# CHAPTER 8 – STATE WRITS

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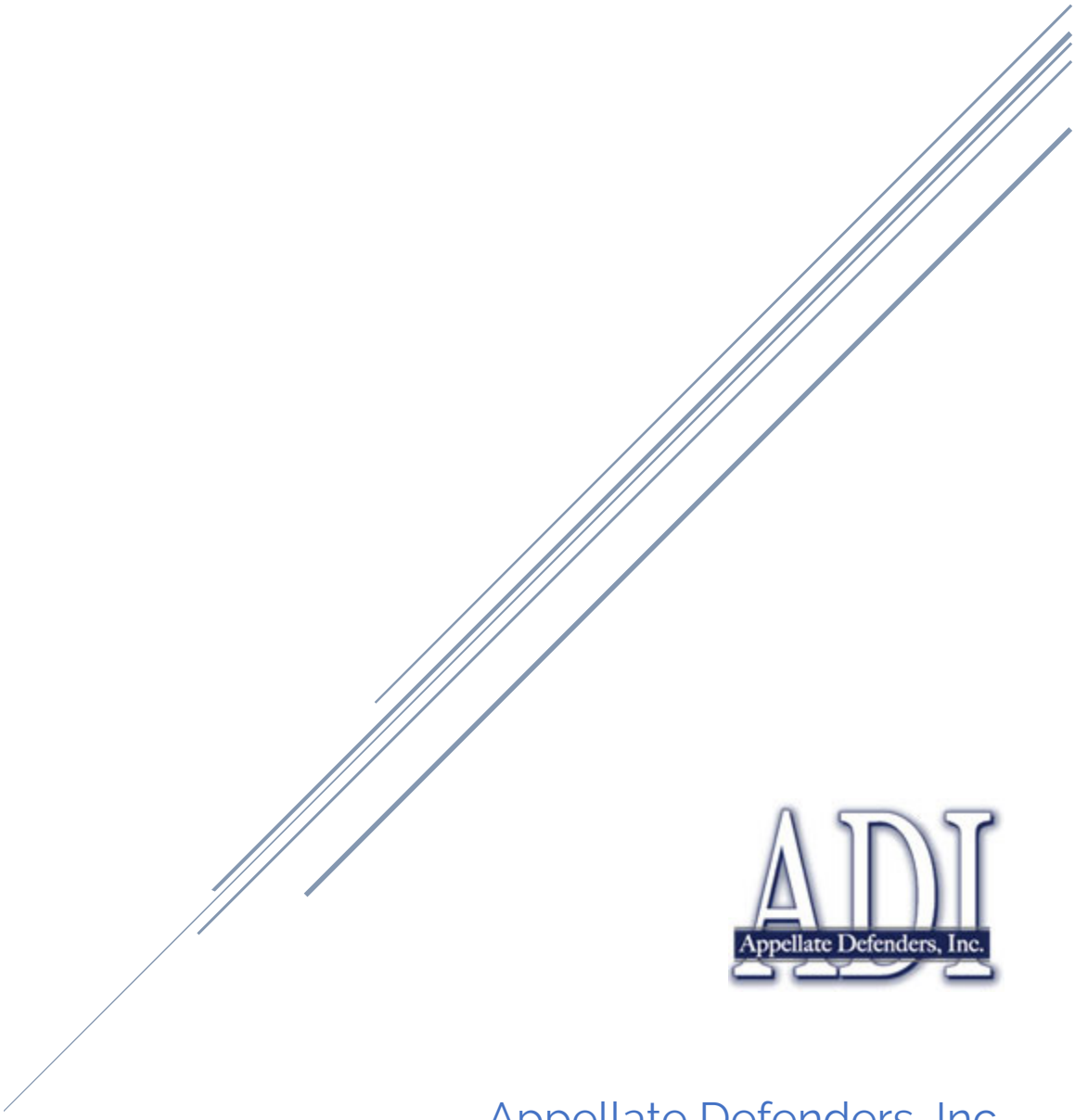

Appellate Defenders, Inc.
California Appellate Practice Manual

# Contents





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# CHAPTER EIGHT

# PUTTING ON THE WRITS: CALIFORNIA EXTRAORDINARY REMEDIES

## 1 INTRODUCTION [§ 8.0]

This chapter primarily addresses post-conviction writs of habeas corpus in non-capital criminal cases. It also briefly discusses other uses of state habeas corpus and other state writ remedies.

The writ of habeas corpus – the Great Writ – provides an avenue of relief from unlawful custody when direct appeal is inadequate. "[T]he Great Writ has been justifiably lauded as the safe-guard and the palladium of our liberties." (*In re Sanders* (1999) 21 Cal.4th 697, 703-704, internal quotation marks deleted.)

Habeas corpus has been around a long time. (See Habeas Corpus Act of 1679, 31 Chs. II, ch. 2 – the forerunner of all habeas corpus acts.) The United States Constitution expressly protects it: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." (Art. I, § 9, cl. 2.) The comparable state provisions are California Constitution, article I, section 11, and article VI, section 10. (See also Pen. Code, § 1473 et seq.)

### 1.1 Uses of Habeas Corpus Often Encountered in Criminal and Juvenile Appellate Practice [§ 8.1]

A few hypotheticals illustrate when it might be necessary to file a petition for writ of habeas corpus:

Criminal context:

- At trial counsel's advice (not as part of a plea bargain), the defendant admitted a prior serious felony, residential burglary (Pen. Code, § 667, subd. (a)). In fact, the burglary was of a commercial building.

- Before trial, the defendant unsuccessfully contested several strong issues, including adequacy of the evidence under Penal Code section 995, speedy



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trial, and *Miranda*.[1] In anticipation of getting a reversal on these issues, to avoid a time-consuming trial, counsel had the defendant plead guilty.

- After the defendant was sentenced, trial counsel received a call from a juror who, plagued by conscience, described how one juror swayed others by "evidence" the juror obtained outside the courtroom.

- New legislation was enacted which would inure to defendant's benefit if the conviction did not become final before the legislation's effective date. But counsel neglected to file an appeal, and the conviction appears to have become final before the effective date.

Dependency context:

- Counsel failed to object to jurisdiction under Welfare and Institutions Code section 300, subdivision (g) where the incarcerated mother could arrange for the care of her child and in fact there were relatives available to provide.

- Review of the record shows valid grounds for a motion based on a change in circumstances. (Welf. & Inst. Code, § 388.) Trial counsel, however, made no such motion and now admits having failed to consider making one.

- The child welfare agency never asked father whether he had Indian heritage. Father is a registered member of the Comanche Tribe.

- Counsel did not take any steps to establish paternal status in a timely manner. Father is a biological father capable of providing safe care.

Either context:

- The client claims a number of witnesses who could have testified favorably were either not interviewed by trial counsel or not called to testify. The potential witnesses corroborate this claim.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.



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In a previous appeal, counsel neglected to raise an issue that has come back to haunt the client. Prior appellate counsel admits never having considered the issue.

What do all of these examples have in common? Appeal is not an adequate remedy, either because the facts necessary to resolve the problems do not appear in the appellate record or because the time for appeal is past. The remedy is a petition for writ of habeas corpus. Habeas corpus allows a petitioner to bring in facts outside the record, if those facts support a claim cognizable in habeas corpus. It often has more relaxed, non-jurisdictional deadlines than an appeal. (See § 8.18, *post*.)

A number of the examples above describe possible ineffective assistance of counsel, trial or appellate. This is one of the most common uses of habeas corpus in both criminal and juvenile proceedings. For the most part, courts expect an allegation of IAC to be presented by habeas corpus and refer to evidence outside the record establishing lack of strategic purpose to counsel's actions. (E.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268.)

Other examples are specified in Penal Code section 1473, subdivision (b), which also provides these are not the exclusive uses of habeas corpus.[2] A petition

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[2] Under section 1473, subdivision (b), a petition may allege, among other grounds:

> (1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration. [¶] (2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person. [¶] (3)(A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial. . . .

For purposes of section 1473, "'new evidence' means evidence that has been discovered after trial, that could not have been discovered prior to trial by the



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for writ of habeas corpus may serve purposes other than challenging a conviction on the basis of facts outside the record. (See § 8.53 et seq., *post*.)

## 1.2 ADI's Expectations [§ 8.2]

### 1.2.1 Pursuit of Writs When Appropriate [§ 8.3]

As a matter of policy, ADI expects appointed counsel to be attentive to possible issues requiring habeas or other writ remedies and to pursue those reasonably necessary and reasonably within the scope of appellate responsibilities. Although the California Supreme Court has stated that in a noncapital case counsel has no legal duty to conduct an investigation to discover facts outside the record, nevertheless if counsel learns of such facts in the course of representation, counsel may have an ethical obligation to advise the client of a course of action to obtain relief "or take other appropriate action." (*In re Clark* (1993) 5 Cal.4th 750, 783-784, fn. 20.)

Regardless of legal duty, some appellate projects such as ADI, with the approval of their courts, hold counsel to higher expectations than the bare minimum. Counsel are expected to pursue remedies outside the four corners of the appeal, including habeas corpus, when reasonably necessary to represent the client appropriately. (See *People v. Thurman* (2007) 157 Cal.App.4th 36, 47 [quoting Manual, part of preceding sentence].) In some appellate districts, however, the court imposes restrictions on the authority of counsel to pursue extraordinary remedies. Counsel must consult the applicable project.

### 1.2.2 Consultation with ADI Before Pursuing Writ Remedy [§ 8.4]

Counsel should consult with the assigned ADI staff attorney when considering a writ investigation or petition. Counsel must consider such questions as whether the available evidence and the current law or signs of potential changes support a petition; whether and how off-record claims should be investigated; whether, where, and when a petition should be filed; whether the client would benefit from the

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exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (Pen. Code, § 1473, subd. (b)(3)(B).)



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remedy; and whether the client might suffer adverse consequences[3] by pursuing writ relief. Given the complexity of these matters, it is necessary for the attorney to heed the old adage "two heads are better than one" and consult with the assigned staff attorney. Thus counsel should consult with the assigned ADI staff attorney when in doubt about applying these expectations to their own case.

Another reason to seek ADI input is the recurring problem of how to approach trial counsel in investigating a possible ineffective assistance of counsel claim.[4] Appellate counsel generally should avoid becoming a potential witness. Counsel also will want to elicit trial counsel's cooperation; although in most instances prior counsel are cooperative in investigating ineffective assistance of counsel, some attorneys are not, perhaps because of embarrassment or concern about their professional status.[5] ADI may be able to assist in these situations.[6]

In appropriate cases appellate counsel may seek fees for expert assistance, such as an investigator, a physician, a psychiatric evaluation of the client or client's

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[3] See § 4.91 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection," on adverse consequences.

[4] A resource to consult is 24 A.L.R.7th Art. 5 (construction and application of ABA standards in determining ineffective assistance of counsel); see also *People v. Force* (2019) 39 Cal.App.5th 506, 517, fn. 3 and cases cited therein [while ABA guidelines are not binding authority, California courts have recognized they serve as useful reference for evaluating propriety of counsel's conduct].

[5] Business and Professions Code sections 6068, subdivision (o)(7) and 6086.7 require an attorney and a court to notify the State Bar whenever a modification or reversal of a judgment in a judicial proceeding is based on misconduct or willful misrepresentation by an attorney. In addition, the sections, respectively, require reporting when modification or reversal is based on "gross[] incompetent representation" or "incompetent representation."

[6] The requirement of consultation with ADI before raising an ineffective assistance of counsel issue is not confined to habeas corpus investigations, but also applies to raising that issue on direct appeal.



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records, or DNA testing. Travel, translation services, and other costs may be approved, as well. The assigned ADI staff attorney should be consulted; court preapproval may be necessary for some expenses.

## 2 BASIC REQUIREMENTS FOR AND LIMITATIONS ON STATE HABEAS CORPUS TO CHALLENGE CRIMINAL CONVICTION[7] [§ 8.5]

*People v. Duvall* (1995) 9 Cal.4th 464 and *People v. Romero* (1994) 8 Cal.4th 728 are especially useful in describing general state habeas corpus procedure, law, and theory in the context of challenging a criminal conviction. (See also *People v. Pacini* (1981) 120 Cal.App.3d 877.) As noted above, this use of habeas corpus is the most commonly encountered use in appellate practice and is generally invoked when the basis for the challenge lies in facts outside the record.

Habeas corpus use has certain limitations. Among these are the requirement of custody and related mootness issues, the bar against repetitive petitions, the bar against use of habeas corpus when appeal is or would have been available, and the requirement of due diligence.

### 2.1 Custody and Mootness [§ 8.6]

The fundamental purpose of habeas corpus in most post-conviction contexts is to provide a remedy for the release of persons confined under the restraint of an illegal judgment. This theoretical underpinning necessarily raises the question of whether the petitioner is under the restraint of the decision under attack – in other words, whether he is in custody. It also raises the related but distinct question of whether habeas corpus can offer meaningful relief – i.e., whether the case is moot.

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[7] Dependency applications of habeas corpus are discussed in § 8.63, post.



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### 2.1.1 Custody requirement [§ 8.7]

A fundamental prerequisite for habeas corpus jurisdiction is that the petitioner be "in custody," either actual or constructive, at the time the petition is filed.[8] (See Pen. Code, § 1473, subd. (a); *People v. Villa* (2009) 45 Cal.4th 1063; In *re Azurin* (2001) 87 Cal.App.4th 20, 26; *In re Wessley W.* (1981) 125 Cal.App.3d 240, 246.) Constructive custody means the person is not physically incarcerated but is subject to the potential of incarceration – as when on probation, parole, bail, or own recognizance. (*Wessley W.*, at pp. 246-247; e.g., *In re Lira* (2013) 58 Cal.4th 573.)

The jurisdictional custody requirement applies at the time the petition is filed. If the petitioner is released or dies while the petition is pending, the requirement remains satisfied and the court continues to have jurisdiction. (See *In re King* (1970) 3 Cal.3d 226 [relief on habeas corpus granted, although defendant no longer in custody at time of decision]; *Ex parte Byrnes* (1945) 26 Cal.2d 824, 827 [habeas corpus relief granted although defendant no longer in custody]; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [defendant died during pendency of habeas corpus proceeding; judgment of guilt vacated and proceedings permanently abated].)[9] The remedy at that point will be something other than release from custody – such as removing the conviction from the petitioner's record or correcting the record (*In re King*, *supra*, 3 Cal.3d at pp. 237-238) or ordering an appeal from the conviction to go forward (*Ex parte Byrnes*, *supra*, 26 Cal.2d at p. 828) or abating the proceedings (*In re Sodersten*, *supra*, 146 Cal.App.4th at pp. 1236-1237).

If the petition is filed after all actual or potential custody has expired, however, the court lacks habeas corpus jurisdiction, even though the petitioner is currently

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[8] Federal habeas corpus has a similar rule. (*Spencer v. Kemna* (1998) 523 U.S. 1, 7 ["custody" satisfied; defendant incarcerated when petition filed, but released before adjudication of petition]; *Carafas v. LaVallee* (1968) 391 U.S. 234, 237-240; *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, 1219 [enough that defendant be in custody when petition filed; subsequent release does not deprive court of jurisdiction].

[9] Mootness becomes a consideration at this point. (See § 8.8, post.)



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suffering collateral consequences of the conviction.[10] (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [mandamus is proper remedy to seek post-finality relief in cases where the defendant is no longer in custody];[11] *In re Douglas* (2011) 200 Cal.App.4th 236; *In re Azurin* (2001) 87 Cal.App.4th 20, 26 [no habeas corpus jurisdiction because petition filed long after state custody expired, even though petitioner in federal custody pending deportation because of state conviction]; *In re Wessley W.* (1981) 125 Cal.App.3d 240, 246-247 [court lacked power to order sealing of criminal records for which petitioner no longer in custody, despite collateral consequences from records]; see also *In re Stier* (2007) 152 Cal.App.4th 63 [prospective loss of medical license and speculative risk of future custody if defendant fails to register as sex offender do not prove constructive custody].) Detention by federal immigration officials pending deportation because of a state conviction is not itself "custody" for state habeas corpus purposes, if all actual or potential custody is past. (*People v. Villa* (2009) 45 Cal.4th 1063; *People v. Kim* (2009) 45 Cal.4th 1078; *People v. Azurin*, *supra*, 87 Cal.App.4th at p. 26.)

### 2.1.2 Mootness issues [§ 8.8]

When a petitioner is released from all custody constraints, actual or constructive, an issue of mootness may arise. If the habeas corpus proceeding is attacking a criminal judgment, the case is ordinarily not moot, even after all potential for custody expires, because of the collateral consequences flowing from a felony conviction. (*In re King* (1970) 3 Cal.3d 226, 229, fn. 2.; *People v. Succop* (1967) 67 Cal.2d 785, 789-790; *Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 325 [habeas considered, though moot, where trial court had refused to appoint particular public defender based on case load]; cf. *In re Jackson* (1985) 39 Cal.3d 464, 468, fn. 3; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [death of defendant

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[10] Other remedies than habeas corpus may be available. (See § 8.9, post.)

