct R 22 and be filed at least 15 days before the document's file date, except in the most extraordinary circumstances. US Sup Ct R 33.1(d). For further details, see US Sup Ct R 24-25, 33-34. Petitioners may obtain a free copy of the U.S. Supreme Court Rules by writing or calling the Clerk of the U.S. Supreme Court. The address and telephone number are given in §12.2. The rules may also be downloaded from the Supreme Court's website at http://www.supremecourtus.gov/ctrules/ctrules.html. See §12.2.

PRACTICE TIP: Although the opinions and orders pertaining to the various state court proceedings must be attached as exhibits in the appendix of the petition for certiorari (US Sup Ct R 14.1(i)), counsel should not send a photocopy of an opinion from an advance sheet unless that is the only format of the opinion available. Instead, he or she should send the original typewritten copy of the slip opinion to ensure that the type is no smaller than 12 points. See US Sup Ct R 33.1(b). The U.S. Supreme Court will probably reject a petition or appeal with type smaller than 12 points.

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§12.20 B. Filing

Filing of all documents with the U.S. Supreme Court clerk must be done either in person or by mail, within the appropriate time limits. For time to file, see §12.25. Documents filed by mailing will be considered timely if, on or before the last day for filing, they are (US Sup Ct R 29.2):

- Sent by first-class mail, postage prepaid, and bear "a postmark, other than a commercial postage meter label, showing that the document was mailed," or
- Delivered to a third party commercial carrier for delivery to the clerk within 3 calendar days.

First-class mail includes express and priority mail. If the postmark is missing or illegible, or if the commercial carrier does not provide the date on which the document was received, the Clerk will require the person who mailed the document to submit a notarized statement or declaration under penalty of perjury attesting to the date and giving details of the mailing. US Sup Ct R 29.2. See the sample declaration of mailing in §12.24.

If the document is filed by an inmate confined in an institution, it is timely if deposited in the institution's internal mail system on or before the last day for filing and accompanied by a notarized statement or declaration under penalty of perjury stating the date of deposit and that first-class postage has been prepaid. US Sup Ct R 29.2.

Unless proceeding in forma pauperis, the petitioner must file 40 copies of the petition and pay the $300 docketing fee. US Sup Ct R 12.1, 38(a). If proceeding in forma pauperis, the petitioner must file an original and 10 copies of the petition together with the original and 10 copies of the motion for leave to proceed in forma pauperis. A copy of the motion must precede and be attached to each copy of the petition. An inmate confined to an institution who is unrepresented by counsel and is proceeding in forma pauperis need file only an original petition and motion. US Sup Ct R 12.2.

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§12.21 C. Service

Service to parties may be made personally, by mail, or by third party commercial carrier. Personal service on a party who is represented by counsel is made by delivering the document to the office of counsel of record, either to counsel or an employee. When a document is served by mail, it must be addressed to counsel of record with no less than first-class postage prepaid. If served by commercial carrier, the document must be delivered to the carrier for delivery to counsel of record within 3 calendar days. Service on an unrepresented party may be in person, by mail, or by commercial carrier. US Sup Ct R 29.3. Ordinarily, a party is expected to choose a method for serving other parties that is at least as fast as the method used to file the document in court. US Sup Ct R 29.3.

Proof of service, presented to the Clerk when the document is filed, must be separate from the document itself. US Sup Ct R 29.5. The proof of service must contain or be accompanied by a statement that all parties required to be served have been served, and a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each attorney represents. US Sup Ct R 29.5. Proof of service may consist of:

- An acknowledgment of service signed by counsel of record for the party served;
- A certificate of service signed by counsel for the serving party if counsel is a member of the U.S. Supreme Court bar or has been appointed under 18 USC §3006A or another applicable federal statute (see sample in §12.24); or
- A notarized affidavit or declaration of service, made under penalty of perjury, by a serving person who is not a member of the U.S. Supreme Court bar or appointed to represent the petitioner under a federal statute. See §12.18.

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§12.22 D. Docketing

Once the petition has been filed with appropriate proof of service, the case will be placed on the docket. The petitioner must promptly notify all respondents of the date of filing, the date the case was placed on the docket, and the docket number of the case, using a form supplied by the Clerk of the Court. Service of the notice must comply with US Sup Ct R 29. US Sup Ct R 12.3.

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§12.23 E. Form: Declaration of Mailing

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SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _,	**No. _ _ _ _ _ _**
Petitioner,	
vs	
THE STATE OF CALIFORNIA,	
Respondent.	

DECLARATION OF MAILING

1. I, _ _[*name of counsel*]_ _, am a member of the bar of the U.S. Supreme Court;

2. I represent the petitioner in this case;

3. On _ _[*date*]_ _, _ _[*state type of paper filed, e.g., a petition for writ of certiorari*]_ _ in this case was placed in the U.S. mail, first-class postage prepaid, at _ _[*location*]_ _ and addressed to:

Office of the Clerk
1 First St.
United States Supreme Court
Washington, D.C. 20543

I declare under penalty of perjury _ _[*if executed outside the United States, add "under the laws of the United States of America"*]_ _ that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of attorney or petitioner*]__
_ _[*Typed name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party if typewritten, three copies for each attorney of record and unrepresented party if printed); office copies.

Comment: This declaration under penalty of perjury must be submitted to the Court when the filing's postmark is missing or illegible, or if a third party commercial carrier does not provide the date the document was received by the carrier. See §12.20. For further discussion of format of document, filing, and service, see §§12.19-12.21.

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§12.24 F. Form: Certificate of Service

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SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _,	**No. _ _ _ _ _ _**
Petitioner,	
	CERTIFICATE OF SERVICE
vs	
THE STATE OF CALIFORNIA,	
Respondent.	

I hereby certify that I am a member of the U.S. Supreme Court bar and that I have on this date served copies of _ _[*state type of paper filed, e.g., Petition for Writ of Certiorari*]_ _ on all parties required to be served by depositing them in the U.S. mail, first-class postage prepaid, at _ _[*location*]_ _ and addressed to:

[*Name of Attorney General*]
Attorney General's Office
[*Name of Deputy Attorney General*]
[*Address*]
[*Telephone number*]
[*Name of Party Represented*]

[*Name of District Attorney*]
District Attorney
[*Name of Deputy District Attorney*]
[*Address*]
[*Telephone number*]

[*Name of County Clerk*]
County Clerk
for delivery to the Hon. _ _[*name of trial judge*]_ _
[*Address*]

California Court of Appeal
_ _ _ _ _ _ Appellate District
Division _ _ _ _ _ _
[*Address*]

[*Name of client*]
[*Address*]

Dated _ _[*date*]_ _, in _ _[*city*]_ _, California.

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

Copies: Original (filed with court clerk); copies for service (one for each attorney of record and unrepresented party if typewritten, three copies for each attorney of record and unrepresented party if printed); office copies.

Comment: For further discussion of format of document, filing, and service, see §§12.19-12.21.

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G. Time to File

§12.25 1. Filing Deadlines

United States Supreme Court Rule 13.1 requires that the petition for a writ of certiorari from both state and federal criminal convictions be filed "within 90 days after entry of the judgment." For this purpose, the date of entry of judgment is the date that the court's decision is rendered, not any later date of finality or issuance of the remittitur. US Sup Ct R 13.3. See *Market St. Ry. Co. v Railroad Comm'n* (1945) 324 US 548, 89 L Ed 1171, 65 S Ct 770.

When discretionary review of an intermediate state appellate court decision by a state court of last resort is sought (*e.g.,* petition for review from the California Court of Appeal to the California Supreme Court), the petition "is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." US Sup Ct R 13.1.

If a petition for rehearing is filed in the court below by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the 90-day time period does not begin until rehearing is denied or, if the petition for rehearing is granted, until the subsequent judgment is entered. US Sup Ct R 13.3. However, this extension of the finality date "does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court." *Missouri v Jenkins* (1990) 495 US 33, 45 n13, 109 L Ed 2d 31, 50 n13, 110 S Ct 1651.

The Court has not regarded certiorari time limits in criminal cases as jurisdictional. If it so chooses, the Court may ignore the tardy filing of a petition for certiorari. *Taglianetti v U.S.* (1969) 394 US 316, 317 n1, 22 L Ed 2d 302, 89 S Ct 1099. For further discussion of time limits, see Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §§6.1-6.8.

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§12.26 2. Extensions of Time

An extension, not exceeding 60 days, may be granted for good cause on application to the Circuit Justice. The Circuit Justice for California is currently Associate Justice Anthony M. Kennedy. The application must be filed at least 10 days before the petition's due date. US Sup Ct R 13.5, 30.2-30.3. The filing date is usually the date on which the application is mailed first class or delivered to a commercial carrier for delivery within 3 calendar days. US Sup Ct R 29.2. See §12.20. Exceptions to the 10-day rule are granted only "in extraordinary circumstances." US Sup Ct R 13.5, 30.2. The application must set out the basis for the Court's jurisdiction, identify the judgment from the court below, include a copy of the opinion and any order respecting rehearing, and set out specific reasons justifying the request. Such applications are not favored. US Sup Ct R 13.5. The original and two copies, on 8-1/2 by 11-inch opaque, unglazed paper, addressed to the Circuit Justice must be filed and accompanied by proof of service as required by Rule 29. US Sup Ct R 22.2. Rule 30.3 requires that an application to extend time be served on all other parties. See the sample proof of service in §12.24.

The practice of granting or denying extensions has been very inconsistent and variable by Justice. Apparently, there has been a gradual decline in the granting of timely applications. See Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §§6.1-6.8. Once denied, however, an application to extend time may not be renewed. US Sup Ct R 22.4, 30.3.

Justice Antonin Scalia, as Circuit Justice for the Sixth Circuit, rendered a noteworthy opinion concerning extensions of time to file petitions for certiorari in *Kleem v INS* (1986) 479 US 1308, 93 L Ed 2d 566, 107 S Ct 484. Counsel had sought a 60-day extension for additional time to research the constitutional issues presented. Denying the application, Justice Scalia stated, "The same reason could be adduced in virtually all cases. It does not meet the standard of 'good cause shown' for the granting of a disfavored extension." 479 US at 1308.

Justice Scalia again expounded on his construction of "good cause shown" in *Madden v Texas* (1991) 498 US 1301, 112 L Ed 2d 1026, 111 S Ct 902, stating that capital cases could not receive generic exception from the case-by-case requirements of US Sup Ct R 13.2. He further stated that, even in capital cases the withdrawal of previous appellate counsel and failure to secure replacement counsel do not automatically constitute good cause.

In *Penry v Texas* (1995) 515 US 1304, 132 L Ed 2d 887, 116 S Ct 2, Justice Scalia denied a request for an extension to file in a capital case, made on the basis of the voluminous record and the number of issues below, as well as the impending absence of counsel of record from his office during the week before the petition would be due. Justice Scalia noted that counsel had had substantial time to become familiar with the issues, and he stated that "counsel's planned absences should affect neither the degree of preparation afforded a client's case nor the orderly administration of our deadlines."

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H. Preparation of Petition for Writ of Certiorari

§12.27 1. Less Rigorous Compliance Allowed for Pro Per Petitioners

The form requirements of the petition for certiorari are set out in US Sup Ct R 14, 33, and 34. If the clerk determines that a petition that is timely and submitted in good faith does not comply with the formal requirements of Rules 14, 33, or 34, the clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with US Sup Ct R 29.2 and received within 60 days of the clerk's letter is considered timely. US Sup Ct R 14.5.

Nonetheless, the Court has traditionally shown considerable indulgence toward pro per petitioners, accepting virtually any documents that can be fairly read as showing a colorable claim. Handwritten, semiliterate letters from prisoners have sometimes been the genesis of precedent-shattering decisions. Of these, *Gideon v Wainwright* (1963) 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, is one of the most important examples. See Lewis, Gideon's Trumpet (1964). The Court's indulgence is not without limit, however, and prisoners filing petitions without counsel's aid should follow the Court's rules as closely as possible. Prisoners should also consult, if possible, the Court's Guide to Filing *In Forma Pauperis* Cases, which is available free from the Supreme Court clerk's office, and on its website at http://www.supremecourtus.gov/casehand/casehand.html. This Guide includes detailed instructions, a copy of the Supreme Court rules, and a form motion for leave to proceed in forma pauperis, a form petition for writ of certiorari, and a form proof of service. When the petition is prepared by counsel, there is no excuse for failure to comply with the Court's rules.

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§12.28 2. Summary of Contents of Petition

Under US Sup Ct R 14.1, the petition must contain the following information presented in the following order, subject to some exceptions that are specified in the cross-referenced sections:

(1) Cover (see §12.29);
(2) Questions presented (see §12.30);
(3) List of parties to action (see §12.31);
(4) Table of contents (if the petition exceeds five pages or 1500 words) (see §12.32);
(5) Table of authorities (if the petition exceeds five pages or 1500 words) (see §12.33);
(6) Inside caption and prayer for relief (see §§12.34, 12.37);
(7) Opinions and Orders below (see §§12.35, 12.37);
(8) Grounds for jurisdiction (see §§12.36-12.37);
(9) Constitutional provisions, treaties, statutes, ordinances, and regulations (see §12.38);
(10) Statement of the case (see §12.39);
(11) Reasons for granting the writ (see §12.40); and
(12) Appendix (see §12.41).

If submitted by counsel in a non-forma pauperis case, the petition must be printed in booklet form. US Sup Ct R 33.1(a). Typewritten petitions, however, are permitted for petitioners filing in forma pauperis. US Sup Ct R 33.2, 39.3. Printed petitions must meet the specifications of US Sup Ct R 33.1. They must be prepared using opaque, unglazed paper 6-1/8 by 9-1/4 inches of minimum 60-pound weight and "standard typesetting process." US Sup Ct R 31.1(a), (c). The typeface must be a "Century" font such as Century Schoolbook 12-point (or 10-point for footnotes) with a minimum 2-point leading between lines. US Sup Ct R 33.1(b). The petition may not exceed 9000 words, and must be accompanied by a signed certificate stating the number of words in the document and that the document complies with the word limitations. US Sup Ct R 33.1(g)-(h). The word limit includes footnotes but does not include the list of questions presented, list of parties, table of contents, table of authorities, list of counsel at the end, appendix, or the verbatim quotation of constitutional, statutory, or other provisions required by US Sup Ct R 14.1(f). US Sup Ct R 33.1(d).

Petitions filed in forma pauperis may be on 8-1/2 by 11-inch paper, double-spaced, and may not exceed 40 pages. US Sup Ct R 33.2(a)-(b).

WARNING: Counsel should heed the statement in US Sup Ct R 14.4 that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Petitions "should be stated briefly and in plain terms." US Sup Ct R 14.3.

No supporting brief may be submitted; all contentions and arguments must be contained in the body of the petition. US Sup Ct R 14.2.

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§12.29 3. Form: Cover

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12.29-1 Cover

No. _ _ _ _ _ _

SUPREME COURT OF THE UNITED STATES

_ _[*Name*]_ _, **Petitioner,**

vs

THE STATE OF CALIFORNIA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
_ _[*name of court that last ruled on the case*]_ _, _ _ _ _ _ _ **APPELLATE DISTRICT**

PETITION FOR WRIT OF CERTIORARI

_ _[*Name of attorney*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Petitioner
Counsel of Record

Comment: The cover for a booklet-form petition must be on 65-pound-weight white paper. US Sup Ct R 33.1(e), (g).

The case number is assigned by the clerk. The first part of the number is derived from the term, *e.g.,* all cases filed during the October 2001 term are assigned a number beginning "01-." Cases filed in forma pauperis are numbered beginning with 5000. Thus, the first such case in the October 2001 term would be numbered "01-5000." The detailed rules governing cover layout are in US Sup Ct R 34.1.

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§12.30 4. Form: Questions Presented

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12.30-1 Questions presented

QUESTIONS PRESENTED

[*E.g., Whether the police violated a minor's Fourth Amendment rights when they arrested him in his home, without a warrant, and without reasonable or probable cause, solely on the basis of his mother's consent.*]

Comment: "Questions Presented" is a relatively small, but very important, part of the petition. It comes first—even before the table of contents. It is believed by many attorneys that some Justices focus almost exclusively on the questions presented or at least give critical attention to this part of the petition. Therefore, the questions should be composed with great care. The questions should capsulize the petitioner's contentions on the merits and the reasons that the petitioner believes the Court should exercise its discretionary power of review. Under US Sup Ct R 14.1(a), "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." The same rule advises that the questions "should be short and should not be argumentative or repetitive." The questions should state the issues in the factual context presented by the case, but unnecessary factual complexities must be avoided. Abstract questions to which there is an obvious answer are inadequate and may annoy the Court, *e.g.,* "Whether petitioner may be subjected to the death penalty when he was denied any semblance of due process of law at his trial, in violation of the Fifth and Fourteenth Amendments to the United States Constitution."

United States Supreme Court Rule 14.1(a) also provides that "[i]f the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation 'capital case' shall precede the questions presented." In such cases the respondent must file a brief in opposition to the petition, which is optional in other cases. US Sup Ct R 15.1. Rules governing the filing and form of a brief in opposition are found in US Sup Ct R 15.2-15.3.

PRACTICE TIP: In framing the questions presented, counsel should be sensitive to the restriction of review to "the questions set out in the petition, or fairly included therein" (US Sup Ct R 14.1(a)). In several cases that restriction has been applied to foreclose review of issues after certiorari was granted. See *Caspari v Bohlen* (1994) 510 US 383, 388, 127 L Ed 2d 236, 244, 114 S Ct 948. In *Caspari,* however, the Court held that the substantive constitutional question raised in the state's petition in a federal habeas corpus proceeding did fairly include the "subsidiary question" of the prisoner's disentitlement to assert the constitutional claim retroactively, under *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060. See §§15.37-15.40.

For a good discussion of how to formulate questions presented, with examples, see Wiener, Briefing and Arguing Federal Appeals (2001). Examples of "Questions Presented" in recent granted cases may also be found online at the Supreme Court website (http://www.supremecourtus.gov) or at FindLaw's Supreme Court Center (http://supreme.lp.findlaw.com). The Supreme Court site provides such access if the docket number of the case is known: Effective March 29, 2004, Internet users can review the Questions Presented in granted and noted cases simply by clicking on the hyperlink located within the Docket's case summary information for a particular case. FindLaw's site allows browsing the 2007 and 2008 dockets by month and lists the questions presented for all granted cases on those dockets.

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§12.31 5. Form: Parties to the Proceeding

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12.31-1 Parties to the proceeding

PARTIES TO THE PROCEEDING

[*E.g., In addition to petitioner named in the caption, John Doe, the other petitioners in this proceeding are Anne Smith, Jay Brown, and Catherine Jones.*]

Comment: This part of the petition is only necessary if there are additional parties to the action not named in the caption to the case, *e.g., John Doe et al. v California*. US Sup Ct R 14.1(b).

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§12.32 6. Table of Contents

Under US Sup Ct R 14.1(c) and 34.2, a petition that exceeds five pages or 1500 words must contain a table of contents in the appendix. This is similar to the "topical index" used in California state appellate court briefs.

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§12.33 7. Table of Authorities

A table of authorities is required if the petition exceeds five pages or 1500 words. US Sup Ct R 14.1(c), 34.2. The table used in a petition for writ of certiorari is similar to that used in briefs filed in California appellate courts. It should contain separate alphabetical listings of cases, statutes, constitutional provisions, and miscellaneous items such as books and law review articles. There is no required citation form. Clarity and consistency should be counsel's goal. See Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice, Appendix IV.C for sample table of authorities and sample table of contents. Counsel should bear in mind that, because the U.S. Supreme Court is a federal court, he or she should cite, *e.g.,* "Cal Pen C," rather than simply "Pen C," or spell out the full code title.

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§12.34 8. Inside Caption; Prayer for Relief

Although not specified in the U.S. Supreme Court Rules, the petition proper traditionally begins with an inside caption followed by a prayer for relief. This is followed by other materials required by US Sup Ct R 14.1, beginning with "opinions below." See sample in §12.37.

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§12.35 9. Opinions Below

United States Supreme Court Rule 14.1(d) requires a statement of references to opinions below, including opinions by administrative agencies. The statement must include both the official and unofficial citations. If the opinion in the lower court was unpublished, this fact should be stated, along with the date the opinion was filed. See sample in §12.37.

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§12.36 10. Grounds for Jurisdiction

The Grounds for Jurisdiction section follows the Opinions Below section. The required contents are set out in US Sup Ct R 14.1(e). The rule is self-explanatory. See sample in §12.37.

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§12.37 11. Form: Inside Caption, Prayer for Relief, Opinions Below, Jurisdiction (Petition for Writ of Certiorari)

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SUPREME COURT OF THE UNITED STATES
October Term, _ _[*date*]_ _

_ _[*Name*]_ _,	**No. _ _ _ _ _ _**
Petitioner,	
vs	
THE STATE OF CALIFORNIA,	
Respondent.	

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _ _ _ _ _ _ APPELLATE DISTRICT

Petitioner, _ _[*name*]_ _, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, _ _ _ _ _ _ Appellate District, which affirmed the judgment of the Superior Court of California, County of _ _ _ _ _ _, convicting petitioner of _ _[*state nature of crime*]_ _in violation of California Penal Code §_ _[*number*]_ _.

OPINIONS BELOW

[*Add one of the following alternatives*]

[*Alternative 1*]

The opinion of the Court of Appeal, the highest state court to review the merits, appears at Appendix _ _ to the petition and is reported at _ _[*give both official and unofficial citations*]_ _.

[*Alternative 2*]

The opinion of the Court of Appeal, the highest state court to review the merits, appears at Appendix _ _ to the petition and is unpublished.

[*Continue*]

JURISDICTION

The Court of Appeal entered its judgment on _ _[*date*]_ _, _ _[*and denied petitioner's timely request for rehearing on _ _[*date*]_ _]_ _. A copy of the Court of Appeal decision appears at Appendix _ _ and a copy of its order denying rehearing appears at Appendix _ _.

The California Supreme Court denied _ _[*petitioner's timely petition for*]_ _ review in this case on _ _[*date*]_ _. A copy of the order denying review appears at Appendix _ _.

[*Add one of the following alternatives*]

[*Alternative 1*]

The instant Petition for Writ of Certiorari is filed within 90 days of that order.

[*Alternative 2*]

An extension of time to file the petition for a writ of certiorari was granted to and including _ _[*date*]_ _, on _ _[*date*]_ _, in Application No. _____.

[*Continue*]

Petitioner invokes the jurisdiction of this Court under 28 USC §1257 on the ground that _ _[*his/her*]_ _ rights under the _ _[*number*]_ _ amendment to the U.S. Constitution were violated.

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§12.38 12. Constitutional Provisions, Treaties, and Statutes

United States Supreme Court Rule 14.1(f) requires the petitioner to set out verbatim in the petition all "constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case." The appropriate citation for these provisions must also be given. However, the rule also permits the petitioner to merely cite the provisions in the petition if they are "lengthy" and set them out in full in the appendix. If the latter course is followed, the petitioner should state in the petition that the provisions are lengthy and are therefore quoted in full in the appendix.

PRACTICE TIP: California statutory provisions should be cited to enable easy location by justices and staff who may not work with desk sets of California codes, *e.g.,* "California Pen C §187, 47A West's Ann. Cal. Codes, p. 4 (1999)."

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§12.39 13. Statement of Case

When review of a state court proceeding is sought, the statement of the case must specify "the stage in the proceedings, both in the court of first instance and in the appellate court, when the federal questions sought to be reviewed were raised; [and] the method or manner of raising them and the way in which they were passed upon by those courts." US Sup Ct R 14.1(g)(i). The petitioner must also quote or summarize the pertinent portions of the record that will "show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." US Sup Ct R 14.1(g)(i).

It is best to demonstrate that the issue was properly raised in the court below by quoting from the record. Counsel should summarize the facts and quote only the most relevant parts of the record unless the required quotations would be excessively long. In this event, US Sup Ct R 14.1(g) permits counsel to include the pertinent parts of the record in the appendix. Counsel should then state in the petition that the relevant parts of the record are set forth in the appendix. Counsel must support summaries of the facts with citations to the record. If there is no support in the trial court record, the petitioner should do the best he or she can with it and then point out that the appellate court clearly found the issue properly raised.

Facts other than those directly related to jurisdiction should, but need not, be supported by citations to the trial record. The citations are helpful because they verify the accuracy of counsel's statement. They can also help the Justices find the relevant parts of the record. The U.S. Supreme Court does not ordinarily have the trial record when considering certiorari petitions; however, the Justices can obtain it if they wish.

The jurisdictional facts and other pertinent procedural facts may be integrated or set out independently, depending both on counsel's preference and on the particulars of the case. It should be noted that US Sup Ct R 14.1(g) emphasizes that the statement of the case should be "concise" and contain only facts material to consideration of the questions presented. It should be only long enough to convey to the Court the factual context in which the issues presented for review arose. Ordinarily, it will be considerably shorter than the statement of the case presented to a state appellate court.

Within these limits, the statement of the case must be complete. It must state the facts candidly; unfavorable facts must not be omitted. Nonetheless, the statement by itself should attempt to persuade the Court that an important federal issue is at stake and that a serious injustice has been done. This must be accomplished by skillful writing—careful phrasing and persuasive juxtaposition of facts—not by argument.

On contents of the statement of the case, see Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §6.30. On the Court's consideration of certiorari petitions *without* a record, see Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §6.12.

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§12.40 14. Reasons for Granting Writ

United States Supreme Court Rule 14.1(h) requires a "direct and concise argument amplifying the reasons relied on for allowance of the writ." See US Sup Ct R 10.

It must be emphasized that the purpose of this section is to persuade the U.S. Supreme Court that the particular case merits its attention and time. A petition for writ of certiorari "will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." US Sup Ct R 10. The fact that the court below was erroneous in its conclusion or reasoning, or demonstrated a lack of legal scholarship or concern, is of little relevance. The former almost certainly is an insufficient reason for granting certiorari and mention of the latter could possibly antagonize the Court. The Supreme Court views itself less as a court of last resort than as a lawmaking body.

Three general factors are often viewed as having the greatest impact on the Court's decision to grant certiorari:

- First, the Court evaluates the importance of the question, *i.e.,* the depth or breadth of impact that the resolution of the posed question may have. Counsel should identify for the Court an issue of great national importance and explain its great significance to other litigants.
- Second, the Court determines whether there is a genuine conflict with other state or federal courts. If possible, such a conflict should be argued together with the contention that an important question of law is at issue. Even if no true conflict exists, counsel can make use of confusion and differences among the courts while discussing the importance of the question presented.
- Third, the Court considers whether the lower court's decision conflicts with relevant decisions of the United States Supreme Court itself.

See US Sup Ct R 10; see also Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §§3.3, 5.1-5.15.

The presence of any of these factors, either singly or in combination, should not be seen as providing certain access to the U.S. Supreme Court; they are merely factors that seem to draw the Court's attention to a case and that counsel should consider when preparing reasons for granting the writ. In addition, counsel should heed the admonition of US Sup Ct R 14.3 that the petition "should be stated briefly and in plain terms."

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§12.41 15. Appendix

The appendix referred to in this section is the appendix to the petition for writ of certiorari, not the appendix to the briefs on the merits. The latter is frequently called the *joint* appendix. Discussions in texts such as Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice that refer to the "appendix" usually refer to the joint appendix. For discussion of the joint appendix, see §12.42.

The contents of the appendix to the petition are specified in US Sup Ct R 14.1(i). The required contents and the order in which they must appear are as follows:

(1) Materials from the court whose decision petitioner seeks to have reviewed. The required materials are opinions, orders, findings of fact, and conclusions of law. If any of these were delivered orally, a copy of the appropriate part of the transcript must be produced. US Sup Ct R 14.1(i). If, for some excusable reason, oral materials were not transcribed, a notation to that effect should be made.

(2) Materials from other courts or administrative bodies. The same materials set out in (1) above must be included for any other courts in which the case was litigated when such matters are "relevant." Such materials must also be presented for any companion cases "if reference thereto is necessary to ascertain the grounds of the judgment." Each document must include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry. US Sup Ct R 14.1(i)(ii).

(3) The order on rehearing or review and the judgment decree. These materials must be reproduced so that the full caption appears showing the name of the court or agency, the title and number of the case, and the date the judgment, decree, or other order was entered. The judgment sought to be reviewed must be included if the date of its entry is different from the date of the opinion or order. If counsel petitioned for a rehearing in the California Court of Appeal, the order granting or denying the rehearing should be included. If counsel petitioned for review in the California Supreme Court, the order granting or denying it should be included. US Sup Ct R 14.1(i).

(4) Voluminous portions of record and legal authority. Counsel may include relevant legal provisions and portions of the record that were too voluminous to quote in the text but are necessary for the U.S. Supreme Court to properly consider the case. US Sup Ct R 14.1(f)-(g), (i)(v). See §12.38.

(5) Other materials. Counsel may also include in the appendix any other material that is believed to be essential to understanding the petition. US Sup Ct R 14.1(i)(vi).

In some cases, the necessary materials may be so bulky that it is not practical to include them in the appendix bound with the petition. In this event, it is permissible to bind the materials in a separate volume or volumes with appropriate covers. US Sup Ct R 14.1(i).

Note that every appendix to a document must be preceded by a table of contents that provides a description of each document in the appendix. US Sup Ct R 34.4.

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X. PREPARING THE BRIEF AND ORAL ARGUMENT

§12.42 A. Joint Appendix

Under US Sup Ct R 26.1, if the U.S. Supreme Court grants certiorari, the petitioner must file a joint appendix within 45 days of the Court's acceptance of the case. Rule 26.1 provides that petitioner shall file 40 copies prepared in booklet form according to Rule 33.1 and serve three copies on each of the parties. As provided in US Sup Ct R 26.2, the parties must cooperate in preparing the appendix. If the parties cannot agree on the contents of the joint appendix, US Sup Ct R 26.2 sets forth a detailed process to be followed in designating the record and filing the appendix.

The appendix must include:

- The relevant docket entries in the courts below;
- Any relevant pleadings, jury instructions, findings, conclusions, or opinions;
- The judgment, order, or decision in question; and
- Any other parts of the record to which the parties wish to direct the Court's attention.

If prepared in booklet (printed) form under US Sup Ct R 33.1, materials already reproduced in a petition for writ of certiorari or its appendix may be omitted from the joint appendix. US Sup Ct R 26.1.

Note that every appendix to a document must be preceded by a table of contents that provides a description of each document in the appendix. US Sup Ct R 34.4.

Two lines must appear at the bottom of the cover of the joint appendix: The first line must indicate the date the writ was filed or the date the appeal was docketed, and the second line must indicate the date certiorari was granted or the date jurisdiction of the appeal was noted or postponed. US Sup Ct R 26.6. Counsel of record for each party must be listed on the cover of the joint appendix. US Sup Ct R 34.1(f).

It is to everyone's advantage to compile the joint appendix shortly after review is granted. This allows the briefs to be written with consistent referencing. Much of what is required for the joint appendix may have been previously acquired for the lower courts, or for the appendix to the petition for writ of certiorari (see §12.41). Thus, compiling the joint appendix may not be as time-consuming as it might appear.

Filing of the joint appendix may be deferred on permission of the Clerk of the U.S. Supreme Court until after the briefs have been filed. However, deferred filing "is not favored." US Sup Ct R 26.4(a). Moreover, a deferred appendix must contain, on each page, the page number of the record where the material may be found. US Sup Ct R 26.4(b). If filing of the appendix is deferred, the briefs may first be filed in 8-1/2 by 11-inch format, with references to the pages of the record. Thereafter, printed copies of the brief citing the appendix must be filed within 10 days after the filing of the joint appendix. US Sup Ct R 26.4(b). Such deferred filing of the appendix may *not* be used to gain additional time to polish the brief. Under US Sup Ct R 26.4(b), no changes may be made between the original and final copies of the brief other than the substitution and addition of references to the appendix and correction of typographical errors.

If questions or problems arise in preparing the joint appendix, counsel should refer to US Sup Ct R 26 and to Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice, chap 12. The U.S. Supreme Court Clerk is also an invaluable resource.

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§12.43 B. Writing the Brief

United States Supreme Court Rules 24 and 25, pertaining to briefs on the merits, are clear and detailed. There is no real difference between writing a brief of quality for the U.S. Supreme Court and any other court. The U.S. Supreme Court demands succinct presentation. Rule 24.6 provides: "A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph."

Counsel cannot expect to deceive or distract the Court. Each section is important and must be drafted carefully, directly, and honestly. The Court may reject an opening brief and send it back to be rewritten if the language is overly complex or is not concise. See *Huffman v Pursue Ltd.* (1974) 419 US 892, 42 L Ed 2d 136, 95 S Ct 169.

Only questions properly raised in lower courts and presented in the petition for certiorari may be argued in the briefs. Although the Court reserves the power to examine "plain error," even if never raised before (US Sup Ct R 24.1(a)), counsel cannot predict the rare times when the Court will exercise that power.

One feature unique to U.S. Supreme Court briefing is the summary of argument, required immediately before the argument in all but reply briefs, where it is optional. US Sup Ct R 24.1(h), 24.4. The summary must be "a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient." US Sup Ct R 24.1(h). The summary of argument can be an important and powerful tool of advocacy, in part because it may be consulted more fully than, if not indeed to the exclusion of, the argument itself. See Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §13.10. Preparation of the summary requires the writer to think through and recite his or her contentions concisely and logically, without digression or lengthy quotations or citations. Although the summary of argument will run perhaps one-tenth the length of the following argument itself, including citations, it should be crisply and independently informative and persuasive, much like the Reporter of Decisions' syllabi of U.S. Supreme Court opinions.

NOTE: United States Supreme Court Rule 25.9 now requires counsel to submit the brief electronically to both the Clerk of the Court and opposing counsel, in addition to filing paper copies.

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§12.44 C. Oral Argument

Only one attorney per side is permitted to argue. Argument by more than one attorney per side must be requested by motion filed no later than 7 days after the filing of the respondent's brief and is not favored. US Sup Ct R 28.4. Counsel is limited to 30 minutes for oral argument. Additional time is rarely accorded. US Sup Ct R 28.3. Additional time must be requested by motion not later than 7 days after the filing of the respondent's brief. US Sup Ct R 28.3. By leave of the Court, counsel for an amicus curiae who has filed a brief may argue orally on the side of a party, with consent of the party. Only in extraordinary circumstances will the Court grant leave for such counsel to argue in the absence of consent. US Sup Ct R 28.7.

The Justices look favorably on brevity, spontaneity, command of the material, and a forthright manner. Anything that could give the impression of evasion must be avoided. "Oral argument read from a prepared text is not favored." US Sup Ct R 28.1. In order to be most relaxed and effective, counsel should be totally prepared on the law and the facts of his or her case.

An observer of numerous oral arguments before the U.S. Supreme Court recommends that attorneys be well prepared. Counsel should be completely familiar with the facts of the case, and expect possible questions concerning unbriefed preliminary matters of jurisdiction and justiciability such as standing, ripeness, and mootness. Moreover, counsel have a continuing duty to inform the Court of any developments that may conceivably affect the outcome of the litigation, including advising the Court at oral argument of facts that would cause the writ of certiorari to be dismissed as moot. *Board of License Comm'rs of Tiverton v Pastore* (1985) 469 US 238, 83 L Ed 2d 618, 105 S Ct 685. Justices and commentators have spoken frequently and eloquently about the importance of oral argument. See, *e.g.,* Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §14.1; Wiener, Briefing and Arguing Federal Appeals (2001).

Note also that there may be extensive questioning by the Justices, or none at all (the former is common, the latter, rare). The issues that appear to counsel to be of preeminent importance and great subtlety may be entirely ignored in favor of an obscure or minor point. The Justices control oral argument; counsel must be prepared to adapt to their wishes.

There are also many minor items regarding oral argument with which counsel should become familiar. Counsel should observe the arguments of other attorneys a few days before counsel's own appearance. One should familiarize oneself in advance with the courtroom, the acoustics, the demeanor of both the Court and the advocates, timing, lights, what to wear, where to sit, and how to address the Court. Prior consultation with the clerk and experienced U.S. Supreme Court advocates may be quite helpful. The court's Guide for Counsel in Cases to be Argued contains extensive advice about both formal appearance and method of argument. The Guide is available from the Clerk of the Court and on its website. See §12.2.

Moot court sessions with colleagues posing questions likely to be encountered are highly desirable. Most attorneys moot their cases repeatedly before oral argument. Such practice sessions train attorneys to deliver precise, succinct answers and to react quickly. They also force lawyers to prepare earlier than they might otherwise.

PRACTICE TIP: Georgetown University's Law Center has one of the most highly respected moot court programs in the country, the Supreme Court Institute Moot Court Program. Approximately two-thirds of all cases heard by the Supreme Court are mooted at Georgetown before a panel of "Justices" that includes law faculty and experienced Supreme Court advocates. The Institute will moot anyone with a case before the Supreme Court at no charge, but will not moot both parties in the same case; it is first come, first served. Thus, the first call that many attorneys make upon hearing the news that his or her case has been accepted by the Supreme Court is a telephone call to the Institute to schedule a moot court. San Francisco Daily Journal, Mar. 8, 2007, p 1. Information about the Institute may be found at http://www.georgetown.edu (click on "law center" and type "moot court" in search box); contact information is: Supreme Court Institute, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001; (202) 662-9630. In California, Stanford, Boalt, and Santa Clara Law Schools have also held moot courts for California attorneys with cases pending before the Supreme Court.

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§12.45 XI. PETITION FOR REHEARING

A petition for rehearing may be filed within 25 days after the U.S. Supreme Court's judgment or decision on the merits. US Sup Ct R 44.1. It is also permissible to file a petition for rehearing after an order denying a petition for writ of certiorari. A petition for rehearing after denial of certiorari, however, will not be accepted for filing without a signed certificate of counsel attesting that the petition is restricted to "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented" and "is presented in good faith and not for delay." US Sup Ct R 44.2.

If the clerk determines that a petition for rehearing, which is timely and submitted in good faith, does not comply with the formal requirements of Rules 33, 34, or 44, the clerk will return it with a letter noting the deficiency. A corrected petition submitted in accordance with US Sup Ct R 29.2 and received within 15 days of the clerk's letter is considered timely. US Sup Ct R 44.6.

In either event, the U.S. Supreme Court very rarely grants rehearings. See generally Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice §§15.1-15.7.

Note that while the Court's rules provide for the extension of time in which to file a petition for rehearing of "judgment or decision on the merits," they do not provide for extensions of time in which to file a petition for rehearing of an order denying certiorari; "such an order is plainly not a 'judgment or decision on the merits.'" *Boumediene v Bush* (2007) 550 US 1301, 167 L Ed 2d 757, 758, 127 S Ct 1725.

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§12.46 XII. DECISION TO SEEK FURTHER REVIEW

The denial of certiorari by the Supreme Court is not a decision on the merits and does not foreclose filing a federal habeas corpus petition in federal district court.

NOTE: When the Supreme Court grants certiorari review of a state court direct appeal or habeas corpus decision, the Supreme Court is not bound by the strict standard of review set forth in 28 USC §2254(b).

For discussion of review of state court convictions by habeas corpus in the federal courts, see chaps 13-18.

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I. OVERVIEW OF FEDERAL HABEAS CORPUS

§13.1 A. Availability of Writ

Federal habeas corpus, the "great writ," is a civil remedy (*Browder v Director, Illinois Dep't of Corrections* (1978) 434 US 257, 269, 54 L Ed 2d 521, 534, 98 S Ct 556; *Schlanger v Seamans* (1971) 401 US 487, 490 n4, 28 L Ed 2d 251, 254 n4, 91 S Ct 995) that allows a person who is "in custody" as the result of a judgment of conviction in state or federal court to bring an action in federal district court challenging the legality of the conviction or the sentence on the ground that it violates the United States Constitution or federal law. 28 USC §§2254(a) (state convictions), 2255(a) (federal convictions).

Although the petitioner must be "in custody," the words "in custody" as used in the habeas corpus statutes have been construed broadly to encompass restraints on liberty that fall short of actual imprisonment. See, *e.g., Hensley v Municipal Court* (1973) 411 US 345, 348, 36 L Ed 2d 294, 298, 93 S Ct 1571 (release on own recognizance); *Jones v Cunningham* (1963) 371 US 236, 239, 9 L Ed 2d 285, 289, 83 S Ct 373 (parole). On custody generally, see §§14.2-14.7.

PRACTICE TIP: Note, however, that habeas corpus is available only to challenge the legality of the custody itself. Prisoners challenging prison conditions or the means of execution of their sentences must seek alternative remedies such as civil rights suits under 42 USC §1983.

The discussion of federal habeas corpus in this book is limited to litigation involving California prisoners who are challenging the legality of a conviction in state court or a prison sentence imposed as a result of a state court conviction under 28 USC §2254. It does not address federal habeas corpus litigation in capital cases; nor does it address habeas corpus litigation by federal prisoners under 28 USC §2255.

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§13.2 B. Limitations on Use

Statutory limitations. The writ of habeas corpus is rooted in the common law (*Fay v Noia* (1963) 372 US 391, 399, 9 L Ed 2d 837, 845, 83 S Ct 822, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 5, 118 L Ed 2d 318, 326, 112 S Ct 1715), but is authorized and regulated by statute. See 28 USC §§2241-2255, 2261-2266. These statutory provisions place a number of procedural and substantive limitations on the availability of federal habeas corpus relief. They include:

- A 1-year limitation period for all postconviction federal habeas petitions (28 USC §2244(d)) (see §§15.1-15.7);
- Stringent restrictions on the court's authority to hold evidentiary hearings when the petitioner "has failed to develop the factual basis of the claim in State court proceedings" (28 USC §2254(e)(2) (see §§17.17-17.19); and
- A ban on consideration of any claim that was presented in a previous habeas corpus petition and stringent restrictions on the district court's authority to entertain a second or successive habeas corpus petition that was not presented in a prior application (28 USC §2244(b)) (see §§15.9-15.11).

Furthermore, under 28 USC §2254(d)(1)-(2) and (e)(1), federal courts are required to give great deference to state court findings of law and fact. See §§13.24-13.28, 17.23.

These and other limitations on the availability of federal habeas corpus relief were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub L 104-132, 110 Stat 1214), which took effect April 24, 1996. This legislation, commonly known by the acronym "AEDPA," amended 28 USC §§2244, 2253-2255, and Fed R App P 22, and made profound changes in federal habeas corpus practice. The substantive provisions of AEDPA apply to all cases in which the habeas corpus petition was filed in district court on or after April 24, 1996. *Lindh v Murphy* (1997) 521 US 320, 322, 138 L Ed 2d 481, 486, 117 S Ct 2059. See also *Woodford v Garceau* (2003) 538 US 202, 204, 155 L Ed 2d 363, 367, 123 S Ct 1398.

NOTE: Many of AEDPA's restrictions apply only when the petitioner is "in custody pursuant to the judgment of a State court." See 28 USC §§2244, 2254. See *McNeely v Blanas* (9th Cir 2003) 336 F3d 822, 824 n1 (pretrial petition alleging speedy trial violations did not fall under 28 USC §2254).

U.S. Supreme Court decisions limiting availability of habeas relief. Beginning in the 1970's, the United States Supreme Court has issued a series of decisions limiting the power of federal courts to review state convictions through habeas corpus petitions. The following are among the most significant of these decisions:

- *Stone v Powell* (1976) 428 US 465, 491 n31, 49 L Ed 2d 1067, 1086 n31, 96 S Ct 3037 (Fourth Amendment claims are not cognizable on habeas corpus). See §15.41.
- *Wainwright v Sykes* (1977) 433 US 72, 84, 53 L Ed 2d 594, 606, 97 S Ct 2497 (state court procedural default precludes federal court from considering claims unless petitioner can show "cause" for default and "prejudice" from errors at trial). On the procedural default doctrine, see §§15.12-15.36.
- *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060; *Bousley v U.S.* (1998) 523 US 614, 619, 140 L Ed 2d 828, 838, 118 S Ct 1604 (habeas corpus relief may not be granted on basis of new rule of criminal procedure). See §15.37.
- *Brecht v Abrahamson* (1993) 507 US 619, 123 L Ed 2d 353, 113 S Ct 1710 (adopting standard of harmless error review for habeas corpus cases more lenient than standard of *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824). See §§17.24-17.28.
- *Williams v Taylor* (2000) 529 US 362, 412, 146 L Ed 2d 389, 429, 120 S Ct 1495 (concurring opinion of O'Connor and, in part, Rehnquist) (under AEDPA, federal court may grant habeas relief only if state court's construction of controlling federal law is objectively unreasonable). See §§13.23-13.27, 17.23.

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§13.3 C. Preserving the Right to Federal Habeas Corpus in California Noncapital Felony Cases

When a judgment of conviction is entered in a noncapital case, a convicted California offender must exhaust state remedies before he or she is eligible to bring a habeas corpus petition in federal court. 28 USC §2254(b)(1)(A). The exhaustion doctrine is thoroughly discussed in §§14.18-14.40.

NOTE: In capital cases, there is an automatic appeal from the superior court to the California Supreme Court. See Cal Const art VI, §11; Pen C §1239(b). The automatic appeal exhausts state remedies.

Briefly stated, to exhaust state remedies, the state prisoner must fairly present both the operative facts and the legal theory underlying his or her federal constitutional claim to the highest court in the state, even if that court offers only discretionary review. *Picard v Connor* (1971) 404 US 270, 276, 30 L Ed 2d 438, 444, 92 S Ct 509; *O'Sullivan v Boerckel* (1999) 526 US 838, 842, 144 L Ed 2d 1, 8, 119 S Ct 1728. To ensure that the federal courts will conclude that the federal constitutional claim has been "fairly presented," the defendant should specify the federal constitutional basis for any potential federal claim in the state court proceedings. See *Duncan v Henry* (1995) 513 US 364, 366, 130 L Ed 2d 865, 868, 115 S Ct 887 (concurring opinion of Souter, Ginsburg, and Breyer). This is often referred to as "federalizing." For discussion, see §4.34.

In a felony case, to exhaust state remedies in California with respect to claims of error that are apparent from the trial record, the defendant must appeal the judgment of the superior court to the court of appeal. If the court of appeal affirms the conviction, the offender must request review in the California Supreme Court. Cal Rules of Ct 8.500. See §§5.41-5.50. In a misdemeanor case, the defendant has no right to petition the California Supreme Court for review after affirmance of the conviction on direct review. On review of the judgment in misdemeanor cases, see Cal Rules of Ct 8.1005. When a substantial federal issue is involved in a misdemeanor case, the defendant exhausts state remedies by filing a petition for a writ of habeas corpus in the California Supreme Court. *Larche v Simons* (9th Cir 1995) 53 F3d 1068, 1072. For further discussion, see §14.31.

To preserve a claim of federal constitutional error that requires the development of facts outside the record, the offender must present the claim to the California Supreme Court in a petition for writ of habeas corpus. On state habeas, see chaps 9-10.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.4 D. Applicable Rules of Court

§13.4 D. Applicable Rules of Court

The following is a list of rules applicable in federal habeas corpus proceedings involving California state court convictions.

United States District Courts

- Habeas Rules. Formally called the Rules Governing Section 2254 Cases in the United States District Courts (following 28 USC §2254; see Appendix B);
- Federal Rules of Civil Procedure;
- Federal Rules of Evidence;
- Local Rules of the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California;
- General Orders of the respective district courts;
- 28 USC §§2241-2254.

The United States Court of Appeals for the Ninth Circuit

- Federal Rules of Appellate Procedure, particularly Title VI, Rules 22-24;
- Rules of the United States Court of Appeals for the Ninth Circuit;
- General Orders of the Ninth Circuit;
- Internal Operating Procedures.

United States Supreme Court

- Supreme Court Rules.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.5 E. Location of Courts and Prisons by Federal Judicial District and County

§13.5 E. Location of Courts and Prisons by Federal Judicial District and County

A federal habeas corpus petition challenging a California state court conviction should be filed in the federal judicial district in which the court that issued the judgment of conviction is located. See §16.7 on venue. A civil rights action under 42 USC §1983 should be filed in the district where the claim arose or all defendants reside. 28 USC §1391(b). A motion under 28 USC §2255, seeking relief from a federal conviction, should be filed with the federal sentencing court. All appeals should be filed in the Court of Appeals for the Ninth Circuit.

The following list gives the mailing address and telephone number of the United States District Courts in California, the counties each district encompasses, the state correctional institutions for adults located in each district, and the mailing address and telephone number of the Ninth Circuit Court of Appeals.

United States District Courts

1. Northern District

United States Courthouse, Federal Bldg.
450 Golden Gate Ave.
P.O. Box 36060
San Francisco, CA 94102
http://www.cand.uscourts.gov
(415) 522-2000
Counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo, Sonoma

State Prisons for Adults:
Correctional Training Facility (Highway 101 North, Soledad, Monterey County 93960, (831) 678-3951)
Pelican Bay State Prison (5905 Lake Earl Dr., Crescent City, Del Norte County 95531, (707) 465-1000)
Salinas Valley State Prison (31625 Highway 101, Soledad, Monterey County 93960, (831) 678-5500)
San Quentin State Prison (San Quentin, Marin County 94964, (415) 454-1460)

2. Eastern District

United States Courthouse
501 I St., Suite 4-200
Sacramento, CA 95814
http://www.caed.uscourts.gov
(916) 930-4000
Counties: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, Yuba

State Prisons for Adults:
Avenal State Prison (#1 Kings Way, Avenal, Kings County 93204, (559) 386-0587)
California Correctional Center (711-045 Center St., Susanville, Lassen County 96130, (530) 257-2181)
California Correctional Institution (24900 Highway 202, Tehachapi, Kern County 93581, (661) 822-4402)
California Medical Facility (1600 California Dr., Vacaville, Solano County 95696, (707) 448-6841)
Folsom State Prison (300 Prison Rd., Represa, Sacramento County 95671, (916) 985-2561)
Central California Women's Facility (23370 Road 22, Chowchilla, Madera County 93610, (559) 665-5531)
Corcoran State Prison (4001 King Ave., Corcoran, Kings County 93212, (559) 992-8800)
Deuel Vocational Institution (23500 Kasson Rd., Tracy, San Joaquin County 95378, (209) 835-4141)

Sacramento State Prison (Prison Rd., Represa, Sacramento County 95671, (916) 985-8610)
High Desert State Prison (475-750 Rice Canyon Rd., Susanville, Lassen County 96127, (530) 251-5100)
Mule Creek State Prison (4001 Highway 104, Ione, Amador County 95640, (209) 274-4911)
North Kern State Prison (2737 West Cecil Ave., Delano, Kern County 93216, (661) 721-2345)
Pleasant Valley State Prison (24863 West Jayne Ave., Coalinga, Fresno County 93210, (559) 935-4900)
Sierra Conservation Center (5100 O'Byrnes Ferry Rd., Jamestown, Tuolumne County 95327, (209) 984-5291)
California Substance Abuse Treatment Facility (900 Quebec Ave., Corcoran, Kings County 93212, (559) 992-7100)
California State Prison, Solano (2100 Peabody Rd., Vacaville, Solano County 95696, (707) 451-0182)
Valley State Prison for Women (21633 Avenue 24, Chowchilla, Madera County 93610, (559) 665-6100)
Wasco State Prison (701 Scofield Ave., Wasco, Kern County 93280, (661) 758-8400)

3. Central District

United States Courthouse
312 N. Spring St.
Los Angeles, CA 90012
http://www.cacd.uscourts.gov
(213) 894-1565 or (213) 864-2215
Counties: Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, Ventura

State Prisons for Adults:
California Institution for Men (14901 Central Ave., Chino, San Bernardino County 91710, (909) 597-1821)
California Institution for Women (16756 Chino-Corona Rd., Corona, Riverside County 91720, (909) 597-1771)
California Men's Colony (Highway 1, San Luis Obispo, San Luis Obispo County 93409, (805) 547-7900)
California Rehabilitation Center (5th St. & Western, Norco, Riverside County 91760, (951) 737-2683)
California State Prison (44750 60th St. West, Lancaster, Los Angeles County 93536, (661) 729-2000)
Chuckawalla Valley State Prison (19025 Wiley's Well Rd., Blythe, Riverside County 92226, (760) 922-5300)
Ironwood State Prison (19005 Wiley's Well Rd., Blythe, Riverside County 92226, (760) 921-3000)

4. Southern District

United States Courthouse
940 Front St.
San Diego, CA 92101
http://www.casd.uscourts.gov
(619) 557-5600
Counties: San Diego, Imperial

State Prisons for Adults:
Calipatria State Prison (7018 Blair Rd., Calipatria, Imperial County 92233, (760) 348-7000)
Centinela State Prison (2302 Brown Rd., Imperial, Imperial County 92251, (760) 337-7900)
Richard J. Donovan Correctional Facility at Rock Mountain (480 Alta Rd., San Diego, San Diego County 92179, (619) 661-6500)

United States Court of Appeals for the Ninth Circuit
United States Court of Appeals, Ninth Judicial Circuit
95 Seventh St.
San Francisco, CA 94103
Mailing address: P.O. Box 193939, San Francisco, CA 94119-3939
http://www.ca9.uscourts.gov
(415) 556-9800 (clerk's office).

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F. Legal Research

1. In General

§13.6 a. Practice Aids

The following books provide helpful information regarding federal habeas corpus practice: Hertz & Liebman, Federal Habeas Corpus Practice and Procedure (5th ed 2005); Wright, Miller, et al, Federal Practice and Procedure, *Jurisdiction*, vols. 16AA-17B (4th ed 2008); Moore's Federal Practice (3d ed 1997); Yackle, Postconviction Remedies §4 (1981) (historical overview of habeas corpus jurisdiction); and Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice (9th ed 2007). A very good guide to appellate practice is Moskovitz, Winning an Appeal (4th ed 2007).

Other research aids include:

- California Habeas Resource Center, created by the California legislature. See http://www.hcrc.ca.gov for more information.
- Law review articles, including Georgetown Law Journal American Criminal Law Review's annual review of federal criminal procedure (see https://www.law.georgetown.edu/cle/publications.cfm); and Criminal Law in the Ninth Circuit: Recent Developments (published annually in the Loyola of Los Angeles Law Review; see http://llr.lls.edu).
- Bureau of National Affairs' Criminal Law Reporter, a weekly publication containing the full text of all United States Supreme Court opinions in criminal matters, plus summaries and extracts of other significant federal and state cases.

Counsel should consult the United States Code Annotated (USCA) for federal habeas corpus statutes (28 USCA §§2241-2266). To keep abreast of recent Ninth Circuit cases, counsel should review current published opinions *and* unpublished dispositions (available online through the Westlaw or Lexis database, at the Ninth Circuit website, http://www.ca9.uscourts.gov/opinions/, or from the clerk of the Ninth Circuit). Although unpublished decisions are not citable authority, they can be very useful in locating controlling cases and in familiarizing attorneys with well-settled legal principles.

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§13.7 b. Controlling Legal Principles

Under AEDPA, a federal court may grant postconviction relief only if the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC §2254(d)(1). The United States Supreme Court has construed this provision in *Williams v Taylor* (2000) 529 US 362, 412, 146 L Ed 2d 389, 429, 120 S Ct 1495, and in *Lockyer v Andrade* (2003) 538 US 63, 71, 155 L Ed 2d 144, 155, 123 S Ct 1166. See also *Price v Vincent* (2003) 538 US 634, 640, 155 L Ed 2d 877, 885, 123 S Ct 1848. For discussion, see §§13.23-13.27, 17.23.

Any claim for relief on federal habeas under AEDPA must begin with identification of the United States Supreme Court decisions pertinent to the claim (*Garvin v Farmon* (9th Cir 2001) 258 F3d 951, 955), and must show either that the state court's decision was in conflict with a rule of constitutional law laid down by the Supreme Court or that its application of the rule was objectively unreasonable (*Himes v Thompson* (9th Cir 2003) 336 F3d 848, 852).

The Ninth Circuit is no longer authorized to reverse a state court decision on the ground that it "conflicts with Ninth Circuit precedent on a federal Constitutional issue." *Duhaime v Ducharme* (9th Cir 1999) 200 F3d 597, 600. Only decisions of the United States Supreme Court are binding on state courts. *Himes v Thompson, supra*; *Duhaime v Ducharme, supra.* However, Ninth Circuit precedent "remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable." *Himes v Thompson, supra*.

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2. Pro Se Legal Research

§13.8 a. Basic Tools

Persons unfamiliar with legal research techniques would benefit by reading a brief introductory book on the subject, such as Lewis, Using American Law Books (4th ed 1995); Cohen & Olson, Legal Research in a Nutshell (9th ed 2007); or the Southern California Association of Law Libraries, Locating the Law (5th ed 2009) available in print or for free online at http://www.aallnet.org/chapter/scall/locating.htm. An English dictionary is an essential aid to pro se legal research as is a legal dictionary of some type. A good introduction to the law of criminal procedure such as Israel & LaFave, Criminal Procedure in a Nutshell; Constitutional Limitations (7th ed 2006) will also prove helpful. In addition, the annual December issue of the Georgetown Law Journal publishes an overview of the area of postconviction remedies.

MacKay & The Prison Law Office, The California State Prisoners Handbook: A Comprehensive Practice Guide to Prison and Parole Law (4th ed 2008) (available from Rayve Productions, P.O. Box 726, Windsor, CA 95492, (800) 852-4890, see http://www.prisonlaw.com/orderforminprogress.htm) contains a helpful chapter on legal research written especially for California prisoners. The book is discounted for inmates. Two other sources on basic legal research are Mack, California Paralegal's Guide (5th ed 1998), which contains chapters on law sources, the courts, legal writing, legal research, and criminal law, and National Association of Legal Assistants, NALA Manual for Paralegals and Legal Assistants: A General Skills and Litigation Guide for Today's Professionals (4th ed 2004), which has chapters on legal terminology and legal research.

If the question involves a substantive legal matter (such as the definition of voluntary manslaughter in California), the following book may be helpful: Witkin & Epstein, California Criminal Law (3d ed 2000). If the question involves the admission of evidence, the following books may be helpful: Witkin, California Evidence (4th ed 2000) and Jefferson's California Evidence Benchbook (4th ed CJA-CEB 2009).

NOTE: Users should bear in mind that, when using any research aid, they should always read the actual cases or statutes rather than rely solely on an unofficial summary of a case or statute.

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§13.9 b. Access to Legal Materials

Prisoners representing themselves in court may have problems gaining access to legal research material. Prisoners in administrative segregation ("solitary") are most apt to experience these problems because they are generally not permitted to go to the prison law library. The prison's failure to provide legal materials may violate due process if it actually deprives prisoners of meaningful access to the courts to challenge their convictions or conditions of confinement. *Lewis v Casey* (1996) 518 US 343, 351, 135 L Ed 2d 606, 618, 116 S Ct 2174.

If denial of access to legal materials causes a petition to be untimely, the denial could be deemed a state-created impediment to filing a habeas corpus petition within the meaning of 28 USC §2244(d)(1) (see *Whalem/Hunt v Early* (9th Cir 2000) 233 F3d 1146, 1148 (case remanded to district court for further factual development)), or give rise to equitable tolling (see *Espinoza-Matthews v California* (9th Cir 2005) 432 F3d 1021 (prison's refusal to allow petitioner access to legal papers for 11 months despite diligent attempts to obtain them was extraordinary circumstance that entitled him to equitable tolling)).

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II. COURT-APPOINTED COUNSEL

§13.10 A. Right to Counsel in Capital Habeas Proceedings

Indigent defendants in capital cases also are entitled to funds for investigative, expert, or other reasonably necessary services (18 USC 3599(a)(2)), and district courts cannot require petitioners to demonstrate possible success on a claim before the claim can be investigated. *Daniels v U.S. Dist. Court* (9th Cir 1995) 72 F3d 775 (indigent defendants in death penalty cases are entitled to funding for pursuit of material evidence relating to colorable claims that are cognizable under 28 USC §2254 and that, if proven, would entitle petitioner to habeas relief).

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§13.11 B. Right to Counsel in Noncapital Habeas Proceedings

The Sixth Amendment guarantee of assistance of counsel does not apply to federal habeas corpus proceedings in cases in which the petitioner has been sentenced to a term of imprisonment. *Chaney v Lewis* (9th Cir 1986) 801 F2d 1191, 1196. See also *Pennsylvania v Finley* (1987) 481 US 551, 554, 95 L Ed 2d 539, 545, 107 S Ct 1990 (no right to counsel in state postconviction proceedings); *Ross v Moffitt* (1974) 417 US 600, 41 L Ed 2d 341, 94 S Ct 2437 (counsel constitutionally mandated only in first state appeal as of right, *i.e.,* to intermediate state appellate court). But see 18 USC §3599 (court *must* appoint counsel for indigent prisoner who has received death penalty).

