The California Supreme Court Should Consider Using Summary Reversal

The California Supreme Court has a problem. There is tension between its mission to give each case due consideration, and the need to keep its docket under control. This piece proposes a possible solution: summary reversal.[1]

On average, each year the court considers twenty capital cases, forty related habeas corpus petitions, 5200 petitions for review in civil and criminal matters, and 3400 writ petitions (primarily noncapital habeas corpus petitions). 2013 Court Statistics Report (2013) at 5. Except for oral argument weeks, the justices meet each week in conference to discuss and vote on between 150 and 300 petitions. Goodwin Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel* (2014) at 1269 ("Liu"). Despite its best efforts, the court can only hear eighty-three discretionary cases per year on average, in part due to the constitutional requirement that the court directly review all capital appeals. 2013 Court Statistics Report, at 13; Cal. Const. Art. VI, § 11(a).

Presently, the court has several tools to manage review petitions. For instance, the court may grant a petition then transfer the case back to the intermediate appellate court—a process commonly referred to as "grant and transfer." It may also depublish Court of Appeal opinions.[2] But unlike other courts, California's high court does not use summary reversal. This may be because at first glance Article VI, section 14 of the California constitution appears to preclude summary reversal, as it requires that all "[d]ecisions of the Supreme Court . . . that determine causes" must "be in writing with reasons stated."

But section 14 says nothing about how long the statement of reasons must be. Thus, although that section plainly bars granting a petition and reversing with no comment, the court may satisfy the constitutional requirements by issuing a short opinion that briefly explains its reasons for reversal. Obviously a terse four-word "because we said so" statement would be inadequate. But there is no requirement

that the "reasons stated" go on for 100 pages. And nothing in section 14 requires the court to review merits briefs or hear oral arguments.[3]

As explained below, limited exercise of summary reversal presents little danger of violating section 14, as the court would still provide a reasoned opinion justifying its decision. Rather than creating more work by adopting this tool, the procedure suggested below capitalizes on work the court already performs. To avoid confusing lower courts with tersely opaque summary reversals, the court could keep some or all of these short opinions unpublished; section 14 does not require that the court publish its opinions. And the court can strengthen its public perception of legitimacy by using these short opinions instead of depublishing appellate opinions without explanation.[4]

1. The Relevant Constitutional Provisions and Rules of Court Permit Summary Reversal

Considering a case and disposing of it by summary reversal likely qualifies as determining a "cause" under Article VI, section 14, which requires California Supreme Court decisions "that determine causes" to "be in writing with reasons stated."[5] Because a summary reversal requires granting review, decides the case, and would serve some purpose in guiding lower courts, it should be considered a "cause" under section 14. Thus, a summary reversal must be in writing with reasons stated.

Even if granting review only to summarily reverse is a "cause," it does not follow that a lengthy discourse is necessary to take action. The requirement that decisions be "in writing with reasons stated" is flexible. The court has held that it is sufficient to set forth the "grounds" or "principles" upon which the justices concur in the judgment. *Amwest Surety Ins. Co. v. Wilson* (1995) at 1266–67. As the court noted in *People v. Kelly* (2006) at 122, section 14 "does not require the inclusion of information or analysis beyond that necessary to apprise the reader of the contention considered and the reasons underlying that court's conclusion that the contention fails."[6] Short opinions find support in the constitutional convention:

> *[W]hen we require [the court] to state the reasons for a decision, we do not mean they shall write a hundred pages of detail. . . . To give us the reason for it does not*

> *take three lines. I maintain that there is hardly a single case, many points as may be made, that cannot be cleared up, and reasons given in five pages. Many of the decisions now in the reports contain thirty pages. Let them write short opinions in all cases, and I contend that it will not be difficult for them to write up all the decisions of the Court.*

Debates & Proceedings of the California Constitutional Convention at 1455–56.

Summary reversal is consistent with the other constitutional tools available to the court, which generally are at the court's discretion and do not require a full opinion. Under section 12, the court "may, before decision, transfer a cause from itself to a court of appeal . . . ." Because this transfer occurs before a decision, no written opinion is required. The transfer procedures are set by the Judicial Council in the Rules of Court. Cal. Const. Art. VI, § 12(c). Those rules give the court wide discretion in transferring cases back to the Court of Appeal: "The Supreme Court may order review of a Court of Appeal decision: . . . For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." Rule 8.500(b)(4); see also Rule 8.552(c). Thus, the court's reasoned discretion is the only limit on granting a review petition solely to transfer the case.