[11] *Picklesimer* specifically involved relief under the ruling of *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, which held mandatory lifetime sex offender registration for violations of Penal Code section 288a, subdivision (b)(1), voluntary oral copulation with a 16- or 17-year-old minor, violates equal protection. *Hofsheier*'s equal protection holding was overruled in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. *Picklesimer* remains good law on the remedy.



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makes habeas corpus proceedings moot, although it may continue in court's discretion].)

If the petition is attacking some other decision than a judgment of conviction, however – one that no longer affects the petitioner in any way – the case may be considered moot. Examples might be pretrial detention, custody credits after discharge from parole, and prison disciplinary decisions corrected or no longer correctable. In that situation the court will usually decline to entertain the petition.

Even if the case is moot, a California court may exercise discretion to decide the case if it involves issues of serious public concern that would otherwise elude resolution. (*In re Jackson* (1985) 39 Cal.3d 464, 468, fn. 3, and *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [death of defendant]; *In re William M.* (1970) 3 Cal.3d 16, 23-25 [detention of juvenile before jurisdictional hearing]; *In re Newbern* (1961) 55 Cal.2d 500, 505 [contact with bondsman]; *In re Fluery* (1967) 67 Cal.2d 600, 601 [credits for time in jail].)

(In the federal system, in contrast, because of the "case or controversy" requirement of article III, section 2 of the United States Constitution, mootness as to the individual litigants defeats jurisdiction. (*United States v. Juvenile Male* (2011) 564 U.S. 932, 936 ["basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed"].)

### 2.1.3 Alternatives to habeas corpus if custody requirement is not met [§ 8.9]

Certain remedies may be available even if the custody requirement for habeas corpus is not met. Depending on the facts and circumstances of the case, for example, a petition for a writ of error *coram nobis* might be a possibility. (See *In re Azurin* (2001) 87 Cal.App.4th 20, 27, fn. 7; cf. *People v. Ibanez* (1999) 76 Cal.App.4th 537, 546, fn. 13 [coram nobis not appropriate if underlying claim is ineffective assistance of counsel]; see § 8.66 et seq., *post*.) A post-judgment motion under Penal Code section 1385 to dismiss previous convictions in the interests of justice is beyond the jurisdiction of the court. (*People v. Chavez* (2018) 4 Cal.5th 771.)

In certain specialized situations a person may have a statutory right to attack a judgment. For example, Penal Code section 1016.5 requires the trial court to advise



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of immigration consequences before accepting a guilty plea and allows the defendant to move to vacate the judgment if the trial court fails to comply with the requirement. (See *People v. Totari* (2002) 28 Cal.4th 876.) Penal Code section 1473.5 permits habeas corpus on the ground expert evidence on domestic battering and its effects was excluded. (See *In re Walker* (2007) 147 Cal.App.4th 533.)

Another example is Penal Code section 1473.6, which allows a person no longer in physical or constructive custody to challenge the judgment by motion, if there is newly discovered evidence of fraud or perjury or misconduct by a government official. (See *People v. Germany* (2005) 133 Cal.App.4th 784; see also *People v. Murillo* (2021) 71 Cal.App.5th 1019.) Still another is section 1473.7, which allows a person no longer imprisoned or restrained to move to vacate a conviction or sentence because of (a) error prejudicing the defendant's understanding of immigration consequences of the plea or (b) newly discovered evidence of actual innocence. In contrast, Penal Code section 1385 is not available to dismiss an action after judgment is imposed and the defendant has served the sentence. (*People v. Kim* (2012) 212 Cal.App.4th 117.)

## 2.2 Successive Petitions [§ 8.10]

The general rule is that all claims must be presented in a single, timely petition; successive petitions will be summarily denied.[12] Repeated presentation of the same issue may be considered an abuse of the writ and subject counsel or petitioner to sanctions. (*In re Reno* (2012) 55 Cal.4th 428, 512; *In re Clark* (1993) 5 Cal.4th 750, 769; *In re White* (2004) 121 Cal.App.4th 1453, 1479 [imposing sanctions].) An exception to this rule might be petitions alleging facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to a conviction or sentence. (*In re Clark* (1993) 5

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[12] Sometimes a court may treat a post-conviction "motion" as a petition for writ of habeas corpus. If so, the movant/petitioner should be aware that cognizable issues not included in the motion/petition may be foreclosed from later consideration under the successive petitions rule. (Cf. *Castro v. United States* (2003) 540 U.S. 375, 383 [as a matter of federal judicial procedure, before re-characterizing a motion to review a federal conviction as a 28 U.S.C. § 2255 federal habeas corpus petition, the district court must warn the defendant of the successive petitions rule].)



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Cal.4th 750, 796-797; see also *In re Martinez* (2009) 46 Cal.4th 945, 950, *In re Robbins* (1998) 18 Cal.4th 770, and *In re Gallego* (1998) 18 Cal.4th 825; see Pen. Code, § 1475.)[13]

Also, changes in the law may excuse the bar against a successive or repetitive habeas corpus petition. (*In re Richards* (2016) 63 Cal.4th 291, 294, fn. 2 [change in applicable law concerning definition of false evidence, petition was not subject to procedural bar of successiveness]; *In re Reno* (2012) 55 Cal.4th 428, 466 [change in law will excuse successive or repetitive habeas petition].)

A habeas corpus petition collaterally attacking a conviction is not a successive petition to an earlier *Benoit*[14] petition used to gain the right to appeal after an untimely notice of appeal. The *Benoit* petition is not an attack on the judgment, but merely a vehicle for rescuing the right to appeal. (See *Johnson v. United States* (9th Cir. 2004) 362 F.3d 636, 638 [construing analogous federal provision].)

## 2.3 Availability of Appeal [§ 8.11]

Habeas corpus cannot be used to raise issues that could have been but were not raised on appeal (*In re Dixon* (1953) 41 Cal.2d 756, 759), nor to seek a second determination of issues raised on appeal and rejected (*In re Foss* (1974) 10 Cal.3d 910, 930; *In re Waltreus* (1965) 62 Cal.2d 218, 225; see also *In re Brown* (1973) 9 Cal.3d 679, 683 [defendant who abandoned appeal after certificate of probable

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[13] In contrast with "fundamental miscarriage of justice," Penal Code section 1509, subdivision (d), provides for capital habeas, "[A] successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive . . . petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility [for capital sentence as defined in the statute]. . . ."

[14] *In re Benoit* (1973) 10 Cal.3d 72.



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cause was denied and at that time failed to use proper remedy (mandate) to perfect appeal cannot use habeas corpus to attack denial of motion to withdraw plea].[15])

*In re Harris* (1993) 5 Cal.4th 813, 829-841, disapproved on other grounds in *Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, discusses at some length the exceptions to this policy (called the *Waltreus* rule for convenience). They include "in rare situations, some clear and fundamental constitutional violation striking at the heart of the trial process that should have been raised or was unsuccessfully raised on appeal, and that cannot be remedied by resort to the doctrine of ineffective assistance of counsel" (*Harris*, at p. 836),[16] lack of fundamental jurisdiction over the subject matter (*Harris*, at pp. 836-838; see *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 66), errors of sufficient magnitude that the trial court may be said to have acted in excess of jurisdiction (*Harris* at pp. 838-841;[17] *In re Sands* (1977) 18 Cal.3d 851, 856-857), excessive punishment (*In re Nunez* (2009) 173 Cal.App.4th 709, 724), and a change in the law benefitting the petitioner (*In re King* (1970) 3 Cal.3d 226, 229, fn. 2; see ADI's guide to "Potentially Favorable Changes in the Law," located at the bottom of the Recent Changes in the Law webpage.[18] Part Two, on "General Principles of Retroactivity"). (See also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 ["rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal . . . would not bar an ineffective assistance claim on habeas corpus"]; see *In re Robbins* (1998)18 Cal.4th 770, 814,

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[15] Dictum in *Foss* on another point disapproved in *People v. White* (1976) 16 Cal.3d 791, 796, footnote 3; dictum in Brown on another point disapproved in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 and footnote 7.

[16] *Harris* found this exception considerably narrower than previous opinions had indicated and declined to "define the exact boundaries of any . . . surviving exception." (*In re Harris*, *supra*, 5 Cal.4th at p. 836.) *In re Seaton* (2004) 34 Cal.4th 193, 199-200, held the exception to *Waltreus* for "fundamental" issues not raised on appeal does not apply to errors not objected to at trial.

[17] *Harris* limited this exception to cases where "a redetermination of the facts underlying the claim is unnecessary." (*In re Harris, supra*, 5 Cal.3d at pp. 840-841.)

[18] http://www.adi-sandiego.com/news_alerts/changes_law.asp



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fn. 34.) In addition, habeas corpus may be used when appeal is an inadequate remedy because prompt relief is required. (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305.)

## 2.4 Timeliness [§ 8.12]

Unlike appeals or federal habeas corpus proceedings, which have specific time limits, there is no prescribed, fixed time period in which to seek state habeas corpus relief in a noncapital criminal case.[19] The general limitation is that habeas relief must be sought in a "timely fashion," "reasonably promptly." (*In re Sanders* (1999) 21 Cal.4th 697, 703; *In re Robbins* (1998)18 Cal.4th 770, 805-806; *In re Swain* (1949) 34 Cal.2d 300, 304.) Unreasonable delay, or laches, is a ground for denial of relief. (*In re Ronald E.* (1977) 19 Cal.3d 315, 321-322; *People v. Jackson* (1973) 10 Cal.3d 265, 268-269.) A petitioner must point to particular circumstances sufficient to justify substantial delay.[20] (*In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1.) Reasonable delay may be excused, within limits, particularly when the petition seeks to correct an erroneous sentence. (*In re Nunez* (2009) 173 Cal.App.4th 709, 723-724; *People v. Miller* (1992) 6 Cal.App.4th 873, 881; see *In re Streeter* (1967) 66 Cal.2d 47, 52.)

Delay in seeking habeas corpus or other collateral relief is measured from the time a petitioner becomes aware of the grounds for relief, which may be as early as the date of conviction. (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5, and cases cited therein; *In re Douglas* (2011) 200 Cal.App.4th 236; see also *Robinson v. Lewis* (2020) 9 Cal.5th 883, 898, fn. 7 ["as promptly as the circumstances allow" and "without substantial delay" are equivalent terms].)

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[19] Dependency habeas corpus cases have tight time restrictions because of the need to avoid undue delay. (See § 8.63, post.)

[20] To show diligence when a petition collateral to an appeal is contemplated, counsel should indicate by footnote in the brief that a petition is anticipated, and when appropriate explain why the petition is not being filed contemporaneously.



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## 2.5 Retroactivity [§ 8.12A]

California courts have applied two tests for retroactivity, often referred to as the federal and state tests. (*In re Milton* (August 22, 2022. No. S259954) Cal.5th [2022 WL 3582654] and cases therein.) Under both tests, a judicial decision applies retroactively to final cases on collateral review only where the decision created a "new rule" that is substantive. (*Ibid*.) Under the federal test, a judicial decision that created a new procedural rule will not apply retroactively. (*Ibid*.) Under the state test, a new procedural rule may be retroactive upon satisfying a three-factor test: "'"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."'" (*Ibid*., citing *People v. Johnson* (1970) 3 Cal.3d 404.)

# 3 HABEAS CORPUS PROCEDURES [§ 8.13]

Habeas corpus, like other writs, has its own requirements and terminology that can seem arcane even to experienced practitioners. To help navigate the maze, § 8.84 et seq., Appendix A, "Requirements for Habeas Corpus Petitions in California State Courts," provides a step-by-step guide to preparing a petition. § 8.122 et seq., appendix B, "California Post-Conviction Habeas Corpus," provides flow charts showing the typical progression of a habeas corpus case through the California courts. § 8.123, part I, deals with "Typical proceedings to initial decision." § 8.124, part II, deals with "Proceedings to review initial decision." These materials may be useful in clarifying the procedural requirements and visualizing the various steps in the process.

## 3.1 Where and When To File [§ 8.14]

Filing a habeas corpus petition when an appeal is pending requires a decision as to both as to *venue* – the appropriate court in which to file the petition – and *timing* – whether to file it during or after the appeal.

### 3.1.1 Venue [§ 8.15]

All superior and appellate courts have statewide habeas corpus jurisdiction. (Cal. Const., art. VI, § 10; *In re Roberts* (2005) 36 Cal.4th 575, 582; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 346; *In re Van Heflin* (1976) 58 Cal.App.3d 131, 135.) However, practical and judicial policy considerations generally dictate that



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the court most closely associated with the case and most efficiently equipped to resolve the issues should decide the petition. Venue choice involves the "territorial" question of the area where the habeas corpus proceeding should take place and also the "vertical" question of which court – trial or appellate – within a given territory should hear the matter. The present discussion covers only challenges to the judgment or sentence; see § 8.53 et seq., *post*, for other uses of habeas corpus, such as remedying illegal prison conditions and parole denials.

#### 3.1.1.1 "TERRITORIAL" QUESTION [§ 8.16]

The appropriate venue for challenges to a conviction or sentence is normally the district or county where judgment was imposed. (*In re Roberts* (2005) 36 Cal.4th 575, 583; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.) If the petition is filed in the wrong appellate district, the Court of Appeal may deny it without prejudice and, if it does, must identify the appropriate court in its order. (Cal. Rules of Court, rule 8.385(c).) If a petition is filed in the wrong superior court, the court may retain jurisdiction or transfer the case after making an initial determination that the petition states a prima facie case.[21] (Rule 4.552(b)(2); *Roberts*, at p. 583; *Griggs*, at p. 347.)

#### 3.1.1.2 "VERTICAL" QUESTION [§ 8.17]

Normally as a matter of orderly procedure a habeas corpus petition should be filed in the superior court in the first instance.[22] (*People v. Hillery* (1962) 202 Cal.App.2d 293, 294 [an appellate court "has discretion to refuse to issue the writ as

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[21] If the petition challenges a denial of parole or seeks relief on a *Tenorio* claim (*People v Tenorio* (1970) 3 Cal.3d 89 [invalidating statute requiring consent of prosecutor to strike prior conviction]), the superior court normally should transfer the petition to the court that rendered the underlying judgment without making an initial determination of prima facie merit. (Rule 4.552(c); *In re Roberts*, *supra*, 36 Cal.4th 575, 593; *In re Cortez* (1971) 6 Cal.3d 78, 88-89, fn. 9; see also *Griggs v. Superior Court*, *supra*, 16 Cal.3d at p. 347, fn. 5.)

[22] Counsel should understand that, after the petition is filed, compensation for services in the superior court generally must be sought in that court, rather than under the appellate appointment.



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an exercise of original jurisdiction on the ground that application has not been made therefor in a lower court in the first instance"]; see also *D.C. v. Superior Court* (2021) 71 Cal.App.5th 441, 458 [habeas petition should be initiated in superior court]; *In re Ramirez* (2001) 89 Cal.App.4th 1312 [this policy not changed by trial court unification].) This is especially true when there are factual matters to be resolved (*Hillery*, at p. 294); an appellate court is not well equipped to conduct evidentiary hearings and make factual determinations (*People v. Pena* (1972) 25 Cal.App.3d 414, 423, disapproved on another ground in *People v. Duran* (1976) 16 Cal.3d 282, 292).

Appellate courts nevertheless have authority to entertain habeas corpus petitions not previously filed in a lower court. They are more inclined to do so when the petition is closely related to an issue in a pending appeal and/or the issue is purely one of law. (See, e.g., *In re Davis* (1979) 25 Cal.3d 384, 389; *In re Kler* (2010) 188 Cal.App.4th 1399; *People v. Pena* (1972) 25 Cal.App.3d 414, 423, disapproved on another ground in *People v. Duran* (1976) 16 Cal.3d 282, 292.) Thus, when a habeas corpus issue is directly linked to an appeal, it is preferable to file the petition in the appellate court.[23] (See *People v. Frierson* (1979) 25 Cal.3d 142, 151.) A common example is an appeal arguing ineffective assistance of trial counsel as a matter of law and a related petition raising facts outside the record to support the showing of ineffectiveness.

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[23] The cover should prominently state that the petition is collateral to a pending appeal. A request to consolidate the appeal and the petition is usually a good idea. (See, e.g., rule 8.500(d) [separate petitions for review required if appeal and writ not consolidated and no order to show cause issued].) As with all motions, it should be filed as a separate document, not included in a brief or petition. (See rule 8.54.) For mandatory electronic filing, see post, at § 8.19. For those who may be exempt from mandatory electronic filing, the covert must be red (Cal. Rules of Court, rule 8.40(a)(1); see also rule 8.44.)



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### 3.1.2 Timing [§ 8.18]

If the petition is to be filed in the Court of Appeal while an appeal is pending, it should be submitted promptly, so that the appeal and writ can be considered together.

