ALL YOU WILL EVER NEED TO KNOW ABOUT REHEARING AND REVIEW PETITIONS
A Second Look, 2016 (with Minor Revisions in 2020)

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Introduction and Summary of Article

Picture yourself in the following predicament: After months of episodic hard work on a worthy appeal assigned to you, which included one or more promising and legally challenging issues, you have just received the unanimous unpublished opinion of the Court of Appeal affirming the judgment.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?

How could it not? Once you have written cruel but true comments in the margin of the opinion – no doubt using those electronic sticky notes, since we no longer receive opinions on paper – and let out some of your frustration with a colleague, friend, significant other, or understanding pet, you will then try to figure out 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 a cutting edge issue that is "review worthy" or any kind of claim of federal constitutional error.

As detailed in Part I below, a rehearing petition is absolutely necessary in two 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. There is also another, "secret category" of rehearing petition which does not fit within these accepted categories which you will also want to bring – where a critical decision or point of law was not covered by the briefing or opinion – usually because of a new decision or change in the law, but also – sometimes – because you blew it by not raising this critical point of law earlier. (More on this in Part I-E below.)

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.

By contrast, a review petition 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. Whichever type of review petition you prepare – and a petition can and should serve both purposes much of the time – it 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.

This is all the more essential given the recent significant "changing of the guard" at the California Supreme Court. Unlike the very conservative, pro-prosecution bent of our state's high court which has prevailed since the 1986 elections, the four most recent Jerry Brown appointments to the Court have now upped our odds of having some of our issues selected for review, as well as increased the chances of favorable opinions from

that court. As discussed in Part II-A below, this should meaningfully alter our calculus of what issues are "review-worthy" and worth battling about, and have made it possible to mount challenges to some of the worst pro-prosecution decisions of the past three decades.

It is a different story for the, unfortunately, too common situation in which a petition is filed primarily to exhaust your client's claims of federal constitutional error. The goal in this situation is to facilitate the filing of a federal habeas petition (or, rarely, a cert. petition) by your client or by you on his or her 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 a description of how the error was prejudicial under the controlling standard.

Ironically, it appears that the likelihood of success for our clients on federal habeas review appears to have notably declined based on a number of factors to be discussed below, most notably the severe restrictions of AEDPA as it has been interpreted by a High Court which, like our state supreme court, has been dominated by Republican appointees for the past several decades. Maybe, as suggested below, this means we need to tilt our review petition practice more in the direction of identifying and arguing review-worthy issues, with less emphasis on exhaustion to facilitate collateral review – without, of course, giving up the practice of exhaustion to preserve the client's rights.

I. TO REHEARING OR NOT TO REHEARING. . . .

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 protect 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 following the opinion 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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> (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. (And be ready for the secret fifth category of rehearing, discussed below, which you will occasionally want to pull out of your hat in a moment of desperation.)

A. Case Decided on a Never-Briefed 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 neither briefed nor discussed by you or the attorney general. What can you do besides shed salt tears into your bowl of oatmeal?

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 in mandatory language that "rehearing shall be ordered" upon timely petition if supplemental briefing has not been requested.[1]

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 Cal.4th 1114. My opportunity to brief this issue after rehearing probably played a big part in review being granted in that case. On the second occasion, 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 (it just so happened) violated the Ex Post Facto Clause because my client's current robbery crime was not a violent felony when it was committed in 1996. In both cases, I successfully petitioned for rehearing, citing Government Code

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1. "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.)

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 oversteps 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 petition is non-controversial, as it's hard to imagine a situation where you would not want a rehearing to address an issue which you never briefed that the court believes is decisively unfavorable to your client.

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." 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.

When this article was originally written, back in 2008, there was something of a vigorous debate within criminal appellate practitioners about whether or not to file such

rehearing petitions. On the one hand, one group, which included more than a few luminaries in the field, contended that this type of glaring error on the facts or the law actually *improved* the odds of obtaining a meaningful remedy for your client on federal habeas. This viewpoint suggests you not file a rehearing petition in this situation, but simply point out the error and argue your issue in the review petition; the Supreme Court will invariably deny review on the merits. The advocates of this viewpoint suggested that the California Supreme Court has never, insofar as anyone knew, 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, the efficacy of this point of view depends on a couple of assumptions which have, more recently, begun to recede in their salience. The first assumption – which was quite fitting a decade ago – is that criminal appellate practitioners and our clients have virtually nothing to be gained by a grant of review in the California Supreme Court, and potentially everything to lose. Hearkening back to a theme advertised in the Introduction to this article, I think it is fair to say that this conclusion is no longer entirely correct. There may, in fact, now be much to gain by positioning a "review-worthy" case for a grant of review by the California Supreme Court. The second assumption is that, at least after the point in time that the Court of Appeal has shot down the important issues in a case, the best chance for meaningful post-appeal relief for our clients is on federal habeas, not discretionary review in the Supreme Court. This still may be a good point in a majority of cases. But federal habeas relief for our clients seems to be drying up, both in the district courts and in the hitherto friendly Ninth Circuit, worn down by more than two decades of crushing AEDPA restrictions on federal habeas relief and a seemingly more conservative federal judiciary, at least in terms of federal habeas practice.

Thus, while I was skeptical about the "No Rehearing for Tactical Reason" position in my first version of this article, I am even more skeptical about it today. My view, then

and now, is that 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.

Plus, along the lines of the new "theme" of this article, we should be focusing more and more on putting important and cutting edge issues up for review, with the understanding that the changing of the guard at the California Supreme Court means there will be greater receptivity and chance of success as to such issues.

However, I recognize that my viewpoint on this aspect of rehearing practice remains controversial. In the interest of presenting both sides of the controversy, I have included, as Appendix C to this article, a short discussion of the alternative view by its chief exponent, panel attorney Cliff Gardner, whose knowledge and experience as to all matters habeas – state and federal – is arguably second to none. His view has altered recently and is, to be sure, more nuanced than my characterization of it above; thus, I wanted to include it with this article as a counter-point for you to consider. I can honestly

say that I will certainly consider Cliff's points carefully in any case where a Court of Appeal opinion involves a set of issues most likely to prevail on federal habeas review.

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 mentioned 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; they are simply a product of shoddy, disingenuous, or erroneous analysis. In this all-too-common situation, is a rehearing petition required or useful?

In my view, this decision whether to ask for rehearing – as opposed to the one discussed in the previous section – is essentially a tactical one, calling 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 as the presumptive limit for such petitions in the compensation guidelines.

An example of this type of rehearing petition being successfully brought can be found with respect to the California Supreme Court's opinion in *People v. Dominguez* (2007) 39 Cal. 4th 1141.[2] In that case, my colleague Dallas Sacher used a rehearing

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2. A rehearing petition can be filed in the California Supreme Court within 15 days of the issuance of an opinion. (See Rule 8.536.)

petition to point out to the Court that it had erred in 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, ultimately, saved Dallas the problem in his federal habeas claim of having to deal with a bogus finding of procedural default. Mind you, in the end this mattered not at all to Mr. Dominguez, who lost his federal claims. But it did preclude the federal courts from taking a shortcut to denial by means of a state court's 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, on a few occasions, succumbed to the temptation to file this type of petition 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 offensive-ness. If you know that part of your impetus for seeking rehearing is to vent your spleen, 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) – even when they are perfectly descriptive of what the Court of Appeal has done.

