Why Summary Reversals Are Not The Answer

Several months ago, Brandon Stracener wrote a post suggesting that the California Supreme Court (the "Court") should use summary reversals instead of granting and transferring or depublishing erroneous Court of Appeal decisions. Citing the U.S. Supreme Court's summary reversal procedure and the Ninth Circuit's use of memorandum dispositions, Mr. Stracener claims that the use of summary reversals will improve efficiency and eliminate miscarriages of justice. Mr. Stracener's goal is certainly commendable. Procedures that help the Court manage its workload should always be welcome, and errors, as a general principle, should be corrected whenever possible. But the Court is *not* the U.S. Supreme Court or the Ninth Circuit. Unlike those federal courts, the Court faces both legal and practical barriers that make it extremely difficult, if not impossible, to use "a grant for summary reversal" procedure.[1] Ultimately, the grant-and-transfer procedure, with some minor tweaks, may be better able to address Mr. Stracener's concerns.

1. Article VI, Section 2 of the California Constitution Likely Precludes The Use of Summary Reversals Without Oral Argument.

In his post, Mr. Stracener discusses article VI, section 14 of the California Constitution—which requires that California Supreme Court decisions "that determine causes" must "be in writing with reasons stated." But he does not discuss article VI, section 2—which states that "[c]oncurrence of 4 judges present at the argument is necessary for a judgment." That section appears to preclude the Court from summarily reversing a judgment in most cases without oral argument.

Article VI, section 2 "contain[s] an 'implicit' recognition of a right to oral argument in all appeals." *Lewis v. Superior Court* (1999) at 1256. It does not, however, create "a constitutional right to oral argument in all causes decided by an appellate court on the merits." (*Ibid*.) Where "governing decision, statutes, and rules do not contemplate oral argument, the constitutional provision does not confer such a right

independently." *In re Rose* (2000) at 455. Thus, no oral argument is required before a court issues a peremptory writ because nothing in the case law, statutes, or rules ever required it. See *Lewis*, at pp. 1256-1258. For the same reason, no oral argument is required before the California Supreme Court denies a petition for review of a State Bar Court decision. *Rose*, at p. 454. But oral argument *is* required before an appellate court decides a direct appeal from a trial court judgment in a criminal case (see *People v. Brigham* (1979) at 287 ["The Constitution of the State of California recognizes a right to oral argument on appeal"]) or a civil case (see *Moles v. Regents of University of California* (1982) at 872 [holding that the California Constitution recognizes "the right to oral argument in civil—as well as—criminal cases . . . ."]). This same reasoning would likely preclude the California Supreme Court from reversing a judgment *without* oral argument after granting reviewing from a direct appeal of a trial court judgment in a criminal or civil case.[2] See *People v. Pena* (2004) at 398, n. 5 (distinguishing *Lewis* and *Rose* because they did not involve direct appeals and noting that "in this case the Attorney General has not questioned that under current California law a party has the right to present oral argument on direct appeal"). Indeed, the Court in *Lewis* distinguished direct appeals from peremptory writs and limited its holding (that no oral argument is required) to peremptory writs.[3]

Most, if not all, instances where the California Supreme Court would issue a summary reversal involve a direct appeal from a trial court judgment in a criminal or civil case. Thus, article VI, section 2 would likely preclude the Court from using summary reversals.

2. Deciding Cases Through Summary Dispositions Will Require Significantly More Resources of the Court.

According to Mr. Stracener, the Court can, with little or no effort, issue short opinions reversing an erroneous Court of Appeal decision by taking the conference memorandum used by the Justices to decide whether to grant review and converting it into an opinion. His conclusion does not, however, reflect the practical realities faced by the Court.

The Court's central staff prepares conference memoranda to assist the Justices in deciding whether to grant or deny review. At that stage, the Court is more concerned about whether the case meets the criteria for review rather than whether the Court of Appeal reached the correct outcome. As a result, the conference memoranda analyze the petitions in terms of the Court's criteria for review (see Cal. Rules of Court, rule 8.500(b)). And they generally do *not* analyze the merits of the issues raised in the petition in-depth. Although this is due in part to the Court's limited role at this point, it is also due to practical limitations. These limitations make it impossible for the Court to adopt a summary reversal procedure without significantly more resources.