If an appeal is pending and the petition is to be filed in the superior court,[24] the issue arises whether to file it before or after the appeal has concluded. The superior court has concurrent habeas corpus jurisdiction over the case on matters that are not and could not be raised in a contemporaneous appeal. (*In re Carpenter* (1995) 9 Cal.4th 634, 645-646.) In some cases it may be important to file the petition during the appeal. Witness availability, for example, may be limited. In a criminal case, for a client who has a short sentence, meaningful relief may require an early decision. (See generally § 1.30 et seq. of chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," on protecting the client in time-sensitive cases.)

In a number of other situations, however, it may desirable to defer the filing. Two simultaneous attacks on the same judgment can be inefficient and generate confusion. The decision on appeal might moot the writ proceeding, and vice versa. A trial judge may be doubtful about, or reluctant to exercise, his or her authority to grant the petition, since such a decision could effectively preempt proceedings in the higher court.

Juvenile dependency habeas corpus proceedings are subject to much stricter time limits. (See § 8.63, *post*.)

## 3.2 Petition [§ 8.19]

"The petition serves primarily to launch the judicial inquiry into the legality of the restraints on the petitioner's personal liberty." (*People v. Romero* (1994) 8 Cal.4th 728, 738.) The petition also states the grounds for the claimed illegality of

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[24] When the petition challenges the ruling of a superior court judge, usually another judge must hear the case. (Pen. Code, § 859c; *Fuller v. Superior Court* (2004) 125 Cal.App.4th 623, 626-628.)



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the petitioner's liberty, so that the return can respond to the allegations and frame the issues for the proceedings.

§ 8.84 et seq., appendix A, "Requirements for Habeas Corpus Petitions in California State Courts," provides a step-by-step guide to preparing a petition. (See also Cal. Rules of Court, rule 8.384 et seq..)

Information about filing and service requirements is summarized on ADI's Filing and Service pages.[25] The "Cheat Sheet" on ADI's website provides current service addresses for Fourth District courts and agencies. See California Rules of Court, rule 8.74 for electronic filing standards. TrueFiling is mandatory for filings by an attorney in non-capital original writ proceedings in the California Supreme Court. (Supreme Court Rule Regarding Electronic Filing, rule 3(a)(2).)

### 3.2.1 Purpose: establishing prima facie cause for relief [§ 8.20]

The purpose of a habeas corpus petition is to set forth facts and law sufficient to state a prima facie cause– i.e., if the facts stated are assumed true, the petitioner would be entitled to relief.[26]

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[25] http://www.adi-sandiego.com/practice/filing_service_chart.asp

[26] Occasionally a petitioner may find it difficult to state a cause without discovery. The Catch 22 is that in the absence of a pending cause a California trial court lacks jurisdiction to order post-judgment discovery. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256.) There is a statutory exception for special circumstances cases. (Pen. Code, § 1054.9, which superseded *Gonzales*; see *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897 et seq.; *In re Steele* (2004) 32 Cal.4th 682, 691.)

Even after trial, however, the prosecution continues to have an ethical duty to disclose exculpatory information that casts doubt on conviction. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179; see also *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383-1384; see *Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-750 [state had "present duty to turn over exculpatory evidence" in federal habeas corpus proceeding].)



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> If the imprisonment is alleged to be illegal, the petition must . . . state in what the alleged illegality consists. The petition should both (i) state fully and with particularity the facts on which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.

*(People v. Duvall* (1995) 9 Cal.4th 464, 474, internal citations and quotation marks omitted.)

The petition should be factually and legally adequate *as filed*. As the California Supreme Court has warned:

> The inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect. The court will determine the appropriate disposition of a petition for writ of habeas corpus based on the allegations of the petition as originally filed and any amended or supplemental petition for which leave to file has been granted.

(*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

### 3.2.2 Formal petition [§ 8.21]

Although the entire document filed with the court is usually called a "petition" for habeas corpus, it contains within it a formal pleading, also called a "petition," that sets out the facts and law necessary to state a prima facie cause of action. The formal pleading is supplemented with points and authorities and evidentiary exhibits. The formal petition must include a prayer for relief and be verified.

#### 3.2.2.1 Format [§ 8.22]

California Rules of Court rule 8.384 prescribes the requirements for a petition filed by an attorney. A formal petition can be drafted using the format from a reliable source book such as Bonneau et al., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2007), with updates. Another option is to use Judicial Council



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form HC-001, a copy of which is available from the California courts' or ADI's website.[27] This form is required for pro per petitions, unless the Court of Appeal has excused use of it. (Rule 8.380(a).) A petition filed by an attorney need not be on the form, but it should include all of the information specified on the form. (Rule 8.384(a)(1).) With TrueFiling, the use of the form must be integrated with the district's local rules for electronic document formatting. (See § 8.19, *ante*.)

#### 3.2.2.2 FACTS AND LAW [§ 8.23]

The key elements in the formal petition are supporting facts and supporting cases, rules, or other authority. Although the facts and law in the formal petition need not and generally should not be extremely detailed, they must be sufficiently specific to constitute a cause of action, i.e., a prima facie case for relief. Amplifying detail and legal analysis can be included in the accompanying points and authorities. Technically, however, the petition must stand on its own without reference to anything else. (E.g., *In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12; *In re Robbins* (1998) 18 Cal.4th 770, 799, fn. 21.)

#### 3.2.2.3 CONCLUSION AND PRAYER FOR RELIEF [§ 8.24]

The petition should include a conclusion. It may summarize the main points made in the petition.

The prayer should specify the ultimate relief sought, such as an order to set aside the conviction, to vacate the sentence and return to court for resentencing, or to vacate the plea.[28] It may also ask for such intermediate orders as issuance of an order to show cause or petition for writ of habeas corpus. (The Judicial Council form does not include a specific prayer for relief.)

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[27] Court website: https://www.courts.ca.gov/documents/hc001.pdf#082020; ADI website: http://www.adi-sandiego.com/practice/forms_samples.asp

[28] In doing so it should recognize that habeas corpus relief is given by an order, not a writ. (*People v. Romero* (1994) 8 Cal.4th 728, 743.) A common mistake is to pray for a "writ of habeas corpus granting [the ultimate] relief."



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#### 3.2.2.4 VERIFICATION [§ 8.25]

A petition must be verified under penalty of perjury. (See Pen. Code, §§ 1474, subd. 3, & 1475; see also Code Civ. Proc., § 2015.5.)[29] Counsel may apply for habeas corpus relief on behalf of a client, and verification by counsel satisfies this requirement. (*In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5.) Counsel should have sufficient personal knowledge of and confidence in the facts to sign under penalty of perjury.[30] Otherwise, it is better practice to instruct the client to sign the verification.

### 3.2.3 Points and authorities [§ 8.26]

A memorandum of points and authorities should be attached to the formal petition to amplify the legal implications of the facts and address relevant authority. It must be in the proper format for the intended court, including a statement of case, statement of facts, argument, and conclusion. It must include references to the record, declaration, or exhibits. (See Cal. Rules of Court, rules 8.204(a)-(b), 8.384(a)(2).) Except in capital cases, the memorandum is subject to the length limit for civil briefs established in rule 8.204(c). (Rule 8.384(a)(2).) Given TrueFiling, it must comply with the applicable local rule provisions on pagination, etc. (See § 8.19, *ante*.)

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[29] Because of the verification requirement, a petition is not "properly filed" in state court until a verification is filed, for purposes of tolling the federal habeas corpus statute of limitations. (*Zepeda v. Walker* (2009) 581 F.3d 1013.)

[30] A verification on counsel's "belief" in the truth of the allegations is insufficient. (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 597, disapproved on other grounds in *In re Joyner* (1989) 48 Cal.3d 487.) Factual allegations on which the petition is based must be "in such form that perjury may be assigned upon the allegations if they are false." (*Ex parte Walpole* (1890) 84 Cal. 584.)



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### 3.2.4 Declarations, exhibits, and other supporting documents [§ 8.27]

Declarations and exhibits should be attached to the petition.[31] Any reference to facts outside the record must be supported by adequate declarations or exhibits.[32] If petitions in the same case have been filed previously, copies of the petitions (but no exhibits) must be included, unless the prior petition was filed in the same appellate court and the present petition so states and identifies the documents by case name and number. (Cal. Rules of Court, rule 8.384(b)(1).) If the petition asserts a claim that was the subject of an evidentiary hearing, a certified copy of the transcript must be included. (Rule 8.384(b)(2).)

For hard copy petitions filed by one not mandated to use TrueFiling, any supporting documents accompanying the formal pleading must be bound, tabbed, and preceded by a table of contents. (Cal. Rules of Court, rules 8.384(b)(3), 8.486(c).) With TrueFiling, see section 8.19, *ante*.

If the case is time-sensitive, counsel may wish to consider the possibility of release pending decision on habeas corpus. (Pen. Code, § 1476.)

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[31] For one not mandated to use TrueFiling, for Court of Appeal habeas corpus cases, four copies of the petition itself must be filed, but unless the court orders otherwise only one copy of the supporting documents is required. (Cal. Rules of Court, rule 8.44(b)(3) & (5).) Different rules apply to Supreme Court writ filings. (Rule 8.44(a)(2) & (3).)

[32] Factual allegations on which the petition is based must be "in such form that perjury may be assigned upon the allegations if they are false." (*Ex parte Walpole* (1890) 84 Cal. 584.) Hearsay statements in the petition or declarations thus may be insufficient. (See *People v. Madaris* (1981) 122 Cal.App.3d 234, 242, disapproved on another ground in *People v. Barrick* (1982) 33 Cal.3d 115; cf. *People v. Duvall* (1995) 9 Cal.4th 464, 484-485 [handling of factual allegations difficult or impossible to establish at pleading stage].)



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## 3.3 Initial Response by Court of Appeal to Petition [§ 8.28]

This section addresses procedures after a petition is filed in the Court of Appeal. (See Cal. Rules of Court, rule 8.385 et seq.) Superior court procedures are discussed in § 8.45 et seq., *post.* Counsel should consult the published Internal Operating Practices and Procedures of the Courts of Appeal,[33] or call the appellate project or court clerk's office for details about practices in a particular court. § 8.123, appendix B, "California Post-Conviction Habeas Corpus," part I, "Typical proceedings to initial decision," part II, may help in visualizing the process.

The Court of Appeal may respond to a petition in a number of ways – most commonly, (a) summary denial, (b) denial without prejudice to refiling in superior court, (c) request for an informal response, or (d) issuance of a writ of habeas corpus or an order to show cause.[34] (Cal. Rules of Court, rule 8.385.) The court may use (c) as a way of determining whether a prima facie case is stated, but after deciding the petition does establish a prima facie case warranting relief, the court *must* choose

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[33] Court processes are described in the courts' Internal Operating Practices and Procedures (IOPP's), which are published in conjunction with the California Rules of Court and also for some courts online at http://www.courts.ca.gov/courtsofappeal.htm.

In the Fourth Appellate District, for example:

Division One IOPP's: http://www.courts.ca.gov/documents/IOP_District4_division1.pdf.

Division Two's internal processes are briefly described in section VII of its Internal Operating Practices and Procedures (IOPP's), which are published with the California Rules of Court but are not posted on the court's website.

Division Three IOPP's: http://www.courts.ca.gov/documents/IOP_District4_division3.pdf.

[34] The court may occasionally dismiss a petition for mootness, inappropriate venue, or other procedural reason.



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(d). (*People v. Romero* (1994) 8 Cal.4th 728, 740; see Pen. Code, § 1476, rule 8.385(d).) Summary relief on the basis of the petition alone is not authorized in habeas corpus cases. (*Romero*, at pp. 740-744.)[35]

### 3.3.1 Summary denial [§ 8.29]

If, assuming its factual allegations are true, the petition fails to state a cause for relief on its face or that all claims are procedurally barred, the Court of Appeal may deny the petition summarily. (*People v. Romero* (1994) 8 Cal.4th 728, 737.) Such a decision does not create a cause of action (*id.* at p. 740); it does not require oral argument or a written opinion (see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237); it does not create the law of the case (*People v. Pacini* (1981) 120 Cal.App.3d 877, 884, dicta on other grounds disapproved in *People v. Lara* (2010) 48 Cal.4th 216, 228, fn. 19; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 891-892).

If a summary denial is not filed on the same day as the decision in a related appeal, the decision is final immediately; no petition for rehearing may be filed, and any petition for review is due within 10 days. (Cal. Rules of Court, rules 8.268(a)(2), 8.387(b)(2)(A), 8.500(e)(1).) However, if the denial is filed on the same day as the decision on appeal, it becomes final at the same time as the appeal. Normally, that would be 30 days after filing, unless rehearing is granted, or the opinion is later certified for publication, or the judgment is modified, or some other event affecting finality occurs. (Rule 8.387(b)(2)(B); see chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," § 7.29 et seq., on finality.)

Summary denial is not authorized if the petition states a prima facie cause of action; in that case, the court is obligated by statute to issue a writ of habeas corpus

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[35] In mandate and other prerogative writ cases, in contrast, a peremptory writ in the first instance is possible.



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or order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728, 737-738; see Pen. Code, § 1476.)[36]

### 3.3.2 Summary denial without prejudice to refile in superior court [§ 8.30]

If no petition has yet been filed in the superior court, the Court of Appeal may dismiss the petition "without prejudice" to refile in the superior court. This disposition is not a decision on the sufficiency of the allegations in the petition, but is merely a determination the superior court is a more appropriate venue to hear the petition in the first instance. (E.g., *In re Ramirez* (2001) 89 Cal.App.4th 1312, 1313 et. seq.; see *In re Roberts* (2005) 36 Cal.4th 575, 593-594; *People v. Superior Court* (*Jiminez*) (2002) 28 Cal.4th 798, 806, fn. 3.)

### 3.3.3 Request for informal response [§ 8.31]

Before determining the adequacy of the petition, the Court of Appeal often uses an "informal response" procedure, outlined in California Rules of Court, rule 8.385(b), which enables the court to assess the sufficiency of the petition without immediately issuing a writ or order to show cause. It streamlines the statutory procedures (Pen. Code, § 1473 et seq.), which were designed for the superior court and many of which date back to the 1800s. It permits the Court of Appeal to deny a petition without oral argument or a written opinion. The procedure is roughly (and imperfectly) analogous to demurrer in a civil action. (*People v. Romero* (1994) 8 Cal.4th 728, 742, fn. 9.)

California Rules of Court, rule 8.385(b) provides:

> (b) Informal response
> (1) Before ruling on the petition, the court may request an informal written response from the respondent, the real party in interest, or an interested person. The court must send a copy of any request to the

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[36] In mandate and other prerogative writ cases, in contrast, issuance of an order to show cause or alternative writ is discretionary; the petition may be summarily denied.



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petitioner.

(2) The response must be served and filed within 15 days or as the court specifies.

(3) If a response is filed, the court must notify the petitioner that a reply may be served and filed within 15 days or as the court specifies. The court may not deny the petition until that time has expired. [37]

Upon considering the informal response and reply, the court may deny the petition, if it does not state a prima facie case for relief, or issue an order to show cause if it does. The informal procedure does not permit the Court of Appeal to order ultimate relief without issuing an order to show cause or providing an opportunity for a formal return.[38] (Pen. Code, § 1476; *People v. Romero* (1994) 8 Cal.4th 728, 740-744.)

### 3.3.4 Issuance of writ of habeas corpus or order to show cause [§ 8.32]

If the petition establishes a prima facie case warranting relief, the court *must* issue either a writ of habeas corpus requiring the presence of the petitioner or an order to show cause, which does not require the petitioner's presence. (*People v. Romero* (1994) 8 Cal.4th 728, 740; Pen. Code, § 1476, Cal. Rules of Court, rule 8.385(d).) The issuance of the writ or order establishes a cause of action. (*Romero,* at p. 740.) It is a preliminary determination that the facts as alleged in the petition, if true, state a cause for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, rejected on other grounds in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) If the writ or order is issued only as to some of

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[37] This subdivision addresses the Supreme Court's warning "due process may require that . . . habeas corpus petitioners be permitted to answer the response." (*In re Ibarra* (1983) 34 Cal.3d 277, 283, fn. 2, abrogated on another ground as recognized in *People v. Mosby* (2004) 33 Cal.4th 353, 360.)

[38] The respondent may waive the requirement of an order to show cause by stipulating to the truth of the allegations and the right to relief. (*Romero*, at p. 740, fn. 7; cf. *In re Olson* (2007) 149 Cal.App.4th 790, 801-802 [failure to object to granting of relief without order to show cause is not waiver of requirement].)



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the claims alleged in the petition, it implicitly denies those not mentioned. (*In re Bolden* (2009) 46 Cal.4th 216, 218.) Neither the writ nor the order to show cause adjudicates the ultimate right to relief. (*Romero*, at p. 738.)