Finally, section 14 grants the court considerable discretion to depublish without a written opinion: "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate . . . ." And so the legislature has, but the relevant law merely trades "appropriate" for "expedient"—a nonsubstantive substitution.[7] Rule 8.1125(c)(2) provides that the court "may order an opinion depublished on its own motion" or after a request for depublication. Although the court could use the justifications for depublication provided in Rule 8.1105(c) as guidance, nothing in the Rules, the state constitution, or the Government Code *limit* depublication decisions to only those justifications.[8]

2. The Current Options Are Inefficient, Lack Transparency, and Can Result in Miscarriages of Justice

The existing options, including depublication and grant-and-transfer, are fine

solutions when they work. But they are not always efficient or effective. Adding the option of summary reversal to the court's toolkit will fill some gaps left by the currently-available procedures, and could solve some of the problems created by the existing tools.

Depublication reduces transparency. Ostensibly, the court expresses no "opinion of the correctness of the result of the decision or of any law stated in the opinion." Rule 8.1125(d). Without knowing why the court ordered depublication, and without any formal standard for doing so, lower courts and litigants learn nothing from depublication. Was the result wrong? Was the reasoning wrong? Were both flawed?

This lack of transparency creates legitimacy issues for the court. There is a wealth of commentary debating depublication.[9] Cynics wonder if the court uses depublication to pursue policy goals as a form of judicial activism. There is some basis for that concern, as the prohibition against citing depublished cases permits depublication to be used for silently shaping the law. Rule 8.1115(a).[10] Without providing its reasoning, the court risks reduced legitimacy due to the unavoidable impression that it may use depublication for exactly that purpose. Even if no sinister motivation exists, the mystery of the Sphinx does not generate confidence.

The court's ability to grant-and-transfer is a similarly blunt tool for correcting errors that do not merit a full opinion. Deceptively simple in concept, in practice grant-and-transfer can actually result in *less* efficiency for the court.[11] For instance, the Court of Appeal may be resistant to a case being returned with opaque directions to review the listed precedent and change its opinion accordingly. And nothing in the constitutional scheme compels the Court of Appeal to reverse its original position. Maybe the panel did read those cases, found them irrelevant, and chose not to discuss them. Or maybe the panel, on reconsideration, concludes it was right the first time and affirms its original opinion; SCOCA must then either decide the matter itself on full briefing, or let it go. This uncommunicative exchange wastes judicial resources, delays finality for the parties, and impedes effective administration of the law.

Adding summary reversal to the list of available options can address these issues.

3. Summary Reversal with a Short Opinion Balances Constitutional Concerns

with Caseload Reality

If the California Supreme Court adopted summary reversal, it could enhance efficiency by avoiding the inefficient, opaque grant-and-transfer process and avoiding the risk that a Court of Appeal panel will reaffirm its previous (wrong) decision. See, e.g., *Lane v. Hughes Aircraft Co.* at 416. Additionally, summary reversal could alleviate legitimacy concerns about the depublication process by reducing the need to use it.

The effective employment of summary reversal by other courts demonstrates that its appropriate use can assist our high court in managing its caseload. The most prominent example is the U.S. Supreme Court summary reversal procedure, which does not involve briefing by the parties or oral argument,[12] and sometimes disposes of cases in just one paragraph.[13] And the Ninth Circuit employs memorandum dispositions.[14] That procedure is an excellent model for summary reversal by SCOCA, as it permits efficient workload management, especially for egregious legal errors that do not involve development of the law or a conflict among lower courts—errors that depublication cannot possibly address because that option leaves the flawed result intact.

One might caution that introducing summary reversals to the California Supreme Court will increase its workload, as the requirement of an opinion in writing with reasons stated would require more work than a simple grant-and-transfer or depublication order. But the reverse is true: adopting a summary reversal procedure would *help* the court manage its workload. As detailed by both Justice Grodin and Justice Liu, central staff prepare conference memoranda used each week by the justices in conference.[15] If these conference memoranda accomplish—or can be used to accomplish—at least the minimal work done in the Ninth Circuit's memorandum dispositions, then the justices at conference need only approve a conference memorandum as a draft of the summary reversal. Thus, summary reversal better addresses the use case for depublication: fixing a bad result without adding to the court's workload.[16]

Using summary reversal, the court can reach more cases, clarify more law, and manage its workload more efficiently, all while improving its legitimacy and

transparency. And more cases will be decided correctly. Without summary reversal, the court simply cannot grant review to address every miscarriage of justice. That necessarily means that some miscarriages of justice are allowed to stand—hardly a desirable result. Adopting a summary reversal procedure at minimum would mean that *more* reversible error will be corrected, while likely reducing (or at least not increasing) the court's workload.