Nevertheless, counsel *must* be appointed for an indigent prisoner if:

- An evidentiary hearing is necessary (Habeas Rule 8(c); for discussion of evidentiary hearings, see §§17.17-17.19, 17.29-17.31);
- Counsel is necessary for the effective use of discovery procedures (Habeas Rule 6(a)); or
- Due process requires it (*Eskridge v Rhay* (9th Cir 1965) 345 F2d 778, 782; see also *Dillon v U.S.* (9th Cir 1962) 307 F2d 445 (28 USC §2255 case)) (due process may require appointment of counsel when issues are very complex).

In addition, the district court *may* appoint counsel in a habeas corpus case to represent an indigent prisoner if it finds "that the interests of justice so require." 18 USC §3006A(a)(2). See also 28 USC §§1915(d), 2254(h); Habeas Rule 8(c). In deciding whether to appoint counsel, the district court will evaluate the likelihood of success on the merits as well as the petitioner's ability to articulate his or her claims pro se in light of the complexity of the legal issues involved. *Weygandt v Look* (9th Cir 1983) 718 F2d 952. See *Allen v Calderon* (9th Cir 2005) 408 F3d 1150 (district court abused discretion in dismissing petition without appointing counsel for limited purpose of representing petitioner at competency hearing given substantial question about petitioner's competence); Fed R Civ P 17(c); *Bashor v Risley* (9th Cir 1984) 730 F2d 1228, 1234 ("interests of justice" did not require appointment of counsel when petitioner thoroughly presented his claims and district court stated that petitioner's pleadings would be subjected to standards less stringent than those applied to lawyer-drafted pleadings).

Note that because there is no constitutional right to counsel in noncapital habeas proceedings, ineffective assistance of counsel in state or federal habeas proceedings is not a ground for federal habeas relief. See 28 USC §2254(i).

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§13.12 1. Requests for Appointment of Counsel

A request for appointment of counsel must specifically state why counsel is required. An order denying appointment of counsel in a habeas case is not immediately appealable. *Kuster v Block* (9th Cir 1985) 773 F2d 1048.

It is futile to request that counsel be appointed to *prepare* the habeas corpus petition. Usually a petition alleging facts that show a real possibility of federal constitutional error must be filed prior to the appointment of counsel. *Aubut v Maine* (1st Cir 1970) 431 F2d 688. But see *Anderson v Heinze* (9th Cir 1958) 258 F2d 479, 484.

If the petitioner proceeded pro se in the federal district court, he or she may later seek appointed counsel in the Ninth Circuit. However, the petitioner must show that the issues are sufficiently complex and weighty so that appointment of counsel is necessary. *Dillon v U.S.* (9th Cir 1962) 307 F2d 445.

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§13.13 2. Appointment

When the defendant is represented in the state appellate courts by a state public defender who decides to pursue federal habeas corpus, no appointment by a federal judge is necessary. The public defender acts as retained counsel would except that he or she must apply for in forma pauperis status for the defendant. *Warren v U.S.* (8th Cir 1959) 263 F2d 263.

A court-appointed private attorney who represented a defendant in the state appellate courts and wishes to pursue federal remedies has several options. Counsel may prepare a federal habeas petition on a pro bono basis if the defendant is willing to proceed pro se, or he or she may seek federal court appointment following the filing of a pro se petition by the defendant.

As a practical matter, if the district court chooses to appoint counsel, it usually appoints the Federal Public Defender or an attorney from the district court's Criminal Justice Act Panel.

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§13.14 3. Compensation

The current rate of compensation for appointed attorneys in habeas corpus proceedings is $40 per hour for out-of-court time and $60 per hour for in-court time. In certain districts the rate can be up to $75 per hour. 18 USC §3006A(d)(1). Appointed attorneys are also entitled to reimbursement for expenses reasonably incurred, including the costs of authorized transcripts. 18 USC §3006A(d)(1).

Each attorney representing a defendant before a United States magistrate or district court is entitled to receive a maximum of $7000 in a case in which one or more felonies are charged and $2000 in a case in which only misdemeanors are charged. The maximum amount of compensation for representing a defendant in an appellate court is currently $5000 for each attorney. 18 USC §3006A(d)(2). Lengthy or complex representation may entitle counsel to payment in excess of the maximum; however, the court must certify that the amount of the excess payment is necessary to provide fair compensation, and the payment must be approved by the chief judge of the circuit or as he or she delegates. 18 USC §3006A(d)(3).

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§13.15 C. Pro Se Petitioners

A very large proportion of federal habeas corpus petitions are filed by petitioners acting pro se (also called in propria persona or in pro per), which means by petitioners representing themselves. In general, pro se petitions are construed liberally by the courts and pro se petitioners are held to less stringent standards than lawyers. See, *e.g., Price v Johnston* (1948) 334 US 266, 292, 92 L Ed 1356, 1372, 68 S Ct 1049; *Pembrook v Wilson* (9th Cir 1966) 370 F2d 37, 40. However, if the petition does not satisfy the threshold requirements of custody (see §§14.2-14.7) and exhaustion (see §§14.18-14.40) and does not state a claim for federal habeas relief, federal courts will deny the petition.

If a petition asserts a claim on which relief can be granted, but does so in a vague and conclusory manner, the court will likely dismiss with leave to amend. *Ballard v Nelson* (9th Cir 1970) 423 F2d 71, 73. A petition should not be dismissed without leave to amend unless it appears that no tenable claim could be pleaded if leave were granted. *Jarvis v Nelson* (9th Cir 1971) 440 F2d 13, 14.

California defendants who wish to challenge their state conviction by way of federal habeas corpus should use the checklist in §16.14 to make sure they have taken all necessary steps. See also §13.4 for the names and descriptions of the statutes and court rules that govern federal habeas corpus proceedings, §13.5 for addresses and telephone numbers of federal district courts in California, and §13.6 for a list of research aids that may be helpful in pursuing a federal remedy.

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§13.16 D. Form: Request for Appointment of Counsel

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_ _[*Name of attorney or pro se party*]__
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name(s)*]_ _, **Petitioner**	)	**No. _ _ _ _ _ _**
	)	
	)	**MOTION AND DECLARATION**
vs	)	**FOR APPOINTMENT OF**
	)	**COUNSEL**
_ _[*Name(s)*]_ _, **Respondent**	)	
	)	

Petitioner, _ _[*name*]_ _, moves the Court for an order appointing counsel at public expense. 28 USC §§1915(e)(1), 2254(h); 18 USC §3006A.

[*Add one of the following alternatives*]

[*Alternative 1*]

Counsel should be appointed because the issues in this case are particularly complex. _ _[*Set out what the issues are, and the difficulty petitioner is having in trying to understand them.*]_ _

[*Alternative 2*]

Counsel should be appointed because petitioner _ _[*is illiterate/suffers from a mental disability*]_ _**, and is unable to proceed alone. *Kreiling v Field* (9th Cir 1970) 431 F2d 638. _ _**[*Set out petitioner's problem in detail.*]_ _

[*Alternative 3*]

Counsel should be appointed because this court has granted petitioner leave to use discovery before the hearing, and counsel is needed to allow petitioner to make use of those discovery rights. Habeas Rule 6(a).

[*Alternative 4*]

Counsel should be appointed because an evidentiary hearing has been set by the court. Habeas Rule 8(c).

[*Continue*]

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at _ _[*name of city or county and state*]_ _ **on _ _**[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of petitioner*]__
_ _[*Typed name*]_ _

Copies: Original and one copy (filed with federal district court clerk); one copy for client; one office copy.

Comment: Petitioners and counsel representing habeas petitioners must consult the local rules for the particular federal district court in which they are filing a petition to determine the applicable document format and filing requirements. Court rules vary greatly among district courts and are updated often.

All federal district courts require factual assertions in motions to be supported by either an affidavit or a declaration (see, *e.g.,* 28 USC §1746) or other physical evidence attached to the motion, or lodged with the clerk of the court.

Some habeas corpus matters, such as requests for appointment of counsel, in forma pauperis status, and free transcripts, are handled ex parte by custom or local rule. Most matters requesting action by the court, however, must be brought in the form of a motion, with proper service made on all parties in conformance with the local district court rules. See the sample proof of service in §13.22. When in doubt about the proper procedure, petitioners should check with the court clerk.

In preparing requests for the court, pro se petitioners should include their name, prison number, institution, city, state, and zip code. The final line under this information should state "Pro Per Petitioner."

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III. BAIL AND STAYS

A. Bail

§13.17 1. Requests for Bail

Release on bail is granted to federal habeas petitioners only in the rarest and most extraordinary circumstances. Federal habeas petitioners may file a motion to set bail in the state trial court (*Hensley v Municipal Court* (1973) 411 US 345, 348, 36 L Ed 2d 294, 298, 93 S Ct 1571) or in the federal district court (Fed R App P 23; see *Marino v Vasquez* (9th Cir 1987) 812 F2d 499 (issue of bail for state prisoners seeking habeas corpus relief in federal courts is governed by Federal Rules of Appellate Procedure rather than by provisions of federal Bail Reform Act of 1966 (Pub L 89-465, 80 Stat 214)); *Woodcock v Donnelly* (1st Cir 1972) 470 F2d 93 (Bail Reform Act inapplicable to state prisoners seeking collateral relief); *Johnston v Marsh* (3d Cir 1955) 227 F2d 528 (district court has inherent common law power and jurisdiction, even in absence of specific statutory authority, to admit petitioner to bail pending hearing and disposition). For a sample form of a motion to set bail in the state trial court, see §2.37. For a sample form of a motion to set bail in the federal district court, see §§13.20-13.22.

It is very difficult for a petitioner to satisfy the federal standard for bail pending habeas review. Requests for bail are granted only in extraordinary circumstances. Various cases have articulated the bail standard as follows: (1) There must be a substantial question of law that challenges the legality of the petitioner's detention; (2) there must be some circumstance making this application exceptional and deserving of special treatment in the interests of justice (*Aronson v May* (1964) 13 L Ed 2d 6, 85 S Ct 3); (3) the petitioner's substantial constitutional claims must have a high probability of success; and (4) the grant of bail must be necessary to make the habeas remedy effective (*Calley v Callaway* (5th Cir 1974) 496 F2d 701; *Goodman v Ault* (ND Ga 1973) 358 F Supp 743).

In addition to requesting bail, a federal habeas petitioner may also seek release on his or her own recognizance. *Land v Deeds* (9th Cir 1989) 878 F2d 318.

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§13.18 2. Review of District Court's Denial of Bail

The proper procedure for reviewing a district court's denial of bail to a state prisoner whose habeas petition is pending is to file a petition for mandamus in the federal circuit court of appeals. *Land v Deeds* (9th Cir 1989) 878 F2d 318. The standard of review on appeal is abuse of discretion. *Slough v Yeager* (3d Cir 1971) 449 F2d 755.

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§13.19 B. Stays

A district court judge before whom a habeas corpus proceeding is pending may, before final judgment, after final judgment of discharge, or pending appeal, stay any state proceedings, including the execution of a sentence. 28 USC §2251(a)(1)-(2). If a person sentenced to death applies for counsel pursuant to 18 USC §3599, the stay of execution of the sentence of death terminates within 90 days of the appointment of counsel or the withdrawal or denial of the application. 28 USC §2251(a)(3). For discussion of the appointment of counsel in habeas proceedings, see §§13.10-13.16. After the granting of a stay, any further state proceeding is void. 28 USC §2251(b).

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C. Forms

§13.20 1. Form: Application for Bail Pending Determination of Petition for Writ of Federal Habeas Corpus

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_ _[*Name of attorney or pro per party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name*]_ _,	)	**No. _ _ _ _ _ _**
Petitioner	)	
	)	**APPLICATION FOR BAIL**
vs	)	**PENDING DETERMINATION**
	)	**PETITION FOR WRIT OF**
_ _[*Name*]_ _,	)	**HABEAS CORPUS**
Respondent	)	
_____	)	

Petitioner, _ _[*name*]_ _, prays in this court order that _ _[*he/she*]_ _ be admitted to bail in the sum of _ _[*dollar amount*]_ _ pending the determination of _ _[*his/her*]_ _ petition for writ of habeas corpus, which is pending before this Court. This request is based on _ _[*his/her*]_ _ application, the attached declaration of petitioner, and the pleadings and records on file in this case.

[*Give circumstances of conviction, e.g.*]

1. Petitioner was convicted by a jury of _ _[*state violation, e.g., California Penal Code §_ _ _*]_ _ in the _ _ _ _ _ _ County Superior Court on _ _[*date*]_ _.

[*Give history of bail status, e.g.*]

2. Before conviction, _ _[*he/she*]_ _ was on bail in the sum of _ _[*dollar amount*]_ _. Following _ _[*his/her*]_ _ conviction, _ _[*he/she*]_ _ was granted bail on appeal in the sum of _ _[*dollar amount*]_ _. This bail was continued pending _ _[*his/her*]_ _ petition for a writ of certiorari in the United States Supreme Court, filed after the California Court of Appeal affirmed _ _[*his/her*]_ _ conviction and the California Supreme Court denied _ _[*his/her*]_ _ petition for hearing. After _ _[*his/her*]_ _ petition to the United States Supreme Court was denied, _ _[*his/her*]_ _ motion to continue bail pending the instant petition for writ of habeas corpus was denied by the _ _ _ _ _ _ Superior Court on _ _[*date*]_ _. Petitioner is currently _ _[*at liberty and located at _ _ _ _ _ _/incarcerated and confined at _ _ _ _ _ _]_ _.

3. The issues raised in petitioner's petition for writ of habeas corpus raise important and substantial constitutional questions (see Petition for Writ of Habeas Corpus and Points and Authorities) on which petitioner has a high probability of success.

[*If appropriate, add*]

4. An Order to Show Cause was filed on _ _[*date*]_ _, and Respondent's Return was served on petitioner on _ _[*date*]_ _.

[*Continue*]

[5.] Unless bail is granted, petitioner is likely to be irreparably harmed because _ _[*explain, e.g., petitioner may have served out _ _*[*his/her*]*_ _ sentence before final resolution of the instant matter, because petitioner has a determinate California sentence of _ _*[*number*]*_ _ months, which means that with one-third time off for good-time/work-time credit, _ _*[*his/her*]*_ _ total sentence served will be _ _*[*number*]*_ _ months*]*_ _***.**

[6.] Petitioner's declaration (attached) shows _ _[*adapt the following list, as appropriate*]*_ _***:**

(a) _ _[*He/She*]*_ _* **has no arrests or convictions other than the instant matter;**

(b) _ _[*He/She*]*_ _* **has had strong community contacts over the past years;**

(c) _ _[*He/She*]*_ _* **has an infant child and a stable marriage;**

(d) _ _[*He/She*]*_ _* **has employment if released on bail and _ _**[*his/her*]*_ _* **spouse has been employed by _ _**[*company name*]*_ _* **for _ _**[*number*]*_ _* **years;**

(e) _ _[*He/She*]*_ _* **was on bail without incident during trial and for _ _**[*number*]*_ _* **month(s) following trial.** *_ _*[*If state-granted bail expired and petitioner voluntarily surrendered himself/herself when ordered to, so state and provide details.*]*_ _*

[7.] Petitioner's case is analogous to *Goodman v Ault* (ND Ga 1973) 358 F Supp 743, 747, in which the court found that the potential ineffectiveness of petitioner's remedy, the substantial nature of his constitutional attack, and the facts that he had strong local ties, employment, and no prior convictions justified bail pending the determination of his petition for habeas corpus. Petitioner has shown these same factors, and in addition has demonstrated that _ _[*he/she*]*_ _* **is unlikely to flee the jurisdiction if granted bail; accordingly, bail should be granted.**

[8.] Additional exceptional circumstances that warrant bail pending a determination of petitioner's petition are _ _[*list other exceptional circumstances*]*_ _***.**

WHEREFORE, petitioner prays that _ _[*he/she*]*_ _* **be admitted to bail in the sum of _ _**[*dollar amount*]*_ _* **pending resolution of the instant Petition for Writ of Habeas Corpus.**

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney or pro per petitioner*]__
_ _[*Typed name*]*_ _*

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.21 2. Form: Declaration in Support of Application for Bail

§13.21 2. Form: Declaration in Support of Application for Bail

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[*Caption: None required by local rules in Central, Eastern, and Southern federal districts if form is attached to papers served. Otherwise, same captions as on those papers. In Northern district, separate parts of motion, except proof of service, must be separately captioned and must not be attached.*]

DECLARATION OF _ _[*name of petitioner*]_ _

I, _ _[*name of petitioner*]_ _**, declare under penalty of perjury as follows** _ _[*adapt the following list, as appropriate*]_ _**:**

1. I am the petitioner in the instant Petition for Writ of Habeas Corpus, Civil Case Number _ _ _ _ _ _**.**

2. I am currently _ _[*at liberty and residing at* _ _ _ _ _ _*/incarcerated at* _ _ _ _ _ _]_ _**.**

3. I was released on bail during the pendency of my trial, and released on bail pending appeal from _ _[*date*]_ _**, to** _ _[*date*]_ _**. I have never missed a court appearance and have voluntarily surrendered myself when ordered to begin serving my term by the trial court.**

4. I have lived in _ _ _ _ _ _ **County for** _ _[*number*]_ _ **years. In the** _ _[*number*]_ _ **years before I was initially sentenced, I had a stable family relationship.** _ _[*Explain relationship.*]_ _ **I** _ _[*have/had*]_ _ **employment at** _ _[*company*]_ _**, and my** _ _[*husband/wife*]_ _ **has worked for** _ _[*company*]_ _ **for approximately** _ _[*number*]_ _ **years.**

[*If appropriate, add*]

5. I have never been arrested or convicted of an offense other than the instant matter.

[*Continue*]

[6.] I face a determinate California term of _ _[*number*]_ _ **months. With good-time/work-time credits, I will be incarcerated for** _ _[*number*]_ _ **months.**

Executed at _ _[*location*]_ _**, California, on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of petitioner*]__
_ _[*Typed name*]_ _

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§13.22 3. Form: Proof of Service

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[*Caption. None required by local rules if form is attached to papers served. Otherwise, same caption as on those papers.*]

PROOF OF SERVICE

[*Form for attorneys*]

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of _ _ _ _ _ _, State of California, and not a party to the above-entitled cause. On _ _[*date*]_ _, I served a true copy of Application for Bail Pending Determination of Petition for Writ of Habeas Corpus by personally delivering it to the person(s) indicated below in the manner provided in Federal Rule of Civil Procedure 5(b), by depositing it in the United States Mail in a sealed envelope with postage prepaid to the following: _ _[*List name(s) and address(es) for person(s) served. Attach additional sheets if necessary.*]_ _

Mailed at _ _[*location*]_ _**.**

Executed at _ _[*location*]_ _**, California, on** _ _[*date*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1*]

I hereby certify that I am a member of the Bar of the United States District Court, _ _ _ _ _ _ District of California.

[*Alternative 2*]

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

[*Continue*]

[*Form for prisoners*]

I, the undersigned, mailed a true and correct copy of the Application for Bail Pending Termination of Petition for Writ of Habeas Corpus to the following parties: _ _[*List name(s) and address(es) of person(s) served.*]_ _

Mailed at _ _[*location*]_ _**.**

Executed at _ _[*location*]_ _**, California, on** _ _[*date*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of person making service*]__
_ _[*Typed name*]_ _

Comment: Petitioners and attorneys should consult the local federal district court rules for requirements pertaining to the form, service, and filing of the proof of service (also called a certificate of service). See, *e.g.,* ND Cal Local R 5-6. All federal district courts in California now require attorneys to file pleadings and other documents using the "Case Management/Electronic Case Files" ("CM/ECF") filing system unless a special exemption is obtained. It is good practice to file the proof of service at the same time as the motion it supports. Some courts provide a form proof of service.

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IV. FEDERAL REVIEW OF STATE COURT DECISIONS

§13.23 A. Highly Deferential Standard of Review

To state a claim for postconviction federal habeas corpus relief, a state prisoner must allege that his or her detention violates the federal Constitution, a federal statute, or a treaty. 28 USC §2254. However, when considering a claim for relief brought by an individual in custody under the judgment of a state court, the federal courts are not permitted to make an independent determination of the federal claim presented.

Postconviction petitions in noncapital cases filed by such individuals after April 24, 1996, are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires federal courts to employ a "highly deferential standard for evaluating state court rulings." *Lindh v Murphy* (1997) 521 US 320, 333 n7, 138 L Ed 2d 481, 492 n7, 117 S Ct 2059.

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B. Standard of Review for Questions of Law

§13.24 1. U.S. Supreme Court Holdings Determine Federal Law

Under AEDPA, when a state court has decided the issue presented in a postconviction federal habeas corpus petition on the merits, the federal court may not grant relief unless state court review has "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC §2254(d)(1). As explained by the high court in *Williams v Taylor* (2000) 529 US 362, 412, 146 L Ed 2d 389, 429, 120 S Ct 1495, the phrase "clearly established Federal law, as determined by the Supreme Court" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state court decision."

In determining whether a claim is arguable on federal habeas corpus, and in preparing the petition and supporting argument, counsel should keep in mind that "[a]nalysis of an AEDPA habeas corpus appeal begins with identification of what Supreme Court decisions plaintiff claims the state court decision was contrary to or misapplied." *Garvin v Farmon* (9th Cir 2001) 258 F3d 951, 955. If decisions of the United States Supreme Court do not clearly spell out a constitutional standard by which to measure a claim, there is no "clearly established Federal law," and the petitioner is not entitled to relief. *Davis v Grigas* (9th Cir 2006) 443 F3d 1155, 1158. Thus, in *Davis,* the Ninth Circuit rejected a claim of ineffective assistance of counsel at sentencing because "the Supreme Court has not delineated a standard which should apply to ineffective assistance of counsel claims in noncapital sentencing cases." 443 F3d at 1158.

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§13.25 2. Contrary to Federal Law

Under *Williams v Taylor* (2000) 529 US 362, 405, 146 L Ed 2d 389, 425, 120 S Ct 1495, a state court decision is "contrary to clearly established Federal Law" if it "applies a rule that contradicts the governing law set forth in" decisions of the U.S. Supreme Court or if it "confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court and reaches a different result. For further discussion, see §17.23.

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§13.26 3. Unreasonable Application of Federal Law

Perhaps the most common claim in a federal habeas corpus petition by a state prisoner is that the state court decision was an unreasonable application of federal constitutional law within the meaning of 28 USC §2254(d)(1). The high Court in *Williams v Taylor* (2000) 529 US 362, 412, 146 L Ed 2d 389, 429, 120 S Ct 1495 (concurring opinion of O'Connor), noted that in using the word "unreasonable," Congress meant something more than erroneous or incorrect. 529 US at 411. In *Lockyer v Andrade* (2003) 538 US 63, 75, 155 L Ed 2d 144, 158, 123 S Ct 1166, the United States Supreme Court held that the term "objectively unreasonable" used in *Williams* also means more than "clear error." Although not defining the precise contours of the term, the Supreme Court held that the clear error standard does not give enough deference to state courts. 538 US at 75, 155 L Ed 2d at 158. See *Price v Vincent* (2003) 538 US 634, 155 L Ed 2d 877, 123 S Ct 1848 (state court's determination that defendant's conviction did not violate double jeopardy was not objectively unreasonable, even though guilty verdict was obtained after trial court first granted motion for directed verdict of acquittal and then changed its mind); *Yarborough v Alvarado* (2004) 541 US 652, 664, 158 L Ed 2d 938, 951, 124 S Ct 2140 (fair-minded jurists could disagree about whether suspect was in custody for *Miranda* purposes). For further discussion, see §17.23.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.27 4. Illustrative Ninth Circuit Cases

§13.27 4. Illustrative Ninth Circuit Cases

Ninth Circuit cases analyzing errors under the rules described in §§13.23-13.26, include the following:

- *Pinholster v Ayers* (9th Cir 2009) 590 F3d 651, 674 (counsel's failure to investigate defendant's background for mitigating evidence was objectively unreasonable and prejudicial such that California Supreme Court's denial of habeas petition was contrary to and unreasonable application of Supreme Court precedent under *Strickland*);
- *Bradway v Cate* (9th Cir 2009) 588 F3d 990 (defendant failed to show how distinction drawn by California courts between first degree lying in wait murder statute and lying in wait special circumstance was contrary to or unreasonable application of federal law);
- *Bible v Ryan* (9th Cir 2009) 571 F3d 860, 870 (state court's determination that petitioner suffered no prejudice as result of attorney's representation was not unreasonable);
- *Gonzalez v Brown* (9th Cir 2009) 585 F3d 1202 (though prosecutor could not remember why she struck juror, in light of lack of clear, contrary declaration from Supreme Court, it could not be said state court unreasonably applied *Batson*);
- *Smith v Curry* (9th Cir 2009) 580 F3d 1071 (upholding of trial court's instruction to deadlocked jury to consider evidence supporting conviction was unreasonable application of established Supreme Court law);
- *Holley v Yarborough* (9th Cir 2009) 568 F3d 1091 (upholding trial court's decision to limit cross-examination of child victim-witness and exclude testimony regarding her statements about certain sexual acts and desire others felt for her was unreasonable application of federal law;
- *Byrd v Lewis* (9th Cir 2009) 566 F3d 855, 861 (state court's application of harmless error analysis to instructional error by trial court not unreasonable application of Supreme Court precedent);
- *Gonzalez v Duncan* (9th Cir 2008) 551 F3d 875, 889 (state court unreasonably applied federal Eighth Amendment jurisprudence when it approved defendant's conviction and sentence of 28-years-to-life for failing to renew registration as a sex offender within 5 days of his birthday);
- *Cox v Del Papa* (9th Cir 2008) 542 F3d 669, 678 (given lack of holdings from Supreme Court, it cannot be said court unreasonably applied clearly established law when it failed to hold sua sponte hearing on defendant's mental capacity to waive *Miranda*);
- *Arnold v Runnels* (9th Cir 2005) 421 F3d 859 (because defendant's statement that he did not want to talk on tape was clear and unequivocal invocation of right to remain silent, which was never revoked, permitting recording to be used at trial was unreasonable application of clearly established federal law);
- *Inthavong v Lamarque* (9th Cir 2005) 420 F3d 1055 (state court's conclusion that admission of coerced confession was harmless error was not unreasonable application of clearly established federal law);
- *Hirschfield v Payne* (9th Cir 2005) 420 F3d 922 (denial of *Faretta* motion on ground that defendant did not have sufficient legal knowledge to represent himself was contrary to clearly established federal law);
- *Campbell v Rice* (9th Cir 2005) 408 F3d 1166 (relief denied; state court's determination that defendant received effective assistance of counsel and that he was not prejudiced by his exclusion from in-chambers meeting was not contrary to, nor unreasonable application of, clearly established federal law);
- *Martinez v Garcia* (9th Cir 2004) 371 F3d 600, 601 (when instructions combined two theories of guilt, one of which was untenable, and conviction could have rested on untenable theory, state court's conclusion that structural error did not occur was objectively unreasonable);
- *Su Chia v Cambra* (9th Cir 2004) 360 F3d 997 (exclusion of hearsay statements simultaneously inculpating declarant and exonerating defendant was unreasonable application of clearly established federal law when statement was only corroborative evidence available to defendant);
- *Powell v Galaza* (9th Cir 2003) 328 F3d 558 (when trial court's instruction effectively directed verdict for prosecution, state court's use of harmless error analysis to deny relief was contrary to clearly established federal, *i.e.,* Supreme Court, law);
- *Avila v Galaza* (9th Cir 2002) 297 F3d 911 (relief granted; referee's findings of fact unreasonable in light of facts

presented at evidentiary hearing on petitioner's state habeas petition);

- *Benn v Lambert* (9th Cir 2002) 283 F3d 1040 (relief granted under clear error standard; *Brady* error);
- *Bailey v Newland* (9th Cir 2001) 263 F3d 1022 (relief denied; ruling not unreasonable application because courts differ in interpretation of rule);
- *Gunn v Ignacio* (9th Cir 2001) 263 F3d 965, 968 (relief granted under clear error standard; breach of plea agreement);
- *Fisher v Roe* (9th Cir 2001) 263 F3d 906, overruled on other grounds in *Payton v Woodford* (2003) 346 F3d 1204, 1218 n18 (relief granted under clear error standard; defendant's right to be present at readback);
- *Wildman v Johnson* (9th Cir 2001) 261 F3d 832 (relief denied; ineffective assistance of trial counsel);
- *Garvin v Farmon* (9th Cir 2001) 258 F3d 951, 955 (relief denied; fruit-of-the-poisonous-tree);
- *Lockhart v Terhune* (9th Cir 2001) 250 F3d 1223, 1228 (relief granted; conflict of interest by trial counsel);
- *LaCrosse v Kernan* (9th Cir 2001) 244 F3d 702, 707 (relief denied; right to be present at readback);
- *Depetris v Kuykendall* (9th Cir 2001) 239 F3d 1057, 1061 (relief granted under clear error standard; exclusion of defense evidence); and
- *Loi Van Nguyen v Lindsey* (9th Cir 2000) 232 F3d 1236 (relief denied; prosecutorial misconduct).

WARNING: Cases decided using the clear error standard disapproved in *Lockyer v Andrade* (2003) 538 US 63, 75, 155 L Ed 2d 144, 158, 123 S Ct 1166, may not analyze state court decisions with sufficient deference. In addition, the United States Supreme Court has remanded several Ninth Circuit cases granting habeas corpus relief for reconsideration in light of *Early v Packer* (2002) 537 US 3, 10, 154 L Ed 2d 263, 271, 123 S Ct 362. See, *e.g., Galaza v Powell* (2002) 537 US 1016, 154 L Ed 2d 422, 123 S Ct 549.

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§13.28 V. COMMON CONSTITUTIONAL CLAIMS

Some of the more commonly raised constitutional claims are surveyed below in §§13.29-13.84.

CAUTION: The claims listed below are examples of claims that have been held cognizable on habeas corpus. A number of court of appeals cases decided before the enactment of AEDPA and before the decision of the U.S. Supreme Court in *Williams v Taylor* (2000) 529 US 362, 412, 146 L Ed 2d 389, 429, 120 S Ct 1495 (concurring opinion of O'Connor), are included. These cases should not be relied on for their analysis of the legal issues involved.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/ A. Fifth Amendment/§13.29 1. Double Jeopardy

A. Fifth Amendment

§13.29 1. Double Jeopardy

A federal habeas corpus petition may be based on a violation of a defendant's Fifth Amendment protection against double jeopardy. See, *e.g., Robinson v Neil* (1973) 409 US 505, 35 L Ed 2d 29, 93 S Ct 876; *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189; *Fain v Duff* (5th Cir 1973) 488 F2d 218, 224.

The following United States Supreme Court cases are instructive regarding the scope of the Fifth Amendment's double jeopardy protection:

- *Price v Vincent* (2003) 538 US 634, 638, 155 L Ed 2d 877, 885, 123 S Ct 1848 (state court's determination that defendant's conviction did not violate double jeopardy was not objectively unreasonable, even though guilty verdict was obtained after trial court first granted motion for directed verdict of acquittal and then changed its mind);
- *Schiro v Farley* (1994) 510 US 222, 227, 127 L Ed 2d 47, 55, 114 S Ct 783 (failure of jury that convicted defendant of rape-murder to return verdict on separate charge of intentional murder was not acquittal of intentional murder charge that would preclude trial court at sentencing phase from finding that defendant had intended to kill);
- *U.S. v Dixon* (1993) 509 US 688, 125 L Ed 2d 556, 113 S Ct 2849 (double jeopardy does not bar criminal prosecution based on same conduct previously punished as criminal contempt of court as long as offense and contempt require proof of different elements);
- *Dowling v U.S.* (1990) 493 US 342, 107 L Ed 2d 708, 110 S Ct 668 (admission of evidence of different crime, of which defendant had been acquitted, at trial of second crime did not violate double jeopardy or due process); see also *Charles v Hickman* (9th Cir 2000) 228 F3d 981;
- *Ricketts v Adamson* (1987) 483 US 1, 9, 97 L Ed 2d 1, 11, 107 S Ct 2680 (defendant's breach of plea agreement waived double jeopardy protection);
- *Montana v Hall* (1987) 481 US 400, 95 L Ed 2d 354, 107 S Ct 1825; *Smalis v Pennsylvania* (1986) 476 US 140, 90 L Ed 2d 116, 106 S Ct 1745; *Arizona v Rumsey* (1984) 467 US 203, 81 L Ed 2d 164, 104 S Ct 2305 (double jeopardy limits on capital resentencing once death sentence rejected by sentencer);
- *Boston Municipal Court v Lydon* (1984) 466 US 294, 80 L Ed 2d 311, 104 S Ct 1805 (retrial without judicial determination of sufficiency of evidence at prior trial does not violate double jeopardy);
- *Missouri v Hunter* (1983) 459 US 359, 74 L Ed 2d 535, 103 S Ct 673 (legislative intent that identical crimes be subject to cumulative punishments not double jeopardy violation);
- *Crist v Bretz* (1978) 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156 (jeopardy attaches when jury is impaneled and sworn);
- *Arizona v Washington* (1978) 434 US 497, 54 L Ed 2d 717, 98 S Ct 824 (retrial not barred after mistrial caused by manifest necessity);
- *Brown v Ohio* (1977) 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (double jeopardy limits power of prosecutor to separate single event into several otherwise identical crimes); and
- *Blockburger v U.S*. (1932) 284 US 299, 76 L Ed 306, 52 S Ct 180 (two crimes are different for double jeopardy purposes if each requires proof of different elements).

The following United States Supreme Court cases are instructive on the question whether a government-imposed sanction is penal or civil in nature for purposes of the double jeopardy clause:

- *Seling v Young* (2001) 531 US 250, 148 L Ed 2d 734, 121 S Ct 727) (statute found to be civil on its face cannot be penal "as applied" to single individual);
- *Hudson v U.S.* (1997) 522 US 93, 139 L Ed 2d 450, 118 S Ct 488 (sanctions consisting of monetary penalty and loss of professional license were civil in nature; imposition did not bar subsequent criminal prosecution for same

conduct);

- *Kansas v Hendricks* (1997) 521 US 346, 138 L Ed 2d 501, 117 S Ct 2072 (civil commitment under sexually violent predator statute imposed shortly before petitioner was due to be released from confinement on underlying offense did not violate double jeopardy clause; purpose of commitment was treatment and protection of community); and
- *Kennedy v Mendoza-Martinez* (1963) 372 US 144, 9 L Ed 2d 644, 83 S Ct 554 (setting forth general principles for determining whether statutory sanctions are penal or civil).

The following Ninth Circuit cases are instructive regarding the scope of the Fifth Amendment's double jeopardy protection:

- *Weston v Kernan* (9th Cir 1995) 50 F3d 633 (double jeopardy bars retrial after mistrial unless defendant consented to mistrial or there was manifest necessity for mistrial);
- *Mannes v Gillespie* (9th Cir 1992) 967 F2d 1310 (dismissal for insufficient evidence barred retrial);
- *McDaniel v Arizona* (9th Cir 1990) 921 F2d 966 (resentencing that reduced overall punishment imposed by several sentences did not violate double jeopardy although sentences changed from concurrent to consecutive);
- *U.S. v Stauffer* (9th Cir 1990) 922 F2d 508 (correction of verdict when jury made clerical error on verdict form did not violate double jeopardy);
- *Taylor v Kincheloe* (9th Cir 1990) 920 F2d 599 (reinstatement of more severe charges after guilty plea was set aside on appeal did not violate double jeopardy);
- *Stone v Godbehere* (9th Cir 1990) 894 F2d 1131, 1135 (when state law created expectation of finality in sentence at time of pronouncement, later increase in sentence by state court denial of good-time credits violated double jeopardy);
- *Durosko v Lewis* (9th Cir 1989) 882 F2d 357, 359 (double jeopardy applies to sentence enhancement proceedings if enhancement facts must be proved beyond a reasonable doubt);
- *Massie v Hennessey* (9th Cir 1989) 875 F2d 1386 (retrial after California death penalty automatic appeal did not violate double jeopardy);
- *Fitzpatrick v McCormick* (9th Cir 1989) 869 F2d 1247, 1255 (double jeopardy limits on capital resentencing);
- *U.S. v Kaytso* (9th Cir 1988) 868 F2d 1020, 1021 (termination of first prosecution on grounds unrelated to guilt or innocence does not preclude second prosecution);
- *U.S. v Bernhardt* (9th Cir 1988) 840 F2d 1441, 1448 (double jeopardy encompasses doctrine of collateral estoppel);
- *U.S. v Bernhardt* (9th Cir 1987) 831 F2d 181, 182 (separate state and federal prosecutions for same acts do not violate double jeopardy);
- *Haynes v Cupp* (9th Cir 1987) 827 F2d 435 (lesser-included offense);
- *Kennick v Superior Court* (9th Cir 1984) 736 F2d 1277, 1281 (probation constitutes punishment for purpose of double jeopardy);
- *Dixon v Dupnik* (9th Cir 1982) 688 F2d 682 (statute proscribing commission of felony while defendant released on recognizance violates double jeopardy); and
- *May v Sumner* (9th Cir 1980) 622 F2d 997 (California enhanced punishment statute does not violate double jeopardy).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.30 2. Unconstitutional Confessions and Privilege Against Self-Incrimination

§13.30 2. Unconstitutional Confessions and Privilege Against Self-Incrimination

To be constitutional, a confession must satisfy both the Fifth Amendment prohibition against self-incrimination and its associated *Miranda* requirements (*Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602; *Dickerson v U.S.* (2000) 530 US 428, 147 L Ed 2d 405, 120 S Ct 2326 (*Miranda* requirements are constitutionally based)) as well as the due process prohibition against involuntary confessions. Courts, however, do not always keep these two constitutional protections separate.

A federal habeas corpus petition may challenge the constitutionality of a defendant's confession under the Fifth Amendment privilege against self-incrimination. See, *e.g., Milton v Wainwright* (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174; *Jackson v Denno* (1964) 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774; *Rogers v Richmond* (1961) 365 US 534, 5 L Ed 2d 760, 81 S Ct 735.

The Fifth Amendment privilege against self-incrimination also prohibits any adverse use by the prosecution of a defendant's refusal to testify or make a statement. See, *e.g., Carter v Kentucky* (1981) 450 US 288, 67 L Ed 2d 241, 101 S Ct 1112 (when requested, trial court must instruct jury that it cannot draw any inference from defendant's failure to testify).

A defendant may raise Fifth Amendment *Miranda* claims in a federal habeas corpus proceeding even though the state courts have previously provided a full and fair opportunity to litigate those claims. *Withrow v Williams* (1993) 507 US 680, 123 L Ed 2d 407, 113 S Ct 1745.

The following cases are instructive regarding *Miranda* requirements:

- *Davis v U.S.* (1994) 512 US 452**,** 129 L Ed 2d 362, 114 S Ct 2350 (invocation of right to counsel must be unequivocal to trigger *Miranda* protections and preclude further questioning under *Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880);
- *McNeil v Wisconsin* (1991) 501 US 171, 115 L Ed 2d 158, 111 S Ct 2204 (invoking Sixth Amendment right to counsel during judicial proceedings does not also invoke *Miranda* rights);
- *Minnick v Mississippi* (1990) 498 US 146, 152, 112 L Ed 2d 489, 497, 111 S Ct 486 (once defendant requests counsel, police may not initiate any further interrogations except in presence of counsel);
- *Arizona v Roberson* (1988) 486 US 675, 100 L Ed 2d 704, 108 S Ct 2093 (invoking right to counsel with respect to any charge prohibits police-initiated interrogation with respect to all charges);
- *Colorado v Spring* (1987) 479 US 564, 93 L Ed 2d 954, 107 S Ct 851 (waiver);
- *Oregon v Elstad* (1985) 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285 (prior confession without *Miranda* warnings but otherwise not in violation of Fifth Amendment did not taint postwarning confession);
- *Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (interrogation must cease if counsel requested);
- *Michigan v Mosley* (1975) 423 US 96, 46 L Ed 2d 313, 96 S Ct 321 (suspect's invocation of right to silence in robbery investigation did not preclude subsequent questioning about unrelated crime: first officer immediately ceased questioning, considerable time elapsed between first and second interrogation, and second officer read suspect *Miranda* warnings before questioning);
- *U.S. v Hernandez* (9th Cir 2007) 476 F3d 791, 796 (trial court's admission of testimony commenting on defendant's silence violated Fifth Amendment, though error harmless because comments were brief, government did not mention silence again, and overwhelming evidence existed of defendant's guilt).
- *Jackson v Giurbino* (9th Cir 2004) 364 F3d 1002 (trial court's admission of defendant's statements in violation of *Miranda* was contrary to clearly established federal law);
- *Clark v Murphy* (9th Cir 2003) 331 F3d 1062 (California court's finding that defendant's statement, "I think I would like to talk to a lawyer," was not unambiguous invocation of right to counsel was neither contrary to nor unreasonable application of federal constitutional law);
- *Fetterly v Paskett* (9th Cir 1998) 163 F3d 1144, 1148 (defendant released on bond after counsel appointed to

represent him on credit card fraud charge properly interrogated on unrelated murder charge without presence of counsel);

- *Greenawalt v Ricketts* (9th Cir 1991) 943 F2d 1020 (previous confession in violation of *Edwards* but not in violation of Fifth Amendment does not taint later voluntary confession; *Minnick* not applied retroactively on habeas corpus);
- *Medeiros v Shimoda* (9th Cir 1989) 889 F2d 819, 823 (prior unwarned confession did not taint later confession);
- *Shedelbower v Estelle* (9th Cir 1989) 885 F2d 570, 573 (functional equivalent of interrogation; waiver after prior invocation);
- *U.S. v Connell* (9th Cir 1989) 869 F2d 1349, 1351 (inadequate *Miranda* warning);
- *Smith v Endell* (9th Cir 1988) 860 F2d 1528 (conditional request for counsel not equivocal);
- *U.S. v Fouche* (9th Cir 1985) 776 F2d 1398 (equivocal request for counsel allows limited follow-up questioning);
- *Hinman v McCarthy* (9th Cir 1982) 676 F2d 343 (permitting impeachment use of evidence otherwise excluded under *Miranda*).

The following cases are instructive regarding the scope of the Fifth Amendment and *Miranda*:

- *Brogan v U.S.* (1998) 522 US 398, 139 L Ed 2d 830, 118 S Ct 805 (no "exculpatory no" exception under statute prohibiting making of false statements);
- *Pennsylvania v Muniz* (1990) 496 US 582, 110 L Ed 2d 528, 110 S Ct 2638 (routine booking questions exempt from *Miranda*; police officer's sobriety test instructions and request to take breathalyzer not interrogation; slurred character of speech not testimonial; mathematical question asked to test powers of mental calculation was interrogation and response was testimonial);
- *Berkemer v McCarty* (1984) 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138 (*Miranda* applies to traffic misdemeanors if suspect is in custody, but traffic stop not custodial);
- *New York v Quarles* (1984) 467 US 649, 81 L Ed 2d 550, 104 S Ct 2626 (public safety exception to *Miranda*);
- *Estelle v Smith* (1981) 451 US 454, 68 L Ed 2d 359, 101 S Ct 1866 (*Miranda* applies to psychiatric exam used only in penalty phase of trial);
- *Rhode Island v Innis* (1980) 446 US 291, 64 L Ed 2d 297, 100 S Ct 1682 (defines interrogation as any practice reasonably likely to elicit an incriminating response);
- *Dunaway v New York* (1979) 442 US 200, 60 L Ed 2d 824, 99 S Ct 2248 (relation between Fourth and Fifth Amendments);
- *Pens v Bail* (9th Cir 1990) 902 F2d 1464 (Fifth Amendment applies to confidential statements made during postconviction state-mandated psychiatric treatment);
- *Williams v Borg* (9th Cir 1998) 139 F3d 737 (petitioner's testimony on direct examination stricken because he invoked his privilege against self-incrimination and refused to submit to cross-examination);
- *Deering v Brown* (9th Cir 1988) 839 F2d 539 (Fifth Amendment applies only to acts that are both testimonial and compelled);
- *Jones v Cardwell* (9th Cir 1982) 686 F2d 754 (Fifth Amendment applies to confession during presentence interview); and
- *Extradition of Powell* (SD Cal 1998) 4 F Supp 2d 945, 951 (*Miranda* does not apply to extradition proceedings).

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B. Sixth Amendment

§13.31 1. Right to Speedy Trial

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment speedy trial rights. See, *e.g., Doggett v U.S.* (1992) 505 US 647, 120 L Ed 2d 520, 112 S Ct 2686 (delay of 8½ years between indictment and arrest was presumptively prejudicial and violated defendant's right to speedy trial); *U.S. v Loud Hawk* (1986) 474 US 302, 88 L Ed 2d 640, 106 S Ct 648; *Braden v 30th Judicial Circuit Court of Kentucky* (1973) 410 US 484, 35 L Ed 2d 443, 93 S Ct 1123; *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (enunciating four-part test for determining whether pretrial delay violates speedy trial guarantee); *Smith v Hooey* (1969) 393 US 374, 21 L Ed 2d 607, 89 S Ct 575. See also *U.S. v Valentine* (9th Cir 1986) 783 F2d 1413; *U.S. v Williams* (9th Cir 1985) 782 F2d 1462; *Tucker v Wolff* (9th Cir 1978) 581 F2d 235.

In *McNeely v Blanas* (9th Cir 2003) 336 F3d 822, the Ninth Circuit dismissed a prosecution with prejudice because the petitioner had been denied his right to a speedy trial. The court also held that when the petitioner establishes a prima facie speedy trial violation, the state has the burden of explaining the reasons for the delay. *McNeely v Blanas, supra*.

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§13.32 2. Right of Confrontation

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment right to confront testifying witnesses. See, *e.g., Mancusi v Stubbs* (1972) 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308. The following United States Supreme Court cases are instructive regarding the scope of the Sixth Amendment right of confrontation:

- *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354 (admission of testimonial hearsay in criminal trial violates defendant's right of confrontation unless witness is unavailable *and* defendant has had adequate opportunity to cross-examine); see also *Davis v Washington* (2006) 547 US 813, 821, 165 L Ed 2d 224, 236, 126 S Ct 2266 (distinguishing between testimonial and nontestimonial statements to police);
- *Maryland v Craig* (1990) 497 US 836, 111 L Ed 2d 666, 110 S Ct 3157 (permitting child sexual abuse witnesses to testify outside defendant's presence);
- *Kentucky v Stincer* (1987) 482 US 730, 96 L Ed 2d 631, 107 S Ct 2658 (no right of confrontation in pretrial proceedings);
- *Davis v Alaska* (1974) 415 US 308, 39 L Ed 2d 347, 94 S Ct 1105 (confrontation includes right to impeach prosecution witness); and
- *Bruton v U.S*. (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620 (use of nontestifying codefendant's out-of-court statement may require severance).

The following Ninth Circuit cases are instructive regarding the scope of the Sixth Amendment right of confrontation:

- *Holley v Yarborough* (9th Cir 2009) 568 F3d 1091 (exclusion of testimony and limitation on cross-examination of child victim-witness concerning statements she made about certain sex acts and others' desire for her violated Sixth Amendment;
- *Thomas v Hubbard* (9th Cir 2001) 273 F3d 1164, overruled on another ground in *Payton v Woodford* 2003) 346 F3d 1204, 1218 n18 (admission of multilevel hearsay violated confrontation clause because it was unreliable);
- *Whelchel v Washington* (9th Cir 2000) 232 F3d 1197 (admission of out-of-court statements by nontestifying codefendants violated confrontation clause because admissibility not grounded in "firmly rooted" hearsay exception);
- *Christian v Rhode* (9th Cir 1994) 41 F3d 461 (right of confrontation extends to pretrial depositions taken by prosecutor for trial use);
- *Hardnett v Marshall* (9th Cir 1994) 25 F3d 875 (*Bruton* error);
- *Acosta-Huerta v Estelle* (9th Cir 1992) 954 F2d 581 (use of prior testimony does not violate confrontation clause if witness is unavailable and defendant had opportunity to cross-examine at time of prior testimony);
- *Clark v Ricketts* (9th Cir 1991) 942 F2d 567 (restriction on cross-examination preventing disclosure of prosecution witness's name and address did not violate right of confrontation); and
- *Bright v Shimoda* (9th Cir 1987) 819 F2d 227 (restriction on cross-examination of prosecution witness).

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§13.33 3. Right to Counsel

A petition for federal habeas corpus relief may be based on a denial of the assistance of counsel in violation of the Sixth Amendment. See, *e.g., Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525; *Chambers v Maroney* (1970) 399 US 42, 53, 26 L Ed 2d 419, 90 S Ct 1975; *Satchell v Cardwell* (9th Cir 1981) 653 F2d 408, overruled on another ground in *Butcher v Marquez* (1985) 758 F2d 373, 376; *Cooper v Fitzharris* (9th Cir 1978) 586 F2d 1325 (en banc).

The following United States Supreme Court cases are instructive regarding the scope of the Sixth Amendment right to counsel:

- *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 968, 129 S Ct 2079 (doctrines ensuring voluntariness of Fifth Amendment waiver of right to counsel ensure voluntariness of Sixth Amendment waiver of right to counsel; *Michigan v Jackson* (1986) 475 US 625, 89 L Ed 2d 631, 106 S Ct 1404, overruled).
- *Fellers v U.S.* (2004) 540 US 519, 157 L Ed 2d 1016, 124 S Ct 1019 (police officers violated Sixth Amendment when they "deliberately elicited" information from defendant at his home during arrest);
- *Alabama v Shelton* (2002) 535 US 654, 152 L Ed 2d 888, 122 S Ct 1764 (Constitution guarantees right to counsel when incarceration is possibility; thus, sentence could not be imposed even though it was suspended, because defendant was not afforded counsel);
- *U.S. v Henry* (1980) 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183 (use of informer to deliberately elicit incriminating statements from uncounseled, formally charged defendant violates Sixth Amendment);
- *Gilbert v California* (1967) 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951 (right to counsel at pretrial lineup); and
- *U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926 (right to counsel at pretrial lineup).

The following Ninth Circuit cases are instructive regarding the scope of the Sixth Amendment right to counsel:

- *Schell v Witek* (9th Cir 2000) 218 F3d 1017 (trial court abused its discretion in failing to hear defendant's motion for substitution of counsel; remanded for evidentiary hearing on whether conflict between defendant and counsel was so severe that it deprived defendant of constitutionally adequate assistance of counsel);
- *Crandell v Bunnell* (9th Cir 1994) 25 F3d 754 (defendant who rejects assistance of incompetent appointed attorney does not thereby waive right to counsel);
- *Hendricks v Zenon* (9th Cir 1993) 993 F2d 664 (defendant was forced to proceed pro se when his appointed attorney on appeal withdrew following denial of defendant's motion for substitution of appointed counsel; court held there was neither valid waiver of right to counsel nor valid invocation of right to self-representation);
- *Jordan v Ducharme* (9th Cir 1993) 983 F2d 933 (exclusion of counsel from discussions between police and witnesses immediately before postindictment lineup was harmless, even if it violated right to counsel);
- *Greenawalt v Ricketts* (9th Cir 1991) 943 F2d 1020 (Fifth and Sixth Amendment rights coextensive in the context of custodial interrogations);
- *Jackson v Ylst* (9th Cir 1990) 921 F2d 882 (no automatic right to substitute counsel);
- *U.S. v Foster* (9th Cir 1990) 904 F2d 20 (defendant denied counsel at trial cannot be imprisoned);
- *Menefield v Borg* (9th Cir 1989) 881 F2d 696, 701 (defendant who elects self-representation at trial has right to counsel for posttrial new trial motion);
- *Norman v Ducharme* (9th Cir 1989) 871 F2d 1483 (waiver);
- *Bruno v Rushen* (9th Cir 1983) 721 F2d 1193 (prosecutor improperly commented at trial on defendant's representation by counsel); and
- *Cahill v Rushen* (9th Cir 1982) 678 F2d 791 (posttrial confession obtained in absence of counsel violated right to counsel).

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§13.34 4. Right to Effective Assistance of Trial Counsel

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment right to the *effective* assistance of counsel. A defendant basing his or her claim on ineffective assistance is required to show that he or she has been prejudiced as a result of the ineffective assistance. The court employs a two-part test for determining whether or not counsel's assistance was ineffective (*Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052):

- Were counsel's actions objectively unreasonable?
- Was there a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different?

See also *Williams v Taylor* (2000) 529 US 362, 146 L Ed 2d 389, 120 S Ct 1495; *Lockhart v Fretwell* (1993) 506 US 364, 122 L Ed 2d 180, 113 S Ct 838. But see *Davis v Grigas* (9th Cir 2006) 443 F3d 1155, 1158 (suggesting that for purposes of federal habeas review under AEDPA, *Strickland* standards for effective assistance of counsel apply only to capital sentencing). For discussion, see §13.24.

The following United States Supreme Court cases are instructive regarding the scope of the Sixth Amendment right to the effective assistance of counsel:

- *Wong v Belmontes* (2009) ___ US ___, 175 L Ed 2d 328, 337, 130 S Ct 383 (*Strickland* does not require State to "rule out" a sentence of life in prison in order to prevail but places burden on defendant to show "reasonable probability" that result would have been different but for counsel's deficient performance);
- *Bobby v Van Hook* (2009) ___ US ___, 175 L Ed 2d 255, 259, 130 S Ct 13 (counsel's decision not to seek more mitigating evidence professionally reasonable; *Strickland,* not ABA guidelines apply);
- *Wiggins v Smith* (2003) 539 US 510, 156 L Ed 2d 471, 123 S Ct 2527 (in capital case, trial counsel's failure to investigate defendant's background and present mitigating social history evidence at penalty phase deprived petitioner of effective assistance of counsel; state court's contrary conclusion was unreasonable application of *Strickland v Washington, supra*);
- *Mickens v Taylor* (2002) 535 US 162, 152 L Ed 2d 291, 122 S Ct 1237 (automatic reversal not required in capital case, even though defendant's appointed counsel was attorney for victim at time of homicide, and same judge had made both appointments and failed to inform defendant of conflict);
- *Roe v Flores-Ortega* (2000) 528 US 470, 145 L Ed 2d 985, 120 S Ct 1029 (standard for determining whether counsel's failure to file notice of appeal was deficient is ineffective assistance of counsel);
- *Burger v Kemp* (1987) 483 US 776, 97 L Ed 2d 638, 107 S Ct 3114 (failure to investigate or present mitigating sentencing evidence; conflict of interest);
- *Kimmelman v Morrison* (1986) 477 US 365, 91 L Ed 2d 305, 106 S Ct 2574 (ineffective assistance claim based on failure to file motion to suppress evidence under Fourth Amendment);
- *Hill v Lockhart* (1985) 474 US 52, 88 L Ed 2d 203, 106 S Ct 366 (ineffective assistance claim based on guilty plea);
- *U.S. v Cronic* (1984) 466 US 648, 80 L Ed 2d 657, 104 S Ct 2039 (possibility of per se ineffective assistance);
- *Morris v Slappy* (1983) 461 US 1, 75 L Ed 2d 610, 103 S Ct 1610 (indigent defendant has no right to "meaningful attorney-client relationship" or to counsel of his choice; impact of denial of continuance on right to trial);
- *Cuyler v Sullivan* (1980) 446 US 335, 348, 64 L Ed 2d 333, 338, 100 S Ct 1708 (when there is no objection to joint representation of codefendants, defendant must show that conflict actually affected adequacy of representation to establish Sixth Amendment violation); and
- *Holloway v Arkansas* (1978) 435 US 475, 55 L Ed 2d 426, 98 S Ct 1173 (automatic reversal required when counsel forced to represent codefendants over timely objection).

The Ninth Circuit has found ineffective assistance of counsel under the facts presented in the following cases:

- *Hamilton v Ayers* (9th Cir 2009) 583 F3d 1100 (counsel failed to investigate substantial amount of available mitigating evidence, called only one witness at penalty phase who was likely more harmful to defendant than helpful, and did not explain significance of meager evidence presented at closing argument);
- *Alcala v Woodford* (9th Cir 2003) 334 F3d 862 (failure to call witness who could have established date and time of alibi);
- *Avila v Galaza* (9th Cir 2002) 297 F3d 911 (trial counsel failed to investigate and introduce evidence that crime was committed by defendant's brother);
- *Mayfield v Woodford* (9th Cir 2001) 270 F3d 915 (trial counsel conducted inadequate investigation for penalty phase, gave perfunctory performance at hearing, and failed to explain significance or use of mitigating evidence that was presented);
- *Delgado v Lewis* (9th Cir 2000) 223 F3d 976 (trial counsel failed to participate meaningfully in court proceedings and appellate counsel filed *Anders/Wende* (no issue) brief after trial court had certified probable cause to appeal);
- *Baylor v Estelle* (9th Cir 1996) 94 F3d 1321 (counsel failed to follow up on tests suggesting that semen found at scene of rape was not defendant's);
- *Crotts v Smith* (9th Cir 1996) 73 F3d 861 (counsel failed to object to prosecutor's questions to defendant about alleged uncharged crime when it was undisputed that defendant had not committed uncharged crime);
- *Hendricks v Calderon* (9th Cir 1995) 70 F3d 1032 (counsel failed to investigate and present mitigating evidence at penalty phase, including evidence of psychiatric problems);
- *Harris v Wood* (9th Cir 1995) 64 F3d 1432, 1438 (cumulative effect of single counsel's errors: inadequate pretrial interview, failure to investigate, allowing defendant to give statement to prosecutors, calling petitioner to testify, and ineffective closing argument);
- *Chacon v Wood* (9th Cir 1994) 36 F3d 1459, 1164 (interpreter grossly mischaracterized consequences of guilty plea);
- *Tomlin v Myers* (9th Cir 1994) 30 F3d 1235 (counsel failed to object to identification testimony from unconstitutional line-up);
- *Kwan Fai Mak v Blodgett* (9th Cir 1992) 970 F2d 614 (counsel failed to present available mitigating evidence at penalty phase);
- *Thomas v Municipal Court* (9th Cir 1989) 878 F2d 285, 290 (conflict of interest);
- *Iaea v Sunn* (9th Cir 1986) 800 F2d 861 (counsel grossly mischaracterized probable sentence on guilty plea and gave erroneous advice on possible effects of going to trial);
- *Eggleston v U.S.* (9th Cir 1986) 798 F2d 374 (counsel failed to investigate);
- *Lang v Callahan* (9th Cir 1986) 788 F2d 1416 (counsel stipulated to admission of otherwise inadmissible prosecution evidence);
- *Weygandt v Ducharme* (9th Cir 1985) 774 F2d 1491 (counsel failed to object to prosecutor's improper remarks);
- *Marrow v U.S.* (9th Cir 1985) 772 F2d 525 (counsel failed to notify defendant of right to appeal); and
- *Hudson v Rushen* (9th Cir 1982) 686 F2d 826 (irreconcilable conflict between counsel and defendant).

The Ninth Circuit upheld the state court's denial of relief on ineffective assistance grounds in the following cases:

- *Allen v Woodford* (9th Cir 2005) 395 F3d 979 (representation at penalty phase was below objective standard of reasonableness, but defendant not prejudiced);
- *Beardslee v Woodford* (9th Cir 2004) 358 F3d 560 (same);
- *Brodit v Cambra* (9th Cir 2003) 350 F3d 985 (state court's rejection of ineffective assistance claim on ground that trial counsel may have had sound tactical reasons for not calling expert who could have testified that defendant did not fit child molester profile not unreasonable determination of facts in light of trial counsel's testimony at evidentiary hearing explaining reasons for decision);
- *Hendricks v Calderon* (9th Cir 1995) 70 F3d 1032 (counsel's failure to conduct further investigation of mental defenses in capital case guilt phase in which psychiatric experts found no basis for mental defense);
- *Hensley v Crist* (9th Cir 1995) 67 F3d 181, 184 (counsel's submission of guilt phase of capital case on stipulated facts when tactical reasons existed);

- *U.S. v Mett* (9th Cir 1995) 65 F3d 1531, 1534 (defense counsel's representation of prosecutor in separate criminal case);
- *Williams v Calderon* (9th Cir 1995) 52 F3d 1465, 1469 (counsel's alleged failure to conduct adequate investigation of possible diminished capacity defense: no prejudice shown);
- *Maiden v Bunnell* (9th Cir 1994) 35 F3d 477 (defense counsel had prosecuted defendant on earlier, unrelated charge);
- *Garcia v Bunnell* (9th Cir 1994) 33 F3d 1193 (before trial defense counsel accepted position with prosecutor's office);
- *U.S. v Keller* (9th Cir 1990) 902 F2d 1391 (inaccurate advice about length of sentence on guilty plea; failure to advise defendant of potential defense when no showing that defense likely would have succeeded);
- *Toomey v Bunnell* (9th Cir 1990) 898 F2d 741, 744 (counsel's intentional failure to move to suppress evidence in order to create ground for appeal);
- *Torrey v Estelle* (9th Cir 1988) 842 F2d 234 (failure to inform defendant of collateral consequences of guilty plea); and
- *Smith v Ylst* (9th Cir 1987) 826 F2d 872 (mentally ill counsel not per se ineffective).