The writ of habeas corpus and order to show cause are functionally similar. A writ of habeas corpus is an order to produce "the body" – i.e., physically bring the petitioner before the court for proceedings on the petition. (*People v. Romero* (1994) 8 Cal.4th 728, 738, fn. 4.) The petition serves only a limited function: to institute formal proceedings and order the custodian to file a return. Appellate courts usually do not order the petitioner's physical presence before them, because they are not equipped to handle prisoners, but instead issue an order to show cause, which requires the custodian to file a return. (*Id.* at p. 738; see also *People v. Villa* (2009) 45 Cal.4th 1063, 1073.)[39]

Once the cause of action is established, several kinds of further proceedings are possible, depending on the issues and their relationship if any to an appeal. In its order to show cause, the Court of Appeal will direct which procedures will be followed. § 8.123 et seq., appendix B, "California Post-Conviction Habeas Corpus," part I, "Typical proceedings to initial decision," may help in visualizing the alternatives in this process.

#### 3.3.4.1 LEGAL PLEADINGS WITHOUT FACT-FINDING [ 8.33]

If there appear to be no contested factual matters, the Court of Appeal may order further pleadings without fact-finding.

#### 3.3.4.2 RETURN BEFORE SUPERIOR COURT [§ 8.34]

The Court of Appeal may make the order to show cause returnable in the superior court, thus transferring jurisdiction to that court. (Pen. Code, § 1508; Cal. Rules of Court, rule 8.385(e); *People v. Romero* (1994) 8 Cal.4th 728, 740; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, rejected on other grounds in *In re Fields*

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[39] In recognition of this reality, California Rules of Court, rule 8.385(d) requires issuance of an order to show cause and does not mention the writ of habeas corpus alternative.



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(1990) 51 Cal.3d 1063, 1070, fn. 3.) It frequently chooses that option when the case involves issues of fact requiring an evidentiary hearing. (*Romero*, at p. 740.) The respondent must then file a return before that court, the petitioner must have an opportunity to file a traverse, and the court must decide the case formally. The superior court may not summarily deny the petition or decline to decide the facts on the grounds habeas corpus is not a proper remedy. (*Hochberg*, at pp. 875-876; *Rose v. Superior Court (People)* (2000) 81 Cal.App.4th 564, 574-576 [mandate issued when superior court failed to hold evidentiary hearing or state reasons in response to Court of Appeal order to show cause].)

#### 3.3.4.3 REFERENCE TO SUPERIOR COURT [§ 8.35]

The appellate court, alternatively, may "refer" the matter to the superior court, i.e., retain jurisdiction but order a "referee" (usually a superior court judge) to serve as a fact-finder and report the findings back to the Court of Appeal. (E.g., *In re Sakarias* (2005) 35 Cal.4th 140, 144; Cal. Rules of Court, rule 8.386(f).)

As discussed further in § 8.41 et seq., "Decision on the Merits," *post*, upon receipt of the factual findings, the appellate court will resolve the issues raised by the petition and determine whether any relief should be granted. It must first permit an opportunity for oral argument. (Cf. *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 230; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895; *People v. Medina* (1972) 6 Cal.3d 484, 489-490; but see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237, 1256-1261 [no right to oral argument if a peremptory writ of mandate is issued in the first instance].)

#### 3.3.4.4 COURT OF APPEAL AS TRIER OF FACT [§ 8.36]

On very rare occasions, the Court of Appeal may sit as a fact-finding tribunal in the first instance and directly receive evidence.

### 3.4 Return [§ 8.37]

*People v. Duvall* (1995) 9 Cal.4th 464 deals with the topic of habeas corpus returns in depth. Once the writ or order to show cause is issued, the return by the prosecution to the court's order becomes the principal pleading, analogous to a complaint in a civil proceeding. (*People v. Romero* (1994) 8 Cal.4th 728, 738-739.) While this analogy is far from complete, it does underscore one of the basic functions of the return: to "sharpen[] the issues that must be decided." (*Duvall*, at p. 480.)



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The return must be responsive to allegations of the petition and may not simply assert "the existence of a judgment of conviction and sentence." (*People v. Duvall* (1995) 9 Cal.4th 464, 476; see Pen. Code, § 1480.) A general denial is insufficient: the return must allege specific facts in support of the petitioner's detention and recite the facts on which any denial of the petition's allegations is based. (*Duvall,* at pp. 476, 479-480.) The return, "where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed." (*In re Lewallen* (1979) 23 Cal.3d 274, 278, fn. 2.) The return is deemed to admit those material factual allegations it fails to dispute. (*In re Sixto* (1989) 48 Cal.3d 1247, 1252.)

California Rules of Court, rule 8.386(b) and (c) governs the time, form, length, and content of the return.

## 3.5 Traverse [§ 8.38]

The petitioner's response to the return is a traverse.[40] It is analogous to the answer in a civil lawsuit, and through the return and traverse the issues are joined. (*People v. Romero* (1994) 8 Cal.4th 728, 739.) The factual allegations in the return will be deemed true unless the petitioner controverts them in the traverse. (*In re Lawler* (1979) 23 Cal.3d 190, 194.) Appellate counsel should keep these principles and analogies in mind and not be lulled into thinking a traverse is an "optional" pleading like a reply brief on appeal.

In the traverse the petitioner may reassert the allegations of the petition and may incorporate by reference material previously put forth in either the petition or the reply to an informal response. (*In re Lewallen* (1979) 23 Cal.3d 274, 277.) The petitioner may also stipulate that the petition be treated as a traverse. (*People v. Duvall* (1995) 9 Cal.4th 464, 477; see *In re Stafford* (1958) 160 Cal.App.2d 110, 113.) If the factual allegations in the return are so inadequate that the petitioner cannot answer them, "the petitioner may 'except to the sufficiency' (Pen. Code, §

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[40] For proceedings in the superior court, rule 4.551(e) calls this pleading by the petitioner a "denial."



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1484) of the return in his . . . traverse, thus raising questions of law in a procedure analogous to demurrer." (*Duvall,* at p. 477.)

The traverse may allege additional facts in support of the claim on which an order to show cause has issued, but it may not introduce additional claims or wholly different factual bases for those claims. It cannot "expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.) To bring additional claims before the court, petitioner must obtain leave to file a supplemental petition for writ of habeas corpus. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235; see also *In re Cox* (2003) 30 Cal.4th 974, 980-981; *People v. Green* (1980) 27 Cal.3d 1, 43, fn. 28, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

California Rules of Court, rule 8.386(d) governs the time, form, length, and content of the traverse.

## 3.6 Evidentiary Hearing [§ 8.39]

If the return and traverse present no disputed material factual issue, the court may dispose of the petition without the necessity of an evidentiary hearing. (*People v. Romero* (1994) 8 Cal.4th 728, 739, and cases cited therein.) If there are disputed facts and the petitioner's right to relief may turn on the resolution of a factual matter, then a hearing is required.[41] (*Id.* at pp. 739-740; see Pen. Code, § 1484; Cal. Rules of Court, rule 3.386(f)(1).)

Evidentiary hearings are normally conducted in the superior court before a judge of that court, even if the Court of Appeal has retained jurisdiction over the cause. (See Cal. Rules of Court, rule 3.386(f)(2).)

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[41] The hearing is governed by the rules of evidence. Hearsay is not admissible unless an exception applies. (See *In re Fields* (1990) 51 Cal.3d 1063, 1070.)



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## 3.7 Argument in the Court of Appeal [§ 8.40]

If the Court of Appeal has retained jurisdiction and has issued a prior writ of habeas corpus or order to show cause, the court must permit oral argument. (Cal. Const., art. VI, § 14; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895; *People v. Medina* (1972) 6 Cal.3d 484, 489-490; *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 230; cf. *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237 [no right to oral argument if a peremptory writ of mandate is filed in the first instance].)

## 3.8 Decision on the Merits [§ 8.41]

California Rules of Court, rule 8.387 governs the filing, finality, and modification of the decision, rehearing, and remittitur in a habeas corpus proceeding.

### 3.8.1 Effect of prior habeas corpus writ or order to show cause [§ 8.42]

Without a prior writ of habeas corpus to produce the petitioner or an order to show cause, a proceeding initiated by a habeas corpus petition does not become a "cause."[42] Relief may not be *granted* in that situation (*People v. Romero* (1994) 8 Cal.4th 728, 740), although it can be *denied* (*id*. at p. 737).[43] If the proceeding is in the Court of Appeal, no written opinion is then required. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1260, fn. 18.)

If a writ or order to show cause has issued and the case is in the Court of Appeal, a written opinion is necessary. (Cal. Const., art. VI, § 14 ["Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with

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[42] In contrast, issuance of a peremptory writ of mandate in the first instance without an alternative writ or order to show cause creates a cause. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178, fn. 6.)

[43] The respondent may waive the requirement of an order to show cause by stipulating to the truth of the allegations and the right to relief. (*Romero*, at p. 740, fn. 7; cf. *In re Olson* (2007) 149 Cal.App.4th 790, 801-802 [failure to object to granting of relief without order to show cause is not waiver of requirement].)



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reasons stated"]; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895.)

### 3.8.2 Factual findings [§ 8.43]

Factual findings by any referee the court may have appointed are not binding, but are entitled to great weight when supported by substantial evidence, especially findings that require resolution of testimonial conflicts and assessment of witnesses' credibility because the referee has the opportunity to observe the witnesses' demeanor.[44] (*In re Sakarias* (2005) 35 Cal.4th 140, 151; *In re Hamilton* (1999) 20 Cal.4th 273, 296-297; *In re Ross* (1995) 10 Cal.4th 184, 201; *In re Marquez* (1992) 1 Cal.4th 584, 603.)

### 3.8.3 Burden of proof [§ 8.43A]

The petitioner ordinarily bears the burden of proving, by a preponderance of the evidence, the facts on which the claim depends. (*In re Large* (2008) 41 Cal.4th 538, 549.) Some claims, however, must meet other standards.[45]

For example, the long-standing burden for a habeas corpus claim based on *newly discovered evidence* used to be that the evidence must "completely undermine the entire structure of the case upon which the prosecution was based." (*In re Lawley* (2008) 42 Cal.4th 1231, 1239; *In re Clark* (1993) 5 Cal.4th 750, 766.) But on

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[44] The same standard applies when the appellate court is considering a habeas corpus petition after denial of a petition in the superior court in the same case. (*In re Resendiz* (2001) 25 Cal.4th 230, 249, abrogated on other grounds by *Padilla v. Kentucky* (2010) 559 U.S. 356; *In re Wright* (1978) 78 Cal.App.3d 788, 801-802.) See § 8.51, *post*.

[45] When a petition alleges instructional error as to the elements of an offense, based on intervening law, reversal is required unless the People can show beyond a reasonable doubt that the jury must have relied on a valid theory of guilt. (*In re Martinez* (2017) 3 Cal.5th 1216, 1225.)



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January 1, 2017, subdivisions (b)(3)(A) and (B) of Penal Code section 1473 became effective.

One court has noted the amendment to section 1473 changed that. (*In re Sagin* (2019) 39 Cal.App.5th 570, 579.) A petitioner no longer has to prove innocence but rather must show that the new evidence – viewed in relation to the evidence actually presented at trial – would raise a reasonable doubt as to guilt.[46] The statute creates a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner. (*Id*. at pp. 579-580.)

In contrast, a claim of *false evidence* under Penal Code section 1473, subdivision (e) raises a question of "materiality" – whether the false evidence was of such significance as to create a reasonable probability it may have affected the outcome of the trial. (*In re Richards* (2016) 63 Cal.4th 291, 312.) This standard is the same as the one for *Watson* prejudice. (*Id.* at pp. 312-313, referring to *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is lower than the preponderance burden. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [under *Watson* a reasonable "'probability' . . . does not mean more likely than not, but merely *a*

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[46] Since the standard requires that a court engage in the retrospective analysis of deciding whether the new evidence would have changed the trial outcome, the court considers only the new evidence identified by the petitioner and the trial record. The court does not consider other evidence outside the record such as exhibits attached to the return to order to show cause. Such effort misapprehends the nature of the court's inquiry, which is to determine whether the new evidence proffered by petitioner entitles him/her to a new trial, not to predict the outcome of a future trial or to determine the ultimate issue of culpability. (*Sagin*, at p. 579. fn. 2.)



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*reasonable chance*, more than an *abstract possibility*," italics original]; see also *Watson*, 46 Cal.2d at p. 837.)[47]

### 3.8.4 Form of relief [§ 8.44]

If the court decides to grant relief, it issues an *order* (e.g., releasing the petitioner, altering the conditions of confinement, etc.), not a *writ*. The "writ" of habeas corpus has the limited function described in § 8.32, *ante* – to bring the petitioner brought before the court and require the respondent to file a return justifying the custody. This aspect of habeas corpus is in contrast to mandate, in which the relief is granted by issuance of a peremptory writ (either in the first instance or after issuance of an alternative writ or order to show cause). (*People v. Romero* (1994) 8 Cal.4th 728, 743.)

The terms of the order are shaped to the individual situation, "as the justice of the case may require." (Pen. Code, § 1484; *In re Crow* (1971) 4 Cal.3d 613, 619.) The nature of habeas corpus requires "the initiative and flexibility essential to ensure that miscarriage of justice within its reach are surfaced and corrected." (*Harris v. Nelson* (1969) 394 U.S. 286, 291.)

## 3.9 Proceedings in Superior Court After Habeas Corpus Petition Is Filed [§ 8.45]

Habeas corpus proceedings in the superior court are governed by California Rules of Court, rule 4.550 et seq.[48] (See also Pen. Code, § 1473 et seq.; see *Maas v. Superior Court* (2016) 1 Cal.5th 962 [habeas is a "special proceeding" and is subject to Code Civ. Proc., § 170.6 peremptory challenge to judge upon filing of petition].) The requirements and sequence are, for the most part, similar to those for

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[47] See ADI's article on "Some Tips for Arguing Watson Prejudice More Persuasively" for further discussion of this point at http://www.adi-sandiego.com/practice/pract_articles.asp.

[48] Compensation for services in the superior court generally must be sought in that court, rather than under the appellate appointment. Counsel should contact the assigned ADI staff attorney about the particular situation.



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Court of Appeal habeas corpus cases. Unlike Court of Appeal proceedings, however, the rules for superior court cases set forth procedural time lines. § 8.123, appendix B, "California Post-Conviction Habeas Corpus," part I, "Typical proceedings to initial decision," may help in visualizing the process.

### 3.9.1 Initial ruling on petition [§ 8.46]

The court must rule on the petition within 60 days. (Cal. Rules of Court, rule 4.551(a)(3).) This means the court must make a preliminary determination whether the case is to go forward[49] – that is, it must deny the petition, issue an order to show cause, or request an informal response. (Rule 4.551(a)(4).) In doing so, the court must assume the petitioner's factual allegations are true and then decide whether they would, if proven, establish a right to relief. (Pen. Code, § 1476; rule 4.551(c)(1).) The court may deny the petition summarily if it fails to state a prima facie case for relief. It *must* issue an order to show cause if the petitioner has made a prima facie showing of entitlement to relief. (Pen. Code, § 1476; rule 4.551(c)(1).)

### 3.9.2 Informal response [§ 8.47]

California Rules of Court, rule 4.551(b) provides for an informal response procedure to assist the superior court in assessing the sufficiency of the petition, similar to that in rule 8.385(b) for Court of Appeal proceedings. The informal response must be filed within 15 days after the court requests it. (Rule 4.551(b)(2).) The petitioner must be given an opportunity to file an informal reply (due 15 days after the response). (Rule 4.551(b)(2) & (3).) After allowing a time for a reply, the court must either deny the petition or issue an order to show cause within 45 days from the filing of the informal response. (Rule 4.551(a)(5).)

### 3.9.3 Later proceedings [§ 8.48]

If the court issues an order to show cause and the petitioner is indigent, it must appoint counsel. (Cal. Rules of Court, rule 4.551(c)(2).) The respondent may file a return within 30 days, and the petitioner may file a denial (i.e., traverse) within 30

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[49] The procedures for responding to a failure to rule are rather Byzantine. (See rule 4.551(a)(3)(B).)



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days after that. (Rule 4.551(d) & (e).) Within 30 days of the petitioner's denial or expiration of the time for filing one, the court must either grant or deny the relief sought or, if needed, order an evidentiary hearing. (Rule 4.551(f).) An order denying the petition must include a statement of reasons. (Rule 4.551(g).) The court may reconsider an order granting relief within the 60 days the People have to appeal. (*Jackson v. Superior Court (People)* (2010) 189 Cal.App.4th 1051; see also *People v. Berg* (2019) 34 Cal.App.5th 856, 861 [trial court lacks jurisdiction, after unqualified affirmance, to reconsider merits of action, even in face of change in law].)

## 3.10 Review of Habeas Corpus Decision [§ 8.49]

### 3.10.1 Filing in Court of Appeal after superior court decision [§ 8.50]

The denial of a petition for writ of habeas corpus by the superior court is not appealable. (Pen. Code, § 1506; *In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; see *People v. Gallardo* (2000) 77 Cal.App.4th 971, 986.) The remedy is to file a new petition for writ of habeas corpus in the Court of Appeal.

