ALL YOU WILL EVER NEED TO KNOW ABOUT REHEARING AND REVIEW PETITIONS

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Introduction and Summary of Argument

Picture yourself in the following predicament: After months of episodic hard work on your case on appeal, which included one or more promising and legally challenging issues, you have just received the unanimous unpublished opinion of the Court of Appeal affirming the judgment. The opinion cavalierly thumps your favorite issues in the case, distorts or avoids key facts which support your argument, and generally gets your blood boiling to the point that it would cause a reasonable person to act rashly. Does this sound familiar?

It very well may. Once you have written cruel but true comments in the margin of the opinion and let out some of your frustration with a colleague, you will then turn to the question of what steps need to be taken to continue the fight for your client. Is a petition for rehearing either necessary or useful? And should a review petition be filed, and what kind of review petition should it be?

This article intends to address this seeming "all-is-lost" moment in appellate practice and the steps that can and should (and sometimes should not) be taken on behalf of your client. The thesis of the article is that rehearing petitions are essential in certain rare situations, and useful in a few others, but that review petitions are almost always crucial, especially when your case involves any kind of claim of federal constitutional error.

As discussed in Part I below, a rehearing petition is absolutely necessary in two

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[1] I am grateful to my esteemed colleague, Dallas Sacher, for his review and comments on an early draft of this article, which improved the quality of the writing, helped me to emphasize several important points, and saved me the embarrassment of several errors which might have otherwise appeared in the text. I am solely responsible for any mistakes left in the text which Dallas' encyclopaedic mind and eagle eye may have missed.

situations: where the court decides the case on a legal principle or ground not discussed in the briefs, and when the court's opinion omits or misstates an issue or a material fact. Rehearing petitions are also useful when there is a fundamental mistake of law or faulty reasoning in the opinion and you have some reason to believe that the court will correct its error in your client's favor if it is pointed out to them in a rehearing petition, including the situation where the Court of Appeal incorrectly makes a finding of procedural default. As to all other rehearing petitions: Beware! Avoid using a rehearing petition as a means of venting the rage and frustration discussed in the introductory paragraph, as it rarely serves any purpose useful to your client or to your own credibility with the court.

Review petitions should generally be filed in any case which involves a "review-worthy" issue, i.e., where you believe that there is a legal claim that could be of interest to the Supreme Court, and in every case in which you have raised a claim of federal constitutional error where your client has any chance of obtaining relief in federal court. A review petition should never be "tossed off" with a rehash of your opening brief. If you have a "review-worthy" issue, you should carefully frame the issue statement and the "Reasons for Granting Review" portion of the petition, and use the brief portion of the petition to lay out your argument, the grave problems with the Court of Appeal's analysis in your case, and further develop the reasons why a grant of review is needed to resolve an important question of law.

A very different focus is called for in a petition filed primarily to exhaust your client's claims of federal constitutional error. The goal in this situation is to facilitate the filing of the federal habeas petition (or, rarely, cert. petition) by your client or by you on his behalf. This can be accomplished by filing a petition which contains the necessary elements for a federal habeas claim, i.e., a clear statement of the nature of the federal constitutional error, with references to the specific constitutional provisions (e.g., the 6th & 14th Amends.), citations to pertinent U.S. Supreme Court authority, an explanation of why the Court of Appeal's opinion is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the

United States . . .” (28 U.S.C. § 2254(d)(1)), and an explanation how the error was prejudicial under the controlling standard.

I. TO REHEARING OR NOT TO REHEARING. . . .[2]

The question whether, and when, to file a petition for rehearing is an area of criminal appellate practice where there is considerable confusion and disagreement. This portion of the article seeks to provide a framework for deciding whether a rehearing petition is either necessary or useful (or both). Much of the discussion will hopefully tie into themes addressed in the review petition portion of the article, including the need to raise certain points via rehearing, and issues about what is, or isn't, needed to preserve against procedural default in later collateral relief habeas petitions in federal court.

The rules of court permit a party to petition for rehearing within fifteen days after an opinion is filed. (Rule 8.268.) The court has until the thirtieth day to grant or deny rehearing, and it is deemed denied if no order is filed. (*Ibid*.)

The overwhelming majority of rehearing petitions are denied. Thus, it often seems there is no good reason to file a rehearing petition. At the same time, rehearing can sometimes be a prompt and convenient way of responding to an appellate opinion which dodges, slurs, or bulldozes over meritorious appellate issues.

Generally speaking, there are four sets of reasons to file a rehearing petition:

> (1) The court has decided the case based on an issue not proposed or briefed by either party;
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> (2) The opinion of the Court of Appeal omits or misstates an issue or a material fact;
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> (3) There is a fundamental error (or errors) in the opinion of the Court of Appeal which skews the analysis and result, or an erroneous finding of procedural default by the Court, and there is a reasonable possibility of a cure by means of a rehearing petition; and

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[2] This is a rehash of a newsletter article I wrote in December of 2002, with requisite changes in the Rules of Court numbers and a few substantive and editorial modifications.

(4) You are so fumed with the way the opinion of the Court of Appeal has treated you, your client, and/or the factual background and legal arguments presented that you feel compelled to point out everything that's wrong or unfair about their opinion in a rehearing petition.

In my view, the first three grounds are all legitimate reasons to file a rehearing petition, but the fourth is not. I will discuss each in its turn. Keep in mind, though, that the categories may sometimes blur or overlap, making it hard to sort them out.

A. **Case Decided on an Unbriefed Issue: Entitlement to Rehearing per Government Code § 68081**. You've written a great brief, and should win on the issues. But the Court of Appeal decides against you based on a point of law or a procedural default never briefed or discussed by you or the attorney general. What can you do besides cry into your teacup?

There is an avenue of redress. Government Code section 68081 requires the Court of Appeal to request supplemental briefing if they plan to decide a case based on an issue not briefed by the parties, and provides that "rehearing shall be ordered" upon timely petition if supplemental briefing has not been requested.[3]

In my experience, one can actually get rehearing granted on this ground. This has happened to me twice, both involving published opinions. The first time, the majority in a Sixth District case engaged in some creative statutory interpretation of section 22(b) of the Penal Code which had not been addressed by either appellant or respondent, and which was ultimately repudiated by the Supreme Court in *People v. Mendoza* (1998) 18

[3] "Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." (Govt. Code § 68081.)

Cal.4th 1114. My opportunity to brief this issue after rehearing probably played a big part in review being granted in that case. The second time, a different court deciding a credits issue in favor of my client went out of its way to concomitantly order credits limited to 15 percent under Penal Code section 2933.1, a legal question never briefed by the parties, and one which, as it turned out, violated Ex Post Facto Clause because my client's current robbery crime was not a serious felony when it was committed in 1996. In both cases, I successfully petitioned for rehearing, citing Government Code section 68081. Notably, in the latter case, the court corrected itself and deleted all reference to section 2933.1 in the opinion after rehearing. (See *People v. Mack* (2002) 99 Cal.App.4th 329, rev. gtd. 8-28-02.)

So, if the court reaches out in your case and decides it on an issue that was never briefed, you should always petition for rehearing under Government Code section 68081. This type of rehearing is non-controversial, as it's hard to imagine a situation where you would not want a rehearing to address an issue the court believes is decisive which you never briefed.

The kicker here is that the court may not agree with you that the issue or sub-issue fits within the rubric of a decision based on an issue not briefed by the parties. Recently, the Supreme Court has made it clear that the requirement of supplemental briefing in Government Code section 68081 does not apply if an issue can be considered "fairly included" within the issues presented. (*People v. Alice* (2007) 41 Cal.4th 668, 677-679.) However, the actual holding in *Alice*, that a separate basis for appealability relied upon by the Court of Appeal to uphold the propriety of a prosecution appeal was not fairly included in the issues presented on appeal (*ibid*.), may be helpful. In any case, you will need to carefully explain why this rule applies to your situation, and why the issue at hand is not "fairly included" in the issues briefed by the parties.

B. **Opinion Omits or Misstates an Issue or Material Fact**. Most rehearing petitions get filed under the rubric of Rule 8.500(c)(2), which provides as follows:

> A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's 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.

Whether to file such a rehearing petition is a subject on which criminal appellate practitioners disagree. In the view of some, including a few luminaries in the field, you are better off *not* asking for rehearing and giving the Court of Appeal a chance to clean up its mistakes and reduce your client's chance of ultimately prevailing on the issues in a federal habeas petition. This viewpoint suggests you simply point out the error and argue your issue in the review petition; the Supreme Court will invariably deny review on the merits, and has never, insofar as anyone knows, denied review on procedural grounds based on a failure to comply with Rule 8.50(c)(2) or its predecessor versions (former Rules 28(c)(2) and 29(b)(2)). The federal courts will not apply a forfeiture based on this rule, so the argument goes, as long as the issue was fully presented in the review petition, and denied on the merits.