E. **Oops, I Forgot an Issue!**

Then there is the fifth category of rehearing petition – one that is kind of off the chart, like the fifth Beatle, or the fifth Marx Brother.[3] But do take this last suggested grounds for rehearing 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 raised a procedural default issue which you thought was absolutely laughable, and which you demolished 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. Now the joke is now on you and your client. 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 answer is little better than "maybe." 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.) 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, you have little choice but to go for this exercise of discretion: raise the claim for the first time in a rehearing petition, citing the

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3. There really was a fifth Beatle, Stu Sutcliffe, and a fifth Marx Brother, Gummo. The former quit the band and then died of a brain tumor; the latter tired of the uncertainties of show biz, and became a shoe salesman; and both missed out on a ton of fame. I guess this suggests we should use this type of rehearing petition sparingly.

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, Miller v. Alabama*, etc.), or a brand new applicable statute or initiative measure – and there have been a lot of the latter recently, with new laws either allowing exercise of discretion to strike firearm and serious felony enhancements, or eliminating drug and prison prior enhancements – 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. But in the typical situation, the court will simply deny the rehearing petition. The trick is to then present the issue in your review petition, again citing the above authority. When the Supreme Court denies the petition on its merits, you have then – at least 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 anything but foolproof. It leaves you wide open for either the Court of Appeal or the Supreme Court finding 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. Thus you should also consider the other manner of raising and preserving such an issue, i.e., 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.

F. **Rehearing Granted, or Denied with Modifications**.

It does happen that the Court of Appeal will grant a rehearing petition. More frequently, they will deny rehearing but modify some portion of the opinion as part of the denial order. Thus, I am including a brief discussion of what you can and should do when this occurs, and how it might affect your client's case and further pursuit of his post-conviction rights.

1. **AG Asks for Rehearing.**

If the AG asks for rehearing – they will do that some times, most often if they lose – there is nothing to do but sit tight and wait for the Court of Appeal to do what they typically do when we ask them to rehear – issue a denial order. There used to be a rule allowing an answer to a rehearing petition to be filed, but it was repealed some years ago. The rules now rather inartfully provide that "[a] party must not file an answer to a petition for rehearing unless the court requests an answer." (Rule 8.268(b)(2).)

If rehearing is *granted* on the AG's petition, depending on the grounds on which rehearing is sought, you should consider asking leave to file a supplemental brief addressing the matter to which the AG's rehearing petition was directed. Sometimes you won't have to because the Court of Appeal will direct you to brief the issues.

2. **Your Rehearing Petition is Granted!**

Where a rehearing petition is granted, the original opinion basically disappears as a controlling document in your case. Typically the court will issue a new opinion, which usually looks a lot like the previous opinion, but with some changes, including, potentially, a different ruling as to one or more issues addressed in the rehearing petition.

Bear in mind that there is no automatic right to file any kind of briefing once rehearing is granted. The goal of a good rehearing petition is to make it work like a supplemental brief trying to correct some error or omission in the opinion. Thus, if the problem was, as suggested in Part I-A above, that the Court decided the case based on an issue which the parties never briefed, your rehearing petition should address this issue as

thoroughly as possible. However, once rehearing is granted, as suggested above, you can ask for leave to file supplemental briefing, and the Court itself will often ask for such briefing without a request.

After some magic interval, the Court will issue an order indicating that the case has been submitted again, and then an opinion after rehearing will be filed. All of your deadlines for petitions for review will be based on the date of the *new* opinion after rehearing.

3. **Court Denies Rehearing With Some Modification of the Opinion.**

Much more common than an order granting rehearing is one which denies rehearing but modifies the opinion in some manner. You should review any such modification carefully. As a matter of practice, the court, when it issues the modification order, will expressly state that the modification either "changes the judgment" or "makes no change in the judgment." This matters in terms of your deadline for seeking review because, under Rule 8.264(c), a modification which does not change the judgment means that the opinion will still be "final" 30 days after the original opinion was filed; whereas, a modification which changes the judgment means that the opinion will be final 30 days after the order modifying the opinion is issued.

Obviously, you should review any modification carefully, as it could affect arguments which you will raise in your review petition and in subsequent petitions for collateral review in federal court. Also, you are going to have to include a copy of the order denying rehearing with a modification as an exhibit to your review petition, along with the court's opinion.

4. **Court Denies Rehearing.**

This is the typical result. Nothing changes, except you may have preserved some important procedural right for your client, as described above. The opinion is still final on the 30th day, which is often either the same day, or nearly the same day, that the denial order is filed. If you haven't already drafted your petition for review, it's time to start

doing it right away!

You do not have to include a copy of the order denying rehearing with your review petition. But you should advise the Supreme Court in your introductory paragraph of the petition that a petition for rehearing was sought and denied on a specific date. And of course you can cut and paste many of your choice arguments from the rehearing petition into the petition for review, if that works.

II. REVIEW PETITIONS RECONSIDERED

Let us now turn to the real "meat" of this article (or tofu, for the vegetarians among you) – the petition for review. The operating assumption of this article is that 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
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> – Cases where a review petition has only one meaningful purpose, exhausting 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 can, should, and will often overlap because issues that are potentially review-worthy commonly involve federal constitutional error. In such cases, you will need to pay attention to both sets of concerns discussed below. And, returning again to the key thesis of the revised article, given recent shifts in state and federal courts and practices, we have to alter our mindsets more in the direction of looking for meaningful "review-worthy" issues, and with a reduced focus on presenting claims for the purpose of exhausting issues and setting them up for federal collateral review.

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. . . ."[4]

Our primary emphasis in crafting review petitions should always be cases where you reasonably believe you have a "review-worthy" issue, one that involves a novel question of legal interpretation, and/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.

1. 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.

2. Cases with issues that include the "echo-effects" of landmark opinions or changes in the law, e.g., *Crawford*, *Apprendi*, or, more recently, *Chun*, or *Miller*, or ones that involve new issues concerning important new criminal law initiatives or statutes – e.g,. most recently, SB 1437 and its changes of homicide law .

3. 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.

4. Cases where we win, published or unpublished, and the AG petitions for review. These don't really fit the topic, but at least until recently, you were most likely to get a chance to argue – and, for the past three decades, mostly lose – in

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4. The other grounds for review include two which we will not see very often – that the "Court of Appeal lacked jurisdiction," or the opinion "lacked the concurrence of a sufficient number of qualified justices." The last ground is "for the purpose of transferring the matter to the Court of Appeal for such proceeding as the Supreme Court may order . . .", which may actually come up now and again, as discussed below. (Rule 8.500(b).)

the Supreme Court in such a case. Maybe – just maybe, mind you – this unfortunate codicil may be altering in our favor.

5. Cases where review has already been granted on the same or closely related point, which provide 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 statutory 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.)

For the last 16 years, Judicial Council rules have permitted the filing of 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 nature, i.e., whether the key determination of the issue depends upon an interpretation of state law or federal constitutional law. As an example, consider one of my former pet issues (which went nowhere for me), in which I argued 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, such that the prosecution must prove not only that the victim was actually afraid, but that such fear was "objectively reasonable" or, if unreasonable, that the defendant knew about, and took advantage of, the victim's unreasonable fear. (See *People v. Iniguez* (1994) 7 Cal.4th 847.) When the Court of Appeal rejected 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) – was there 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, this type of issue, though nominally involving federal constitutional rights (sufficiency of evidence and instructions on elements of the crime), is decided based on a pure interpretation of state law, and is thus 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 fit within the category of persons who could obtain some meaningful 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. Federal habeas procedure permits a federal court to retain jurisdiction over a federal habeas petition 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.) However, before proceeding, 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 – e.g., as a "strike" prior, or even simply as a felony conviction which disqualifies a person from many citizenship rights or could lead to the client's removal from the court by immigration authorities.

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 provides that review petitions should comply with the requirements for briefs set forth in Rule 8.204 (Rule 8.504(a).) This means 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 for briefs in Rule 8.204(b).

In addition, very 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 normally 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 between the 41st and 60th day after the opinion is filed – during which time period 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. I have actually had better success with a slightly late certiorari petition in the U.S. Supreme Court than a late review petition in the California Supreme Court.