Unlike a denial, the *grant* of a writ of habeas corpus is appealable. (Pen. Code, § 1506.) The standard of review when the People appeal a grant is the same as that on appeal after a trial. The court applies the substantial evidence test to pure questions of fact and the abuse of discretion standard to decisions within the lower court's discretion, and independently reviews questions of law. If there are mixed questions of law and fact, the Court of Appeal's review uses a substantial evidence standard when the decision is predominantly factual and a de novo one when it is predominantly legal. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

### 3.10.2 Factual findings [§ 8.51]

When the Court of Appeal considers a habeas corpus petition filed after denial of a petition in the superior court in the same case, the court is exercising its original as opposed to appellate jurisdiction. The Court of Appeal is thus acting as finder of fact and makes its own determination. "Because a petition for a writ of habeas corpus is a collateral attack on a presumptively final criminal judgment, [a petitioner] bears the burden of proving his entitlement to relief by a preponderance of the evidence. [Citations.]" (*In re Gay* (2020) 8 Cal.5th 1059, 1072.)

Nevertheless, as when it considers the findings of a referee it has appointed, "[t]he referee's factual findings are 'entitled to great weight where supported by



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substantial evidence.' [Citations.] Those findings are not, however, conclusive, and 'we can depart from them upon independent examination of the record even when the evidence is conflicting.' [Citations.] The ultimate responsibility for determining whether [petitioner] is entitled to relief rests with this court. [Citation.]" (*In re Gay* (2020) 8 Cal.5th 1059, 1072–1073; § 8.43, *ante*.)

### 3.10.3Court review [§ 8.52]

Whether the Court of Appeal denies or grants the petition, relief may be sought from the California Supreme Court by a petition for review (Pen. Code, § 1506; Cal. Rules of Court, rule 8.500(a)(1)) or, if necessary, a new habeas corpus petition in the Supreme Court. Since the general rule is that writ relief will be denied if adequate appellate remedies are available, normally a petition for review should be sought. However, if it is necessary to present additional materials (for example, newly discovered information) or if time considerations make the appellate remedy (petition for review) inadequate, then a petition for habeas corpus would be appropriate.

A petition for review must be filed within 10 days after a decision denying habeas corpus relief becomes final as to the Court of Appeal. (Cal. Rules of Court, rule 8.500(e)(1).) A denial is final in 30 days if (1) it is filed on the same day as a related appeal or (2) an order to show cause was issued (rule 8.387(b)(1) & (2)(B)). In these two circumstances, a petition for review is due in the 30 to 40-day window after decision. Otherwise, a denial is final immediately, and the petition for review is due 10 days after the decision. (Rule 8.387(b)(2)(A).) The Court of Appeal may order earlier finality as to that court for good cause. (Rule 8.387(b)(3)(A).)

If the Court of Appeal decided the habeas corpus petition without issuing an order to show cause and without consolidating it with a related appeal, separate petitions for review must be filed for the habeas corpus and appeal. (Cal. Rules of Court, rule 8.500(d).)

§ 8.124, appendix B, part II, "Proceedings to review initial decision," a flow chart, may help in visualizing the review process.

## 4 OTHER APPLICATIONS OF STATE HABEAS CORPUS [§ 8.53]

Habeas corpus has applications in other circumstances than a post-conviction challenge to the judgment under which the petitioner is constrained. While detailed



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analysis is beyond the scope of this chapter, examples encountered in appellate practice include:

## 4.1 Late or Defective Notice of Appeal [§ 8.54]

Although habeas corpus cannot be used as a substitute for appeal, it may be used to establish a constructive filing of a notice of appeal when the petitioner reasonably relied on counsel to file a timely notice of appeal and counsel failed to do so.[50] (*In re Benoit* (1973) 10 Cal.3d 72; see also *Rodriquez v. United States* (1969) 395 U.S. 327.) Habeas corpus can also be used to establish constructive filing of a writ petition with a deadline. (*In re Antilia* (2009) 176 Cal.App.4th 622; see *In re Lambirth* (2016) 5 Cal.App.5th 915 [habeas corpus used to establish constructive filing of administrative appeal].); see also § 8.83, *post*.)

Habeas corpus may also be used to validate a late-filed appeal on the ground of ineffective assistance of counsel, when trial counsel failed to consult with the client about an appeal and a reasonable defendant might have wanted to appeal. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470.) Another possible ineffective assistance of counsel issue would be based on failure to obtain timely a certificate of probable cause in a guilty plea appeal.

For use of habeas in dependency appeals based on ineffective assistance of counsel in failing to perfect a timely notice of appeal, see *In re A.R.* (2021) 11 Cal.5th 234, 256-257.

This subject is treated in § 2.115 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

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[50] Practice note: Courts vary in their handling of requests for late filing of a notice of appeal. A motion is used in some courts, while others require a formal petition for writ of habeas corpus. (See *People v. Zarazua* (2009) 179 Cal.App.4th 1054.) Counsel should consult with the project if the situation arises.



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## 4.2 Release Pending Appeal [§ 8.55]

Before trial, a writ of habeas corpus may be used to review either a denial of release or the imposition of excessive bail. After judgment, the superior court's denial of release pending appeal may be challenged by a habeas corpus petition or, more simply, an application under California Rules of Court, rule 8.312.[51] (*In re Pipinos* (1982) 33 Cal.3d 189, 196-197; *In re Podesto* (1976) 15 Cal.3d 921; *People v. McGuire* (1993) 14 Cal.App.4th 687, 700, fn. 14, citing *People v. Lowery* (1983) 145 Cal.App.3d 902, 904.) See § 3.37 et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal," for an extended discussion of release pending appeal.

## 4.3 In-Prison Conditions and Administrative Decisions, Parole, and Other Issues Arising After Judgment[52] [§ 8.56]

Habeas corpus may be used to challenge in-prison conditions, administrative decisions such as credits and discipline, and similar matters.[53] (E.g., *In re Vicks* (2013) 56 Cal.4th 274; *In re Cabrera* (2012) 55 Cal.4th 683; *In re Arias* (1986) 42 Cal.3d 667, 678; *In re Gomez* (2016) 246 Cal.App.4th 1082; *In re Martinez* (2013) 216 Cal.App.4th 1141; *In re Villa* (2013) 214 Cal.App.4th 954; *In re Fratus* (2012) 204 Cal.App.4th 1339; see *In re Lambirth* (2016) 5 Cal.App.5th 915 [habeas corpus used to establish constructive filing of administrative appeal].) A petition seeking to remedy unlawful custodial conditions or administrative decisions should be filed in

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[51] Before 2004, the provision for a bail application to the reviewing court was in rule 32 and before 2006, the provision for a bail application was in rule 30.2.

[52] Counsel are cautioned that an appellate appointment does not cover such proceedings. Counsel may seek compensation elsewhere or refer the client to a prisoner assistance organization. The ADI website maintains a partial list of prisoner assistance resources. http://www.adi-sandiego.com/practice/pract_resources.asp. Counsel can also provide habeas corpus forms and instructions on filing them.

[53] Federal habeas corpus or civil rights relief may be available. (E.g., *Skinner v. Switzer* (2011) 562 U.S. 521; *Wilkinson v. Dotson* (2005) 544 U.S. 74; *Preiser v. Rodriguez* (1973) 411 U.S. 475.)



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the district or division in which the petitioner is in custody. (*In re Roberts* (2005) 36 Cal.4th 575, 583-584; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.) If the proceeding becomes moot as to the petitioner personally during litigation because the individual matter is resolved, but the inmate's complaint is a matter of broad public concern or is a recurring issue for other prisoners and the Department of Corrections and Rehabilitation, the court may permit it to proceed as a "class action" vehicle, figuratively speaking. (*In re Carr* (1981) 116 Cal.App.3d 962, 964, fn. 1; *In re Brindle* (1979) 91 Cal.App.3d 660, 670; see also *In re Jackson* (1987) 43 Cal.3d 501, 504, fn. 1; *In re Davis* (1979) 25 Cal.3d 384.)

A prisoner under civil commitment may use habeas corpus as a way of testing forced medication. (E.g., *In re Qawi* (2004) 32 Cal.4th 2 [MDO]; *In re Greenshields* (2014) 227 Cal.App.4th 1284 [NGI]; *In re Calhoun* (2004) 121 Cal.App.4th 1315 [SVP]; Welf. & Inst. Code, § 5332 [LPS].)

A finding by the Board of Parole Hearings that a prisoner is not suitable for parole is subject to state habeas corpus review.[54] (*In re Roberts* (2005) 36 Cal.4th 575, 584.) A petition attacking denial of parole is not a challenge to the conditions of confinement and should be filed in the county in which judgment was imposed, rather than the county in which petitioner is incarcerated. (*Id.* at p. 593.) The Board's or Governor's decision denying parole is subject to a limited judicial review by habeas corpus, to determine only whether the decision is supported by "some evidence." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 625; *In re Scott* (2005) 133 Cal.App.4th 573; *In re Smith* (2003) 109 Cal.App.4th 489; see *In re Lira* (2013) 58 Cal.4th 573.) Habeas corpus may also be used to contest the reasonableness of parole conditions. (*In re David* (2012) 202 Cal.App.4th 675.)

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[54] Federal habeas corpus is available to review state parole decisions alleged to violate such provisions of the federal Constitution as due process or ex post facto. Federal review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), at 28 United States Code section 2241 et seq. Section 2254 of AEDPA requires a deferential standard of review of these decisions. (*Himes v. Thompson* (9th Cir. 2003) 336 F.3d 848, 852-854.) Section 2244(d) applies a one-year statute of limitations to filing for federal relief. (*Redd v. McGrath* (9th Cir. 2003) 343 F.3d 1077; see also *Shelby v. Bartlett* (9th Cir. 2004) 391 F.3d 1061).



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## 4.4 Contempt [§ 8.57]

Code of Civil Procedure section 1209 et seq. and Penal Code section 166 set forth the statutory provisions covering contempt.

Direct contempt is conduct in the immediate presence of the judge, such as disruptive or disrespectful courtroom behavior. It may be dealt with summarily by the judge against whom and in whose court the offense was committed. (E.g., *In re Buckley* (1973) 10 Cal.3d 237, 247, 256, 259 [in-court disparagement of trial judge]; *In re Ciraolo* (1969) 70 Cal.2d 389, 393 [false declaration about statements made by judge].) A finding of direct contempt requires an order reciting the facts constituting the contempt, adjudging the person guilty, and prescribing the punishment. The facts as recited must show on their face a legal contempt. (*Id.* at p. 394.)

Indirect contempt occurs outside the courtroom – for example, disobedience of a court order. (E.g., *Kreling v. Superior Court* (1941) 18 Cal.2d 884, 887 [violation of injunction]; see also *In re Berry* (1968) 68 Cal.2d 137.) The accused is entitled to notice of the accusations, in the form of a declaration setting forth the facts constituting the alleged contempt, and an order to show cause giving him an opportunity for a defense. (*Warner v. Superior Court* (1954) 126 Cal.App.2d 821, 824, superseded by statute as noted in *In re Ivey* (2000) 85 Cal.App.4th 793; *In re Felthoven* (1946) 75 Cal.App.2d 466, 468-469; see also *In re M.R.* (2013) 220 Cal.App.4th 49.) If punitive sanctions are imposed, the burden of proof is beyond a reasonable doubt. (*Hicks v. Feiock* (1988) 485 U.S. 624, 632, fn. 5; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256.)

### 4.4.1 Procedures for reviewing contempt order [§ 8.58]

Habeas corpus is available to review an adjudication of contempt imposing punitive (as opposed to remedial) sanctions, involving incarceration of the accused. (*In re Buckley* (1973) 10 Cal.3d 237, 247, 259 [in-court disparagement of trial judge]; *Kreling v. Superior Court* (1941) 18 Cal.2d 884, 887 [violation of injunction alleged to be void].)

Certiorari is another remedy. (See Code Civ. Proc., § 1222; *In re Buckley* (1973) 10 Cal.3d 237, 259; *Hawk v. Superior Court* (1972) 42 Cal.App.3d 108, 115; see also § 8.75, *post*.)



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A criminal contempt conviction under Penal Code section 166 is appealable as a misdemeanor. (*In re Buckley* (1973) 10 Cal.3d 237, 259, fn. 28.)

### 4.4.2 Jurisdiction [§ 8.59]

To make a finding of contempt, the trial court must have "jurisdiction," in a specialized meaning of the term.

Jurisdiction to find a direct contempt committed in the immediate presence of the court requires an order reciting the facts, adjudging guilt, and prescribing the punishment. The facts recited must demonstrate on their face the commission of a legal contempt. (*In re Buckley* (1973) 10 Cal.3d 237, 247.)

Jurisdiction to find an indirect contempt, disobedience of a court order outside the presence of the court, requires specific factual findings:

> The facts essential to jurisdiction for a contempt proceeding are (1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance; (4) willful disobedience of the order. The record of the court must affirmatively show upon its face the facts upon which jurisdiction depends so that an appellate court can determine if a contempt has been committed.

(*Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736, internal citations and quotation marks omitted [violation of consent decree].)

### 4.4.3 Standards of review [§ 8.60]

In reviewing an adjudication of contempt, the reviewing court's sole responsibility is to determine whether the trial court had jurisdiction to render the judgment. (*In re Buckley* (1973) 10 Cal.3d 237, 247.) "Jurisdiction" has the specialized meaning described in § 8.59, *ante*.

A contempt judgment is construed in favor of the accused – that is, the appellate court does not presume it is justified unless shown otherwise, but instead requires that each element of jurisdiction, in the specialized sense described in § 8.59, *ante*, be demonstrated affirmatively on the face of the record. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256; *In re Liu* (1969) 273 Cal.App.2d 135,



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146; see also *In re Cassill* (1995) 37 Cal.App.4th 1081, 1087; *Blake v. Municipal Court* (1956) 144 Cal.App.2d 131, 136.)

This principle does not mean, however, that the appellate court must take a view of the evidence least favorable to upholding the order. (*City of Vernon v. Superior Court* (1952) 38 Cal.2d 509, 517.) The standard is whether there was any substantial evidence before the trial court to sustain its jurisdiction, and the power to weigh the evidence rests with the trial court. (*In re Buckley* (1973) 10 Cal.3d 237, 247; *City of Vernon*, at p. 517; *Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1737.) If punitive sanctions are imposed, the burden of proof is beyond a reasonable doubt (*Hicks v. Feiock* (1988) 485 U.S. 624, 632, fn. 5; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256), and therefore the appellate court must determine whether under the evidence the trial court could have found beyond a reasonable doubt the accused was guilty of contempt.

## 4.5 Civil Commitments [§ 8.61]

Because civil commitments involve custody of the person, habeas corpus may be used to challenge the legality of the confinement when appellate remedies are unavailable or inadequate. For example, in proceedings under the Sexually Violent Predator Act, the appropriate remedy for challenging a probable cause finding is a habeas corpus petition, not a motion to dismiss under Penal Code section 995. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405.) Habeas corpus is also used for seeking dismissal of an SVP petition when the underlying judgment has been reversed on appeal. (*In re Smith* (2008) 42 Cal.4th 1251; *In re Franklin* (2008) 169 Cal.App.4th 386.) Habeas corpus is used in *Lanterman-Petris-Short* conservatorship proceedings to challenge short-term detentions. (Welf. & Inst. Code, §§ 5275, 5353.) It is the appropriate procedure for testing the administrative placement of an mentally disordered offender and for raising a claim that the individual's confinement in a prison facility violates his constitutional rights. (*People v. Gram* (2012) 202 Cal.App.4th 1125, 1143.)

## 4.6 Reinstatement of Appeal [§ 8.62]

A petition for writ of habeas corpus filed in a reviewing court may be used after an appeal to challenge the appellate proceedings on such grounds as ineffective assistance of appellate counsel. If the petition is successful, recall of the remittitur is an appropriate remedy. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397*; In re Smith* (1970) 3 Cal.3d 192, 203-204; *In re Grunau* (2008) 169 Cal.App.4th 997; *People v.*



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*Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490, fn. 12; Cal. Rules of Court, rules 8.272(c)(2), 8.366(a), 8.540(c)(2).) Alternatively, a motion to recall the remittitur may be used when the grounds do not depend on facts outside the record. (*Mutch,* at pp. 396-397 [fundamental change in law, altering elements of the offense, after original opinion]; *People v. Lewis* (2006) 139 Cal.App.4th 874, 879.)

Habeas corpus may also be used to seek reinstatement of an appeal dismissed under California Rules of Court, rule 8.360(c)(5) for failure to file an opening brief. (*In re Serrano* (1995) 10 Cal.4th 447, 450.) A motion to reinstate is commonly used, as well.

## 4.7 Dependency and Family Law Applications [§ 8.63]

Habeas corpus may be available in the juvenile dependency context, on the theory "custody" is involved. The remedy not only safeguards the parent's fundamental rights but also ensures the correctness of the result. If the proceedings have resulted in an inappropriate termination of the parent-child relationship, the child may have an interest equal to that of the parents in its restoration. (*In re Kristin H*. (1996) 46 Cal.App.4th 1635, 1664; see also *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1093.)