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§13.35 5. Right to Effective Assistance of Appellate Counsel

The due process clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of appellate counsel on his or her first direct appeal of right. *Evitts v Lucey* (1985) 469 US 387, 391, 83 L Ed 2d 821, 833, 105 S Ct 830. There is no right to counsel on discretionary appeals, postconviction collateral attacks, or petitions for certiorari to the United States Supreme Court. *Pennsylvania v Finley* (1987) 481 US 551, 554, 95 L Ed 2d 539, 545, 107 S Ct 1990; *Miller v Keeney* (9th Cir 1989) 882 F2d 1428, 1431.

Although defense counsel has no constitutional duty to raise every nonfrivolous issue requested by defendant (*Jones v Barnes* (1983) 463 US 745, 754, 77 L Ed 2d 987, 103 S Ct 3308), an indigent appellant is entitled to counsel who acts as an active advocate (*U.S. v Griffy* (9th Cir 1990) 895 F2d 561, 562).

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§13.36 6. Right to Self-Representation

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment right to self-representation at trial. See, *e.g., Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525; *McKaskle v Wiggins* (1984) 465 US 168, 79 L Ed 2d 122, 104 S Ct 944 (defendant's Sixth Amendment right to conduct own defense not violated by unsolicited participation of standby counsel). A defendant's request to represent himself or herself cannot be denied because of the defendant's lack of legal qualifications. *Peters v Gunn* (9th Cir 1994) 33 F3d 1190. The request must be knowing and intelligent, timely, unequivocal, and not for the purpose of delay. *Lopez v Thompson* (9th Cir 2000) 202 F3d 1110; *Moore v Calderon* (9th Cir 1997) 108 F3d 261; *Adams v Carroll* (9th Cir 1989) 875 F2d 1441. A defendant representing himself or herself, however, has no constitutional right to advisory counsel. *U.S. v Kienenberger* (9th Cir 1994) 13 F3d 1354.

There is no constitutional right to self-representation on appeal. *Martinez v California* (2000) 528 US 152, 145 L Ed 2d 597, 120 S Ct 684.

The following Ninth Circuit cases are instructive regarding the scope of the Sixth Amendment right to self-representation:

- *Bribiesca v Galaza* (9th Cir 2000) 215 F3d 1015, overruled on other grounds in *Kane v Garcia Espitia* (2005) 546 US 9, 163 L Ed 2d 10, 13, 126 S Ct 407 (self-representation improperly denied; record did not support trial court's factual finding that petitioner could not abide by rules of courtroom procedure and protocol); *Maxwell v Sumner* (9th Cir 1982) 673 F2d 1031 (same);
- *Jackson v Ylst* (9th Cir 1990) 921 F2d 882 (request for self-representation properly denied when untimely and equivocal);
- *Savage v Estelle* (9th Cir 1990) 908 F2d 508 (severe stutterer properly denied right to self-representation);
- *U.S. v Smith* (9th Cir 1986) 780 F2d 810 (demand for self-representation untimely after trial already well under way);
- *Armant v Marquez* (9th Cir 1985) 772 F2d 552 (refusal to allow continuance so that defendant could prepare his own defense effectively denied defendant his right to self-representation);
- *Milton v Morris* (9th Cir 1985) 767 F2d 1443 (writ granted; county jail authorities prevented petitioner from effectively using telephone, hiring investigator, and using messenger to deliver subpoenas despite state court order securing those privileges);
- *U.S. v Wilson* (9th Cir 1982) 690 F2d 1267 disapproved on other grounds in *U.S. v Hoac* (9th Cir 1993) 990 F2d 1099 (denial of pretrial right of self-representation and access to law library did not effectively deny petitioner right of self-representation);
- *Fritz v Spalding* (9th Cir 1982) 682 F2d 782 (timely self-representation motion should not have been denied because it would delay trial; factual finding that motion made for purpose of delay was required); and
- *Bittaker v Enomoto* (9th Cir 1978) 587 F2d 400 (showing of prejudice unnecessary).

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§13.37 7. Right to Call Witnesses and to Present Defense

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment right to call witnesses and to present a defense. See, *e.g., Crane v Kentucky* (1986) 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142 (exclusion of testimony showing circumstances of confession constituted violation of defendant's right to present defense). The following Ninth Circuit cases are instructive regarding the scope of the Sixth Amendment right to call witnesses and to present a defense:

- *Alcala v Woodford* (9th Cir 2003) 334 F3d 862 (when testimony of chief prosecution witness, who initially appeared to know nothing about murder, "continuously evolved" during the course of repeated interviews with police, exclusion of defense expert who would have testified that witness had been hypnotically influenced deprived defendant of crucial witness);
- *Greene v Lambert* (9th Cir 2002) 288 F3d 1081, 1091 (when defendant proffered defenses of insanity and diminished capacity, exclusion of all testimony concerning his mental disorder "was constitutionally disproportionate to the state's interest in preventing unreliable or confusing scientific testimony");
- *Jordan v Ducharme* (9th Cir 1993) 983 F2d 933 (exclusion of expert testimony on eyewitness identification did not violate right to present defense);
- *Denham v Deeds* (9th Cir 1992) 954 F2d 1501 (right to call witnesses not violated by trial court's exclusion of defense witness who, on cross-examination by prosecution, would have invoked Fifth Amendment and would have refused to testify regarding noncollateral matters);
- *Perry v Rushen* (9th Cir 1983) 713 F2d 1447 (exclusion of third party culpability evidence did not violate defendant's right to call witnesses because proffered evidence was collateral and lacked probative value); and
- *Fendler v Goldsmith* (9th Cir 1983) 728 F2d 1181 (exclusion of defense testimony as sanction for discovery violation may violate Sixth Amendment right to present defense).

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§13.38 8. Defendant's Right to Testify

The following cases are instructive on the scope of a defendant's Sixth Amendment right to testify:

- *Portuondo v Agard* (2000) 529 US 61, 146 L Ed 2d 47, 120 S Ct 1119 (Sixth Amendment does not prohibit prosecutor from commenting that testifying defendant has heard other witnesses testify and has had opportunity to tailor testimony accordingly);
- *Rock v Arkansas* (1987) 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704 (exclusion of petitioner's hypnotically refreshed testimony was impermissible limitation of defendant's right to testify); and
- *Williams v Borg* (9th Cir 1998) 139 F3d 737 (striking of defendant's testimony on direct examination based on refusal to submit to cross-examination did not violate defendant's right to testify).

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§13.39 9. Right to Fair Notice of Crimes Charged

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment right to fair notice of crimes charged. See, *e.g.*:

- *Lankford v Idaho* (1991) 500 US 110, 126, 114 L Ed 2d 173, 187, 111 S Ct 1723 (state statute authorizing death penalty for crimes of conviction did not provide adequate notice to accused that sentencing judge might actually impose sentence of death when proceedings before sentencing had been conducted on explicit understanding that prosecutor was not seeking death penalty);
- *Gautt v Lewis* (9th Cir 2007) 489 F3d 993, 1014 (right to notice violated when defendant was charged with sentencing enhancement under one statute but received enhancement under different statute);
- *Clark v Brown* (9th Cir 2006) 442 F3d 708, 718, amended (9th Cir 2006) 450 F3d 898 (retroactive application of newly interpreted felony-murder special circumstance statute violated due process right to fair notice that conduct made defendant death-eligible);
- *Calderon v Prunty* (9th Cir 1995) 59 F3d 1005, 1008 (charging document, prosecution's opening statement, and prosecution's evidence provided adequate notice of lying-in-wait theory, even though trial court ruled at pretrial hearing that evidence did not support lying in wait special circumstance);
- *Stephens v Borg* (9th Cir 1995) 59 F3d 932, 934 (2-day notice to defendant, including submission of felony-murder jury instruction while defendant was still putting on his case-in-chief, was constitutionally adequate notice of felony-murder theory);
- *Sheppard v Rees* (9th Cir 1990) 909 F2d 1234 (surprise felony-murder instruction at end of trial violated right to fair notice);
- *Lincoln v Sunn* (9th Cir 1987) 807 F2d 805 (case remanded to district court to consider whether deviation between indictment and jury instructions denied defendant adequate notice to prepare defense); and
- *Miller v Stagner* (9th Cir 1985) 757 F2d 988, modified at 768 F2d 1090 (information that tracks language of applicable statute provides fair notice of charge).

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§13.40 10. Right to Jury Trial

A petition for federal habeas corpus relief may be based on a violation of a defendant's Sixth Amendment right to a jury trial. The following cases are instructive regarding the scope of the Sixth Amendment right to jury trial:

- *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531 (sentencing procedure in which defendant was given "exceptional sentence" on basis of factual finding made by trial judge did not comply with Sixth Amendment);

NOTE: *Blakely* does not apply retroactively to cases already final on direct review when it was decided. *In re Consiglio* (2005) 128 CA4th 511, 27 CR3d 167. See *Schriro v Summerlin* (2004) 542 US 348, 159 L Ed 2d 442, 124 S Ct 2519.

- *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428 (*Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, leads to conclusion that facts that make defendant eligible for death penalty must be found by jury beyond reasonable doubt);

NOTE: *Ring* does not apply retroactively to cases already final on direct review when it was decided. *Schriro v Summerlin* (2004) 542 US 348, 159 L Ed 2d 442, 124 S Ct 2519.

- *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348 (except with respect to prior convictions, defendant has right to jury determination of every fact used to increase punishment above statutory maximum);
- *Sullivan v Louisiana* (1993) 508 US 275, 124 L Ed 2d 182, 113 S Ct 2078 (right to jury trial and right to due process violated by instruction that did not require jury to find guilt beyond reasonable doubt);
- *Schad v Arizona* (1991) 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (when means by which crime is committed is not element of crime, jury does not have to agree on means);
- *Holland v Illinois* (1990) 493 US 474, 107 L Ed 2d 905, 110 S Ct 803 (white defendant can challenge exclusion of blacks from jury venire, but not from jury itself, under Sixth Amendment "fair cross-section" requirement);
- *Blanton v North Las Vegas* (1989) 489 US 538, 109 S Ct 1289, 103 L Ed 2d 550 (test for petty offenses that do not require jury trial);
- *Lockhart v McCree* (1986) 476 US 162, 90 L Ed 2d 137, 106 S Ct 1758 (right to impartial jury in death penalty case);
- *Powell v Galaza* (9th Cir 2003) 328 F3d 558 (trial court's instruction to jury that defendant's testimony satisfied specific intent requirement was impermissible under controlling Supreme Court decisions); and
- *Lambright v Stewart* (9th Cir 1999) 191 F3d 1181 (use of separate juries to decide defendants' guilt not unconstitutional per se).

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C. Eighth Amendment

§13.41 1. Excessive Bail

A federal habeas corpus claim may be based on the excessive bail provision of the Eighth Amendment. *Hunt v Roth* (8th Cir 1981) 648 F2d 1148, rev'd on mootness grounds sub nom *Murphy v Hunt* (1982) 455 US 478, 71 L Ed 2d 353, 102 S Ct 1181 (blanket denial of possibility of pretrial bail to persons accused of violent sexual offenses violated excessive bail clause of the Eighth Amendment).

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§13.42 2. Penalty Disproportionate

A federal habeas corpus petition in a noncapital case may be based on a claim that the defendant's sentence is grossly disproportionate to the offense or the offender under the Eighth Amendment. The Eighth Amendment disproportionality challenge to a sentence is available only in exceedingly rare and extreme cases. *Lockyer v Andrade* (2003) 538 US 63, 72, 155 L Ed 2d 144, 123 S Ct 1166. See *Gonzalez v Duncan* (9th Cir 2008) 551 F3d 875, 889 (sentence of 28-life grossly disproportionate to offense of failing to renew registration as a sex offender within 5 days of birthday); *Cocio v Bramlett* (9th Cir 1989) 872 F2d 889 (life sentence for homicide committed by driving recklessly while intoxicated not constitutionally disproportionate); *Alford v Rolfs* (9th Cir 1989) 867 F2d 1216, 1221.

In *Ewing v California* (2003) 538 US 11, 155 L Ed 2d 108, 123 S Ct 1179, seven members of the Supreme Court agreed that the Eighth Amendment embodies at least a narrow proportionality principle that is applicable to noncapital sentencing, but a majority of the court concluded that the 25-to-life sentence that the defendant received for his conviction of grand theft under California's Three Strikes Law did not violate the Eighth Amendment.

In *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, the United States Supreme Court ruled that imposing the death penalty on mentally retarded defendants is disproportionate to their culpability under the Eighth Amendment. The court imposed a categorical ban on the execution of the mentally retarded just 13 years after its decision in *Penry v Lynaugh* (1989) 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934, overruled on other grounds in *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, in which it had declined to take this step. The court explained that, in the interim, legislation in most states prohibiting execution of the mentally retarded signaled the emergence of a national consensus against the practice.

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§13.43 3. Inadequacy or Arbitrariness of Capital Sentencing Procedure

In a capital case, a federal habeas corpus petition may be based on a claim that the sentencing procedure was inadequate or arbitrary under the Eighth Amendment's prohibition against cruel and unusual punishment. The following cases are instructive regarding the scope of this Eighth Amendment protection:

- *Calderon v Coleman* (1998) 525 US 141, 142 L Ed 2d 521, 527, 119 S Ct 500 (harmless error analysis of *Brecht v Abrahamson* (1993) 507 US 619, 623, 123 L Ed 2d 353, 363, 113 S Ct 1710 (no reasonable likelihood of different result) applies to errors in capital sentencing instructions);
- *Buchanan v Angelone* (1998) 522 US 269, 139 L Ed 2d 702, 711, 118 S Ct 757 (state trial court's failure to instruct capital sentencing jury on concept of mitigation and on particular statutorily defined mitigating factors did not violate defendant's Eighth Amendment rights);
- *Johnson v Texas* (1993) 509 US 350, 125 L Ed 2d 290, 113 S Ct 2658 (same capital sentencing procedure held inadequate in *Penry v Lynaugh* (1989) 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934, overruled on other grounds in *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, permitted adequate consideration of mitigating circumstances in this case);
- *Payne v Tennessee* (1991) 501 US 808, 115 L Ed 2d 720, 111 S Ct 2597 (victim-impact evidence admissible during penalty phase of capital trial);
- *Boyde v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 (standard for evaluating ambiguous jury instruction is whether there is reasonable likelihood that jury has erroneously applied instruction);
- *Penry v Lynaugh* (1989) 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934 (capital sentencing procedure did not permit adequate consideration of mitigating circumstances); see also *Tennard v Dretke* (2004) 542 US 274, 159 L Ed 2d 384, 124 S Ct 2562;
- *California v Brown* (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837 (plurality) (instruction during penalty phase of capital murder trial admonishing jurors not to be "be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" does not violate Eighth Amendment);
- *Coleman v Calderon* (9th Cir 2000) 210 F3d 1047 ("*Briggs* instruction" informing capital jury of governor's power to commute or pardon sentence of life without parole was unconstitutionally misleading and prejudicial);
- *Jeffers v Lewis* (9th Cir 1994) 38 F3d 411 (appellate reweighing of aggravating and mitigating factors was adequate); and
- *Creech v Arave* (9th Cir 1991) 928 F2d 1481, overruled on other grounds in *Arave v Creech* (1993) 507 US 463, 123 L Ed 2d 188, 113 S Ct 1534 (after first capital sentence vacated, Eighth Amendment required trial judge to give defendant an opportunity to present new mitigation evidence at resentencing hearing).

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D. Due Process

§13.44 1. Prosecutorial Misconduct

A petition for federal habeas corpus relief may be based on prosecutorial misconduct that renders a trial fundamentally unfair. The following cases are instructive regarding the scope of this ground:

- *Darden v Wainwright* (1986) 477 US 168, 91 L Ed 2d 144, 106 S Ct 2464 (prosecutor's inflammatory argument (*e.g.*, suggesting that prison officials could not be trusted to keep defendant in custody, referring to him as "an animal") did not deny him due process);
- *Caldwell v Mississippi* (1985) 472 US 320, 337, 86 L Ed 2d 231, 105 S Ct 2633 (prosecutor's statement in argument that death verdict would be subject to automatic review denied defendant due process; Fourteenth Amendment does not permit imposition of death penalty by trier of fact that has been led to believe that responsibility for determining appropriateness of death penalty rests elsewhere);
- *Smith v Phillips* (1982) 455 US 209, 71 L Ed 2d 78, 102 S Ct 940 (prosecutor's failure to disclose until after trial that juror had applied for job as DA investigator did not deprive defendant of due process);
- *Donnelly v De Christoforo* (1974) 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868 (relevant question is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process");
- *Earp v Stokes* (9th Cir 2005) 423 F3d 1024 (undue prosecutorial interference in defense witness's decision to testify violates due process);
- *Nguyen v Lindsey* (9th Cir 2000) 232 F3d 1236 (applying AEDPA) (inconsistencies in evidence presented by prosecutor at separate trials of different defendants did not deny due process when prosecution's theory of culpability was consistent in both cases);
- *Thompson v Calderon* (9th Cir 1997) 120 F3d 1045, rev'd on another ground (1998) 523 US 538, 140 L Ed 2d 728, 118 S Ct 1489 (fundamentally inconsistent theories of culpability in separate trials of different defendants violated due process);
- *Campbell v Kincheloe* (9th Cir 1987) 829 F2d 1453 (closing argument did not deny petitioner due process);
- *Lincoln v Sunn* (9th Cir 1987) 807 F2d 805 (case remanded to trial court to determine whether prosecutor's comments on defendant's failure to testify were prejudicial); and
- *Bruno v Rushen* (9th Cir 1983) 721 F2d 1193 (prosecutor's unfounded assertions that defense counsel induced important defense witness to repudiate earlier pro-prosecution statements were prejudicial misconduct).

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§13.45 2. Failure to Disclose, Collect, or Preserve Exculpatory Evidence

In *Brady v Maryland* (1963) 373 US 83, 87, 10 L Ed 2d 215, 83 S Ct 1194, the United States Supreme Court held that the prosecution has an affirmative duty under the federal constitution to disclose material, favorable evidence relevant to either guilt or punishment. Defendant is not required to show bad faith. 373 US at 87. The duty to disclose is independent of any request by defendant. *U.S. v Agurs* (1976) 427 US 97, 107, 49 L Ed 2d 342, 96 S Ct 2392. The duty includes both exculpatory and impeachment evidence. *U.S. v Bagley* (1985) 473 US 667, 676, 87 L Ed 2d 481, 105 S Ct 3375. Materiality is established by showing a "reasonable probability" that disclosure would have changed the outcome of the case. 473 US at 682.

A petition for federal habeas corpus relief may be based on the failure to disclose what has come to be known as *Brady* material. The following cases are instructive regarding the scope of this ground:

- *Strickler v Greene* (1999) 527 US 263, 144 L Ed 2d 286, 119 S Ct 1936 (*Brady* violation has three components: (1) exculpatory or impeaching evidence, (2) suppression by the prosecution, and (3) prejudice; prejudice not shown here);
- *Wood v Bartholomew* (1995) 516 US 1, 133 L Ed 2d 1, 116 S Ct 7 (undisclosed results of polygraph examination not material under *Brady*; results were not admissible at trial; evidence of guilt was overwhelming);
- *Kyles v Whitley* (1995) 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555 (once *Brady* violation is established, no further harmless error analysis is required on federal habeas review because reasonable probability that outcome would have been different establishes that error had substantial and injurious effect or influence in determining the jury's verdict as required by *Brecht v Abrahamson* (1993) 507 US 619, 623, 123 L Ed 2d 353, 113 S Ct 1710);
- *Silva v Brown* (9th Cir 2005) 416 F3d 980 (prosecution's failure to disclose that it made deal requiring that its star witness refrain from undergoing psychiatric evaluation before testifying was *Brady* error requiring reversal of murder conviction);
- *Downs v Hoyt* (9th Cir 2000) 232 F3d 1031 (prosecution not required to turn over materials that merely provided investigative leads); and
- *U.S. v Kennedy* (9th Cir 1989) 890 F2d 1056 (undisclosed information not material).

Failure to preserve evidence that is not exculpatory on its face but is potentially exculpatory may be a ground for federal habeas corpus relief, but only if the exculpatory potential of the evidence was apparent at the time the evidence was destroyed and petitioner can demonstrate bad faith. *Arizona v Youngblood* (1988) 488 US 51, 102 L Ed 2d 281, 109 S Ct 333; *California v Trombetta* (1983) 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528. The following cases are instructive regarding the scope of this ground:

- *Grisby v Blodgett* (9th Cir 1997) 130 F3d 365 (bad faith not shown); and
- *Miller v Vasquez* (9th Cir 1989) 868 F2d 1116, 1120 (claim of bad faith failure to *collect* potentially exculpatory evidence states violation of due process under *Youngblood*).

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§13.46 3. Impermissibly Suggestive Identification Procedures

A petition for federal habeas corpus relief may challenge impermissibly suggestive identification procedures. See *Stovall v Denno* (1967) 388 US 293, 18 L Ed 2d 1199, 87 S Ct 1967. The following cases are instructive regarding the scope of this ground:

- *Manson v Brathwaite* (1977) 432 US 98, 53 L Ed 2d 140, 97 S Ct 2243 (reliability, not suggestiveness, is touchstone for exclusion; judged by totality of circumstances);
- *Neil v Biggers* (1972) 409 US 188, 34 L Ed 2d 401, 93 S Ct 375 (suggestive confrontation held reliable—and therefore admissible—because victim had substantial opportunity to view rapist and description unusually thorough);
- *Van Pilon v Reed* (9th Cir 1986) 799 F2d 1332 (in-court identifications reliable even assuming encounter between defendant and witnesses at pretrial hearing was suggestive);
- *U.S. v Bagley* (9th Cir 1985) 772 F2d 482 (one-on-one showup, held shortly after crime, though suggestive, was legitimate identification technique);
- *U.S. v Givens* (9th Cir 1985) 767 F2d 574, 580 (in-court identification not tainted by suggestiveness of pretrial viewing of single photograph of defendant, because witness was unable to identify defendant from photo);
- *Ponce v Cupp* (9th Cir 1984) 735 F2d 333, 336 (in-court identification reliable despite suggestive pretrial showup);
- *Green v Loggins* (9th Cir 1980) 614 F2d 219, 224 (pretrial encounter at which witness learned defendant's name tainted subsequent identification); and
- *Jackson v Fogg* (2nd Cir 1978) 589 F2d 108 (suggestive pre-lineup view of suspect tainted subsequent identification).

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§13.47 4. Preindictment Delay

A petition for federal habeas corpus relief may challenge excessive preindictment delay. See, *e.g., Prantil v California* (9th Cir 1988) 843 F2d 314.

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§13.48 5. Prosecutorial or Judicial Vindictiveness

A petition for federal habeas corpus relief may challenge prosecutorial or judicial vindictiveness. See, *e.g., Alabama v Smith* (1989) 490 US 794, 104 L Ed 2d 865, 109 S Ct 2201; *Taylor v Kincheloe* (9th Cir 1990) 920 F2d 599.

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§13.49 6. Involuntary Guilty Plea

A petition for federal habeas corpus relief may challenge the use of an involuntary guilty plea. A guilty plea is voluntarily and knowingly made when the record shows that the defendant was advised by competent counsel and was made aware of the nature of the charge against him or her and when nothing in the record impeached the plea or suggested that the defendant's admissions in open court were anything but the truth. *Brady v U.S.* (1970) 397 US 742, 750, 25 L Ed 2d 747, 757, 90 S Ct 1463. A valid guilty plea also requires the judge to advise the defendant in open court of his or her privilege against self-incrimination, right to a jury trial, and right to confront the witnesses against him or her. The defendant must then knowingly and voluntarily waive these rights on record. *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709.

The following United States Supreme Court cases are instructive regarding the scope of this ground:

- *Blackledge v Allison* (1977) 431 US 63, 52 L Ed 2d 136, 97 S Ct 1621 (guilty plea challenge based on facts outside record);
- *Santobello v New York* (1971) 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (plea bargain); and
- *North Carolina v Alford* (1970) 400 US 25, 27 L Ed 2d 162, 91 S Ct 160 (fear of death penalty does not render plea involuntary).

The following Ninth Circuit cases are instructive regarding the scope of this ground:

- *Adams v Peterson* (9th Cir 1992) 968 F2d 835 (defendant's stipulation to existence of all factual elements of crimes charged not equivalent to guilty plea and not subject to *Boykin* protections; stipulation constitutional if knowing and voluntary);
- *Torrey v Estelle* (9th Cir 1988) 842 F2d 234 (failure to inform defendant of collateral consequences of plea does not render it involuntary);
- *Carter v McCarthy* (9th Cir 1986) 806 F2d 1373; *Chizen v Hunter* (9th Cir 1987) 809 F2d 560 (failure to inform defendant of mandatory special parole term rendered plea involuntary);
- *Iaea v Sunn* (9th Cir 1986) 800 F2d 861 (coercion by third parties);
- *Hayes v Kincheloe* (9th Cir 1986) 784 F2d 1434 (failure to inform defendant of elements of crime rendered plea involuntary);
- *Rodriguez v Ricketts* (9th Cir 1985) 777 F2d 527 (due process clause does not require that guilty plea be supported by factual basis in record);
- *Quiroz v Wawrzaszek* (9th Cir 1984) 749 F2d 1375, overruled on other grounds in *Adams v Peterson* (1992) 968 F2d 835, 841 (failure to advise defendant on record of maximum penalty); and
- *Wayne v Raines* (9th Cir 1982) 690 F2d 685 (failure to inform defendant of mandatory special parole term).

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§13.50 7. Prejudicial Joinder of Defendants

A petition for federal habeas corpus relief may challenge the prejudicial joinder of defendants. *Byrd v Wainwright* (5th Cir 1970) 428 F2d 1017.

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§13.51 8. Prejudicial Joinder of Charges

A petition for federal habeas corpus relief may challenge the prejudicial joinder of charges, but joint trial of charges violates the federal Constitution only if it renders the trial fundamentally unfair. *Sandoval v Calderon* (9th Cir 2001) 241 F3d 765, 771 (joinder of counts was not prejudicial because evidence showed link between crimes); *Bean v Calderon* (9th Cir 1998) 163 F3d 1073 (joinder of two indictments deprived petitioner of fundamentally fair trial because evidence was not cross-admissible and prosecutor repeatedly urged jury to consider similarity of crimes); *Corbett v Bordenkircher* (6th Cir 1980) 615 F2d 722, 724.

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§13.52 9. Denial of Continuance

Issues pertaining to the denial of a continuance are in most cases within the sound discretion of the state trial court and not generally cognizable in federal habeas proceedings. *Jones v Swenson* (8th Cir 1972) 469 F2d 535, 537. In some circumstances, however, the trial court's refusal to grant a continuance may deny a defendant the effective assistance of counsel or be so arbitrary as to violate the right to due process. *Grigsby v Mabry* (8th Cir 1980) 637 F2d 525; *Davis v Alabama* (5th Cir 1977) 545 F2d 460, 466.

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§13.53 10. Competency to Stand Trial, Plead Guilty, or Waive Right to Counsel

A petition for federal habeas corpus relief may challenge a ruling on a defendant's competency. Competency to stand trial, plead guilty, or waive the right to counsel is assessed by the same standard: Does the defendant possess a rational understanding of the proceedings? *Godinez v Moran* (1993) 509 US 389, 125 L Ed 2d 321, 113 S Ct 2680.

The following cases are instructive regarding the scope of this ground:

- *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572 (placing burden of proving incompetence to stand trial on defendant does not violate due process);
- *Pate v Robinson* (1966) 383 US 375, 15 L Ed 2d 815, 86 S Ct 836 (trial court must hold hearing to assess defendant's competency if evidence raises a bona fide doubt about defendant's competency);
- *Torres v Prunty* (9th Cir 2000) 223 F3d 1103 (applying AEDPA) (state courts' finding that *Pate* hearing unnecessary was unreasonable within the meaning of 28 USC §2254(d)(2));
- *Amaya-Ruiz v Stewart* (9th Cir 1997) 121 F3d 486, 493 (evidence before state trial court did not require second competency hearing);
- *Hernandez v Ylst* (9th Cir 1991) 930 F2d 714 (competency hearing required if substantial doubt exists regarding defendant's competency);
- *Boag v Raines* (9th Cir 1985) 769 F2d 1341; and
- *De Kaplany v Enomoto* (9th Cir 1976) 540 F2d 975.

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§13.54 11. Right to Effective Psychiatric Assistance

A petition for federal habeas corpus relief may be based on the violation of a defendant's right to effective psychiatric assistance. If a defendant makes a preliminary showing that his or her sanity at the time of the offense is likely to be a significant issue at trial, due process requires that the state provide access to a psychiatrist's assistance on the issue if the defendant cannot afford one. *Ake v Oklahoma* (1985) 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087.

The following cases are instructive regarding the scope of this ground:

- *Washington v Texas* (1967) 388 US 14, 18 L Ed 2d 1019, 87 S Ct 1920;
- *Chaney v Stewart* (9th Cir 1998) 156 F3d 921 (state trial court's denial of capital defendant's request for appointment of psychiatric expert constituted harmless error; *Ake* holding inapplicable);
- *Williams v Calderon* (9th Cir 1995) 52 F3d 1465, 1473 (informal, in camera inquiry by petitioner on whether funds were available for psychiatric assistance does not satisfy *Ake*'s requirement that petitioner make threshold showing of need for psychiatrist);
- *Smith v McCormick* (9th Cir 1990) 914 F2d 1153, 1157 (extended entitlement to psychiatric assistance to cases in which defendant "places his mental state at issue"); and
- *Harris v Vasquez* (9th Cir 1990) 913 F2d 606 (right to psychiatric assistance for defense).

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§13.55 12. Pretrial Publicity

Pretrial publicity can deprive a defendant of the Sixth Amendment right to be tried before a fair and impartial jury. *Sheppard v Maxwell* (1966) 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507. But see *Patton v Yount* (1984) 467 US 1025, 1038, 1039, 81 L Ed 2d 847, 104 S Ct 2885 (evidence that all but two members of jury panel had seen news accounts of case and eight of twelve jurors had at one time formed opinion about defendant's guilt did not unfairly prejudice defendant under totality of circumstances). The following cases are instructive regarding the scope of this ground for federal habeas corpus relief:

- *Mu'Min v Virginia* (1991) 500 US 415, 114 L Ed 2d 493, 111 S Ct 1899 (no right to voir dire jurors exposed to pretrial publicity about content of that publicity);
- *Murphy v Florida* (1975) 421 US 794, 44 L Ed 2d 589, 95 S Ct 2031 (jurors' exposure to news accounts of crime or defendant's prior convictions does not alone presumptively deprive defendant of fair and impartial jury);
- *Hart v Stagner* (9th Cir 1991) 935 F2d 1007 (petitioner failed to show that substantial media coverage biased jurors);
- *Harris v Pulley* (9th Cir 1989) 885 F2d 1354, 1360 (two-prong test for determining whether media coverage violates Sixth Amendment);
- *Lincoln v Sunn* (9th Cir 1987) 807 F2d 805; and
- *Bashor v Risley* (9th Cir 1984) 730 F2d 1228.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.56 13. Juror Bias and Misconduct

§13.56 13. Juror Bias and Misconduct

A petition for federal habeas corpus relief may be based on the issue of juror bias or misconduct. The following Ninth Circuit cases are instructive regarding the scope of this ground:

- *Green v White* (9th Cir 2000) 232 F3d 671 (false statements and evidence of bias by juror);
- *Sassounian v Roe* (9th Cir 2000) 230 F3d 1097 (juror misconduct; jury's consideration of extrinsic evidence);
- *Dyer v Calderon* (9th Cir 1998) 151 F3d 970 (false statements during voir dire);
- *Lawson v Borg* (9th Cir 1995) 60 F3d 608 (juror misconduct; presentation of extrinsic evidence to jury);
- *Lee v Marshall* (9th Cir 1994) 42 F3d 1296 (presence of police officers in jury room);
- *Jeffries v Blodgett* (9th Cir 1993) 988 F2d 923, modified at 5 F3d 1180 (juror misconduct);
- *Tinsley v Borg* (9th Cir 1990) 895 F2d 520, 523 (actual and implied juror bias);
- *Hughes v Borg* (9th Cir 1990) 898 F2d 695, 699 (juror misconduct—presentation of extrinsic evidence to jury);
- *Dickson v Sullivan* (9th Cir 1988) 849 F2d 403, 405 (juror misconduct—presentation of extrinsic evidence to jury);
- *Marino v Vasquez* (9th Cir 1987) 812 F2d 499 (juror misconduct);
- *Lincoln v Sunn* (9th Cir 1987) 807 F2d 805 (juror bias); and
- *Bayramoglu v Estelle* (9th Cir 1986) 806 F2d 880, 887 (juror misconduct and bias).

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§13.57 14. Judicial Bias

A petition for federal habeas corpus relief may be based on the issue of judicial bias. See, *e.g., Duckett v Godinez* (9th Cir 1995) 67 F3d 734 (state judge's behavior must render trial so fundamentally unfair as to violate federal due process); *Lang v Callahan* (9th Cir 1986) 788 F2d 1416.

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§13.58 15. Presence of Courtroom Demonstrators

A petition for federal habeas corpus relief may challenge the presence of courtroom demonstrators. See, *e.g., Norris v Risley* (9th Cir 1989) 878 F2d 1178, 1183.

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§13.59 16. Right to Be Present at Trial Proceedings

A petition for federal habeas corpus relief may challenge the violation of a defendant's right to be present at trial proceedings. The following cases are instructive regarding the scope of this ground:

- *Kentucky v Stincer* (1987) 482 US 730, 745, 96 L Ed 2d 631, 647, 107 S Ct 2658;
- *Faretta v California* (1975) 422 US 806, 819 n15, 45 L Ed 2d 562, 572 n15, 95 S Ct 2525;
- *Snyder v Massachusetts* (1934) 291 US 97, 78 L Ed 674, 54 S Ct 330, overruled on other grounds in *Malloy v Hogan* (1964) 378 US 1, 2, 12 L Ed 2d 653, 656, 84 S Ct 1489;
- *Fisher v Roe* (9th Cir 2001) 263 F3d 906, 915, overruled on other grounds in *Payton v Woodford* (2003) 346 F3d 1204, 1218 (under established Supreme Court precedent, defendants had right to be present at jury readback if their absence could have undermined fundamental fairness);
- *Hegler v Borg* (9th Cir 1995) 50 F3d 1472;
- *Campbell v Wood* (9th Cir 1994) 18 F3d 662; and
- *Sturgis v Goldsmith* (9th Cir 1986) 796 F2d 1103 (right to be present at competency hearing).

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§13.60 17. Trial in Jail Garb

A petition for federal habeas corpus relief may challenge the fact that a defendant was wearing jail-issued clothing when tried. See, *e.g., Estelle v Williams* (1976) 425 US 501, 48 L Ed 2d 126, 96 S Ct 1691; *Felts v Estelle* (9th Cir 1989) 875 F2d 785. But see *Duckett v Godinez* (9th Cir 1995) 67 F3d 734 (requiring defendant to wear jail garb during penalty phase of bifurcated trial does not violate due process).

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§13.61 18. Use of Restraints on Defendant at Trial

A petition for federal habeas corpus relief may challenge the use of restraints or other security measures on the defendant at trial. The following cases are instructive regarding the scope of this ground:

- *Illinois v Allen* (1970) 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057; *Holbrook v Flynn* (1986) 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (security personnel in courtroom);
- *Rhoden v Rowland* (9th Cir 1999) 172 F3d 633 (shackling);
- *Duckett v Godinez* (9th Cir 1995) 67 F3d 734 (shackling during penalty phase of bifurcated trial);
- *King v Rowland* (9th Cir 1992) 977 F2d 1354 (security personnel in courtroom);
- *Castillo v Stainer* (9th Cir 1992) 983 F2d 145, modified at 997 F2d 669 (shackling of defendant violated due process, but was harmless error);
- *Morgan v Aispuro* (9th Cir 1991) 946 F2d 1462 (use of high-security courtroom not inherently prejudicial);
- *Jones v Meyer* (9th Cir 1990) 899 F2d 883;
- *Hamilton v Vasquez* (9th Cir 1989) 882 F2d 1469, 1471;
- *Spain v Rushen* (9th Cir 1989) 883 F2d 712; and
- *Stewart v Corbin* (9th Cir 1988) 850 F2d 492.

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§13.62 19. Forced Medication of Defendant During Trial

A petition for federal habeas corpus relief may challenge the use of restraints or other security measures on the defendant at trial. Administering an antipsychotic drug to a defendant during trial may violate due process if there is an insufficient showing made regarding less restrictive alternatives or the necessity of the procedure to further an essential state interest. To prevail, a defendant need not show actual prejudice, only a strong possibility of prejudice. *Riggins v Nevada* (1992) 504 US 127, 118 L Ed 2d 479, 112 S Ct 1810.

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§13.63 20. Evidentiary Rulings by Trial Court

A petition for federal habeas corpus relief may challenge the evidentiary rulings of a trial court, although those rulings, even if erroneous, violate due process only if they render the trial fundamentally unfair. As a general matter, the *admission* of relevant evidence does not violate due process even if the admission violates state law. *Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475. However, the admission of irrelevant "other acts" evidence may violate due process when it is probative only of a defendant's character and criminal propensity, and when the jury could have drawn *no* permissible inferences from the evidence. *McKinney v Rees* (9th Cir 1993) 993 F2d 1378. The determination of whether the *exclusion* of evidence violates a defendant's due process rights requires balancing the importance of the evidence offered by the defendant against the state's interest in exclusion. *Chia v Cambra* (9th Cir 2004) 360 F3d 997, 1003; *Miller v Stagner* (9th Cir 1985) 757 F2d 988, 994, modified at 768 F2d 1090.

Note that in some circumstances the admission of hearsay evidence may raise a Sixth Amendment confrontation clause issue. See *Idaho v Wright* (1990) 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139 (use of unreliable hearsay may violate confrontation clause). See also *Thomas v Hubbard* (9th Cir 2001) 273 F3d 1164, overruled on another ground in *Payton v Woodford* 2003) 346 F3d 1204, 1218 n18.

The following Ninth Circuit cases are instructive on the constitutional implications of the admission and exclusion of evidence:

- *Su Chia v Cambra* (9th Cir 2004) 360 F3d 997 (exclusion of hearsay statements that simultaneously inculpated declarant and exonerated defendant violated due process);
- *Jordan v Ducharme* (9th Cir 1993) 983 F2d 933 (exclusion of expert evidence regarding reliability of eyewitness identification did not violate due process);
- *Jammal v Van de Kamp* (9th Cir 1991) 926 F2d 918 (admission of "other acts" evidence did not violate due process);
- *Gilpin v McCormick* (9th Cir 1990) 921 F2d 928 (no due process right to compel prosecution witnesses to undergo psychiatric examination);
- *Gordon v Duran* (9th Cir 1990) 895 F2d 610, 613 (admission of evidence of prior misconduct did not violate due process);
- *Tinsley v Borg* (9th Cir 1990) 895 F2d 520, 530 (exclusion of evidence);
- *Kealohapauole v Shimoda* (9th Cir 1986) 800 F2d 1463 (admission of autopsy videotape);
- *Butcher v Marquez* (9th Cir 1985) 758 F2d 373 (admission of evidence of uncharged crime); and
- *Batchelor v Cupp* (9th Cir 1982) 693 F2d 859 (exclusion of impeachment evidence).

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§13.64 21. Failure to Grant Immunity to Witness

A petition for federal habeas corpus relief may challenge a court's failure to grant immunity to a witness. See, *e.g., Prantil v California* (9th Cir 1988) 843 F2d 314.

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§13.65 22. Failure to Disclose Plea Agreement of Prosecution Witness

A petition for federal habeas corpus relief may be based on a failure to disclose the plea agreement of a prosecution witness. The following cases are illustrative:

- *Giglio v U.S.* (1972) 405 US 150, 31 L Ed 2d 104, 92 S Ct 763;
- *Williams v Calderon* (9th Cir 1995) 52 F3d 1465, 1474; and
- *Willhoite v Vasquez* (9th Cir 1990) 921 F2d 247, overruled on another ground in *Hayes v Brown* (9th Cir 2005) 399 F3d 972, 981 n2.

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§13.66 23. Involuntary Confessions

A federal habeas corpus petition may challenge an involuntary confession on due process grounds under the Fifth Amendment. *Jackson v Denno* (1964) 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774. See also*:*

- *Miller v Fenton* (1985) 474 US 104, 88 L Ed 2d 405, 106 S Ct 445;
- *Davis v North Carolina* (1966) 384 US 737, 16 L Ed 2d 895, 86 S Ct 1761;
- *Collazo v Estelle* (9th Cir 1991) 940 F2d 411;
- *Derrick v Peterson* (9th Cir 1990) 924 F2d 813; and
- *U.S. v Tingle* (9th Cir 1981) 658 F2d 1332.

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§13.67 24. Prosecutor's Comment on Defendant's Silence or Testimony

Due process prohibits a prosecutor from commenting on a defendant's silence. *Wainwright v Greenfield* (1986) 474 US 284, 88 L Ed 2d 623, 106 S Ct 634; *Doyle v Ohio* (1976) 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240; *Lincoln v Sunn* (9th Cir 1987) 807 F2d 805, 809. Courts apply the following two-part test to determine if a prosecutor's comment resulted in a due process violation: Did the prosecutor call attention to the defendant's silence by impeachment or otherwise? Did the court permit the prosecutor's use of the defendant's silence? *Greer v Miller* (1987) 483 US 756, 763, 97 L Ed 2d 618, 628, 107 S Ct 3102.

The prosecutor, however, may constitutionally comment that a testifying defendant had the opportunity to hear other witnesses testify and could tailor his testimony accordingly. *Portuondo v Agard* (2000) 529 US 61, 146 L Ed 2d 47, 120 S Ct 1119.

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§13.68 25. Jury Instructions

Jury instruction issues normally are matters of state law not reviewable by way of federal habeas corpus unless a petitioner can show that the trial court's decision resulted in the denial of a federal constitutional right. *Gonsior v Craven* (9th Cir 1971) 449 F2d 20, 21. The test on habeas review to determine constitutional error is whether a given instruction, in the context of other instructions and the trial record, infected the entire trial and made it fundamentally unfair. *Duckett v Godinez* (9th Cir 1995) 67 F3d 734 (failure to give alibi instruction does not violate due process unless it renders trial fundamentally unfair). In determining whether a challenged instruction deprived the defendant of the right to a fair trial, whether or not the challenged instruction violated state law is irrelevant. *Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475.

When an instruction is ambiguous, the court must determine whether there is a reasonable likelihood that the jury applied the instruction unconstitutionally—a greater burden than the showing required to establish plain error on direct appeal. *Calderon v Coleman* (1998) 525 US 141, 142 L Ed 2d 521, 119 S Ct 500; *Victor v Nebraska* (1994) 511 US 1, 127 L Ed 2d 583, 114 S Ct 1239 (California's "reasonable doubt" jury instruction does not violate due process; no reasonable likelihood it was unconstitutionally applied); *Boyde v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 ("reasonable likelihood" standard for judging ambiguous jury instructions); *Cupp v Naughten* (1973) 414 US 141, 38 L Ed 2d 368, 94 S Ct 396. If, however, the challenged instruction is not ambiguous, but simply wrong, the "reasonable likelihood" standard does not apply. *Ho v Carey* (9th Cir 2003) 332 F3d 587.

As with other constitutional errors, a constitutionally defective jury instruction entitles the petitioner to habeas corpus relief only if the error had a "substantial and injurious effect" on the judgment. *Calderon v Coleman* (1998) 525 US 141, 142 L Ed 2d 521, 527, 119 S Ct 500. See *Brecht v Abrahamson* (1993) 507 US 619, 623, 123 L Ed 2d 353, 113 S Ct 1710. For discussion, see §§17.24-17.31.

In *Conde v Henry* (9th Cir 1999) 198 F3d 734, the Ninth Circuit concluded that the state trial court had denied the defendant a fair trial by the cumulative effect of preventing defense counsel from presenting the defendant's theory of the case in closing argument, refusing to instruct the jury on defendant's theory, and giving instructions that did not require the jury to find every element of the offense.

In death penalty cases, due process requires lesser included offense instructions when (1) the evidence warrants them, and (2) the only available choice is between death and acquittal. *Schad v Arizona* (1991) 501 US 624, 646, 115 L Ed 2d 555, 574, 111 S Ct 2491; *Hopper v Evans* (1982) 456 US 605, 611, 72 L Ed 2d 367, 373, 102 S Ct 2049.

It is not clear whether due process requires lesser included offense instructions to be given in noncapital cases. Compare *James v Reese* (9th Cir 1976) 546 F2d 325 with *Bashor v Risley* (9th Cir 1984) 730 F2d 1228, 1240. The existence of divergent views on the question strongly suggests that a state prisoner could not prevail on a federal habeas corpus petition under AEDPA on the ground that the trial court had refused instructions on a lesser included offense, because any error by the trial court would not be contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court." 28 USC §2254(d)(1). See *Williams v Taylor* (2000) 529 US 362, 146 L Ed 2d 389, 410, 120 S Ct 1495. Depending on the facts of the case, however, it might be possible to argue that the failure to give instructions on a lesser included offense infringed some other better-established right.

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§13.69 26. Use of Presumptions in Jury Instructions

A petition for federal habeas corpus relief may be based on the use of presumptions in jury instructions. For example, a presumption that shifts the burden of *persuasion* on an element of an offense violates due process. *Sandstrom v Montana* (1979) 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (reversing conviction because jury instruction shifted burden of persuasion to defendant on issue of intent, contrary to presumption of innocence and due process). See also *People v Saddler* (1979) 24 C3d 671, 679, 156 CR 871. However, a permissive presumption that shifts the burden of *production* is permissible if the fact presumed more likely than not flows from the fact proved and if it does not shift the burden of persuasion. *Ulster County Court v Allen* (1979) 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

The following Ninth Circuit cases are instructive regarding the scope of this ground:

- *Patterson v Gomez* (9th Cir 2000) 223 F3d 959 (instruction that required jury to presume defendant's sanity during guilt phase of trial of specific intent crime held *Sandstrom* error);
- *Windham v Merkle* (9th Cir 1998) 163 F3d 1092, 1104 (CALJIC 3.02, which makes aider and abettor liable for a crime that is natural and probable consequence of intended crime, does not create burden-shifting presumption under *Sandstrom*);
- *Martinez v Borg* (9th Cir 1991) 937 F2d 422 (use of former CALJIC 3.01 (aiding-and-abetting instruction held *Sandstrom* error in *People v Beeman* (1984) 35 C3d 547, 199 CR 60) deprived defendant of fair trial);
- *Watts v Bonneville* (9th Cir 1989) 879 F2d 685, 688; and
- *Dickey v Lewis* (9th Cir 1988) 859 F2d 1365 (*Sandstrom* error).

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§13.70 27. Sufficiency of Evidence

A petition for federal habeas corpus relief may challenge the sufficiency of the evidence supporting a verdict. See, *e.g., Jackson v Virginia* (1979) 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781; *Vachon v New Hampshire* (1974) 414 US 478, 38 L Ed 2d 666, 94 S Ct 664; *Thompson v Louisville* (1960) 362 US 199, 4 L Ed 2d 654, 80 S Ct 624. When alternative theories of liability are presented to a jury, a general verdict is valid as long as the evidence is sufficient to support one of those theories. *Griffin v U.S.* (1991) 502 US 46, 116 L Ed 2d 371, 112 S Ct 466 (distinguishing between factual and legal sufficiency for purpose of determining whether judgment withstands attack on due process grounds).

The following Ninth Circuit cases may be instructive regarding the scope of this ground:

- *Schell v Witek* (9th Cir 2000) 218 F3d 1017 (fingerprint evidence found sufficient);
- *Martineau v Angelone* (9th Cir 1994) 25 F3d 734 (evidence found insufficient);
- *McMillan v Gomez* (9th Cir 1994) 19 F3d 465 (fingerprint evidence found sufficient);
- *Payne v Borg* (9th Cir 1992) 982 F2d 335 (evidence found sufficient to infer intent to aid and abet killing);
- *Mikes v Borg* (9th Cir 1991) 947 F2d 353, 356 (fingerprint evidence found insufficient);
- *Gordon v Duran* (9th Cir 1990) 895 F2d 610, 612;
- *Prantil v California* (9th Cir 1988) 843 F2d 314; and
- *Miller v Stagner* (9th Cir 1985) 757 F2d 988, modified at 768 F2d 1090.

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§13.71 28. Inconsistent Verdicts

A petition for federal habeas corpus relief may challenge the existence of inconsistent verdicts. When a jury returns verdicts on multiple counts, due process is violated only if the verdicts are *necessarily* inconsistent, *i.e.,* only if, based on the evidence, no rational factfinder could have found a consistent set of facts supporting both convictions. *Masoner v Thurman* (9th Cir 1993) 996 F2d 1003.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/13 Federal Habeas Corpus: Overview; Appointment of Counsel; Bail and Stays; Standards and Grounds for Review/§13.72 29. Sentencing

§13.72 29. Sentencing

A petition for federal habeas corpus relief may be based on a claim that the defendant's sentence or the manner in which it was determined violates due process. See, *e.g., McMillan v Pennsylvania* (1986) 477 US 79, 91 L Ed 2d 67, 106 S Ct 2411. The following cases provide examples of unconstitutional sentencing procedures:

- *Cunningham v California* (2007) 549 US 270, 274, 166 L Ed 2d 856, 864, 127 S Ct 856 (California's Determinate Sentencing Law violated Sixth and Fourteenth Amendments by permitting upper-term sentences to be based on facts found by sentencing judge by preponderance of evidence rather than on facts found by jury beyond reasonable doubt);
- *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428 (aggravating factors that permit imposition of death penalty are functionally equivalent to elements of greater offense and must therefore be found by jury beyond reasonable doubt);
- *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348 (imposition of sentence enhancement that upon proof of certain facts increases sentence beyond statutory maximum requires jury finding and proof beyond reasonable doubt); and
- *Lankford v Idaho* (1991) 500 US 110, 114 L Ed 2d 173, 111 S Ct 1723 ("surprise" death sentence violated due process because defendant had no previous notice of the possibility of such a sentence).

The following Ninth Circuit cases are instructive regarding the scope of this ground:

- *U.S. v Mercado* (9th Cir 2007) 474 F3d 654 (when calculating sentence under advisory guidelines, federal court may consider conduct underlying charges on which defendant was acquitted);
- *Clark v Brown* (9th Cir 2006) 442 F3d 708, 718, amended (9th Cir 2006) 450 F3d 898 (retroactive application of newly interpreted felony-murder special circumstance statute violated due process right to fair notice that defendant could receive death sentence);
- *Duhaime v Ducharme* (9th Cir 1999) 200 F3d 597, 601 (not unconstitutional for state to offer maximum sentence of life with parole to defendants pleading guilty while subjecting defendants who go to trial to potential sentence of life without parole);
- *Aponte v Gomez* (9th Cir 1993) 993 F2d 705 (state court's choice of more stringent of two interpretations of sentence enhancement statute did not violate due process, because defendant was notified of both interpretations);
- *Mak v Blodgett* (9th Cir 1992) 970 F2d 614 (capital sentencing proceeding violated due process because of excluded relevant mitigating evidence and incorrect instruction that decision not to impose death penalty required jury unanimity);
- *Boardman v Estelle* (9th Cir 1992) 957 F2d 1523 (defendant has due process right to speak personally at time of sentencing);
- *Nichols v McCormick* (9th Cir 1991) 929 F2d 507 (sentencing factor permitting enhancement of sentence beyond statutory maximum was not an element of underlying substantive offense and need not be submitted to jury);
- *McQueary v Blodgett* (9th Cir 1991) 924 F2d 829 (new determinate sentencing scheme did not create due process liberty interest for prisoner properly sentenced under previous indeterminate sentencing scheme);
- *Marzano v Kincheloe* (9th Cir 1990) 915 F2d 549 (sentence in excess of permissible statutory maximum was unconstitutional); *Wasko v Vasquez* (9th Cir 1987) 820 F2d 1090 (same);
- *Oxborrow v Eikenberry* (9th Cir 1989) 877 F2d 1395, 1400 (due process requires notice of sentence enhancement and an opportunity to be heard); *LaMere v Risley* (9th Cir 1987) 827 F2d 622 (same);
- *Coleman v McCormick* (9th Cir 1989) 874 F2d 1280 (resentencing under retroactive death penalty statute violated due process);
- *Brothers v Dowdle* (9th Cir 1987) 817 F2d 1388 (sentencing factors);
- *Chatman v Marquez* (9th Cir 1985) 754 F2d 1531 (sentence enhancement); and

- *Guzman v Morris* (9th Cir 1981) 644 F2d 1295 (determinate sentencing).

For general discussion regarding California sentencing procedures, parole procedures, and extradition, see California Criminal Law Procedure and Practice (Cal CEB Annual); MacKay & The Prison Law Office, The California State Prisoners Handbook: A Comprehensive Practice Guide to Prison and Parole Law (4th ed 2008) (available from Reach360 Fulfillment, 440 Tesconi Circle, Santa Rosa, CA 95401, (800) 630-4104, see http://www.prisonlaw.com/handbook.html).

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§13.73 30. Use of Prior Conviction in Subsequent Proceeding

A habeas corpus petition challenging the petitioner's current or future confinement may also challenge the constitutionality of any prior completed sentence and conviction used to enhance the petitioner's current or future confinement. *Brock v Weston* (9th Cir 1994) 31 F3d 887, 888. See also *Custis v U.S.* (1994) 511 US 485, 128 L Ed 2d 517, 114 S Ct 1732; *Parke v Raley* (1992) 506 US 20, 121 L Ed 2d 391, 113 S Ct 517 (imposing on defendant burden of proving that prior convictions were invalid does not violate due process).

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§13.74 31. Failure to Record Proceedings

A petition for federal habeas corpus relief may be based on the failure to record court proceedings. See, *e.g., Madera v Risley* (9th Cir 1989) 885 F2d 646, 648.

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§13.75 32. Failure to Advise of Right to Appeal

A petition for federal habeas corpus relief may be based on an indigent defendant's loss of opportunity to pursue a state appeal due to the trial court's failure to advise the defendant of his or her right to appeal and right to the appointment of free appellate counsel. *Riser v Craven* (9th Cir 1974) 501 F2d 381; *U.S. ex rel Smith v McMann* (2d Cir 1969) 417 F2d 648. Trial counsel does not, however, have a duty to file a notice of appeal from every judgment of conviction. Instead, the Supreme Court has ruled, counsel has a constitutionally imposed duty to consult with a defendant about an appeal when counsel has reason to think either that (1) a rational defendant would want to appeal, or (2) the particular defendant is interested in appealing. *Roe v Flores-Ortega* (2000) 528 US 470, 145 L Ed 2d 985, 120 S Ct 1029; *Tanner v McDaniel* (9th Cir 2007) 493 F3d 1135, 1140.

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§13.76 33. Involuntary Waiver of Right to Appeal

A petition for federal habeas corpus relief may be based on a defendant's involuntary waiver of appeal rights. See, *e.g., Cuffle v Goldsmith* (9th Cir 1990) 906 F2d 385 (right to appeal and right to counsel were involuntarily waived when state threatened prisoner with death sentence if appeal succeeded and death sentence could not have been imposed because it would have violated double jeopardy).

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§13.77 34. Delay in Processing Appeal

A petition for federal habeas corpus relief may be based on the extreme delay in the processing of an appeal. See, *e.g.*:

- *Coe v Thurman* (9th Cir 1991) 922 F2d 528 (3-year-and-8-month delay in state court direct appeal violated due process);
- *U.S. v Tucker* (9th Cir 1993) 8 F3d 673 (en banc);
- *U.S. v Antoine* (9th Cir 1990) 906 F2d 1379; and
- *U.S. ex rel Hahn v Revis* (7th Cir 1977) 560 F2d 264 (unduly delayed parole revocation hearing).

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§13.78 E. Newly Discovered Evidence

A petition for federal habeas corpus relief may challenge a prior court ruling regarding newly discovered evidence. See, *e.g., Quigg v Crist* (9th Cir 1980) 616 F2d 1107, 1112. Failure to grant a new trial on the ground of newly discovered evidence violates due process only if the evidence would probably produce an acquittal. *Gordon v Duran* (9th Cir 1990) 895 F2d 610, 614.

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§13.79 F. Vagueness of Statute

A petition for federal habeas corpus relief may be based on the claim that the statute under which the petitioner was convicted is unconstitutionally vague in warning of the criminal conduct it prohibits. See, *e.g., McSherry v Block* (9th Cir 1989) 880 F2d 1049, 1052 (arrest under unconstitutionally vague statute); *U.S. ex rel Newsome v Malcolm* (2d Cir 1974) 492 F2d 1166. But see *Michigan v DeFillippo* (1979) 443 US 31, 61 L Ed 2d 343, 99 S Ct 2627 (validity of arrest in good faith reliance on ordinance subsequently declared unconstitutional); *Jennings v Superior Court* (1980) 104 CA3d 50, 163 CR 391 (rejecting *DeFillippo* good faith rule under *state* constitutional analysis).

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§13.80 G. Ex Post Facto

The ex post facto clause of the United States Constitution prohibits a state from applying an expanded definition of a crime or a more severe punishment to conduct that occurred before the change. US Const art I, §10.

A petition for federal habeas corpus relief may be based on a violation of the ex post facto clause. For example, it is an ex post facto violation for a state to change the evidence required for conviction after the crime has been committed. *Carmell v Texas* (2000) 529 US 513, 146 L Ed 2d 577, 120 S Ct 1620. See also *Oxborrow v Eikenberry* (9th Cir 1989) 877 F2d 1395, 1399 (retroactive application of unforeseeable interpretation of state statute can violate ex post facto clause).

It can be an ex post facto violation for a state parole board to apply a parole regulation adopted after a prisoner is sentenced. *Weaver v Maass* (9th Cir 1995) 53 F3d 956, 959 (violation cured when board applied proper regulation). Similarly, the removal of discretion to mitigate a sentence (*U.S. v Paskow* (9th Cir 1993) 11 F3d 873, 877), or changes in a state's rules regarding the scheduling of parole hearings (*California Dep't of Corrections v Morales* (1995) 514 US 499, 131 L Ed 2d 588, 115 S Ct 1597), or award of good time credits (*Weaver v Graham* (1981) 450 US 24, 28, 67 L Ed 2d 17, 101 S Ct 960; *Flemming v Oregon Bd. of Parole* (9th Cir 1993) 998 F2d 721) can also violate the ex post facto clause. But see *Garner v Jones* (2000) 529 US 244, 146 L Ed 2d 236, 120 S Ct 1362 (ex post facto prohibition did not prohibit application of new rules increasing interval between parole considerations because petitioner made no showing of significant risk of increased punishment).

However, neither the application of California's then newly enacted Determinate Sentencing Law's parole eligibility guidelines to a prisoner who received an indeterminate sentence (*Connor v Estelle* (9th Cir 1992) 981 F2d 1032) nor the community notification/registration provisions of California's sex offender statute (*Russell v Gregoire* (9th Cir 1997) 124 F3d 1079) constituted ex post facto violations. See also *Aponte v Gomez* (9th Cir 1993) 993 F2d 705 (California court's interpretation of sentence-enhancement scheme did not violate ex post facto prohibition).