Concerns that summary reversals will be too brief to provide proper guidance can be resolved by not publishing them, much like the Ninth Circuit's memorandum dispositions. This would require alteration of the Rules of Court by the Judicial Council to permit summary reversal opinions to be unpublished, but that change is within the constitutional limits set forth in Article VI, section 14: publication "as the Supreme Court deems appropriate . . . ."

It may seem hypocritical to advocate for unpublished summary reversal opinions when depublication is so highly criticized. But even unpublished summary reversal opinions improve on depublication by providing some reasoning; in cases where the court wishes to remain silent, it can still depublish without comment. Depublication could continue in what Katz refers to as the "weak form" of depublication: as "merely a tool to police compliance with the criteria for publication."[17] The need for depublication in its "strong form"—"the rule forbidding citation of unpublished opinions"—would lessen because the court could instead use summary reversal for those opinions with the greatest danger of confusing the law, and those opinions where the result is clearly incorrect. Depublication could be reserved for the cases where the court truly has no "opinion of the correctness of the result of the decision or of any law stated in the opinion." Rule 8.1125(d).

4. Conclusion

No tool employed by California's high court (or any court for that matter) will be perfect. None of the existing tools are useless; all serve the purpose of helping an overburdened court manage its workload. Adding the option for disciplined use of a grant for summary reversal will enhance the California Supreme Court's efficiency and foster transparency, legitimacy, and clarity in the law. It is difficult to imagine that having such a tool would make matters worse.

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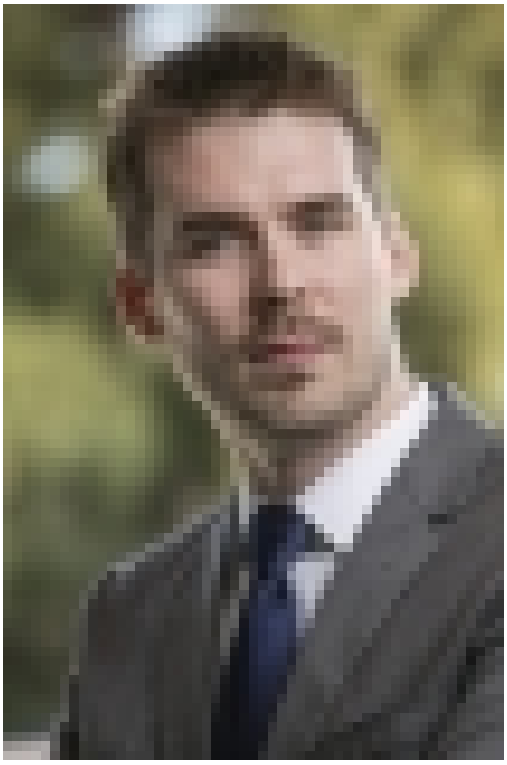

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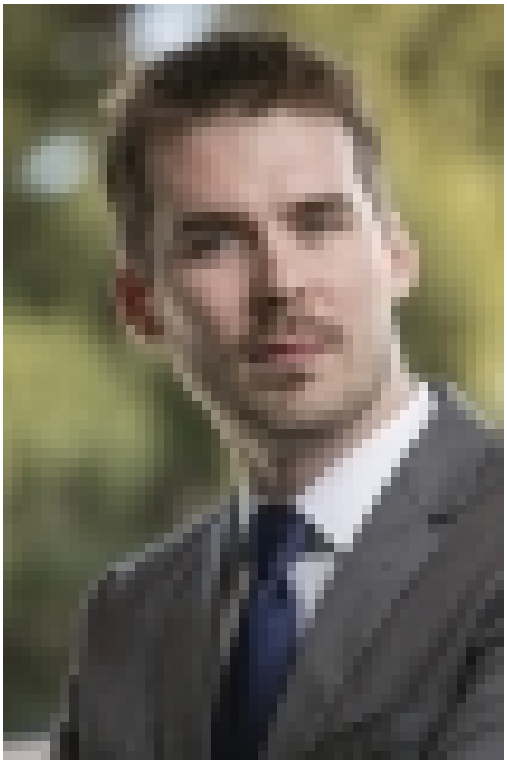

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[1] I use "summary reversal" as a shorthand for the California Supreme Court granting a petition for review then resolving the case without briefing or oral arguments. This mirrors the process employed by the U.S. Supreme Court. See *infra*, at footnote 12.