A common issue in dependency habeas corpus proceedings is ineffective assistance of counsel based on facts outside the appellate record. (E.g., *In re Darlice C*. (2003) 105 Cal.App.4th 459, 462-467; *In re Carrie M*. (2001) 90 Cal.App.4th 530, 534-535; *In re Kristin H*. (1996) 46 Cal.App.4th 1635, 1642, 1672; *Adoption of Michael D*. (1989) 209 Cal.App.3d 122, 136, superseded by statute on another point; but see *In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1161-1166 [habeas corpus based on ineffective assistance of counsel not available after termination of parental rights under Welf. & Inst. Code, § 366.26]; cf. *In re Darlice C*., *supra*, 105 Cal.App.4th 459, 464-466 [declining to follow *Meranda P*.]; *In re Carrie M*. (2001) 90 Cal.App.4th 530, 533-534 [same].) Habeas corpus may not be used to challenge a child's placement. (*In re Cody R*. (2018) 30 Cal.App.5th 381, 393.)[55]

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[55] *Cody R*. also says, more expansively: "[H]abeas corpus in dependency proceedings is limited to claims of wrongful withholding of custody of the child,



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Family law applications include non-dependency child custody issues (*In re Richard M*. (1975) 14 Cal.3d 783, 789) and adoption-related proceedings (see generally *Adoption of Alexander S*. (1988) 44 Cal.3d 857, 866-868).

Because of the time-sensitive nature of child-focused proceedings, juvenile dependency and family habeas corpus cases are held to a stricter time schedule than criminal cases. To protect the child's welfare, the parent generally must file the petition within the time deadlines for filing an appeal from the particular juvenile court order or judgment. (*Adoption of Alexander S*. (1988) 44 Cal.3d 857, 866; *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1093; *In re Carrie M*. (2001) 90 Cal.App.4th 530 533-534.) The right to habeas corpus relief is limited to the dependency order to which the claimed ineffective assistance of counsel relates. (*In re Carrie M*., *supra*, 90 Cal.App.4th at pp. 533-534.) It may not be used to challenge earlier orders. (*Id*. at p. 534.)

## 4.8 Other Applications [§ 8.64]

Habeas corpus is occasionally used in other ways than those outlined above; this discussion does not purport to enumerate all such ways. Some of the most commonly encountered applications in criminal and juvenile appellate practice might be seeking habeas corpus in lieu of appeal when, because of extreme time pressures, appellate remedies are inadequate (and particularly so when the case involves a constitutional issue) (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305; *In re Duran* (1974) 38 Cal.App.3d. 632, 635); securing immediate release of an inmate who has already served all the time legally authorized; challenging on ineffective assistance of counsel grounds the validity of a prior conviction used to enhance a sentence in a current proceeding (see *Custis v. United States* (1994) 511 U.S. 485, 497; *People v. Allen* (1999) 21 Cal.4th 424, 435; cf. *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 964-966 [similar in regard to alleged prior IAC]);[56] and

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including lack of jurisdiction, and claims of ineffective assistance of counsel." Counsel should not be deterred by this language, arguably dictum, from considering use of habeas corpus when necessary. Habeas has been used in some ICWA situations, for example. Consult the project in this situation.

[56] A challenge to a prior conviction enhancement grounded on failure to comply with *Boykin-Tahl* requirements may, in contrast, be done by a motion to strike



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collaterally attacking an enhancement because of an ameliorative change in the law or providing "a vehicle to obtain relief limited to a new sentencing hearing in the original criminal action, which may result in a different sentence" (*People v. Buycks, et al.* (2018) 5 Cal.5th 857, 895, quoting In re *Kirchner* (2017) 2 Cal.5th 1040, 1052, fn. 9.)

# 5 OTHER EXTRAORDINARY WRITS IN CALIFORNIA CRIMINAL AND JUVENILE APPELLATE PRACTICE [§ 8.65]

Criminal and juvenile appellate practitioners seldom need to apply for writ relief other than habeas corpus, but very occasionally may have to consider use of *coram nobis* or *coram vobis*, supersedeas, mandate or prohibition, certiorari, or other common law or statutory writs. The writs most likely to be encountered in appellate practice are mentioned here, with a brief description of their typical uses and requirements. Other resources offer more comprehensive treatment. (E.g., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2021) Pt. II, §§ 7.1-11.1.) Division One of the Fourth Appellate District has a handout[57] on writs of mandate, prohibition, and supersedeas.

## 5.1 Writs of Error Coram Nobis and Error Coram Vobis [§ 8.66]

A petition for writ of error *coram nobis* in the criminal law context is filed in the superior court that rendered judgment and is the equivalent of a post-judgment motion to withdraw a guilty plea or a motion to vacate the judgment. If the judgment was previously appealed and affirmed, a petition for writ of error *coram vobis* is filed in the reviewing court. The writs also are available in the juvenile dependency context. (E.g., *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296-1298 [extrinsic fraud element missing]; *In re Derek W.* (1999) 73 Cal.App.4th 828, 831-833 [procedural and substantive requirements for writ were not met].)

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in the current proceeding. (*Allen*, at pp. 426-427; see *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.)

[57] https://www.courts.ca.gov/documents/4DCA-Div1-Handout-on-Writs.pdf



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### 5.1.1 *Coram nobis* as motion to vacate judgment [§ 8.67]

In its function as a motion to vacate the judgment, a writ of error *coram nobis* may be granted when three requirements are met:

> (1) [T]he petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment; (2) the petitioner has shown that the newly discovered evidence does not go to the merits of the issues tried; and (3) the petitioner has shown that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.

(*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618-1619; see also *People v. Shipman* (1965) 62 Cal.2d 226, 230; see *People v. Kim* (2009) 45 Cal.4th 1078 [discussing cases granting and denying the writ]; *People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352.) *Coram nobis* is used only to correct errors of *fact*, as distinguished from errors of law. (See *People v. Ibanez* (1999) 76 Cal.App.4th 537, 545.)[58] Due diligence and unavailability of alternative remedies are procedural prerequisites. (*Kim*.)

### 5.1.2 *Coram nobis* as motion to withdraw guilty plea [§ 8.68]

Without statutory authorization, no right exists to seek relief by a post-judgment motion to vacate a guilty plea. (*People v. Shokur* (2012) 205 Cal.App.4th

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[58] In *Ibanez*, the alleged error was the failure of the trial court to admonish the defendant of the possibility of consequences under the Sexually Violent Predators Act before accepting the defendant's plea of guilty. On the People's appeal from the grant of the defendant's coram nobis petition, the appellate court concluded that there was no error in the failure to advise and in any event coram nobis was unavailable because the alleged error was legal not factual. In footnote 13, the court also noted that ineffective assistance of counsel could not be raised by coram nobis. (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 546, fn. 13.)



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1398; see also *People v. Picklesimer* (2010) 48 Cal.4th 330, 337-338 [unless authorized by specific statute, motion made after judgment becomes final cannot be considered].) *Coram nobis* may be available, however. In a *coram nobis* petition seeking withdrawal of a guilty plea, the defendant must make a showing similar to the "good cause" showing required for withdrawal of a plea before judgment under Penal Code section 1018.

For example, *coram nobis* relief may be available when a defendant has entered a plea because of a misrepresentation by a responsible public official, duress, fraud, or other fact overreaching free will and judgment. In such situations, the defendant has improperly been deprived of the right to a trial on the merits. (*People v. Goodrum* (1991) 228 Cal.App.3d 397, 400-401 [statements by judge caused misperception, *id*. at p. 400, fn. 4]; cf. *Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 793, 796 [*coram nobis* not available to challenge guilty plea induced by prospect that perjured testimony would be offered against defendant, if neither prosecuting authorities nor court had reason to know about the perjury at the time].)[59]

If the misrepresentation or overreaching of will comes from counsel rather than a public official, habeas corpus rather than *coram nobis* is the appropriate remedy. (*People v. Kim* (2009) 45 Cal.4th 1078, 1104; People *v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983; *People v. Goodrum* (1991) 228 Cal.App.3d 397, 400-401.)

### 5.1.3 Appeal of coram nobis denial [§ 8.69]

Unlike the denial of a habeas corpus petition in the trial court, the denial of a *coram nobis* petition may be appealable to the Court of Appeal. As explained in *People v. Gallardo* (2000) 77 Cal.App.4th 971, 982:

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[59] An exception to this general rule is when the court fails to advise a defendant of immigration consequences pursuant to Penal Code section 1016.5; rather than a common law writ, the correct remedy is a statutory motion. (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1521, 1524-1526, 1531.)



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> Denial of a defendant's request for *coram nobis* relief is appealable (*People v. Allenthorp* (1966) 64 Cal.2d 679, 683) unless the petition failed to state a prima facie case for relief (*People v. Kraus* (1975) 47 Cal.App.3d 568, 575, fn. 4) or the petition merely duplicated issues which had or could have been resolved in other proceedings (*People v. Vaitonis* (1962) 200 Cal.App.2d 156, 159; see generally [Prickett, *The Writ of Error Coram Nobis in California* (1990) 30 Santa Clara Law Rev. 1, 48-66].)

(See also *People v. Castaneda* (1995) 37 Cal.App.4th 1612; *People v. Goodrum* (1991) 228 Cal.App.3d 397; §§ 2.73 and 2.74 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started.")

### 5.1.4 Coram vobis [§ 8.70]

*Coram vobis* is essentially the same as *coram nobis*, except that it is addressed to a higher court, while *coram nobis* is addressed to the court in which the petitioner was convicted. (*People v. Welch* (1964) 61 Cal.2d 786, 790; *In re De La Roi* (1946) 28 Cal.2d 264, 276.) It is necessary if the trial court has no jurisdiction to vacate the judgment. For example, when the judgment has been affirmed in a previous appeal, the appropriate remedy is a *coram vobis* petition filed in the court that affirmed the judgment – that is, the Court of Appeal (or Supreme Court, if review was granted). (Pen. Code, § 1265, subd. (a)[60].) Similarly, if an appeal is pending when the error is discovered, *coram vobis* in the appellate court is necessary. (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1435.)

## 5.2 Mandate, Prohibition, and Certiorari [§ 8.71]

Writs of mandate, prohibition, and certiorari are "prerogative" writs. The theory and requirements of these writs are explained in several leading cases of the California Supreme Court. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232; *Kowis v. Howard* (1992) 3 Cal.4th 888; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36

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[60] If the trial court denies the petition and the decision is appealed, the Court of Appeal may treat the appeal as a petition for writ of error coram vobis. (*People v. Forest* (2017) 16 Cal.App.5th 1099, 1108.)



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Cal.3d 171; see also *People v. Romero* (1994) 8 Cal.4th 728, and *People v. Pacini* (1981) 120 Cal.App.3d 877, 883-884 [distinguishing between habeas corpus and prerogative writs].)

Writ proceedings in reviewing courts are governed by California Rules of Court, rule 8.485 et seq.[61] Decisions in some writ proceedings filed in the superior court may be reviewed by appeal (see § 2.74, chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started") or by a writ proceeding filed in the reviewing court (see *Kinder v. Superior Court* (1978) 78 Cal.App.3d 574, 578, citing *Robinson v. Superior Court* (1950) 35 Cal.2d 379, 383-384).

Division One of the Fourth Appellate District has a handout[62] on writs of mandate, prohibition, and supersedeas.

### 5.2.1 Basic purpose [§ 8.72]

#### 5.2.1.1 MANDATE [§ 8.73]

A writ of mandate (mandamus) is an order from a higher court to a lower one, or to some other entity or individual, commanding that some act be performed. (Code Civ. Proc., §§ 1084-1097.) Many applications in criminal cases are pretrial. A common use of mandate in criminal appellate practice is ordering the issuance of a certificate of probable cause, to permit an appeal contesting the validity of a guilty plea.[63] (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1180; *In re Brown* (1973) 9 Cal.3d 679, 683, dictum on another point disapproved in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 & fn. 7; cf. Pen. Code, § 1237.5; Cal. Rules of Court,

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[61] Rule 8.486, petitions; 8.487, opposition and amicus curiae; 8.488, certificate of interested parties; 8.489, notice to trial court; 8.490, decisions; 8.492, sanctions; 8.493, costs.

[62] https://www.courts.ca.gov/documents/4DCA-Div1-Handout-on-Writs.pdf

[63] Certificates of probable cause are covered in § 2.43 and § 2.105 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."



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rule 8.304(b); *People v. Warburton* (1970) 7 Cal.App.3d 815, 820, fn. 2.) It is also available in the dependency context. (E.g., *Karen P. v. Superior Court* (2011) 200 Cal.App.4th 908.)

Another potential use is in lieu of an expedited appeal, when even an accelerated appeal may not be expedient enough. (Cf. *Turner v. Superior Court* (2003) 105 1046, 1053-1054 [where Court of Appeal initially denied mandamus because defendant could seek expedited appeal after trial, Supreme Court issued order to show cause to hear mandamus on merits].)

Mandate may be an alternative to appeal when required by statute. (E.g., § 8.83, *post*, on statutory writs.) Case law or the exigencies of a case may call for mandate. (E.g., *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408, 1412 [dismissal of dependency petition at conclusion of detention hearing]; see *In re Mario C.* (2004) 124 Cal.App.4th 1303, 1311-1312 [deferred entry of judgment in delinquency case]; cf. *People v. Mena* (2012) 54 Cal.4th 146 [availability of writ review does not bar review by appeal].) It may also be an alternative to habeas corpus when the person is no longer in actual or constructive custody (e.g., *People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [mandamus is proper remedy to seek post-finality relief in cases where the defendant is no longer in custody];[64] § 8.7, *ante*).

#### 5.2.1.2 PROHIBITION [§ 8.74]

A writ of prohibition is an order prohibiting a threatened act in excess of the jurisdiction of the court or other entity, such as a trial of a defendant once in jeopardy. (Code Civ. Proc., §§ 1102-1105; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 509, fn. 1.)

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[64] *Picklesimer* specifically involved relief under the ruling of *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, which held mandatory lifetime sex offender registration for violations of Penal Code section 288a, subdivision (b)(1), voluntary oral copulation with a 16- or 17-year-old minor, violates equal protection. *Hofsheier*'s equal protection holding was overruled in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. *Picklesimer* remains good law on the remedy.



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For purposes of prohibition, the term "jurisdiction" is given a broad meaning, beyond the most fundamental sense – the presence or absence of power over the subject matter. Prohibition also applies to situations in which a court has authority to act only in a particular manner, or to give only certain kinds of relief, or to act only with the occurrence of certain procedural prerequisites. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-289.)

#### 5.2.1.3 CERTIORARI [§ 8.75]

Certiorari, also known as a writ of review, is used when a tribunal has acted in excess of jurisdiction and an appeal is an unavailable or inadequate remedy – for example, review by the Supreme Court of a decision of the appellate division of the superior court, or review of a contempt judgment.[65] (Code Civ. Proc., §§ 1067-1077; see *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230; *Dvorin v. Appellate Dept of Superior Court* (1975) 15 Cal.3d 648; *In re Buckley* (1973) 10 Cal.3d 237, 240, fn. 1, citing *John Breuner Co. v. Bryant* (1951) 36 Cal. 2d 877, 878; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454-455.) As with prohibition, for purposes of certiorari the term "jurisdiction" is construed to mean considerably more than fundamental power to act on the subject matter. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-289.)

### 5.2.2 Petition and informal opposition, reply [§ 8.76]

A petition for a prerogative writ in the Supreme Court and Court of Appeal must comply with rule 8.486 of the California Rules of Court.[66] (See also rules 8.204 as to form and length, 8.74 as to e-filing,[67] and 8.73 as to service and filing.) It must

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[65] Habeas corpus is also an appropriate remedy for reviewing a contempt adjudication if the contemnor is incarcerated. (*In re Buckley* (1973) 10 Cal.3d 237, 240, fn. 1; see § 8.57 et seq., ante.)

[66] Rule 8.486 refers to rule 8.44, but see rule 8.70.

[67] See also News Release of March 18, 2020, https://newsroom.courts.ca.gov/news/california-supreme-court-expands-electronic-filing-response-covid-19-pandemic.



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explain any failure to seek relief in a lower court, must name the respondent and any real party in interest, must identify any related appeal, must be verified, and must include points and authorities. (Rule 8.486(a).) It must be accompanied by an adequate record and supporting documents. (Rule 8.486(b).)[68] The form of supporting documents is governed by rule 8.486(c), again subject to e-filing modifications. Service is recipients and other requirements are set forth in rule 8.486(e).)

The respondent or real party in interest may file a preliminary opposition within 10 days stating legal and factual bases why the relief should not be granted. The petitioner may reply within 10 days. (Rule 8.487(a).)