The following cases are instructive regarding the scope of this ground:

- *Kansas v Hendricks* (1997) 521 US 346, 138 L Ed 2d 501, 117 S Ct 2072;
- *California Dep't of Corrections v Morales* (1995) 514 US 499, 131 L Ed 2d 588, 115 S Ct 1597;
- *Miller v Florida* (1987) 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446;
- *Scott v Baldwin* (9th Cir 2000) 225 F3d 1020;
- *Watson v Estelle* (9th Cir 1989) 886 F2d 1093;
- *Darnell v Swinney* (9th Cir 1987) 823 F2d 299;
- *Chatman v Marquez* (9th Cir 1985) 754 F2d 1531, 1535;
- *Holguin v Raines* (9th Cir 1982) 695 F2d 372; and
- *Knapp v Cardwell* (9th Cir 1982) 667 F2d 1253.

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§13.81 H. Equal Protection

***Batson* claims.** A petition for federal habeas corpus relief may challenge the exclusion of certain members of the jury on equal protection grounds. The exercise of peremptory challenges to exclude members of a "cognizable group" from the jury because of their membership in that group is a prima facie equal protection violation. *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (African-American prospective jurors). See also *J.E.B. v Alabama* (1994) 511 US 127, 128 L Ed 2d 89, 114 S Ct 1419 (peremptory challenges may not be used to exclude jurors on basis of gender); *Powers v Ohio* (1991) 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364 (white defendant may raise *Batson* claim challenging exclusion of black prospective jurors from jury). A trial court's determination that no discriminatory intent motivated the exclusion of minority jurors is a factual finding reviewed by the Supreme Court under a "clearly erroneous" standard of review. *Hernandez v New York* (1991) 500 US 352, 114 L Ed 2d 395, 111 S Ct 1859. See *e.g., Cook v Lamarque* (2010) 593 F3d 810.

Other claims. The exclusion of minority members from a grand jury also violates equal protection. *Vasquez v Hillery* (1986) 474 US 254, 88 L Ed 2d 598, 106 S Ct 617.

The retroactive application of a new state supreme court ruling to one defendant and not another has been held to violate equal protection. *Myers v Ylst* (9th Cir 1990) 897 F2d 417, 421.

It is exceedingly rare for a legislature's determination of the appropriate punishment for a crime to be considered a violation of equal protection. See, *e.g., Grooms v Keeney* (9th Cir 1987) 826 F2d 883 (existence of two statutes with different penalties prohibiting identical criminal conduct does not violate equal protection); *McQueary v Blodgett* (9th Cir 1991) 924 F2d 829 (failure to apply determinate sentencing scheme retroactively to prisoner sentenced under previous indeterminate sentencing scheme in Washington State did not violate equal protection).

In *Alford v Rolfs* (9th Cir 1989) 867 F2d 1216, 1219, the court held that the equal protection guaranty does not guarantee uniformity of judicial decisions or immunity from judicial error.

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§13.82 I. Lack of Jurisdiction

A petition for federal habeas corpus relief may be based on a claim that the trial court lacked jurisdiction over the petitioner. See, *e.g., Solem v Bartlett* (1984) 465 US 463, 79 L Ed 2d 443, 104 S Ct 1161 (under 18 USC §1153, state lacked jurisdiction over crime committed by Indian).

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§13.83 J. First Amendment

A petition for federal habeas corpus relief may be based on first amendment grounds. See, *e.g., Dawson v Delaware* (1992) 503 US 159, 117 L Ed 2d 309, 112 S Ct 1093 (admission of defendant's membership in Aryan Brotherhood prison gang in capital sentencing proceeding violated First Amendment); *Wurtz v Risley* (9th Cir 1983) 719 F2d 1438 ("intimidation" statute held unconstitutionally overbroad).

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§13.84 K. Nonconviction Restraints on Liberty

A petition for federal habeas corpus relief may challenge restraints on liberty resulting from causes other than conviction and sentencing, such as a prison disciplinary committee's revocation of good time credits (*Wolff v McDonnell* (1974) 418 US 539, 554, 41 L Ed 2d 935, 949, 94 S Ct 2963; *Preiser v Rodriguez* (1973) 411 US 475, 487, 36 L Ed 2d 439, 93 S Ct 1827; *Bostic v Carlson* (9th Cir 1989) 884 F2d 1267, 1269), the imposition of disciplinary segregation (*Bostic v Carlson, supra; Zimmerlee v Keeney* (9th Cir 1987) 831 F2d 183, 186), a state parole board's denial of or determination regarding parole (*Weaver v Maass* (9th Cir 1995) 53 F3d 956, 959; *Powell v Gomez* (9th Cir 1994) 33 F3d 39; *Pedro v Oregon Parole Bd*. (9th Cir 1987) 825 F2d 1396, 1397), revocation of parole (*Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593), failure to hold a periodic parole review required by state law (*Watson v Estelle* (9th Cir 1989) 886 F2d 1093; *Kelly v Risley* (9th Cir 1989) 865 F2d 201, 203), or the failure to award work-time credits (*Miller v Rowland* (9th Cir 1993) 999 F2d 389; *Kalka v Vasquez* (9th Cir 1989) 867 F2d 546).

In most of these cases, the prisoner's claim will allege due process violations and thus will turn in part on whether the state has created a protected liberty interest. See *Pedro v Oregon Parole Bd*. (9th Cir 1987) 825 F2d 1396, 1398. Whether a state has created a protected liberty interest turns in part on whether deprivation of the interest in question results in an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. *Sandin v Conner* (1995) 515 US 472, 484, 132 L Ed 2d 418, 430, 115 S Ct 2293 (no due process violation resulted from prison's failure to follow rules governing disciplinary proceedings because deprivation imposed on prisoner, 30 days' disciplinary segregation, was within range of confinement to be expected for sentence being served). See also *Vitek v Jones* (1980) 445 US 480, 493, 63 L Ed 2d 552, 569, 100 S Ct 1254 (transfer to mental hospital); *Washington v Harper* (1990) 494 US 210, 221, 108 L Ed 2d 178, 197, 110 S Ct 1028 (involuntary administration of psychotropic drugs). In *Sandin v Conner, supra,* the Supreme Court abandoned its earlier approach to determining whether a state statute or regulation created a liberty interest, which looked to whether the statute or regulation in question imposed a mandatory limitation on the state's discretion to deprive the inmate of the interest in question. Accordingly, pre-*Sandin* Ninth Circuit cases should be viewed with extreme caution, as they may no longer be good law.

The following cases are instructive on the procedural due process requirements applicable to prison disciplinary proceedings in which a protected liberty interest is at stake:

- *Superintendent v Hill* (1985) 472 US 445, 86 L Ed 2d 356, 105 S Ct 2768 (disciplinary findings need be supported only by "some evidence");
- *Ponte v Real* (1985) 471 US 491, 85 L Ed 2d 553, 105 S Ct 2192 (advance written notice of charges, written findings, and, to limited degree, right to call witnesses);
- *Baxter v Palmigiano* (1976) 425 US 308, 47 L Ed 2d 810, 96 S Ct 1551 (fair and impartial tribunal);
- *Bostic v Carlson* (9th Cir 1989) 884 F2d 1267;
- *Zimmerlee v Keeney* (9th Cir 1987) 831 F2d 183; and
- *Cato v Rushen* (9th Cir 1987) 824 F2d 703.

For the procedural due process requirements applicable to parole determinations, see *Greenholtz v Inmates of Nebraska Penal & Correctional Complex* (1979) 442 US 1, 7, 60 L Ed 2d 668, 99 S Ct 2100 (prisoner does not have constitutional right to early release, but state's early release statutes can create liberty interest); *Bergen v Spaulding* (9th Cir 1989) 881 F2d 719, 721; see *Sass v California Bd. of Prison Terms* (9th Cir 2006) 461 F3d 1123 (life prisoner's liberty interest in parole requires that parole denial be supported by "some evidence").

For the procedural due process requirements applicable to probation determinations, see *Black v Romano* (1985) 471 US 606, 85 L Ed 2d 636, 105 S Ct 2254 (due process does not require sentencing court to indicate that it considered alternatives to incarceration before revoking probation).

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14

Prerequisites to Seeking Federal Habeas Corpus Relief

Clifford Gardner

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§14.1 I. OVERVIEW: STATUTORY PREREQUISITES TO FEDERAL HABEAS CORPUS RELIEF

Under 28 USC §2254(a), a defendant in a state court criminal case must satisfy two separate jurisdictional prerequisites to seek habeas relief from a federal court. The first relates to the status of the habeas petitioner; §2254(a) requires that the habeas petitioner be "in custody pursuant to the judgment of a State court." The second relates to the types of claims that are cognizable in federal court; §2254(a) limits federal courts to hearing claims that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States."

Title 28 USC §2254(b) sets forth a third prerequisite for state defendants to satisfy before seeking habeas relief. This section provides that before a federal court may grant relief, the habeas petitioner must have "exhausted the remedies available in the courts of the State." In contrast to the custody and cognizability requirements of §2254(a), which are jurisdictional, the requirement to exhaust state remedies is *not* jurisdictional. *Granberry v Greer* (1987) 481 US 129, 131, 95 L Ed 2d 119, 123, 107 S Ct 1671. Accordingly, not only can the state waive exhaustion, but there are several exceptions which permit a federal court to resolve the merits of claims which have not been exhausted in the state system.

This chapter discusses these three prerequisites to relief: custody, cognizability, and exhaustion.

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II. CUSTODY

§14.2 A. Definition

Although 28 USC §2254(a) requires that habeas petitioners be in "custody," it does not define the term. "Custody" includes physical confinement in prison, jail, or any other state facility. See *Fay v Noia* (1963) 372 US 391, 394, 9 L Ed 2d 837, 842, 83 S Ct 822, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 5, 118 L Ed 2d 318, 326, 112 S Ct 1715 (prison); *Townsend v Sain* (1963) 372 US 293, 306, 9 L Ed 2d 770, 781, 83 S Ct 745, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 118 L Ed 2d 318, 112 S Ct 1715 (jail); *Baxstrom v Herold* (1966) 383 US 107, 108, 15 L Ed 2d 620, 622, 86 S Ct 760 (mental health facility). However, custody is not limited to actual physical confinement. Instead, custody has been found for purposes of §2254(a) in many other situations in which the individual is subject to restraints on liberty not shared by the public generally, such as while serving a period of parole or probation. *Jones v Cunningham* (1963) 371 US 236, 240, 9 L Ed 2d 285, 289, 83 S Ct 373 (parole); *Cervantes v Walker* (9th Cir 1978) 589 F2d 424, 425 n1 (probation). See §14.3.

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1. Situations in Which Custody Found to Exist

§14.3 a. Restraints Short of Actual Custody

Courts have found custody to exist when one of the following restraints is imposed:

- Furlough from prison. *U.S. ex rel Geisler v Walters* (3d Cir 1975) 510 F2d 887, 893.
- Parole. *Jones v Cunningham* (1963) 371 US 236, 243, 9 L Ed 2d 285, 291, 83 S Ct 373; *Gordon v Duran* (9th Cir 1990) 895 F2d 610, 612; *Armant v Marquez* (9th Cir 1985) 772 F2d 552, 555.
- Probation. *Cervantes v Walker* (9th Cir 1978) 589 F2d 424, 425 n1; *Benson v California* (9th Cir 1964) 328 F2d 159, 162.
- Involuntary civil commitment in state hospital. *Tyars v Finner* (9th Cir 1983) 709 F2d 1274, 1279.
- Sentence to attend alcohol rehabilitation classes. *Dow v Circuit Court of First Circuit* (9th Cir 1993) 995 F2d 922.
- Stay of execution of sentence pending appeal. *Harris v Superior Court* (9th Cir 1974) 500 F2d 1124, 1126 n2, citing *Hensley v Municipal Court* (1973) 411 US 345, 36 L Ed 2d 294, 93 S Ct 1571.
- Bail or release on own recognizance (O.R.). *Boston Municipal Court v Lydon* (1984) 466 US 294, 300, 80 L Ed 2d 311, 319, 104 S Ct 1805; *Hensley v Municipal Court* (1973) 411 US 345, 351, 36 L Ed 2d 294, 300, 93 S Ct 1571 (dictum).

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§14.4 b. Consecutive or Concurrent Sentences

The federal courts have held that the custody requirement has been satisfied in a variety of situations involving consecutive or concurrent sentences. Thus, if other prerequisites are satisfied, a state prisoner may seek federal habeas corpus relief in the following situations:

- To challenge the conviction underlying the first of two consecutive sentences. *Walker v Wainwright* (1968) 390 US 335, 19 L Ed 2d 1215, 88 S Ct 962. See also *Velasquez v Rhay* (9th Cir 1969) 408 F2d 9, 10 (habeas available even though unchallenged future consecutive sentence must still be served).
- To challenge the conviction underlying the first of two consecutive sentences, even when the defendant has served all the time imposed in connection with that sentence if the first conviction continues to postpone the date on which the defendant will be released from custody. *Garlotte v Fordice* (1995) 515 US 39, 41, 132 L Ed 2d 36, 40, 115 S Ct 1948.
- To challenge the conviction underlying one sentence while the petitioner is serving the sentence for another unchallenged conviction concurrently. *Benton v Maryland* (1969) 395 US 784, 23 L Ed 2d 707, 89 S Ct 2056.

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§14.5 c. Future Restraints

Courts have also held that the custody requirement is satisfied in certain situations in which a petitioner who is currently under restraint challenges not the conviction or other judicial process that is the cause of the current restraint but a conviction or other process that will be the source of a restraint in the future. Thus, if other prerequisites are satisfied, a state prisoner may seek federal habeas corpus relief in the following situations:

- To challenge the conviction underlying the second of two consecutive sentences, even though the defendant has not yet begun to serve time on the second sentence. *Peyton v Rowe* (1968) 391 US 54, 67, 20 L Ed 2d 426, 434, 88 S Ct 1549.
- To challenge a detainer for pending charges while serving a sentence for an unchallenged conviction. *Braden v 30th Judicial Circuit Court of Kentucky* (1973) 410 US 484, 488, 35 L Ed 2d 443, 448, 93 S Ct 1123; *Wilson v Belleque* (9th Cir 2009) 554 F3d 816, 821.
- To challenge the conviction underlying a future term to be served in another jurisdiction while serving a sentence for an unchallenged conviction. *Maleng v Cook* (1989) 490 US 488, 493, 104 L Ed 2d 540, 546, 109 S Ct 1923; *Estelle v Dorrough* (1975) 420 US 534, 536 n2, 43 L Ed 2d 377, 380 n2, 95 S Ct 1173; *Nelson v George* (1970) 399 US 224, 229, 26 L Ed 2d 578, 582, 90 S Ct 1963; *Rose v Morris* (9th Cir 1980) 619 F2d 42, 43.
- To challenge a pending indictment or detainer that influences the conditions of the current sentence on an unchallenged conviction. *Nelson v George* (1970) 399 US 224, 225, 26 L Ed 2d 578, 580, 90 S Ct 1963; *U.S. ex rel Scranton v New York* (2d Cir 1976) 532 F2d 292; *Fain v Duff* (5th Cir 1973) 488 F2d 218.

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2. Situations in Which Custody Found Not to Exist

§14.6 a. Petitioner Not in Custody on Prior Conviction Used to Enhance Sentence for Current Conviction

Under current law, a habeas petitioner may not challenge a completed conviction for which he or she is not currently "in custody" even if it is currently being used to enhance a current or future sentence for which he or she is "in custody," when the prior conviction is no longer open to direct or collateral attack in its own right. *Lackawanna County Dist. Attorney v Coss* (2001) 532 US 394, 402, 149 L Ed 2d 608, 617, 121 S Ct 1567 (petitions under 28 USC §2254). See also *Daniels v U.S.* (2001) 532 US 374, 382, 149 L Ed 2d 590, 121 S Ct 1578 (petitions under 28 USC §2255). A majority of the Court has recognized an exception to this rule when the prior conviction was obtained in violation of the right to counsel (*Lackawanna,* 532 US at 404, 149 L Ed 2d at 618) and a plurality of the Court has suggested an exception for those "rare cases in which no channel of review was actually available to the defendant with respect to a prior conviction due to no fault of his own" (*Daniels,* 532 US at 383, 149 L Ed 2d at 600).

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§14.7 b. Other Situations in Which Custody Found Not to Exist

The custody requirement has been found to be unsatisfied in the following situations:

- A defendant sentenced only to pay a fine is not "in custody" within the meaning of 28 USC §2254. *U.S. v Mett* (9th Cir 1995) 65 F3d 1531, 1533; *Dremann v Francis* (9th Cir 1987) 828 F2d 6, 7 ("fine only" sentence does not satisfy "in custody" requirement even if refusal to pay fine makes incarceration more likely); *Edmunds v Won Bae Chang* (9th Cir 1975) 509 F2d 39, 40.
- A fugitive from justice is not "in custody" within the meaning of 28 USC §2254. *Estelle v Dorrough* (1975) 420 US 534, 537, 43 L Ed 2d 377, 380, 95 S Ct 1173; *Gonzales v Stover* (10th Cir 1978) 575 F2d 827.
- A convicted felon who has completed his or her sentence but is required by state law to register as a sex offender is not "in custody" within the meaning of 28 USC §2254. *Henry v Lungren* (9th Cir 1999) 164 F3d 1240, 1241; *Williamson v Gregoire* (9th Cir 1998) 151 F3d 1180.
- A noncitizen in custody on an immigration hold is not "in custody" within the meaning of 28 USC §2241(c), even though the hold is the direct consequence of the conviction the petition challenges. *Resendiz v Kovensky* (9th Cir 2005) 416 F3d 952, 954.

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§14.8 B. Petitioner Must Be in Custody When Petition Is Filed

A petitioner must be in custody on the date that the federal habeas corpus petition is filed. *Carafas v LaVallee* (1968) 391 US 234, 238, 20 L Ed 2d 554, 558, 88 S Ct 1556; *Warren v Cardwell* (9th Cir 1980) 621 F2d 319, 322. Once jurisdiction attaches, however, it is not lost even if the petitioner is unconditionally released from custody before completion of all federal habeas proceedings. *Maleng v Cook* (1989) 490 US 488, 492, 104 L Ed 2d 540, 544, 109 S Ct 1923; *Tyars v Finner* (9th Cir 1983) 709 F2d 1274; *Sailer v Gunn* (9th Cir 1977) 548 F2d 271, 273 n1. The petition may, however, be moot, even though the court retains jurisdiction. Mootness is discussed in §§14.9-14.14.

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C. Mootness and Custody Compared

§14.9 1. Federal Jurisdiction Limited to "Cases" and "Controversies"

In the context of federal jurisdiction, it is important to keep separate the concepts of custody and mootness. See, *e.g., Maleng v Cook* (1989) 490 US 488, 491, 104 L Ed 2d 540, 545, 109 S Ct 1923; *Feldman v Perrill* (9th Cir 1990) 902 F2d 1445, 1448. Although the unconditional release of a petitioner *after* the filing of the habeas petition will not result in a loss of federal jurisdiction on "custody" grounds, it may on "mootness" grounds. Article III of the United States Constitution limits federal jurisdiction to "cases" and "controversies." *North Carolina v Rice* (1971) 404 US 244, 246, 30 L Ed 2d 413, 415, 92 S Ct 402; *Flast v Cohen* (1968) 392 US 83, 94, 20 L Ed 2d 947, 958, 88 S Ct 1942. When a petitioner is unconditionally released and there are no adverse collateral consequences of the conviction, there is no longer a case or controversy and the matter is moot. For further discussion of mootness, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §8.2b (5th ed 2005).

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§14.10 2. Challenge to Conviction Not Moot If Conviction Entails Collateral Consequences

Whether a petition is moot often depends on whether the petitioner is challenging the conviction itself or only the punishment imposed. Legally imposed disabilities and penalties resulting from the fact of conviction or other finding of misconduct, such as the possibility of impeachment in a future judicial proceeding, prosecution under a persistent offender statute, or an enhanced sentence for future crimes, are sufficient collateral consequences to forestall mootness. *Evitts v Lucey* (1985) 469 US 387, 391 n4, 83 L Ed 2d 821, 826 n4, 105 S Ct 830; *Robbins v Christianson* (9th Cir 1990) 904 F2d 492, 496. See also *U.S. v Spawr Optical Research, Inc*. (9th Cir 1988) 864 F2d 1467, 1470 (ineligibility to receive government contracts sufficient collateral consequence to forestall mootness). Collateral consequences also include prohibitions against engaging in certain businesses, serving as a juror, and voting. *Carafas v LaVallee* (1968) 391 US 234, 237, 20 L Ed 2d 554, 558, 88 S Ct 1556.

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§14.11 3. Challenge to Sentence Likely to Be Moot When Sentence Ends

When the petitioner challenges only the sentence or some aspect of it, such as the imposition of a mandatory parole term or the imposition and duration of a particular sentence, it is more likely that termination of the challenged sentence will moot the habeas corpus petition. This is because legal disabilities and penalties are usually imposed on the basis of conviction and are not dependent on the particular sentence imposed. See *Cox v McCarthy* (9th Cir 1987) 829 F2d 800, 803. Nonstatutory consequences of the sentence apart from the conviction, such as the effect of the sentence on employment prospects or on the sentence imposed in a future criminal proceeding, are insufficient to save the petitioner's case from becoming moot once the challenged portion of the sentence has been served. *Lane v Williams* (1982) 455 US 624, 631, 71 L Ed 2d 508, 514, 102 S Ct 1322; *Fendler v U.S. Bureau of Prisons* (9th Cir 1988) 846 F2d 550, 555; *Aaron v Pepperas* (9th Cir 1986) 790 F2d 1360, 1361; *Brady v U.S. Parole Comm'n* (9th Cir 1979) 600 F2d 234, 236.

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§14.12 4. Whether Petitioner Must Allege Existence of Collateral Consequences to Avoid Mootness Is Unsettled

It is unclear whether the petitioner must affirmatively allege collateral consequences to overcome the mootness barrier. In *Sibron v New York* (1968) 392 US 40, 57, 20 L Ed 2d 917, 932, 88 S Ct 1889, the Supreme Court stated that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction," suggesting that if there is no showing that there are no collateral consequences, their existence will be presumed. On the other hand, in *Lane v Williams* (1982) 455 US 624, 633, 71 L Ed 2d 508, 516, 102 S Ct 1322, the Court said, "[c]ollateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." Following *Sibron*, the Ninth Circuit does not require the petitioner to allege or prove the existence of collateral consequences. *Chacon v Wood* (9th Cir 1994) 36 F3d 1459, 1463 (felony); *Hirabayashi v U.S.* (9th Cir 1987) 828 F2d 591, 605 (misdemeanor). But see *Larche v Simons* (9th Cir 1995) 53 F3d 1068, 1071 (criticizing *Chacon*, and indicating that, but for that decision, the court would hold that the petitioner's claim was moot).

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§14.13 5. Class Action May Prevent Petition from Becoming Moot

When a habeas corpus petition challenges a practice or a condition of confinement that affects other individuals, it may be possible to avoid a mootness bar by filing a class action. See, *e.g., U.S. Parole Comm'n v Geraghty* (1980) 445 US 388, 397, 63 L Ed 2d 479, 491, 100 S Ct 1202; *Gerstein v Pugh* (1975) 420 US 103, 110 n11, 43 L Ed 2d 54, 63 n11, 95 S Ct 854; *Dilley v Gunn* (9th Cir 1995) 64 F3d 1365, 1368. For discussion of class actions, see §14.3.

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§14.14 6. Exception to Mootness Doctrine

Even when collateral consequences do not exist, a case may not be deemed moot if the wrong alleged is "capable of repetition, yet evading review." See *Spencer v Kemna* (1998) 523 US 1, 17, 140 L Ed 2d 43, 56, 118 S Ct 978. This exception to the mootness doctrine is applicable when (a) the challenged action is too short in duration to be fully litigated before its cessation or expiration, and (b) there is a reasonable expectation that the complaining party will again be subjected to the same action. *Spencer v Kemna,* 523 US at 17, 140 L Ed 2d at 56; *City of Los Angeles v Lyons* (1983) 461 US 95, 109, 75 L Ed 2d 675, 689, 103 S Ct 1660; *Hawkins v Comparet-Cassani* (9th Cir 2001) 251 F3d 1230, 1236.

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D. Challenging Pretrial Custody

§14.15 1. Challenges to Pretrial Custody Governed by 28 USC §2241

Pretrial custody is not challenged under 28 USC §2254, which by its terms applies only to individuals in custody "pursuant to the judgment of a State court." 28 USC §2254(a). Instead, a petitioner who is in custody awaiting trial may challenge the lawfulness of the custody under the more general provisions of 28 USC §2241), which contains no requirement that the custody relate to a state court judgment, but permits a federal court to grant relief when a state prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." See *Stow v Murashige* (9th Cir 2004) 389 F3d 880, 886; *White v Lambert* (9th Cir 2004) 370 F3d 1002, 1006. Note that 28 USC §2241(e), barring habeas corpus relief to detainees designated as U.S. enemy combatants, was found unconstitutional by *Boumediene v Bush* (2008) ___ US ___, 171 L Ed 2d 41, 94, 128 S Ct 2229.

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§14.16 2. Grounds for Pretrial Relief

There are four major grounds supporting pretrial federal habeas relief:

(1) Denial of a speedy trial (see *Braden v 30th Judicial Circuit Court of Kentucky* (1973) 410 US 484, 488, 35 L Ed 2d 443, 448, 93 S Ct 1123; *McNeely v Blanas* (9th Cir 2003) 336 F3d 822, 832);

(2) Double jeopardy (*Carden v Montana* (9th Cir 1980) 626 F2d 82);

(3) Denial of bail or setting unreasonably high bail (see *Finetti v Harris* (2d Cir 1979) 609 F2d 594, 595; *U.S. ex rel Goodman v Kehl* (2d Cir 1972) 456 F2d 863, 866); and

(4) Lack of jurisdiction over the defendant (*Solem v Bartlett* (1984) 465 US 463, 465, 79 L Ed 2d 443, 447, 104 S Ct 1161; *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191, 55 L Ed 2d 209, 98 S Ct 1011).

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§14.17 III. COGNIZABILITY

The second jurisdictional prerequisite set forth in 28 USC §2254(a) involves the types of claims which can be raised by a state petitioner seeking federal habeas relief. Under the terms of §2254(a), the petitioner must establish that "he is in custody in violation of the Constitution or laws or treaties of the United States." Thus, only claims that challenge the propriety of a defendant's conviction or seek release from custody may be brought under §2254. See *Heck v Humphrey* (1994) 512 US 477, 481, 129 L Ed 2d 383, 391, 114 S Ct 2364. Similarly, only claims that involve "a violation of the Constitution or laws or treaties of the United States" may be brought under §2254. Thus, for example, "instructional errors of state law generally may not form the basis for federal habeas relief." *Gilmore v Taylor* (1993) 508 US 333, 344, 124 L Ed 2d 306, 319, 113 S Ct 2112.

NOTE: Counsel for the defendant in state court proceedings should use care in concluding that an error is "merely" one of state law. An error that violates state law may also violate federal law and serve as the basis for federal relief. See *Depetris v Kuykendall* (9th Cir 2001) 239 F3d 1057, 1061 (evidence erroneously excluded from trial under state law also violated defendant's constitutional right to present defense; held habeas relief proper); *Bains v Cambra* (9th Cir 2000) 204 F3d 964, 973 (evidence erroneously admitted at trial in violation of state law also violated defendant's Sixth Amendment right to confrontation). When in state court, defense counsel should be alert to the need to properly present (and exhaust) the federal basis for any claim that also has a state law basis. On federalizing, see §4.36.

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IV. EXHAUSTION OF STATE REMEDIES

§14.18 A. Purpose and Nature of Doctrine

Under the terms of 28 USC §2254(b)(1)(A), an application for a writ of habeas corpus on behalf of a person in custody under the judgment of a state court "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state." The primary purpose of this requirement is to foster comity between state and federal courts. Put simply, the exhaustion doctrine is intended to give state courts the first opportunity to consider federal constitutional claims without interference from federal courts. *Vasquez v Hillery* (1986) 474 US 254, 257, 88 L Ed 2d 598, 605, 106 S Ct 617; *Rose v Lundy* (1982) 455 US 509, 515, 71 L Ed 2d 379, 386, 102 S Ct 1198. See also *Robinson v Kramer* (9th Cir 2009) 588 F3d 1212 (petitioner failed to raise Sixth Amendment *Ferreta* claim in state appeal or state habeas; held, claim unexhausted).

As noted in §14.1, the exhaustion doctrine is not jurisdictional. *Granberry v Greer* (1987) 481 US 129, 131, 95 L Ed 2d 119, 123, 107 S Ct 1671. Instead, it is treated as an affirmative defense, which can be waived by the state and to which there are certain exceptions.

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§14.19 B. Major Requirements

There are two primary requirements for exhausting a federal claim in state court. First, the substance of the federal claim must be fairly presented to the state courts. Second, as a matter of procedure, the claim must be presented to the appropriate state court, *i.e.,* the highest state court that has jurisdiction to review the claim.

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§14.20 1. Fair Presentation

The exhaustion doctrine generally requires that, before a prisoner can bring a claim in a federal habeas petition, that claim must first have been "fairly presented" to the highest state court with jurisdiction to consider it. *Duncan v Henry* (1995) 513 US 364, 365, 130 L Ed 2d 865, 868, 115 S Ct 887; *Anderson v Harless* (1982) 459 US 4, 6, 74 L Ed 2d 3, 7, 103 S Ct 276; *Kellotat v Cupp* (9th Cir 1983) 719 F2d 1027, 1029. A claim has been fairly presented when the legal basis and factual bases for the claim have been presented to the state courts.

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§14.21 a. Fair Presentation of Legal Basis of Claim

The legal basis of a claim has been fairly presented if in state court the petitioner made an express reference to a specific federal constitutional guarantee. *Duncan v Henry* (1995) 513 US 364, 365, 130 L Ed 2d 865, 888, 115 S Ct 887. The general statement of a broad constitutional principle such as due process is not sufficient. *Gray v Netherland* (1996) 518 US 152, 162, 135 L Ed 2d 457, 470, 116 S Ct 2074; *Hiivala v Wood* (9th Cir 1999) 195 F3d 1098, 1106. See *Castillo v McFadden* (9th Cir 2005) 399 F3d 993, 1003 (reference to "fundamental error" did not fairly present federal claim).

Moreover, it is not enough to explicitly refer to the federal nature of the claim at trial, or on appeal. Instead, the *federal* nature of the claim must be made clear at all levels of the state system in which state law requires relief to be sought, including the state supreme court. See *Baldwin v Reese* (2004) 541 US 27, 29, 158 L Ed 2d 64, 69, 124 S Ct 1347 (federal claim made in intermediate appellate court but not in petition for discretionary review to state supreme court was not "fairly presented," even though claim was addressed in intermediate appellate court's opinion); *Castille v Peoples* (1989) 489 US 346, 351, 103 L Ed 2d 380, 386, 109 S Ct 1056 (claim first raised in petition for discretionary review of lower court judgment is not fairly presented).

Pro se petitions may, however, be held to a lower standard. See *Sanders v Ryder* (9th Cir 2003) 342 F3d 991, 999 (petitioner's ineffective assistance claim was exhausted even though pro se petition for review did not cite federal law when brief to court of appeal cited *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052, and Sixth Amendment).

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§14.22 (1) Fair Presentation Exhausts Claim Even If Court Does Not Address Claim

Note that the exhaustion requirement is generally considered a presentation requirement only. Once a petitioner fairly presents a claim to the highest state court with jurisdiction to consider it, the exhaustion requirement is satisfied even if the state court does not address the claim at all. *Smith v Digmon* (1978) 434 US 332, 333, 54 L Ed 2d 582, 98 S Ct 597; *Beam v Paskett* (9th Cir 1993) 3 F3d 1301, 1305, overruled on other grounds in *Lambright v Stewart* (9th Cir 1999) 191 F3d 1181, 1185. Thus, for purposes of exhaustion, "there is no need to petition for rehearing if the [California] Court of Appeal has failed to discuss [an] issue." Foley, Non-Capital Habeas for Beginners: A Primer, 22 CACJ Forum 35, 37 n12 (1995).

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§14.23 (2) Court's Consideration of Merits Exhausts Claim Even If Claim Not Properly Presented

Because the fundamental purpose of the exhaustion doctrine is to give state courts the first opportunity to address federal constitutional questions, if a state court addresses the merits of a claim that was not properly presented to it under state law, and imposes no procedural default, the claim has properly been exhausted. See, *e.g., Greene v Lambert* (9th Cir 2002) 288 F3d 1081, 1086 (when state supreme court amended opinion in response to Sixth Amendment claim raised for first time in petition for reconsideration, exhaustion requirement was met).

For discussion of the exhaustion doctrine generally, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, chap 23 (5th ed 2005).

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§14.24 b. Fair Presentation of Factual Basis of Claim

In addition to exhausting the legal basis of a claim, the state petitioner must also present to the state courts the factual basis of the claim. This aspect of the exhaustion doctrine requires the petitioner to present "the substance of [the] claim to the state courts." *Vasquez v Hillery* (1986) 474 US 254, 258, 88 L Ed 2d 598, 605, 106 S Ct 617. It does not require the petitioner to present every fact to the state court that the federal courts may later deem relevant to deciding the habeas corpus petition. 474 US at 257, 88 L Ed 2d at 604. See *Davis v Silva* (9th Cir 2008) 511 F3d 1005, 1010 (pro se petitioner presented all facts necessary to state claim; state court had only to check the case, statute, and regulation and read those with the rest of petition for theory and operative facts to become clear).

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§14.25 (1) Presentation of Additional Facts in Federal Court

In pleading and presenting a case in federal court, a habeas petitioner is not limited to the exact same facts presented in state court. The presentation of additional facts violates the exhaustion doctrine only if the new facts "fundamentally alter the legal claim already considered by the state courts." *Vasquez v Hillery* (1986) 474 US 254, 260, 88 L Ed 2d 598, 606, 106 S Ct 617.

The development of additional facts in federal court will not render a claim unexhausted, even if the additional facts alter the precise factual predicate of the claim, if the new facts do not fundamentally alter the *legal* claim that was presented to the state courts. *Weaver v Thompson* (9th Cir 1999) 197 F3d 359, 364. In *Weaver v Thompson,* for example, in state court the petitioner alleged that the bailiff committed misconduct by telling the jurors they could not leave for the night without reaching a verdict. At the evidentiary hearing in federal court, the court determined that the bailiff actually told the jurors that they had to reach a verdict on all counts. 197 F3d at 364. This factual variation did not render the claim unexhausted, because the factual basis for the claim "remained rooted in the same incident," the underlying legal claim of improper jury coercion was unchanged, and the discrepancy between the facts the petitioner presented in the state courts and the facts found by the trial court after the evidentiary hearing "stemmed from the state courts' refusal to grant him an evidentiary hearing on the matter, rather than from any failure of diligence on his part." 197 F3d at 364.

NOTE: Facts not presented in state court are often adduced in support of a federal habeas claim when the state courts have denied a petitioner's claim without ordering discovery or holding an evidentiary hearing, and the federal district court subsequently orders additional factual development.

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§14.26 (2) Illustrative Cases

The following cases illustrate the requirement of fair presentation of the factual basis of a claim:

- *Vasquez v Hillery* (1986) 474 US 254, 260, 88 L Ed 2d 598, 606, 106 S Ct 617 (habeas petitioner's claim of racial discrimination in grand jury selection not fundamentally altered by presentation in federal court of sophisticated statistical analysis of racial composition of grand jury);
- *Davis v Silva* (9th Cir 2008) 511 F3d 1005, 1010 (pro se petitioner presented all facts necessary to state claim; state court had only to check the case, statute, and the regulation and read those with the rest of petition for theory and operative facts to become clear);
- *Beaty v Stewart* (2002) 303 F3d 975, 989 (petitioner's claim that trial counsel had conflict of interest not exhausted when claim in state court was that conflict caused by possibility that colleague at public defender's office might be witness in new trial motion, whereas claim in federal court was that conflict was due to public defender's previous representation of potential suspect in defendant's case);
- *Crotts v Smith* (9th Cir 1996) 73 F3d 861 (claim exhausted even though, in federal habeas petition, petitioner challenged prosecutor's asking *two* witnesses improper questions whereas, in state habeas petition, petitioner challenged prosecutor's asking *one* witness the improper questions);
- *Chacon v Wood* (9th Cir 1994) 36 F3d 1459, 1468 (claim exhausted even though in state court defendant alleged guilty plea induced by counsel's inaccurate advice about potential punishment, whereas in federal court defendant alleged plea induced by inaccurate translation of counsel's advice); and
- *Aiken v Spalding* (9th Cir 1988) 841 F2d 881 (new scientific evidence presented to federal court that placed claim in significantly stronger light than it was when in state court required exhaustion).

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§14.27 2. Presentation to the Highest State Court

Exhaustion requires that the federal habeas claim must have been properly presented to the *highest* state court that has jurisdiction to review the claim, even when that court offers only discretionary review. *O'Sullivan v Boerckel* (1999) 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728; *U.S. ex rel Kennedy v Tyler* (1925) 269 US 13, 17, 70 L Ed 138, 46 S Ct 1; *Ex parte Hawk* (1944) 321 US 114, 117, 88 L Ed 572, 574, 64 S Ct 448; *Cartwright v Cupp* (9th Cir 1981) 650 F2d 1103. This requirement applies as well to misdemeanor appellants. *Larche v Simons* (9th Cir 1995) 53 F3d 1068, 1071. In California, the proper method of presenting a claim to the state supreme court varies depending on the nature of the proceeding.

In felony cases, where a state defendant has appealed his or her conviction to the intermediate court of appeal, it is not enough for the defendant to have presented one or more federal claims to the court of appeal. See *Baldwin v Reese* (2004) 541 US 27, 158 L Ed 2d 64, 124 S Ct 1347. In order to exhaust these claims, the defendant must also present them to the California Supreme Court through a petition for review. See *Roettgen v Copeland* (9th Cir 1994) 33 F3d 36, 39 (petitioner did not exhaust a federal claim he raised on appeal but failed to raise in petition for review to state supreme court).

Where a state defendant has sought relief through a habeas petition filed in state court, it is not enough for the defendant to have presented federal claims in a petition filed with the state trial court, or even the state court of appeal. Here, too, if the defendant wants to exhaust these claims, he or she must present them to the state supreme court in either a petition for review or a state habeas petition. See *Roberts v Arave* (9th Cir 1988) 847 F2d 528, 529 (petitioner did not exhaust a federal claim he raised in state habeas proceedings at the trial and appellate levels, but failed to present to the state supreme court). Counsel should be aware, however, that although California law permits a defendant to file state habeas petitions in the superior court and the court of appeal, such filings are not required as part of the exhaustion process. A state defendant may satisfy the exhaustion requirement by presenting a federal claim to the California Supreme Court in a state habeas petition filed originally with the California Supreme Court even if the defendant has not filed in a lower court.

NOTE 1: The California Rules of Court provide a simplified format for use in a petition for review filed solely for the purpose of exhausting state remedies. See Cal Rules of Ct 8.508, discussed in §5.44. Although the presentation of federal issues in an exhaustion petition does not need to be elaborate, it must be sufficiently complete to meet the fair presentation requirement discussed in §14.20. See *Acosta-Huerta v Estelle* (9th Cir 1993) 7 F3d 139 (issue stated in appellate brief but not supported by argument deemed abandoned).

NOTE 2: There is some conflict in the case law as to whether a pretrial writ requires exhaustion of state remedies. By its own terms, §2254(b)—which codifies the exhaustion requirement—applies only to habeas petitions filed "on behalf of a person in custody pursuant to the judgment of a State court." But pretrial writs are not filed under §2254(a) precisely because the defendant is *not* in custody "pursuant to the judgment of a State court." Instead, they are filed under §2241, which contains no exhaustion requirement. Several courts, including the Ninth Circuit, have relied on this different statutory language to conclude that there is no exhaustion requirement in the pretrial context. See *Stow v Murashige* (9th Cir 2004) 389 F3d 880, 886 and n9; *Benson v Superior Court* (1st Cir 1981) 663 F2d 355, 358. Other courts, without recognizing that the pretrial writs arise under §2241 rather than §2254, have assumed without analysis that the exhaustion requirement of §2254 applies to pretrial writs as well. See *Boston Municipal Court v Lydon* (1984) 466 US 294, 80 L Ed 2d 311, 104 S Ct 1805; *Mannes v Gillespie* (9th Cir 1992) 967 F2d 1310, 1313, n6.

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§14.28 C. Respondent Has Duty to Allege Nonexhaustion

Because exhaustion is not jurisdictional, the burden is on the respondent to plead the petitioner's failure to exhaust. Habeas Rule 5 provides that in answering a habeas petition, the state "shall state whether the petitioner has exhausted his state remedies." In cases arising from convictions in the California courts, the Attorney General usually alleges failure to exhaust state remedies in a motion to dismiss the petition. On motions, see Fed R Civ P 7(b)(1). For form requirements, see Fed R Civ P 10.

As a practical matter, counsel for a habeas petitioner may wish to include allegations in the petition explaining when and how particular claims were presented to the state courts.

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D. Exhausting State Remedies in Felony Cases

§14.29 1. Issues Raised on Direct Appeal

When a conviction has been affirmed by the court of appeal, discretionary review of the judgment is available in the California Supreme Court by means of a petition for review. On petitions for review, see Cal Rules of Ct 8.508 and discussion in §§5.41-5.50. To preserve the defendant's right to federal habeas corpus review of the state court conviction, an attorney representing a criminal defendant in the direct appeal in the court of appeal must petition the California Supreme Court for review of any issue that arguably implicates the defendant's rights under the federal Constitution, setting forth both the legal and factual basis for the federal claim.

When the sole purpose of filing a petition for review is to preserve the client's right to federal review of such issues, counsel may file an abbreviated petition for review under Cal Rules of Ct 8.508. In an "exhaustion petition" it is not necessary to make extensive arguments or recite the facts in detail, but the petition must contain enough information about the factual and legal basis of each claim to constitute a fair presentation under federal law. See Cal Rules of Ct 8.508(b) and discussion in §5.44.

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§14.30 2. Petition for Writ of Habeas Corpus in California Supreme Court

When exhaustion of state remedies requires the petitioner to file a petition for a writ of habeas corpus in state court, the petitioner must ultimately present his or her habeas claims in the California Supreme Court. Because under California law, the California Supreme Court has original jurisdiction over habeas corpus petitions (Cal Const art VI, §10), the petitioner may exhaust state remedies by filing the habeas corpus petition directly in the supreme court without first requesting relief in the superior court or the court of appeal. Filing the habeas corpus petition in the California Supreme Court in the first instance rather than in a lower court may increase the likelihood of having the case heard in federal court expeditiously.

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§14.31 E. Exhausting State Remedies in Misdemeanor Cases

A defendant in a misdemeanor case may appeal of right to the appellate division of the superior court. Further discretionary review is available in the court of appeal. Cal Rules of Ct 8.1005. There is no right of review in the California Supreme Court unless the court of appeal certifies the case and denies relief. See Cal Const art VI, §12; Cal Rules of Ct 8.500. Despite the fact that there is ordinarily no right to request discretionary review of a misdemeanor conviction in the California Supreme Court, in *Larche v Simons* (9th Cir 1995) 53 F3d 1068, 1072, the Ninth Circuit held that a defendant in a misdemeanor case had not exhausted state remedies because he had not filed a petition for writ of habeas corpus in the California Supreme Court.

Therefore, counsel for a defendant in a misdemeanor case who wants to preserve the client's right to federal review of any federal constitutional issues presented by the case should file a petition for a writ of habeas corpus in the California Supreme Court fairly presenting both the factual basis and the legal principles underlying any issues of federal law.

A habeas petition filed in a misdemeanor case for the purpose of exhausting state remedies should include all potential federal issues, including issues that were argued and rejected on direct appeal, because the decision in *Larche* appears to encompass all federal issues arising from a misdemeanor conviction, not merely those issues that were not decided in the direct appeal.

It is not clear that the court in *Larche* considered the California procedural rule barring relief on habeas corpus for claims that were decided in the direct appeal (*In re Waltreus* (1965) 62 C2d 218, 225, 42 CR 9) or federal cases indicating that the exhaustion requirement is satisfied if no further state remedies are available (see, *e.g., Teague v Lane* (1989) 489 US 288, 297, 103 L Ed 2d 334, 347, 109 S Ct 1060; *Middleton v Cupp* (9th Cir 1985) 768 F2d 1083, 1086). Thus, it is possible that the *Larche* rule requiring misdemeanor defendants to petition the California Supreme Court for a writ of habeas corpus to exhaust state remedies may ultimately be held not to apply in those situations in which all claims asserted in the federal habeas petition were raised in the direct appeal. In the meantime, however, counsel should presume that any issue that has not been presented to the California Supreme Court will be considered unexhausted.

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F. Steps Not Required to Exhaust State Remedies

§14.32 1. Petitioner Not Required to Present Claims More Than Once

The purpose of the exhaustion doctrine is to give the state courts the first opportunity to address federal claims. Once the state court has been given that opportunity, the exhaustion doctrine is satisfied. Thus, there is no need to give state courts repeated opportunities to address a federal claim. The petitioner's claims need be presented to the state's highest court only once; having done that, the petitioner need not repetitiously exhaust every possible avenue of state relief. *O'Sullivan v Boerckel* (1999) 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728; *Wilwording v Swenson* (1971) 404 US 249, 250, 30 L Ed 2d 418, 420, 92 S Ct 407; *Brown v Allen* (1953) 344 US 443, 447, 97 L Ed 469, 484, 73 S Ct 397; *Turner v Compoy* (9th Cir 1987) 827 F2d 526, 528; *Kellotat v Cupp* (9th Cir 1983) 719 F2d 1027, 1029; *Allbee v Cupp* (9th Cir 1983) 716 F2d 635, 637 n5.

Nor does a state court criminal defendant need to seek rehearing in the state courts to exhaust an issue. Foley, *Non-Capital Habeas for Beginners: A Primer*, 22 CACJ Forum 35, 37 n12 (1995).

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§14.33 2. Petitioner Not Required to Petition for Writ of Certiorari

Since the exhaustion doctrine requires only that petitioner exhaust "the remedies available in the courts of the State," a petitioner need not seek certiorari from the United States Supreme Court in order to exhaust state remedies. See *Ulster County Court v Allen* (1979) 442 US 140, 149 n7, 60 L Ed 2d 777, 787 n7, 99 S Ct 2213; *Fay v Noia* (1963) 372 US 391, 9 L Ed 2d 837, 83 S Ct 822, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 5, 118 L Ed 2d 318, 326, 112 S Ct 1715. Moreover, a petition for certiorari is not part of state postconviction proceedings and does not toll the limitations period for seeking federal habeas corpus relief from a state court judgment under 28 USC §2244(d). See *Lawrence v Florida* (2007) 549 US 327, 329, 166 L Ed 2d 924, 929, 127 S Ct 1079; *Roper v Weaver* (2007) 550 US 598, 167 L Ed 2d 966, 969, 127 S Ct 2022.

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§14.34 G. Effect of Failure to Exhaust

Although an unexhausted claim in a petition for writ of habeas corpus may be *denied* on the merits (28 USC §2254(b)(3)), it may not be granted over the objection of the state. The state may raise failure to exhaust state remedies at any point in the proceedings. Under current law, the state will not be deemed to have waived the exhaustion requirement unless it expressly waives it. 28 USC §2254(b)(2).

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H. Procedure for Petitions Containing Both Exhausted and Unexhausted Claims

§14.35 1. Former Rule: Dismissal Required

Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214), described in §13.2, the Supreme Court held that a mixed petition—one that contained both exhausted and unexhausted claims—had to be dismissed. *Rose v Lundy* (1982) 455 US 509, 518, 71 L Ed 2d 379, 387, 102 S Ct 1198. Under *Rose*, the habeas petitioner had two options in such a situation.

The petitioner could elect to proceed with his or her federal habeas petition, but only on the exhausted claims. 455 US at 510, 71 L Ed 2d at 382. This choice ran the risk that if the petitioner ever sought federal habeas review of the as yet unexhausted claims, it would have to be in a second federal habeas petition, and these claims might be barred as second or successive petitions. For discussion, see §§15.9-15.11.

Alternatively, the petitioner could elect to dismiss the entire mixed petition, return to state court to exhaust the as yet unexhausted issues, and then return to federal court to litigate all claims in one proceeding. 455 US at 510, 71 L Ed 2d at 382. Before the enactment of the AEDPA, this "dismissal option" was the most common consequence of filing a mixed petition.

In the AEDPA, however, Congress imposed a 1-year statute of limitations within which a state petitioner is required to file in federal court. See 28 USC §2244(d). Because the AEDPA time limit is not jurisdictional, the district court may, but is not required to, consider the timeliness of the petition on its own motion. *Day v McDonough* (2006) 547 US 198, 208, 164 L Ed 2d 376, 387, 126 S Ct 1675. Because of the AEDPA, the dismissal option under *Rose* posed a serious risk; if the defendant was unable to exhaust and return to federal court before the 1-year period expired, federal review would be forever barred.

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§14.36 2. Rule of *Rhines v Weber:* Stay and Abeyance

In *Rhines v Weber* (2005) 544 US 269, 276, 161 L Ed 2d 440, 450, 125 S Ct 1528, the Supreme Court, in recognition of the problem discussed in §14.35, modified the rule of *Rose v Lundy* (1982) 455 US 509, 518, 71 L Ed 2d 379, 387, 102 S Ct 1198. In *Rhines*, the high Court held that federal courts need not in all circumstances dismiss a mixed petition. Instead, federal courts now have power to hold such petitions in abeyance pending the petitioner's return to state court to exhaust state remedies. *Rhines v Weber*, *supra*.

Two criteria must be met in order to obtain such a stay. First, the unexhausted claims must not be "plainly meritless." 544 US at 277, 161 L Ed 2d at 451. Second, the petitioner must show good cause for failing to exhaust the as yet unexhausted claims. 544 US at 277, 161 L Ed 2d at 451. See *Jackson v Roe* (9th Cir 2005) 425 F3d 654, 660 (applying *Rhines*). See also *Wooten v Kirkland* (9th Cir 2008) 540 F3d 1019, 1024 (petitioner's "impression" appellate attorney had exhausted all claims not good cause).

Recognizing the AEDPA's timeliness concerns, the Court directed that if a stay is granted, district courts "should place reasonable time limits on a petitioner's trip to state court and back." 544 US at 278, 161 L Ed 2d at 452. As an example of the type of limit it envisioned, the Supreme Court suggested that district courts could "condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered." 544 US at 278, 161 L Ed 2d at 452.

As this proposed limit shows, the Supreme Court was plainly anticipating that petitioners would come to federal court with claims they had not yet even brought in state court. In *Rhines*, itself, for example, the federal petition contained eight claims that were unexhausted. 544 US at 272, 161 L Ed 2d at 448. At the time the petitioner filed his petition in federal court, he still had not initiated state court proceedings to exhaust these claims. See 544 US at 272, 161 L Ed 2d at 448. Thus, when a petitioner is already in state court before he seeks a stay in federal court, he is in an even stronger position to obtain a stay than the petitioner in *Rhines*.

WARNING: It is important to include all federal claims in the initial petition, whether they are exhausted or not. Claims in an amended petition filed after the 1-year statute of limitations has expired, and that were not included in the original petition, will not relate back to the original petition if they are based on "facts that differ in both time and type from those the original pleading set forth." *Mayle v Felix* (2005) 545 US 644, 650, 162 L Ed 2d 582, 590, 125 S Ct 2562. See, *e.g., Hebner v McGrath* (9th Cir 2008) 543 F3d 1133, 1137. See discussion in §15.8.

The petitioner must request the court to use the stay and abeyance petition when a mixed petition is filed. The court is not required to consider the stay and abeyance option on its own motion even when the petitioner is not represented by counsel. *Robbins v Carey* (9th Cir 2007) 481 F3d 1143. See *Pliler v Ford* (2004) 542 US 225, 124 S Ct 2441, 159 L Ed 2d 338.

NOTE: The three-step stay and abeyance procedure first articulated by *Calderon v U.S. Dist. Court* (*Taylor*) (9th Cir 1988) 134 F3d 981, 986 and then *Kelly v Small* (9th Cir 2002) 315 F3d 1063, remains viable after *Rhines* and does not require petitioner to show good cause for failing to have exhausted his or her claims in state court. *King v Ryan* (9th Cir 2009) 564 F3d 1133. Under the *Kelly* procedure: (1) the petitioner amends the petition to delete unexhausted claims; (2) the court holds in abeyance the amended, exhausted petition while the petitioner returns to state court to exhaust the deleted claims; and (3) the petitioner later amends the original petition to re-attach the newly exhausted claims. The *Rhines* and *Kelly* procedures are distinct; *Rhines* applies to stays of mixed petitions while *Kelly* applies to stays of fully exhausted petitions. *King v Ryan,* 564 F3d at 1140. Under Ninth Circuit law, while the three-step *Kelly* procedure is easier for petitioner in that it does not require a showing of good cause for failing to exhaust, it may pose a risk to petitioners if the state court petition is found untimely. *King v Ryan,* 564 F3d at 1141.

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I. Circumstances Excusing Failure to Exhaust

§14.37 1. Waiver

Because the exhaustion doctrine is not jurisdictional, it may be waived by the state. *Granberry v Greer* (1987) 481 US 129, 131, 95 L Ed 2d 119, 123, 107 S Ct 1671. Before the AEDPA, the state did not have to explicitly waive exhaustion; like any other litigant, and any other affirmative defense, the state could waive exhaustion by failing to raise it in the district court. *Granberry v Greer, supra*.

This rule changed with the AEDPA. Under 28 USC §2254(b)(3), "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

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2. Statutory Exceptions to Exhaustion Requirement

§14.38 a. No State Remedies Available

There are two statutory exceptions to the exhaustion requirement. First, exhaustion is not required if "there is an absence of available State corrective process." 28 USC §2254(b)(1)(B)(i). Under this exception, a petitioner need not exhaust a claim if, at the time the petitioner files the federal petition, there is no state procedure available to review the petitioner's federal claim. See *Young v Ragen* (1949) 337 US 235, 238, 93 L Ed 1333, 1336, 69 S Ct 1073.

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§14.39 b. State Remedies Ineffective

Under the second exception, exhaustion is not required when "circumstances exist that render such process ineffective to protect the right of the applicant." 28 USC §2254(b)(1)(B)(ii). Thus, inordinate state delay in processing appeal or state postconviction proceedings can render the state process ineffective and excuse exhaustion. See, *e.g.*, *Coe v Thurman* (9th Cir 1991) 922 F2d 528, 530; *Jackson v Duckworth* (7th Cir 1997) 112 F3d 878, 881; *Carpenter v Young* (10th Cir 1995) 50 F3d 869, 871.

NOTE: The cases cited in the previous paragraph establish that a state's inordinate delay in processing an appeal can render a state remedy ineffective and excuse exhaustion. But in light of the custody requirement for seeking habeas relief, when a defendant's sentence is very short, even the normal time frame for an appeal may render the state remedy ineffective to preserve the defendant's ability to go to federal court because a defendant serving a short sentence could be released from custody before completing one full round of appeals in state court.

In this situation, the Supreme Court has suggested (without deciding) that exhaustion may be excused. *Preiser v Rodriguez* (1973) 411 US 475, 496, 36 L Ed 2d 439, 454, 93 S Ct 1827. Alternatively, in light of *Rhines v Weber* (2005) 544 US 269, 161 L Ed 2d 440, 125 S Ct 1528, the defendant in such a situation might consider filing a federal petition before exhausting state remedies, but while he or she is still in custody, and asking for a stay until state proceedings are completed. Because the petition would be filed while the defendant was still in custody, the federal court would not lose jurisdiction if the defendant was released from custody before the state court decided the case.

A state appellate court's denial of appellate counsel, which prevented the petitioner from presenting claims to the state courts, rendered the state appellate process ineffective and excused exhaustion in *Hendricks v Zenon* (9th Cir 1993) 993 F2d 664, 672.

In addition, if a state's procedure for exhausting claims before its highest court is not clearly defined or gives rise to confusion or uncertainty, the exhaustion requirement is excused. *Harmon v Ryan* (9th Cir 1992) 959 F2d 1457, 1461. See also *Coley v Gonzales* (9th Cir 1995) 55 F3d 1385, 1388 (lack of clearly defined procedure in Arizona for exhausting claims excused failure to exhaust).

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§14.40 3. Non-Statutory Exceptions to the Exhaustion Requirement

The exceptions set forth in 28 USC §2254(b) may not be the exclusive exceptions to the exhaustion requirement. The Supreme Court has on several occasions noted that exhaustion may be excused when there are "special circumstances." *Frisbie v Collins* (1952) 342 US 519, 521, 96 L Ed 541, 545, 72 S Ct 509; *Granberry v Greer* (1987) 481 US 129, 136, 95 L Ed 2d 119, 107 S Ct 1671. Counsel should be alert to potential exceptions that fit this category even though they do not technically fit within either of the statutory exceptions of §2254(b).

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15

Limitations on Federal Habeas Corpus Relief

Carolyn Wiggin

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§15.1 I. AEDPA 1-YEAR TIME LIMIT

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214), described in §13.2, all petitions seeking federal habeas corpus relief must be filed within 1 year from the *latest* of the following dates (28 USC §2244(d)(1); see Habeas Rule 3(c)):

- The conclusion of direct review or expiration of the time for seeking review (which includes a petition for certiorari);
- The removal of any unconstitutional state impediment to filing a habeas petition;
- The recognition by the Supreme Court of a new constitutional right that has been made retroactively applicable to cases on collateral review; or
- The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The AEDPA time limit is not jurisdictional. The district court may, but is not required to, consider the timeliness of the petition on its own motion. *Day v McDonough* (2006) 547 US 198, 208, 164 L Ed 2d 376, 387, 126 S Ct 1675. Before acting, the court must provide the parties with notice and an opportunity to be heard, and "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Day,* 547 US at 210, 164 L Ed 2d at 388.

NOTE: A paper filed by a prisoner is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system for legal mail, the prisoner must use that system to receive the benefit of this rule. See Habeas Rule 3(d).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/15 Limitations on Federal Habeas Corpus Relief/§15.2 A. Calculating the Date of Finality

§15.2 A. Calculating the Date of Finality

In *Bowen v Roe* (9th Cir 1999) 188 F3d 1157, 1158, the Ninth Circuit held that direct review does not conclude under 28 USC §2244(d)(1)(A) until the expiration of the period during which the defendant could apply for a writ of certiorari in the United States Supreme Court, *i.e.,* 90 days after the date of finality of the state court decision that the writ of certiorari asks the Court to review. Because, under Cal Rules of Ct 8.532(b)(2), an order of the California Supreme Court denying review is final as to that court when filed, in the typical case in which the judgment is affirmed on appeal and the California Supreme Court denies review, the AEDPA 1-year grace period begins 90 days after the order denying review is filed. 188 F3d at 1158. Note however, if a state court grants the right to file an out-of-time direct appeal during the pendency of the state's collateral review, that resets the date on which a conviction becomes "final" for the purposes of AEDPA. *Jimenez v Quarterman* (2009) ___ US ___, 172 L Ed 2d 475, 481, 129 S Ct 681.

If a petition for certiorari is filed after the conviction is affirmed on appeal and the California Supreme Court denies review, the period during which the case is on review in the United States Supreme Court is counted as part of the period of direct review; the limitations period does not begin until the U.S. Supreme Court has completed its review. *Clay v U.S.* (2003) 537 US 522, 527, 155 L Ed 2d 88, 94, 123 S Ct 1072.

NOTE: In computing the 1-year limitations period pursuant to Fed R Civ P 6(a), the date of the event that triggers commencement of the period is excluded, whereas the last day of the period, *i.e.,* the date that the federal petition is due, is included, unless the court is closed that day.

Alternate "triggering" dates. While the date of finality is the most common "triggering" date for AEDPA's 1-year statute of limitations, a later date can be used as the triggering date in some circumstances:

- The date on which an impediment to filing a federal petition that was created by state action in violation of the Constitution or laws of the United States is removed. Under this provision, if the state created an illegal impediment to filing, such as having an ineffective mail system or an inadequate law library, and that impediment prevented the petitioner from filing on time, the date the impediment was removed is the date the 1-year clock begins to run. 28 USC §2244(d)(1)(B). See, *e.g., Earl v Fabian* (8th Cir 2009) 556 F3d 717; *Whalem/Hunt v Early* (9th Cir 2000) 233 F3d 1146.
- The date the United States Supreme Court recognizes a new right and makes it retroactively applicable to cases on collateral review. 28 USC §2244(d)(1)(C).