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.) Thus, federal courts may simply refuse to recognize an exhaustion via habeas which is premised on IAC for failure to file a timely review petition.

Put this all together and you will see how essential it is to file a timely review petition on behalf of your client. However you do your calendar, it is not hard to make absolutely sure, on the day that unfavorable opinion comes out, that you carefully and accurately calendar your deadline and give yourself sufficient time to get the petition filed in a timely manner.

b. **Word Length.**

Once upon a time there was a 30 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 – as small as 11 point! But for the past 10 years, we instead have a word limit of 8400 words. (Rule 8.504(d)(1).) This is barely more than a third the length allowed for an opening brief.

The rule permits a longer petition on application to the Chief Justice. The good news is that if such a request is denied, the Court graciously gives you ten days to shrink it down and file a conforming petition.[5] In the past, requests for oversize petitions were typically denied by former Chief Justice George. The better news is that our current Chief Justice, Tani Cantil-Sakauye, seems be a bit more forgiving, and appears to be willing to grant requests to file petitions over the word limit in cases with numerous and/or complex review issues.

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 is 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 pithy 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-__.)"

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5. Call me if you are in this situation. I know some wonderful tricks for cutting the word count down, e.g. delete all those useless "*supra*" and "pp." in cites – there goes about 150 words; and delete the word "that" about 80 percent of the time. Or, just cut out all those footnotes, since no one reads them anyway.

This can pare many pages/words off your petition, while allowing 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.**

One of the two most important specific requirements 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 – as happens with brief writing generally – 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 briefing portion of the petition. 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 in Appendix A. You will note that some issue statements are short and sweet, others 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. At a FDAP seminar a few years ago, Justice Kruger reiterated a point which I mentioned in the first draft of this article, namely the Supreme 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 forth the Statement of Issues may well be decisive in terms of putting your client's case into the "A" list and thus vastly improving the chance of having review granted.

d. **Reasons for Granting Review.**

The second requirement unique to the petition for review, equally critical to an effective petition as a proper framing of the issue, 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 I've seen, this requirement is complied with simply by a single sentence 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 effective appellate practitioners, is to create a second section after the "Statement of Issues" which is entitled "Reasons for Granting Review," or something similar. In this critical portion of the review petition, you must lay out, as clearly as possible, the reasons why the case involves an important statewide issue of law and/or how there is a split of authority within the Courts of Appeal.

Crafting an effective "Reasons for Review" section requires focus on two critical components: (a) the legal underpinnings of the argument, situating it, when possible, in a sequence of pertinent prior court decisions and/or legislative enactments to show its importance as a legal issue of statewide importance; and (b) the outlines of a pointed critique of the Court of Appeal opinion in your case. 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, the common nature of the issue or error, and thus the need for clear guidance from the Supreme Court.

The "Reasons for Review" section should ideally 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" as to this issue. 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" 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. (But see Vonnegut's *Cat's Cradle*.) The idea here is to come up with a fresh take on your issue that makes it just the sort of case the Court will want to grant review. A rehash of your Court of Appeal briefs will simply 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 so 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, you have an uphill fight on your hand 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/or significance of the issue presented, and the need for guidance from the state's highest court based on apparent conflicts in the case law.[6]

However, a word of caution is in order here, based on the dichotomous nature of review petitions. 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 settled 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 – a prerequisite to federal habeas relief in the post-AEDPA universe we are stuck in. (More on this in a bit.)

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 30 or so years ago or so, well before I went to work as a Staff Attorney for SDAP, I was attending a CACJ 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

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6. To show that the issues arises frequently, it is possible to cite a long list of unpublished opinions in the past couple years where the issue arose. The rule precluding citation to unpublished opinions means you can't cite them as *authority*; but there is no rule precluding you from citing these opinions to show how frequently the issue is before the appellate courts and how divided the courts are in the resolution of the issue. (See *McArthur v. McArthur* (2014) 224 Cal.App.4th 651, 656, fn. 5 [unpublished cases may be cited for reasons other than reliance upon them].)

former State Public Defender back in the heyday of that office in the late 1970s. His presentation laid out all the types of cases 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 back of the seminar room at the Old State Building 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 Supreme Court as a court 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.

3. **The Exception: Remand to Fix Obvious Error.**

Mind you, in a few unusual circumstances, a review petition *can* be used to get a quick remand to fix an obvious error by the Court of Appeal. The most obvious situation – which I was able to use recently – involves an intervening controlling decision by the state or federal Supreme Court which is flat out contrary to the Court of Appeal's holding. In my case, it was the Supreme Court's favorable Prop. 36 decision in *People v. Johnson* (2015) 61 Cal.4th 674. In such a case, your review petition can point out the error, and ask the Supreme Court to simply grant review and transfer the case, under Rule 8.528(d), back to the Court of Appeal.[7]

Recently, this has proven helpful with recent changes in the law, noted above, eliminating certain sentence enhancements, or giving courts section 1385 discretion as to other enhancements. With the courts uniformly holding that these changes in the law apply retroactively to cases not yet final on appeal under *In re Estrada* (1965) 63 Cal.2d 740, depending on the timing, a review petition gives you a chance to ask the Supreme Court to grant review and transfer the case to the Court of Appeal with directions to decide this issue.

A trickier way of achieving the same result can be attempted where the matter involves a more settled point of law where the Court of Appeal clearly erred. This is the same sort of case where you will have probably pointed out the court's erroneous legal reasoning in a rehearing petition which you expected to produce a grant and correction, but which did not happen. It is possible for the Supreme Court to grant a remedy in this situation by simply granting review and remanding the case to correct the obvious error.

In a fairly recent example, the Supreme Court issued such an order in a not-so-obvious situation. In *People v. Thomas* (2013) 218 Cal.App.4th 630, 632, the First District, in its original, unpublished opinion, found a trial court's error in failing to

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7. That rule provides that "[a]fter ordering review, the Supreme Court may transfer the cause to a Court of Appeal without decision but with instructions to conduct such proceedings as the Supreme Court orders."

instruct on heat-of-passion voluntary manslaughter to be harmless, applying the *Watson* test as seemingly mandated by the Supreme Court's decision in *People v. Breverman* (1998) 19 Cal.4th 142, 177–178. When the defendant, who had argued throughout that such an error violated the federal constitution and should have been subject to *Chapman* harmless error, petitioned for review as to this issue, the Supreme Court – much to everyone's surprise, I think – granted review and transferred the case back to the Court of Appeal "with directions to address defendant's contention that the trial court's refusal to instruct on heat of passion voluntary manslaughter constituted federal constitutional error." (*Thomas, supra*, at p. 632.) The Court of Appeal got the message and ruled that it was federal constitutional error, which it then found prejudicial under *Chapman*!

Mind you, this sort of thing is not going to work most of the time. But Rule 8.528(d) does provide an available, if rarely used mechanism for the Supreme Court to sit as a kind of "high court of errors" and send cases back to the Court of Appeal to fix obvious and detrimental mistakes in their analysis.

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?

It's now been 16 years since 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 the following:

(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 time and some 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 any federal constitutional error claim; 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 the 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 you are essentially throwing away if an exhaustion petition is filed in lieu of a review petition. Moreover, with the recent changes at the Cal. Supreme Court, there may be more opportunity for success in pitching federal constitutional issues to that court. 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 – our version of a "mixed petition" – a strategy which can't be undertaken with a pure exhaustion petition.