### 5.2.3 Court response and return or opposition, reply [§ 8.77]

When an appellate court considers a petition for writ of mandate or prohibition the court may: (1) deny the petition summarily; (2) issue an alternative writ or order to show cause; or (3) grant a peremptory writ[69] in the first instance after giving the required notice and opportunity for opposition. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1239; Code Civ. Proc., §§ 1088, 1105; see Cal. Rules of Court, rule 8.487(a)(4).) It may also grant or deny a request for a temporary stay. (Rule 8.487(a)(4).)

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[68] If the petitioner is a corporation or other entity, a certificate of interested parties under rule 8.208 is required. (Rule 8.488(b).)

[69] A "peremptory" writ is an order for ultimate relief. It may be issued after an alternative writ or an order to show cause or "in the first instance," without such a prior order. (E.g., *Albertson v. Superior Court* (2001) 25 Cal.4th 796 [litigation begun by alternative writ, followed by peremptory writ]; *Hotel Employees & Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585 [order to show cause, followed by peremptory writ]; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, 181 [speaking of peremptory writs both with and without prior issuance of an alternative writ]; see Code Civ. Proc., §§ 1087, 1088.)



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#### 5.2.3.1 SUMMARY DENIAL [§ 8.78]

The court may deny a petition summarily, before or after receiving preliminary opposition. (Cal. Rules of Court, rule 8.487(a)(4).) A "summary denial" is one without an order to show cause or alternative writ and without a written opinion or opportunity for oral argument. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 898 [summary denial with a brief statement of reasons does not establish law of the case, even if a decision on the merits is the sole possible ground; declaring "firm rule that a denial without an alternative writ and written opinion does not establish law of the case"]; cf. *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1024 [setting of case for oral argument and decision by full opinion is equivalent of order to show cause and means the decision is not "summary denial"; thus it becomes final 30 days after filing as to deciding court under current rule number 8.490(b)(2)]; *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 413-417 [denial of writ after notice under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, with full opinion, is law of the case and final as to deciding court in 30 days, in case where statute requires writ as the only available means of review]; see also *People v. Medina* (1972) 6 Cal.3d 484 [summary denial without opinion of pretrial writ challenging Penal Code section 1538.5 denial is not law of the case or res judicata on subsequent appeal].)

Oral argument and a written opinion are not required when a writ is resolved by a summary denial. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241.) The decision is final immediately. (Cal. Rules of Court, rules 8.490(b)(1), 8.532(b)(2)(C).) With a summary denial, the writ proceeding does not become a "cause," and the denial does not establish law of the case. (*Kowis v. Howard* (1992) 3 Cal.4th 888.)

#### 5.2.3.2 ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE [§ 8.79]

The court may issue an alternative writ or order to show cause, before or after receiving preliminary opposition. An alternative writ commands the respondent either to perform a specific act or to show cause why it has not done so. (Code Civ. Proc., § 1087.) An order to show cause invites further argument in support of the respondent's position in a formal return, which may be by demurrer and/or a verified answer, filed within 30 days of the alternative writ or order to show cause. The petitioner may reply within 15 days. (Cal. Rules of Court, rule 8.487(b).)

If the respondent performs the act specified in an alternative writ, the matter does not become a "cause," and the proceeding is moot. (*Lewis v. Superior Court*



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(1999) 19 Cal.4th 1232, 1241.) If the respondent files a return instead or an order to show cause is issued, the matter is a cause. In that case, an opportunity for oral argument and a written decision, which becomes law of the case, are required. (*Ibid.*; *Kowis v. Howard* (1992) 3 Cal.4th 888 , 894-895; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178, fns. 5 & 6; see Cal. Const., art. VI, §§ 2, 3, 14.) The decision is final in 30 days. (Cal. Rules of Court, rules 8.490(b)(2), 8.532(b)(1).)

#### 5.2.3.3 PEREMPTORY WRIT IN THE FIRST INSTANCE [§ 8.80]

The court may grant a peremptory writ in the first instance – that is, order ultimate relief without first issuing an alternative writ or order to show cause. (Code Civ. Proc., § 1088.) If the court is considering such a remedy, it must notify the parties and provide an opportunity for opposition. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-180; Cal. Rules of Court, rule 8.487(a)(4) & (b)(1).) This accelerated procedure should be used only sparingly and only in exceptional circumstances. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1261; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223;[70] *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

Issuance of a peremptory writ in the first instance creates a "cause," establishing law of the case and triggering the state constitutional requirement of a written decision with reasons stated. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241, 1261 et seq.; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178; see Cal. Const., art. VI, § 14.) It does not, however, require an opportunity for oral argument. (*Lewis*, at pp. 1260-1261; see Cal. Const., art. VI, § 2, 3; cf. *People v. Brigham* (1979) 25 Cal.3d 283, 285-289.) It is final 30 days after filing. (Cal. Rules of Court, rules 8.490(b)(2), 8.532(b)(1).)

#### 5.2.3.4 DISPOSITION [§ 8.81]

When the court has issued an alternative writ or order to show cause or is ordering peremptory relief in the first instance, the decision must be in the form of a

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[70] Overruled on other grounds in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, footnote 4.



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written opinion with reasons stated. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241.)

If the Court of Appeal grants ultimate relief, the opinion itself is not a peremptory writ. The writ cannot issue until the case is final as to the Supreme Court. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 33-34; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 181; see Cal. Rules of Court, rule 8.532(b).) This rule contrasts with habeas corpus, where the "writ" is an intermediate procedural step and the actual judgment is an "order." (See § 8.44, *ante*; *People v. Romero* (1994) 8 Cal.4th 728, 743.)

## 5.3 Supersedeas [§ 8.82]

Supersedeas is an order staying a judgment or order pending appeal. It is seldom encountered in criminal practice, but can be used to stay potential harm such as a custodial condition of probation. (*In re Manuel P.* (1989) 215 Cal.App.3d 48, 72-73; *In re Batey* (1959) 175 Cal.App.2d 541, 542; see Cal. Rules of Court, rule 8.112.) Supersedeas may also be used in dependency appeals. (*In re M.M.* (2007) 154 Cal.App.4th 897, 916 [in appeal where state jurisdiction was lost upon order transferring jurisdiction to tribe pursuant to ICWA, loss of jurisdiction might have been averted had minor's counsel sought immediate stay of transfer order pending minor's exhaustion of appellate remedies; if juvenile court denies stay, aggrieved party may then petition for supersedeas pending appeal].) Division One of the Fourth Appellate District has a writs handout[71] that includes discussion of supersedeas.

[71] https://www.courts.ca.gov/documents/4DCA-Div1-Handout-on-Writs.pdf



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## 5.4 Statutory Writs [§ 8.83]

### 5.4.1 General statutory writs [§ 8.83A]

Sometimes a statute specifically permits or requires review by writ – usually to avoid the delay entailed in an appeal. Such a procedure, called a "statutory writ," may be the exclusive remedy for review or may be an alternative to appeal.[72]

Many such provisions involve interlocutory orders in ongoing trial proceedings. (E.g., Code Civ. Proc. §§ 170.3, subd. (d), 170.6 [disqualification of trial judge]; Pen. Code, §§ 871.6 [delay in preliminary hearing], 999a [denial of motion to set aside information or indictment], 1511 [trial date], 1512 [severance or discovery], 1538.5, subds. (i) & (o) [denial of search and seizure suppression motion], 4011.8 [denial of application for voluntary mental health services by person in custody]; Welf. & Inst. Code, § 707 and Cal. Rules of Court, rule 5.770(g) [fitness for juvenile delinquency proceedings], construed in *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, disapproved on another ground in *People v. Green* (1980) 27 Cal.3d 1, 33-35; *Kevin P. v. Superior Court* (2020) 57 Cal.App.5th 173, 187.)

Other statutory writs involve final judgments potentially affecting the immediate public welfare. (E.g., Pen. Code, § 1238, subd. (d) [review sought by People of order granting probation]; Health & Saf. Code, § 11488.4, subd. (h) [challenge to order declaring seized property not subject to forfeiture].) An appellate practitioner might encounter such a case on occasion.

Usually statutory writs are mandate, prohibition, or certiorari in form. They may, however, entail a specially prescribed procedure created by statute and/or rule. (E.g., Welf. & Inst. Code, §§ 366.26, subd. (l) & 366.28; Cal. Rules of Court, rules

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[72] For a catalog of civil and juvenile statutory writs, see (in combination) Eisenberg at al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) 15:97-15:134.17 and 16 Witkin, Summary of Cal. Law (11th ed. 2021) Juvenile, § 887. For a catalog of criminal statutory writs, see Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2021) § 7.7.



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8.450, 8.452, 8.454, 8.456 [review of order for permanency plan hearing or order for placement of child after termination of parental rights]; see § 8.83B, *post*.)

Most statutory writs have short, jurisdictional time limits. But the doctrine of constructive filing sometimes can be invoked to determine a writ petition was timely filed. (*In re Antilia* (2009) 176 Cal.App.4th 622; see § 8.54, *ante*, and § 2.115 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started.")

### 5.4.2 Dependency writs under sections 366.26 and 366.28 [§ 8.83B]

An especially important limitation on appellate practice in dependency law is the provision in Welfare and Institutions Code sections 366.26 and 366.28 that referral orders for a permanent plan hearing (§ 366.26) or a post-termination child placement order (§ 366.28) cannot be appealed unless they have previously been the subject of a writ under California Rules of Court, rules 8.450 et seq. and the writ has been denied other than on the merits. (See *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1513-1514.)

The requirement of challenge by writ applies to the order setting a permanent plan hearing and other findings subsumed within that order, such as a decision to bypass or terminate reunification services or a finding services were adequate. (Welf. & Inst. Code, § 366.26, subd. (l).) This provision ensures that challenges to findings made at the time the hearing is set are resolved expeditiously and do not interfere with later proceedings. (*In re A.L.* (2015) 243 Cal.App.4th 628, 639; see *In re Zeth S.* (2003) 31 Cal.4th 396, 413.)

A dependency writ is functionally a hybrid of an appeal and a writ. It is intended to take the place of an appeal from these highly time-sensitive proceedings and replace it with a streamlined writ-like procedure. Like appeal, it is initiated by filing a notice in the trial court – in this situation, a *notice of intent to file a writ petition*.[73] The notice of intent is filed by trial counsel or the petitioner, under short time limits. (Cal. Rules of Court, rules 8.450(c), (e), 8.454(c), (e).) The superior court

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[73] See Judicial Council form notices of intent are JV-820 and JV-822.



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clerk mails notice of the filing to relevant parties and prepares a "normal record," as in an appeal. (Rules 8.450(g)-(h), 8.454(g)-(h).)

The filing of the record in the Court of Appeal triggers a short, 10-day deadline for a writ petition. (Cal. Rules of Court, rules 8.452(a)-(c), 8.456(a)-(c).) ADI has a sample petition on its dependency writs page,[74] in a more traditional professional format. The Judicial Council has an alternative sample form petition, JV-825,[75] in a fill-in-the blanks style, which trial counsel or the petitioner in pro per may find more convenient. Counsel may file a no-issue letter (sample[76] on ADI website) if no arguable issues are found. (See *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 579-580.) Any response by the real party in interest is due within 10 days after the petition is filed, or 15 days if the service copy was mailed. (Rules 8.452(c)(2), 8.456(c)(2).) The record may be corrected or augmented. (Rules 8.452(e), 8.456(e).) Procedures in the Court of Appeal are governed by rules 8.452(g)-(i) and 8.456(g)-(i). A decision on the merits is required except in extraordinary circumstances. (Rules 8.452(h), 8.456(h).)

ADI's dependency writs page[77] lists resources for counsel handling dependency writs.

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[74] http://www.adi-sandiego.com/delinq_depend/dependency/dep_writs.asp

[75] http://www.courts.ca.gov/documents/jv825.pdf

[76] http://www.adi-sandiego.com/delinq_depend/dependency/dep_writs.asp

[77] http://www.adi-sandiego.com/delinq_depend/dependency/dep_writs.asp



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# APPENDIX A [§ 8.84]

# REQUIREMENTS FOR HABEAS CORPUS PETITIONS FILED BY COUNSEL IN COURT OF APPEAL

Habeas corpus proceedings are governed generally by Penal Code section 1473 et. seq. California Rules of Court, rule 8.384 governs petitions by an attorney filed in the Court of Appeal or California Supreme Court. Rule 8.380 deals with pro per petitions, and rule 4.550 et seq. governs petitions filed in the superior court. The following discussion *only* applies to petitions filed by *counsel* in the *Court of Appeal* or *Supreme Court*.

## 6 FORMAL REQUIREMENTS [§ 8.85]

Information about filing and service requirements is summarized on ADI's Filing and Service pages.[78] Current service addresses are in the CHEAT SHEET,[79] accessed from ADI's home page.

### 6.1 Form [§ 8.86]

A petition filed by attorney in a reviewing court may be on Judicial Council form HC-001.[80] If it is not filed on the HC-001 form, the petition must include the information required by that form, and both the petition and any accompanying points and authorities must comply with rule 8.204(a) and (b) of the California Rules of Court. (Rule 8.384(a)(1) & (2).)

### 6.2 Cover [§ 8.87]

The cover, or the required information on the first page if there is no cover, is required for a petition filed by an attorney. (Cal. Rules of Court, rules 8.384(a)(1);

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[78] http://www.adi-sandiego.com/practice/filing_service_chart.asp

[79] http://www.adi-sandiego.com/index.asp

[80] https://www.courts.ca.gov/documents/hc001.pdf#082020



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8.40(b).) The required information for e-filed documents is specified in rule 8.74(a)(9). It should identify the petitioner's custodian[81] and comply, to the extent applicable, with rule 8.204(b)(10).

## 6.3 Service [§ 8.88]

Proof of service must be attached to the petition. (See Pen. Code, § 1475, 3.)

### 6.3.1 Persons to be served [§ 8.89]

The rules do not specify service requirements, but counsel should err on the side of inclusiveness and serve those who reasonably may be affected or have an interest in the petition – for example, the Attorney General, district attorney, custodian of the petitioner, the superior court or Court of Appeal (unless filed there, of course), trial and/or appellate counsel, ADI, etc. – as dictated by the nature of the petition and issues.

Penal Code section 1475, third paragraph, specifically requires service on the district attorney "of the county wherein such person is held in custody or restraint" if the person is held under restraint by an officer of any court. That statute also has special service requirements when the person is in local custody for violation of an ordinance or when the petition is challenging a parole decision and an order to show cause has issued.

### 6.3.2 Method of service [§ 8.90]

Practices may vary as to whether the court will permit service by mail on the respondent. If it is filed in the Court of Appeal, proof of service by mail is usually adequate. When immediate relief is requested, personal service is advisable. Email service may be an adequate substitute for personal service. Counsel may check local

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[81] If the petitioner is in constructive rather than physical custody – for example, on probation, bail pending appeal, parole – the name of the custodian (such as the chief parole agent, chief probation officer, or superior court) should be used. (See generally 6 Witkin & Epstein, Cal. Crim. Law (4th ed. 2021) Crim. Writs, ch, XVIII, § 16.)



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rules, the appellate court clerk's office, or the assigned ADI attorney for specific requirements.

## 6.4 Filing Copies [§ 8.91]

Habeas corpus petitions in a reviewing court by counsel must use TrueFiling. (Cal. Rules of Court, rules 8.71, 8.74; Supreme Court Rule Regarding Electronic Filing, rule 3(a)(2). *Note*: the latter mandatory rule only expressly applies to pleadings prior to issuance of an order to show cause). Currently, no paper copy is necessary. (News Release.)[82] For the Supreme Court, one unbound paper copy of the document must also be submitted. (Supreme Court Rule Regarding Electronic Filing, rule 5(a)(1).) The paper copy must be mailed, delivered to a common carrier, or delivered to the court within two court days after the document is filed electronically with the court. If the filing requests an immediate stay, the paper copy must be delivered to court by the close of business the next court day after the document is filed electronically. (Supreme Court Rule Regarding Electronic Filing, rule 5(a)(2).)

If they are filed in a trial court, counsel should consult the superior court rules. (Pro per petitioners should use Judicial Council form HC-001.)[83]

## 6.5 Other Requirements [§ 8.92]

Specific requirements for the formal petition, points and authorities, etc., are covered below.

Local rules: Local rules should additionally be consulted since there are variances in procedure. (See, e.g., Ct. App., Fourth Dist., Fourth District, Local Rules.[84] Another source of information is the Internal Operating Practices and Procedures (IOPP's) of the Courts of Appeal. (See, e.g.,

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[82] https://newsroom.courts.ca.gov/news/california-supreme-court-expands-electronic-filing-response-covid-19-pandemic

[83] https://www.courts.ca.gov/documents/hc001.pdf#082020

[84] https://www.courts.ca.gov/documents/4dca-local-rules.pdf



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https://www.courts.ca.gov/2834.htm.) Counsel may also consult the appellate project (e.g., ADI) or the court clerk's office.[85]

# 7 CONTENTS OF FORMAL PETITION [§ 8.93]

If counsel does not use form HC-001, the petition must contain all information requested on the form including:

## 7.1 Current Confinement [§ 8.94]

The petition must state the place of detention if the petitioner is in physical custody and the name of the prison warden or other custodian.[86]

## 7.2 Underlying Proceedings [§ 8.95]

### 7.2.1 Court [§ 8.96]

The petition must state the name and location of the court under whose authority the person is confined (such as the superior court in which judgment was entered).