NOTE: Although the United States Supreme Court has not specifically addressed how a new constitutional right is "made retroactively applicable to cases on collateral review," in the context of the AEDPA limitations period, it has construed a similar phrase, "made retroactive to cases on collateral review," which appears in 28 USC §2244(b)(2)(A). *In Tyler v Cain* (2001) 533 US 656, 662, 150 L Ed 2d 632, 642, 121 S Ct 2478, the high court ruled that "made" means "held." Thus, "the requirement is satisfied only if this Court has ruled that the new rule is retroactively applicable to cases on collateral review." *Tyler v Cain, supra*. This holding would appear to be equally applicable to 28 USC §2244(d)(1).

- The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 USC §2244(d)(1)(D). Under this provision, the 1-year limitations period begins to run on the date that the petitioner could, with due diligence, discover the essential facts supporting a claim or claims. Thus for an ineffective assistance of counsel claim, the Ninth Circuit held that under this provision the statute of limitations did not begin to run until petitioner discovered (or with the exercise of due diligence could have discovered) facts suggesting both unreasonable performance and resulting prejudice. *Hasan v Galaza* (9th Cir 2001) 254 F3d 1150.

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§15.3 B. Statutory Tolling

California's indeterminate timeliness standard. The 1-year time limit is tolled during the period that a "properly filed" state postconviction petition is pending. 28 USC §2244(d)(2). For California petitioners exhausting state remedies, tolling extends for the full period from the initial filing of the petition in superior court to the supreme court's denial, including periods between the petition's denial in the lower court and its refiling in the reviewing court. *Nino v Galaza* (9th Cir 1999) 183 F3d 1003, 1006. For pro se prisoners, the state petition is deemed filed the moment the prisoner delivers it to prison authorities for forwarding to the court. *Ramirez v Yates* (9th Cir 2009) 571 F3d 993, 996.

If a California state prisoner exhausts issues in state courts by filing successive state habeas petitions in superior court, the court of appeal, and the supreme court, determining when a postconviction petition is pending is complicated by the state's unique postconviction practice. California has no statutory procedure for reviewing the superior court's denial of a habeas corpus petition. See Pen C §1506. Instead, a "new" original petition, reiterating the allegations of the petition denied by the superior court, must be filed in the court of appeal. Review of the court of appeal's denial of a habeas petition can be obtained in the same manner, or by petitioning the California Supreme Court for discretionary review. See Pen C §1506; *Carey v Saffold* (2002) 536 US 214, 221, 153 L Ed 2d 260, 268, 122 S Ct 2134. For discussion, see §10.30.

The intervals between denial in one court and the filing of a "new" petition in a higher court will not interrupt tolling as long as there is no "unreasonable" delay between denial of relief in a lower court and filing the petition in the next higher court. *Carey v Saffold,* 536 US at 222, 153 L Ed 2d at 269. In determining whether a delay is reasonable, when there is no clear indication from the state court about when a petition is considered timely, the federal court "must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness." *Evans v Chavis* (2006) 546 US 189, 198, 163 L Ed 2d 684, 694, 126 S Ct 846 (unexplained 6-month gap between filing of habeas petitions in California courts unreasonable and therefore untimely).

In carrying out the task of determining whether California courts would have considered particular periods of time before and between the filing of state habeas petitions to be unreasonable, the Ninth Circuit and lower federal courts have reached a variety of conclusions. See *Winston v Sisto* (ED Cal, May 19, 2008, No. CIV S-07-2284) 2008 US Dist LEXIS 92227 fn5 (citing numerous cases). One critical variable is whether or not any delay is explained. Thus in *Winston*, the district court held that because a petitioner explained and justified each segment of the 212-day period between the denial of one state petition and the filing of the next, he was entitled to gap tolling for the delay between petitions. On the other hand, in *Waldrip v Hall* (9th Cir 2008) 548 F3d 729, 737, the Ninth Circuit held that the petitioner was not entitled to "gap tolling" for an unjustified delay of over 8 months between the denial of one state petition and the filing of the next.

PRACTICE TIP: Counsel in state court should file each "new" petition promptly. In the absence of clear guidance from the California courts on what they would consider "unreasonable" delay, it appears that counsel should be prepared to justify any delay in filing that is longer than the 30-day to 60-day interval typically allowed in states that have determinate timeliness rules. See *Chavis,* 546 US at 201, 163 L Ed 2d at 696.

"Properly filed" defined. For purposes of tolling the 1-year limitations period, a state postconviction petition is "properly filed" when it is delivered to the appropriate state court clerk or other official and complies with the applicable laws and rules governing filings. The fact that some or all of the claims in the petition may be procedurally barred does not make the petition improperly filed. *Artuz v Bennett* (2000) 531 US 4, 8, 148 L Ed 2d 213, 218, 121 S Ct 361. However, a state postconviction petition is not "properly filed" if it fails to comply with the state's rules governing filing, including timeliness. Thus, an untimely state petition for postconviction relief does not toll the AEDPA statute of limitations. See *Artuz v Bennett* (2000) 531 US 4, 8, 148 L Ed 2d 213, 219, 121 S Ct 361; *Pace v DiGuglielmo* (2005) 544 US 408, 413, 161 L Ed 2d 669, 675, 125 S Ct 1807. See also *Allen v Siebert* (2007) 552 US 3, 4, 169 L Ed 2d 329, 332, 128 S Ct 2 (whether time limit is jurisdictional, an affirmative defense, or something in between, it is a "condition to filing," and places limit on how long prisoner can wait before filing postconviction petition). This rule applies

even when a state's filing deadline has exceptions if the state petition is not timely under one of the exceptions. *Pace,* 544 US at 413, 161 L Ed 2d at 675. In *Bonner v Carey* (9th Cir 2005) 425 F3d 1145, amended at (9th Cir 2006) 439 F3d 993, the Ninth Circuit held that when a California state court denied a petition because the petitioner did not explain his delay in asserting certain claims, it was denying the petition as untimely and thus, under *Pace,* the petition was not "properly filed."

End of tolling. Tolling ends on the date of finality of the decision or order finally resolving the petition for postconviction relief in state court. Under Cal Rules of Ct 8.532(b)(2), a California Supreme Court decision denying a petition for a writ within the court's original jurisdiction is final on filing if the court has not issued an order to show cause (or an alternative writ). If there has been an OSC, the date of finality is 30 days after filing. Cal Rules of Ct 8.532(b).

No tolling for filing in federal court. The limitations period is *not* tolled while a habeas corpus petition is pending in *federal* court. *Duncan v Walker* (2001) 533 US 167, 172, 150 L Ed 2d 251, 258, 121 S Ct 2120. See also *Jiminez v Rice* (9th Cir 2001) 276 F3d 478. Consequently, the timely filing in federal district court of a petition containing unexhausted state claims does not extend the time for exhausting claims in state court. In *Lawrence v Florida* (2007) 549 US 327, 329, 166 L Ed 2d 924, 929, 127 S Ct 1079, the U.S. Supreme Court held that the filing of a petition for certiorari in the Supreme Court after denial of a petition for postconviction relief in the state court does not extend the time for filing a federal habeas corpus petition.

CAUTION: In *Fail v Hubbard* (9th Cir 2002) 315 F3d 1059, the petitioner filed a federal habeas petition within the AEDPA limitations period. The federal district court dismissed the petition, finding that petitioner had not exhausted any of his claims. By the time the court dismissed the petition, the AEDPA deadline had run. The Ninth Circuit held that equitable tolling was not available in this circumstance to toll any of the time that elapsed while the unexhausted petition was pending in federal court. If, however, at least one federal claim is exhausted, it may be possible to preserve the unexhausted claims. See §§14.35-14.36.

A state clemency petition does not toll the AEDPA limitations clock. *Malcom v Payne* (9th Cir 2002) 281 F3d 951.

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C. Equitable Tolling

§15.4 1. Availability

The doctrine of equitable tolling may be available to supplement statutory tolling in unusual situations. See, *e.g., Townsend v Knowles* (9th Cir 2009) 562 F3d 1200, 1206 (petitioner entitled to equitable tolling when delay in filing federal petition was due to reliance on Ninth Circuit precedent subsequently overruled by U.S. Supreme Court); *Harris v Carter* (9th Cir 2008) 515 F3d 1051, 1057 (same); *Espinoza-Matthews v California* (9th Cir 2005) 432 F3d 1021 (prison's refusal to allow petitioner access to legal papers for 11 months despite diligent attempts to obtain them was extraordinary circumstance that entitled petitioner to equitable tolling); *Jefferson v Budge* (9th Cir 2005) 419 F3d 1013 (when trial court erroneously dismissed mixed petition without offering petitioner opportunity to amend petition to omit unexhausted claims, petitioner was entitled to equitable tolling while state exhaustion proceedings were pending); *Corjasso v Ayers* (9th Cir 2002) 278 F3d 874 (district court's erroneous dismissal of pro se petitioner's original writ petition because of technical deficiencies and court's subsequent loss of petition were extraordinary circumstances that justified equitable tolling); *Huizar v Carey* (9th Cir 2001) 273 F3d 1220 (even though petition was never filed, prisoner who delivered petition to prison authorities was entitled to equitable tolling from date of delivery if he was diligent in following up when he failed to receive disposition from court within reasonable time); *Calderon v U.S. Dist. Court* (9th Cir 1998) 163 F3d 530, 542, overruled on other grounds in *Woodford v Garceau* (2003) 538 US 202, 206, 155 L Ed 2d 363, 369, 123 S Ct 1398 (counsel's reliance on court order staying all proceedings other than issue of petitioner's sanity justified application of equitable tolling doctrine). But see *Ford v Pliler* (9th Cir 2009) 590 F3d 782 (because he could not show he had been affirmatively misled by district court about statute of limitations before dismissing his mixed petitions, petitioner not entitled to equitable tolling).

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§15.5 2. Circumstances Must Be Extraordinary

To justify equitable tolling, however, the circumstances must be extraordinary. "[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Miranda v Castro* (9th Cir 2002) 292 F3d 1063, 1066, quoting *U.S. v Marcello* (7th Cir 2000) 212 F3d 1005, 1010. Thus, ordinary attorney negligence is not a ground for equitable tolling. *Miranda,* 292 F3d at 1068 (attorney miscalculation of due date did not trigger equitable tolling). When, however, an attorney's misconduct is sufficiently egregious, it may constitute an extraordinary circumstance warranting equitable tolling. *Spitsyn v Moore* (9th Cir 2003) 345 F3d 796 (equitable tolling appropriate when attorney retained to prepare habeas petition failed to do so and disregarded requests for return of files until after date petition was due).

Even in circumstances in which equitable tolling might otherwise be appropriate, the petitioner may not rely on the doctrine to excuse his or her own lack of diligence. See *Guillory v Roe* (9th Cir 2003) 329 F3d 1015 (although district court erred in denying petitioner's motion to strike unexhausted portions of petition, petitioner was not entitled to equitable tolling because he waited 3 years before attempting to exhaust unexhausted claims).

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§15.6 3. Court May Be Required to Order Factual Development

When a petition alleges facts that would support equitable tolling, the district court should not dismiss it as untimely without developing the factual record. See *Ramirez v Yates* (9th Cir 2009) 571 F3d 993 (denial of habeas petition vacated and district court ordered to conduct further factfinding to resolve claim for equitable tolling); *Laws v Lamarque* (9th Cir 2003) 351 F3d 919 (district court abused discretion in denying petition without ordering development of factual record on eligibility for equitable tolling due to mental incompetence); *Herbst v Cook* (9th Cir 2001) 260 F3d 1039, 1043 (district court erred in dismissing petition as untimely without giving petitioner opportunity to develop facts when petitioner alleged facts supporting claims of equitable tolling and state-created impediment to filing).

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§15.7 4. Actual Innocence

The United States Supreme Court has held that other procedural bars to consideration of the merits of a habeas corpus petition must give way if a petitioner can establish, in light of new reliable evidence, that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v Delo* (1995) 513 US 298, 327, 130 L Ed 2d 808, 836, 115 S Ct 851. The new evidence need not be newly "discovered," only newly "presented." *Griffin v Johnson* (9th Cir 2003) 350 F3d 956, 960. This exception to procedural bars is known as the "*Schlup* actual innocence gateway" to a hearing on the merits.

The AEDPA statute of limitations contains no exception for claims of actual innocence (see 28 USC §2244(d)(1)). However, the Ninth Circuit has suggested that the Constitution requires an exception to the limitations period for claims that meet the *Schlup* standard. See *Majoy v Roe* (9th Cir 2002) 296 F3d 770, 775 and cases cited therein. The U.S. Supreme Court has held that the *Schlup* test for a "first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence" has not been replaced by the stricter AEDPA standard of review for second or successive petitions involving no retroactively applicable new law or set as the threshold for obtaining an evidentiary hearing on claims undeveloped in state court. *House v Bell* (2006) 547 US 518, 539, 165 L Ed 2d 1, 22, 126 S Ct 2064. Thus in the Ninth Circuit, the *Schlup*, or "miscarriage of justice," exception is available in cases in which the petitioner asserts innocence and establishes that the court cannot have confidence in the guilty verdict. *Johnson v Knowles* (9th Cir 2008) 541 F3d 933, 936.

NOTE: It is unsettled whether the AEDPA or the *Schlup* standard applies to second or successive petitions seeking consideration of defaulted claims based on a showing of actual innocence. See *Cooper v Brown* (9th Cir 2007) 510 F3d 870, 876 (no need to determine which standard applies when defendant failed to qualify for consideration under either); *Cooper v Woodford* (9th Cir 2004) 358 F3d 1117, 1119 (no need to determine which standard applies when petitioner qualified for consideration under both).

For further discussion of *Schlup,* see §15.36.

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§15.8 D. Amending Petition After Limitation Period

If a federal habeas corpus petition is filed within the AEDPA limitations period, it may be possible to amend the petition to add new claims under some circumstances. Under Fed R Civ P 15(c)(1)(B), it is possible to amend a pleading with a new claim or defense when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Such an amendment is said to relate back to the original pleading. In the habeas context, the Supreme Court has construed Fed R Civ P 15(c)(1) narrowly to preclude the petitioner from adding new claims after the AEDPA filing deadline has expired unless the original claims and the new claims are based on a "common core" of operative facts. *Mayle v Felix* (2005) 545 US 644, 664, 162 L Ed 2d 582, 598, 125 S Ct 2562. See also, *Hebner v McGrath* (9th Cir 2008) 543 F3d 1133, 1137.

NOTE: As the dissent in *Mayle* points out, this ruling disadvantages pro se habeas petitioners who may not be aware of all their federal claims at the time they file their petitions. 545 US at 675, 162 L Ed 2d at 605 (Souter, J., dissenting). Even if counsel is appointed for a pro se petitioner, the appointment is likely to be made after the AEDPA limitations period has expired. An attorney representing an indigent appellant in state court can provide substantial assistance to a client with viable federal constitutional claims by drafting a federal habeas petition for the client that includes all potential claims, whether they have been exhausted or not, even if the attorney does not plan to represent the client in the federal habeas proceedings.

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II. SECOND OR SUCCESSIVE PETITIONS

§15.9 A. AEDPA Restrictions on Successive Petitions

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 USC §§2244, 2254) "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications. If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases. And if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions." *Tyler v Cain* (2001) 533 US 656, 661, 150 L Ed 2d 632, 642, 121 S Ct 2478. See 28 USC §2244(b)(1)-(2). See also *Felker v Turpin* (1996) 518 US 651, 654, 135 L Ed 2d 827, 834, 116 S Ct 2333 (AEDPA restrictions on subsequent petitions constitutional). But see *Woods v Carey* (9th Cir 2008) 525 F3d 886, 890 (pro se petitioner's subsequent petition filed before adjudication of the first petition construed as motion to amend the first petition rather than second or successive application).

The exceptions to the ban on successive petitions permit review of a claim that has not been previously litigated if (28 USC §2244(b)(2)):

- The petitioner shows that the claim relies on a new rule of constitutional law that was previously unavailable and that was made retroactive to cases on collateral review by the Supreme Court; or
- The facts underlying the claim
- Could not have been discovered previously through the exercise of due diligence, *and*
- If proven and viewed in light of the evidence as a whole, establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense.

For second or successive petitions seeking consideration of defaulted claims based on a showing of actual innocence, it is unsettled whether the AEDPA or the *Schlup* "actual innocence gateway" standard applies. See *Cooper v Brown* (9th Cir 2004) 510 F3d 870, 876 (no need to determine which standard applies when defendant failed to qualify for consideration under either); *Cooper v Woodford* (9th Cir 2004) 358 F3d 1117, 1119 (no need to determine which standard applies when petitioner qualified for consideration under both). For more discussion of *Schlup* and the actual innocence gateway to a hearing on the merits of an otherwise procedurally barred claim see §§15.7, 15.36.

NOTE: The statutory bar on second or successive applications does not apply to a *Ford v Wainwright* (1986) 477 US 399, 401, 91 L Ed 2d 335, 341, 106 S Ct 2595, claim of incompetency brought in an application filed when the claim is first ripe. *Panetti v Quarterman* (2007) 551 US 930, 946, 168 L Ed 2d 662, 678, 127 S Ct 2842. In *Panetti,* the Supreme Court opined: "We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Panetti,* 551 US at 947, 168 L Ed 2d at 679.

These restrictions apply to a second petition filed after the effective date of AEDPA, even if the first petition was filed *before* its effective date. *U.S. v Villa-Gonzalez* (9th Cir 2000) 208 F3d 1160, 1163.

NOTE: In *Tyler v Cain*, *supra,* the Supreme Court construed the word "made" in the phrase "made retroactive to cases on collateral review by the Supreme Court" in 28 USC §2244(b)(2)(A) to mean "held." 533 US at 661, 150 L Ed 2d at 642. "Thus," according to the high court, "the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review." In *Tyler*, the court further held that the rule set forth in *Cage v Louisiana* (1990) 498 US 39, 112 L Ed 2d 339, 111 S Ct 328, disapproved on other grounds in *Estelle v McGuire* (1991) 502 US 62, 73 n4, 116 L Ed 2d 385, 112 S Ct 475 (reasonable doubt instruction that jury may have understood to allow conviction on less than proof beyond reasonable doubt is unconstitutional) had not been "made retroactive to cases on collateral review." 533 US at 664, 150 L Ed 2d at 643.

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§15.10 B. New Claim in Subsequent Petition

AEDPA does not define the term "second or successive." The consensus among courts that have considered the question is that the AEDPA limitations on "second or successive" petitions do not apply to subsequent petitions that could not have been brought earlier. *Hill v Alaska* (9th Cir 2002) 297 F3d 895, 897 (prisoner's first petition challenging calculation of release date was not deemed successive because prisoner did not have opportunity to challenge state's conduct in prior petition).

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§15.11 C. Obtaining Permission to File

Under AEDPA, before a petitioner may file a second or successive habeas petition in federal district court, he or she must obtain authorization from a three-judge panel of the federal court of appeals. 28 USC §2244(b)(3)(A)-(B); Habeas Rule 9. The Ninth Circuit has a form, Application for Leave to File Second or Successive Petition Under 28 USC §2254 or Motion Under 28 USC §2255 (Form 12). 9th Cir R 22-3. For a copy of Form 12, see http://www.ca9.uscourts.gov/forms/. Note that applications for leave to file a second or successive habeas petition are exempt from the Ninth Circuit's Electronic Case Files (ECF) system. 9th Cir R 25-5(b)(5).

If the petitioner does not obtain authorization for a second or successive habeas petition, the district court is without jurisdiction to consider the petition. *Burton v Stewart* (2007) 549 US 147, 151, 166 L Ed 2d 628, 634, 127 S Ct 793. The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that it satisfies the requirements of 28 USC §2244(b), discussed in §15.9. See *U.S. v Lopez* (9th Cir 2009) 577 F3d 1053, 1066 (application denied; although government's failure to disclose *Brady* material "troubling," petitioner could not make requisite showing).

The court of appeals must grant or deny a motion for authorization to file a subsequent petition within 30 days. 28 USC §2244(b)(3)(D); *Liriano v U.S.* (2d Cir 1996) 95 F3d 119. The appellate court's disposition of a motion to file a second or successive application is not appealable, and it may not be the subject of a petition for rehearing or writ of certiorari. 28 USC §2244(b)(3)(E); *Felker v Turpin* (1996) 518 US 651, 135 L Ed 2d 827, 116 S Ct 2333.

A dismissal without prejudice for failure to exhaust state remedies is not an adjudication on the merits. Consequently, a new habeas petition filed in the district court after petitioner's initial petition was dismissed for failure to exhaust is not a second or successive petition. *Slack v McDaniel* (2000) 529 US 473, 486, 146 L Ed 2d 542, 556, 120 S Ct 1595. However, a dismissal grounded in a state procedural default is a decision on the merits that bars a second or successive petition raising the same claim. *Henderson v Lampert* (9th Cir 2005) 396 F3d 1049.

WARNING: When the federal habeas petition was filed close to the AEDPA filing deadline, the petitioner may not have time to exhaust state remedies and return to federal court before the expiration of the AEDPA limitations period. In this situation, if the petition contains some exhausted claims, the petitioner may move for a stay on the exhausted claims, asking the court to retain jurisdiction over them but to hold them in abeyance until the petitioner has exhausted state remedies on the unexhausted claims. For discussion of this "stay and abeyance" procedure, see §14.35-14.37.

Federal Rules of Civil Procedure 60(b) authorizes a litigant to file a motion for relief from judgment in a variety of situations. A number of courts, including the Ninth Circuit, saw the need to prevent Rule 60(b) motions from being used to circumvent statutory limitations on successive petitions. See *Felker v Turpin* (11th Cir 1996) 101 F3d 657, 661. The Ninth Circuit has adopted a case-by-case approach to the question. *Hamilton v Newland* (9th Cir 2004) 374 F3d 822. When the factual predicate for a Fed R Civ P 60(b) motion also states a claim for a successive petition, it should be treated as a successive petition. *Thompson v Calderon* (9th Cir 1998) 151 F3d 918, 921. The United States Supreme Court addressed the issue in *Gonzalez v Crosby* (2005) 545 US 524, 530, 162 L Ed 2d 480, 492, 125 S Ct 2641. If the motion in essence brings a claim, *e.g.,* if it seeks to add a new ground for relief or attacks the federal court's judgment on the merits, it will be treated as a second or successive petition; if the motion does not present a claim, *e.g.,* if it attacks the judgment on procedural grounds or attacks a defect in the integrity of the proceedings, it is not subject to the limitations on second or successive petitions. 545 US at 532, 162 L Ed 2d at 492. See *Phelps v Alameida* (9th Cir 2009) 569 F3d 1120 (purpose of Rule 60(b) is to correct erroneous legal judgments that would prevent the true merits of petitioner's constitutional claims from ever being heard).

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III. THE PROCEDURAL DEFAULT DOCTRINE

§15.12 A. Definition of Procedural Default

If a state court cited to a rule of state procedure when it denied a claim, a petitioner may be deemed to have "procedurally defaulted" his or her claim, thereby preventing the federal court from considering the claim on the merits.

A petitioner will be deemed to have procedurally defaulted a claim only if the state has the procedural rule in question, the petitioner has violated the rule, and the state court has relied on the rule in refusing to hear the merits of the petitioner's claim. *Ulster County Court v Allen* (1979) 442 US 140, 147, 60 L Ed 2d 777, 786, 99 S Ct 2213; *McKenna v McDaniel* (9th Cir 1995) 65 F3d 1483, 1487. See §§15.16-15.18. In addition, for a state procedural rule to give rise to a procedural default, it must be independent of federal law (*Coleman v Thompson* (1991) 501 US 722, 737, 115 L Ed 2d 640, 660, 111 S Ct 2546) and it must be consistently applied (*Johnson v Mississippi* (1988) 486 US 578, 587, 100 L Ed 2d 575, 585, 108 S Ct 1981; *Scott v Schriro* (9th Cir 2009) 567 F3d 573). See §§15.19-15.26.

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§15.13 B. Consequences of Procedural Default

A petitioner who has procedurally defaulted is barred from raising a claim in federal court unless he or she can demonstrate *cause* for the procedural default and *actual prejudice* from the alleged constitutional violation. *Reed v Ross* (1984) 468 US 1, 12, 82 L Ed 2d 1, 104 S Ct 2901; *Wainwright v Sykes* (1977) 433 US 72, 84, 53 L Ed 2d 594, 606, 97 S Ct 2497; *Hughes v Idaho State Bd. of Corrections* (9th Cir 1986) 800 F2d 905, 906.

Unlike a dismissal for failure to exhaust state remedies, which is without prejudice (see *Rose v Lundy* (1982) 455 US 509, 520, 71 L Ed 2d 379, 389, 102 S Ct 1198), the dismissal of a federal habeas corpus petition because of a procedural default bars consideration of the same claim in a subsequent petition. See *Henderson v Lampert* (9th Cir 2005) 396 F3d 1049.

Note that a state court's refusal to review the merits of a claim on the ground that it has done so already does not indicate that the claim has been procedurally defaulted. Instead, this indicates that the state has given the issue full consideration and the claim is ripe for federal adjudication. *Cone v Bell* (2009) ___ US ___, 173 L Ed 2d 701, 715, 129 S Ct 1769. See also *Wellons v Hall* (2010) ___ US ___, 175 L Ed 2d 684, 687, 130 S Ct 727. Thus a citation to *In re Waltreus* (1965) 62 C2d 218, does not bar federal review. *Calderon v U.S. Dist. Court (Bean)* (9th Cir 1996) 96 F3d 1126, 1131.

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§15.14 C. Relation Between Exhaustion and Procedural Default

A postconviction federal habeas claim has not been fairly presented (exhausted) if the highest state court declines to hear it on procedural grounds, and another avenue for raising the claim in state court remains open. 28 USC §2254(c); *Sweet v Cupp* (9th Cir 1981) 640 F2d 233, 238. However, when no other avenue is available for raising the claim in state court, the exhaustion requirement is satisfied, even if the petitioner has not presented the claim to the highest available state court or that court has denied the petition on procedural grounds. *Teague v Lane* (1989) 489 US 288, 297, 103 L Ed 2d 334, 347, 109 S Ct 1060; *Middleton v Cupp* (9th Cir 1985) 768 F2d 1083, 1086; *Matias v Oshiro* (9th Cir 1982) 683 F2d 318, 320. Whether a state remedy is available is determined as of the date that the federal habeas petition is filed. *Brown v Maass* (9th Cir 1993) 11 F3d 914.

In this situation, however, federal court consideration of the claim may be barred by the doctrine of procedural default. See generally *Coleman v Thompson* (1991) 501 US 722, 115 L Ed 2d 640, 111 S Ct 2546.

On exhaustion of state remedies, see §14.18-14.40.

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§15.15 D. Purpose of Procedural Default Doctrine

Like the requirement that state prisoners exhaust state remedies before proceeding to federal court, the procedural default doctrine "is grounded in concerns of comity and federalism." *Coleman v Thompson* (1991) 501 US 722, 730, 115 L Ed 2d 640, 656, 111 S Ct 2546. It serves this purpose by requiring federal habeas petitioners to give state courts the first opportunity to correct alleged deprivations of federal rights. 501 US at 731, 115 L Ed 2d at 657. In addition, the procedural default doctrine complements the exhaustion requirement. Because a procedurally defaulted claim is technically exhausted (see §15.14), without the procedural default doctrine "habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court." 501 US at 732, 115 L Ed 2d at 657.

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E. State Court Denial of Relief Must Be Based on State Procedural Bar

§15.16 1. State Court Denies Relief on Both State and Federal Grounds

It is not always easy to discern the state court's reasons for denying relief. For example, a state court decision may invoke a state procedural default rule and at the same time address the defendant's federal claim on the merits. See *Coleman v Thompson* (1991) 501 US 722, 733, 115 L Ed 2d 640, 658, 111 S Ct 2546. When a state court decision "fairly appears to rest primarily on federal law or to be interwoven with federal law," the federal courts will presume that the decision was on the merits of the claim, unless the decision "clearly and expressly" relies on a state procedural rule (or another independent and adequate state ground) to deny relief. *Coleman v Thompson,* 501 US at 733, 115 L Ed 2d at 658, quoting *Michigan v Long* (1983) 463 US 1032, 1040, 77 L Ed 2d 1201, 1214, 103 S Ct 3469; *Harris v Reed* (1989) 489 US 255, 263, 103 L Ed 2d 308, 109 S Ct 1038. Note that this presumption applies only if it appears that the state court decision rests primarily on federal grounds. *Coleman,* 501 US at 737, 115 L Ed 2d at 661.

If a state court expressly holds that a claim is procedurally barred, the claim is procedurally defaulted even if the court, in the alternative, addresses the merits of the claim. *Carriger v Lewis* (9th Cir 1992) 971 F2d 329, 333; *Anselmo v Sumner* (9th Cir 1989) 882 F2d 431, 432. See also *Coleman v Thompson* (1991) 501 US 722, 115 L Ed 2d 640, 657, 111 S Ct 2546; *Harris v Reed* (1989) 489 US 255, 265 n10, 103 L Ed 2d 308, 318 n10, 109 S Ct 1038.

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§15.17 2. State Court Denies Relief Without Explanation

When a state court denies a federal claim without explanation and there is another prior reasoned decision from a state court denying the same claim, the later, unexplained decision is presumed to rest on the same ground as the earlier, reasoned decision. For example, when a claim previously denied on a procedural ground by the court of appeal is then raised in a petition for review to the California Supreme Court, the California Supreme Court's denial of the petition without opinion or citation is also a procedural denial. *McQuown v McCartney* (9th Cir 1986) 795 F2d 807, 809. This presumption can be rebutted by "strong evidence" that the later decision, although unexplained, was based on a different ground from that in the earlier, reasoned decision. *Ylst v Nunnemaker* (1991) 501 US 797, 804, 115 L Ed 2d 706, 717, 111 S Ct 2590.

Coleman v Thompson (1991) 501 US 722, 732, 115 L Ed 2d 640, 657, 111 S Ct 2546, and *Ylst v Nunnemaker, supra,* appear to leave open the question of how to interpret an unexplained denial of relief when the merits of the claim have been presented to the highest state court in a procedurally correct manner that on its face does not suggest any procedural default (the opposite of the situation in *Coleman*) and no state court has ever expressly stated its reasons for denying the claim (the opposite of the situation in *Nunnemaker*). For example: (1) when a claim is originally presented to the state court of appeal in the defendant's brief on direct appeal and in a petition for rehearing but is not expressly decided by that court, and later the same claim is raised in a petition for review that the California Supreme Court denies without opinion or citation, or (2) when a claim, never previously presented to the state courts, is presented for the first time to the California Supreme Court in an original petition for habeas corpus and is denied without opinion or citation.

The Ninth Circuit has stated in several decisions that when the California Supreme Court denies a petition for habeas corpus without opinion or citation, it will presume the denial is a denial of the federal claim on the merits. *Harris v Superior Court* (9th Cir 1974) 500 F2d 1124, 1128; see also *Hunter v Aispuro* (9th Cir 1992) 982 F2d 344, 347; *Lewis v Borg* (9th Cir 1989) 879 F2d 697, 698; *Turner v Compoy* (9th Cir 1987) 827 F2d 526, 529.

When state law mandates that the petitioner raise a claim by a different procedure from the one already pursued, the Ninth Circuit will construe a denial without opinion or citation as a denial on a procedural ground. See *Lindquist v Gardner* (9th Cir 1985) 770 F2d 876, 878 (Idaho; state law required petitioner to seek relief in trial court before filing in supreme court); *Kellotat v Cupp* (9th Cir 1983) 719 F2d 1027, 1031 (Oregon); *Sweet v Cupp* (9th Cir 1981) 640 F2d 233, 238 (Oregon). When, however, a state court merely prefers that a claim be raised by a different procedure, the federal court presumes that a denial without opinion or citation is on the merits. *Turner v Compoy* (9th Cir 1987) 827 F2d 526, 530.

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§15.18 3. State Court Reviews Defaulted Claim Under More Stringent Standard Than It Would Ordinarily Apply

When a state court, instead of barring a defaulted claim, reviews it on the merits under a more stringent standard than it would otherwise apply, the Ninth Circuit will assume the denial was on the merits, but will apply that same standard in reviewing the merits of the claim. For example, in *Walker v Endell* (9th Cir 1987) 850 F2d 470, 473, after the Alaska Supreme Court reviewed a defaulted claim for plain error instead of applying a procedural bar, the Ninth Circuit also reviewed the claim under a plain-error standard.

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§15.19 F. State Procedural Bar Must Be Independent and Adequate

Even when the state court denies relief because of a state procedural rule, the denial on state procedural grounds will preclude federal court review of the claim only if the state procedural bar constitutes an independent and adequate state law ground for the state court's denial of the petitioner's federal claim. *Harris v Reed* (1989) 489 US 255, 103 L Ed 2d 308, 109 S Ct 1038; *Wells v Maass* (9th Cir 1994) 28 F3d 1005.

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§15.20 1. Determining Whether a State Procedural Bar Is Independent of Federal Law

When the applicability of a state procedural bar depends on the assessment of a federal claim, the bar is not independent. *Ake v Oklahoma* (1985) 470 US 68, 75, 84 L Ed 2d 53, 105 S Ct 1087. A state procedural bar may be independent of federal law even though its application requires the state court to assess the magnitude of a constitutional claim, if the application of the bar does not require the state court to assess the merits of the particular claim. *Stewart v Smith* (2002) 536 US 856, 153 L Ed 2d 762, 122 S Ct 2578.

In *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153, the California Supreme Court restated its timeliness bar with the explicit intention of making it independent of federal law. In *Bennett v Mueller* (9th Cir 2003) 322 F3d 573, 583, the Ninth Circuit held that California's untimeliness bar, as restated in *Robbins*, is an independent state procedural bar to relief. For further discussion of California procedural bars to post-conviction relief, see §§15.22-15.26.

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§15.21 2. Determining Whether State Rule Is Adequate

In addition to being independent of federal law, the state procedural bar used to deny relief in the petitioner's case must be consistently and regularly applied in other, similar cases. The question of whether a state procedural rule is "adequate" is a question of federal law. *Cone v Bell* (2009) ___ US ___, 173 L Ed 2d 701, 129 S Ct 1769. A state procedural rule will ordinarily be considered adequate when it is "strictly or regularly followed" and "consistently applied." See, *e.g., Scott v Schriro* (9th Cir 2009) 567 F3d 573, 580; *Morales v Calderon* (9th Cir 1996) 85 F3d 1387, 1393. A state procedural rule is not automatically "inadequate" because it is discretionary; if it is "firmly established" and "regularly followed" it can serve as an adequate ground to bar federal habeas review. *Beard v Kindler* (2009) ___ US ___, 175 L Ed 2d 417, 130 S Ct 612.

NOTE: In determining whether the bar is consistently applied in other similar cases, the district court should distinguish capital cases from noncapital cases, because the California rules governing timeliness in capital cases differ from those governing timeliness in noncapital cases. See *Bennett v Mueller* (9th Cir 2003) 322 F3d 573, 583.

In *Bennett v Mueller* (9th Cir 2003) 322 F3d 573, 584, the Ninth Circuit adopted a burden-shifting mechanism originally used by the Tenth Circuit in *Hooks v Ward* (10th Cir 1999) 184 F3d 1206 for determining whether an independent state procedural bar was firmly established and regularly applied at the time it was applied to the petitioner. First, the respondent must plead the existence of an independent and adequate state bar to relief as an affirmative defense. 322 F3d at 584. The burden then shifts to the petitioner to place the defense in issue by making "specific claims of inadequacy." 322 F3d at 585. The ultimate burden of establishing that the state procedural bar was firmly established and regularly applied at the time of the petitioner's default, however, remains on the respondent. 322 F3d at 585.

Federal courts may consider both published and unpublished state court decisions and minute orders in analyzing the adequacy of a procedural bar. *Powell v Lambert* (9th Cir 2004) 357 F3d 871, 879; *Dennis v Brown* (ND Cal 2005) 361 F Supp 2d 1124, 1131. It is the "actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights." *Powell*, 357 F3d at 879.

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§15.22 3. Independence and Adequacy of Specific California Procedural Bars

The California Supreme Court frequently denies habeas petitions with a citation to a California case in which a procedural bar to relief was established. Among the major cases cited to bar postconviction relief on procedural grounds are the following:

- *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153 (relief barred when claim untimely);
- *In re Waltreus* (1965) 62 C2d 218, 225, 42 CR 9 (relief barred when claim was denied on merits on appeal);
- *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513 (relief barred for claim that could have been but was not raised on direct appeal);
- *In re Horowitz* (1949) 33 C2d 534, 546, 203 P2d 513 (relief barred for claim that could have been but was not raised in previous habeas corpus petition); and
- *In re Lindley* (1947) 29 C2d 709, 723, 177 P2d 918 (sufficiency of evidence claim must be raised on direct appeal and cannot be considered on habeas corpus).

Ninth Circuit decisions on whether these procedural bars to relief constitute procedural defaults precluding federal habeas corpus review unless the petitioner establishes cause and prejudice for the default are discussed in §§15.23-15.26.

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§15.23 a. Bar on Habeas Review of Sufficiency of the Evidence Claims

In *Carter v Giurbino* (9th Cir 2004) 385 F3d 1194, 1196, the Ninth Circuit held that the *Lindley* rule, limiting consideration of sufficiency of the evidence claims to direct review, is an independent and adequate procedural bar. Note that in *Carter* the petitioner did not try to shift the burden to the respondent by identifying cases where the rule had not been applied, so that challenge, therefore, remains to be taken up.

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§15.24 b. Untimeliness Bar

In *Bennett v Mueller (Bennett I)* (9th Cir 2003) 322 F3d 573, 578, the Ninth Circuit held that California's timeliness bar, as defined in *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153, is an *independent* state procedural bar to habeas review, *i.e.,* not interwoven with federal law.

In *Morales v Calderon* (9th Cir 1996) 85 F3d 1387, the Ninth Circuit held that California does not apply its timeliness rule consistently. See also *Townsend v Knowles* (9th Cir 2009) 562 F3d 1200, 1207 (timeliness bar is not applied in consistent manner to non-capital habeas corpus petitions and therefore cannot serve as procedural bar); *Dennis v Brown* (ND Cal 2005) 361 F Supp 2d 1124, 1132 (in relevant time period, timeliness bar had not been consistently applied to capital cases); *Carpenter v Ayers* (ND Cal 2008) 548 F Supp 2d 736, 755 (timeliness bar and *Dixon* bar were not consistently applied during relevant time frame).

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§15.25 c. Rules Barring Successive Petitions and Pretermitted Claims

In *Dennis v Brown* (ND Cal 2005) 361 F Supp 2d 1124, the district court ruled that analysis of the untimeliness bar in *Bennett v Mueller* (9th Cir 2003) 322 F3d 573 (*Bennett I*), discussed in §15.24, compelled the conclusion that two procedural default rules not considered in *Bennett I* are also independent of federal law after the California Supreme Court's decision in *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153. These bars to relief are the rule of *In re Horowitz* (1949) 33 C2d 534, 546, 203 P2d 513, barring consideration of claims that could have been but were not presented in a previous petition (successive petitions) and the rule of *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513, barring consideration of claims that could have been but were not presented on direct appeal (pretermitted claims). See *Dennis*, 361 F Supp 2d at 1126. The district court concluded, however, that none of the three procedural bars that was potentially applicable in the case—the untimeliness bar, the successive petitions bar or the *Dixon* bar—had been consistently applied during the relevant time frames. 361 F Supp 2d at 1132.

In unpublished decisions, federal district courts held that California's *Dixon* bar was not consistently applied during the period at issue in that case and thus was inadequate. See, *e.g., Vaughn v Adams* (ED Cal, May 22, 2006, No. CV-F-01-5241) 2006 US Dist Lexis 37742, 2006 WL 1439400; *Monarrez v Alameda* (CD Cal, Sept. 22, 2005, 03-00104-AHM (MLG)) 2005 US Dist Lexis 37876, 2005 WL 2333462.

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§15.26 d. Bar on Claims Denied on Direct Appeal

A citation to *In re Waltreus* (1965) 62 C2d 218, 225, 42 CR 9, which bars habeas corpus relief of a claim that was denied on direct appeal, does not bar federal review. *Calderon v U.S. Dist. Court (Bean)* (9th Cir 1996) 96 F3d 1126, 1131. See *Ylst v Nunnemaker* (1991) 501 US 797, 805 n3, 115 L Ed 2d 706, 717 n3, 111 S Ct 2590 (denial of claim based on rule preventing relitigation in state postconviction proceedings of claims previously raised on direct appeal is not procedural default).

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§15.27 G. Procedural Default Is Affirmative Defense

The procedural default doctrine is not jurisdictional but represents the exercise of equitable discretion motivated by concerns for comity and the orderly administration of justice. *Reed v Ross* (1984) 468 US 1, 9, 82 L Ed 2d 1, 10, 104 S Ct 2901. In *Trest v Cain* (1997) 522 US 87, 139 L Ed 2d 444, 118 S Ct 478, the U.S. Supreme Court held that the district court is not required to raise an issue of procedural default on its own motion. However, in *Boyd v Thompson* (9th Cir 1998) 147 F3d 1124, 1127, the Ninth Circuit held that when the default is obvious on the face of the petition, a district court may, in its discretion, raise procedural default sua sponte if doing so furthers interests of comity, federalism, and judicial efficiency.

In *Vang v Nevada* (9th Cir 2003) 329 F3d 1069, 1073, the Ninth Circuit concluded that procedural default is an affirmative defense that must be raised in the first responsive pleading, *i.e.,* the answer to the petition, to avoid forfeiture. See *Morrison v Mahoney* (9th Cir 2005) 399 F3d 1042, 1045; Habeas Rule 5(b); Fed R Civ P 8(b)-(c); see also *Franklin v Johnson* (9th Cir 2002) 290 F3d 1223 (state cannot raise procedural default for first time on appeal). The defense is not waived by failure to include it in a motion to dismiss, filed before the first responsive pleading. *Morrison,* 399 F3d at 1046.

Note that when the state succeeds in having a federal habeas corpus petition dismissed for failure to exhaust by arguing that adequate state court remedies remain available, it may be judicially estopped from later asserting that the petitioner is procedurally barred from those remedies. *Russell v Rolfs* (9th Cir 1990) 893 F2d 1033, 1038. See also *Whaley v Belleque* (9th Cir 2008) 520 F3d 997, 1001 (remanded to district court to hear merits of constitutional claims when state represented that petitioner's complaints were moot for purposes of direct appeal but not moot for purposes of raising procedural default defense). But see *Ortiz v Stewart* (9th Cir 1998) 149 F3d 923, 932 (judicial estoppel inapplicable when state never argued that petitioner had adequate and available state remedy and instead consistently took position that petitioner failed to exhaust state remedies by not presenting claims to state court in timely manner).

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H. Avoiding the Procedural Default Bar to Federal Review

§15.28 1. Remedying Trial-Stage Procedural Defaults in State Court Proceedings

Many trial errors are deemed to have been forfeited on direct appeal for want of a timely objection in the trial court. For discussion of situations in which a contemporaneous objection is required by California state law and some of the limited exceptions to the objection requirement, see §§4.26-4.28, 4.33-4.36.

Even if a defendant failed to object to a trial error, or made an inadequate objection, if the California Court of Appeal and the California Supreme Court later decide the claim on the merits, there is no procedural default and the issue is preserved for federal habeas review. See *Ylst v Nunnemaker* (1991) 501 US 797, 115 L Ed 2d 706, 715, 111 S Ct 2590; *Harris v Reed* (1989) 489 US 255, 262, 103 L Ed 2d 308, 317, 109 S Ct 1038; *Huffman v Ricketts* (9th Cir 1984) 750 F2d 798; *Maxwell v Sumner* (9th Cir 1982) 673 F2d 1031, 1034.

At least as common as a complete failure to object to error in the trial court, is an objection solely on state law grounds. Recent California Supreme Court decisions have attempted to clarify the circumstances under which a objection at trial on state law grounds preserves an appellate argument that the error violated the federal constitution. Thus, in *People v Lewis* (2006) 39 C4th 970, 990 n5, 47 CR3d 467, the supreme court explained that it will not consider a federal constitutional claim to have been forfeited to the extent that

> the appellate claim is the kind that required no trial court action to preserve it, or the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional *legal consequence* of violating the Constitution.

See also *People v Partida* (2005) 37 C4th 428, 433, 35 CR3d 644.

Consequently, a defendant should argue federal constitutional error on appeal in the state courts and on state habeas corpus even if trial counsel failed to object in the trial court or objected only on state law grounds.

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§15.29 2. Other Factors in Determining Whether a Procedural Default Bars Consideration on the Merits

If the state's procedural bar, as a practical matter, makes it impossible for the petitioner ever to have raised his claim in state court, the procedural bar is not an adequate and independent state ground and the federal court may consider and decide the claim notwithstanding the procedural default. *Hoffman v Arave* (9th Cir 2001) 236 F3d 523. In addition, state procedures must provide the habeas petitioner with a fair opportunity to seek relief in state court; if not, a procedural default will not bar federal habeas relief. *Harmon v Ryan* (9th Cir 1992) 959 F2d 1457, 1461, 1463. See also *Reiger v Christensen* (9th Cir 1986) 789 F2d 1425, 1431 (purpose of state's contemporaneous objection rule "substantially served" by petitioner's subsequent motion for mistrial).

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§15.30 3. Procedural Default May Be the Basis of a Claim of Ineffective Assistance of Counsel

When a procedural default by the petitioner's attorney forms the basis of a Sixth Amendment ineffective assistance of counsel claim, the default on the underlying claim is not a default of the Sixth Amendment claim. See *Kimmelman v Morrison* (1986) 477 US 365, 374 n1, 91 L Ed 2d 305, 318 n1, 106 S Ct 2574.

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§15.31 4. Excusing Procedural Default by Showing Cause and Prejudice

The federal court may not review a procedurally defaulted claim unless the petitioner can show "cause" for the default and actual prejudice from the claimed violation of federal law. *Coleman v Thompson* (1991) 501 US 722, 750, 115 L Ed 2d 640, 111 S Ct 2546.

The cause-and-prejudice standard applies to all procedural defaults (*Coleman v Thompson, supra*), including those occurring before trial, such as the failure to object to a grand jury's composition (*Francis v Henderson* (1976) 425 US 536, 48 L Ed 2d 149, 96 S Ct 1708), and those occurring during trial, such as the failure to contemporaneously object to the admission of evidence (*Wainwright v Sykes* (1977) 433 US 72, 75, 53 L Ed 2d 594, 600, 97 S Ct 2497) or to a jury instruction (*Engle v Isaac* (1982) 456 US 107, 124, 71 L Ed 2d 783, 798, 102 S Ct 1558). The cause-and-prejudice test also applies to posttrial defaults, such as the failure to raise an issue on appeal (*Murray v Carrier* (1986) 477 US 478, 489, 91 L Ed 2d 397, 409, 106 S Ct 2639), the failure to take an appeal (*Hughes v Idaho State Bd. of Corrections* (9th Cir 1986) 800 F2d 905, 907), and the failure to develop facts in state habeas corpus proceedings (*Keeney v Tamayo-Reyes* (1992) 504 US 1, 118 L Ed 2d 318, 112 S Ct 1715). Further, the test applies to procedural defaults in death penalty cases (*Smith v Murray* (1986) 477 US 527, 91 L Ed 2d 434, 106 S Ct 2661) and to procedural defaults by pro se litigants (*Hughes v Idaho State Bd. of Corrections* (9th Cir 1986) 800 F2d 905, 908).

PRACTICE TIP: It is advisable for counsel for the petitioner to assume that the petitioner has both the burden of producing evidence and the ultimate burden of proof on this subject. See Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §26.3 (5th ed 2005).

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§15.32 a. Showing Cause for Procedural Default

A showing of cause ordinarily turns on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. *Murray v Carrier* (1986) 477 US 478, 488, 91 L Ed 2d 397, 408, 106 S Ct 2639. See also *Amadeo v Zant* (1988) 486 US 214, 222, 100 L Ed 2d 249, 260, 108 S Ct 1771. See, *e.g., Manning v Foster* (9th Cir 2000) 224 F3d 1129 (when trial counsel's failure to act is motivated by self-interest, it may be deemed objective factor excusing state procedural default). If there is a factual dispute regarding the existence of cause, a district court must hold an evidentiary hearing even if neither party requests it. *Buffalo v Sunn* (9th Cir 1988) 854 F2d 1158, 1166. See also *Loveland v Hatcher* (9th Cir 2000) 231 F3d 640 (case remanded for limited evidentiary hearing to determine whether petitioner reasonably believed counsel would file appeal for him and whether petitioner filed habeas petition within reasonable time after he should have known that counsel was not pursuing appeal).

A petitioner has cause for default if the legal basis of the claim is so novel that it is not reasonably available at the time of the default. *Reed v Ross* (1984) 468 US 1, 15, 82 L Ed 2d 1, 14, 104 S Ct 2901. There seems to be little practical effect left to *Reed,* however, in light of the nonretroactivity doctrine announced by the Supreme Court in *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (discussed in §§15.37-15.40). Any claim novel enough to qualify as a cause under *Reed* probably would also be a new rule not retroactively applicable to a habeas corpus petitioner, unless one of *Teague*'s two narrow exceptions applied.

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§15.33 (1) Circumstances Held to Satisfy the Cause Requirement

The following circumstances satisfy the cause requirement:

- The factual basis of the claim is not reasonably available at the time of the default, or interference by state officials make compliance with the procedural rule impracticable. *Amadeo v Zant* (1988) 486 US 214, 220, 100 L Ed 2d 249, 258, 108 S Ct 1771 (factual basis of jury racial exclusion claim concealed by county officials); *Murray v Carrier* (1986) 477 US 478, 488, 91 L Ed 2d 397, 408, 106 S Ct 2639. But see *McCleskey v Zant* (1991) 499 US 467, 497, 113 L Ed 2d 517, 547, 111 S Ct 1454 (newly discovered evidence is not cause if other known or discoverable evidence could have supported claim).
- Attorney ineffectiveness in failing to raise the claim is so substantial that it violates the Sixth Amendment; however, the ineffective assistance claim must first be separately exhausted in state court before it can serve as cause for the procedural default of another claim. *Murray v Carrier* (1986) 477 US 478, 489, 91 L Ed 2d 397, 409, 106 S Ct 2639. If the prisoner has procedurally defaulted on the ineffective assistance claim as well, that claim can serve as "cause" for the procedural default of another claim only if there is independent cause for the procedural default of the ineffective assistance claim. *Edwards v Carpenter* (2000) 529 US 446, 146 L Ed 2d 518, 120 S Ct 1587.

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§15.34 (2) Circumstances Held Not to Satisfy the Cause Requirement

The following circumstances do not satisfy the cause requirement:

- A deliberate tactical decision to procedurally default. *Reed v Ross* (1984) 468 US 1, 13, 82 L Ed 2d 1, 104 S Ct 2901.
- Attorney ignorance, inadvertence, or error short of that which is constitutionally ineffective under the Sixth Amendment. *Murray v Carrier* (1986) 477 US 478, 492, 91 L Ed 2d 397, 411, 106 S Ct 2639 (counsel's failure to recognize factual or legal basis for a claim, or failure to raise claim despite recognizing it, does not constitute cause); *Smith v Murray* (1986) 477 US 527, 535, 91 L Ed 2d 434, 444, 106 S Ct 2661.
- Attorney ineffectiveness in state postconviction proceedings, because there is no right to counsel in those proceedings. *Coleman v Thompson* (1991) 501 US 722, 752, 115 L Ed 2d 640, 670, 111 S Ct 2546; *Ortiz v Stewart* (9th Cir 1998) 149 F3d 923, 932.
- The apparent futility of raising the claim in state court in light of past state court decisions. *Smith v Murray* (1986) 477 US 527, 534, 91 L Ed 2d 434, 444, 106 S Ct 2661; *Engle v Isaac* (1982) 456 US 107, 130, 71 L Ed 2d 783, 801, 102 S Ct 1558; *Roberts v Arave* (9th Cir 1988) 847 F2d 528, 530.
- Illiteracy of a pro se petitioner. *Hughes v Idaho State Bd. of Corrections* (9th Cir 1986) 800 F2d 905, 909.

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§15.35 b. Showing Actual Prejudice

In addition to cause, a defaulting petitioner must also show actual prejudice resulting from the alleged constitutional violation. *Wainwright v Sykes* (1977) 433 US 72, 84, 53 L Ed 2d 594, 97 S Ct 2497. United States Supreme Court decisions are not in agreement on the showing required for actual prejudice. In one decision, "actual prejudice" was construed to mean "might not have been convicted" (*Reed v Ross* (1984) 468 US 1, 12, 82 L Ed 2d 1, 104 S Ct 2901). In another, the petitioner was required to establish not merely that errors at trial constituted a possibility of prejudice but that they worked to petitioner's actual and substantial disadvantage, infecting his or her entire trial with error of constitutional dimensions. *U.S. v Frady* (1982) 456 US 152, 169, 170, 71 L Ed 2d 816, 832, 102 S Ct 1584 (federal prisoner motion for collateral relief under 28 USC §2255, to which the same cause-and-prejudice standard for procedural defaults applies). See also *Correll v Stewart* (9th Cir 1998) 137 F3d 1404, 1415; *Hall v Whitley* (9th Cir 1991) 935 F2d 164.

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§15.36 5. Exception to Cause and Prejudice Requirement for Fundamental Miscarriage of Justice: The Actual Innocence Gateway

A petitioner who cannot show cause and prejudice may yet present a procedurally defaulted claim if he or she can demonstrate that a constitutional error has caused a fundamental miscarriage of justice. *Wainwright v Sykes* (1977) 433 US 72, 91, 53 L Ed 2d 594, 97 S Ct 2497. A fundamental miscarriage of justice is one that has resulted in the conviction of one who is probably innocent. *Murray v Carrier* (1986) 477 US 478, 496, 91 L Ed 2d 397, 413, 106 S Ct 2639; *Smith v Murray* (1986) 477 US 527, 537, 91 L Ed 2d 434, 446, 106 S Ct 2661. See also *Cook v Schriro* (9th Cir 2008) 538 F3d 1000, 1028; *Hughes v Idaho State Bd. of Corrections* (9th Cir 1986) 800 F2d 905, 906 n1; *U.S. v Zuno-Arce* (CD Cal 1998) 25 F Supp 2d 1087. To qualify for the miscarriage of justice exception and obtain a hearing on the merits despite an unexcused procedural default, the petitioner must pass through the "*Schlup* actual innocence gateway," by showing that in light of reliable new evidence that was not introduced at trial, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v Delo* (1995) 513 US 298, 327, 130 L Ed 2d 808, 115 S Ct 851. See *Jaramillo v Stewart* (9th Cir 2003) 340 F3d 877 (evidence that state had concealed eyewitness testimony that supported self-defense claim satisfied "actual innocence" exception to procedural default rule and entitled petitioner to evidentiary hearing on defaulted claim, even though he was unable to show cause and prejudice). See also *Johnson v Knowles* (9th Cir 2008) 541 F3d 933, 937 (petitioner's concession of guilt fatal to miscarriage of justice exception); *Smith v Baldwin* (9th Cir 2007) 510 F3d 1127 (even if petitioner did not commit homicidal act, he could not show actual innocence of felony murder).

The new evidence need not be "newly discovered," only "newly presented." *Griffin v Johnson* (9th Cir 2003) 350 F3d 956; see *Sistrunk v Armenakis* (9th Cir 2002) 292 F3d 669 (en banc). See also *House v Bell* (2006) 547 US 518, 538, 165 L Ed 2d 1, 126 S Ct 2064 (*Schlup* makes clear that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial). For discussion of the application of *Schlup* to the AEDPA statute of limitations and prohibition on successive petitions see §§15.7, 15.9.

When confronted with a procedurally defaulted claim, the court will ordinarily exercise judicial restraint by avoiding consideration of the defaulted claim on the merits when there is another, nondefaulted claim that will potentially provide the petitioner with appropriate relief. *Dretke v Haley* (2004) 541 US 386, 158 L Ed 2d 659, 124 S Ct 1847.

The fundamental miscarriage of justice exception applies to the sentencing determination in a capital case as well as to the adjudication of guilt. *Dugger v Adams* (1989) 489 US 401, 412 n6, 103 L Ed 2d 435, 109 S Ct 1211. A federal court will hear a procedurally defaulted claim related to capital sentencing if the petitioner can show by *clear and convincing evidence* that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *Sawyer v Whitley* (1992) 505 US 333, 335, 120 L Ed 2d 269, 277, 112 S Ct 2514; *Poland v Stewart* (9th Cir 1997) 117 F3d 1094. The miscarriage of justice test articulated in *Sawyer* is stricter than the *Schlup* "gateway" standard. See *House v Bell*, *supra,* 547 US at 539.

When the petitioner requires exculpatory evidence allegedly possessed by the state to provide a sufficient showing of factual innocence to satisfy the miscarriage-of-justice exception, the federal court can direct the state to come forward with any exculpatory evidence in its possession. *Thomas v Goldsmith* (9th Cir 1992) 979 F2d 746.

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IV. IMPERMISSIBLE BASES OF HABEAS CLAIMS

§15.37 A. New Rules of Constitutional Criminal Procedure

A petitioner may not obtain habeas corpus relief if the claim is based on, or seeks to establish for the first time, a "new rule" of constitutional criminal procedure that had not been announced at the time the petitioner's conviction became final. *Teague v Lane* (1989) 489 US 288, 316, 103 L Ed 2d 334, 360, 109 S Ct 1060. See also *Saffle v Parks* (1990) 494 US 484, 488, 108 L Ed 2d 415, 424, 110 S Ct 1257; *Butler v McKellar* (1990) 494 US 407, 413, 108 L Ed 2d 347, 355, 110 S Ct 1212; *Penry v Lynaugh* (1989) 492 US 302, 314, 106 L Ed 2d 256, 275, 109 S Ct 2934, overruled on other grounds in *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242 (*Teague* nonretroactivity rule applies to both capital and noncapital cases); *Jackson v Ylst* (9th Cir 1990) 921 F2d 882.

Teague requires a court deciding a habeas corpus claim to engage in a three-step analysis. First, it must determine the date on which the petitioner's conviction became final. Second, it must survey the legal landscape as it then existed to determine whether a state court considering the petitioner's claim at the time the conviction became final would have felt compelled by existing precedent to conclude that the rule relied on by petitioner was required by the federal Constitution or whether instead it was a "new rule." Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, it must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity. *Beard v Banks* (2004) 542 US 406, 159 L Ed 2d 494, 124 S Ct 2504; *Caspari v Bohlen* (1994) 510 US 383, 390, 127 L Ed 2d 236, 114 S Ct 948.

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§15.38 1. Determining Date of Finality

A petitioner's conviction becomes final once his or her direct appeal is decided and either the time for filing a petition for certiorari has lapsed or the Supreme Court has denied a petition for certiorari. *Griffith v Kentucky* (1987) 479 US 314, 321 n6, 93 L Ed 2d 649, 657 n6, 107 S Ct 708.

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§15.39 2. What Constitutes a New Rule

A "new rule" is one that breaks new ground or imposes a new obligation on the states or the federal government, or one that is not dictated by precedent existing at the time the petitioner's conviction became final. *Saffle v Parks* (1990) 494 US 484, 487, 108 L Ed 2d 415, 424, 110 S Ct 1257; *Teague v Lane* (1989) 489 US 288, 301, 103 L Ed 2d 334, 360, 109 S Ct 1060. It is not enough that the decision or proposed rule on which the petitioner seeks to rely is informed, controlled, or governed by previous Supreme Court decisions that had been announced at the time the petitioner's conviction became final; rather, a decision or proposed rule is a "new rule" unless it is compelled by previous decisions existing at the time the conviction became final. *Caspari v Bohlen* (1994) 510 US 383, 127 L Ed 2d 236, 114 S Ct 948; *Graham v Collins* (1993) 506 US 461, 122 L Ed 2d 260, 113 S Ct 892; *Saffle v Parks, supra*; *Butler v McKellar* (1990) 494 US 407, 414, 108 L Ed 2d 347, 110 S Ct 1212; *Butler v Curry* (9th Cir 2008) 528 F3d 624, 635 n10 (review of Supreme Court Sixth Amendment precedent reveals *Cunningham* did not announce new rule). See also *Beard v Banks* (2004) 542 US 406, 159 L Ed 2d 494, 124 S Ct 2504 (if reasonable minds could differ about whether decision is compelled by previous decisions, it is new rule). Most Supreme Court decisions will fall within this extremely broad definition of "new rule," and will thus be inapplicable to petitioners whose convictions are final at the time the decision is announced.