In my view, following this line of thinking makes sense only if you can absolutely guarantee that review will not be granted. If review *is* granted, the California Supreme Court can, and normally will, refuse to reach an issue because of the failure to petition for rehearing. (See, e.g., *People v. Peevy* (1998) 17 Cal.4th 1184, 1205-1206 and *People v. Bransford* (1994) 8 Cal.4th 885, 893, fn. 10.) If the Supreme Court declines to reach an issue because of this procedural default, there's a good chance a federal court will refuse to consider the issue on federal review based on the fact that it was decided on "independent and adequate state procedural grounds." (See, e.g., *Wainright v. Sykes* (1977) 433 U.S. 72.) There may be ways to argue around default – e.g., that the procedural rule is not consistently applied (see *Wells v. Maass* (9th Cir. 1994) 28 F.3d 1005, 1010) – but the risk of default is not, in my view, worth the potential reward of avoiding a "fix-up" opinion on rehearing by the Court of Appeal. As noted above, rehearing is very rarely

granted. Furthermore, most "corrections" of the opinions by the court of appeal will not meaningfully affect your client's right or chances to obtain federal habeas relief; and they could, in the right circumstances, result in a more favorable opinion – e.g., finding error on an omitted issue or, as in my *Mack* case cited above, correcting an erroneous legal holding to the benefit of the client.

C. **Rehearing to Correct Erroneous or Faulty Reasoning or Analysis**. Appellate opinions will sometimes mess things up pretty badly: a basic legal principle can be botched in their analysis; key facts discussed in the summary of the case can be omitted in the discussion of an issue or of prejudice; a federal constitutional aspect of your argument can be ignored, rather than rejected; or the court could employ the wrong standard for assessing error or prejudice. Another very troubling problem in a Court of Appeal opinion would be the Court's finding of a procedural default which is not supported by the record. Such errors don't, strictly speaking, fit within the rubric of Rule 8.50(c)(2) because they are not omissions or misstatements of a material fact or issue, just shoddy or erroneous analysis. In this all-too-common situation, is a rehearing petition required or useful?

In my view, the decision whether to ask for rehearing in this situation calls for a careful exercise of discretion on the part of the appellate practitioner, with perhaps some input from your project buddy or other colleagues. If you think there is a "reasonable possibility" of an improvement in the result, ask for rehearing. If you think there is not, don't waste your time. If it's a close call, draft and file the rehearing petition. You will need to make the same points in your review petition, and you might as well not use up the scant ten hours provided for such petitions in the compensation guidelines.

A recent example of such a petition being successfully brought in the California Supreme Court is *People v. Dominguez* (2007) 39 Cal. 4th 1141, in which my colleague Dallas Sacher pointed out in the rehearing petition the erroneousness of the Court's

finding that an instructional error issue was defaulted for failure to argue it in the Court of Appeal. Following a rehearing petition, the Court modified the opinion to remove this erroneous conclusion from its opinion, which has saved Dallas the problem in his federal habeas claim of having to deal with a bogus finding of procedural default.

D. **Telling the Court of Appeal How Badly They've Botched the Case and Offended Basic Principles of Due Process**. The fourth category of rehearing petition is the one we always *want* to write, but almost never should. No meaningful advantage to your client can be obtained from using a rehearing petition as a way of venting your frustration regarding slimy analysis and skewed presentations of the facts where there is no reasonable possibility of a better result. It will not result in rehearing being granted; it could well lead to a diminution of your reputation with the members of the court, and/or their law clerks, and thus prejudice your future clients; and it does nothing to advance your client's case in any future review in state or federal court.

Having made that pronouncement, I have to admit that I will sometimes file rehearing petitions as much for the "political" purpose of "speaking truth to power," as for any of the other above-noted reasons. But when I do so, I try very hard to package the petition in one or more of the other three categories described above, and to carefully watch the tone of my prose so as to reduce any perception of offensiveness. If you are really venting your spleen in a rehearing petition, get a colleague or appellate project buddy to 'vet' the petition before filing it, and try to avoid phrases like "intellectually dishonest" and "galling" (both of which were vetted out of my own rehearing petitions at one time or another).

E. **Oops, I Forgot an Issue!** Did I say there were four categories of rehearing petitions? Actually, here's a suggestion for a fifth one which you should take with a grain of salt, and only then as a last resort.

Yes, it does happen that you realize only after you read the opinion that you forgot to brief an issue, or an aspect of an issue. One fairly common example is where the AG

raises a procedural default issue which you think is absolutely laughable, and which you demolish in your reply brief. And then, stunningly, the Court of Appeal relies on that flimsy garment of procedural default to cover up your winning issue and find it forfeited. You didn't bother to brief a backup argument of ineffective assistance of counsel (IAC) because it seemed entirely unnecessary and absurd, but now it's the only way to preserve your issue, other than to challenge the procedural ruling in a petition for review and pray for a miracle. Can anything be done on rehearing to rescue your client's winning issue?

The bad news is that the general rule precludes raising a point of law, issue or sub-issue for the first time on petition for rehearing, and courts will routinely refuse to consider issues raised in this manner. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121; *County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 459, fn. 5.)[4] However, where good cause appears for the consideration of such new matters, a court has discretion to do so for the first time on a petition for rehearing. (*Mounts v. Uyeda*, *supra*, at p. 121; *Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 446, fn. 12.)

If you find yourself in this position, raise the claim for the first time in a rehearing petition, citing the above authority, and asking the court to treat the petition as a supplemental brief. You will have to explain why it is that you failed to brief the issue, e.g., there was a novel point of law which was not foreseeable, trial counsel was ineffective for failing to raise and preserve the issue, you were ineffective for not raising the IAC claim in your briefing, the AG put a voodoo hex on you, etc.

Of course, except in unusual situations involving very recent landmark decisions (e.g., *Cunningham*, *Crawford*), it is quite rare for a Court of Appeal to grant such a rehearing petition. If they do grant it, you are in fine shape, and the issue will hopefully get a ruling on the merits. In the normal circumstance, the court will simply deny the rehearing petition. The trick is to then present the issue in your review petition, again

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[4]Raising such an issue for the first time in a review petition is also, generally speaking, a doomed proposition. (See Rule 8.500(c)(1).)

citing the above authority. When the Supreme Court denies the petition on its merits, you have then, arguably, raised and preserved the issue for federal habeas review, either because it was decided on the merits, or because the procedural rule described in cases like *Mounts* is not one which is consistently applied. (See *Wells v. Maass*, *supra*, 28 F.3d at p. 1010.)

I have to conclude with a caveat. This method is not tried and true, and is not foolproof, as it leaves a chance that either the Court of Appeal or the Supreme Court will find the *new* issue (IAC in my hypothetical) procedurally defaulted, and creates a basis, even if they don't, for the government to argue on federal habeas that the issue was defaulted under an independent and adequate state ground. The only foolproof way to preserve such an issue is by a "fall-on-your-sword" habeas petition, which raises the issue by means of an allegation of ineffective assistance of appellate counsel. To be on the safe side, it probably makes the most sense to do both.

II. REVIEW PETITIONS REVIEWED

The most sensible way to think about petitions for review is to break them up into two sometimes overlapping categories:

- Cases which involve an issue or issues which have some meaningful chance to lead to a grant of review by the supreme court which could be beneficial to your client, referred to herein by the shorthand phrase "review-worthy issues"; and
- Cases where a review petition is necessary to exhaust a federal constitutional claim in order to present the claim in a federal habeas petition (or, more rarely, in a cert. petition).

Different strategies, argumentative styles, and goals apply to these two different types of petitions, and thus they are discussed under separate headings. Bear in mind, though, that the categories will often overlap in that issues which are potentially review-worthy often involve federal constitutional error. In such cases, you will need to pay attention to both sets of concerns discussed below.

A. **Review-Worthy Issues**. The grounds for granting review are set forth in Rule 8.500(b). Of the four grounds cited in that rule, we normally need concern ourselves only with subdivision (1), which provides, "the Supreme Court may order review of a Court of Appeal decision . . . [w]hen necessary to secure uniformity of decision or to settle an important question of law. . . ."

Emphasis and most work should always be in those cases where you reasonably believe you have a "review-worthy" issue, one that involves a novel question of legal interpretation, or which involves conflict within the Courts of Appeal. It's hard to generalize as to what kinds of cases are most likely to lead to a grant of review. Here are some suggested categories of cases where a petition for review has a somewhat better likelihood of being granted.

- Cases involving statutory or constitutional interpretation of new statutes or initiative measures, or of statutes that have proven over the years to be thorny to figure out for appellate courts, or even the Supreme Court itself.
- Cases with issues that include the "echo-effects" of landmark opinions or changes in the law, e.g., *post-Crawford*, *post-Cunningham* cases, typically nasty criminal law initiatives.
- Any case with a published opinion on a novel or hotly disputed issue of law, especially if there was a dissent in the Court of Appeal.
- AG's petitions; i.e., cases where *you* have won in the Court of Appeal, published or unpublished. (These don't really fit the topic, but you are most likely to get a chance to argue – and, unfortunately too often, lose – in the Supreme Court in such a case.)
- Cases where review has already been granted on the same or closely related point, which provide a strong grounds for a "grant and hold" order. (Rule 8.512(d)(2).)

Caveat: Cases in which review is actually granted are as varied as they are rare; the only real measure is the vote of four justices – i.e., a majority of the Supreme Court.

Keep in mind that you may have a great issue where review is denied not because the Court isn't interested in the issue, but just because yours might not be the "right" case in terms of the facts or law.

B. **Raising and Preserving Federal Constitutional Error for Collateral Review.** The second principal reason for filing a review petition is to preserve an issue for collateral review by means of a federal habeas petition. Both federal statute and case law contain an "exhaustion" requirement, which means that as a prerequisite to obtaining federal habeas review, an issue must be presented to the state's highest court, even when, as in California, actual review by such a court is discretionary. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844-845.) In California, this almost always means a petition for review. (*Gatlin v. Madding* (9th Cir. 1999) 189 F.3d 882, 888.)[5]

Judicial Council rules no permit a hybrid "exhaustion petition" whose sole function is to preserve an issue for federal review. (Rule 8.508.) The question whether to present your exhaustion petition under the aegis of this rule or as a regular-old review petition will be addressed in Part II-E-1 below.