### 7.2.2 Identity of case [§ 8.97]

The petition must identify the kind of proceeding (such as criminal or juvenile delinquency) and the case number.

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[85] Caution: Some divisions may not have updated their rules, IOPP's, or websites to reflect the most recent changes.

[86] If the petitioner is in constructive rather than physical custody – for example, on probation, bail pending appeal, parole – the name of the custodian (such as the chief parole agent, chief probation officer, or superior court) should be used. (See generally 6 Witkin & Epstein, Cal. Crim. Law (4th ed. 2021) Crim. Writs, ch, XVIII, § 16.)



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### 7.2.3 Offense [§ 8.98]

The petition must include a description of the offense, including the code section.

### 7.2.4 Proceedings [§ 8.99]

The petition must indicate the plea entered, the type of trial (such as jury, court, or submission on preliminary hearing transcript), and all relevant dates, including the dates of conviction and judgment.

### 7.2.5 Sentence [§ 8.100]

The petition must state the sentence, with the expected date of release, if applicable.

### 7.2.6 Previous review [§ 8.101]

The petition must describe the review previously sought – such as appeal, Supreme Court, or habeas corpus[87] – including the courts, case numbers, issues raised, any hearings held, the results, and all relevant dates. Even if the answer is "none," the petition should so state. (See Pen. Code, § 1475, ¶ 2.) Copies of the petitions, excluding exhibits, must be attached; except that if the previous petition was in the Supreme Court or same Court of Appeal the current petition need only so state and identify the previous case by name and number. (Cal. Rules of Court, rule 8.384(b)(1).)

### 7.2.7 Administrative decision [§ 8.102]

If from an administrative decision, the petition must include a description of that decision and what review of it was sought.

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[87] Under Penal Code section 1475, information about previous writ applications, any related proceedings, and the results must be included. Copies of the previous petitions and a certified transcript of any evidentiary hearing must be included. (Cal. Rules of Court, rule 8.384(b)(1) & (2).)



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## 7.3 Counsel [§ 8.103]

The petition must provide the name and address of the current attorney, trial counsel, and appellate, habeas corpus or other counsel if applicable.

## 7.4 Possible Procedural Irregularities [§ 8.104]

Counsel have an affirmative duty to address why applicable procedural bars do not preclude consideration of their claims. Failure to do so may be considered an abuse of the writ, subject to sanctions and grounds for denying the claims without consideration of the merits. (*In re Reno* (2012) 55 Cal.4th 428, 453; *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

### 7.4.1 Delay [§ 8.105]

The petition should explain any delay in filing it or in discovering the claimed ground for relief.

### 7.4.2 Failure to raise on appeal [§ 8.106]

The petition should explain why the current issue was not raised on appeal (for example: "The issue is based on facts outside of the appellate record").

### 7.4.3 Failure to file in lower court [§ 8.107]

If it might have been filed in a lower court, the petition should explain why it was not.

### 7.4.4 Failure to exhaust administrative remedies [§ 8.108]

If administrative remedies were arguably available but were not exhausted, the petition should explain why they were inadequate.

## 7.5 Relief Sought [§ 8.109]

The petition must identify the nature of the relief sought – such as "new trial," "recall of remittitur," "order deeming notice of appeal timely filed," "immediate release from custody," etc.



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## 7.6 Grounds for Relief [§ 8.110]

The petition must include a summary of the grounds for relief, including all essential supporting facts and basic supporting law. These can be expanded in the points and authorities, but the formal petition should be self-contained, so as to state a cause of action on its face. References to matters in the supporting documents must include citations to the index tab and page. (Cal. Rules of Court, rule 8.384(a)(3).)

## 7.7 Verification [§ 8.111]

### 7.7.1 Requirement for petition [§ 8.112]

Verification is required by Penal Code sections 1474, paragraph 3, and 1475, paragraph 2.[88]

### 7.7.2 Verification by Counsel [§ 8.113]

Because counsel may apply for habeas corpus relief on behalf of a client, verification by counsel satisfies this requirement. (*In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5; see Pen. Code, § 1474.) However, a verification based on information and belief may be found defective. (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204-205; *Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568, 574.)

**Sample Verification by Counsel**

I am an attorney admitted to practice before the courts of the State of California and have my office in (name of) County.

I represent the petitioner and am authorized to file this petition for writ of habeas corpus. Petitioner is unable to make this verification because he is incarcerated at (place), California. I am filing this petition

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[88] A defectively verified petition may result in denial of relief. (*Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939.)



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under the authority of Penal Code section 1474. I drafted this petition and know its contents.

I declare under penalty of perjury under the laws of the state of California that the foregoing statements are true and correct.

(Date and place of signing, signature, name, State Bar number, address, and other contact information.)I am an attorney admitted to practice before the courts of the State of California and have my office in (name of) County.

## 8 POINTS AND AUTHORITIES [§ 8.114]

This section should expand on the legal points summarized in the formal petition. It resembles an appellate brief. In form it must comply with California Rules of Court, rule 8.204(a)-(b). (Rule 8.384(a)(2).) References to matters in the supporting documents must include citations to the index number or letter and page. (Rule 8.384(a)(3).)

## 9 SUPPORTING DOCUMENTS [§ 8.115]

California Rules of Court, rule 8.384(b)(1)-(3) covers the requirements for attachments and other supporting documents.

### 9.1 Required Attachments [§ 8.116]

All relevant records, declarations, and other documents necessary to establish right to relief must be attached as exhibits or, if substantial (such as transcripts), lodged with the court.[89] A copy of any previous petition pertaining to the same judgment must accompany the petition, along with a certified copy of a transcript of any evidentiary hearing.

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[89] *Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568, 574; *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 156; *Rose v. Superior Court* (1941) 44 Cal.App.2d 599, 600-601.



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### 9.2 Form [§ 8.117]

California Rules of Court, rule 8.486(c) governs the form of supporting documents if the petition is filed by counsel in a reviewing court. (See rule 8.384(b)(3).) Rule 8.486(c)(1)(A)-(B) specifically refer to submission in paper form, whereas counsel are now expected to file and serve electronically; see rules 8.71, 8.74. Rule 8. 74 should be reviewed with particularity.

### 9.3 Number of Filed of Supporting Copies [§ 8.118]

For the Supreme Court, rule 8.385(c) refers to rule 8.44(a) in regard to the number of copies of supporting documents. Currently, no paper copy is necessary. (News Release.)[90] Ordinarily, for the Supreme Court, one unbound paper copy of the document must also be submitted. (Supreme Court Rule Regarding Electronic Filing, rule 5(a)(1).) The paper copy must be mailed, delivered to a common carrier, or delivered to the court within two court days after the document is filed electronically with the court. If the filing requests an immediate stay, the paper copy must be delivered to court by the close of business the next court day after the document is filed electronically. (Supreme Court Rule Regarding Electronic Filing, rule 5(a)(2).)

Rule 8.44(b)(5) nominally requires one set of supporting paper documents if bound separately from a petition filed in in the Court of Appeal. But rule 8.44(c) permits a court to establish otherwise for the submission of an electronic copy. Though the Courts of Appeal have not expressly provided by rule, as a practical matter, the courts do not want and will not accept paper copies from those required to and who do filed electronically.

## 10 PETITION FILED IN CONJUNCTION WITH APPEAL [§ 8.119]

### 10.1 Cover [§ 8.120]

The cover should state “Related Appeal Pending” and the name and number of the appeal. The petition and opening brief in the appeal must each be

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[90] https://newsroom.courts.ca.gov/news/california-supreme-court-expands-electronic-filing-response-covid-19-pandemic



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independent documents; neither should attempt to incorporate parts of the other by reference. (*In re Ronald E.* (1977) 19 Cal.3d 315, 322, fn. 3, overruled on another issue in *People v. Howard* (1992) 1 Cal.4th 1132, 1175–1178.).)

## 10.2 Record [§ 8.121]

References to a reporter's or clerk's transcript are often necessary in the petition and points and authorities. If the references are brief, it is best to attach the pertinent pages of the record to the petition, along with a declaration that they are true and correct copies. If the references are substantial, a request for judicial notice of the appellate transcripts would be appropriate. Such a request should be made by motion filed separately from a brief or petition. (Cal. Rules of Court, rules 8.252(a)(1), 8.386(e)– *note*: rule 8.386 governs proceedings once a return is ordered to be filed in the reviewing court, but as a practical matter, the reviewing courts accept judicial notice, accompanying a petition seeking an order to show cause, as a means of reviewing voluminous materials.)



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# APPENDIX B [§ 8.122]

# CALIFORNIA POST-CONVICTION HABEAS CORPUS

## Part I. Typical Proceedings to Initial Decision [§ 8.123]

## Part II. Proceedings to Review Initial Decision [§ 8.124]



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# Part I. TYPICAL PROCEEDINGS TO INITIAL DECISION [§ 8.123]

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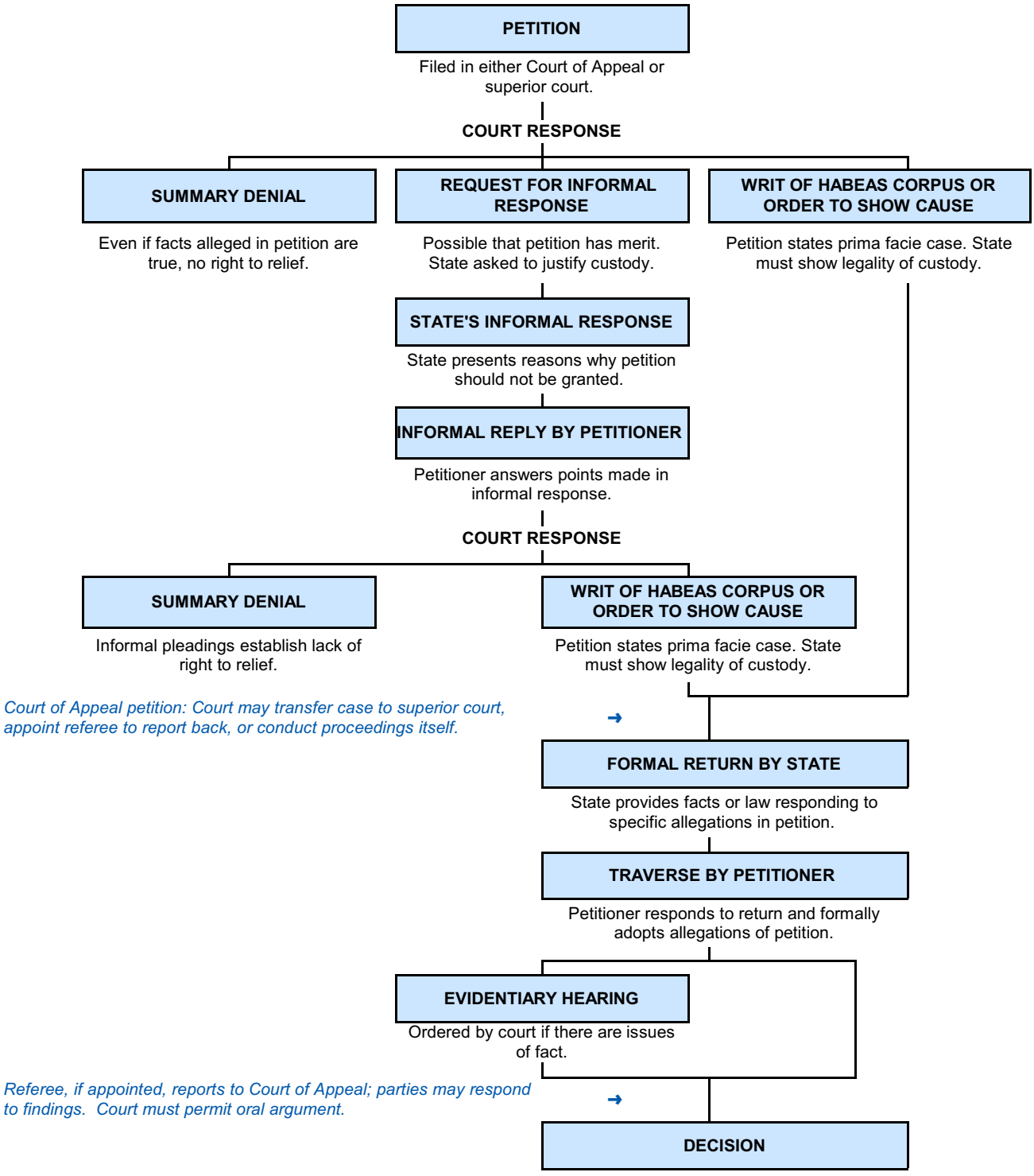
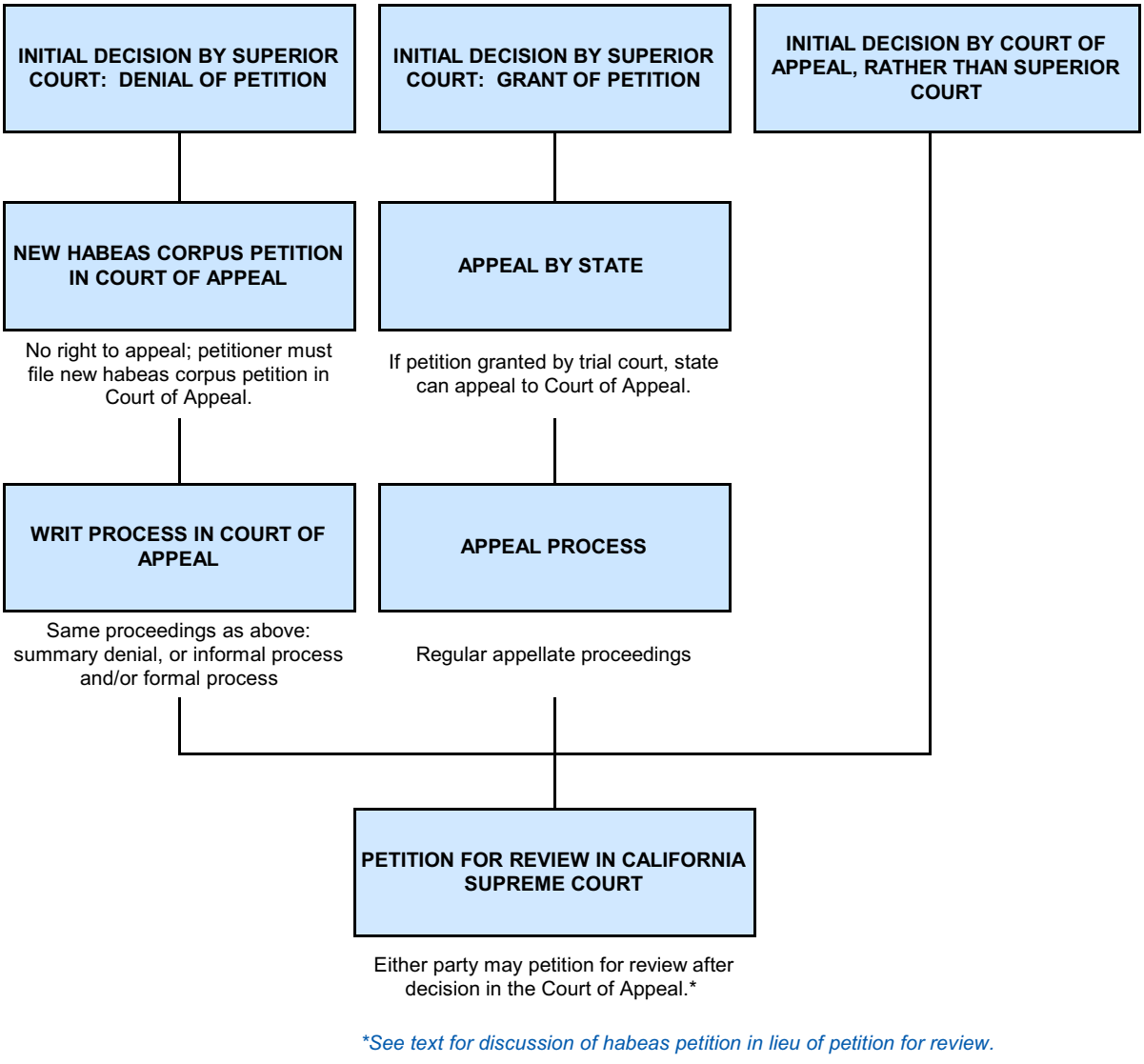


## Part II. PROCEEDINGS TO REVIEW INITIAL DECISION [§ 8.124]




**See text for discussion of habeas petition in lieu of petition for review.*

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