In *Stringer v Black* (1992) 503 US 222, 117 L Ed 2d 367, 112 S Ct 1130, the Court held that, because the *Teague* rule bars a petitioner both from relying on new rules announced in other cases after his or her conviction became final and from using his or her own habeas case to establish a new rule, *Teague*

> require[s] a federal court to answer an initial question, and in some cases a second. First, it must be determined whether the decision relied upon announced a new rule. If the answer is yes, the decision is not available to the petitioner. If, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent.

A decision is not compelled by precedent if the issue is subject to debate among reasonable minds. *Butler v McKellar, supra*. The application of a settled rule to different facts does not create a new rule if it does not extend the precedent. *Beam v Paskett* (9th Cir 1993) 3 F3d 1301, 1305, overruled on other grounds in *Lambright v Stewart* (9th Cir 1999) 191 F3d 1181, 1185.

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§15.40 3. Exceptions to the *Teague* Nonretroactivity Rule

There are two narrow exceptions to the *Teague* rule of nonretroactivity. First, a new rule will be retroactively applied on habeas corpus if it forbids criminal punishment of certain kinds of primary, individual conduct or prohibits a certain category of punishment for a class of defendants because of their status or offense. *Penry v Lynaugh* (1989) 492 US 302, 314, 106 L Ed 2d 256, 275, 109 S Ct 2934, overruled on other grounds in *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242. Second, a new rule will be retroactively applied on habeas corpus if it is a "watershed" rule of criminal procedure without which the likelihood of an accurate conviction is seriously diminished. *Schriro v Summerlin* (2004) 542 US 348, 159 L Ed 2d 442, 449, 124 S Ct 2519. See also *Whorton v Bockting* (2007) 549 US 406, 167 L Ed 2d 1, 10, 127 S Ct 1173 (rule of *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, is not "watershed rule" within meaning of *Teague*). Watershed rules are rules "implicating the fundamental fairness and accuracy of the criminal proceeding.") *Saffle v Parks* (1990) 494 US 484, 495, 108 L Ed 2d 415, 429, 110 S Ct 1257. See also *Teague v Lane* (1989) 489 US 288, 313, 103 L Ed 2d 334, 360, 109 S Ct 1060; *Jones v Smith* (9th Cir 2000) 231 F3d 1227, 1237.

Teague bars only the application of new rules of criminal procedure to decide the merits of a collateral attack on a conviction. It does not bar the creation of new rules governing the procedure by which collateral review is conducted (*e.g.,* a new statutory interpretation of 28 USC §2254(b)'s exhaustion requirement). *Coe v Thurman* (9th Cir 1991) 922 F2d 528, 534 (order denying hearing).

Nonretroactivity is a threshold issue. If the state raises it as a bar to relief, the court may not address the merits of the petitioner's claim unless it is resolved in the petitioner's favor. *Teague v Lane* (1989) 489 US 288, 316, 103 L Ed 2d 334, 360, 109 S Ct 1060. See also *Horn v Banks* (2002) 536 US 266, 153 L Ed 2d 301, 122 S Ct 2147 (when state properly raised retroactivity issue in federal district court, fact that state supreme court had considered merits of petitioner's constitutional claim did not relieve court of appeals from duty to address it). However, the rule is not jurisdictional. *Goeke v Branch* (1995) 514 US 115, 117, 131 L Ed 2d 152, 156, 115 S Ct 1275; *Collins v Youngblood* (1990) 497 US 37, 41, 111 L Ed 2d 30, 38, 110 S Ct 2715. If the state fails to raise it, the court is not bound to apply it (although it may). *Caspari v Bohlen* (1994) 510 US 383, 389, 127 L Ed 2d 236, 114 S Ct 948. See also *Schiro v Farley* (1994) 510 US 222, 228, 127 L Ed 2d 47, 55, 114 S Ct 783 (Supreme Court declined to consider *Teague* defense when state raised it for first time after certiorari granted); *Jordan v Ducharme* (9th Cir 1993) 983 F2d 933 (court of appeals declined to consider *Teague* defense when state raised it for first time on appeal).

AEDPA amended 28 USC §2254 to provide that a federal court may not grant postconviction habeas relief to a state prisoner on a claim actually decided on the merits in state court unless the state court decision "was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." 28 USC §2254(d)(1). In *Williams v Taylor* (2000) 529 US 362, 146 L Ed 2d 389, 120 S Ct 1495, the United States Supreme Court held that the use of the phrase "clearly established federal law" codifies *Teague*'s nonretroactivity rule (529 US at 379, 146 L Ed 2d at 1506); that the language "as determined by the Supreme Court of the United States" extends *Teague* by specifying the Supreme Court as the sole source of federal doctrine on which the circuit courts can rely (529 US at 381, 146 L Ed 2d at 1506), but that *Teague* jurisprudence is of only slight use in construing the "unreasonable application" prong of AEDPA (529 US at 412, 146 L Ed 2d at 1523). This aspect of AEDPA is discussed further at §17.23.

NOTE: In *Danforth v Minnesota* (2008) 552 US 264, 281, 169 L Ed 2d 859, 872, 128 S Ct 1029, the high court clarified that the *Teague* rule is fashioned to minimize federal intrusion into state court criminal proceedings by limiting the authority of federal courts to overturn state convictions. It is not intended to limit a state court's authority to grant relief for a violation of a new rule of constitutional law when reviewing its own conviction. 169 L Ed at 871. Therefore, a state court is not precluded from applying a broader retroactivity standard than that set out in *Teague*. 169 L Ed at 863. See *Delgadillo v Woodford* (9th Cir 2008) 527 F3d 919, 922 (in light of *Danforth's* holding that federal rule of nonretroactivity for federal habeas proceedings is not binding on state courts, state court's decision to retroactively apply *Crawford* was reasonable).

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§15.41 B. Fourth Amendment Claims

The United States Supreme Court has ruled that Fourth Amendment claims based on the exclusionary rule cannot be raised by way of federal habeas corpus unless there was no opportunity for a full and fair hearing on the search and seizure issue in the state courts. *Stone v Powell* (1976) 428 US 465, 494, 49 L Ed 2d 1067, 1088, 96 S Ct 3037. See also *Cardwell v Taylor* (1983) 461 US 571, 572, 76 L Ed 2d 333, 335, 103 S Ct 2015; *Caldwell v Cupp* (9th Cir 1986) 781 F2d 714; *Ponce v Cupp* (9th Cir 1984) 735 F2d 333. Moreover, even when the state fails to invoke *Stone v Powell* as a bar to a Fourth Amendment exclusion-of-evidence claim, the district court or the Ninth Circuit must raise it sua sponte and deny relief unless the petitioner shows the lack of a full and fair opportunity to litigate the claim in state court. *Woolery v Arave* (9th Cir 1993) 8 F3d 1325. Even if First Amendment values are at stake but the only basis for suppressing the evidence is the operation of the exclusionary rule under the Fourth Amendment (*e.g.,* invalidity of a search warrant to seize alleged obscene material), the decision in *Stone v Powell, supra,* precludes any basis for habeas relief. *Abell v Raines* (9th Cir 1981) 640 F2d 1085.

The decision in *Stone v Powell, supra,* does not bar habeas corpus review of the following claims:

- Fourth Amendment claims not based on the exclusionary rule, such as the claim that a statute that criminalizes the refusal to submit to a breathalyzer test violates the Fourth Amendment. *Burnett v Municipality of Anchorage* (9th Cir 1986) 806 F2d 1447, 1449. See also *Rose v Mitchell* (1979) 443 US 545, 560, 61 L Ed 2d 739, 752, 99 S Ct 2993.
- Claims under the Sixth Amendment for ineffective assistance of counsel based on counsel's failure to raise Fourth Amendment claims adequately in state court. *Kimmelman v Morrison* (1986) 477 US 365, 91 L Ed 2d 305, 106 S Ct 2574.
- Fifth Amendment *Miranda* claims that the petitioner has had a full and fair opportunity to litigate in state court. *Withrow v Williams* (1993) 507 US 680, 123 L Ed 2d 407, 113 S Ct 1745; *Hinman v McCarthy* (9th Cir 1982) 676 F2d 343, 348.

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§15.42 C. Issues of State Law

A writ may issue only if the prisoner's custody violates federal law. It may not issue on the basis of a state law error by the state court. *Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475; *Pennhurst State Sch. & Hosp. v Halderman* (1984) 465 US 89, 79 L Ed 2d 67, 104 S Ct 900 (federal courts lack jurisdiction to enjoin state officials on basis of state law violations); *Pulley v Harris* (1984) 465 US 37, 79 L Ed 2d 29, 104 S Ct 871; *Wainwright v Goode* (1983) 464 US 78, 84, 78 L Ed 2d 187, 192, 104 S Ct 378 (finding no Eighth Amendment violation even if state trial court failed to follow state law). Ordinarily, issues of state law such as evidentiary rulings, jury instruction rulings, the validity of a gubernatorial commutation (*Rose v Hodges* (1975) 423 US 19, 46 L Ed 2d 162, 96 S Ct 175), or the violation of state constitutional speedy trial rules (see *Brown v Wainwright* (5th Cir 1974) 495 F2d 559) are not cognizable in federal habeas corpus proceedings. As discussed in §13.63 (Evidentiary Rulings by Trial Court) and §13.68 (Jury Instructions), a state law claim becomes a federal due process claim only if they render the trial fundamentally unfair. *Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475. See also *Engle v Isaac* (1982) 456 US 107, 71 L Ed 2d 783, 102 S Ct 1558 (mere error of state law is not denial of due process); *Pennywell v Rushen* (9th Cir 1983) 705 F2d 355 (no due process violation even if violation of state law occurred); *Cooks v Spalding* (9th Cir 1981) 660 F2d 738 (only if state court's action is arbitrary or fundamentally unfair does its violation of state law also violate due process). But see *Fetterly v Paskett* (9th Cir 1993) 997 F2d 1295 (denial of state law-based right constitutes violation of constitutional liberty interest). In addition, in some circumstances the denial of a state-created right to a jury determination of punishment or other issue besides guilt can amount to a due process violation. *Hicks v Oklahoma* (1980) 447 US 343, 65 L Ed 2d 175, 100 S Ct 2227. On the importance of "federalizing," *i.e.,* asserting a federal constitutional claim when an asserted error of state law arguably gives rise to a claim of error under the federal Constitution, see §4.36.

In determining whether a violation of state law has occurred, the Ninth Circuit usually defers to a state court's interpretation of its own laws unless that court's interpretation is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation. *Oxborrow v Eikenberry* (9th Cir 1989) 877 F2d 1395, 1399; *Aponte v Gomez* (9th Cir 1993) 993 F2d 705.

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§15.43 D. Federal Statutory and Supervisory Power Issues

Many appeals of federal convictions (*i.e.,* cases titled "*U.S. v* _____") are decided on federal statutory grounds or on the basis of the supervisory power of the federal courts over federal prosecutions. Because these grounds have no applications to state prisoners, they cannot form the basis of a habeas corpus claim by a state prisoner. See *Mu'Min v Virginia* (1991) 500 US 415, 114 L Ed 2d 493, 111 S Ct 1899; *Rosales-Lopez v U.S.* (1981) 451 US 182, 68 L Ed 2d 22, 101 S Ct 1629; *Harris v Rivera* (1981) 454 US 339, 70 L Ed 2d 530, 102 S Ct 460.

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§15.44 E. Right to Preliminary Hearing

There is no federal constitutional right to a preliminary hearing. Therefore, the denial of a preliminary hearing is not a permissible basis of a habeas corpus claim. *Hines v Enomoto* (9th Cir 1981) 658 F2d 667. See also *Hurtado v California* (1884) 110 US 516, 28 L Ed 232, 4 S Ct 111 (no constitutional right to be prosecuted only by indictment). A violation of the time limits for trial under the Interstate Agreement on Detainers also does not give rise to a claim for habeas relief. *Reed v Farley* (1994) 512 US 339, 129 L Ed 2d 277, 114 S Ct 2291.

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§15.45 F. Errors in Postconviction Proceeding

A state prisoner may not use a federal habeas corpus petition to challenge errors in a state postconviction proceeding (*Franzen v Brinkman* (9th Cir 1989) 877 F2d 26) or raise a claim of equitable estoppel (*O'Bremski v Maass* (9th Cir 1990) 905 F2d 281).

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§15.46 G. Claims of Innocence

Absent an independent constitutional violation, a claim of actual innocence is not a ground for federal habeas corpus relief, except possibly in capital cases. *Herrera v Collins* (1993) 506 US 390, 122 L Ed 2d 203, 113 S Ct 853; *Carriger v Stewart* (9th Cir 1997) 132 F3d 463. A claim of actual innocence that is strong enough to satisfy the standard required in *Schlup v Delo* (1995) 513 US 298, 327, 130 L Ed 2d 808, 115 S Ct 851, permits federal review of a procedurally defaulted claim even if the petitioner cannot show cause and prejudice. For discussion, see §15.36.

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§15.47 V. EFFECT OF GUILTY PLEA ON SCOPE OF HABEAS CORPUS

A counseled guilty plea automatically waives all *nonjurisdictional* federal habeas issues as long as the plea was voluntarily, knowingly, and intelligently made. *Tollett v Henderson* (1973) 411 US 258, 36 L Ed 2d 235, 93 S Ct 1602; *McMann v Richardson* (1970) 397 US 759, 25 L Ed 2d 763, 90 S Ct 1441; *U.S. v Montilla* (9th Cir 1989) 870 F2d 549, amended by *U.S. v Montilla* (9th Cir 1990) 907 F2d 115 (guilty plea generally waives pre-plea constitutional violations). For discussion of voluntariness as an issue on federal habeas corpus, see §13.49. However, if state law permits a defendant to plead guilty without forfeiting his or her state right to judicial review of specified constitutional issues, then the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. *Lefkowitz v Newsome* (1975) 420 US 283, 43 L Ed 2d 196, 95 S Ct 886. For issues that may be appealed after guilty plea under California law, see §1.14-1.15. For procedures applicable to guilty plea appeals in California state courts, see §§1.11-1.15, 2.8.

Jurisdictional claims not waived by a guilty plea include:

- Federal constitutional claims of double jeopardy (see *Menna v New York* (1975) 423 US 61, 46 L Ed 2d 195, 96 S Ct 241; but see *U.S. v Broce* (1989) 488 US 563, 574, 102 L Ed 2d 927, 938, 109 S Ct 757 (guilty plea waived double jeopardy claim when defendant could not prove claim without introducing new evidence));
- Claims challenging the constitutionality of the statute underlying the conviction (*Journigan v Duffy* (9th Cir 1977) 552 F2d 283, 287; *Mercado v Rockefeller* (2d Cir 1974) 502 F2d 666, 672; *Gesicki v Oswald* (SD NY 1971) 336 F Supp 365, 374 n3); and
- Claims challenging the power of the state to bring the defendant into court to answer the charges (*Blackledge v Perry* (1974) 417 US 21, 30, 40 L Ed 2d 628, 635, 94 S Ct 2098; *Journigan v Duffy, supra*).

The violation of a plea bargain by the state is a violation of the due process clause of the Fourteenth Amendment that may be raised in a later federal habeas proceeding. *Santobello v New York* (1971) 404 US 257, 30 L Ed 2d 427, 92 S Ct 495; *Brown v Poole* (9th Cir 2003) 337 F3d 1155, 1159 (federal due process protections that apply to state criminal defendants enable defendant to enforce terms of a plea agreement entered in state court in 1986). Due process requires enforcement of the literal terms of the plea agreement once the defendant has performed all of his or her obligations. *U.S. v Packwood* (9th Cir 1988) 848 F2d 1009, 1012; *U.S. v Carrillo* (9th Cir 1983) 709 F2d 35, 37. However, the defendant has no right to specific enforcement of a plea bargain unless a judgment has been entered based on the bargain or the defendant detrimentally relied on it; thus, a breach of the plea agreement before the defendant enters a plea is not a due process violation. *Mabry v Johnson* (1984) 467 US 504, 507, 81 L Ed 2d 437, 442, 104 S Ct 2543. Nor does the defendant have a right to reinstatement of a plea bargain that the state has previously rescinded. *King v Brown* (9th Cir 1993) 8 F3d 1403.

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16

Preparing and Filing Petition

Carolyn Wiggin

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I. REQUIREMENTS

§16.1 A. Use of Form Petition

Postconviction petitions for writs of habeas corpus, whether prepared by counsel or by a prisoner in pro per, must be substantially in the form annexed to the Rules Governing 28 USC §2254 Cases in the United States District Courts (Habeas Rules) or a form prescribed by a local district court rule. Habeas Rule 2(d). The petition must be printed, typewritten, or legibly handwritten and must be signed and sworn to by the petitioner or a person authorized to sign it for the petitioner. Habeas Rule 2(c).

NOTE: Habeas Rules are found in Rules Governing 28 USC §2254 Cases in the United States District Courts. See Appendix B.

The following local rules of the federal district courts in California specify the form requirements for noncapital habeas petitions: CD Cal Local R 83-16.1; ED Cal Local R 190; ND Cal Habeas Local R 2254-3(d)-(e); SD Cal Local R HC.2(b). Only the Central District now requires petitioners represented by counsel to use the locally prescribed form. The Northern and Southern Districts permit the filing of court-issued petitions as well as forms that contain all the information required by the court's form. ND Cal Habeas Local R 2254-3(d). SD Cal Local R HC.2(b).

NOTE: Locally prescribed forms may have significant space limitations. If the space is inadequate to address sophisticated or complex legal issues, a petitioner may attach extra pages to the form and may also file a memorandum of points and authorities in support of the petition.

A district court should construe a prisoner's pro se pleading as a habeas petition to the extent that it seeks habeas-type relief, although the prisoner might have designated the petition as something other than a habeas corpus petition, such as a federal civil rights action. *Tyler v U.S.* (9th Cir 1991) 929 F2d 451; *Tucker v Carlson* (9th Cir 1991) 925 F2d 330.

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§16.2 B. Obtaining Forms

Form petitions for writs of habeas corpus are available from the clerks of the various federal district courts. The addresses and telephone numbers of the clerks' offices in California are listed in §13.5. The form petitions are free. Habeas Rule 2(d).

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§16.3 C. Content

Under Habeas Rule 2(c), habeas petitions must:

- Specify all grounds for relief that are available to the petitioner;
- State the facts supporting each ground; and
- State the relief requested.

Applications for writs of habeas corpus must allege the facts concerning the applicant's commitment or detention and the name of the person who has custody over him or her and by virtue of what claim or authority, if known. The application may be amended or supplemented as provided in the rules of procedure applicable to civil actions. If addressed to the United States Supreme Court, a justice of that Court, or a circuit judge, the application must state the reasons for not making application to the district court of the district in which the applicant is held. 28 USC §2242.

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§16.4 D. Verification

Applications for writs of habeas corpus must be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his or her behalf. 28 USC §2242; Habeas Rule 2(c) (requiring habeas petitions to be signed under penalty of perjury). A district court has the discretion to dismiss or refuse to file unverified petitions or instead to disregard the defect and address the merits of the petition. *Hendricks v Vasquez* (9th Cir 1990) 908 F2d 490. Therefore, petitioners who do not use the official form should be sure to verify their petitions. For discussion of the verification of habeas petitions, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §11.7b (5th ed 2005).

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II. PROPER PARTIES

§16.5 A. Petitioner or "Next Friend"

Under Habeas Rule 2(c), the habeas petition must be signed under penalty of perjury by the petitioner or by a person authorized to sign the petition for the petitioner by 28 USC §2242. Section 2242 provides that the petition may be "signed and verified by the person for whose relief it is intended or by someone acting in his or her behalf," *i.e.*, a "next friend." Next friends may be close relatives (*Davis v Austin* (ND Ga 1980) 492 F Supp 273, 275) or legal representatives (*Lenhard v Wolff* (1979) 443 US 1306, 61 L Ed 2d 885, 100 S Ct 3). See also *Warren v Cardwell* (9th Cir 1980) 621 F2d 319, 321 n1.

Even though permissible under 28 USC §2242, "next friend" petitions should be used only if there is no other alternative. See, *e.g., Whitmore v Arkansas* (1990) 495 US 149, 161, 109 L Ed 2d 135, 149, 110 S Ct 1717 (habeas corpus "next friend" standing limited to cases in which (1) person detained is prevented by inaccessibility or disability from bringing petition, and (2) next friend is truly dedicated to best interests of person on whose behalf he or she seeks to litigate); *Wilson v Dixon* (9th Cir 1958) 256 F2d 536 (when next friend signs petition, reason why procedure is necessary and identity of next friend must be made clear to court). A "next friend" petition may be necessary due to the youth or legal incompetency of the person on whose behalf the "next friend" is acting (*Demosthenes v Baal* (1990) 495 US 731, 734, 109 L Ed 2d 762, 767, 110 S Ct 2223; *Vargas v Lambert* (9th Cir 1998) 159 F3d 1161 (mother of prisoner sentenced to death had standing as next friend to seek stay of execution to allow for hearing on prisoner's competency)) or to the urgency of the filing deadline (*Davis v Austin* (ND Ga 1980) 492 F Supp 273, 275).

For further discussion of "next friend" petitions, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §8.3 (5th ed 2005).

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§16.6 B. Respondent

The petition must also allege the name of the person who has custody of the petitioner. 28 USC §2242; Habeas Rule 2(a). See *Rumsfeld v Padilla* (2004) 542 US 426, 159 L Ed 2d 513, 124 S Ct 2711. The California Penal Code suggests that the proper respondent for both state and federal habeas petitions filed by California inmates is the Director of Corrections and Rehabilitation, not the warden of the institution in which the inmate happens to be confined. See Pen C §§1202a (state prisoners are committed to the custody of the Director of Corrections and Rehabilitation), 5054 (Director retains custody of state prisoners). The Ninth Circuit, however, has held that both the warden of a California prison and the Director of Corrections and Rehabilitation have the power to produce a prisoner and that either is a proper respondent. *Ortiz-Sandoval v Gomez* (9th Cir 1996) 81 F3d 891. But see *Bridges v Chambers* (7th Cir 2005) 425 F3d 1048 (questioning continuing validity of *Ortiz-Sandoval* in light of *Rumsfeld*). Given the widespread misperception that the warden is a proper person to name as respondent, and doubts about the continuing validity of *Ortiz-Sandoval*, in the Ninth Circuit it is prudent to name both the warden and the Director of Corrections. See, *e.g., Stanley v California Supreme Court* (9th Cir 1994) 21 F3d 359.

NOTE: It is to an inmate's advantage to include the Director of Corrections and Rehabilitation as respondent because (1) in the event that he or she is transferred to a new institution or released on parole, the inmate will not have to change the name of the respondent, and (2) the respondent is the person ordered to release a successful habeas petitioner and, if the inmate is transferred to a new institution or released on parole, the named warden may no longer have custody.

If the petitioner is currently in custody in another jurisdiction but in the future will be subject to custody under a pending California judgment against which he or she seeks relief, the proper respondents are (1) the warden or chief penal officer having present custody of petitioner in the other jurisdiction, *and* (2) the California Attorney General. See Habeas Rule 2(b).

The failure to allege the petitioner's custodian as the respondent deprives the court of personal jurisdiction over the petitioner's custodian, but it does not deprive the court of subject matter jurisdiction over the petition. *Smith v Idaho* (9th Cir 2004) 392 F3d 350. Unlike subject matter jurisdiction, lack of personal jurisdiction can be waived. 392 F3d at 355. See also *Rumsfeld v Padilla* (2004) 542 US 426, 451, 159 L Ed 2d 513, 538, 124 S Ct 2711 (Kennedy, J., concurring).

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III. FILING THE PETITION

§16.7 A. Jurisdiction and Venue

A habeas corpus petition may be filed either in the federal judicial district in which the petitioner is in custody or in the federal district where the state sentencing court is located. Both courts have concurrent jurisdiction to entertain the application and may transfer the application to the other district court for hearing and determination. 28 USC §2241(d). As a practical matter, California district courts ordinarily transfer habeas petitions to the district court that has venue over the county in which the state court imposed sentence. This practice promotes the availability of witnesses as well as state court records. However, such a transfer also causes delay in the court's consideration of the merits of a habeas petition; thus, it is advisable for the petitioner to file the petition in the district in which the sentencing court is located.

A prisoner need not be located within the district for the district court to have habeas jurisdiction. Under 28 USC §2241, subject matter jurisdiction to issue a writ of habeas corpus exists in the court of the district where the prisoner is confined and in any other court having personal jurisdiction over the custodian. *Braden v 30th Judicial Circuit Court of Kentucky* (1973) 410 US 484, 35 L Ed 2d 443, 93 S Ct 1123. See also *Subias v Meese* (9th Cir 1987) 835 F2d 1288, 1289 (federal court in Kentucky had jurisdiction over habeas petition by Alabama prisoner seeking relief against Kentucky, which had filed detainer against him); *Hassain v Johnson* (9th Cir 1986) 790 F2d 1420; *U.S. v Giddings* (9th Cir 1984) 740 F2d 770, 772; *Huante v Craven* (9th Cir 1974) 500 F2d 1004, 1006. The Ninth Circuit, however, has created an exception to this rule by holding that there is no jurisdiction when a prisoner is only temporarily confined in the district where the petition is filed. *Miller v Hambrick* (9th Cir 1990) 905 F2d 259, 262. But see *Francis v Rison* (9th Cir 1990) 894 F2d 353, 354 (if jurisdiction exists at time of filing, later transfer of prisoner out of district or circuit does not destroy jurisdiction). For discussion of the proper forum for a habeas action, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, chap 10 (5th ed 2005).

If a habeas petition is filed in a district lacking jurisdiction over it, that district court may transfer it to a district having jurisdiction rather than dismiss it, if the court finds that transferring the case is in the interest of justice. 28 USC §1631; *Miller v Hambrick,* 905 F2d at 262. Factors the court may consider in determining whether the transfer would be in the interests of justice include whether the case would be time-barred if it were dismissed; whether filing it in the wrong district was in good faith; and whether a "peek at the merits" indicates that the petition is not "clearly doomed." *Haugh v Booker* (10th Cir 2000) 210 F3d 1147, 1150.

Individual circuit judges have concurrent original jurisdiction with district courts to issue habeas corpus writs. 28 USC §2241(a). An original petition addressed to a circuit judge must state the reasons for not petitioning the district court. Because ordinarily this petition will be transferred to the appropriate district court, filing a petition with a circuit judge will only delay consideration of its merits. 28 USC §§2241(b), 2242; Fed R App P 22(a). The final order of a circuit judge on an original habeas corpus petition can be appealed to the court of appeals. 28 USC §2253.

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§16.8 B. Separate Petitions

A petition for habeas corpus relief is limited to claims arising out of the judgment or judgments of a single state court. To challenge the judgment or judgments of a second state court (*e.g.,* in a different county), it is necessary to file a separate habeas petition. Habeas Rule 2(e); *Bianchi v Blodgett* (9th Cir 1991) 925 F2d 305. Both petitions, however, could be filed in the district of confinement. 925 F2d at 308 n3.

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§16.9 C. Where to File; Copies

A habeas corpus petition must be filed in the office of the clerk of the district court. Ordinarily, it must be accompanied by two conformed copies. Habeas Rule 3(a). However, petitioners should check local rules for prescribed filing instructions. For example, the Northern District requires pro se petitioners to file only the original, while petitioners represented by counsel must file the original and one copy (ND Cal Local R 2554-3(g)).

All federal district courts in California now require attorneys to file pleadings and other documents using the "Case Management/Electronic Case Files" ("CM/ECF") filing system unless a special exemption is obtained. In the Eastern District of California, both petitions and all subsequent filings are to be done electronically. ED Cal Local R 133(a). In other districts, pleadings that initiate a case (*e.g.,* the petition) must be filed in paper and, perhaps, electronically as well. CD Cal Local R 3-2 (originally paper, then by e-mail within 24 hours); ND Cal General Order 45(V)(A) (originally paper, then e-mail filed within 10 days); SD Cal Electronic Case Filing Administrative Policies and Procedures Manual §2(c) (paper only). In all districts, attorneys must file all subsequent documents electronically. Pro se litigants are not required to use the CM/ECF system.

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IV. FEES

§16.10 A. In General

A habeas corpus petition must be accompanied by the prescribed filing fee unless the petitioner applies for and is granted leave to prosecute the petition in forma pauperis. Habeas Rule 3(a). For discussion regarding in forma pauperis status, see §§16.11 and 16.13. In addition to a filing fee, there may be other associated costs in a habeas corpus action, including fees for marshals, witnesses, printing, depositions, and transcripts. See 28 USC §1915(b)-(c); Habeas Rule 6(c).

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§16.11 B. Requests for In Forma Pauperis Status

A federal court may authorize a federal habeas corpus action without prepayment of fees if it receives an affidavit requesting to proceed in forma pauperis. There is no clear-cut monetary limit for proceeding in forma pauperis; one need not be absolutely destitute. *Jefferson v U.S.* (9th Cir 1960) 277 F2d 723. Whether to grant the request to proceed in forma pauperis is within the discretion of the district court. *O'Loughlin v Doe* (9th Cir 1990) 920 F2d 614, 616. The affidavit must state (28 USC §1915(a)):

- The nature of the action, defense, or appeal;
- The assets that the petitioner possesses;
- Why the petitioner is entitled to relief; and
- That the petitioner is unable to pay the filing fees.

The affidavit must be accompanied by a certificate from the place in which the petitioner is incarcerated showing how much money he or she has on deposit. Habeas Rule 3(a). Because district courts vary somewhat on the standards and information required for an in forma pauperis request, a petitioner should check the local rules governing such requests. For a copy of the Declaration in Support of a Request to Proceed In Forma Pauperis used in the Central District, see §16.16.

In addition to excusing filing fees, the federal district court must order the state to produce pertinent parts of the state court record, including the trial transcripts, when the habeas petitioner is challenging the sufficiency of the evidence supporting a state court factual determination and cannot produce the pertinent parts of the record due to his or her indigency. 28 USC §2254(f); *Austad v Risley* (9th Cir 1985) 761 F2d 1348. On a petitioner's right to receive copies of federal court documents without cost, see 28 USC §2250; 9th Cir R 30-3; *U.S. v Connors* (9th Cir 1990) 904 F2d 535.

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§16.12 V. DEFECTIVE OR FRIVOLOUS PETITIONS

If the petition fails to comply with the requirements of Habeas Rule 2, the court must accept the petition for filing but it can require the petitioner to submit a corrected petition that conforms to Habeas Rule 2(c). Advisory Notes to 2004 Amendment to Habeas Rule 2; Habeas Rule 3(b). If the court finds that the petition is frivolous, it must dismiss the petition. Habeas Rule 4.

However, if the petition is deficient because it is "mixed," *i.e.,* contains both exhausted and unexhausted claims, the petitioner should ask the court to dismiss only the unexhausted claims and hold the remaining claims in abeyance until the petitioner has had an opportunity to return to state court to exhaust state remedies on the unexhausted claims. See *King v Ryan* (9th Cir 2009) 564 F3d 1133, 1140. On a showing of good cause, the district court can also stay the mixed petition and hold it in abeyance while the petitioner exhausts the unexhausted claims in state court, and then lift the stay once the petition has finished exhausting the claims in state court. See *Rhines v Weber* (2005) 544 US 269, 161 L Ed 2d 440, 125 S Ct 1528. For further discussion, see §§14.35-14.36.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/16 Preparing and Filing Petition/§16.13 VI. PREFILING REVIEW OF IN FORMA PAUPERIS ACTIONS [Deleted]

§16.13 VI. PREFILING REVIEW OF IN FORMA PAUPERIS ACTIONS [Deleted]

The material in this section has been deleted.

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§16.14 VII. CHECKLIST: STEPS IN PREPARING AND FILING FEDERAL HABEAS CORPUS PETITION

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

- *Where to obtain the petition*
- Petitions are available free from any district court clerk and should be available in prison law libraries. Petitioner should write the court clerk's name on the envelope. The addresses of the courts are in §13.5. There are some variations in the forms among the district courts. A sample federal habeas corpus petition is reproduced in §16.15.
- *Preparing the petition*
- Only federal constitutional and statutory issues may be raised. See §§13.28-13.84.
- Sufficient facts must be alleged in support of each claim. See 28 USC §2242 (application for writ of habeas corpus "shall allege the facts concerning the applicant's commitment or detention"); Habeas Rule 2(c); *Boehme v Maxwell* (9th Cir 1970) 423 F2d 1056, 1058; *Schlette v California* (9th Cir 1960) 284 F2d 827, 833.
- The federal issues being raised must already have been presented adequately to the highest state court available. On exhaustion of state remedies, see generally §§14.18-14.40.
- The defendant must be "in custody" as that term is defined for purposes of habeas, which may include situations other than incarceration. See §§14.2-14.7.
- *Proper parties*
- The prisoner applying for habeas relief is the petitioner.
- The warden of the state institution in which the petitioner is incarcerated, or the Director of Corrections and Rehabilitation, is normally the respondent. See §16.6.
- *Requesting counsel and in forma pauperis status*
- A request by a prisoner for appointment of counsel to assist in preparing a petition for writ of habeas corpus will almost certainly be denied. The better practice is for the prisoner to prepare and file a petition accompanied by a request for counsel to be appointed. The prisoner should be specific about the reasons why counsel is necessary. For discussion of when appointment of counsel is mandatory, see §§13.10-13.11. For a sample form, see §13.16.
- The prisoner should fill out the request for in forma pauperis status that is at the end of the petition. See the sample in §16.16.
- *Where to file the petition*
- The habeas petition should be filed in the federal district in which the petitioner was convicted. Petitions may also be filed in the federal district in which the petitioner is confined, but such petitions are normally transferred after a delay to the district of conviction (see §16.7 on venue). The addresses of the federal district courts located in California, and counties within them, are listed in §13.5. The envelope should be addressed to the court clerk. If the petition is denied, the prisoner then files a notice of appeal in district court, which initiates an *appeal* of the denial of the habeas petition in the Ninth Circuit. See discussion in chap 18. If the federal district court fails to take any action for more than 1 year, petitioner may consider filing a petition for a writ of mandamus in the Ninth Circuit Court of Appeals to compel the court to act. See 28 USC §1361. For further discussion of mandamus, see Wright, Miller, Cooper & Struve, 16AA Federal Practice and Procedure §§3967-3967.1 (4th ed 2008).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/16 Preparing and Filing Petition/ VIII. FORMS/§16.15 A. Form: Petition for Writ of Habeas Corpus by a Person in State Custody (Central District)

VIII. FORMS

§16.15 A. Form: Petition for Writ of Habeas Corpus by a Person in State Custody (Central District)

NAME

PRISON IDENTIFICATION/BOOKING NO.

ADDRESS OR PLACE OF CONFINEMENT

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FULL NAME (*Include name under which you were convicted*)

Petitioner,

v.

NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

CV _____
To be supplied by the Clerk of the United States District Court

☐ _____ **AMENDED**

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION _____

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT (*List by case number*)

CV _____

CV _____

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.

2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.

3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.

5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

5. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.

6. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

Print

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:

1. ☐ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue
   a. Place of detention _____
   b. Place of conviction and sentence _____

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked).*
   a. Nature of offenses involved *(include all counts)*: _____
   b. Penal or other code section or sections: _____
   c. Case number: _____
   d. Date of conviction: _____
   e. Date of sentence: _____
   f. Length of sentence on each count: _____
   g. Plea *(check one)*:
      ☐ Not guilty
      ☐ Guilty
      ☐ Nolo contendere
   h. Kind of trial *(check one)*:
      ☐ Jury
      ☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☐ Yes ☐ No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: _____
   b. Grounds raised *(list each)*:
      (1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

c. Date of decision: _____

d. Result _____

_____

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☐ Yes ☐ No

If so give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

a. Case number: _____

b. Grounds raised *(list each)*:

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

c. Date of decision: _____

d. Result _____

_____

5. If you did not appeal:

a. State your reasons _____

_____

_____

_____

_____

b. Did you seek permission to file a late appeal? ☐ Yes ☐ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☐ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

Print

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

c. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

7. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: _____

_____

(1) Supporting FACTS: _____

_____

_____

_____

_____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

b. Ground two: _____

_____

(1) Supporting FACTS: _____

_____

_____

_____

_____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

c. Ground three: _____

_____

(1) Supporting FACTS: _____

_____

_____

_____

_____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

d. Ground four: _____

_____

(1) Supporting FACTS: _____

_____

_____

_____

_____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

e. Ground five: _____

_____

(1) Supporting FACTS: _____

_____

_____

_____

_____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

Print

8. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: _____

_____

_____

9. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☐ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

Print

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

10. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☐ No

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

11. Are you presently represented by counsel? ☐ Yes ☐ No

If so, provide name, address and telephone number: _____

_____

_____

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding,

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____

Date *Signature of Petitioner*

Copies: On filing the petition, see §16.9.

Comment: This form provides the basic information that is required in a petition for habeas corpus before the federal courts. Although similar information is required by each federal district court, each form is different and petitioners should use the appropriate federal district court form for their district. See Habeas Rule 2(c)-(d).

Copies of current forms are available, free of charge, in the court clerk's office in the appropriate district. Local rules ordinarily specify the number of copies each district requires to be filed.

A pro se petitioner may wish to file the following documents along with the habeas petition: a request for the appointment of counsel (see §13.16), and a request to proceed in forma pauperis (see §16.16).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/16 Preparing and Filing Petition/§16.16 B. Form: Declaration in Support of Request to Proceed In Forma Pauperis (Central District)

§16.16 B. Form: Declaration in Support of Request to Proceed In Forma Pauperis (Central District)

_____
Petitioner

_____
Respondent(s)

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? ☐ Yes ☐ No

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. _____

   _____

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. _____

2. Have you received, within the past twelve months, any money from any of the following sources?

   a. Business, profession or form of self-employment? ☐ Yes ☐ No

   b. Rent payments, interest or dividends? ☐ Yes ☐ No

   c. Pensions, annuities or life insurance payments? ☐ Yes ☐ No

   d. Gifts or inheritances? ☐ Yes ☐ No

   e. Any other sources? ☐ Yes ☐ No

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: _____

   _____

   _____

3. Do you own any cash, or do you have money in a checking or savings account? *(Include any funds in prison accounts)*

   ☐ Yes ☐ No

   If the answer is yes, state the total value of the items owned: _____

   _____

Print

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? *(Excluding ordinary household furnishings and clothing)* ☐ Yes ☐ No

   If the answer is yes, describe the property and state its approximate value: _____

   _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: _____

   _____

   _____

I, declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____

Date *Signature of Petitioner*

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: _____

_____

_____

_____ _____

Date *Authorized Officer of Institution/Title of Officer*

Comment: Although similar information is required by each federal district court, each form is different and petitioners

should use the appropriate federal district court form for their district. See Habeas Rule 2(c)-(d). Copies of current forms are available, free of charge, in the court clerk's office in the appropriate district.

This form consists of the last two pages of the form petition for habeas corpus. For discussion of in forma pauperis requests, see §16.11.

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17

Hearing and Determination of Petition

I. ASSIGNMENT OF CASE TO JUDGE OR MAGISTRATE
- A. Related Case Rule §17.1
- B. Temporary Unavailability of Assigned Judge §17.2
- C. Related Class Actions §17.3
- D. Referral to Magistrate §17.4

II. INITIAL CONSIDERATION OF PETITION
- A. Prompt Disposition Requirement §17.5
- B. Summary Dismissal §17.6
- C. Order to Show Cause §17.7

III. STATE'S RESPONSE
- A. Motion to Dismiss §17.8
- B. Answer to Petition §17.9
- C. Motion for Summary Judgment §17.10
- D. Service and Filing §17.11
- E. Default Judgment Not Available §17.12

IV. PETITIONER'S REPLY §17.13

V. DISTRICT COURT PROCEEDINGS
- A. Expansion of Record §17.14
- B. Discovery §17.15
- C. Determination of Facts
  - 1. Affidavits or Declarations in Place of Evidentiary Hearing §17.16
  - 2. Evidentiary Hearings Under AEDPA §17.17
    - a. Determining Whether Evidentiary Hearing Is Required When Petitioner Has Been Diligent in Attempting to Develop the Factual Record §17.18
    - b. Determining Whether Evidentiary Hearing Is Required When Petitioner Has Failed to Use Diligence in Attempting to Develop the Factual Record §17.19
  - 3. Independent Review of Record If No Evidentiary Hearing Is Held §17.20
  - 4. Burden to Provide Record to Support Factual Allegations §17.21
  - 5. Presumption of Correctness of State Court Fact Finding §17.22
  - 6. Determination of Merits of Petitioner's Claim for Relief
    - a. Did State Court Err Under Clearly Established Constitutional Law? §17.23
    - b. Harmless Error
      - (1) Generally §17.24
      - (2) Types of Error §17.25
      - (3) Harmless-Error Determination §17.26
      - (4) Examples of Harmless Error §17.27
      - (5) Examples of Prejudicial Error §17.28
    - c. Conduct of Evidentiary Hearing
      - (1) Generally §17.29
      - (2) Applicable Rules §17.30
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VI. DISPOSITION
- A. Writ Denied §17.32
- B. Writ Granted; Conditional Release §17.33
- C. Res Judicata Effect of District Court's Habeas Decision §17.34

VII. FORMS
- A. Form: Motion to Dismiss §17.35
- B. Form: Reply to Answer §17.36
- C. Form: Order to Show Cause §17.37

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I. ASSIGNMENT OF CASE TO JUDGE OR MAGISTRATE

§17.1 A. Related Case Rule

Judges and magistrates are ordinarily assigned habeas cases by the clerk's office in a random manner. Under the "related case rule," however, new cases that are related to a pending or closed case may be transferred to the judge who heard the prior case. Local rules specify what is necessary for cases to be related. See, *e.g.,* ND Cal Local R 3-12(a) (actions concern substantially same parties, property, transaction or event, and it appears likely that there will be unduly burdensome duplication of labor and expense or conflicting results if cases are conducted before different judges); SD Cal Local R 40.1(f) (related actions involve some of the same parties and the same or similar claims; the same property, transaction, or event; or substantially the same facts and the same questions of law).

In the Northern District, whenever a party knows or learns or believes that it is possible that an action filed in or removed to the district is related to an action that is or was pending in the district, the party must promptly file in the earliest-filed case an administrative motion to consider whether the cases should be related under ND Cal Local R 7-11. ND Cal Local R 3-12(b). See also ND Cal Local R 3-12(d). Also, a judge who believes that a case pending before him or her is related to another case may sua sponte refer the case to the judge assigned to the earliest-filed case with a request that that judge consider whether the cases are related. The referring judge must file and send a copy of the referral to all parties to all affected cases. ND Cal Local R 3-12(c). The parties may file motions in opposition or support. See ND Cal Local R 3-12(c) and 3-12(e).

If the judge assigned to the earliest-filed case decides that the cases are not related, no change in case assignment will be made. When there are more than two potentially related cases, the clerk must submit the order to the judges assigned to the other cases in order of filing with a form of order to decide within 10 court days whether the cases are related. If no judge relates any of the remaining cases, no change in case assignment will be made. If any judge decides that any of the cases are related, the clerk must reassign all related later-filed cases to that judge and notify the parties and the affected judges accordingly. See ND Cal Local R 3-12(f).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/17 Hearing and Determination of Petition/§17.2 B. Temporary Unavailability of Assigned Judge

§17.2 B. Temporary Unavailability of Assigned Judge

In the event that a judge assigned to a case later becomes unavailable, the matter is either referred to the judge acting as the general duty judge, or another judge is chosen to fill in.

NOTE: Assuming that a case has not yet been heard by the unavailable judge and that the replacement judge has had to take a substantial amount of action on the case, such as dealing with discovery motions, it is possible that the replacement judge would be willing to keep the case for all purposes.

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§17.3 C. Related Class Actions

A judge other than the assigned judge might handle a habeas case if the case is a class action. For example, if the same attorney represents clients with petitions pending in separate districts and those petitions contain related issues, he or she might consider expanding one of the actions into a class action and naming both clients as class members. This procedure is especially recommended if the judge in one of the districts appears more likely to grant favorable relief.

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§17.4 D. Referral to Magistrate

In many cases, instead of hearing a habeas petition himself or herself, a district court judge will refer the petition to a United States magistrate for further action. A magistrate has the authority to conduct an evidentiary hearing, make proposed findings of fact, and issue a report and recommendation for the disposition of the petition. 28 USC §636(b)(1)(B); Habeas Rule 8(b); *Ballard v Estelle* (9th Cir 1991) 937 F2d 453. The district judge retains the final power to decide the case de novo, however, and on objection by a party can accept, reject, or modify the magistrate's findings and recommendations. 28 USC §636(b)(1)(C); Habeas Rule 8(b).

NOTE: Habeas Rules are found in Rules Governing 28 USC §2254 Cases in the United States District Courts. See also Appendix B.

To obtain review by the district court judge, a party must file written objections to the magistrate judge's findings of fact and law within 14 days of being served with a copy of the magistrate's report. 28 USC §636(b)(1); Habeas Rule 8(b). In *U.S. v Reyna-Tapia* (9th Cir 2003) 328 F3d 1114, the Ninth Circuit, sitting en banc, ruled that de novo review of both the factual findings and the legal conclusions of the magistrate is required only on objection, impliedly overruling *Barilla v Ervin* (9th Cir 1989) 886 F2d 1514, 1518, in which the court had held that de novo review of the magistrate judge's legal conclusions was required even if no party filed objections. See *Schmidt v Johnstone* (D Ariz 2003) 263 F Supp 2d 1219, 1225. Note that in *Dawson v Marshall* (9th Cir 2009) 561 F3d 930, 933, the Ninth Circuit found no violation of law when a district court judge reviewed a habeas petition on which he had previously made findings and recommendations as a magistrate.

When a party has filed objections to the magistrate's factual findings, the district court must at a minimum review the evidence that was presented to the magistrate and the transcript or tape recording of the relevant portions of any proceedings held before the magistrate. *U.S. v Remsing* (9th Cir 1989) 874 F2d 614, 617; *Spaulding v Univ. of Washington* (9th Cir 1982) 676 F2d 1232, 1235; *Orand v U.S.* (9th Cir 1979) 602 F2d 207, 208. It is insufficient for the district court to review only the magistrate's report and recommendation. *U.S. v Remsing* (9th Cir 1989) 874 F2d 614, 618. In its discretion, the district court may also hold a de novo evidentiary hearing. 28 USC §636(b)(1)(C). On magistrate judge practice generally, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, chap 18 (5th ed 2005).

In addition to the magistrate procedure authorized by 28 USC §636(b), the magistrate with the consent of the parties can act as the final decision maker and conduct all proceedings in the case. 28 USC §636(c); Fed R Civ P 73(a)-(b). See *Pacemaker Diagnostic Clinic of Am., Inc. v Instromedix, Inc.* (9th Cir 1984) 725 F2d 537; *Alaniz v California Processors, Inc.* (9th Cir 1982) 690 F2d 717, 719. The parties can appeal the magistrate's judgment in a §636(c) proceeding either directly to the Ninth Circuit or to the district court. 28 USC §636(c)(4)-(5); Fed R Civ P 73(c)-(d); *U.S. v Foumai* (9th Cir 1990) 910 F2d 617.

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II. INITIAL CONSIDERATION OF PETITION

§17.5 A. Prompt Disposition Requirement

Habeas Rule 4 provides that a petition for a writ of habeas corpus challenging a state court conviction must be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The district court may, but is not required to, consider timeliness when ruling on a state prisoner's habeas petition. *Day v McDonough* (2006) 547 US 198, 209, 164 L Ed 2d 376, 126 S Ct 1675. On assignment of case, see §§17.1-17.4. The petition must then be promptly examined by the judge to whom it is assigned. Habeas Rule 4. See also *Ruby v U.S*. (9th Cir 1965) 341 F2d 585, 587. Despite this directive, in reality habeas petitions are often the lowest priority items on the docket.

If no action has been taken on a habeas petition for 6 months, the petitioner has the following options:

(1) Write to the assigned judge or the clerk of court, or both, requesting the "prompt" disposition mandated by Habeas Rule 4. If a satisfactory response is not forthcoming, the petitioner faces a dilemma—whether to do nothing and wait or to try to force action, possibly antagonizing the judge. Most observers conclude that it is unlikely that insisting that action be taken would cause the judge to change his or her disposition of the case.

(2) File a petition for a writ of mandamus in the Ninth Circuit. A mandamus petition, however, is extremely unlikely to be granted. For discussion of mandamus relief generally, see Wright, Miller, Cooper & Struve, 16AA Federal Practice and Procedure (4th ed 2008). The petitioner could also try a less drastic alternative such as writing a letter to the chief judge of the particular district court and appending a copy of his or her earlier letter to the assigned judge. This could be especially effective if the petition has been awaiting action in the office of the prisoner petitions attorney (Northern District) or writ clerk (Eastern District), both of whom work under the direction of the chief judge. Even if another judge is responsible for the delay, it is possible that the chief judge would informally mention the matter to his or her colleague.

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§17.6 B. Summary Dismissal

Habeas Rule 4 provides that, if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge must make an order for its summary dismissal and notify the petitioner of the dismissal. Habeas Rule 4. A district court can summarily dismiss a habeas corpus petition before the state has answered only when the allegations are vague or conclusory, palpably incredible, or patently frivolous or false. *Hendricks v Vasquez* (9th Cir 1990) 908 F2d 490.

A habeas petition must contain allegations of specific facts supporting the claims for relief that it contains; "notice" pleading is insufficient. *O'Bremski v Maass* (9th Cir 1990) 905 F2d 281, 283; *Wacht v Cardwell* (9th Cir 1979) 604 F2d 1245. If the allegations of a pro se petition are too conclusory to state a claim, the preferred procedure is for the district court to dismiss it with leave to amend, pointing out the deficiencies. *James v Giles* (9th Cir 2000) 221 F3d 1074, 1077; *Jarvis v Nelson* (9th Cir 1971) 440 F2d 13, 14; *Pembrook v Wilson* (9th Cir 1966) 370 F2d 37, 39 n4. A habeas corpus petition may be amended or supplemented in the manner provided for civil actions in the Federal Rules of Civil Procedure. 28 USC §2242; *Noll v Carlson* (9th Cir 1987) 809 F2d 1446, 1448.

NOTE: When the district court dismisses, for *any* procedural deficiency, a petition filed in forma pauperis by a pro se litigant, the petitioner is entitled to an informed opportunity to amend the petition unless it clearly appears from the petition "that the deficiency cannot be overcome by amendment." *James v Giles* (9th Cir 2000) 221 F3d 1074, 1077, quoting *Noll v Carlson*, *supra*.

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§17.7 C. Order to Show Cause

The respondent is not required to respond to a habeas corpus petition unless the district court determines that the petition states a prima facie case for relief. If the court concludes that the petition does state a prima facie case for relief, the court must order the state to file an answer, motion, or other response and fix a time for the state's response. Habeas Rule 4. This is typically done by means of an order to show cause. For a sample order to show cause, see §17.37.

The respondent in a habeas corpus proceeding is the person who has custody of the petitioner. See §§16.6, 17.9. In California, the respondent is ordinarily represented by the Attorney General. The respondent may, and often does, respond to the order to show cause by filing a motion to dismiss petition instead of an answer. See *White v Lewis* (9th Cir 1989) 874 F2d 599, 603.

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III. STATE'S RESPONSE

§17.8 A. Motion to Dismiss

A motion to dismiss may be based on any ground that would require dismissal of the petition without reaching the merits. Common grounds for dismissal include the time bar imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214), failure to exhaust state remedies, procedural default, and the bar on second or successive petitions. These and other restrictions on the right to federal habeas corpus are discussed in chap 15.

Motions must be in writing, must state the grounds "with particularity," and must specify the relief sought. Fed R Civ P 7(b)(1). They must comply with the form and formatting requirements applicable to pleadings and be signed. Fed R Civ P 7(b)(2). See Fed R Civ P 10, 11.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/17 Hearing and Determination of Petition/§17.9 B. Answer to Petition

§17.9 B. Answer to Petition

An answer must respond to the allegations of the petition. Under Habeas Rule 5, the respondent must state whether any claim in the petition is barred by any of the following:

- Failure to exhaust state remedies;
- A procedural bar;
- Nonretroactivity; or
- A statute of limitations.

NOTE: In practice, if one of these grounds for denying relief without reaching the merits of the petitioner's claim exists, the respondent will ordinarily file a motion to dismiss, and only file an answer to the petition if the motion to dismiss is denied.

The answer to the petition must also state what transcripts of pretrial, trial, and posttrial proceedings are available and when they can be furnished, and what proceedings have been recorded but not transcribed.

In addition, the respondent must attach the following documents:

- All relevant portions of the transcripts;
- Any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;
- Any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and
- The opinions and dispositive orders of the appellate court relating to the conviction or the sentence. Habeas Rule 5.

When the respondent has raised any asserted reasons for denying the petition on procedural grounds in a motion to dismiss, the answer typically either controverts the facts stated in the petition, or argues that even if the facts stated in the petition are true, the petitioner is not entitled to relief on legal grounds. In an appropriate case, the answer may argue both factual and legal grounds for denying the petition.

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§17.10 C. Motion for Summary Judgment

Summary judgment is available in habeas corpus, as it is in other civil proceedings. *Blackledge v Allison* (1977) 431 US 63, 80, 52 L Ed 2d 136, 151, 97 S Ct 1621. See, *e.g., Earp v Ornoski* (9th Cir 2005) 431 F3d 1158, 1166. Summary judgment for the respondent is appropriate when the evidence produced by petitioner is not sufficient to support the claim for relief or when the respondent can present evidence conclusively showing that there is no triable issue of material fact. *Williams v Calderon* (CD Cal 1998) 48 F Supp 2d 979, 988. Summary judgment for respondent may also be appropriate when it is possible for the court to determine from the record that the claimed error did not have a "substantial and injurious effect" on the judgment as required by *Brecht v Abrahamson* (1993) 507 US 619, 637, 123 L Ed 2d 353, 373, 113 S Ct 1710. *Williams,* 48 F Supp 2d at 995.

On summary judgment, the facts alleged in each party's affidavits are presumed to be true. If the issues cannot be resolved without making credibility determinations, the case is inappropriate for resolution on summary judgment. *Earp*, 432 F3d at 1170.

A motion for summary judgment is typically filed in conjunction with the answer.

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§17.11 D. Service and Filing

A motion to dismiss, an answer to the petition, or a motion for summary judgment must be served on the petitioner, or if the petitioner is represented by counsel, on the petitioner's attorney. Fed R Civ P 5(a)-(b).

Service by mail is acceptable, and is complete on mailing. Fed R Civ P 5(b)(2)(B). Local rules may permit electronic service with prior written consent of the party. See Fed R Civ P 5(b)(2)(E). The motion or answer must be filed with the court within "a reasonable time" after service. Fed R Civ P 5(d). They may be filed electronically if local rule permits. Fed R Civ P 5(e).

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§17.12 E. Default Judgment Not Available

The state's failure to file a timely response to the order to show cause does not entitle the petitioner to relief. *Gordon v Duran* (9th Cir 1990) 895 F2d 610, 612. If the state fails to respond, the court should consider the evidence in support of the petition and may grant relief on the merits only if the evidence warrants it. *Bermudez v Reid* (2d Cir 1984) 733 F2d 18, 21.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/17 Hearing and Determination of Petition/§17.13 IV. PETITIONER'S REPLY

§17.13 IV. PETITIONER'S REPLY

The petitioner may submit a reply to the state's answer or other pleading within a time fixed by the judge. Habeas Rule 5(e). If the petitioner does not reply to the state's answer to the petition for writ of habeas corpus, the factual allegations in the answer will be found true except to the extent that the judge finds to the contrary from the evidence. 28 USC §2248. Therefore, even though the reply is not a mandatory pleading, the petitioner should ordinarily file a reply to the answer. For sample form, see §17.36.

NOTE: Petitioners should consult the local rules regarding habeas practice for guidance in this area.

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V. DISTRICT COURT PROCEEDINGS

§17.14 A. Expansion of Record

If a habeas petition is not dismissed summarily (see §17.6), the judge may direct that the record be expanded by the parties by the inclusion of additional materials relating to the petition. Habeas Rule 7(a).

The expanded record may include letters predating the filing of the petition, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge, and the state court trial record. Affidavits or declarations may be submitted and considered as a part of the record. Habeas Rule 7(b). For discussion of the use of affidavits and declarations in lieu of evidentiary hearings, see §17.16.

If the court directs an expanded record, copies of the proposed documents must be submitted to the opposing party, who must be provided an opportunity to admit or deny their correctness. Habeas Rule 7(c). The court may require that the proposed documents be authenticated. Habeas Rule 7(a).

Expansion of the record under Habeas Rule 7, like ordering an evidentiary hearing, requires the court to determine whether the petitioner exercised diligent efforts to develop the factual basis of his or her claims in the state court proceedings. *Holland v Jackson* (2004) 542 US 649, 159 L Ed 2d 683, 124 S Ct 2736; *Cooper-Smith v Palmateer* (9th Cir 2005) 397 F3d 1236, 1241. If the court finds that the petitioner failed to develop the facts in state court and that the failure was the result of a lack of diligence on the part of the petitioner, the district court may not order expansion of the record unless the requirements of 28 USC §2254(e)(2) (discussed in §17.17) are met.

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§17.15 B. Discovery

Although the broad discovery provisions of the Federal Rules of Civil Procedure do not apply in habeas cases, a party in a habeas proceeding may request the district court to order discovery, and may be entitled to invoke the discovery provisions of the Federal Rules of Civil Procedure on a showing of good cause. Habeas Rule 6(a). See *Harris v Nelson* (1969) 394 US 286, 295, 22 L Ed 2d 281, 288, 89 S Ct 1082. Good cause for discovery may be shown by "specific allegations" that provide reason to believe that if the facts are "fully developed," the petitioner may be entitled to relief. *Harris*, 394 US at 299, 22 L Ed 2d at 291. See *Bracy v Gramley* (1997) 520 US 899, 908, 138 L Ed 2d 97, 106, 117 S Ct 1793.

Although discovery requests most frequently are made after the court grants an evidentiary hearing, the court may order discovery before ordering an evidentiary hearing. Advisory Committee Note to Habeas Rule 6; *Harris,* 394 US at 300, 22 L Ed 2d at 291. Indeed, in some situations, discovery might render an evidentiary hearing unnecessary. Advisory Committee Note to Habeas Rule 6; *Blackledge v Allison* (1977) 431 US 63, 81, 52 L Ed 2d 136, 151, 97 S Ct 1621. See *Jones v Wood* (9th Cir 1997) 114 F3d 1002, 1009 (discovery available to habeas petitioners whether or not evidentiary hearing is contemplated).

If necessary for the effective utilization of discovery, counsel may be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 USC §3006A. Habeas Rule 6(a). On appointment of counsel, see §§13.10-13.16.

Discovery motions must be accompanied by any proposed interrogatories or requests for admissions and a list of any documents sought to be produced. Habeas Rule 6(b).

The respondent may request leave to take the deposition of the petitioner or other individuals who submit declarations in support of the habeas corpus petition. If the respondent is granted leave to take the deposition of the petitioner or any other person, the judge may, as a condition of taking it, direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition. Habeas Rule 6(c).

Denial of a discovery request under Habeas Rule 6(a) is reviewed for abuse of discretion. A district court abuses its discretion in denying a request for Rule 6(a) discovery if it is shown that discovery is essential to enable the habeas petitioner to develop fully his or her underlying claim. *Dung The Pham v Terhune* (9th Cir 2005) 400 F3d 740, 741.

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C. Determination of Facts

§17.16 1. Affidavits or Declarations in Place of Evidentiary Hearing

If additional facts are necessary for a court's determination of a federal habeas petition, and the existing facts are undisputed, the court may, for reasons of judicial economy, prefer the submission of affidavits (or declarations under 28 USC §1746) to an evidentiary hearing. There is a strong tendency among federal judges to avoid evidentiary hearings if more expeditious, less costly methods of resolving the dispute are available.

The use of affidavits is ordinarily within the discretion of the judge. 28 USC §2246; Habeas Rule 7(b). For example, when it is necessary to explain trial counsel's reasons for adopting a particular course of action to dispose of an ineffective assistance allegation, there is no need for an evidentiary hearing if trial counsel provides an affidavit and both sides agree that the additional facts are as stated in the affidavit. On expansion of the record, see §17.14; on ineffective assistance of counsel claims, see §§13.34-13.35.