I recommend using an exhaustion petition only in one rare circumstances: where you honestly conclude that all the federal constitutional issues in the case fit the category of "arguable but all-but-hopeless" in both state *and* federal court. In other words, use the exhaustion petition to permit your client to seek collateral review in federal court only where you think his chances of getting such relief are extremely poor. I say this because, 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 – which you are not going to do in the typical Rule 8.508 exhaustion petition – 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. As I see it, 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. But too often a review petition filed to exhaust the claim in state court is based on the first approach, and is typically 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. Now it's time to "vent away," with the focus being on the unreasonableness of the opinion on the key federal constitutional questions of law.

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 where, as is typically the case, there was no meaningful *Chapman* review in state court. (*Fry v. Pliler* (2007) 551 U.S. 112.)

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 federal habeas petition form where you are supposed to describe the nature of the issue and the factual basis and legal authority which supports it, I will simply indicate, "See Argument 2 in review petition," or what have you. Alternatively, I will include separate "attachments" to the form petition 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.[8]

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.[9] While it seems to be unfortunately the case that district courts are granting such motions more rarely now than in the past, there is still a decent shot at appointment if you can make a sufficient showing of the need.

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 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, and a fair

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8. 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.

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

number of these seem to be from California cases. (See, e.g., *Riley v. California* (2014) 573 U.S. 373.)

A second, more significant class of cases where the primary goal of your review petition will be setting up a cert petition involves 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. Most recently – at least until the California Supreme Court's landmark decision in *People v. Gallardo* (2017) 4 Cal.5th 120 – this has involved Apprendi's applicability to increases in punishment based on recidivism facts, e.g., in California, prior serious felony convictions where the prosecution must include proof of "non-elemental facts" about the prior crime in order for it to qualify as a serious felony/strike offense – for example, that a prior robbery from another state included all the elements of robbery under California law, or that a prior crime involved personal use of a deadly weapon where that fact was not pled and proved; or the applicability of this new class of *Apprendi-Descamps* case law to "arming" findings for Prop. 36 resentencing eligibility determinations. While there is some help from Supreme Court cases, the matter is unsettled enough, in the first case, and unsupported in the second, such that a federal habeas petition would be doomed by the requirement of case law from the Supreme Court which "settles" the question. Thus, in this type of case, as in Fourth Amendment cases, the goal of an exhaustion review petition is not to permit federal habeas review – except as a kind of almost-hopeless last resort – but to set up a potentially winning cert petition.

Your strategy in drafting a review petition to set up 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 exhaustion petition focused on obtaining a federal habeas remedy, the goal is to make it clear that the

Court of Appeal's opinion ignores controlling U.S. 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 and where – at least for the foreseeable future – the California Supreme Court appears more likely to rule favorably in criminal appellate cases than the U.S. Supreme Court. Also, bear in mind as mentioned earlier in this article – that you may be able to get the California Supreme Court to reconsider its prior poorly reasoned decisions on important federal constitutional questions, and should not hesitate to frame an issue in terms of such a reconsideration request.

G. **Review Petitions and/or New Petitions as to Habeas Denials.**

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, here too, 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 a habeas claim in the California Supreme Court. The first option is a petition for review of the order denying habeas relief; the second option is a successor petition filed under the original jurisdiction of the Supreme Court. 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. For a "standalone" habeas petition, a denial order is deemed to be "final" on the date of filing. (Rule 8.387(b)(2)(A).) Thus, a review petition in such 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 -which is typically the case when you bring a habeas petition in connection with a direct appeal in the Sixth District – a helpful court rule will afford you the normal forty days to file a review petition. (See Rule 8.387(b)(2)(B).) Either way, 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.

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." (See *In re Clark* (1993) 5 Cal.4th 750, 795, fn. 30.) However, bear 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 have the grave consequence of

eliminating the normal tolling of the one-year AEDPA statute of limitations 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 by the Court of Appeal, 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 – unfortunately rarely followed in actual practice – 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.) We have seen a number of instances where the Supreme Court has granted review and directed the Court of Appeal to issue an

OSC.[10]

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 (which I had to do once), 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 case involving lengthy prison sentences, the time delay in getting a ruling is of only marginal significance. As long as the habeas petition itself was "timely filed," any delay in a ruling by the Cal. Supreme Court will not effect the deadline for federal habeas, because the client will be entitled to "gap-tolling" of the statute of limitations. (See *Evans v. Chavis* (2006) 546 U.S. 189, 192-93; *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046, 1048.)[11]

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10. The word limit for a habeas petition is 14,000. (Rules 8.204(c) & 8.384(a)(2).)

11. I hasten to add that this area of the law represents a veritable hornet's nest of federal habeas law, particularly when it involves pro per habeas petitions filed by a client

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?

Rule 8.500(d) provides the answer. Under the rule, two separate petitions for review are required unless the Court of Appeal has: (1) issued an order to show cause; or (2) consolidated the appeal and the habeas action. As a matter of Sixth District practice, the appeal and habeas are never formally consolidated. Thus, at least in Sixth District cases, two petitions for review will always be required.

It should be noted that the Court of Appeal will occasionally deny the habeas in the same opinion as the direct appeal. This circumstance does not then allow a single petition for review unless the criteria of rule 8.500(d) are satisfied. Interestingly, an occasional member of the Supreme Court's Clerk's Office will be unaware of rule 8.500(d) and will try to reject your separate petitions. Given this possibility, it is good practice to write a detailed cover letter to the clerk that explains why two petitions are being submitted for filing.

3. Court of Appeal Issues an Order to Show Cause on Only One of Several Claims Advanced in the Habeas Petition.

Not long ago, a panel attorney had a case where the Court of Appeal wrote an opinion and issued an order to show cause returnable in the trial court. In so doing, the court limited the OSC to only one claim and expressly rejected other claims. The panel attorney sought guidance as to whether an immediate petition for review was required in order to ensure that the lost claims were properly and timely exhausted. Insofar as the order to show cause served to transfer jurisdiction to the trial court per rule 8.385(e), it

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after an appeal is over. For our present purposes, though, if your Court of Appeal habeas petition was filed at or around the time of the reply brief in the Court of Appeal, and your successor habeas in the Cal. Supreme Court was filed within 60 days of the denial by the Court of Appeal, we can pretty much assume that gap-tolling would apply, and the deadline for a federal habeas would be one year after the Supreme Court's denial order.

appeared that there was a reasonable argument that the lost issues could later be exhausted on renewed appellate habeas if relief was not granted in the trial court. Nonetheless, the prospect of doing nothing worried the panel attorney.

After extensive research and consultation with other experienced practitioners, we were surprised to learn that there is no existing case law on this point. The decision was made to immediately take a petition for review. Insofar as the Supreme Court accepted the petition for filing, it appears that the lost claims were properly exhausted. Given the uncertainty in the law, it is recommended that you take the same step if you have a case where an OSC is issued on some, but not all of your claims.

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. 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 of Appeal 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 distant past, this occurred with some regularity,

and review petitions were actually taken with some success to challenge this.[12]

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 that will do irreparable harm to your client.

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 or her of the bad news, sending along 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 the client 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 or her with instructions as to how to file such a petition on his or her own if the client wants to raise and/or preserve the issue. Sample letters are available on our website. (http://www.sdap.org/pt-s-letters.html "Instructions to Client on How to File a Petition for Review".)

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

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12. In current practice, when the Sixth District believes the showing inadequate to require augmentation, its commendable practice 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.

for this. Again, sample letters are available on SDAP's website. (Same link as above, "Instructions on how to file post-conviction petitions."

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 the client by filling out the federal habeas form for the client when such issues have been presented and preserved. If you have drafted the "exhaustion"-based review petition along the lines suggested above, 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. If anyone is in this situation, and wants some hands-on help as to how to assist the client with such a petition (in a SDAP case), I, or your SDAP buddy, would be happy to work with you.

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 grandiose promise because (a) I don't know everything and (b) because what you most need to know about these petitions can be learned best only through experience which you will garner over the years by writing them in winning and (mostly) losing causes.