Before embarking on one or the other form of exhaustion petition, a couple of factors need to be considered. First, ask yourself whether the issue or issues are truly federal constitutional in scope, i.e., whether the key determination of the issue depends on an interpretation of state law or federal constitutional law. As an example, consider one of my pet issues (which has so far gone nowhere), in which I argue that the "fear" element of the crime of robbery includes an objective as well as subjective component, as it does in the similar crime of rape. (See *People v. Iniguez* (1994) 7 Cal.4th 847.) Where the Court of Appeal rejects my claims of sufficiency and/or instructional error on an element of the offense – both of which are federal constitutional claims (see *Jackson v. Virginia* (1979) 443 U.S. 307 and *Estelle v. McGuire* (1991) 502 U.S. 62, 69) – is there

[5]The exception, discussed below, involves habeas petitions, which can properly be exhausted by means of a habeas petition in the California Supreme Court.

really a federal constitutional issue worth preserving and seeking federal habeas relief? The answer, unfortunately, is probably "no." It's well settled that it is a matter of state law to describe and interpret the elements of a crime. (See, e.g., *Martin v. Ohio* (1987) 480 U.S. 228, 232, *Patterson v. New York* (1977) 432 U.S. 197, 211.) Thus, an issue such as this, which nominally involves federal constitutional rights (sufficiency of evidence and instructions on elements of the crime), but is decided based on a pure interpretation of state law, is one where your client is almost certain to lose in federal court based upon an independent and adequate state law basis for the ruling.

Second, you need to figure out whether your client and his punishment fits within the category of persons who could obtain actual benefit from collateral review. Federal habeas relief is limited to persons "in state custody," which means either actual physical custody of the state, or constructive custody such as parole or probation. (*Jones v. Cunningham* (1963) 371 U.S. 236, 240; see also *Miranda v. Reno* (9th Cir. 2001) 238 F.3d 1156, 1158 [summarizing expanded meaning of "custody" for purposes of federal habeas statutes].) For those of you who have not handled a federal habeas claim, it is not unusual for such a claim to take three to six years to get a final result. While federal habeas procedure permits a petition to continue until judgment where a petitioner is out of custody, provided that he was in custody when the petition was filed (*Maleng v. Cook* (1989) 490 U.S. 488, 491-92), you should consider whether your client will be subject to significant legal or collateral restraints if and when federal habeas relief could be obtained, and thus whether he will get any kind of meaningful relief from a federal habeas win. Keep in mind, though, that even if there is no longer any custodial restraint from a conviction, most clients would be pleased to have a criminal conviction removed from their record, especially considering the potential collateral consequences which such a conviction can have on their lives.

C. **Strategies For Drafting Review Petitions.**

1. **The Requisites of a Proper Review Petition**. Rule 8.504 sets forth the

technical requirements for a petition for review. As a general matter, the rule requires that review petitions comply with the requirements for briefs set forth in Rule 8.204 (Rule 8.504(a).) This means that review petitions must include tables of contents and authorities, separated headings and subheadings of arguments, a statement of the case and facts, and otherwise comply with the "form" requirements of Rule 8.204(b).

Careful attention must be paid to the following *specific* requirements for a review petition set forth in the remaining parts of Rule 8.504.

a. **Timeliness**. A review petition must be filed "within ten days after the Court of Appeal decision is final. . . ." (Rule 8.504(e)(1).) Since a Court of Appeal decision in an appeal is final after thirty days, the petition should be filed between the 31st and 40th day after the opinion. However, the petition can actually be submitted to the Supreme Court for filing before the date of finality. (Rule 8.504(e)(2).) Keep in mind that the due date for a review petition is a "guillotine" rule: a review petition will not be accepted for filing when it is late, and an untimely filing will forfeit both any chance of review being granted and your client's exhaustion of federal constitutional issues. The sole exception is a sub-rule permitting a party to ask the Chief Justice to grant relief from default within the sixty day period during which the court can grant review on its own motion. (Rule 8.504(e)(2).) In practice, such requests appear to be routinely denied when they are based on any form of inexcusable neglect of counsel. Dire emergencies (death or hospitalization of counsel or loved one, etc.) have led to relief under this rule, but hardly anything else.

On a few occasions, we have been able to get around an attorney's neglectful failure to file a timely review petition by drafting the motion and petition *in propria persona* by the client, and including a declaration indicating that the client was relying in good faith on the attorney's promise to file a timely review petition. Even here, the results have been spotty. The only other way to recover from a failure to file a timely review petition is to prepare a pro per original habeas petition on behalf of the client based on ineffective assistance of counsel in failing to file a timely review petition.

However, the risks here are considerable, since the U.S. Supreme Court has held that there is no federal constitutional right to counsel with respect to the filing of a discretionary petition on appeal to the state's highest court, and at least arguably under federal law no right to the effective assistance of counsel as to such a petition. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555-556.)

It is thus obvious that the only viable course is to file a timely review petition on behalf of your client.

b. **Word Length**. There used to be a thirty page limit to review petitions. I could live with this limit because I use 1.5 line spacing, and the old rules allowed you to get away with using smaller typefaces. Now there is a word limit of 8400 words (Rule 8.504(d)(1)), which is a bit more than a third the length allowed for an opening brief. As I write a brief, this ends up being shorter than 30 pages. For double-spacers, however, this gives you a petition that is considerably longer than 30 pages. The rule permits a longer petition on application to the Chief Justice, but here too such a request is frequently denied. The good news is that if it is denied, the Court will give you ten days to file a conforming petition.

Problems with word length often arise in cases involving numerous issues with federal constitutional claims that have to be preserved, particularly where the petition also involves one or more review-worthy issues. My best advice is to draft the petition as concisely as possible, from beginning to end. When your draft if finished, and you are over the word limit, read it through with the idea of paring it down and eliminating unnecessary or repetitive passages. One trick employed routinely by many practitioners, including this writer, is to not include Statements of the Case or Facts, but to simply state, under the heading of "Statements of the Case and Facts," the following phrase:

> "Except as otherwise noted herein, appellant adopts the statement of the case and facts in the opinion of the court of appeal. (Slip opin., pp. 1-__.)"

This can pare many pages/words off your petition, and allows you to deal with distortions

and omissions in the Court of Appeal opinion in the body of your arguments.

c. **Statement of Issues for Review** Perhaps the most important specific requirement for review petitions is a brief description of the issues presented, which is aptly described in the rule:

> "The body of the petition must begin with a concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail."

(Rule 8.504(b)(1).)

My own practice has always been to draft the issue statement first, before writing the rest of the petition. This helps me to focus and frame the argument. I work on it, sometimes for hours, trying to make it catchy, clear, precise, and yet specific enough to lay out the facts that matter in the case. Then, after I've put together a draft of the rest of the petition, I will go back to the statement of issues and rework it if needed, since the focus of arguments can often change in the course of writing a review petition.

For reasons obscured by time, I have always framed the "statement of the issues"in the form of "Question[s] Presented for Review." Some years ago, I was surprised to learn that the "question" format was not required, but kept doing it in most cases out of habit. The "question" format seems to give broad latitude for a precise framing of what is before the court. It can also provide you a way, in the more mundane case with little chance of a review grant, of simply rephrasing your issue headnote as a question so that it doesn't seem repetitive when you say it again in the brief portion of the argument. And, it provides good practice in case you decide to become a contestant on "Jeopardy" [double or otherwise].

Some sample "Questions for Review" are included as Appendix A. You will note that some issue statements are short and sweet, otherwise full of more detail and complexity. Keep in mind while drafting your Statement of Issues that the quality and clarity of this part of the petition may well be critical. In a recent FDAP seminar, a Supreme Court staff clerk described the Court's internal process of dividing up review

petitions into an "A" list and a "B" list, with the former cases actually presented to the justices for specific consideration, and the latter "B" cases essentially denied after staff review. The quality and care you put into setting for the Statement of Issues may well be decisive in terms of putting your client's case into the "A" list.

d. **Reasons for Granting Review**. A second requirement unique to the petition for review is stated in Rule 8.504(b)(2):

> "The petition must explain how the case presents a ground for review under rule 8.500(b)."

In many review petitions which I've seen, this requirement is complied with simply by stating that the described issue is "necessary to settle an important question of law, and by citing Rule 8.500(b)(1). This is almost certainly insufficient.

The better practice, followed by most appellate practitioners, is to create a second section after the Statement of Issues which is entitled "Reasons for Granting Review," or something similar, and then laying out, as clearly as possible, the reasons why the case involves an important statewide issue of law or involves a split of authority within the Courts of Appeal.

Crafting an effective "Reasons for Review" section requires focus on the legal underpinnings of the argument, situating it, when possible, in a sequence of pertinent prior court decisions and/or legislative enactments, and critically taking apart, at least in outline form, the Court of Appeal opinion. If the opinion on appeal is published, emphasize the harm from the misinterpretation or obfuscation in the opinion; if it is unpublished, stress the extent to which it does not take seriously enough the importance of the issue and the need for clear guidance from the Supreme Court.

The "Reasons for Review" should be kept fairly short. If you've written a strong "Summary of Argument" as an introduction to your issue in the opening brief, this can often provide a good starting point for drafting the reasons for review. Where the primary purpose of the review petition, or of the inclusion of particular issues in a

petition, is to exhaust federal constitutional claims, little more need be said than that exhaustion is required, citing the federal case law to this effect.