First, the Court has no more than 90 days to: (1) review the petition, any opposition to the petition, the reply and the underlying record—including the briefing before the Court of Appeal; (2) draft the conference memorandum; and (3) decide whether to grant review. And as a practical matter, the Court has far less time (less than 60 days) to do so. Under rule 8.512(b)(1) of the California Rules of Court, the Court *must* decide whether to grant review within 90 days from the date the petition is filed. Otherwise, the petition is deemed denied. (See Cal. Rules of Court, rule 8.512(b)(2).) Because the party opposing review has 20 days to file an opposition (*id.*, rule 8.500(e)(4)), and the party seeking review then has 10 additional days to file a reply (*id.*, rule 8.500(e)(5)), the Court has less than 60 days following the completion of briefing to review the petition, the opposition to the petition, the reply, and the record and draft the conference memorandum.[4] This leaves little time for the central staff to do a thorough, in-depth analysis of the issues raised by any given petition.

Second, the ability of central staff to do a thorough, in-depth analysis of the issues raised by the petition is further curtailed by the large number of petitions filed each year. As Mr. Stracener points out, the Court considers over 5000 petitions for review and over 3000 writ petitions each year. At any given conference, the Justices will

discuss between 150 to 300 petitions. The Court's criminal and civil central staffs have less than 40 attorneys. Thus, each central staff attorney likely drafts at least one conference memoranda for each conference and, for some conferences, far more.[5] Again, this makes it difficult, if not impossible, for the Court's central staff to do a thorough, in-depth analysis of the issues raised by any given petition.[6]

Given these practical realities, the Court cannot simply convert its conference memoranda into short opinions within the 90-day limit without devoting significantly more resources. The Court's central staff will have to spend far more time and resources reviewing the merits of the issues raised in any petition that may warrant a summary reversal and drafting any proposed summary opinions.[7] And the Justices and their staff will have to spend far more time reviewing the merits of those issues and the proposed opinions than they would have spent deciding whether to grant review. Because unanimity among the Justices on both the result and reasoning of a summary reversal may also be difficult to reach, the amount of additional time and resources that would need to be expended by the Court could be considerable.

Mr. Stracener suggests that the Court can simply adopt a procedure similar to the summary reversal procedure used by the United States Supreme Court or the memorandum disposition procedure used by the Ninth Circuit. But neither of those courts operates under the restrictive time limits that the California Supreme Court operates under.[8] Indeed, the Ninth Circuit has *no* hard deadline for deciding its appeals and can spend as much time as necessary to decide cases by memorandum disposition.

The California Supreme Court is a court of discretionary review and only decides cases that raise important issues of California and constitutional law. The Court's mission is *not* to correct every error. And the more resources that the Court devotes to error correction, the less resources that the Court has to devote to writing

opinions that address matters of statewide importance. Given the Court's declining production,[9] the devotion of more of the Court's limited resources to issuing summary reversals makes little sense.

3. The Grant and Transfer Process is More Than Adequate To Correct Miscarriages of Justice When They Have Occurred.

Mr. Stracener argues that summary reversals are superior to the grant-and-transfer and depublication procedures. Citing transparency, he claims that summary reversals can replace some depublications of erroneous Court of Appeal decisions. Citing efficiency, he claims that summary reversals are a better option than grant-and-transfers. However, neither is true. In fact, the grant-and-transfer procedure—perhaps, with some minor tweaks—can efficiently correct any miscarriages of justice.

Mr. Stracener's claim that a summary reversal should be used instead of depublication is based on a false premise: that the Court is depublishing opinions that should have been reversed. But depublication has become greatly disfavored by the Court over the last decade. Indeed, the number of depublished opinions has dramatically decreased since FY 2000. More recently, the Court depublished just six opinions in FY 2014 and has depublished fewer than 20 opinions per year since FY 2005.[10] Given the small number of depublished opinions, it is far more likely that the opinions contain legal errors that do *not* affect the outcome. Thus, summary reversals will likely have little or no impact on the depublication rate.