While digesting all of the above, keep in mind that the Supreme Court rarely grants review in criminal cases, and – at least until recently – 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. Up until recently the best bet for our client in this situation is to provide help in framing a review petition as 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, I think it is fair to say now that things have changed and will continue to change for the better in this regard. The George court, for all its failings and its pro-prosecution, Republican bias, was a considerable improvement over the Lucas court which preceded it. And the current court is turning out to be something different and better. And now there is clear liberal majority on the court, with the four most recent appointees by former Governor Brown – Justices Liu, Cuellar, Kruger, and Groban, and the Court as a whole seems to be moving in a more progressive direction. So, our new assumption should be that it is now time to pitch review petitions about important and controversial legal issues – even ones where there may have been a clearly unfavorable ruling form the George or Lucas courts which stands as adverse authority. 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 the increasingly more progressive California Supreme Court, the review process will always be needed to preserve federal constitutional claims on behalf of your client. Although AEDPA, as interpreted by a habeas-unfriendly Supreme Court has weakened our clients' chances of winning on collateral federal review, we are still in the realm of the Ninth Circuit and there are wins out there to be had for our clients. If your work on primarily exhaustion-oriented review petitions provides your client with help on federal habeas review, 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.

APPENDICES TO REHEARING-REVIEW ARTICLE

APPENDIX A: SAMPLE "QUESTIONS PRESENTED FOR REVIEW"

A. "Review-Worthy" Petitions

1. 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?

2. 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.

3. 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?

4. From *People v. Stoll*, complex credits issue, review denied 2008:

> 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.

5. From *People v. Todd Miller* (sadly, review petition withdrawn when client died while petition pending); case involved horrible botching of meritorious issues by trial court and Court of Appeal; detailed and complex framing of errors in multi-parts was targeted at (a) showing the scope and breadth of these errors and (b) desperately seeking a "hook" for review to be granted; and I actually believed I would succeed with this one, so badly was this botched.

1. Where a trial court considers, as a "factor" in its denial of *Romero* relief under Penal Code section 1385, a recent money laundering criminal charge against appellant, which had been dismissed by the prosecution for lack of evidence, and for which no supporting facts, "beyond mere allegation," were before the court, is reversal for abuse of discretion required based on a violation of settled principles of California sentencing law and a defendant's due process right, under the Fourteenth Amendment, that a sentencing court only consider facts with some minimum indicia of reliability?

2. Did the Court of Appeal err by implicitly concluding that appellant forfeited challenge to the use of the "facts" of the money laundering charge by not objecting to the prosecutor's description of the alleged crime when counsel for appellant objected to the court's consideration of the money laundering charge on three different occasions? Did the Court of Appeal's contrary conclusion, which implicitly required defendant to come forward with contrary evidence to rebut the facts described by the prosecutor, amount to a violation of appellant's due process sentencing rights and his Fifth Amendment privilege?

3. Did the Court of Appeal's resolution of the issue in this case, which concurred that there was no proper basis for the sentencing judge to conclude defendant had any criminal culpability as to the dismissed money laundering charge (opin. at 10), but then concluded the trial court did not err by "factoring in" the money laundering case into its considerations or by characterizing it as requiring a "great deal of sophistication" (opin. at 7-8), amount to an arbitrary and unreasonable application of the federal constitutional Due Process sentencing principles on which defendant's argument is premised, such that review should be granted to permit proper appellate review of this contention?

4. Did the trial court further abuse its discretion by misconstruing the argument for recall under section 1170, subdivision (d) ("section 1170(d)") advanced by defendant as somehow premised on an Eighth Amendment "cruel and unusual punishment" claim, when it was actually directed at a proper and fair exercise of *Romero* discretion under this Court's case law?

5. Is reversal and remand for resentencing required based on the abuse of discretion and constitutional sentencing error described above where many factors strongly supported a grant of *Romero* relief on recall?

B. Petitions Focused on Preserving Federal Constitutional Issues

1. 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.)?

2. 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?

C. **Mixed Review-Worthy and Exhaustion Petitions:**

1. From People v. Lopez, rev. denied 2007: "review-worthy" 4th Amend. issue and exhaustion 8th Amend issue:

> 1. Is there a detention under the Fourth Amendment, i.e., would a reasonable person believe he was not free to walk away, in a situation where he is walking down a dark street at 2 a.m., a police car drives up to him, shines a spotlight at him, and a police officer in the car says, "What's up, can I talk to you?" Did the Court of Appeal err in its analysis of pertinent "spotlight" detention cases in holding that there was no detention in these circumstances?
>
> 2. Was the 25 to life prison term imposed under the Three Strikes Law cruel and/or unusual punishment (U.S. Const., 8th Amend; Cal. Const., Art. I, § 17) as applied to appellant and his crimes of simple possession of methamphetamine and heroin?

2. People v. Smith, rev. den. 2015, mixed petition desperately seeking some kind of Supreme Court action on bad cases on "arming" exception to resentencing under Prop. 36, and preserving *Apprendi-Descamps* Claim for U.S. Supreme Court Cert review.

> 1. **Questions Concerning Statutory Construction of "Arming" Exception to Eligibility for Resentencing Pursuant to the Three Strikes Reform Act of 2012 ("Reform Act")**:
>
> a. Did the Court of Appeal in the present case, and several Courts of Appeal in previous published cases, err in rejecting appellant's contention that the "arming" exclusion to resentencing must be construed, based on its plain language, as only applying when there is a separate "tethering" felony charge in which the defendant was armed with a firearm?
>
> b. Did the Court of Appeal in the present case, and numerous Courts of Appeal in previous published cases, err in rejecting the argument advanced by appellant that the "arming" exception can only apply where the prosecution had pled and proven arming in connection with the proceedings in the "current offense" on which the Third Strike life sentence was imposed?

2. In light of recent *Apprendi* jurisprudence (*Apprendi v. New Jersey* (2000) 530 U.S. 466) of the United States Supreme Court in *Descamps v. United States* (2013) 570 U.S. __, 133 S.Ct. 2276, do the jury trial guarantee of the Sixth Amendment and the due process protections of the Fourteenth Amendment preclude judicial factfinding, in the context of the eligibility determination for resentencing under the Reform Act, concerning the defendant's "arming" conduct during the commission of the offense that resulted in his current sentence when, as in the present case, "arming" was neither found by the trier of fact beyond a reasonable doubt nor admitted by the defendant as part of his plea?

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*, denied 2008**

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.)

D. **Todd Miller (see description in No. 5 above)**

A bedrock principle of sentencing law under the Due Process Clause of the federal Constitution, as interpreted by the federal courts, is that sentencing judges, while permitted to exercise wide discretion to consider collateral facts regarding a defendant's wrongful conduct, can do so only when there is a threshold factual showing of reliability beyond the mere fact of allegation. (*Townsend v. Burke* (1948) 334 U.S. 736, 741; *United States v. Tucker* (1972) 404 U.S. 443, 447; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 91-92; see, e.g., *United States v. Juwa* (2d Cir. 2007) 508 F.3d 694, 700-701, *United*

States v. Weston (9th Cir. 1971) 448 F.2d 626, 634; *United States v. Zimmer* (6th Cir. 1994) 14 F.3d 286, 290.)

California law reflects the same principles. A court rule provides that such allegations cannot properly be included in a probation officer's report, and thus, by implication, cannot properly be relied upon by a sentencing judge, "unless supported by facts concerning the arrest or charge." (Cal. Rules of Court, rule 4.411.5(a)(3).) *Romero* jurisprudence further underlines this point. In *People v. Carmony* (2004) 33 Cal.4th 367, 378 this Court recognized that an exercise of discretion is improper where it is based on "impermissible factors"; and *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 found an abuse of discretion where a court's decision was based in significant part on unproven allegations with no meaningful evidentiary support.