A few sample "Reasons for Review" excerpted from review petitions are provided in Appendix B.

D. **Some Suggestions for Drafting Petitions in "Review-Worthy" Cases.**

1. **Find a Hook**. No, not for use on the author of the Court of Appeal opinion. The idea here is to come up with a fresh take on your issue that makes it just the sort on which the Court will want to grant review. A rehash of your Court of Appeal briefs will not do it.

Sometimes it isn't hard to find the hook, as the issue itself will be hook enough. For example, in the *People v. Mendoza* case (my only win in the Supreme Court), the hook was a divided Court of Appeal in a published case ruling that the mental state for aiding and abetting was general intent, and that intoxication evidence was not admissible under Penal Code section 22(b) to negate such a mental state. My goal in the review petition in that case was to clearly present the issue, laying out the pertinent decisions of the Supreme Court which suggested that the dissenter correctly found that aiding and abetting required a specific intent, and using the analysis of Justice Mihara's dissenting opinion to good advantage.

In other cases, the "review worthiness" of the issue will not be obvious, and it is your job to persuade the screening clerks and justices that the issue really is one of statewide significance. When, as is most commonly the case, the opinion is unpublished and there is no dissenting opinion, the uphill fight is to demonstrate why the issue really matters. Emphasize the frequency of the legal and factual predicament that gave rise to the issue in your case, the novelty and significance of the issue presented, and the need for guidance from the state's highest court based on apparent conflicts in the case law.

At the same time, beware of saying too much about the novelty of the issue; your words may come back to haunt you or your client in a later federal habeas petition after

review is denied where you are seeking to show that the Court of Appeal unreasonably interpreted federal constitutional law. If the issue is truly novel, it's harder to maintain that the Court of Appeal decision was "contrary to or an unreasonable application of" settled constitutional law.

2. **Don't Expend Too Much Energy Discussing How Your Client Got "Slimed" by the Court of Appeal Opinion**. I have to begin this section with a little story. About 20 years ago or so, well before I went to work as a Staff Attorney for SDAP, I was attending an appellate seminar at which a lead attorney on the Supreme Court's Central Staff was giving a presentation on petitions for review. Although his name escapes me, I recall that he was a former State Public Defender back in the heyday of that office in the late 1970s. His presentation laid out all the types of cases which were likely to lead to a grant of review, and gave some tips about how to package issues to the court. Following his presentation, I raised my hand from the top of the seminar room and asked him what he would suggest we can do to obtain review when the Court of Appeal opinion distorts the facts, miscasts the legal arguments presented, ignores federal constitutional claims, and generally obfuscates the issues on the way to affirming. "Did everyone hear the question?" he said to the audience. When many said "No," he spoke up: "The question is, what do you do when you get slimed by the Court of Appeal." His answer, as I recall, was that you should get over it and try to package the issue as one which is worthy of review.

Generally speaking, this is wise advice. It's the issue, and not its mishandling by the Court of Appeal, which will attract the Supreme Court's attention. This follows from the nature of the Court as one of limited jurisdiction which sits not to review and correct bad decisions by the lower appellate courts, but to decide legal issues of statewide importance. At best, all the Supreme Court can do with a poorly reasoned and analyzed opinion of the Court of Appeal is to depublish it. So channel your energy into finding a good hook, showing how the issue is one that is or will be vexing the courts, and why

your take on the issue interprets the law in the manner it is supposed to be interpreted under the case law of the state and/or federal Supreme Courts.

That said, don't entirely shy away from the sins and omissions in the Court of Appeal opinion. Explaining how they botched it is a part of your argument as to why the issue is important to your client and others, and how a correct analysis or interpretation of the issue should go. Plus, as explained in the ""Exhausting Federal Habeas Claims" section below, laying out the negative factors about the Court of Appeal's opinion is a crucial part of the federal habeas argument that this "last reasoned decision" was either "contrary to" or "an unreasonable application" of federal constitutional law.

E. **Raising and Preserving Federal Constitutional Issues.** As explained above, a petition for review must be filed to properly exhaust state court remedies, a prerequisite to obtaining federal habeas relief. Even when the primary goal of a review petition is to comply with this exhaustion requirement, it is important to devote careful attention to the petition that you file for exhaustion purposes, as it can have a helpful or injurious impact on your client's chances of obtaining relief in federal court.

1. **Exhaustion Petition or Review Petition?** A couple years back, the Rules of Court were amended to permit a "Petition for Review to Exhaust State Remedies" in lieu of a review petition. (Rule 8.508) Under this rule, there is no requirement of a Statement of Issues or a description of the Reasons for Granting Review (Rule 8.508(b)(3)), and fewer copies of the petition need be filed with the Court. (Rule 8.44(a)(4).) The requirements for such a petition are limited. It must include

> (A) A statement that the case presents no grounds for review under rule 8.500(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;
>
> (B) A brief statement of the underlying proceedings, including the nature of the conviction and the punishment imposed; and
>
> (C) A brief statement of the factual and legal bases of the claim.

(Rule 8.508(b)(3)(A)-(C).)

Although an exhaustion petition may save you some time and out-of-pocket costs, in my view it should be used rarely and warily. A careful framing of the issue is essential to raising and properly exhausting your claim, and thus it is debatable whether styling your petition as an exhaustion petition will actually save you any meaningful time. And it will often be the case that at least one of your federal constitutional issues you are seeking to exhaust has some "review-worthy" qualities, and at least a marginal chance of having review granted, a chance which is essentially thrown away if an exhaustion petition is filed in lieu of a review petition. Many times I have packaged a review petition on a range of federal constitutional issues around the theme of arguing for review as to one or more issues, while simply seeking exhaustion of the remaining issues, a strategy which can't be undertaken with a pure exhaustion petition.

I recommend using an exhaustion petition only where you believe that all the federal constitutional issues fit the category of "arguable but completely hopeless." As explained in the next section, even where you are pretty sure there is no chance for review to be granted on any of your issues, putting together a carefully worded description of the factual and legal predicates for your issue(s) and the deficiencies in the Court of Appeal's analysis can be very helpful to your client's chances of obtaining any federal habeas relief.

2. **Using the Review Petition to Lay Out the Argument for Federal Habeas Relief.** Even more important than the decision whether to file a review or exhaustion petition is the need to pay careful attention to the content of the petition, with the goal of advancing your client's chances at presenting and winning his federal habeas claim. The thesis here is that your chances of having review granted are somewhere between slim and nun, I mean none. Thus your goals in filing a petition primarily focused on exhaustion should be one of the following:

- ♦ Keep the ball in the air, i.e., do the minimum necessary to preserve the client's ability to seek relief in federal court; or

- ♦ Use your knowledge and experience about the case and the issue, and about the requirements for success in a federal habeas claim, to do all you can to advance your client's chances of succeeding in federal court.

As you might have noticed from the phrasing of these two options, I strongly favor the second approach. Too often a review petition filed to exhaust the claim in state court is little more than a rehash of the opening brief. While this is easy and takes less time, you can do a tremendous service for your client – and get paid for it – by crafting a review petition which both raises and preserves the federal constitutional claims presented on appeal, and which takes apart, as best you can, the reasoning of the Court of Appeal opinion on the federal constitutional issue. If you spend some time putting together an effective review petition that accomplishes both goals, you will have utilized the federal court requirement of an exhaustion petition to the state's highest court (*O'Sullivan v. Boerckel*, *supra*, 526 U.S. at pp. 844-845) as a way of drafting the key parts of your client's federal habeas petition.

For example, instead of just pointing out how the Court of Appeal decision was a bad interpretation of the law, demonstrate how it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (28 U.S.C. § 2254(d)(1).) This is not all that difficult to do in most instances. And, it provides you with a good opportunity to channel some of that outrage you felt when you first read the opinion on appeal and which I have urged you not to vent in a rehearing petition.

As an additional touch, when arguing the prejudice from the trial error in your case, don't confine yourself to *Chapman* analysis as to how the error was not harmless beyond a reasonable doubt; argue alternatively that the error had a "substantial and injurious effect or influence in determining the jury's verdict . . ." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 636-638), the accepted standard of prejudice for all federal habeas claims, even when there was no meaningful *Chapman* review in state court. (*Fry v. Pliler*

(2007) __ U.S. __, 127 S. Ct. 2321, 2328.)

Get the picture? The goal is to allow your client, or you on his behalf, to use the form federal habeas petition and to present the substance of the issues raised by simply attaching a copy of the review petition. I have personally ghost written many federal habeas petitions on behalf of clients by doing little more than this. Under the headings of the form where you are supposed to describe the nature of the issue and the factual basis and legal authority which support it, I will simply indicate, "See Argument 2 in review petition," or what have you. Alternatively, I will include separate "attachments" which, largely copying and pasting from the prose in the review petition, set forth the legal and factual bases for federal habeas relief. In this way, you can use the review petition, which is included as part of your compensated work in state court, as a way of furthering your client's ability to put forward the best possible argument in federal court, where you might not be paid for your work.[6]

I would add, as a final comment, that doing this to help your client will also give you and your client a chance to have the district court exercise its discretionary power and appoint you as his counsel in federal court. Once an OSC is issued, and the attorney general files a complicated answer, especially one raising complex claims of procedural default, there may well be strong grounds for arguing that your untrained client needs help to adequately present his claim.[7]

F. **Review Petition in Cert.-Worthy Cases.** Normally, your exhaustion focus in crafting a review petition will be on setting up your client's federal habeas petition in federal district court. However, in some instances another goal, and sometimes the only goal, will be to lay the groundwork for a petition for writ of certiorari in the U.S. Supreme

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[6] The form for a federal habeas petition is simple to download and fill out for your client. Just go to the website of the Northern District Court (http://www.cand.uscourts.gov/) , click "Forms," "Prisoner," and "Habeas Corpus Petition," and you will be there.