Affidavits cannot ordinarily replace an evidentiary hearing when there are disputed facts and the resolution of those facts depends on the court's credibility determination. *Earp v Ornoski* (9th Cir 2005) 431 F3d 1158, 1169. But see *Watts v United States* (9th Cir 1988) 841 F2d 275, 277 (in "rare instances," documentary evidence and evidence in record may conclusively resolve credibility issue). On summary judgment, see §17.10.

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§17.17 2. Evidentiary Hearings Under AEDPA

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214), with two narrow exceptions, the federal district court may not order an evidentiary hearing on a petitioner's claim if it finds that the petitioner has failed to develop the factual basis for the claim in state court. 28 USC §2254(e)(2). The use of the word "failed" in this context, connotes fault on the part of the petitioner. Thus, the mere fact that the record was not developed in state court proceedings does not trigger the requirements of 28 USC §2254(e)(2). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v Taylor* (2000) 529 US 420, 432, 146 L Ed 2d 435, 449, 120 S Ct 1479; see *Baja v Ducharme* (9th Cir 1999) 187 F3d 1075, 1078.

The Ninth Circuit has explained as follows the procedure a district court should follow under AEDPA in deciding whether to hold an evidentiary hearing:

> Under the amended statutory scheme, a district court presented with a request for an evidentiary hearing… must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court." If so, the court must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in §2254(e)(2)(A) & (B). If, on the other hand, the applicant has not "failed to develop" the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under *Townsend* [*v Sain* (1963) 372 US 293, 312, 9 L Ed 2d 770, 785, 83 S Ct 745].

Baja v Ducharme (9th Cir 1999) 187 F3d 1075, 1078, quoting from *Cardwell v Greene* (4th Cir 1998) 152 F3d 331, 337, overruled on another ground in *Bell v Jarvis* (4th Cir 2000) 236 F3d 149, 160. See also *Jones v Wood* (9th Cir 1997) 114 F3d 1002, 1012.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/17 Hearing and Determination of Petition/§17.18 a. Determining Whether Evidentiary Hearing Is Required When Petitioner Has Been Diligent in Attempting to Develop the Factual Record

§17.18 a. Determining Whether Evidentiary Hearing Is Required When Petitioner Has Been Diligent in Attempting to Develop the Factual Record

If the petitioner was diligent in attempting to establish the factual basis for a claim in state court, and the district court cannot determine the merits of the petition without further factual development, the court uses the standards set forth in *Townsend v Sain* (1963) 372 US 293, 313, 9 L Ed 2d 770, 785, 83 S Ct 745, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 4, 118 L Ed 2d 318, 326, 112 S Ct 1715, to decide whether an evidentiary hearing is required. A habeas petitioner is entitled to an evidentiary hearing on a showing of one of the following:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

372 US at 313, 9 L Ed 2d at. 785. See also *Earp v Ornoski* (9th Cir 2005) 431 F3d 1158, 1167; *Insyxiengmay v Morgan* (9th Cir 2005) 403 F3d 657, 669.

As a general rule, when the petitioner meets the AEDPA threshold and the petition raises a colorable claim for relief that rests on a credibility determination, the court should not deny the petition without an evidentiary hearing. See, *e.g., Earp v Ornoski* (9th Cir 2005) 431 F3d 1158, 1169 (district court abused discretion in denying habeas petition without evidentiary hearing when petitioner raised colorable claim of prosecutorial misconduct that was supported by witness's affidavit).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/17 Hearing and Determination of Petition/§17.19 b. Determining Whether Evidentiary Hearing Is Required When Petitioner Has Failed to Use Diligence in Attempting to Develop the Factual Record

§17.19 b. Determining Whether Evidentiary Hearing Is Required When Petitioner Has Failed to Use Diligence in Attempting to Develop the Factual Record

Under 28 USC §2254(e)(2), if a petitioner fails to develop the factual basis of a claim in state court, a federal court may *not* hold an evidentiary hearing unless the petitioner shows that:

- The facts underlying the claim would show by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense; *and*
- The claim relies on
- A new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that previously was unavailable; *or*
- A factual predicate that could not have been discovered previously by due diligence.

NOTE: The language used in 28 USC §2254(e)(2)—"new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"—to describe circumstances that will excuse the petitioner from developing the factual basis for the claim in state court is identical to the language used to describe circumstances that will permit the court to consider a successive petition. See 28 USC §2244(b)(2)(A). In *Tyler v Cain* (2001) 533 US 656, 150 L Ed 2d 632, 642, 121 S Ct 2478, the high Court construed this phrase, ruling that "made" means "held." Thus, "the requirement is satisfied only if this Court has ruled that the new rule is retroactively applicable to cases on collateral review." *Tyler v Cain, supra.* A similar phrase is used in 28 USC §2244(d)(1)(C) in reference to the AEDPA limitations period.

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§17.20 3. Independent Review of Record If No Evidentiary Hearing Is Held

If a district court denies the habeas petition without an evidentiary hearing and if the petition raises questions of fact or mixed questions of fact and law that, if resolved in favor of the petitioner, would entitle him or her to relief, the district court must independently review all relevant portions of the state court record in deciding the merits of the petitioner's claims. *Reiger v Christensen* (9th Cir 1986) 789 F2d 1425, 1428; *Richmond v Ricketts* (9th Cir 1985) 774 F2d 957, 961; *Johnson v Lumpkin* (9th Cir 1985) 769 F2d 630, 636. See also *Ballard v Estelle* (9th Cir 1991) 937 F2d 453. The court in *Jones v Wood* (9th Cir 1997) 114 F3d 1002, 1013, held that

> the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA [Antiterrorism and Effective Death Penalty Act of 1996 (Pub L 104-132, 110 Stat 1214)]. Without such a review of the record, it is impossible to determine whether the state court adjudication rested on an "unreasonable application" of clearly established federal law or an "unreasonable determination" of fact.

Review of the state court record is unnecessary if a petition raises only purely legal questions. *Chaney v Lewis* (9th Cir 1986) 801 F2d 1191, 1194.

The district court must make specific findings and conclusions on the petitioner's assertions that state a claim for relief in order to show that it has independently reviewed the record. *Lincoln v Sunn* (9th Cir 1987) 807 F2d 805, 808. If it is not clear that the district court has examined all relevant parts of the state court record before denying the petition, the Ninth Circuit on appeal may remand the case to the district court. See, *e.g., Reiger v Christensen* (9th Cir 1986) 789 F2d 1425, 1428; *Patterson v Warden* (9th Cir 1980) 624 F2d 69. The statement by a district court that "for the reasons set forth in the California Court of Appeal's thorough opinion, the petition is dismissed," indicated that federal court review of the record was limited to a reading of the state court appellate opinion and was therefore inadequate. *Hamilton v Vasquez* (9th Cir 1989) 882 F2d 1469, 1472 n2.

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§17.21 4. Burden to Provide Record to Support Factual Allegations

Under 28 USC §2254(f), a petitioner challenging the sufficiency of the evidence to support any factual determination made by the state court must produce the part of the record that supports the claim or show that he or she is not able to produce it. See *Chaney v Lewis* (9th Cir 1986) 801 F2d 1191, 1194; *Austad v Risley* (9th Cir 1985) 761 F2d 1348, 1353. If the petitioner provides a satisfactory reason for not producing the record, the respondent is required to produce the record. Indigency may be a valid reason for being unable to produce the record. 28 USC §2254(f).

Although in cases involving disputed facts, the burden is on the petitioner to produce the relevant portions of the record, the burden is not a heavy one. *Reiger v Christensen* (9th Cir 1986) 789 F2d 1425, 1435 n7. Under Habeas Rule 5(c), "[t]he answer must… indicate what transcripts… are available, when they can be furnished, and what proceedings have been recorded but not transcribed." Portions of the transcript that the respondent deems relevant must be attached to the answer. In addition, the district court may order the respondent to provide other parts of existing transcripts or to furnish transcriptions of untranscribed recordings. Habeas Rule 5(c).

If the petition requires resolution of a mixed question of fact and law, the district court must order the entire state court record sua sponte and review the relevant portions. *Hamilton v Vasquez* (9th Cir 1989) 882 F2d 1469, 1471; *Ruff v Kincheloe* (9th Cir 1988) 843 F2d 1240. A district court does not need to order the state court record to determine purely legal questions because it is unnecessary to review the record to decide these questions. *Chaney v Lewis* (9th Cir 1986) 801 F2d 1191, 1194.

NOTE: It appears that these pre-AEDPA cases are still good law. See, *e.g., Watkins v Waddington* (9th Cir 2004) 106 Fed Appx 582, 583 (unpublished opinion).

The district court must independently review relevant portions of the record before denying a habeas corpus petition. See, *e.g., Chaney v Lewis* (9th Cir 1986) 801 F2d 1191, 1193.

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§17.22 5. Presumption of Correctness of State Court Fact Finding

Under 28 USC §2254(e)(1), when the state court has adjudicated a claim on the merits, federal court review of the state court's findings of fact is limited to the question of whether the state court made an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 USC §2254(d)(2). A state court's factual determination is not automatically unreasonable simply because the federal court would have reached a different conclusion. *Wood v Allen* (2010) ___ US ___, 175 L Ed 2d 738, 747, 130 S Ct 841.The federal court may not "second-guess" the state court's fact-finding process unless, on review of the state court record, it determines that the state court was not merely wrong, but actually unreasonable. *Taylor v Maddox* (9th Cir 2004) 366 F3d 992, 999. The presumption that the state court's factual findings are correct may only be rebutted by clear and convincing evidence. 28 USC §2254(e)(1); *Torres v Prunty* (9th Cir 2000) 223 F3d 1103.

To warrant setting aside the presumption of correctness given to a state trial court's factual findings on federal habeas review, the facts left undeveloped by the state court must be material, not trivial or tangential to the issue presented; missing facts must be crucial, vital, or indispensable to a fair, rounded development of the material facts. For example, in one case, a state court's finding regarding the impartiality of a juror was not entitled to a presumption of correctness on habeas review, because the state trial judge failed to conduct further investigation into the juror's alleged bias. There was a material possibility that the state judge would have found that the juror was not impartial had he considered all the facts readily available to him. *Dyer v Calderon* (9th Cir 1998) 151 F3d 970, 976. Other cases in which the Ninth Circuit concluded that the state court made an unreasonable determination of fact include *Ali v Hickman* (9th Cir 2009) 584 F3d 1174, 1193 (comparative juror analysis along with other facts demonstrated purported race-neutral reasons for peremptory jury strikes were pretextual and court of appeal's contrary conclusion was not only incorrect but unreasonable); *Juan H. v Allen* (9th Cir 2005) 408 F3d 1262 (no reasonable fact-finder could find that petitioner aided and abetted first-degree murder); *Taylor v Maddox* (9th Cir 2004) 366 F3d 992 (state court conclusion that 16-year-old's confession was voluntary was objectively unreasonable); and *McClain v Prunty* (9th Cir 2000) 217 F3d 1209, 1220 (trial court's factual finding that defendant had not made out prima facie case of intentional racial discrimination in jury selection was unreasonable in light of seriously disproportionate number of black prospective jurors excluded by prosecutor).

NOTE: It is unclear how §2254(e)(1) is intended to operate in conjunction with 28 USC §2254(d)(2). The latter section states that a federal court can overturn a state court's decision only if it made fact findings that were unreasonable in light of the evidence presented in the state court proceeding. This seems clear, until construed in conjunction with §2254(e)(1), which provides that a state's fact findings are presumed correct and that a petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. This apparent discrepancy may be the result of poor drafting or may stem from the different objectives of the two sections.

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6. Determination of Merits of Petitioner's Claim for Relief

§17.23 a. Did State Court Err Under Clearly Established Constitutional Law?

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214), described in §13.2, a state postconviction petitioner can obtain federal habeas relief with respect to any claim that was adjudicated on the merits in state court proceedings only if the adjudication of the claim resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 USC §2254(d)(1)-(2). These provisions of the Act apply only to cases filed after AEDPA became effective, not to pending noncapital cases. *Lindh v Murphy* (1997) 521 US 320, 327, 138 L Ed 2d 481, 488, 117 S Ct 2059.

In *Williams v Taylor* (2000) 529 US 362, 146 L Ed 2d 389, 410, 120 S Ct 1495, the Supreme Court elaborated for the first time on the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court," holding that the inquiry is similar to the inquiry into whether a legal rule is a "new rule" under *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060. See §§13.37-13.40. The only difference is that the source of clearly established law is limited to decisions of the Supreme Court. *Williams v Taylor, supra*. The requirement that the legal rule petitioner relies on be clearly established does not, however, mean that the controlling precedent setting forth the rule must have arisen in factual circumstances identical to the petitioner's. 489 US at 384 (federal courts retain their "independent obligation to say what the law is"). See also *Duhaime v Ducharme* (9th Cir 1999) 200 F3d 597, 601.

For a discussion of how *Teague* and AEDPA overlap, see Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff L Rev 381, 414 (1996).

The Supreme Court also elaborated in *Williams* on what it means for a state court decision to be "contrary to" or an "unreasonable application of" clearly established Supreme Court law (*Williams v Taylor* (2000) 529 US 362, 406, 146 L Ed 2d 389, 120 S Ct 1495):

> A state-court decision will certainly be contrary to our clearly established precedent if the state court [(1)] applies a rule that contradicts the governing law set forth in our cases… [or (2)] confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Two subsequent decisions provide an additional gloss on these phrases. See *Early v Packer* (2002) 537 US 3, 154 L Ed 2d 263, 123 S Ct 362 (Ninth Circuit erred in finding that state court's decision was contrary to established federal law); *Woodford v Visciotti* (2002) 537 US 19, 154 L Ed 2d 279, 123 S Ct 357 (Ninth Circuit erred in finding that state court's decision was both contrary to, and entailed unreasonable application of, established federal law).

A state court's decision (*Williams v Taylor* (2000) 529 US 362, 407, 146 L Ed 2d 389, 120 S Ct 1495)

> involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case… [or] either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

The pertinent question is "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v Taylor* (2000) 529 US 362, 409, 146 L Ed 2d 389, 120 S Ct 1495. Although the term "objectively unreasonable" does not have a precise definition, it means something more than "clear error." *Lockyer v Andrade* (2003) 538 US 63, 155 L Ed 2d 144, 123 S Ct 1166, overruling *Tuan Van Tran v Lindsey* (9th Cir 2000) 212 F3d 1143, 1152. The clear error standard does not give enough deference to state courts. *Lockyer v Andrade, supra.* See also *Price v Vincent* (2003) 538 US 634, 155 L Ed 2d 877, 123 S Ct 1848 (state court's determination that defendant's conviction did not violate double jeopardy was not objectively unreasonable, even though guilty verdict was obtained after trial court first granted motion for directed verdict of acquittal and then changed its mind). Whether a

state court's decision was unreasonable must be assessed in light of the record the court had before it. *Holland v Jackson* (2004) 542 US 649, 159 L Ed 2d 683, 124 S Ct 2736; *Miller-El v Cockrell* (2003) 537 US 322, 348, 154 L Ed 2d 931, 957, 123 S Ct 1029.

When the state court decides the claim on the merits but fails to supply the reasoning for its decision, the federal court must independently review the record to determine whether the state court's decision is contrary to Supreme Court law. *Pirtle v Morgan* (9th Cir 2002) 313 F3d 1160. See also *Fisher v Roe* (9th Cir 2001) 263 F3d 906, 914, overruled on other grounds in *Payton v Woodford* (2003) 346 F3d 1204, 1218 n18; *Delgado v Lewis* (9th Cir 2000) 223 F3d 976, 981.

For Ninth Circuit cases applying *Williams v Taylor, supra,* to claims made by state prisoners, see §§13.23-13.27.

In *Sanders v Ryder* (9th Cir 2003) 342 F3d 991, the Ninth Circuit Court of Appeals addressed the standard the federal court must use in reviewing the state court's factual findings. The court found that the California appellate court made an unreasonable determination of the facts when it reversed the trial court's order granting the petitioner's habeas corpus petition, in part because the reviewing court failed to give the requisite weight to the trial court's necessary findings of fact. If a petitioner establishes under 28 USC §2254(d)(2) that the decision of the state court is "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," the petitioner has "of necessity" also rebutted by clear and convincing evidence the presumption of correctness of those findings under §2254(e)(1). *Torres v Prunty* (9th Cir 2000) 223 F3d 1103, 1110 n6 (relief granted).

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b. Harmless Error

§17.24 (1) Generally

The United States Supreme Court has created another substantial barrier to habeas corpus relief by relaxing the harmless error standard applicable to federal habeas corpus actions. *Brecht v Abrahamson* (1993) 507 US 619, 123 L Ed 2d 353, 113 S Ct 1710. See also *Standen v Whitley* (9th Cir 1993) 994 F2d 1417; *McKinney v Rees* (9th Cir 1993) 993 F2d 1378. Before *Brecht,* habeas courts applied the more stringent "harmless beyond a reasonable doubt" standard of review first enunciated in *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, and still applicable to the review of constitutional errors on direct appeal. See also *Yates v Evatt* (1991) 500 US 391, 114 L Ed 2d 432, 111 S Ct 1884, overruled on other grounds in *Estelle v McGuire* (1991) 502 US 62, 72 n4, 116 L Ed 2d 385, 399 n4, 112 S Ct 475; *Arizona v Fulminante* (1991) 499 US 279, 311, 113 L Ed 2d 302, 332, 111 S Ct 1246.

Under the *Brecht* standard, a federal constitutional error is considered harmless unless it had "substantial and injurious effect or influence in determining the jury's verdict" and resulted in actual prejudice. *Brecht v Abrahamson* (1993) 507 US 619, 623, 123 L Ed 2d 353, 113 S Ct 1710. Ninth Circuit precedent places the burden on the respondent to establish that the effect of a federal constitutional error did not have a substantial and injurious effect on the verdict. *Payton v Woodford* (9th Cir 2003) 346 F3d 1204, 1216, rev'd on other grounds in *Brown v Payton* (2005) 544 US 133, 161 L Ed 2d 334, 125 S Ct 1432.

The adoption of a standard of review on federal habeas less rigorous than that applicable to state court review of constitutional errors has given rise to a difference of opinion among the federal circuit courts about what standard of review (*Brecht* or *Chapman*) a federal habeas court should use when federal constitutional error has occurred in petitioner's trial but that error has never been reviewed under the *Chapman* standard, either because the state court did not recognize the error as federal constitutional error or because the state court applied the wrong standard of review.

In *Bains v Cambra* (9th Cir 2000) 204 F3d 964, 977, the Ninth Circuit joined "the vast majority of out sister circuits by deciding that the *Brecht* standard should apply uniformly in all federal habeas corpus cases under §2254." Under this approach, the constitutional error will never be reviewed by any court under the more stringent *Chapman* standard if the state court found no error or found error that it reviewed under the applicable state standard of review. In dictum, *Bains* did suggest that a state court's use of the wrong standard of review "would *permit* a federal district court to grant the habeas corpus petition with the condition that the petition would not be granted if the California Court of Appeal were to reevaluate those errors under the appropriate standard of review." 204 F3d at 975. See also *Jeffries v Wood* (9th Cir 1997) 114 F3d 1484, 1500 (en banc) (state court's requirement that defendant show actual and substantial prejudice from juror misconduct found "contrary to clearly established federal law as determined by the Supreme Court" under AEDPA).

If a state court disposes of a constitutional error as harmless using an appropriate standard of review, the *Brecht* harmless error standard is applied only after the federal court has determined that the state court's harmless error analysis amounted to an unreasonable application of clearly established federal law. *Medina v Hornung* (9th Cir 2004) 386 F3d 872, 877.

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§17.25 (2) Types of Error

There are differing burdens of proof, depending on whether an alleged error is construed by the court as a "trial error," a "structural defect," or a "deliberate and egregious trial error." *Brecht v Abrahamson* (1993) 507 US 619, 123 L Ed 2d 353, 113 S Ct 1710. Habeas relief is available for trial errors if a petitioner was actually prejudiced by a constitutional error that had a substantial and injurious effect or influence in determining the jury's verdict. 507 US at 637, 123 L Ed 2d at 373 (trial errors are amenable to harmless-error analysis because they can be quantitatively assessed in context of other evidence presented to determine effect they had on trial). Examples of trial errors include comments on a defendant's post-*Miranda* silence, the erroneous admission of evidence, improper closing arguments cured by admonitions to the jury, and the admission of a withdrawn guilty plea. See *Arizona v Fulminante* (1991) 499 US 279, 311, 113 L Ed 2d 302, 332, 111 S Ct 1246; *Burks v Borg* (9th Cir 1994) 27 F3d 1424; *Standen v Whitley* (9th Cir 1993) 994 F2d 1417, 1422.

Unlike trial errors, structural defects, or errors that affect the integrity of the entire trial process, require automatic reversal. *Brecht v Abrahamson* (1993) 507 US 619, 123 L Ed 2d 353, 113 S Ct 1710. Structural defects involve the framework within which the trial proceeds, rather than simply an error in the trial process itself. Examples of structural defects include the denial of a defendant's right to counsel, the unlawful exclusion of members of the defendant's race from the jury, the denial of a defendant's right to self-representation at trial, and the denial of a defendant's right to a public trial. *Arizona v Fulminante* (1991) 499 US 279, 331, 113 L Ed 2d 302, 111 S Ct 1246; see *Martinez v Garcia* (9th Cir 2004) 379 F3d 1034 (structural error occurred when jury instructions combined two theories of guilt, one of which was untenable, and it could not be determined on which theory jury convicted).

Deliberate and egregious trial errors, or trial errors that are combined with a pattern of prosecutorial misconduct, may require reversal even if they do not substantially affect the verdict. *Brecht v Abrahamson* (1993) 507 US 619, 638 n9, 123 L Ed 2d 353, 373 n9, 113 S Ct 1710 (error must affect integrity of entire proceeding). It is unclear whether "footnote 9" error requires automatic reversal or is subject to reversal under *Chapman*'s harmless-error standard. *Hardnett v Marshall* (9th Cir 1994) 25 F3d 875, 879, 893 (dictum) ("footnote 9 error" requires automatic reversal).

Ex post facto violations in sentencing are not subject to the *Brecht* standard of harmless error review. The proper relief for an ex post facto violation is remand to permit the state court to apply, if possible, the law in place when the petitioner's crime occurred. *Weaver v Graham* (1981) 450 US 24, 36 n22, 67 L Ed 2d 17, 27 n22, 101 S Ct 960; *Williams v Roe* (9th Cir 2005) 421 F3d 883, 888; *Murtishaw v Woodford* (9th Cir 2001) 255 F3d 926, 967.

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§17.26 (3) Harmless-Error Determination

Under the harmless-error standard, the court must determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v Abrahamson* (1993) 507 US 619, 623, 123 L Ed 2d 353, 113 S Ct 1710. This determination is ordinarily made by reviewing the entire state trial court record as a whole. *Brecht v Abrahamson, supra*; *Delaware v Van Arsdall* (1986) 475 US 673, 681, 89 L Ed 2d 674, 684, 106 S Ct 1431; *U.S. v Hasting* (1983) 461 US 499, 509 n7, 76 L Ed 2d 96, 106 n7, 103 S Ct 1974. If a district court does not have the state court record, it must obtain it sua sponte before it can make a harmless error determination. See *Hart v Stagner* (9th Cir 1991) 935 F2d 1007; *Vicks v Bunnell* (9th Cir 1989) 875 F2d 258.

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§17.27 (4) Examples of Harmless Error

The following errors have been held harmless:

- Failure to instruct that jury had to find that capital defendant was a principal when defendant was only person involved in the crime. *Mitchell v Esparza* (2003) 540 US 12, 157 L Ed 2d 263, 124 S Ct 7.
- District court's failure to hold conference to discuss whether to respond to juror's note regarding probative value of evidence received from juror during deliberations. *U.S. v Barragan-Devis* (9th Cir 1998) 133 F3d 1287, 1290.
- Defendant's absence from jury room during the reading back of a witness's testimony to a deliberating jury. *Turner v Marshall* (9th Cir 1997) 121 F3d 1248.
- Defendant's absence when jury announced sentence. *Rice v Wood* (9th Cir 1996) 77 F3d 1138.
- Juror's statement that he read defendant pleaded guilty and then withdrew plea. *Thompson v Borg* (9th Cir 1996) 74 F3d 1571.
- Court's failure to instruct jury that specific intent to permanently deprive another of his or her property was element of robbery under Hobbs Act was harmless in light of conspiracy conviction. *U.S. v Capati* (SD Cal 1997) 980 F Supp 1114, 1130.
- Trial court's failure to instruct on misdemeanor manslaughter as form of involuntary manslaughter was nonprejudicial because involuntary manslaughter instructions that were given permitted conviction of that offense on other proper theories. *People v Lee* (1999) 20 C4th 47, 82 CR2d 625.

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§17.28 (5) Examples of Prejudicial Error

The following errors have been found to be prejudicial:

- Failure to require jury to find guilt beyond reasonable doubt. *Sullivan v Louisiana* (1993) 508 US 275, 124 L Ed 2d 182, 113 S Ct 2078.
- Visible shackling of defendant during trial. *Rhoden v Rowland* (9th Cir 1999) 172 F3d 633.
- Jury's exposure during voir dire to potential juror's unequivocal and highly prejudicial statement regarding veracity of children asserting claims of sexual abuse. *Mach v Stewart* (9th Cir 1998) 137 F3d 630, 633.
- Prosecutor's striking of minority juror without sufficient justification. *Turner v Marshall* (9th Cir 1997) 121 F3d 1248.
- Defendant's unwaived absence when jury returned death verdict. *Rice v Wood* (9th Cir 1996) 77 F3d 1138.
- Reading back victim's trial testimony to jury without trial judge's approval and outside of his presence. *Riley v Deeds* (9th Cir 1995) 56 F3d 1117, 1120. But see *U.S. v Arnold* (9th Cir 2001) 238 F3d 1153, 1155 (trial judge's absence from read back to be evaluated on case-by-case basis).
- Instructional error that permitted jurors to convict on legally erroneous theory of liability. *Suniga v Bunnell* (9th Cir 1993) 998 F2d 664.
- Failure to notify defendant adequately of nature and cause of charges. *Sheppard v Rees* (9th Cir 1990) 909 F2d 1234.
- Improper denial of right of self-representation. *Savage v Estelle* (9th Cir 1990) 908 F2d 508.

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c. Conduct of Evidentiary Hearing

§17.29 (1) Generally

Although federal law authorizes evidentiary hearings on petitions for habeas corpus (28 USC §2243 (court must summarily hear and determine facts, and dispose of matter as law and justice requires)), a petitioner has no right to a jury trial in a habeas proceeding (*O'Keith v Johnston* (9th Cir 1942) 129 F2d 889). At these evidentiary hearings, the federal district court takes testimony and determines the facts anew in a trial-like proceeding.

A district court judge may designate a magistrate to conduct evidentiary hearings on applications for post-trial relief made by individuals convicted of criminal offenses and to submit proposed findings of fact and recommendations for the disposition of the matter to the judge. 28 USC §636(b)(1)(B); Habeas Rule 8(b); *Hinman v McCarthy* (9th Cir 1982) 676 F2d 343, 346. For discussion of magistrates generally, see §§17.1-17.4.

Habeas Rule 8 sets forth certain guidelines and requirements for the conduct of federal habeas corpus hearings. This rule authorizes:

- Magistrates to conduct evidentiary hearings and submit proposed findings of fact and recommendations for disposition;
- Parties to file written objections to the proposed findings and recommendations within 14 days after being served; and
- Judges to make de novo determinations of those portions of the findings or recommendations to which a party objects, and to accept, reject, or modify any findings or recommendations made by the magistrate.

When an evidentiary hearing is ordered, Habeas Rule 8(c) provides for the mandatory appointment of counsel to represent petitioners who meet the requirements of 18 USC §3006A(g), as well as the prompt initiation of proceedings, while allowing counsel for both parties adequate time to investigate and prepare. For discussion of appointed counsel, see §§13.10-13.16.

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§17.30 (2) Applicable Rules

The Federal Rules of Evidence apply in habeas corpus proceedings. Fed R Evid 1101(a)-(b), (e); *Spain v Rushen* (ND Cal 1982) 543 F Supp 757, 776 n17, rev'd on other grounds (1983) 464 US 114, 78 L Ed 2d 267, 104 S Ct 453. The district court, when appropriate, can also apply the Federal Rules of Civil Procedure in habeas corpus proceedings. Habeas Rule 12; Fed R Civ P 81(a)(4). However, Fed R Civ P 33, granting the right to *discovery* by means of interrogatories, is not literally applicable to habeas corpus proceedings. Instead, district courts may fashion discovery procedures suitable for particular circumstances. *Harris v Nelson* (1969) 394 US 286, 295, 22 L Ed 2d 281, 288, 89 S Ct 1082. For discussion of discovery in habeas corpus proceedings, see §17.15.

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§17.31 (3) Petitioner's Right to Participate in Habeas Corpus Evidentiary Hearing

The petitioner has the right to be present at a federal habeas corpus evidentiary hearing unless only issues of law will be addressed at the hearing. 28 USC §2243. Therefore, whenever it is likely that an in-court proceeding will result in the court's taking evidence, counsel should insist that the petitioner be present. The petitioner's presence is important because it illustrates to the court that the case does not just involve abstract rules of law and disembodied facts, but rather is a proceeding to determine the liberty of a human being. For this reason the petitioner should sit at the counsel table during the proceeding. For discussion of the petitioner's right to be present at an evidentiary hearing, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §21.3 (5th ed 2005).

Counsel should ensure that any physical restraints on the petitioner be reasonable, that such restraints do not in any way hinder the petitioner's ability to consult with counsel, and that the petitioner is actually and regularly consulted during the hearing. If problems arise after the petitioner is delivered by state authorities to federal authorities (*i.e.,* transportation, meals, or housing), counsel should address them to the United States Marshal's Office and, if necessary, the court.

Court-appointed investigators are not automatically provided once an evidentiary hearing has been ordered on a habeas petition. They may be provided if the facts and circumstances of a case demonstrate the need for these services. *Mason v Arizona* (9th Cir 1974) 504 F2d 1345. Title 18 USC §3006A(e) grants appointed counsel the ability to request investigative services by way of ex parte application (18 USC §3006A(e)(1)) and to obtain necessary investigative services up to $300, without prior authorization but subject to later review (18 USC §3006A(e)(2)). Habeas petitioners and counsel representing petitioners should consult local rules regarding investigation costs.

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VI. DISPOSITION

§17.32 A. Writ Denied

If the district court finds against the petitioner, it denies the petition and the petitioner remains in state custody.

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§17.33 B. Writ Granted; Conditional Release

Ordinarily, when the district court grants a writ of habeas corpus, the proper remedy is to order the prisoner's release at the end of a fixed period of time unless the state has corrected the constitutional error—usually by retrial. See *Herrera v Collins* (1993) 506 US 390, 122 L Ed 2d 203, 113 S Ct 853; *Gardner v Pitchess* (9th Cir 1984) 731 F2d 637, 640 (release alone, not order dismissing charges and barring retrial, is ordinarily extent of proper habeas relief). This remedy is appropriate because the power of the writ of habeas corpus is the power to order the prisoner released from detention, not the power to vacate or revise the state court judgment that authorizes detention. *Fay v Noia* (1963) 372 US 391, 9 L Ed 2d 837, 83 S Ct 822, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 5, 118 L Ed 2d 318, 326, 112 S Ct 1715.

Federal courts, however, have broad discretion in conditioning a judgment granting release. *Hilton v Braunskill* (1987) 481 US 770, 95 L Ed 2d 724, 107 S Ct 2113. Thus, when a petition for habeas corpus is granted, relief usually takes the form of an order that the prisoner be released if the state has not retried him or her within a fixed period, often 60 to 120 days. *Gardner v Pitchess* (9th Cir 1984) 731 F2d 637, 640.

The traditional relief ordered for constitutional violations in a sentencing, appeal, or other posttrial proceeding is a release order conditional on a new sentencing hearing, appeal, or other posttrial proceeding, rather than a new trial. *North Carolina v Pearce* (1969) 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072, overruled on other grounds in *Alabama v Smith* (1989) 490 US 794, 801, 104 L Ed 2d 865, 873, 109 S Ct 2201 (affirmed district court order directing that unconstitutionally sentenced prisoner be released unless resentenced within 60 days); *Dowd v U.S. ex rel Cook* (1951) 340 US 206, 210, 95 L Ed 215, 219, 71 S Ct 262 (prisoner who was unconstitutionally denied right to appeal ordered released unless state allowed him an appeal within reasonable time).

When the constitutional error is one that has effectively denied the petitioner the right to a state court direct appeal or the right to counsel on a state court direct appeal, the proper remedy in a habeas corpus proceeding is to grant the writ subject to the state appellate court's grant of a new appeal to the petitioner. *Hendricks v Zenon* (9th Cir 1993) 993 F2d 664; *Hunt v Vasquez* (9th Cir 1990) 899 F2d 878, 880.

NOTE: A district court has authority to modify a conditional writ to give the state more time to take remedial measures, even after the original deadline has passed. *Harvest v Castro* (9th Cir 2008) 531 F3d 737, 744. Any such modification is governed by the habeas rules and the federal rules of civil procedure, including Fed R Civ P 60, 531 F3d at 745. If the state fails to comply with the writ's conditions and cannot demonstrate it deserves relief under the habeas rules or Fed R Civ P 60, the prisoner must be released. 531 F3d at 750.

NOTE: On occasion, the Ninth Circuit has contemplated or ordered that a petition for habeas corpus be "remanded" to state court as a form of relief. *Conde v Henry* (9th Cir 1999) 198 F3d 734; *Cuffle v Goldsmith* (9th Cir 1990) 906 F2d 385; *Chizen v Hunter* (9th Cir 1987) 809 F2d 560, 563; *Carter v McCarthy* (9th Cir 1986) 806 F2d 1373, 1377; *Kennick v Superior Court* (9th Cir 1984) 736 F2d 1277, 1283; *Evans v Raines* (9th Cir 1983) 705 F2d 1479, 1480. In the author's opinion, these decisions are erroneous and represent a fundamental misunderstanding of the nature of habeas corpus. Because a federal habeas corpus case does not originate in state court, it is impossible to remand it to state court. The federal court's only power is to order the prisoner's release, a power it ordinarily exercises conditionally subject to the state's retrial of the prisoner.

On relief, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, chap 33 (5th ed 2005).

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§17.34 C. Res Judicata Effect of District Court's Habeas Decision

Once it becomes final, a district court's judgment granting habeas corpus relief is res judicata. It must be enforced despite any intervening change in the applicable law that renders it erroneous, even if the relief granted (*e.g.,* future annual parole hearings) will continue into the future. *Clifton v Attorney General* (9th Cir 1993) 997 F2d 660. A federal court judgment in a habeas corpus action can also have res judicata effect in a later 42 USC §1983 action. *Hawkins v Risley* (9th Cir 1993) 984 F2d 321, 323.

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VII. FORMS

§17.35 A. Form: Motion to Dismiss

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_ _[*Name of attorney*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name(s)*]_ _, **Petitioner(s)**	)	**Civil Action No. _ _ _ _ _ _**
vs	)	
_ _[*Name(s)*]_ _, **Respondent**	)	

RESPONDENT'S MOTION TO DISMISS PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

Respondent hereby moves to dismiss petitioner's petition for a writ of habeas corpus on the ground that _ _[*e.g., the petitioner has failed to exhaust state remedies, the petition was filed more than 1 year after the date of finality of the state court judgment, and no exception to the limitations period set forth in 28 USC §2244(d)(1) permits filing after the 1-year grace period*]_ _**. Respondent submits the following points and authorities in support of this motion to dismiss.**

STATEMENT OF FACTS

[*State facts that support the claim that the petition should be dismissed without a decision on the merits*]

ARGUMENT

[*State legal basis for dismissal*]

CONCLUSION

For the foregoing reasons, petitioner's petition for writ of habeas corpus should be dismissed.

Date: _ _ _ _ _ _

_ _[*Name*]_ _
Attorney General, State of California

_ _[*Name*]_ _
Assistant Attorney General

__[*Signature*]__
_ _[*Name*]_ _
Deputy Attorney General

Attorney for Respondent
_ _[*name*]_ _

Copies: Original and one copy (filed with federal district court clerk with proof of service); one copy for service on each attorney of record and each unrepresented party; one office copy.

Comment: In appropriate cases, a motion to dismiss may be filed instead of an answer after issuance of an order to show cause. It is good practice to include a footnote in the motion to dismiss noting that if the court denies the motion to dismiss, respondent will address the merits of the petitioner's claims at that time.

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§17.36 B. Form: Reply to Answer

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_ _[*Name of attorney or pro se party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name*]_ _, **Petitioner**	)	**No. _ _ _ _ _ _**
	)	
	)	**REPLY TO ANSWER TO**
vs	)	**PETITION FOR WRIT OF**
	)	**HABEAS CORPUS; POINTS**
_ _[*Name*]_ _, **Respondent**	)	**AND AUTHORITIES**
	)	
_____	)	

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REPLY TO ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

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_ _[*Name of attorney or pro per party*]__

_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name*]_ _,	)	**No. _ _ _ _ _ _**
Petitioner	)	
	)	**REPLY TO ANSWER TO**
vs	)	**PETITION FOR WRIT OF**
	)	**HABEAS CORPUS**
_ _[*Name*]_ _,	)	
Respondent	)	
_____	)	

_ _[*Name of petitioner*]_ _, Petitioner, makes this Reply to Respondent's Answer to _ _[*his/her*]_ _ Petition for Writ of Habeas Corpus and alleges as follows:

1. Paragraph Number _ _ _ of Respondent's Answer is untrue because it alleges that Petitioner's custody is lawful and proper;

2. Paragraph Number _ _ _ of Respondent's Answer is not true;

3. Paragraph Number _ _ _ of Respondent's Answer is not true;

4. Paragraph Number _ _ _ of Respondent's Answer is not true;

5. Petitioner incorporates by reference and resubmits _ _[*his/her*]_ _ Petition for Writ of Habeas Corpus as if fully set forth herein; and

6. Petitioner also incorporates by reference the Memorandum of Points and Authorities and exhibits to _ _[*his/her*]_ _ Petition _ _[*and this Reply*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature of attorney or pro per petitioner*]__
_ _[*Typed name*]_ _

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POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

I

[*ARGUMENT HEADING*]

[*Text of legal argument and factual dispute. Make certain that facts were previously alleged in petition itself*]

Copies: Original and one copy (filed with federal district court clerk with proof of service); one copy for service on Attorney General, each attorney of record, each unrepresented party; one copy for client; one office copy.

Comment: The reply must be accompanied by a proof of service. For sample proof of service, see §13.22. In the Northern District, a memorandum of points and authorities is filed with the petition; in the Central District, however, it is filed with the reply, also referred to as the traverse. Petitioners should familiarize themselves with the local rules in their district's governing habeas procedure.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/17 Hearing and Determination of Petition/§17.37 C. Form: Order to Show Cause

§17.37 C. Form: Order to Show Cause

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[*Title of court*]

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER TO SHOW CAUSE**
_____	)	

Based on the petition filed herein and good cause appearing: IT IS ORDERED

(1) That respondent file an answer with this Court conforming in all respects to Habeas Rule 5, following Title 28 United States Code §2254, on or before _ _[*date*]_ _, to show cause, if there is any, why a writ of habeas corpus should not be issued;

(2) That the Clerk of this Court immediately serve by certified mail

(a) A copy of the order and a copy of the petition on respondent and on respondent's counsel, the Attorney General of the State of California, and

(b) A copy of this order on petitioner;

(3) That respondent serve a copy of the answer on petitioner before filing the answer with the Court;

(4) That, if petitioner files a response to the answer, this response shall be lodged with the Court and served on respondent's counsel no later than _ _[*date*]_ _;

(5) That respondent file with the answer a copy of all portions of reporter's transcript (a) relevant to determination of the issues presented by the petition, and (b) that have already been transcribed and reduced to typewritten or printed form;

(6) That respondent appear in person or by counsel before the Court on _ _[*date*]_ _, at _ _[*time*]_ _, to complete compliance with the Order to Show Cause.

Date: _ _ _ _ _ _ __[*Signature*]__
United States District Judge

Copies: Original and one copy (filed with federal district court clerk with proof of service); one copy for service for Attorney General, each attorney of record, each unrepresented party; one copy for client; one office copy.

Comment: In some federal district courts, the judge prepares the order to show cause; however, it is better practice to submit a prepared order to show cause with the petition. Petitioners and attorneys should consult the local rules of court for the required procedure and form.

Paragraph (6) of the above order to show cause form provides for a hearing on the order. Hearings on orders to show cause are ordinarily only attended by the government; incarcerated prisoners ordinarily are not permitted to attend. *Wimberly v Rogers* (9th Cir 1977) 557 F2d 671, 673; *Bostick v Craven* (9th Cir 1970) 429 F2d 23, 24 n1. Therefore, pro se petitioners might not wish to include a request for a hearing in the proposed order and instead substitute the following paragraph:

(6) That the matter will be considered submitted on the papers on _ _[*date*]_ _.

The disadvantage of this latter procedure is that the judge will have no opportunity to question the prosecutor. The

absence of such questioning might, in some cases, decrease the odds of an outcome favorable to the prisoner.

The order to show cause generally includes a requirement that the respondent file a copy of all briefs, including the petitioner's brief, filed in the state court of appeal and in the state supreme court. This requirement would ensure an early and reliable resolution of the exhaustion issue. For discussion of the exhaustion requirement, see §§14.18-14.40. This requirement would also guarantee that information pertinent to the exhaustion issue was in the record, avoiding a later remand by the Ninth Circuit in the event that the government raises the exhaustion issue for the first time on appeal.

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18

Review of District Court's Decision

Michael Satris

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I. APPEAL

§18.1 A. Generally

When a federal district court in California issues a final order that grants or denies a petition for a writ of habeas corpus, appeal of the judgment is to the Ninth Circuit Court of Appeals. 28 USC §2253(a). A district court's order granting a writ of habeas corpus is a final appealable order even if the habeas corpus petition raised other claims that the district court left unresolved. *Blazak v Ricketts* (9th Cir 1992) 971 F2d 1408, 1410.

The party bringing the appeal is the "appellant," and the party defending against the appeal is the "appellee." For clarity, however, in briefs and at oral argument, the parties should be referred to by their actual names, the designations used in the lower court, or by such descriptive terms as "petitioner" for the prisoner and "warden" or "state" for the respondent. Fed R App P 28(d).

Habeas corpus petitions are entitled to hearing or submission priority. 9th Cir R 34-3. The party seeking priority must inform the clerk in writing no later than the filing of the first brief. 9th Cir R 34-3.

PRACTICE TIP: The practitioner should consult the Ninth Circuit website at http://www.ca9.uscourts.gov at the outset of any appeal; it provides invaluable and up-to-date information on a range of matters concerning appeals to the Ninth Circuit.

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B. Notice of Appeal

§18.2 1. Must Be Filed in District Court

A timely and sufficient notice of appeal is the essential document for initiating an appeal from the district court's judgment in a federal habeas corpus proceeding and investing the appellate court with jurisdiction over it. Fed R App P 3(a). Even if the district court issues a certificate of appealability (COA) (see §18.10), a notice of appeal must be filed. Habeas Rule 11(b). The notice should be filed with the clerk of the federal *district court* that ruled on the habeas corpus petition. Fed R App P 3(a)(1). If a notice of appeal is wrongly filed in the Court of Appeals, however, it will still be deemed properly filed at that time and the court clerk will send it to the district clerk. Fed R App P 4(d).

NOTE: Habeas Rules are found in Rules Governing 28 USC §2254 Cases in the United States District Courts. See also Appendix B.

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§18.3 2. Must Be Timely

The basic rule for timeliness is that the notice of appeal be filed within 30 days after the entry of judgment, order, or decree. 28 USC §2107(a); Fed R App P 4(a)(1), Habeas Rule 11(b). Care must be taken to meet this deadline, for it is mandatory and jurisdictional absent grant of an extension of time for filing the notice (see §18.9). *Browder v Director, Illinois Dep't of Corrections* (1978) 434 US 257, 264, 54 L Ed 2d 521, 531, 98 S Ct 556.

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§18.4 3. Calculating Due Date

If a district court issues a final order granting or denying the habeas petition, the court must set forth its judgment on a separate document. Fed R Civ P 58. Judgment is deemed entered when it is set forth on the separate document or 150 days from entry of the order in the civil docket under Fed R Civ P 79(a), whichever is earlier. Fed R Civ P 58(b)(2).

NOTE: The 2002 amendment to Fed R Civ P 58(b)(2) adding the 150-day rule appears to overcome the uncertainty of when judgment is deemed entered where the court never sets forth its judgment in a separate document. See *Williams v Borg* (9th Cir 1998) 139 F3d 737, 739; *Allah v Superior Court* (9th Cir 1989) 871 F2d 887, 890; *Mitchell v Idaho* (9th Cir 1987) 814 F2d 1404, 1406 (time to appeal never began to run, and thus never lapsed, because judgment not set forth in separate document); see also Fed R App P 4(a)(7) (defining entry of judgment as time when the judgment is set forth on a separate document or 150 days from entry of the judgment or order in the civil docket under Fed R Civ P 79(a), whichever is earlier).

If the notice is filed after announcement of decision but before entry of judgment, it will be treated as if filed at the time of entry of the judgment. Fed R App P 4(a)(2).

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§18.5 4. Calculating Due Date When Post-Judgment Motion Filed

A party may, within 28 days of entry of judgment, file various motions that may affect the judgment. See, *e.g.,* Fed R Civ P 52(b), 59-60. In that case, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed R App P 4(a)(4)(A).

A notice of appeal filed before the court disposed of the post-judgment motion becomes effective after the court disposes of the motion. If, however, a party intends to challenge an order related to the motion, it must file a notice of appeal or amended notice of appeal within 30 days of entry of the order disposing of the last post-judgment motion. Fed R App P 4(a)(4)(B)(ii).

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§18.6 5. Timeliness of Notice by Incarcerated Litigant

An incarcerated litigant's notice of appeal is timely if the notice is deposited in the institution's internal mail system on or before the last day for filing. If the institution has a system designed for legal mail, the inmate must use that system. Inmates can prove timely filing with a declaration under penalty of perjury or a notarized statement that sets forth the date the notice of appeal was deposited in the prison mailing system and states that first class postage was prepaid. Fed R App P 4(c)(1).

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§18.7 6. Required Contents of Notice

A notice of appeal must specify the party taking the appeal, designate the order or judgment being appealed, and name the court to which the appeal is taken. Fed R App P 3.

The appellant must submit the filing fee and appellate docket fee with the notice of appeal unless (1) the appellant has been proceeding in forma pauperis, (2) has a pending application to proceed in forma pauperis, (3) has been appointed counsel (see §18.18), (4) requires a certificate of appealability to pursue the appeal (see §§18.10-18.16), or (5) is a government entity. Fed R App P 3; 9th Cir R 3-1. Circuit Rule 3-1 provides that "[c]ounsel shall advise the Clerk at the time the notice of appeal is filed if one of these conditions exists." The surest way of doing so is to include the advisement in the notice.

PRACTICE TIP: The filing fee is $5. 28 USC §1917. The docketing fee is at least $450. See http://www.uscourts.gov/library/courtfees.html. Because the fees change periodically and individual circuits may increase the fee, it is wise to check with the court.

As long as a document serves the essential function of disclosing an intention to appeal, it suffices to invoke the jurisdiction of the reviewing court despite defects in form. Fed R App P 3(c)(4). Any document filed by a pro se petitioner that evidences an intention to appeal can serve as a notice of appeal if it is filed within the time to appeal and is otherwise adequate. See, *e.g., Smith v Barry* (1992) 502 US 244, 248, 116 L Ed 2d 678, 685, 112 S Ct 678 (construing appellate brief filed by inmate as notice of appeal); *Estrada v Scribner* (9th Cir 2008) 512 F3d 1227 (construing motion for appointment of appellate counsel as notice of appeal); *Allah v Superior Court* (9th Cir 1989) 871 F2d 887, 889 (construing opening brief from injured party as notice of appeal); *Taylor v Knapp* (9th Cir 1989) 871 F2d 803, 805 n1 (construing motion to appeal in forma pauperis as notice of appeal); *Curtis Gallery & Library, Inc. v U.S*. (9th Cir 1967) 388 F2d 358, 360 (construing designation of record on appeal from pro se appellants as notice of appeal); *Andrade v Attorney General of the State of California* (9th Cir 2001) 270 F3d 743, 752, reversed on other grounds in *Lockyer v Andrade* (2003) 538 US 63, 155 L Ed 2d 144, 123 S Ct 1166 (construing motion to extend time for filing notice of appeal as notice of appeal).

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§18.8 7. Service

The appellant must submit a copy of the notice of appeal for service on counsel for the respondent (when the petitioner is the appellant, counsel for the respondent is typically the Attorney General), so that the district clerk may serve notice of the filing of the notice of appeal on the other parties as required by Fed R App P 3(a). Fed R App P 3(d).

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§18.9 8. Extending or Reopening Time for Filing Notice

An appellant may file a motion in the district court for an order extending or reopening the time to file a notice of appeal. 28 USC §2107(c). See, *e.g., Browder v Director, Illinois Dep't of Corrections* (1978) 434 US 257, 54 L Ed 2d 521, 98 S Ct 556; *Vahan v Shalala* (9th Cir 1994) 30 F3d 102, 103. The motion to extend or reopen time may be filed before the notice of appeal is due, but must be filed no later than 30 days after the notice of appeal was due. Fed R App P 4(a)(5)(A)(i).

The motion must show "excusable neglect or good cause" why the notice cannot or could not be filed in the time prescribed. Fed R App P 4(a)(5)(A)(ii). "Excusable neglect" applies to situations in which the party was at fault, whereas "good cause" concerns matters outside the control of the party. See Advisory Committee Notes to Fed R App P 4 (2002 Amendments and 1979 Amendments); see also *Stutson v U.S.* (1996) 516 US 193, 194, 133 L Ed 2d 571, 574, 116 S Ct 600 (in determining whether there was "excusable neglect" when counsel filed notice of appeal one day late, courts should consider traditional "accommodations to prisoners").

The court may *extend* the time for filing the notice no more than "30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Fed R App P 4(a)(5)(C).

The court may *reopen* the time to file an appeal if all the following conditions are met (Fed R App P 4(a)(6)):

(1) The party did not receive notice of the entry of judgment or order within 21 days after entry as required by Fed R Civ P 77(d);

(2) The motion is filed within 180 days after entry of judgment or within 14 days after the party received the Fed R Civ P 77 notice, whichever is earlier; and

(3) No party would be prejudiced.

The order reopening time to file an appeal cannot be for a period longer than 14 days after entry of the order doing so. Fed R App P 4(a)(6). The 14-day limit is a strict jurisdictional limit that brooks no exception. See, *e.g., Bowles v Russell* (2007) 551 US 205, 168 L Ed 2d 96, 104, 127 S Ct 2360 (court of appeal had no jurisdiction to entertain appeal filed outside 14-day extension period when district court had granted petitioner 17-day extension to file notice and petitioner relied on that order and filed notice on 16th day). An order denying an extension of time to file the notice of appeal is appealable. *Hilliard v Kincheloe* (9th Cir 1986) 796 F2d 308, 309.

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C. Certificate of Appealability

§18.10 1. When Required

Unique to habeas corpus is the requirement that a petitioner denied relief in the district court obtain a certificate of appealability (COA) to take an appeal when "the detention complained of arises out of a process issued by a State court." 28 USC §2253(c)(1)(A). When a COA is required, the appellate court lacks jurisdiction to resolve the merits of any issue for which a COA was not granted. *Rios v Garcia* (9th Cir 2004) 390 F3d 1082, 1086.

Because most habeas petitions challenge the criminal judgment imposed by the state court, the requirement of a COA ordinarily applies. When the habeas petitioner is challenging an executive or administrative action rather than a judicial one, however, no COA is required. See, *e.g., White v Lambert* (9th Cir 2004) 370 F3d 1002, 1011 (denial of challenge to transfer ordered by the Washington Department of Corrections did not require a COA); *Rosas v Nielsen* (9th Cir 2005) 428 F3d 1229, 1231 (challenge to parole authority's denial of parole did not require a COA).

NOTE: As of publication of this update of Appeals and Writs in Criminal Cases, the Ninth Circuit is considering whether to overrule these panel decisions dispensing with the need for a COA for administrative agency decisions. See *Hayward v Marshall* (9th Cir 2008) 527 F3d 797 (rehearing granted en banc).

The state is not required to obtain a COA to appeal the district court's grant of relief. Fed R App P 22(b)(3).

When the district court judge renders a final order adverse to the petitioner, it must also either issue or deny a COA. Habeas Rule 11(a). If the court issues a COA, the court must state the specific issue or issues that support it under 28 USC §2253(c)(2). Habeas Rule 11(a); see also Fed R App P 22(b)(1). If the court denies the COA, that decision may not be appealed. Instead, the appellant may seek the COA in the court of appeals under Fed R App P 22. Habeas Rule 11(a). If the parties have consented to having the petition adjudicated by a magistrate judge, that magistrate has the authority to issue a COA. *Hanson v Mahoney* (9th Cir 2006) 433 F3d 1107, 1111.

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§18.11 2. Standards for Issuance

The court may issue a COA only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 USC §2253(c)(2). The term "substantial showing" means a showing that reasonable jurists could debate or disagree with the district court's decision on the issue presented or that the issue was "adequate to deserve encouragement to proceed further." *Slack v McDaniel* (2000) 529 US 473, 146 L Ed 2d 542, 120 S Ct 1595. This standard is similar to the pre-AEDPA standard for granting a certificate of probable cause. See *Barefoot v Estelle* (1983) 463 US 880, 893, 77 L Ed 2d 1090, 1104, 103 S Ct 3383 (standard for granting certificate of probable cause).

In the case of a petition denied on a procedural ground rather than the merits, "a COA should issue… if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 US at 478. See also *Tennard v Dretke* (2004) 542 US 274, 288, 159 L Ed 2d 384, 397, 124 S Ct 2562.

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§18.12 3. Scope of COA

The COA authorizes appellate review only on the specific issue for which it was granted. For example, a COA issued on the question "Whether the district court erred when it denied petitioner a hearing on his claim that he was prejudiced by trial counsel's representation" would not even allow the reviewing court to consider the closely related issue of whether the court erred in denying a hearing on the portion of the claim concerning the deficiencies in counsel's representation. Therefore, the petitioner is advised to seek a COA that sets forth the issue(s) in the broadest terms possible. For example, a COA issued on the question "Whether the district court erred in denying the petitioner's claim of ineffective assistance of counsel" would permit the petitioner on appeal to challenge any aspect of that denial.

Absent an explicit limitation to the contrary, a COA encompasses all procedural (*e.g.,* exhaustion) issues that must be addressed to enable the court to reach the merits of the issue for which the COA was granted. *Jones v Smith* (9th Cir 2000) 231 F3d 1227, 1231. In some situations, the court of appeals may also consider subsidiary issues of substantive law it deems encompassed in the issue for which the COA was granted. See *Majoy v Roe* (9th Cir 2002) 296 F3d 770, 773 (holding that whether actual innocence gateway of *Schlup v Delo* (1995) 513 US 298, 130 L Ed 2d 808, 115 S Ct 851, was available to overcome untimeliness was encompassed by COA on issues of timeliness of petition and petitioner's entitlement to equitable tolling).

On expanding the certificate of appealability, see §18.15.

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4. Procedural Aspects

§18.13 a. In District Court

The district court is obligated to act on its own; there is consequently no need to file a motion for a COA. The district court must grant or deny the COA at the time that it issues a final order. Habeas Rule 11(a). The COA must specify which specific issue or issues make the requisite showing under 28 USC §2253(c)(3). Habeas Rule 11(a); see also Fed R App P 22(b)(1). When the appellant files a notice of appeal, the district court clerk sends the COA to the court of appeals. Fed R App P 22(b)(1). If the district judge denies a COA, the appellant may move the district court to reconsider that denial; however, that motion does not extend the time for filing a notice of appeal. Habeas Rule 11(a).

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b. In Court of Appeals

§18.14 (1) When District Court Denies COA

If the district court denies a COA or declines to issue a COA, the appellant may request a COA from a circuit judge by filing a motion for such in the Ninth Circuit. Fed R App P 22(b)(1)-(2). The motion must be filed within 35 days of the district court's entry of its order either denying the COA in full or denying a timely filed post-judgment motion, whichever is later. 9th Cir R 22-1(d).

If no motion for a COA is filed in the Ninth Circuit, the court will consider the notice of appeal as a motion for a COA. Fed R App P 22(b)(2); 9th Cir R 22-1(d).

Within 35 days of service of a motion for a COA, respondent may—and in capital cases with no pending execution date must—file a response to the motion. In capital cases in which an execution date is scheduled and no stay is in place, respondent must file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA. A special COA motions panel will decide the matter. 9th Cir R 22-1(d).

If the motions panel denies in full the issuance of a COA, the petitioner may file a motion for reconsideration in accordance with 9th Cir R 27-10. 9th Cir R 22-1(d). If the motion for a COA is denied in part and granted in part, the petitioner may not file a motion for reconsideration. 9th Cir R 22-1(d).

If the court appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion. 9th Cir R 22-1(d). No motion for reconsideration will be entertained, however, if the COA panel granted a COA in part. 9th Cir R 22-1(d).

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§18.15 (2) When District Court Certifies at Least One Issue

In the Ninth Circuit a briefing schedule will be established if the district court grants a COA. 9th Cir R 22-1(c). The rules do not permit a petitioner to file a motion to expand the COA when the district court issues a COA on some but not all issues.

A petitioner may move the merits panel to expand the COA beyond the issues certified by the district court or COA panel by discussing any uncertified issues in the opening brief under the heading "Uncertified Issues." All certified issues should be briefed first under the heading "Certified Issues." 9th Cir R 22-1(e).

In *Stokes v Schriro* (9th Cir 2006) 465 F3d 397, 401 n5, for example, the Ninth Circuit treated the petitioner's opening brief raising uncertified issues as a request to expand the COA. After denying relief on the issue for which it had originally granted the COA, it expanded the COA to include one of the uncertified issues and reversed the judgment on that ground.

PRACTICE TIP: These rules may change because the Ninth Circuit has been finding that they result in significant delay in processing the appeal when a merits panel finds that an uncertified issue briefed in the opening brief justifies a response from the state.

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§18.16 c. In the United States Supreme Court

A petitioner denied a COA by the district and circuit courts may petition for writ of certiorari to the United States for a COA. *Hohn v U.S.* (1998) 524 US 236, 141 L Ed 2d 242, 118 S Ct 1969.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.17 D. Motion for Leave to Proceed In Forma Pauperis

§18.17 D. Motion for Leave to Proceed In Forma Pauperis

A petitioner who was granted in forma pauperis (IFP) status in a district court habeas action may proceed on appeal in forma pauperis without further authorization unless the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the petitioner is not otherwise entitled to proceed in forma pauperis. The district court must state in writing its reasons for the certification or finding and immediately notify the parties and the court of appeals. Fed R App P 24(a)(3)-(4).

Otherwise, a habeas petitioner who wishes to appeal IFP must file a motion in the *district court* and attach an affidavit that (Fed R App P 24(a)(1)):

- Shows in detail the party's inability to pay or to give security for fees and costs;
- Claims an entitlement to redress; and
- States the issues that the party intends to present on appeal.

For a model affidavit, see Fed R App P, Appendix of Forms, Form 4.

PRACTICE TIP: It is preferable to file the IFP motion at the same time as the notice of appeal; otherwise, the clerk may not accept the notice of appeal without payment of the docketing fees. See Fed R App P 3(e); 9th Cir R 3-1.

If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs. Fed R App P 24(a)(2). If the district court denies the motion, it must state its reasons in writing and immediately notify the parties and the court of appeals. Fed R App P 24(a)(2), (4).