In the present case, the trial court initially imposed a 35-to-life, third strike sentence for a current offense bank robbery, but then twice recalled the sentence under section 1170(d) after appellant counsel requested such a recall to consider a *Romero* argument based on this Court's decision in *People v. Garcia* (1999) 20 Cal.4th 490. However, the court ultimately denied any sentencing relief, making it clear that this decision "factored in" a recent money laundering case, where charges had been dismissed for lack of sufficient evidence, with the court characterizing this charge as involving "a great deal of sophistication." (6-4-12 RT 8) By considering the dismissed money laundering charge, for which there was no evidentiary support in the record beyond the mere fact that a charging allegation had been filed, the trial court plainly violated the above-described Due Process principles, as well as California rules and decisional law, requiring reversal and a remand for resentencing.

In reaching a contrary conclusion in its unpublished opinion on appeal, the Court of Appeal made two critical errors, both pointed out in Miller's petition for rehearing. First, the opinion erroneously concluded that "defendant was given the opportunity to contest and object to the People's characterization of the money laundering case during his two resentencing hearings" (Modif.) As explained below, the assumption underlying

this statement, that defendant somehow acquiesced in the reliability of the prosecutor's hearsay descriptions of the money laundering charge, is erroneous because defendant objected, in three different ways, to any use of facts about the money laundering charge, asking at the first resentencing hearing that the court grant a continuance if it sought to consider the money laundering case because the charges were only "allegations", pointing out in the letter seeking recall of sentence the constitutional impropriety of relying on unsubstantiated accusations of unrelated criminal conduct, and arguing, at the second sentence recall hearing, that the court could not consider the dismissed money laundering charge because it had been dismissed for lack of sufficient evidence. These timely actions by counsel cannot be fairly construed as acquiescing in, or agreeing to, the prosecutor's summary of alleged incriminating evidence against appellant.

In fact, as argued further in Part C below, to assume, as the Court's opinion does, that Miller was required to come forward with specific, countervailing information about pending charges, other than to deny them and insist on his right to contest these charges, is to implicitly fault appellant for exercising his Fifth Amendment privilege against self-incrimination, in violation of settled constitutional principles (*Mitchell v. United States* (1999) 526 U.S. 314, 326), and in direct violation of the holding in the leading Ninth Circuit case to consider the same point. (*Weston*, *supra*, 448 F.2d 626.)

Second, the opinion, after purporting to agree with defendant that there was no proper basis for the sentencing judge to have concluded that Miller had any culpability as to the dismissed money laundering charge, concluded that the trial court did not err by "factoring in" the money laundering case into its considerations, or by characterizing it as an offense that requires a great deal of sophistication. This is so, according to the opinion, because the trial court did not indicate that it believed appellant was criminally culpable for the dismissed charge or that he acted with sophistication. (Opin. 10.) Respectfully, this aspect of the opinion is contrary to, or an unreasonable application of the settled due process principles advanced by defendant because it fails to consider or describe precisely what it was that the trial court *could* properly factor into its

consideration about the new offense. If the trial court believed, as the opinion suggests, there was no basis to conclude appellant had any culpability for the dismissed charge, all that remained was the fact he had been charged with the crime, which, under the Due Process cases cited by defendant, is insufficient to support a sentencing decision in another case.

Finally, as explained in Part D, review should be granted to uphold the principle explained in *People v. Belmontes* (1983) 34 Cal.3d 335, that a court cannot properly exercise "informed discretion" when it is "unaware of the scope of its discretionary powers. . . ." The trial court abused its discretion in this sense by plainly misconstruing the argument for recall under section 1170(d) advanced by appellate counsel as somehow premised on an Eighth Amendment "cruel and unusual punishment" claim, when it was quite clearly directed at a proper and fair exercise of *Romero* discretion under *Garcia*.

E. **Patrick Smith** (see description in No. 2 above)

The Reform Act Statutory Construction Issues

Patrick Michael Smith's petition for resentencing under the provisions of the Reform Act was denied based on trial court's conclusion that appellant's 1998 "current offense" possession of a firearm by a convicted felon (former Pen. Code § 12021.1)[13] and possession of ammunition by a convicted felon (former §12316, subd. (b)(1)), – disqualified him from resentencing under the Reform Act because the record of his conviction showed he was "armed with a firearm" in the commission of the offense. (CT 413-424)

Smith argued on appeal that the trial court erred in this conclusion based on a misinterpretation of the new statutory scheme in two critical respects: first, that the "arming" exclusion for eligibility, based on its plain language – i.e., the phrase "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . ." – can only apply where there is a separate "tethering" felony charge in which the defendant

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13. Statutory references are to the Penal Code if not otherwise indicated.

was armed with a firearm, a circumstance entirely absent here; second, because the statutory scheme of the Reform Act clearly requires, under settled principles of statutory construction, that the "fact" of arming have been pleaded and either proven to a jury or admitted by the defendant in the proceedings upon which the "current offense" conviction was based.

Adopting the conclusions of a series of published decisions reaching similar conclusions, the Court of Appeal in the present case rejected both contentions. Review should be granted by this Court because the decision on both points is flawed and contrary to settled principles of statutory construction.

In Part I-A below, we explain why the decision of the Fifth District in *People v. Osuna* (2014) 225 Cal.App.4th 1020 – followed by the Court of Appeal here – misapplies controlling principles of statutory construction. *Osuna*'s rejection of this argument turned on the supposed distinction that the drafters of Proposition 36 utilized the phrase "armed with a firearm *during* the commission" of the current offense, as opposed to the near-identical phrase used in the enhancement statutes from which the tethering argument is taken, which provided for additional punishment when the defendant is "armed with a firearm *in* the commission" of a felony. (*Id*., at 1030-1032.) As will be explained below, *Osuna* makes too much of this "distinction without a difference"; the differing words are basically synonyms, and the case on which *Osuna* purports to base its conclusion, *In re Pritchett* (1994) 26 Cal.App.4th 1754, 1757, was decided based on the court's interpretation of the word "use" in "use of a firearm," not on any perceived distinction between the phrase "armed *in the* commission of" and "armed *during the* commission of . . .", which was not at issue in that case. (*Ibid*.)

In Part I-B below, we address the "pleading and proof" controversy. The opinion below followed a number of published decisions holding that section 1170.126, the "retrospective" portion of the Reform Act, does not incorporate the pleading and proof requirement of the prospective portion of the Reform Act, section 1170.12(c). (See *People v. Chubbuck* (2014) 231 Cal.App.4th 737; *People v. Brimmer* (2014) 230

Cal.App.4th 782; *People v. Elder* (2014) 227 Cal.App.4th 1308; *People v. Osuna*, 225 Cal.App.4th 1020; *People v. White* (2014) 223 Cal.App.4th 512; *People v. Blakely* (2014) 225 Cal.App.4th 1042.) These decisions ignore the plain language of section 1170.126, as well as the clear implications of that language to reach the dubious conclusion that a defendant sentenced before the enactment of the Three Strikes Reform Act may be found ineligible for resentencing under the Act on the basis of facts about his conduct that were not charged, and were neither admitted during the trial proceedings, nor found true by the trier of fact.

These statutory construction issues are review-worthy in their own right, not only because of their importance to persons in appellant's circumstances, but because they may be relevant to the construction of other statutes recently passed that have the goal of ameliorating harsh penal consequences. (See, §1170(d)(2) (recall of sentence for juveniles sentenced to life without parole); §1170.18 (recall of sentence for inmates serving felony sentences for offenses reduced to misdemeanors by Proposition 47; §3051 (parole eligibility for juveniles serving long sentences).)