[7] I have sample motions for appointment of counsel which I would be happy to provide on request.

Court.

Two sets of examples come readily to mind. First and most obvious are cases involving Fourth Amendment issues. Under the puzzling but now longstanding holding of *Stone v. Powell* (1976) 428 U.S. 465, federal courts will not grant habeas relief where there was "full and fair litigation of a Fourth Amendment claim" in state court. In practice, this means that your only chance of obtaining federal court review of a Fourth Amendment issue is by means of a cert petition to the U.S. Supreme Court. While grants of cert are rare compared to the number of wins obtained on federal habeas review, there are still a decent number of Fourth Amendment cases where cert is granted.

A second, more significant class of cases where the primary goal of your review petition will be setting up a cert petition involve contested questions of law where there is no clear precedent from the Supreme Court favorable to your argument. An example of this is any of the numerous *Apprendi*-related issues concerning use of recidivism facts to increase the maximum punishment. Based on the constellation of opinions in *Apprendi* and its progeny, it seems clear enough that there are five votes on the Supreme Court to overrule the 5-4 holding in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which held that there is no right to a jury trial for proof of prior convictions which increases the maximum punishment for a current offense.[8] However, until the Supreme Court actually overrules *Almendarez-Torres*, you will have an enormous impediment to obtaining any kind of federal habeas relief based on an *Apprendi* argument as to proof of recidivism facts, since it will be almost impossible to argue, in light of *Almendarez-Torres*, that a state court's decision, such as *People v. McGee* (2006) 38 Cal.4th 682 and *Black2* (*People v. Black* (2007) 41 Cal. 4th 799, which conclude that there is no jury trial right to proof of recidivism facts which increase the maximum punishment, is either

[8] But see Justice Stevens Statement respecting denial of cert. in *Rangel-Reyes v. United States*, (2006) 547 U.S. 1200 [*Almendarez-Torres* was wrongly decided but insigficant nature of issue and *stare decisis* are basis for denial of cert.].)

"contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (28 U.S.C. § 2254(d)(1).) Thus, in this type of case, as in Fourth Amendment cases, the goal of an exhaustion review petition is to set up a potentially winning cert petition.

Your strategy in drafting such a cert petition will be different than the other two categories of petitions. With review-worthy issues, the best approach is to focus on California statutes and case law, situating your "important question of law" argument in a discussion of related authority from the California Supreme Court and conflicting case law from the Courts of Appeal. For the habeas exhaustion petition, the goal is to make it clear that the Court of Appeal's opinion ignores controlling Supreme Court case law or is entirely unreasonable in its application of settled constitutional principles. In setting up a cert. petition, you want to craft something akin to the "review-worthy" petition but which is focused not on state court case law and authority, but on pertinent lines of U.S. Supreme Court case law and supporting and conflicting authority from lower federal courts and sister states. While the bulk of your work in putting together such an argument will be done in the draft of the cert petition itself, you can use the review petition as a starting point for organizing your broader focused claim of an issue of national constitutional significance.

Obviously, the cert-focused review petition is particularly called for where the California Supreme Court is on record against you. Otherwise, you will likely want to couch your issue of national importance as review-worthy in the California Supreme Court, where your chances of having review granted are probably better.

G. **Review Petitions in Habeas Cases**. When you have filed a habeas petition in the Court of Appeal and it is denied, either summarily or as part of the opinion on appeal, you will almost always want to seek further relief in the California Supreme Court, both as a way of correcting the wrong decision by the lower court and because exhaustion of such a petition in the state's highest court is a requirement to obtaining federal habeas

relief. Exhaustion will almost always be called for since habeas petitions invariably involve federal constitutional rights, usually the Sixth Amendment right to effective assistance of counsel. Several considerations need to be addressed when you embark upon this next stage of habeas review.

1. **Review Petition or Successor Original Jurisdiction Petition?**

There are two viable options for renewing and exhausting the habeas claim in the California Supreme Court. The first option is a successor petition filed under the original jurisdiction of the Supreme Court; the second is a petition for review. You will need to promptly figure out which procedural route is best for advancing your client's chances of obtaining relief in state or federal court.

There are advantages and disadvantages to both. The timing of your filing could be a significant factor. A habeas denial is deemed to be "final" on the date of filing. (Rule 8.264(b)(2)(A).) Thus, a review petition in a habeas petition will normally be due 10 days after denial. However, if the habeas denial occurs on the same day as the opinion in a related appeal, you will have the normal forty days to file a review petition. (Rule 8.264(b)(4).) Thus, you will face a critical "guillotine rule" deadline if you choose to file a review petition, which will be especially difficult to meet if the habeas is denied on a different day than the opinion on appeal.[9]

The "timeliness" of a successor habeas is not based on a fixed deadline. Instead, California follows a puzzlingly complicated "flexible" system which requires that petitions normally be filed in a diligent manner, and includes a "well-established rule that any substantial delay in seeking relief by petition for writ of habeas corpus must be explained and justified." (*In re Clark* (1993) 5 Cal.4th 750, 795, fn. 30.) However, bear

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[9]This will rarely be a factor in the Sixth District, which, as a matter of routine, orders habeas petitions considered together with an appeal, and issues the opinion and denial order (or OSC) on the same day. However, the 10 day deadline may become significant if you are handling a different sort of habeas petition, e.g., a stand alone habeas filed in the Court of Appeal after denial of a habeas in superior court.

in mind that unexplained or insufficiently justified delays in bringing habeas petitions can and will lead to a denial by the Supreme Court, with a citation indicating that it is based on lack of timeliness, which will in turn has the grave consequence of eliminating the normal tolling of the federal habeas statute during the pendency of the habeas petition in the California Supreme Court. (See *Pace v. DiGuglielmo* (2005) 544 U.S. 408 and *Bonner v. Carey* (9th Cir. 2006) 435 F.3d 993.) To be safe, and in the absence of explainable circumstances which justify delay, a successor habeas should be filed in the Supreme Court within sixty days of denial, in order to avoid the risk that the federal courts will deny statutory tolling where there is any further significant and unjustified delay. (See *Evans v. Chavis* (2006) 546 U.S. 189.)

On balance, it will normally be the better and safer practice to exhaust habeas claims by means of a petition for review. There are three very significant advantages to such a petition over a successor habeas. The first and most obvious is the timing of a ruling on the petition. The Supreme Court will decide a review petition within sixty days of its filing, with an occasional brief extension. Original habeas petitions in the Court normally take many months and even as long as a year to be decided.

Second, in a review petition, you can emphasize not only the underlying constitutional error which deprived your client of significant trial rights (e.g., IAC), but also the failure of the Court of Appeal to issue an Order to Show Cause. Thus in your "issues for review" and "reasons for granting review" discussions in the review petition, you can emphasize the fact that the legal authority for habeas relief is solid, that the determination of the validity of the claim really comes down to a question of credibility of your client versus that of trial counsel (to pick a typical example), and that the only proper result is to issue an OSC because of the settled rule that a court considering a habeas petition must presume the truthfulness of its allegations and issue the OSC where a prima facie case for relief is made. (See, e.g., *In re Clark*, *supra*, 5 Cal. 4th at p. 769, fn. 9.)

And third, for reasons which may have more to do with the differences in the staff assigned by the Supreme Court to screen review petitions versus habeas petitions, it

seems to be the case that the Court is more likely to take such an argument seriously in connection with a review petition. Arbitrarily denied habeas claims presented on review seem more often to lead to fairly prompt orders for additional briefing, and, somewhat less frequently, issuance of Orders to Show Cause, than do original jurisdiction petitions.

In a few cases where unusual circumstances are present, an original habeas petition will make more sense than a review petition. If, for example, you need to significantly alter the number and nature of arguments presented from what was raised in the Court of Appeal, or add to, take away, or alter affidavits submitted in support of the petition, an original petition allows you to do this. Where additional time is reasonably needed to secure new supporting declarations or exhibits for the petition, or to investigate an additional issue which may have just come to light, the flexible nature of the diligence rule can permit this. And finally, where the issue is exceedingly complex in terms of the facts and/or legal argument, and you think you can present and exhaust the issue more fully and carefully without having to worry about the 8400 word limit for a review petition, a successor habeas is a better choice, particularly where, as in long sentence cases, the time delay in getting a ruling is of only marginal significance.

2. **One Review Petition or Two?** If you are filing a review petition in the Supreme Court, an additional point of puzzlement comes up where the direct appeal and habeas are decided on the same day: Are you supposed to file one review petition as to both the appeal and habeas, or two separate petitions?

When, as is typical with Sixth District cases, the Court of Appeal issues an opinion in the direct appeal, and then separately disposes of the habeas with a denial order, you are required to file two separate review petitions, one for the habeas, one for the review petition. (Rule 8.500(d).) If, as occasionally happens, the habeas issue is analyzed and denied as part of a consolidated appellate opinion, you are supposed to file one review petition as to the single opinion in the case which covers both the direct appeal and the habeas issues.