Mr. Stracener's claim that summary reversals are superior to grant-and-transfers is also based on a faulty premise: that Courts of Appeal are *not* reversing their erroneous decisions after the California Supreme Court transfers the case back to them. Most transfers occur when the California Supreme Court has granted and held a number of cases that raise the same issue and has issued a written opinion in the

lead case that resolves that issue. In those transfers, Courts of Appeal are extremely unlikely to repeat their error. In the few instances where the California Supreme Court grants and transfers a case solely because the underlying decision may be erroneous, there is no evidence that Courts of Appeal regularly repeat the error after the transfer. And while grant-and-transfers have been criticized as "highhanded,"[11] it is hardly unreasonable to ask the court that is most familiar with and has the most time to review the appellate issues and the record to reconsider its ruling in light of additional guidance from the high court.

To the extent the California Supreme Court creates inefficiency by providing opaque directions to the Court of Appeal, the solution is *not* the adoption of a summary reversal procedure. Rather, the solution is for the Court to provider clearer directions to the Court of Appeal. There is nothing in the state constitution, statutes, or rules that precludes the Court from doing so. And this would resolve any lingering concerns about the inefficiency of the grant-and-transfer procedure.

4. Conclusion

Although Mr. Stracener's goals are laudable, summary reversals are not the answer. Article VI, section 2 of the California Constitution poses a significant legal barrier. And the sheer number of petitions combined with the limited number of attorneys on the Court's central staff—who typically have fewer than 60 days to review the petition, the opposition to the petition, the reply, and the record and draft any summary opinion—make it impossible for the Court to implement summary reversals without devoting far more resources. But those resources are better spent on the Court's core mission: to resolve issues of statewide importance. In any event, grant-and-transfers are more than adequate to correct any miscarriages of justice. This is especially so if the California Supreme Court provides more detailed directions to the Courts of Appeal in the future.

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[1] More recently, Justice J. Anthony Kline and Jerome B. Falk have made a similar suggestion: that the California Supreme Court should use summary dispositions instead of depublication. (Kline, J.A. & Falk, J.B., "Opinion: Making Law in the Dark" (Aug. 8, 2016) *Daily Journal*.) But their suggestion suffers from the same legal and practical barriers that are described in this post.

[2] In most cases, the California Supreme Court has jurisdiction to reverse a decision of the Court of Appeal "in any cause" *only after* granting review. Cal. Const., art. VI, § 12.

[3] See *Lewis*, at p. 1237 ("Our holding in this regard applies only to those proceedings in which an appellate court properly issues a peremptory writ of mandate or prohibition in the first instance, and does not affect the right to oral argument on appeal").

[4] Because the Court's central staff must prepare the memorandum *before* the conference and because the Court typically schedules a petition for consideration no later than the second-to-last conference before the deadline for granting review, the Court typically has far fewer than 60 days to prepare the conference memorandum.

[5] Petitions that raise routine issues, particularly petitions in criminal cases, may be addressed more efficiently in a single conference memorandum. Nonetheless, the estimate that each central staff attorney drafts an average of one conference memorandum per conference is likely to be conservative.

[6] Currently, litigants focus (or should focus) their petitions more on the criteria for review than the merits. The adoption of a summary reversal procedure, however, forces litigants to focus more on the merits. The current length limitations for petitions, oppositions, and replies (8,400 words for petitions and oppositions and 4,200 words for replies) may limit the assistance that the Court receives from the litigants. At a minimum, petitions and oppositions will get longer as litigants feel compelled to discuss the merits in more detail. Likewise, the possibility of requests for supplemental briefing as suggested by Justice Kline and Mr. Falk add to the length of the briefs that the Court must review. This would impose additional burdens on both the Court and the litigants.

[7] Of course, the central staff attorney may conclude, after spending considerable time and effort, that the petition does not raise an issue warranting a summary reversal.

[8] The summary disposition procedure used by the United States Supreme Court has not escaped criticism. (See S.M. Shapiro, et al. (10th ed. 2013) *Supreme Court*

Practice, at p. 353.)

[9] Since FY 2009 —when the California Supreme Court issued 116 written opinions—the Court has not exceeded 100 written opinions. In FY 2014, the Court issued only 85 written opinions. See 2015 Court Statistics Report, at p. 13.

[10] See 2015 Court Statistics Report, at p. 15.

[11] Grodin, The Depublication Practice of the California Supreme Court (1984) at 527-528.