Appellant recognizes that all the published authority on these matters has been adverse to his contentions, and that this Court has declined several opportunities to grant review as to these questions. However, appellant believes a full and fair review of these questions of statutory interpretation, which are of statewide importance, should lead this Court to grant review.

The Constitutional Question

Assuming this Court disagrees with these arguments, in Part II herein appellant seeks review of a novel constitutional legal issue involved in the eligibility determination: whether the federal constitution permits a judge to use facts about a defendant's conduct which were never charged in the accusatory pleading, found true by the trier of fact or admitted by the defendant during the trial to effectively increase a defendant's sentence. It is our contention that the Reform Act makes a two-strike sentence the maximum

sentence that can be imposed on a defendant, like appellant here, who was convicted of a non-strike offense without additional findings of fact about either the nature of the current offense, as specified in section 1170.12(c)(2)(C)(i)-(iii), or about the nature of the defendant's prior convictions, as specified in section 1170.12(c)(2)(C)(iv). (See *Cunningham v. California* (2007) 549 U.S. 270, 275.) This is true because after enactment of the Reform Act, the maximum sentence that may be imposed on an individual in appellant's position, absent additional findings of fact about defendant's conduct during the commission of the offense for which he is serving his sentence, is a second-strike sentence.

Although California law gives a defendant the right to a jury trial on the fact of a prior conviction, it has traditionally permitted the trial court to determine its nature – typically, whether is a serious or violent felony. (See *People v. McGee* (2006) 38 Cal.4th 682, 693.) A court is permitted to use the "entire record" of conviction to make this determination. (*People v. Guerrero* (1988) 44 Cal.3d 343, 353.)

As recognized in *People v. Manning* (2014) 226 Cal.App.4th 1133, this practice "may no longer be tenable" as a means of imposing sentence enhancements for prior convictions because it conflicts with the decision of the United States Supreme Court in *Apprendi* and subsequent decisions of the high court construing *Apprendi*. (*Manning, supra*, at 1141 fn. 2; see also *People v. Wilson* (2013) 219 Cal.App.4th 500, *People v. Saez* (2015) 237 Cal.App.4th 1177.) Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime above the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at 490.) As subsequent cases have made clear, any fact that increases the maximum sentence for the crime operates as "the functional equivalent of an element of a greater offense." (*Ring v. Arizona* (2002) 536 U.S. 584, 606; *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111.)

The past fifteen years have seen a steady expansion of the scope of the *Apprendi* doctrine, such that the limited exception applicable to prior convictions has virtually

disappeared. The cases most relevant here are *Shepard v. United States* (2005) 544 U.S. 13 and *Descamps v. United States*, *supra*, 133 S.Ct. 2276, both construing the Armed Career Criminal Act (ACCA, 18 U.S.C. §528(e)), a federal statute imposing enhanced penalties for recidivists.

In *Shepard*, the high court held, as a matter of statutory interpretation, that when a statute can be violated in alternative ways, only one of which qualifies as a predicate offense under the ACCA, a court trying to determine whether a guilty plea in a prior conviction meets the requirements for sentence enhancement under the ACCA can ask only whether the plea admitted all the necessary elements of the offense. (*Shepard, supra*, 544 U.S. at 26.) The court is empowered to review only a limited set of documents that address that question. (*Ibid*.) Four of the justices also expressed doubt about the constitutionality of imposing an enhanced sentence when neither the facts found by a jury nor admitted by the defendant necessarily established that the prior conviction qualified the defendant for enhanced punishment (*id*. at 24-26 [plurality opn]) and a fifth justice flatly declared that imposing enhanced punishment under such circumstances "gives rise to constitutional error, not doubt." (*Id*. at 26-28, Thomas, J., concurring.)

In *Descamps*, the high court made it clear beyond any doubt that it meant what it said in *Apprendi* when it limited judicial factfinding authorizing enhanced sentences to "the fact of a prior conviction." The defendant's prior conviction in *Descamps* was for a crime that did not include all the elements of an ACCA predicate offense. In this situation, the high court ruled, a sentencing court may not review the proceedings in the lower court to determine whether the crime the defendant committed contained all the elements of the predicate offense because to do so would extend "judicial factfinding beyond the recognition of a prior conviction." (*Descamps, supra*, 133 S.Ct. at 2288.)

California courts have begun to consider the implications of *Descamps*, recognizing it precludes judicial factfinding when a court is determining whether a prior conviction may be used to enhance a defendant's sentence. (*Manning*, *supra*, 226 Cal.App.4th at 1141 fn. 2; *Wilson, supra*, 219 Cal.App.4th at 515, *Saez*, *supra*, 237

Cal.App.4th 1177.) However, no California court has held that *Descamps* precludes such judicial factfinding when determining a defendant's eligibility for resentencing under the Reform Act. Here, the Court of Appeal, quoting *Blakely*, *supra*, 225 Cal.App. 4th at 1062, held that the judicial factfinding engaged in here is appropriate because it "'does not increase or aggravate that individual's sentence; rather, it leaves him or her subject to the sentence originally imposed.'" (Opin. at 6.)

This conclusion ignores the fact that in enacting section 1170.12(c)(2), the electorate created a *new norm* for sentencing individuals with two or more prior strikes, i.e., a two-strike sentence for any defendant who has no disqualifying convictions and whose current offense is neither a serious or violent felony nor subject to one of the exceptions listed in section 1170.12, subd. (c)(2)(C)(i)-(iv). Any fact used to deviate from this norm must be pled and proved. (§1170.12(c)(2)(A).)

As previously explained, the Reform Act created a separate provision, section 1170.126, to determine whether individuals already serving third-strike sentences should be resentenced. Under section 1170.126, the substantive eligibility requirements for defendants sentenced under the old scheme to be resentenced to second-strike terms are identical to the substantive eligibility requirements for defendants sentenced prospectively under the new scheme. (Compare §1170.126(e) with §1170.12(c)(2)(C).)

In other words, the sentencing norm for individuals who were originally sentenced under the old scheme is identical to the norm for individuals sentenced under the new scheme. Under section 1170.126, an individual like appellant, who was not convicted of a strike offense, has no disqualifying prior convictions, and who, during the trial proceedings, neither admitted nor was found beyond a reasonable doubt to have engaged in conduct that fits within one of the exceptions listed in section 1170.12(c)(2)(C)(i)-(iii), can be deemed ineligible for a second-strike sentence only if additional factual findings are made. Put plainly, after enactment of the Reform Act, the statutory maximum for a person in appellant's position is a two-strike sentence, absent additional factual findings "neither inherent in the jury's verdict nor embraced by the defendant's plea."

(*Cunningham v. California, supra*, 549 U.S. at 275.)

Even assuming, as the courts that have considered this question have found, that the enactment of section 1170.126 indicates the electorate intended the pleading and proof requirements contained in section 1170.12(c)(2)(C) to operate prospectively only, the creation of a new sentencing norm applicable to previously-sentenced individuals that limits the maximum term that can be imposed without additional factual findings concerning the conduct that led to the conviction has constitutional implications for such individuals. Even when the legislature intends an amelioratory provision to operate prospectively, constitutional considerations may require it to apply to individuals whose convictions are final. (*In re Kapperman* (1974) 11 Cal.3d 542, 544-545; *In re Chavez* (2004) 114 Cal.App.4th 989, 1000.)

Here, the creation of a new sentencing norm applicable both to defendants who are sentenced after the enactment of the Reform Act and to defendants who were sentenced under the former law has profound implications for the manner in which facts mandating exclusion from the benefits of the act are proved. Because that norm represents the maximum sentence that can be imposed on such a defendant without findings of fact that were never made or admitted during the trial proceedings in this case, *Apprendi* and its progeny preclude a court from making them now.