H. **Petitions for Review of Non-Final Orders of the Court of Appeal**. The rule allowing for review by the Supreme Court is not limited to opinions on appeal and habeas determinations. Rather, Rule 8.500 permits a petition 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." (Rule 8.500(a)(1).) Thus a review petition can be filed to challenge denial of motions to augment the record, motions to consolidate cases on appeal, or any other non-final order of the court which affects your client's rights on appeal.

Most interlocutory orders, including augmentation motion denials, are "final" after thirty days, and you will thus have forty days to prepare a review petition. However, a few specified orders are final when made, meaning you will only have ten days in which to file the petition. (See Rule 8.264(d) [denials of original petitions, writs of supersedeas, bail applications, orders for transfer, or dismissal requests are final when made].)

Obviously, this type of review petition should be used sparingly. A good example of when to ask for review would be a denial of a crucial augmentation request which appears to be particularly arbitrary. In the pre-Rushing PJ days, this occurred with some regularity, and review petitions were actually taken with some success to challenge this.[10]

In this type of a review petition, you are not really seeking review in order to present an issue of statewide importance, but are actually using the Supreme Court as a kind of appellate supervisory authority to fix arbitrary rulings. In this sense, a review petition on an interlocutory order is more akin to taking an extraordinary writ up from the trial court to the Court of Appeal to correct a trial court order which will do irreparable harm to your client.

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[10]Justice Rushing's commendable practice, when he thinks the showing inadequate to require augmentation, is to deny the motion "without prejudice to further showing in support of the request." Typically, on a more thorough showing of the need for augmentation, the motion will be granted.

III. **WHAT AND WHEN TO TELL THE CLIENT ABOUT REVIEW**.

Once an opinion is filed, you should, of course, promptly write to the client to advise him of the bad news, sending a copy of the opinion. At this point, you will hopefully have already made your decision whether to file a review petition. If you will be filing such a petition, just tell him you intend to fight on and that you will send a copy of the petition when it is filed.

If you will not be filing a review petition – e.g., if the issues are not of much interest legally, or turn on a factual determination that is hard to challenge, and there is no significant federal constitutional issue for which collateral federal review would be available – you should promptly advise the client that you will not be filing such a petition, and provide him with instructions as to how to file such a petition on his own if he wants to raise and/or preserve the issue. Sample letters are available on our website. (http://www.sdap.org/pt-s-letters.html .)

When review is denied, you should again write to the client with the bad news. Here too, it's important to describe the next step, explaining the availability of federal habeas review (and/or certiorari, as in Fourth Amendment denials) and the time deadlines for this. Again, sample letters are available on SDAP's website.

If you are potentially available to assist the client in putting together his federal habeas petition, you should say so right off the bat. As a last editorial comment, I strongly encourage counsel to provide at least minimal assistance to your client by filling out the federal habeas form for the client when such issues have been presented and preserved. Your time commitment in doing this will generally be no longer than an hour or two, and the potential benefit to your clients will be considerable in terms of properly presenting preserved issues and avoiding numerous traps of procedural default.

CONCLUSION

The title of this article promised it would be "all you will ever need to know about review and rehearing petitions." Of course I have failed to deliver on this promise

because what you most need to know about these petitions can be learned best only through experience in writing them in winning and (mostly) losing causes which you will garner over the years.

While digesting all of the above, keep in mind that the Supreme Court rarely grants review in criminal cases, and even more rarely does anything favorable for our clients when it does grant review. Many times we wish there was a Supreme Court up there who could help our client, and the law, on a particularly important issue that was savaged in the Court of Appeal opinion, but in reality, the best bet for our client will be to frame a proto-federal habeas exhaustion petition since there is virtually no chance the Supreme Court will grant review or do anything favorable if they did grant review.

However, it is worth recalling that the present Supreme Court, while disappointing compared to the Bird-era Court or the innovative, due-process-focused courts of the 60s and 70s, is still dramatically better than the Lucas Court, whose reign was truly the Dark Ages for criminal appellate defense practice in California. That court rarely granted defendant's petitions for review in criminal cases, and nearly always ruled against the criminal defendant. The George Court grants review in a fair percentage of criminal cases. And though a painful loss is often the resultwhen review is granted, the Court has proven to capable of granting relief,[11] and can be counted on sometimes to produce dissenting opinions which have something of the old passion for criminal law issues.[12]

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[11] For example, see *People v. Superior Court (Romero)* (1996) 13 Cal.3d 497 ("*Romero*"), *In re George T.* , [teen's scary poem is protected speech, not criminal threat], *People v. Sanders* (2003) 31 Cal.4th 318, 333[overruling prior bad ruling to hold that parole search clause that police are unaware of does not preclude Fourth Amendment claim], *In re Marquez* (2003) 30 Cal.4th 14,[defendant not held to impossible "but for" test for presentence credits when custody time from two cases would otherwise be "dead time"], *People v. Hofsheier* (2006) 37 Cal.4th 1135 [striking down mandatory 290 registration for statutory oral copulation based on equal protection claim where registration is discretionary for statutory rape].

[12]See, e.g., Justice Kennard's dissenting opinions in *People v. Wims* (1995) 10 Cal. 4th 293, 320-327, which prefigured the *Apprendi* holding on a jury trial right as to proof

The point of this momentary incursion into the substantive holdings of the Court is simply to emphasize that review-worthy issues are worth pursuing because you can win in the Supreme Court, or at least help lay the groundwork for a future win in another case on your issue when the votes or impetus for the win may be more favorable.

Regardless of our thoughts about the wisdom of pursuing review-worthy cases in a pro-prosecution Supreme Court, the review process will always be needed to preserve federal constitutional claims on behalf of your client. If done properly, as recommended herein, the mandatory step of seeking review can be used to contribute significantly to your client's opportunity to obtain relief in federal court.

So, keep those rehearing and review petitions flying, and keep up the good work for our clients.

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of enhancements and in *People v. Breverman* (1998) 19 Cal.4th 142, 188-191, correctly arguing that failure to instruct on manslaughter as an LIO of murder is misinstruction on an element of the crime.

APPENDIX A: SAMPLE "QUESTIONS PRESENTED FOR REVIEW"

I. "Review-Worthy" Petitions

A. From *People v. Mendoza*, review granted in 1997:

> Does former Penal Code section 22, subdivision (b) preclude or permit introduction of intoxication evidence to negate the intent element of aiding and abetting when a specific intent crime is charged?

B. From *People v. Ledesma*, review granted in 1996:

> Penal Code section 12022.5, subdivision (a) provides that an enhancement for personal use of a firearm during the commission of a felony "shall" be imposed "unless use of a firearm is an element of the offense" of conviction. This exclusion is later qualified at subdivision (d), which provides that an enhancement "*may* be imposed" (emphasis added) for assault with a firearm under section 245, subdivision (a)(2). The issue before the court is whether the use of the normally permissive term "may" in subdivision (d) requires an exercise of discretion and statement of reasons by the trial court when seeking to impose a firearm-use enhancement where the underlying offense is assault with a firearm.

C. From *People v. Wilridge*, review denied in 2004:

> Does the "fear" element of robbery require proof of both a subjective *and* objective component? In the present case, was the trial court's refusal to instruct on the objective aspect of fear in robbery federal constitutional instructional error on an element of the offense which, on the unique facts of the present case, is not harmless beyond a reasonable doubt?

D. From *People v. Stoll*, petition for review denied after I wrote article:

> Under the non-strict standard for credits described by this court in *In re Marquez* (2003) 30 Cal.4th 14, is the defendant in this case entitled to presentence credits for "deadtime" in the following circumstances:

— In March of 2004, he was jointly sentenced on two separate cases, a vehicle taking committed in November of 2003, and an attempted robbery committed in February of 2004, with the court imposing but suspending a three year upper term sentence on the attempted robbery charge, and a one-third middle term sentence of 8 months on the vehicle theft charge, and imposing numerous conditions of probation, identical in every respect except as to mandated jail sentences, which were 80 days on the attempted robbery case, with credits given for time served of 80 days, and 360 days on the vehicle taking case, which defendant then served out in full.

— In November of 2006, after defendant admitted violating his probation, the trial court revoked probation and ordered execution of the previously imposed sentence, granting 152 days credit as to the three year principal term on the attempted robbery, and 429 days credit on the subordinate eight month term imposed for the vehicle taking charge, leaving 189 days of "deadtime" for credits allocated to the vehicle taking charge.

II. **Preserving Federal Constitutional Issues Petitions**

A. From *People v. Moreno*, review denied in 2002:

1. **Evidence Code section 1108 as Ex Post Fact Law**. In light of the holding in *Carmell* v. *Texas* (2000) 529 U.S. 513 reaffirming the fourth category of ex post facto laws which "change the rules of evidence," did the admission of other crime propensity evidence in the present case under the aegis of Evidence Code section 1108 (hereinafter "section 1108") violate the ex post facto clauses of the state and federal constitutions (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9) as applied to appellant, whose alleged crimes were committed prior to effective date of section 1108, because the change in law allowing admission of uncharged prior crimes to show propensity from which the jury could directly infer guilt amounted to a "sufficiency of evidence rule . . . lowering the quantum of evidence required to convict . . .", a rule which "will *always* run in the prosecution's favor [by] mak[ing] it easier to convict the accused . . ." (*Id*., at p. 546)?

2. **Pre-1999 Version of CALJIC 2.50.01 as Impermissible Burden-Reducing Instruction**. Did the trial court's uncharged crime propensity instruction under the pre-1999 version of CALJIC 2.50.01, which told the jury it could (a) find the truth of the uncharged crime by a preponderance of evidence, (b) infer propensity from this conduct, and (c) infer guilt from propensity, violate appellant's due process right (U.S. Const., 5th, 6th & 14th Amends.) to a jury verdict based on proof beyond a reasonable doubt by allowing conviction via propensity evidence based upon the lower preponderance standard?