A petitioner may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Fed R App P 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Fed R App P 24(a)(1). Fed R App P 24(a)(5).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.18 E. Counsel on Appeal

§18.18 E. Counsel on Appeal

If the district court appointed counsel to represent the petitioner in that court and a notice of appeal is filed, "counsel's appointment automatically shall continue on appeal." 9th Cir R 4-1(a). If the petitioner was represented by retained counsel or proceeded pro se in the district court but appears to qualify for appointment of counsel on appeal, the petitioner may move the district court for appointment of counsel on appeal by filing a financial affidavit (Criminal Justice Act (CJA) Form 23). 9th Cir R 4-1(b). If the district court finds that appointment of counsel on appeal is warranted, the court must appoint the attorney who represented the defendant in district court or an attorney on the panel for appointments. The district court clerk must promptly forward a copy of the order appointing counsel to the Ninth Circuit. Substitute counsel must file a notice of appearance in the Ninth Circuit within 14 days of appointment. 9th Cir R 4-1(b). If the court declines to appoint counsel on appeal, the petitioner may file within 14 days of that order a motion in the Ninth Circuit for appointment of counsel, accompanied by CJA Form 23. 9th Cir R 4-1(b). This form is available online at http://www.uscourts.gov/forms/CJA/CJA23.pdf.

PRACTICE TIP: Retained counsel who files a notice of appeal as attorney of record is required to represent the petitioner on appeal unless a motion to withdraw as counsel on appeal is granted. If retained counsel does not intend to represent the petitioner on appeal, counsel should prepare a notice of withdrawal as counsel and a notice of appeal for petitioner to sign and file in propria persona.

Attorneys who are not members of the Ninth Circuit bar must apply for admission no later than at the time of their first appearance in the court. 9th Cir R 46-1.2. Official forms for admission are provided by the clerk's office. Applicants must be members in good standing of the highest court of a state, of a federal district court, of another federal court of appeals, or of the United States Supreme Court. Fed R App P 46(a).

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§18.19 F. Electronic Filing Requirements

The Ninth Circuit now has in place an Electronic Case Files (ECF) System. See 9th Cir R 25-5. Attorneys must submit all filings electronically unless exempted from doing so. There is an ECF exemption form on the court's website that must be completed, and any exemption granted is valid for all cases, but only for a year. See 9th Cir R 25-5(a). The ECF system is voluntary for parties representing themselves. 9th Cir R 25-5(a).

The procedural requirements for ECF filing are set forth in 9th Cir R 25-5, and can also be found on the court's website. While ECF filings require a certificate of service, no service of a paper copy on other parties and counsel registered for electronic filing is necessary; the Appellate ECF System will automatically provide electronic service to the registrants of the filed document. If a party is not registered with the ECF System or the attorney has successfully obtained an exemption from registration, paper copies must be served consistent with FRAP 25(c)(1). 9th Cir R 25-5(f).

PRACTICE TIP: A sample certificate of service can be found on the court's website.

A document filed on the ECF System before midnight of its due date is timely. 9th Cir R 25-5(c)(2). If technical failure prevents timely electronic filing, the party must preserve documentation of the failure and seek appropriate relief from the court. 9th Cir R 25-5(c)(2).

Certain documents, such as excerpts of record and sealed documents, are excluded from electronic filing. See list of excluded documents at 9th Cir R 25-5(b).

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G. Effect of Appeal on Inmate's Custodial Status

1. Stays

§18.20 a. Stay of State Court Proceedings or Judgment

A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any state court or by or under the authority of any state for any matter involved in the habeas corpus proceeding. 28 USC §2251(a)(1)-(2). If a person sentenced to death applies for counsel pursuant to 18 USC §3599, the stay of execution of the sentence of death terminates within 90 days of the appointment of counsel or the withdrawal or denial of the application. 28 USC §2251(a)(3). After the granting of a stay, any further state court proceeding is void. If no stay is granted, the state court proceeding may continue as if no habeas corpus proceedings or appeal were pending. 28 USC §2251(b).

A stay of execution of a state court sentence is essentially a type of preliminary injunction. Therefore, a stay usually requires a threat that the person requesting the stay will suffer irreparable injury if it is not granted and that there is a substantial likelihood that the applicant will prevail on the merits. Stays of sentence pending appeal are rarely granted. A stay might also be necessary to preserve the jurisdiction of the court. *Shaw v Martin* (4th Cir 1980) 613 F2d 487, 491 (stay granted by single circuit judge).

NOTE: Pretrial review may be resisted under the federal abstention doctrine. See *Younger v Harris* (1971) 401 US 37, 27 L Ed 2d 669, 91 S Ct 746.

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§18.21 b. Stay of District Court Judgment

The order or judgment of a district court may be stayed pending appeal. *Hilton v Braunskill* (1987) 481 US 770, 774, 95 L Ed 2d 724, 731, 107 S Ct 2113. Ordinarily, a party must move first in the district court for a stay of the judgment or order of a district court pending appeal. Fed R App P 8(a)(1). However, the motion may also be made in the court of appeals or to one of its judges. Fed R App P 8(a)(2). If so, the motion must either (1) show that moving first in the district court would be impracticable, or (2) state that the motion was brought in the district court but that the court denied the motion or failed to afford the relief requested (including the reasons given by the district court for its action). Fed R App P 8(a)(2)(A).

A motion for a stay of the judgment or order of a district court pending appeal must also include (Fed R App P 8(a)(2)(B)):

- The reasons for granting the relief requested and the facts relied on;
- Originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
- Relevant parts of the record.

The moving party must give reasonable notice of the motion to all parties. Fed R App P 8(a)(2)(C). The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But, in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. Fed R App P 8(a)(2)(D). The court may condition relief on a party's filing a bond or other appropriate security in the district court. Fed R App P 8(a)(2)(E).

If a district court stays an order or judgment to permit application to the court of appeals for a stay pending appeal, an application for the stay must be filed in the court of appeals within 7 days after issuance of the district court's stay. 9th Cir R 27-2.

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§18.22 c. Stays of Execution in Capital Cases

Stays of execution have regularly been granted by federal courts reviewing habeas petitions in death sentence cases. *Evans v Bennett* (1979) 440 US 1301, 1306, 59 L Ed 2d 756, 760, 99 S Ct 1481; *Fouquette v Bernard* (9th Cir 1952) 198 F2d 96, 97. A court of appeals need not determine the competency of a state prisoner sentenced to death before granting a stay of execution to allow the state to conduct an evidentiary hearing to determine if the prisoner is competent. *Vargas v Lambert* (9th Cir 1998) 159 F3d 1161, 1167. However, federal courts can deny a stay of execution pending appeal if the merits of the appeal are presented and considered. See *Barefoot v Estelle* (1983) 463 US 880, 77 L Ed 2d 1090, 103 S Ct 3383 (listing current criteria for granting stays of execution); *Autry v Estelle* (1983) 464 US 1, 78 L Ed 2d 1, 104 S Ct 20.

The Ninth Circuit has adopted special rules governing its procedures for handling habeas corpus death penalty appeals. See 9th Cir R 22-1—22-6.

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§18.23 2. Release Pending Appeal

During the pendency of an appeal, a habeas corpus petitioner can be released, with or without bail, by either the district court or by the Ninth Circuit. Fed R App P 23(b)-(d); 9th Cir R 23-1; *Marino v Vasquez* (9th Cir 1987) 812 F2d 499, 507. When a district court has granted relief that includes release, there is a presumption that the prisoner should be released pending appeal; that presumption can be overcome by factors such as the prisoner's risk of flight or danger to the public, or the state's interest in continuing custody and rehabilitation. *Hilton v Braunskill* (1987) 481 US 770, 95 L Ed 2d 724, 107 S Ct 2113.

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§18.24 3. Transfer of Custody Pending Appeal

A habeas corpus petitioner may not be transferred to the custody of another during the pendency of the appeal except by order of the district court. *Shabazz v Carroll* (9th Cir 1987) 814 F2d 1321, 1324, vacated in part on other grounds by *Shabazz v Carroll* (9th Cir 1987) 833 F2d 149. When a custodian shows the need for a transfer, the court, justice, or judge rendering the decision may authorize the transfer and substitute the successor custodian as a party. Fed R App P 23(a).

PRACTICE TIP: There appears to be little regard for the rule in California. A petitioner wishing to avoid the negative impact of a transfer pending appeal should file notice of this rule in the district court and serve a copy of that notice on his or her custodian and the custodian's counsel. If the petitioner is transferred in violation of the rule during the appeal, the court of appeals retains jurisdiction to decide the appeal. 814 F2d at 1324.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/ H. Record and Motions/§18.25A 1. The Record on Appeal

H. Record and Motions

§18.25A 1. The Record on Appeal

When a notice of appeal is filed, the clerk of the district court will immediately transmit the notice to the court of appeals. 9th Cir R 10-1. The record on appeal consists of the transcript, if any, of oral proceedings before the district court and the district court "clerk's record" of original pleadings, exhibits, and papers filed with the court. Fed R App P 10(a); 9th Cir R10-2. With the advent of electronic filing (see §18.19) and the possibility for online review of the record, the clerk of the district court will no longer transmit a copy of the docket sheet to the court of appeals or to the parties. See 9th Cir R 10-1.

Ninth Circuit Rule 10-3 details how a reporter's transcript of oral proceedings is made part of the record. Unless the parties have agreed on which portions of the transcript to order or appellant intends to order all or none of the transcript, within 10 days of filing the notice of appeal, the appellant must file and serve notice of the portions of the transcript appellant intends to order and the issues that will be raised on appeal. 9th Cir R 10-3.1(a). Appellee must then give notice to appellant within 10 days of any additional portions of the transcript appellee considers necessary to the appeal. 9th Cir R 10-3.1(b). Within 30 days of the filing of the notice of appeal, appellant must file in the district court either a transcript order or a certificate stating that no transcript will be ordered. See 9th Cir R 10-3.1(c)-(d). If a transcript is ordered, appellant must use the court's transcript designation form, and serve a copy of it on the court reporter. That order must also include all portions of the transcript that appellee has listed, unless appellant certifies that those portions of the transcript are unnecessary. 9th Cir R 10-3.1(d).

Appellant must pay for the original transcript unless proceeding in forma pauperis. For discussion of motions to proceed in forma pauperis on appeal, see §18.17; for sample forms, see §§18.46-18.49. Arrangements with the reporter for payment must be made by the date the court is notified that a transcript has been ordered.

If appellant is proceeding in forma pauperis, appellant must state in the order for the transcript that it will be paid for by the United States under the Criminal Justice Act. The appellant must make the necessary arrangements for authorization for such payment by completing CJA Form 24 and sending it to the court reporter with the transcript designation. 9th Cir R 10-3.1(e), 10-3.2(a). "[F]ailure to provide transcripts or other required materials may well result in dismissal of the appeal or other sanctions" under Fed R App P 3(a)(2). *Hall v Whitley* (9th Cir 1991) 935 F2d 164, 165. The Authorization and Voucher for Payment of Transcript (CJA Form 24) is ordinarily sent to appellate counsel by the court on appointment and is available online at http://www.uscourts.gov/forms/CJA/CJA24.pdf. In addition, the district court clerk will provide the form on request.

It is the reporter's duty to prepare and file the designated transcript with the district court clerk and notify the circuit court clerk of the filing. Fed R App P 11(b); 9th Cir R 11-1.1.

The clerk of the court of appeals will advise the parties of a filing date once the court has received the record. Fed R App P 12(c). Physical exhibits will be retained in the district court unless requested by the court of appeals. 9th Cir R 11-4.2. See also 9th Cir R 11-4.4. Note that when the district court has denied a certificate of appealability in a §2254 proceeding and the court record cannot be accessed electronically, the district court must forward the entire record to the court of appeals. 9th Cir R 22-1(b).

The court of appeal sets the briefing schedule for the parties. 9th Cir R 31-2.

NOTE: Federal Rules of Appellate Procedure 30 requires that an appellant file an appendix to the opening brief that includes the relevant portions of the pleadings, charge, findings, or opinion, and other parts of the record to which the parties wish to direct the court's attention. The Ninth Circuit requires the parties (except those who are unrepresented) to file an excerpt of the record rather than an appendix, along with the opening brief. 9th Cir R 30-1, 30-1.2. For discussion of excerpts of record, see §§18.35-18.39.

PRACTICE TIP: If during the course of the appeal a party finds that some matter outside the district court record is material to the appeal, a motion seeking enlargement of the record on appeal must be made to the court of appeals. Fed R App P 10(e). Although the court of appeals will not routinely grant such a motion, particularly

when the party could have made the matter part of the record in the district court, it will permit enlargement in appropriate circumstances. For example, in *Sass v California Bd. of Prison Terms* (9th Cir 2006) 461 F3d 1123, 1125 n1, the court permitted a petitioner who was challenging denial of parole to add to the record evidence of parole proceedings that occurred after filing of the petition.

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§18.25B 2. Possible Motions

Ninth Circuit Rules 27-1 through 27-13 contemplate a variety of motions. The range of motions is limited only by the imagination of the litigant. The guiding rule is that if relief is needed and good cause can be shown for it, the party may move the court for an order that provides for it. See generally 9th Cir R 27-1 and 25-5 regarding the filing of motions.

PRACTICE TIP: It can be helpful to solicit the position of opposing counsel prior to filing a motion, particularly because the moving party must advise the court that the motion is unopposed. See 9th Cir R 27-1(2).

Federal Rules of Appellate Procedure 27(d) governs the filing of motions and related papers, except that if electronic filing is not required (see 9th Cir R 25-5), an original of the document must be filed. 9th Cir R 27-1(b), 25-5. Ninth Circuit Rule 27-3 governs the filing of emergency and urgent motions. Neither a notice of motion nor a proposed order is required for any motion. Fed R App P 27(a)(2)(C). The time for filing a response to a motion and a reply to that response is prescribed, but a court may act on a motion for a procedural order at any time and will not hold oral argument on any motion unless it orders otherwise. Fed R App P 27(a)(3), (b), and (e). Motions for reconsideration or clarification are governed by 9th Cir Rule 27-1. Emergency and urgent motions are governed by 9th Cir Rule 27-3.

PRACTICE TIP: Motions for reconsideration or clarification should be made only in exceptional cases because they are discouraged, disfavored, and rarely granted. See 9th Cir R 27-1; Note (4), Cir Adv Comm.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/ I. Briefs/ 1. Content Requirements/§18.26 a. Appellant's Brief

I. Briefs

1. Content Requirements

§18.26 a. Appellant's Brief

The appellant's brief must contain, under appropriate headings and in the following order (Fed R App P 28(a)):

- A table of contents, with page references;
- A table of authorities, including cases (alphabetically arranged), statutes, and other authorities, with references to the pages of the brief where they are cited;
- A jurisdictional statement;
- A statement of the issues presented for review;
- A statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
- A statement of facts relevant to the issues submitted for review with appropriate references to the record (see Fed R App P 28(e));
- A summary of the argument;
- The argument;
- A short conclusion stating the precise relief sought; and
- A certificate of compliance, stating that the brief conforms to the type-volume-page limitations of Fed R App P 32(a)(7).

NOTE: A suggested form of a certificate of compliance can be found in Fed R App P, Appendix of Forms, Form 6.

The *jurisdictional statement* must include (Fed R App P 28(a)(4); 9th Cir R 28-2.2):

- The basis for the district court's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
- The basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
- The filing dates and rules establishing the timeliness of the appeal; and
- An assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis.

The *summary of the argument* must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and must not merely repeat the argument headings. Fed R App P 28(a)(8).

The *argument* must contain (Fed R App P 28(a)(9)):

- The appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and
- For each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

For each issue, the appellant must state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review. In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, *e.g.,* a failure to admit or to exclude evidence, the appellant must state where in the record on appeal the objection and ruling are set forth. 9th Cir R 28-2.5. Every assertion in briefs regarding matters in the record must be supported by a reference to the location in the excerpts of record where the matter is to be found (citing the volume number). 9th Cir R 28-2.8.

A statement identifying any known related case pending in the Ninth Circuit, or stating that there is no related case, must be set forth on the last page of the initial brief of each party. The statement must include the name and court of

appeals docket number of each related case and describe its relationship to the case being briefed. 9th Cir R 28-2.6.

If determination of the issues presented requires the study of constitutional provisions, treaties, statutes, ordinances, regulations, or rules, relevant parts of those materials must be reproduced verbatim either following the statement of issues presented for review or in an addendum containing a table of contents and bound separately or bound with the brief. If the legal quotations are bound separately in an addendum, a statement referencing that addendum must appear after the statement of issues. If the addendum is bound at the end of the brief, it must be separated from the brief and other materials by a distinctively colored page. Legal quotations previously provided need not be provided again, but if the legal material is not repeated, a statement must appear under the statement of issues as follows: "[e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____." 9th Cir R 28-2.7.

If the appeal is a petition for review of an immigration case, all challenged orders must be in an addendum at the end of the brief. Each addendum must be separated from the brief by a distinctively colored page. 9th Cir R 28-2.7.

Briefs should be written in clear, precise, persuasive language. The brief may not incorporate by reference or have appended to it briefs previously submitted to the district court or any other court. 9th Cir R 28-1(b).

NOTE: In the Ninth Circuit, if the district court granted a COA in part, the petitioner should generally brief only those issues certified. However, if the petitioner concludes that an uncertified issue may provide a basis for relief, the petitioner may brief any such issues under the heading "Uncertified Issues" after all the certified issues have been briefed under the heading "Certified Issues." Uncertified issues raised in this manner are construed as a motion to expand the COA. 9th Cir R 22-1(e). For discussion, see §18.15.

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§18.27 b. Appellee's Brief

An appellee's brief has the same content requirements as an appellant's brief (see §18.26), except that the following sections need not appear unless the appellee is dissatisfied with the appellant's statement: the jurisdictional statement; the statement of the issues; the statement of the case; the statement of the facts; and the statement of the standard of review. Fed R App P 28(b). The appellee should explicitly state agreement at least with appellant's jurisdictional statement if appellee's brief contains no such statement. See 9th Cir R 28-2.2. The appellee need not address any uncertified issues in its brief; instead, the court will grant the appellee an opportunity to respond before relief is granted on any previously uncertified issue. 9th Cir R 22-1(f). The appellee also need not identify in the statement of related cases any such cases already identified in appellant's brief. 9th Cir R 28-2.6.

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§18.28 c. Reply Brief

An appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. No further briefs may be filed without the court's permission. Fed R App P 28(c). See Fed R App P 28.1(c)-(f) for brief requirements and deadlines in cross-appeals.

As with the opening brief, a reply brief must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities, with references to the pages of the reply brief where they are cited. Fed R App P 28(c).

NOTE: A pro se appellant may file the form brief provided by the clerk in lieu of the appellant's brief otherwise required by the rules, in which case the optional reply brief need not comply with the technical requirements of Fed R App P 28(c) or 32(a). 9th Cir R 28-1(c).

PRACTICE TIP: If "pertinent and significant authorities come to a party's attention" after briefing is completed, whether before or after oral argument, the party may include citation of them in a letter to the circuit clerk, with service on all other parties. Fed R App P 28(j). For instructions on length and content of such a letter, counsel should refer to Fed R App P 28(j) (statement of reasons for supplemental citations) and 9th Cir R 28-6 (document not to exceed 350 words). If the letter does not need to be filed electronically under 9th Cir R 25-5, one copy must be provided to the court. 9th Cir R 28-6.

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§18.29 2. Format Requirements

A brief may be produced by any process that results in a clear black image on light paper. The paper must be opaque and unglazed, and only one side of the paper may be used. Fed R App P 32(a)(1). Either a proportionally spaced typeface of 14 points or more or a monospaced typeface of no more than 10.5 characters per inch may be used in a brief. If proportionally spaced type is used, it must have serifs, but sans-serif type may be used in headings and captions. Fed R App P 32(a)(5). A brief must be on 8½ by 11 inch paper. All margins must be at least 1 inch. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced; headings and footnotes may be single-spaced. Fed R App P 32(a)(4). The text must be in a plain, roman typeface. Case names, headings, and signals may be underlined, in italics, or in bold. Fed R App P 32(a)(6). A brief must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open. Fed R App P 32(a)(3).

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§18.30 3. Limitations on Length

A principal brief may not exceed 30 pages and a reply brief may not exceed 15 pages. Fed R App P 32(a)(7)(A). Alternatively, the litigant may file a principal brief that contains no more than 14,000 words, or (if a monospaced typeface is used) no more than 1300 lines of text. Reply briefs may contain "no more than half the type volume" permitted for principal briefs. Fed R App P 32(a)(7)(B).

A litigant who uses word count or line count to comply with the court's length limitations must attach a certificate of compliance to the brief. The certificate may be based on the word-processing program's word- or line-count function. Fed R App P 32(a)(7)(C).

The word and line limits do not include the table of contents, table of citations, certificate of service, certificate of compliance, statement of related cases and any addendum containing statutes, rules, regulations, or other authorities. Fed R App P 32(a)(7)(B). For a sample certificate of compliance, see 9th Cir R Appendix of Forms, Form 8.

A party may file a brief that exceeds the court's length limitations only with the court's permission. The court looks with disfavor on motions to exceed its length limitations, and such a motion will be granted only on a showing of diligence and substantial need. The motion must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion, a single copy of the brief the applicant proposes to file, and a Form 8 certificate of compliance. In ruling on the motion, the court will not consider the cost of preparing and revising the brief. 9th Cir R 32-2. For discussion of extensions of time and enlargements of size for consolidated and joint briefing, see 9th Cir R 28-4. Except in an extraordinary case, the court will not extend the length of the brief to accommodate uncertified issues. 9th Cir R 22-1(e).

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.31 4. Service and Filing Requirements

§18.31 4. Service and Filing Requirements

Electronic filing is required in the Ninth Circuit with limited exceptions. See 9th Cir R 25-5; §18.19. The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. Fed R App P 31(a)(1).

The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing. Fed R App P 31(a)(1).

The Ninth Circuit often will establish a briefing schedule independent of the rules. If it does so, the filing of the appellant's brief before the due date does not advance the due date for the appellee's brief, and the appellee's due date is not subject to the additional 3-day allowance for service of previous papers by mail set forth in Fed R App P 31(a). 9th Cir R 31-2.1.

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§18.32 a. Extension of Time for Filing Brief

In the Ninth Circuit, if good cause is shown, the clerk or a designated deputy may grant an oral request for a single extension of time of no more than 14 days to file an opening, answering, or reply brief. This extension may be applied for and granted or denied by telephone, and is conditioned on prior notice to the opposing party. Such an extension bars further extension unless the party makes a written motion that "demonstrates extraordinary and compelling circumstances." 9th Cir R 31-2.2(a).

In all other cases, an extension of time may be granted only on written motion supported by a showing of diligence and substantial need. 9th Cir R 31-2.2(b). A conclusory statement about the press of business does not constitute a showing of diligence and substantial need. The motion must be filed at least 7 days before the expiration of the time prescribed for filing the brief and must be accompanied by a declaration stating (9th Cir R 31-2.2(b)):

- When the brief is due;
- When the brief was first due;
- The length of the requested extension;
- The reason an extension is necessary;
- The moving party's representation that he or she has exercised diligence and that the brief will be filed within the time requested;
- Whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position; and
- That the court reporter is not in default with respect to any designated transcript.

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§18.33 b. Consequences of Failure to File Brief

If an appellant fails to file a brief within the prescribed time or within an extended time, the court may dismiss the appeal pursuant to 9th Cir R 42-1. 9th Cir R 31-2.3. If an appellee elects not to file an answering brief, the appellee must notify the court by letter on or before the due date to file the brief. Failure to timely file the brief or notify the court otherwise can result in sanctions. 9th Cir R 31-2.3.

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§18.34 5. Number of Briefs

The Ninth Circuit requires the filing of an original and seven copies of each brief. 9 Cir R 31-1. Parties filing electronically should defer filing paper copies until they receive a directive from the court clerk to do so but must serve any exempted or unregistered party with a paper copy on the day the electronic brief is submitted. 9 Cir R 31-1. If a suggestion for hearing or rehearing en banc is granted, each party must file 20 additional copies of its briefs and the appellant must file 20 additional copies of the excerpts of record. 9th Cir R 31-1.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/ J. Excerpts of Record/§18.35 1. Content Requirements

J. Excerpts of Record

§18.35 1. Content Requirements

In addition to briefs, the Ninth Circuit requires both parties to prepare and file excerpts of the record in all cases. 9th Cir R 30-1.1. The excerpts of the record is a crucial and often neglected documentary compilation. A well-prepared, well-organized, and complete excerpts of the record is a great aid to the court of appeals in its resolution of the appeal. The parties should ensure that the excerpts include those parts of the record necessary to permit an informed analysis of their positions. 9th Cir R 30-1.1. References to the record in the briefs should be supported by a reference to the location of the matter in the excerpts of record whenever possible. 9th Cir R 28-2.8.

At the time the appellant's opening brief is submitted, the appellant must submit four copies of the excerpts of the record bound separately from the briefs. 9th Cir R 30-1.3. The appellant must serve one copy of the excerpts on each of the other parties. 9th Cir R 30-1.3. If the brief is submitted electronically under 9th Cir R 25-5, the excerpts of the record must be mailed to the court and to other parties on the same day the brief is submitted. If the brief is not submitted electronically, then the excerpts must accompany the original brief and its copies. 9th Cir R 30-1.3. Parties not represented by counsel are not required to file excerpts, supplemental excerpts, or further excerpts. 9th Cir R 30-1.2.

NOTE: While electronic case filing is mandatory in the Ninth Circuit (see §18.19), excerpts of the record *cannot* be filed electronically. See 9th Cir Administrative Order dated 11/10/08.

Parties not represented by counsel are not required to file excerpts, supplemental excerpts, or further excerpts. 9th Cir R 30-1.2.

The excerpts of the record must include (9th Cir R 30-1.4(a)):

- The notice of appeal;
- The trial court docket sheet;
- The judgment or interlocutory order appealed from;
- Any opinion, findings of fact, or conclusions of law relating to the judgment or order appealed from;
- Any other orders or rulings, including minute orders, sought to be reviewed;
- Any jury instruction given or refused that presents an issue on appeal;
- When an issue on appeal is based on a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;
- When an issue on appeal is based on a challenge to any other ruling, order, finding of fact, or conclusion of law and that ruling, order, finding, or conclusion was delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;
- When an issue on appeal is based on a challenge to the allowance or rejection of jury instructions, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the instructions at issue, including the ruling or order, and objections;
- When an issue on appeal is based on written exhibits (including affidavits), those specific portions of the exhibits necessary to resolve the issue; and
- Any other specific portions of any documents in the record that are cited in the appellant's briefs and necessary to the resolution of an issue on appeal.

In addition to these items, the excerpts of the record must also include (a) the final pretrial order, or, if the final pretrial order does not set out the issues to be tried, the final petition and answer, or other pleadings setting out those issues, and (b) when the appeal is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits, or similar attachments submitted in support of or in opposition to the motion that are essential to

the resolution of an issue on appeal. 9th Cir R 30-1.4(c).

The excerpts of the record must *not* include briefs or other memorandums of law filed in the district court unless necessary to the resolution of an issue on appeal, and, if so, must include only those pages necessary. 9th Cir R 30-1.5.

PRACTICE TIP: Parties should be careful to include in the excerpts of record any relevant papers or transcript excerpts from the state court proceedings that were made part of the district court record. See *Hall v Whitley* (9th Cir 1991) 935 F2d 164 (Ninth Circuit has power to dismiss habeas appeal if relevant state court transcript excerpts are not provided).

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§18.36 2. Format Requirements for Excerpts of Record

The documents that comprise the excerpts of record need not be certified as true copies, but if possible the district court's "filed" stamp should appear on each document.

NOTE: Except for the trial court docket, which is always the last document in the excerpts, the order of the excerpts of record depends on whether it exceeds 75 pages. The format requirements for excerpts of record differ depending on whether the excerpt exceeds 75 pages. For excerpts that exceed 75 pages, counsel should consult 9th Cir R 30-1.6(a). For excerpts that do not exceed 75 pages, counsel should consult 9th Cir R 30-1.6(b).

Excerpts of all lengths. Excerpts of record of all lengths must begin with an index organized in the order that the documents are presented, describing the documents, exhibits, and portions of the reporter's transcript contained in them, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits, or transcript portions may be found in the excerpts. The information on the front cover of the excerpts of the record should be styled exactly as a brief, except that the wording "Excerpts of Record" should be substituted for "Brief of Appellant." 9th Cir R 30-1.6. The excerpts must either be consecutively paginated beginning with page 1 or marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. 9th Cir R 30-1.6. References to the record in the briefs should be to the excerpts of record. 9th Cir R 28-2.8.

Excerpts exceeding 75 pages. If the excerpts of record exceed 75 pages, the first volume must be limited to particular portions of the transcript containing all the court orders at every level pertinent to the issues on appeal, including oral statements of the decision in the reporter's transcript, written orders, reports, opinions, memoranda, or findings of fact or conclusion of law prepared by any federal judicial order, and the state reviewing court disposition. The documents in this first volume must be arranged by file date in reverse chronological order beginning with the document with the most recent file date. 9th Cir R 30-1.6(a). No volume of the excerpts may contain more than 300 pages. 9th Cir R 30-1.6.

Excerpts not exceeding 75 pages. If the excerpts of record do not exceed 75 pages, the documents should be arranged by file date in chronological order beginning with the document with the most recent file date. 9th Cir R 30-1.6(b).

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§18.37 3. Supplemental Excerpts of Record

If the appellee believes that the excerpts of the record filed by the appellant omits required items or if argument in the answer brief requires review of portions of the record not included by the appellant in the excerpts, the appellee must submit supplemental excerpts of the record at the time appellee's brief is submitted. The appellee must submit four copies of the supplemental excerpts and serve one copy on each of the other parties. 9th Cir R 30-1.7. The excerpts must be mailed to the other parties and the court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief. 9th Cir R 30-1.7.

NOTE: If an appellant did not file excerpts of the record, the contents of the appellee's supplemental excerpts are limited to the district court docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portion of the record cited in the appellee's brief. 9th Cir R 30-1.7.

If the reply brief requires review of portions of the reporter's transcript or documents not included in the previously submitted excerpts, the appellant must submit further excerpts of the record at the time the reply brief is submitted. The appellant must submit four copies of the further excerpts and serve one copy on each of the other parties. If the brief is filed electronically, the excerpt of record must be mailed to the court and to other parties on the same day the brief is submitted. If the brief is not submitted electronically, then the excerpts must accompany the original brief and its copies. 9th Cir R 30-1.8(a).

If a supplemental brief submitted under court order requires review of portions of the reporter's transcript or documents not included in any previously submitted excerpts, the party submitting the supplemental brief must submit additional excerpts of record at the time the supplemental brief is submitted. The party must submit four copies of the excerpts and serve one copy on each of the other parties. If the brief is submitted electronically, the excerpts of the record must be mailed to the court and to other parties on the same day the brief is submitted. If the brief is not submitted electronically, then the excerpts must accompany the original brief and its copies. 9th Cir R 30-1.8(b).

Note that parties not represented by counsel are not required to file excerpts, supplemental excerpts, or further excerpts. 9th Cir R 30-1.2.

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§18.38 4. Failure to Comply With Excerpts of Record Requirements

If a party to an appeal omits required materials or includes irrelevant materials in the excerpts, the court may take one or more of the following actions (9th Cir R 30-2):

- Strike the excerpts and order that they be corrected and resubmitted;
- Order that the excerpts be supplemented;
- If the court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the court deems to be excessive; and/or
- Impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed. 9th Cir R 30-2.

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§18.39 5. Pro Se Parties

Parties not represented by counsel are not required to file excerpts, supplemental excerpts, or further excerpts. 9th Cir R 30-1.2. In a pro se appeal, the prisoner may make a written request of the district court for copies of the documents that comprise the excerpts of record. The clerk must forward the documents to the prisoner within 21 days from receipt of the request. 9th Cir R 30-3.

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K. Hearing

§18.40 1. Oral Argument

Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for one or more of the following reasons (Fed R App P 34(a)(2)):

- The appeal is frivolous;
- The dispositive issue or issues have been authoritatively decided; or
- The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

NOTE: In practice, the Ninth Circuit decides many pro se appeals without oral argument.

The clerk must advise all parties whether oral argument will be scheduled and, if so, the date, time, and place for it and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date. Fed R App P 34(b).

When an appeal is orally argued, the place of hearing is set by the court, generally in Pasadena for cases from the Southern or Central District Courts and in San Francisco for cases from the Northern and Eastern District Courts. See 9th Cir R 34-1. Parties may request a change in the time or place of the hearing, but the request must be supported by a showing of good cause. 9th Cir R 34-2. "Only under exceptional circumstances will the Court grant a request to vacate a setting within 14 days of the date set." 9th Cir R 34-2. On occasion, the Ninth Circuit has allowed an incarcerated prisoner to argue an appeal orally by telephone. See *King v Rowland* (9th Cir 1992) 977 F2d 1354; *Royse v Superior Court* (9th Cir 1986) 779 F2d 573.

If the appellee fails to appear for argument, the court must hear the appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the court orders otherwise. Fed R App P 34(e).

NOTE: When cross-appeals are involved, the party who files a notice of appeal first is the appellant. If notices are filed on the same day, the petitioner is the appellant. These designations may be modified by the parties' agreement or by court order. Fed R App P 28.1(b).

The parties may agree to submit a case for decision on the briefs but the court may direct that the case be argued. Fed R App P 34(f); *Bostick v Craven* (9th Cir 1970) 429 F2d 23.

PRACTICE TIP: Counsel should prepare thoroughly and rehearse the oral argument because it may determine the outcome of the case. Counsel should argue as clearly, persuasively, and concisely as possible and be prepared to answer questions from the court. The case typically is submitted for decision on conclusion of oral argument. It usually takes several weeks to several months after oral argument for the court to rule on the appeal.

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§18.41 2. Standard of Review

The "standard of review on appeal… depends on the nature of the claimed error." *Navellier v Sletten* (9th Cir 2001) 262 F3d 923, 944 "[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Harman v Apfel* (9th Cir 2000) 211 F3d 1172, 1174, quoting *Pierce v Underwood* (1988) 487 US 552, 558, 101 L Ed 2d 490, 500, 108 S Ct 2541.

NOTE: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214) establishes standards for review of a state court's decisions on issues of law, mixed issues of law and fact, and issues of fact that bind both the district court and the court of appeals. See generally §13.2.

The court of appeals reviews de novo a district court's judgment on a habeas corpus petition. *Robinson v Ignacio* (9th Cir 2004) 360 F3d 1044, 1055 (district court denied petition, court of appeal reversed; *Leavitt v Arave* (9th Cir 2004) 371 F3d 663, 668, amended (9th Cir 2004) 383 F3d 809 (district court granted petition, court of appeal reversed). The reviewing court defers to the district court's findings of fact, however, and will overturn those findings only when they are clearly erroneous; that is, when the reviewing court is left with a definite and firm conviction that the district court is mistaken. *Turner v Marshall* (9th Cir 1997) 121 F3d 1248, 1251; see also Fed R Civ P 52(a)(6). Moreover, the appropriate standard of review depends on the context of the district court's action assigned as error. See *U.S. v Mateo-Mendez* (9th Cir 2000) 215 F3d 1039, 1042. For example, the court's decision to grant or deny an evidentiary hearing is reviewed for abuse of discretion, as is the decision to grant or deny discovery. See *Stankewitz v Woodford* (9th Cir 2004) 365 F3d 706, 714; *Beardslee v Woodford* (9th Cir 2004) 358 F3d 560, 573 (denying hearing); *Lawson v Borg* (9th Cir 1995) 60 F3d 608, 611 (granting hearing); *Bittaker v Woodford* (9th Cir 2003) 331 F3d 715 (noting habeas discovery is within court's discretion).

PRACTICE TIP: The Ninth Circuit has published an extensive guide of more than 200 pages, entitled "Standards of Review," which advises practitioners of the appropriate standard of review for virtually every issue of law, including habeas issues. It is available on its website at http://www.ca9.uscourts.gov. The Ninth Circuit's website provides a great deal of valuable information, including rules of court and forms. It should be reviewed by every practitioner undertaking an appeal.

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L. Forms

§18.42 1. Form: Notice of Appeal

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_ _[*Name of attorney or pro per party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name*]_ _, **Petitioner-Appellant**	)	**No. _ _ _ _ _ _**
	)	**NOTICE OF APPEAL**
vs	)	
	)	
_ _[*Name*]_ _, **Respondent-Appellee**	)	
_____	)	

Notice is hereby given that _ _[*name of party and whether petitioner or respondent*]_ _ appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment _ _[*denying/granting*]_ _ the petition for writ of habeas corpus entered in this action on _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature of attorney or pro per party*]__
_ _[*Typed name*]_ _

Copies: The appellant must furnish the clerk with enough copies to permit the clerk to serve a copy on the opposing party (Fed R App P 3(a)); one copy for the client; one office copy.

Comment: The appellant should file the notice of appeal with the clerk of the federal district court where the habeas corpus action was decided.

At the same time as filing the notice of appeal, an appellant may also file, if necessary, a motion for a certificate of appealability (see §§18.10-18.16), a motion for leave to proceed in forma pauperis on appeal (see §§18.17, 18.46-18.49), a motion for appointment of counsel filed together with a financial affidavit form (see §13.16), a motion for stay of execution of judgment (see §§18.21-18.22), or a motion for release on appeal (see §§13.17-13.18, 13.20 on bail pending determination of the petition for habeas corpus). The forms may be adapted for use on appeal.

The appellant, of course, is not always the petitioner. When the respondent is the appellant, respondent should change the designations in the title of the case to "Respondent-Appellant" and "Petitioner-Appellee."

See Fed R App P, Appendix of Forms, Form 1.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.43 2. Form: Motion for Order Extending Time for Appeal

§18.43 2. Form: Motion for Order Extending Time for Appeal

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_ _[*Name of attorney or pro per party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name*]_ _,	)	**No. _ _ _ _ _ _**
Petitioner-Appellant	)	
	)	**MOTION FOR ORDER**
vs	)	**EXTENDING TIME FOR**
	)	**APPEAL**
_ _[*Name*]_ _,	)	
Respondent-Appellee	)	
_____	)	

The _ _[*petitioner/respondent*]_ _ in this cause, by and through _ _[*his/her*]_ _ counsel, moves the court for an order extending the time for appeal to the United States Court of Appeals for the Ninth Circuit to and including _ _[*date*]_ _, on the ground that _ _[*there was good cause for the petitioner's failure to file the notice of appeal within the time set forth in 28 USC §2107(a)/the petitioner's failure to file the notice of appeal within the time set forth in 28 USC §2107(a) was the result of excusable neglect*]_ _. This motion is based on the attached declaration(s) of _ _[*name(s)*]_ _.

Date: _ _ _ _ _ _ __[*Signature of attorney or pro per party*]__
_ _[*Typed name*]_ _

Copies: Original and three copies (filed with federal district court clerk); one copy for client; one office copy.

Comment: The moving party should file the motion, declaration (see §18.44), and order (see §18.45) with the clerk of the federal district court where the habeas corpus action that it is based on was decided and where the notice of appeal was filed, and serve a copy of it on the opposing party. On standards for determining the motion, see §18.9.

The appellant is not always the petitioner. When the respondent is the appellant, the party designations should be "Respondent-Appellant" and "Petitioner-Appellee."

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.44 3. Form: Declaration in Support of Motion for Order Extending Time for Appeal

§18.44 3. Form: Declaration in Support of Motion for Order Extending Time for Appeal

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[*Caption: None required by local rules in Central, Eastern, and Northern federal districts if declaration is appended to the moving papers. Otherwise, same caption as on those papers. In Southern district, separate parts of motions must be separately captioned and must not be attached.*]

I, _ _[*name of attorney*]_ _, under penalty of perjury declare:

I am counsel for _ _[*petitioner/respondent*]_ _ in this action. Judgment in this case was entered on _ _[*date*]_ _. The clerk's notice of entry of judgment was served by mail on me on_ _[*date*]_ _. I am unable to file the notice of appeal by its due date of _ _[*date*]_ _ for the following reasons _ _[*state reasons why the 30-day limit cannot be met or was missed to establish excusable neglect or good cause*]_ _.

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _

Comment: For discussion regarding filing a motion for order extending time for appeal, see §18.9. Counsel may use either a declaration under penalty of perjury or an affidavit. See 28 USC §1746. This declaration may be adapted for use by pro se parties.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.45 4. Form: Order Extending Time for Appeal

§18.45 4. Form: Order Extending Time for Appeal

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[*Title of court*]

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER EXTENDING TIME**
	)	**FOR APPEAL**
_____	)	

It appearing that the _ _[*petitioner's/respondent's*]_ _ delay in taking _ _[*his/her*]_ _ appeal in this case is the result of _ _[*excusable neglect/good cause*]_ _,

IT IS HEREBY ORDERED that the time within which the _ _[*petitioner/respondent*]_ _ may take an appeal to the United States Court of Appeals for the Ninth Circuit is hereby extended to and including _ _[*date*]_ _, which date is not more than either 30 days beyond the expiration of the original time for appeal prescribed by Federal Rules of Appellate Procedure 4(a) or 10 days from entry of this order.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
United States District Judge

Comment: For discussion of filing the motion for order extending time for appeal, see Comment to §18.43.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.46 5. Form: Motion for Leave to Proceed on Appeal In Forma Pauperis (Federal District Court)

§18.46 5. Form: Motion for Leave to Proceed on Appeal In Forma Pauperis (Federal District Court)

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_ _[*Name of attorney; State Bar no.*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name*]_ _, **Petitioner-Appellant**	)	**No. _ _ _ _ _ _**
	)	**MOTION FOR LEAVE TO**
vs	)	**PROCEED ON APPEAL IN**
	)	**FORMA PAUPERIS**
_ _[*Name*]_ _, **Respondent-Appellee**	)	
	)	

Petitioner moves the court for an order permitting _ _[*him/her*]_ _ to prosecute an appeal from the judgment entered in this case on _ _[*date*]_ _, in forma pauperis, under the provisions of Title 28 United States Code §1915. Petitioner's affidavit in support of this motion is attached.

Date: _ _ _ _ _ _ __[*Signature of attorney or pro per party*]__
_ _[*Typed name*]_ _

Copies: Original and three copies (filed with federal district court clerk); one copy for client; one office copy.

Comment: The motion, affidavit, and order should be filed in the federal district court where the notice of appeal is filed. They may be submitted at the same time the petitioner submits the notice of appeal. The affidavit should be submitted on Fed R App P, Form 4. See Fed R App P, Appendix of Forms. This form can be downloaded from the Ninth Circuit's website, http://www.ca9.uscourts.gov. On the notice of appeal, see §§18.2-18.9.

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§18.47 6. Form: Order Granting Leave to Prosecute Appeal In Forma Pauperis (Federal District Court)

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[*Title of court*]

[*Title of case*]	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER GRANTING LEAVE TO**
	)	**PROSECUTE APPEAL IN**
	)	**FORMA PAUPERIS**
_____	)	

Petitioner has asked this court to authorize _ _[*him/her*]_ _ to prosecute an appeal from the judgment entered in this case on _ _[*date*]_ _, in forma pauperis. That motion was supported by petitioner's affidavit, stating that _ _[*he/she*]_ _ is unable to pay the costs of an appeal or give security therefor. Because it appears to the court that the motion should be granted,

IT IS ORDERED, that petitioner _ _[*name*]_ _ is permitted to prosecute this appeal in forma pauperis.

Date: _ _ _ _ _ _ __[*Signature of judge*]__
United States District Judge

Comment: See Comment to §18.48.

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§18.48 7. Form: Motion for Leave to Proceed In Forma Pauperis (Ninth Circuit)

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_ _[*Name of attorney or pro per party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

_ _[*Name*]_ _,	)	**No.** _ _ _ _ _ _
Petitioner-Appellant	)	
	)	**MOTION FOR LEAVE TO**
vs	)	**PROCEED IN FORMA**
	)	**PAUPERIS**
_ _[*Name*]_ _,	)	
Respondent-Appellee	)	
_____	)	

This is an appeal from an order of the district court denying petitioner's writ of habeas corpus (Title 28 United States Code §2254). Petitioner is unable, because of_ _[*his/her*]_ _ poverty, to pay the costs on appeal or to give security for the appeal, but believes that _ _[*he/she*]_ _ is entitled to the redress sought. Therefore, petitioner asks leave to proceed on appeal in forma pauperis in accordance with Title 28 United States Code §1915 and Federal Rules of Appellate Procedure 24(a). This motion is based on the attached affidavit. Also attached is a copy of the district court's _ _[*order/certificate*]_ _ denying leave to appeal in forma pauperis, together with a copy of that court's statement of reasons supporting its decision.

Petitioner is _ _[*not on bail pending appeal/on bail pending appeal in the amount of _ _[dollar amount*]_ _]_ _, and no previous applications for in forma pauperis status have been made to this Court.

Date: _ _ _ _ _ _ __[*Signature of attorney or pro per party*]__
_ _[*Typed name*]_ _

Copies: Original and three copies (filed with Ninth Circuit court clerk); one copy for client; one office copy.

Comment: If the district court denies the petitioner's motion to proceed in forma pauperis, a motion requesting in forma pauperis status may be filed in the Ninth Circuit. The motion must be filed within 30 days of service of the district court's order denying in forma pauperis status. Fed R App P 24(a)(5). The motion must include a copy of the affidavit or declaration filed in the district court and the district court's statement of reasons for denying the petitioner's motion to proceed in forma pauperis. Fed R App P 24(a)(5). For a sample declaration, see §16.16. For further discussion, see §18.17.

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§18.49 8. Form: Order Granting Leave to Proceed on Appeal In Forma Pauperis (Ninth Circuit)

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[*Title of court*]

[*Title of case*]	)	**No.** _ _ _ _ _ _
	)	
	)	**ORDER GRANTING LEAVE TO**
	)	**APPEAL IN FORMA**
_____	)	**PAUPERIS**

On the motion of appellant for leave to appeal in forma pauperis without prepayment of fees and costs,

IT IS ORDERED that the motion be granted and the petitioner may take and prosecute _ _[*his/her*]_ _ appeal without prepayment of fees and costs.

Date: _ _ _ _ _ _ __[*Signature of judge*]__
United States Circuit Judge

Comment: See §§18.17, 18.48.

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Source: Criminal Law/Appeals and Writs in Criminal Cases/18 Review of District Court's Decision/§18.50 9. Form: Appellant's Opening Brief

§18.50 9. Form: Appellant's Opening Brief

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

_ _[*Name*]_ _, **Petitioner-Appellant**	**No. _ _ _ _ _ _**
vs	**TITLE**
_ _[*Name*]_ _, **Respondent-Appellee**	

On Appeal From an Order Denying Writ of Habeas Corpus in the United States District Court for the _ _ _ _ _ _ District of California

---

OPENING BRIEF FOR APPELLANT

_ _[*Name of counsel for appellant*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _
Counsel for Appellant

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Appeal Is Timely

Defendant's Bail Status

STATEMENT OF ISSUES PRESENTED FOR REVIEW

[*A concise statement of the questions presented should be set out in capital letters, in separate, numbered paragraphs. Each separate issue should be stated.*]

STATEMENT OF THE CASE

Proceedings Below

[*Recite chronologically the events in the lower court, through the final judgment appealed from.*]

STATEMENT OF FACTS

[*Summarize the facts as they relate to the issues presented for review, with references to the excerpts of record "ER"* [*page number if consecutively paginated or tab number and page number if not*].]

ARGUMENT

Standard of Review on Appeal

[*Give the standard of review on appeal with respect to each contention raised on appeal.*]

Objections Made

[*Expressly state each objection required to be made in the district court, with a citation to that part of the record.*]

Specific Arguments

[*The argument should be divided into logical subdivisions and should concisely state the law as applied to the facts stated. A summary may also be included if the argument is extensive.*]

CONCLUSION

[*The conclusion should be brief, and request the specific relief sought, e.g., the judgment below should be reversed, and a new trial granted.*]

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature of attorney or pro per party*]__
_ _[*Typed name*]_ _

[*Begin new page*]

CERTIFICATE OF RELATED CASES

[*State whether there are any other related cases pending in the Ninth Circuit. Give the case caption, court of appeals docket number, and nature of the relationship. This should be the last page of the brief, beginning on a separate page.*]

[*Begin new page*]

ADDENDUM

[*Include a reproduction of any statute, rule, regulation, or other authority that is important to resolve the appeal. The addendum must be separated from the brief by a blank, distinctly colored page.*]

[*Begin new page*]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Opening Brief for Appellant was hand-delivered this date to the office of _ _[*name*]_ _, as attorney for the Appellee in this case.

Date: _ _ _ _ _ _ __[*Signature of person delivering*]__
_ _[*Typed name*]_ _

Copies: Generally submitted electronically under 9th Cir R 25-5, excluding unrepresented parties and exempted counsel, with limited exceptions for specific documents. Parties submitting briefs electronically should wait for the court's direction to file an original and seven copies with Ninth Circuit court clerk with proof of service. At the time of the electronic submission, counsel should serve one paper copy on unregistered parties or exempted counsel. If proceeding in forma pauperis, file one original and seven copies. It is advisable to keep one copy for client and one office copy. 9th Cir R 31-1.

Appellant must also file four copies of the excerpts of the record, bound separately. For the required contents of the excerpts of the record, see 9th Cir R 30-1.

Comment: On format, content, and time requirements applicable to briefs, see §§18.26-18.34. An appellee's brief has the same form and content requirements as an appellant's brief, except the appellee may omit the jurisdictional statement, the statement of the issues, the statement of the case, the statement of the facts, and the statement of the standard of review if satisfied with appellant's statements. On the appellee's brief, see §18.27. The reply brief generally will be confined to a response to appellee's arguments, with perhaps an introduction if need be, and for clarity typically will maintain the same numbering of the arguments as in the opening brief. See §18.28.

A certificate of compliance with the length and page limitations of Fed R App P 32(a)(7)(C) and 9th Cir R 32-1, signed by counsel or the litigant if not represented by counsel, must be attached to the back of each copy of the brief. Fed R App P 32(a)(7)(C); see Fed R App P, Appendix of Forms, Form 8. It can be downloaded from the Ninth Circuit's website, http://www.ca9.uscourts.gov.

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II. POSTAPPELLATE REVIEW

A. Rehearing

1. Petitions

§18.51 a. Content and Form Requirements

After the Ninth Circuit issues its decision, any party dissatisfied with the decision may petition the panel for a rehearing. Fed R App P 40. For discussion of petitioning for rehearing en banc, see §18.55. A petition for rehearing must state with particularity each point of law or fact that the party believes the court has overlooked or misinterpreted and must succinctly argue why the court erred. Oral argument is not permitted. Fed R App P 40(a)(2). Petitions for rehearings are rarely granted.

The petition must comply in form with Fed R App P 32. Unless the court permits otherwise, a petition for rehearing must not exceed 15 pages unless it complies with the alternative length limitations of 4200 words or 390 lines of text. Fed R App P 40(b); 9th Cir R 40-1(a). The petition must include a copy of the panel's decision being challenged. 9th Cir R 40-1(c).

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§18.52 b. Service and Filing Requirements

Copies of the petition for rehearing must be served and filed as required by Fed R App P 31. Fed R App P 40(b). If the petition is not required to be electronically filed, an original must be filed. 9th Cir R 40-1(b). Unless the court specifies otherwise, a petition for rehearing must be filed within 14 days after entry of judgment. Fed R App P 40(a)(1).

An order to publish a previously unpublished memorandum disposition in accordance with 9th Cir R 36-4 extends the time to file a petition for rehearing to 14 days after the date of the order of publication. 9th Cir R 40-2.

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§18.53 2. Answer

Unless the court requests, no answer to a petition for rehearing is permitted. However, ordinarily rehearing will not be granted in the absence of such a request. Fed R App P 40(a)(3).

Absent an order to the contrary, any answer must conform to the same parameters applicable to the petition. 9th Cir R 40-1.

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§18.54 3. Disposition

If a petition for rehearing is granted, the court may do any of the following (Fed R App P 40(a)(4)):

- Make a final disposition of the case without reargument;
- Restore the case to the calendar for reargument or resubmission; or
- Issue any other appropriate order.

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§18.55 4. En Banc Determinations

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal be heard or reheard by the court of appeals en banc. En banc consideration is not favored and ordinarily will not be ordered unless necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance. Fed R App P 35(a). See 9th Cir R 35-1 (panel opinion in conflict with existing opinion affecting rule of national application is appropriate ground for suggesting rehearing en banc). See *U.S. v Hardesty* (9th Cir 1992) 977 F2d 1347 (unless court rules provide alternate method of resolving decisional conflict, when faced with irreconcilable conflict in controlling authority, three-judge panel must call for en banc decision).

A party may petition for a hearing or rehearing en banc, which is sometimes called a "suggestion" for such en banc consideration. Fed R App P 35(b). The petition must begin with a statement that either (Fed R App P 35(b)(1)):

- The panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
- The proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States courts of appeals that have addressed the issue.

A petition that an appeal be heard initially en banc, rather than before a three-judge panel, must be filed by the date when the appellee's brief is due, while a petition for rehearing en banc must be filed within the same time as a petition for panel rehearing. Fed R App P 35(c). Other than this difference, the same rules of form and procedure apply to both hearing and rehearing en banc. En banc hearing is very rare.

Except by the court's permission, a petition for an en banc rehearing must not exceed 15 pages (or 4200 words or 390 lines of text), excluding material not counted under Fed R App P 32. Fed R App P 35(b)(2), 9th Cir R 40-1(a). For purposes of this page limit, if a party files both a petition for rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule. Fed R App P 35(b)(3).

A petition for a rehearing en banc must be filed within the time prescribed by Fed R App P 40 for filing a petition for rehearing. Fed R App P 35(c). If a petition for rehearing en banc is not required to be filed electronically, Ninth Circuit rules require an original to be filed. 9th Cir R 35-4(b). No response may be filed to a petition for an en banc consideration unless the court orders a response. Fed R App P 35(e).

When a party petitions for rehearing en banc, the court will not order a rehearing without giving the other parties an opportunity to express their views on whether such a rehearing is appropriate. When no petition for en banc review is filed, the court will not ordinarily order such review without giving counsel an opportunity to respond to its appropriateness. 9th Cir R 35-2.

PRACTICE TIP: Ordinarily, a petition for rehearing en banc is made in conjunction with a petition for panel rehearing and filed as a single document. In such a case, reference to both the petition for rehearing en banc and to the petition for panel rehearing must appear on the cover of the combined petition. 9th Cir R 35-1. If filed separately, they still are considered a single document for volume limitations. Fed R App P 35(b).

Because of its size, the Ninth Circuit provides for a "limited en banc court" that consists of its Chief Judge and 10 randomly assigned other judges. 9th Cir R 35-3. In appropriate cases, the court may order a rehearing by the full court following a limited en banc review. 9th Cir R 35-3.

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§18.56 B. Writ of Certiorari to United States Supreme Court

A federal habeas order in the circuit court is reviewable in the Supreme Court by writ of certiorari. Review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the Court considers (US Sup Ct R 10):

- A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. US Sup Ct R 10.

Ordinarily, the petitioner must file 40 copies of a petition for a writ of certiorari, prepared as required by US Sup Ct R 33.1, and must pay a $300 docket fee. US Sup Ct R 12.1. However, a petitioner proceeding in forma pauperis is entitled to file an original and 10 copies of a petition for a writ of certiorari, together with an original and 10 copies of the motion for leave to proceed in forma pauperis. A copy of the motion must precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding in forma pauperis and not represented by counsel, need file only an original petition and motion. US Sup Ct R 12.2.

A petition for a writ of certiorari is timely when it is filed with the clerk of the United States Supreme Court within 90 days after entry of the judgment or denial of a petition for rehearing. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. US Sup Ct R 13.

For details regarding the content requirements of a petition for writ of certiorari, see US Sup Ct R 14; for opposition, reply, and supplemental briefs, see US Sup Ct R 15; and for disposition of writ petition, see US Sup Ct R 16. For further discussion of review in the United States Supreme Court, see chap 12.

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§18.57 C. Form: Petition for Rehearing

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney or pro per party*]_ _
_ _[*Address*]_ _
_ _[*Telephone*]_ _

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

_ _[*Name*]_ _, **Petitioner-Appellant**	**No.** _ _ _ _ _ _
vs	**PETITION FOR REHEARING**
_ _[*Name*]_ _, **Respondent-Appellee**	

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

_ _[*Name of petitioner/respondent*]_ _ **petitions this Honorable Court for a rehearing based on the following facts:**

On _ _[*date*]_ _**, this Court** _ _[*affirmed/reversed*]_ _ **the judgment of the Court below that** _ _[*set out holding of the court*]_ _**.**

[*Give reason for requesting rehearing, e.g.:*]

The ruling in the present case directly conflicts with the decision of the U.S. Supreme Court in _ _[*name of case*]_ _**,** _ _[*date of decision*]_ _**, in which the Court decided that** _ _[*specify*]_ _**. This holding of the U.S. Supreme Court is in direct conflict with the decision of this Court rendered in the instant case, and** _ _[*petitioner/respondent*]_ _ **respectfully requests that this Court grant the petition for rehearing and that the judgment of the District Court be, on further consideration,** _ _[*affirmed/reversed*]_ _**.**

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney or pro per party*]__
_ _[*Typed name*]_ _

Copies: If a petition for rehearing does not include a suggestion for a rehearing en banc, the petitioner must file with the Ninth Circuit court clerk an original and three copies. If a petition for rehearing does include a suggestion for a rehearing en banc, the petitioner must file an original and 50 copies with the court. In addition, the petitioner will need an original and one copy to serve on the Attorney General, each attorney of record, and each unrepresented party, one copy for the client, and one office copy.

Comment: On rehearings generally, see §§18.51-18.55.

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Appendix A

Title 28 United States Code §2244 and Title 28 United States Code §2254

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has

been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(l) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act [21 USC §848], in all proceedings brought

under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

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Appendix B

Federal Habeas Corpus Rules

Rule 1. Scope

(a) Cases involving a petition under 28 USC §2254. These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 USC §2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

(b) Other cases. The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

(As amended Dec. 1, 2004.)

Rule 2. The Petition

(**a) Current custody; naming the respondent.** If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.

(b) Future custody; naming the respondents and specifying the judgment. If the petitioner is not yet in custody —but may be subject to future custody—under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.

(c) Form. The petition must:

(1) specify all the grounds for relief available to the petitioner;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 USC §2242.

(d) Standard form. The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

(e) Separate petitions for judgments of separate courts. A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

(As amended Dec. 1, 2004.)

Rule 3. Filing the Petition; Inmate Filing

(a) Where to file; copies; filing fee. An original and two copies of the petition must be filed with the clerk and must be accompanied by:

(1) the applicable filing fee, or

(2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 USC §1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

(b) Filing. The clerk must file the petition and enter it on the docket.

(c) Time to file. The time for filing a petition is governed by 28 USC §2244(d).

(d) Inmate filing. A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 USC §1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(As amended Dec. 1, 2004.)

Rule 4. Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

(As amended Dec. 1, 2004.)

Rule 5. The Answer and the Reply

(a) When required. The respondent is not required to answer the petition unless a judge so orders.

(b) Contents: addressing the allegations; stating a bar. The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) Contents: transcripts. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) Contents: briefs on appeal and opinions. The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) Reply. The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

(As amended Dec. 1, 2004.)

Rule 6. Discovery

(a) Leave of court required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 USC §3006A.

(b) Requesting discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) Deposition expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

(As amended Dec. 1, 2004.)

Rule 7. Expanding the Record

(a) In general. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) Types of materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) Review by the opposing party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

(As amended Dec. 1, 2004.)

Rule 8. Evidentiary Hearing

(a) Determining whether to hold a hearing. If the petition is not dismissed, the judge must review the answer, any

transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(b) Reference to a magistrate judge. A judge may, under 28 USC §636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) Appointing counsel; **time of hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 USC §3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under §3006A at any stage of the proceeding.

(As amended Dec. 1, 2009.)

Rule 9. Second or Successive Petitions

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 USC §2244(b)(3) and (4).

(As amended Dec. 1, 2004.)

Rule 10. Powers of a Magistrate Judge

A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 USC §636.

(As amended Dec. 1, 2004.)

Rule 11. Certificate of Appealability; Time to Appeal

(a) **Certificate of appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 USC §2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Fed R App P 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

(As amended Dec. 1, 2009.)

Rule 12. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

(As added Dec. 1, 2009.)

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Table of Statutes, Regulations, and Rules

CALIFORNIA

Constitution

Art I, §§2-3: §7.43
Art I, §§6: §7.18
Art I, §9: §4.38
Art I, §11: §9.2
Art I, §12 (formerly §6): §§2.13, 9.15
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