[2] See Stephen R. Barnett, *California Justice*, Book Review of *In Pursuit of Justice: Reflections of A State Supreme Court Justice. by Joseph R. Grodin. Berkeley: University of California Press, 1989* (1990) at 251 ("Depublication is a symptom of the California Supreme Court's grave affliction, its debilitating load of death penalty cases.").

[3] Of course, there are due process concerns, but the court will already have the benefit of the briefing, argument, and decision from the Court of Appeal. Given the discretionary nature of California Supreme Court review, the court's consideration

of the proceedings below along with the review petition briefing should provide an adequate opportunity to be heard. And due process does not prevent the court from using any of the existing procedural tools discussed here.

[4] The Judicial Council recently changed the California Rules of Court, eliminating automatic depublication of published Court of Appeal opinions when the California Supreme Court grants review. Cal. Rules of Court, Rule 8.1105(e)(1)(B). Although this may reduce some transparency and legitimacy concerns stemming from depublication, the bulk of these concerns remain. Indeed, the court still retains the ability to depublish the whole opinion, or a part of the opinion after granting review. Rule 8.1105(e)(2); see also Rule 8.1115(e) (establishing citation practices and binding precedential effect when review of a published opinion has been granted, and permitting the court to order the opinion not citable or to have a different precedential effect). None of these changes affect outright silent depublication without a grant of review. See Rule 8.1125(c)(2).

[5] See *In re Rose* (2000) at 452 (as generally understood, "cause" is a synonym for a proceeding in court, a suit, or action), and Code of Civil Procedure section 22 (defining an action as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense").

[6] See also Lewis v. Superior Court (1999) at 1263 (upholding a court of appeal decision only three paragraphs in length and stating that "the reasons, grounds or principles upon which a decision is based" did not require a court to "discuss every case or fact raised by counsel in support of the parties' positions").

[7] "Such opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports." Gov. Code § 68902.

[8] Note that the Rules were recently amended, eliminating automatic depublication when SCOCA grants review, effective July 1, 2016. This permits the Court of Appeal opinion to stand as good law until it is reversed.

[9] Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*

(1984) at 515; Steven B. Katz, Without Precedent (Mar. 2001) at 46; Steven B. Katz, California's Curious Practice of "Pocket Review" (2001) at 387; Phillip J. Dubois, The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort (1988) at 511 (76.5% of the opinions ordered depublished by the Bird court had conservative outcomes); Gerald F. Uelman, Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier Than the Pencil? (1993) at 1018–20 (correlation shifted in opposite direction when Republican governor appointed justices to replace those defeated in the 1986 elections). The Ninth Circuit has complained that "California's depublication procedure does not send clear signals." State Farm Mut. Auto. Ins. Co. v. Davis (9th Cir. 1991) at 1420, fn. 4.

[10] The rule against citing depublished opinions is neither forbidden nor required by Article VI, section 14, or Government Code section 68902.

[11] See, e.g., Lane v. Hughes Aircraft (1997) 51 Cal.App.4th 1601, affirmed 56 Cal.App.4th 1038, reversed 22 Cal.4th 405 (nearly three-year delay between grant and transfer and the final opinion), and California Assn. of Psychology Providers v. Rank (1990) (Supreme Court granted review three times and ultimately decided the case itself; over three-and-a-half years between the grant and transfer and the ultimate opinion).

[12] See, e.g., Daniel J. Bussel, Opinions First—Argument Afterwards (2014).

[13] Other examples are certainly less than the average length of full California Supreme Court opinions. Compare, e.g., *Williams v. Johnson* (2014) (one paragraph) and Tolan v. Cotton (2014) (approximately 13 pages) with Kirk C. Jenkins, California Supreme Court in 2015: A Year in Transition, (Feb. 4, 2016) (observing California Supreme Court decisions averaging from 27.14 pages in unanimous civil cases to 82.89 pages in non-unanimous capital cases, including the dissent).

[14] See, e.g., Flores v. First Hawaiian Bank (9th Cir., Mar. 4, 2016) (approximately 5 pages); Fulgencio v. City of Los Angeles (9th Cir. 2005) at 99.

[15] See Grodin at 517–18; see also Liu at 1251 ("The court employs staff attorneys to review the petitions and to prepare memos and recommendations for the court's

review”).

[16] Katz, *Without Precedent* at 46; see also Grodin, at 516 (describing “the extent to which the court is overburdened, partially explaining its need to use the depublication procedure”).

[17] Katz at 44.