3. Was the trial court's written response to a question from the deliberating jury concerning the scope of aiding and abetting culpability for the charged sex crimes an erroneous and misleading instruction on the elements of the charged sex crimes in violation of the federal constitution (U.S. Const., 5th, 6th & 14th Amends.)?

4. Is reversal required for evidentiary errors which violated appellant's rights under the confrontation and due process clauses of the federal constitution (U.S. Const., 5th, 6th & 14th Amends.)?

B. McCord review petition, denied 2004

Did the trial court violate appellant's federal constitutional right to present evidence which tends to raise a reasonable doubt as to his guilt (U.S. Const., 6th & 14th Amends., *Crane* v. *Kentucky* (1986) 476 U.S. 683, 687, *Franklin* v. *Henry* (9th Cir. 1997) 122 F.3d 1270) by excluding third party culpability evidence concerning the original prime suspect, Romel Reid?

APPENDIX B: SAMPLE "REASONS FOR GRANTING REVIEW"

A. From *People v. Mendoza*, review granted in 1997

At the time of the commission of the crimes of murder and attempted murder charged against appellant, Penal Code section 22, subdivision (b) (hereinafter "former section 22(b)"), provided:

"Evidence of voluntary intoxication is admissible solely on the issue of

> whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (Stats. 1982, ch. 893, § 2, pp. 3317- 3318.)

In *People* v. *Beeman* (1984) 35 Cal.3d 547 ("*Beeman*"), this court defined the intent required for aiding and abetting as "the intent or purpose of committing, encouraging, or facilitating the commission of the offense." (*Id*., at p. 561.)

The issue presented for review is whether former section 22(b) precludes or permits introduction of intoxication evidence to negate the *Beeman* intent element of aiding and abetting when a specific intent crime is charged.

Appellant Juan Valdez was charged, inter alia, with murder and attempted murder. As it was undisputed that his codefendant Edgar Valencia fired the fatal and injurious shots, the sole theory of Valdez's guilt as to these crimes was as an aider and abettor. There was substantial evidence that Valdez was intoxicated at the time of the alleged crimes. In connection with this evidence, Valdez's trial counsel requested instructions which pinpointed the relationship between voluntary intoxication and the *Beeman* intent element of aiding and abetting which the trial court refused to give.

On appeal, Valdez contended he was entitled to these instructions, and that the failure to give them required reversal of his convictions for murder and attempted murder. In his lead opinion, Justice Mihara agreed in large part, opining that the intent required for aiding and abetting the crimes of murder and attempted murder is a specific intent, and that evidence of a defendant's intoxication is relevant to the question whether the defendant formed the *Beeman*-defined intent element of aiding and abetting with respect to the charged specific intent crimes of murder and attempted murder. (Slip opinion, lead opinion (hereinafter "lead opn."), Part I-J, at pp. 40-51.)

The concurring opinion authored by Justice Bammatre-Manoukian and joined by Presiding Justice Cottle concluded otherwise, holding that former section 22(b) did not authorize the use of evidence of Valdez's voluntary intoxication to disprove the intent element of aiding and abetting upon which Mr. Valdez's culpability was based. (Slip

opinion, conc. opn. of Bammatre-Manoukian, J. (hereinafter "conc. opn."), at pp. 1-22.)

Appellant urges this court to grant review to resolve this important question of law. In the Argument for Review which follows, appellant will demonstrate that former section 22(b) permits and does not preclude the admission of intoxication evidence to negate the intent element of aiding and abetting.

After a short sketch of the factual and procedural background in Part A, we demonstrate in Part B that the intent element of aiding and abetting defined in *People* v. *Beeman* (1984) 35 Cal.3d 547 is a specific intent element required for the commission of a charged crime. Thus, under the plain language of former section 22(b), introduction of intoxication evidence as to this element is proper.

In Part C, we trace the legislative history analysis of former section 22(b) undertaken by this court in *People* v. *Whitfield* (1994) 7 Cal.4th 437 which concluded that the 1982 amendment of section 22 was a minor, clarifying amendment which sought only to specify that the 1981 amendments did not express an intention to alter the longstanding rule excluding intoxication evidence for general intent crimes. A fair review of the language of the statute as phrased after the 1981 amendments compels a conclusion that it would have been proper under the statute as it was then worded to introduce intoxication evidence to negate the intent element of aiding and abetting. Since the *Beeman* intent element constitutes a specific intent and not, by any stretch of the imagination, one which only required general criminal intent, it follows that the minor clarifying amendments of 1982 were not intended to preclude introduction of intoxication evidence to negate the *Beeman* intent element of aiding and abetting.

Two other aspects of the legislative history of section 22(b) which support the position advanced by appellant are also discussed in Part C. First, we note that because *Beeman* was decided two years after the 1982 amendments, the Legislature could not conceivably have intended the terms of that amendment to restrict admissibility of intoxication evidence with respect to proof of the *Beeman*-defined intent element of aiding and abetting. Second, we point out that the most recent amendments to section

22(b) enacted in 1995 to overrule *Whitfield* delete the reference to the term "specific intent crime," giving further indication that the Legislature never intended to limit intoxication evidence to proof of only those specific intent elements contained in the actual definitions of the crimes themselves.

Finally, in Part C we argue under the authority of this court's teachings in *People* v. *Saille* (1991) 54 Cal.3d 1103 that because California law requires that the prosecution prove the *Beeman* intent element in order to convict a defendant upon a theory of aiding and abetting, a defendant has a federal due process right to introduce evidence of intoxication to negate proof of this requisite mental state. (*Saille*, *supra*, at p. 1116, citing *Patterson* v. *New York* (1977) 432 U.S. 197, 215; see also *Rock* v. *Arkansas* (1987) 483 U.S. 44, 55-56, *Chambers* v. *Mississippi* (1973) 410 U.S. 284, and *People* v. *Bobo* (1990) 229 Cal.App.3d 1417, 1442-1443.) Under the settled rule which requires courts to interpret a statute in such manner as to avoid violations of a defendant's constitutional rights, former section 22(b) cannot be construed to preclude introduction of intoxication evidence to negate the intent element of aiding and abetting.

As appellant will demonstrate in the brief that follows, the majority view on this issue in the present case constitutes a seriously mistaken and unsupportable interpretation of former section 22(b) at odds with the plain language of the statute, this court's interpretation of it in *Whitfield* and settled principles of constitutional law. This court should grant review to settle "an important question of law . . ." (Cal. Rules of Court, rule 29(a)) and should conclude after briefing of the question that former section 22(b) permits and does not precludes introduction of intoxication evidence to negate the intent element of aiding and abetting the specific intent crimes of murder and attempted murder.

B. **Wilridge, review denied in 2004:**

1. **Robbery Instructional Error**

a. **Meaning of "Fear" in Robbery**

More than seventy years ago, the court in *People* v. *Borra* (1932) 123 Cal.App.

482, 484 held that there was a necessary *objective* component of fear in the crime of robbery which can be "established by proof of conduct, words or circumstances reasonably calculated to produce fear . . .", holding that proof of this aspect of fear is sufficient even in the absence of proof of subjective fear. Ten years ago, this Court in *People* v. *Iniguez* (1994) 7 Cal. 4th 847, 856-857 held that the "fear" element of the crime of rape requires proof of *both* subjective, "actual" fear, and as an additional component, either an objectively reasonable basis for such fear or a situation where a perpetrator is aware of a victim's unreasonable fear and takes advantage of it.

Review should be granted in the present case to consider the important question whether this same two-part meaning of "fear" applied in *Iniguez* applies to the crime of robbery. Although *Iniguez* concerned the different crime of rape, not robbery, this Court repeatedly relied upon case law concerning robbery for purposes of analyzing the requisites of proof of "fear" in the crime of rape. (See *Iniguez*, *supra*, at 857, citing *In re Michael L.* (1985) 39 Cal.3d 81, 88, *Borra*, *supra*, 123 Cal.App. 482, *People* v. *Brew* (1991) 2 Cal.App.4th 99, 104 and *People* v. *Franklin* (1962) 200 Cal.App.2d 797, 798.) Since the robbery and rape statutes are in pari materia in terms of their use of the term "fear" (*People* v. *Corey* (1978) 21 Cal.3d 738, 743), the holding in *Iniguez* that fear has both an objective and subjective component applies to the crime of robbery with equal weight.

Review should be granted to settle this important question of law.

b. **The Federal Constitutional Nature of the Instructional Error.**

Relying on *Borra*, the defendant in the present case sought an instruction which explained the objective component of fear to the jury. (CT 113-115) The trial court refused the instruction on the ground that the issue was covered by other robbery instructions. (RT 293-294) The court also noted that it was "troubled by" the fact that defense counsel produced the proposed instruction one day after the conference on instructions, and on the morning before the arguments of counsel and jury instruction was

to occur. (RT 290-291)

When raising this issue on appeal, defendant emphasized that a proper instruction defining fear was compelled by the Sixth and Fourteenth Amendment rights to correct instructions defining the elements of charged crimes, which includes a correct explanation of proof of required aspects of an element which the evidence makes relevant. (See *Estelle* v. *McGuire* (1991) 502 U.S. 62, 69, *Carella* v. *California* (1989) 491 U.S. 263, 265, *People* v. *Flood* (1998) 18 Cal.4th 470, 491-492 and *People* v. *Harris* (1994) 9 Cal.4th 407, 425.)