In addition to these considerations, principles of fundamental fairness also counsel against permitting the use of records, such as the trial transcript or appellate opinion used by the trial court in the present case, to prove conduct that was not inherent in the conviction. As pointed out in *Descamps, supra*, 133 S.Ct. at 2289, such "proof" may well be unreliable, because the defendant "often has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to." This may be especially true where, as here, the facts "do not alter the sentencing consequences of the crime." (*Id*., 133.Ct. at 2293 (Kennedy J., concurring).)

Thus, the right to proof beyond a reasonable doubt of the facts necessary to impose the punishment to which the defendant is subjected, the right to jury trial, and the right to

fundamental fairness all favor a rule precluding the court from making factual findings about a defendant's conduct that render him ineligible for relief under the Three Strikes Reform Act when such facts were never pleaded, found at trial beyond a reasonable doubt or admitted by the defendant.

Appellant respectfully urges this court to grant review and so hold.

APPENDIX C:
CLIFF GARDNER ON REHEARING AND AEDPA CONSIDERATIONS

My first rule as to rehearing is that if you think you can actually get rehearing and win in state court, do it. AEDPA be damned. The AEDPA considerations only come into play if the issue on which you are seeking rehearing is a federal issue and you are concerned because you don't think you can get rehearing.

In my view, the federal law has changed dramatically since 2010, and so has what we have to do in state court. Keep in mind that this issue does not involve the question of exhaustion. (See *Castille v. Peoples* (1989) 346 U.S. 346, 350 ["whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court"]; *Smith v. Digmon* (1978) 434 U.S. 332, 333-334 [same].) So if a federal issue is properly presented in the briefing, it is properly exhausted.

With exhaustion out of the calculus, and under current law, it seems to me the decision as to whether to seek rehearing depends on the flaw in the state court opinion. Once again, the primary rule is that if you think you can genuinely get rehearing granted, you should by all means seek it. But putting that aside, here is how I break down the calculus.

Where a state court misses a federal issue completely, the decision to seek rehearing arises at the intersection of three federal doctrines: 28 U.S.C. § 2254(d),

Johnson v. Williams (2013) ___U.S.___, 133 S.Ct. 1088, 185 L.Ed.2d 105 and *Harrington v. Richter* (2011) 562 U.S. ___, 131 S. Ct. 770, 178 L. Ed. 2d 624.

Section 2254(d) bars relief in federal court for all claims which the state court adjudicated on the merits unless the case falls into either of the two exceptions set forth in sections 2254(d)(1) and (d)(2). *Johnson v. Williams* sets up a rebuttable presumption that even when state reviewing courts do not address a federal issue they will be considered to have adjudicated the issue on the merits for purposes of 2254(d). And *Richter* held that where there is an adjudication on the merits but the state court does not give an explanation (as will be the case when the *Johnson* rebuttable presumption applies), the version of section 2254(d) which applies is almost impossible to satisfy. As the Court explained in *Richter*, where there is no state court reasoning to look at, in applying section 2254(d) "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." In the years since *Richter* was decided, the Ninth Circuit has been clear that the even more deferential *Richter* standard applies only where there is no reasoned decision in state court to which section 2254(d) can be applied. *Murray v. Schiro* (9th Cir. 2014) 745 F.3d 984, 996; *Sully v. Ayers* (9th Cir. 2013) 725 F.3d 1057, 1067; *Cannedy v. Adams* (9th Cir. 2013) 706 F.3d 1148, 1157-1158 (9th Cir. 2013).

If *Johnson* is given a broad reading -- that is, if the rebuttable presumption that the state court has adjudicated the merits applies in any case where the state court does not discuss the federal issue -- I think we need to seek rehearing and do our best to get the state court to address the federal issue in every case. Otherwise we end up with federal review under the more difficult to satisfy *Richter* standard. On the other hand, if the *Johnson* rebuttable presumption turns out to apply only in the situation where the state courts have resolved an issue very similar to the federal issue missed by the state court (as were the facts in *Johnson* itself), then I would be much more cautious.

At the end of the day, while it would be great if there was a single defined strategy for state courts, I think the answer is that we have to keep an eye on the federal law to see how it develops. For my money, if I had to decide today whether to seek rehearing in a case, I think *Johnson* will be given a broad reading and, consequently, I would err on the side of seeking rehearing to get the state court to address the issue.

As an aside, the *Richter* rule is why -- all other things being equal -- I file all habeas petitions in the superior court, where court rules entitle my client to a written decision. Obviously, there are situations where a habeas in the appellate court is best, when there is a state appeal pending that the habeas will push along. Putting that situation aside, and as you know, in the appellate or supreme court we often get one-sentence summary denials with no reasoning at all. In that situation (which was the exact situation in *Richter* itself), the federal courts apply the *Richter* standard.

In contrast to the situation where the state court simply misses a federal issue, however, where a state court decides a federal issue but *ignores key facts or gets key facts wrong*, a different set of factors governs the decision to seek rehearing. In this situation, *Johnson* and Richter do not really factor into the decision-making process. Instead, federal law applying section 2254(d) to reasoned state-court decisions assumes importance.

Under current federal law, where the state court decision shows the state court refused to consider facts it should have considered in deciding a constitutional claim, that decision may be considered unreasonable and section 2254(d) will not bar relief. *Williams v. Taylor* (2000) 529 U.S. 362, 397-398; *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1001 ["[a] rational fact finder might discount [these facts] or, conceivably, find [them] incredible, but no rational fact-finder would simply ignore [them]."]; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091. Similarly, where the state court decision shows the state court considered facts which are demonstrably wrong, that decision is unreasonable and § 2254(d) will not bar relief. *Wiggins v. Smith* (2003) 539 U.S. 510, 528. In other words, getting facts wrong, or ignoring key facts, makes a state decision

objectively unreasonable and permits de novo review in federal court under 2254(d).

Once again, if I think this is one of the very rare cases I can actually win on rehearing by pointing out facts that the state court missed, or got wrong, I would do so in a heartbeat. But if I do not think there is a genuine chance at getting rehearing granted, and the state court has gotten key facts wrong or missed other facts entirely, rehearing in state court runs the considerable risk that the state court will simply modify its opinion in such a way that will preclude relief in federal court under section 2254(d).

Now, there are many other variables which can go into the calculus on seeking rehearing. Not all cases will require consideration of AEDPA in the rehearing decision. Obviously if the issue is one of state law, or if the federal issue is not one on which habeas relief is available (for example, if it is a Fourth Amendment issue or if the issue has been *Teague* barred in federal court), then AEDPA considerations should not impact the rehearing decision. Similarly, if as a practical matter the client will not be going to federal court --as where, for example, he is no longer in custody -- then once again AEDPA considerations should not be relevant. And there is a passing reference in *Johnson* to the absence of a rehearing petition -- if that language gets picked up and assumes importance in subsequent federal case law outside the context of a missed federal issue, that too could be important.

At the end of the day, if I think I can win on rehearing, I do it. But keep in mind the chances of getting rehearing granted. Since 1988, for example, there have been approximately 471 rehearing petitions filed in the state supreme court in capital cases. There has been one grant of rehearing. The extremely low chance of actually getting rehearing -- as opposed to getting an adverse modification of the opinion -- is also a factor that must be considered in the decision-making process.

If I do not think I can actually get rehearing, I factor AEDPA into the calculus when the case requires it. I certainly agree that the absence of a rehearing petition could impact the case if review is granted, but given how few Petitions for Review are granted, I am not sure that concern calls for a uniform practice requiring rehearing in all cases.

Rather, I think that concern calls for a case-specific calculus which weighs the AEDPA implications of seeking or not seeking rehearing versus the potential impact on the case in the unlikely even review is granted.