In its opinion below, the court of appeal mentions the sua sponte duty to give correct instructions on elements of charged crimes. (Slip opin., p. 7) However, it then sidesteps this rule by suggesting that a criminal defendant cannot complain on appeal about the adequacy of such an instruction "if he failed to properly request at trial an instruction to pinpoint the issues to be considered by the jury" (slip opin., p. 7, citing *People* v. *Farley* (1996) 45 Cal.App.4th 1697, 1711 and *People* v. *Sully* (1991) 53 Cal.3d 1195, 1218), and then found waiver on appeal of the instructional error in the present case based on the untimeliness of the request and the lack of a full and correct instructional request. (Slip opin., p. 8.)

Review should be granted to settle that waiver is inapplicable to this species of instructional error. The present case stands "on all fours" with this Court's opinion in *Harris*, *supra*, 9 Cal.4th 407, which found federal constitutional error in failing to sua sponte define a key "aspect of an element" instruction in robbery concerning "immediate presence." Equally important, this Court's decisions in *Farley* and *Sully* are inapposite, as they concern the well-settled requirement of a request for a *pinpoint* instruction, and do not involve misinstruction on elements of a charged crime. (*Farley*, *supra*, 45 Cal.App.4th at p. 1711; *Sully*, *supra*, 53 Cal.3d at p. 1218.) Neither case stands for the proposition that a failure to make a "proper" request for a particular instruction somehow negates a trial court's sua sponte duty to correctly instruct on the elements of a charged crime, including "fear" in robbery. (See, *Harris*, *supra*, 9 Cal.4th at p. 425, citing *Yates* v.

Evatt (1991) 500 U.S. 391 [sua sponte duty to correctly explain "immediate presence" element of robbery].)

Finally, any defect in the form of the instruction requested was not a valid reason for failure to the trial court's refusal to instruct on the meaning of "fear" in robbery, since, as this Court has made clear, a trial court is obligated to correct any defects in proposed defense instructions where, as here, the theory of the instructions is made clear. (*People* v. *Fudge* (1994) 7 Cal.4th 1075, 1110.)

As a corollary to its failure to find federal constitutional instructional error, the court of appeal's opinion fails to analyze the error under the strict "harmless beyond a reasonable doubt" standard of *Chapman* v. *California* (1967) 386 U.S. 18 and *Neder* v. *United States* (1999) 527 U.S. 1. In *Harris*, *supra*, 9 Cal.4th 407, this Court expressly rejected the government's claim that the state constitutional standard of *People* v. *Watson* (1956) 46 Cal.2d 818, 826 applied to an erroneous instruction on the "immediate presence" aspect of robbery, holding that *Chapman*, not *Watson*, applies "where the jury has been misinstructed on some aspect of an element of the charged offense." (*Harris*, *supra*, at p. 425, citing *Yates* v. *Evatt*, *supra*, 500 U.S. 391.) Thus, review should be granted to correct this error and remand the case for proper consideration of prejudice under *Chapman*.

C. **Petition in *People v. Stoll*, review denied after I wrote the article.**

The present case involves yet another twist on the much-construed and most-troublesome passage of subdivision (b) of Penal Code section 2900.5 which provides for an award of presentence credit on a prison sentence "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." The general rule adopted by this Court more than a dozen years ago in *People v. Bruner* (1995) 9 Cal.4th 1178, is that presentence custody may be concurrently "attributable" to two or more unrelated acts, with the defendant receiving presentence credit for both, only if the defendant can show that the conduct that led to the

confinement in the other proceeding was also the "'but for' cause of the earlier restraint." (*Id*., at pp. 1180, 1193-1194; see also *In re Joyner* (1989) 48 Cal.3d 487.)

Eight years later, this Court's decision in *Marquez*, *supra*, 30 Cal.4th 14, carved out an exception to the "strict causation" rule of *Bruner* and *Joyner* for situations where custody time attributable to more than one set of criminal conduct would become "dead time" if not credited to the case on which sentence is pronounced. The rationale for this exception to *Bruner* is plain: the "strict causation" rule of *Bruner* has no purpose where the time at issue was not one for which dual credits are sought, and thus not one where the defendant is seeking a "windfall," but rather a situation which involves custody that would otherwise become "dead time." i.e., "'time spent in custody for which he receives no benefit.'" (*In re Marquez*, *supra*, 30 Cal.4th at p. 20.) In these circumstances, it is sufficient for the party seeding credits to demonstrate that custody is meaningfully attributable to charges on which credit is sought, even if it is also attributable to another case for which the credits cannot be applied to a prison sentence. (*Id*., at pp. 22-23; accord, *People v. Gonzalez* (2006) 138 Cal.App.4th 246, 252-254.)

In *Marquez*, the credits at issue were awarded by the Monterey County Superior Court concerning charges from Santa Cruz County in which a conviction had been reversed on appeal and later dismissed, and this Court ordered that the custody for the time in question be credited to the Monterey case.

> [P]etitioner's custody . . . was attributable to charges in both counties. Once the Santa Cruz County conviction was reversed and the charges dismissed, petitioner's situation was no different than if the Santa Cruz County charges had been dismissed before trial. His custody — attributable originally to both sets of charges — would still be attributable to the remaining charges in Monterey County.

(*Marquez*, *supra*, at p. 23.)

In *Gonzalez*, *supra*, 138 Cal.App.4th 246, a panel of the Sixth District Court of Appeal reached a similar result on somewhat more complicated facts that more closely resemble the present case. Gonzalez was on probation for a domestic violence case when

he committed new offenses of auto theft and possession of a firearm by a felon. While pending trial, he picked up a third case for a jail assault. After being convicted by jury trial on the weapon possession and vehicle theft cases, appellant pled guilty to the inmate assault case and admitted probation violations in the domestic violence case. He was then jointly sentenced on the three cases, remaining in custody during the entire period after his arrest on the gun and vehicle theft case. (*Id*., at pp. 248-250.) The credits dispute concerned a 319 day period of custody served by the defendant between his arrest on the auto theft and gun case up until the day prior to the inmate assault. The trial court allocated this period of custody to the domestic violence case, for which defendant already had 361 days of credit which he served solely on the domestic violence case. (*Id*., at p. 250-251.)

On appeal, the Sixth District held that the additional credits had to be reallocated to the auto theft and gun case, finding that the "strict causation" rule of *Bruner* had no application because the time at issue was not one for which dual credits were sought, and that the defendant was entitled to credits because the custody period in question, attributable to both sets of charges, had to under *Marquez* be allocated to the auto theft and gun cases once the few days of custody left to complete the sentence in the domestic violence case were credited to the defendant. (*Id*., at p. 253-254, citing *Marquez*, *supra*, 30 Cal.4th at p. 20.)

In the present case, a somewhat different panel of the Sixth District reached a contrary result on the facts described above. The court ruled that holdings in *Marquez* and *Gonzalez* had no application to the present case because the custody period in question, the 360 day jail term ordered to be served as a condition of probation, "was attributable entirely to the vehicle theft case." (Slip opin., p. 9.)

The Court of Appeal's conclusory determination on this point is erroneous, leading to an improper deprivation of credits that can only be corrected by a grant of review from this Court. For three significant and related reasons, the vehicle theft case on which the jail term was nominally imposed and the attempted robbery case on which additional

credits are sought are sufficiently intertwined such that the custody period in question must be found to be attributable to the conduct underlying *both* cases.

— First, the 360 day jail term at issue was part of probation-condition jail terms in the vehicle taking case and the attempted robbery case that were imposed on the same date, in the same sentencing proceeding, by the same judge, in connection with otherwise identical conditions of probation imposed in both cases.

— Second, it is undisputable that any violation of probation in either case, including, presumably, the failure to serve the jail sentence at issue, would have led to the agreed-upon prison sentence being imposed in *both* cases.

— And third, as a matter of common sense and sound judicial discretion, it is clear that the 360 day jail term was imposed as part of a *package* disposition of both cases. It is simply inconceivable that the trial judge would have imposed a significant, 360 day jail sentence *solely* as a punishment and probation condition for the lesser crime of vehicle taking, committed five months prior to sentencing, with no regard to the more serious and recent crime of attempted robbery.

This Court should grant review to address this important question of law concerning the applicability of *Marquez* to the situation presented here, one which is likely to recur in the trial courts with respect to sentence credits involving multiple counts, and to confirm the rule, announced in *Marquez* and applied in *Gonzalez*, which frowns upon the practice of imposing sentences that leave a defendant with "dead time" custody for which no credits are received.

Review should also be granted based on the due process principles expressed by this Court in *People v. Johnson* (2002) 28 Cal.4th 1050 and *People v. Arnold* (2004) 33 Cal.4th 294, which preclude waivers of credits for time actually served by a defendant unless such waivers are "knowing and intelligent." Here, Mr. Stoll was given no clue that the sentence imposed in March of 2004 would lead to him being deprived of significant credits in the event a prison sentence was later imposed. Interpreting section 2900.5 in a manner consistent with *Marquez* and *Gonzalez* is thus not only the correct legal ruling,

but would avoid a result contrary to appellant's due process rights under *Johnson* and *Arnold*, and conform with the settled principle of statutory construction that requires reviewing courts to "construe statutes to avoid 'constitutional infirmit[ies].'" (*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal. 4th 828, 846, citing *United States v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407-408.)