



**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**2254 Noncapital Habeas Training, Pasadena  
October 27, 2016**

**MATERIALS**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
HABEAS PROGRAM 2016

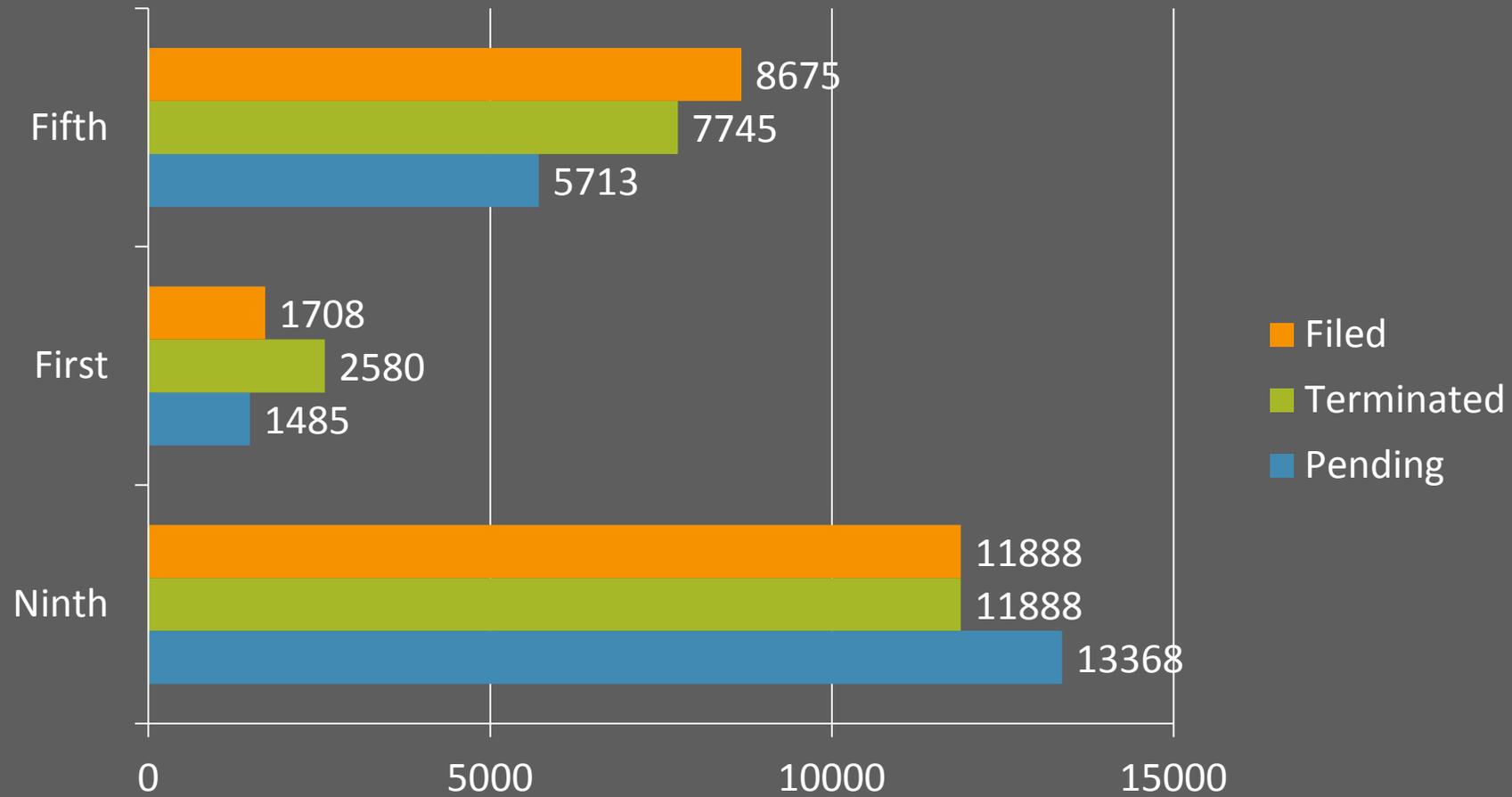


# A FEW NUMBERS

How Many, Where Do They Come From, What Happens to Them, How Long Does it Take?

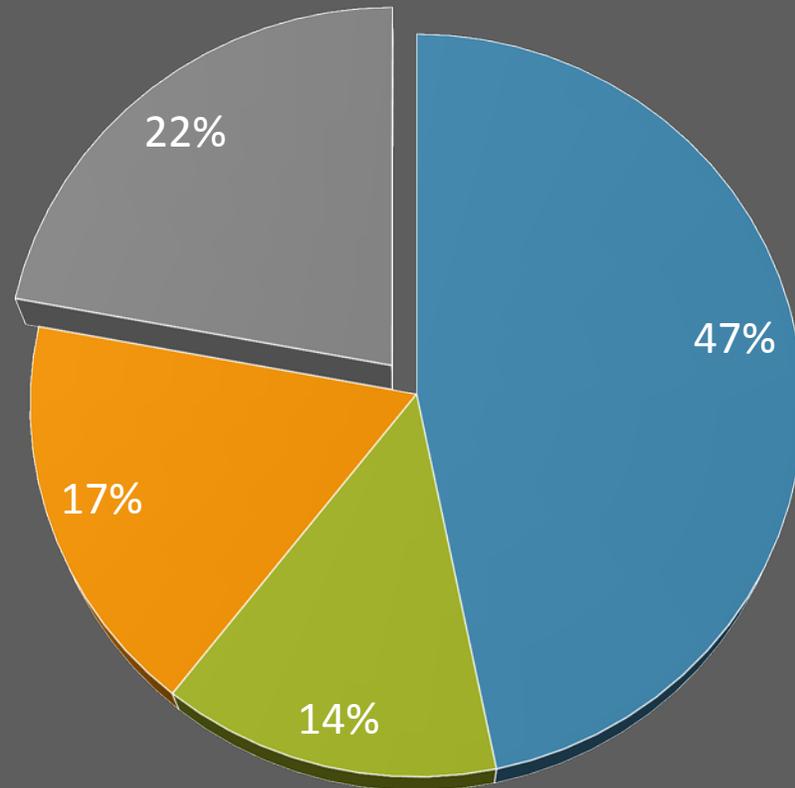
# CASELOAD

AS OF JUNE 30, 2016



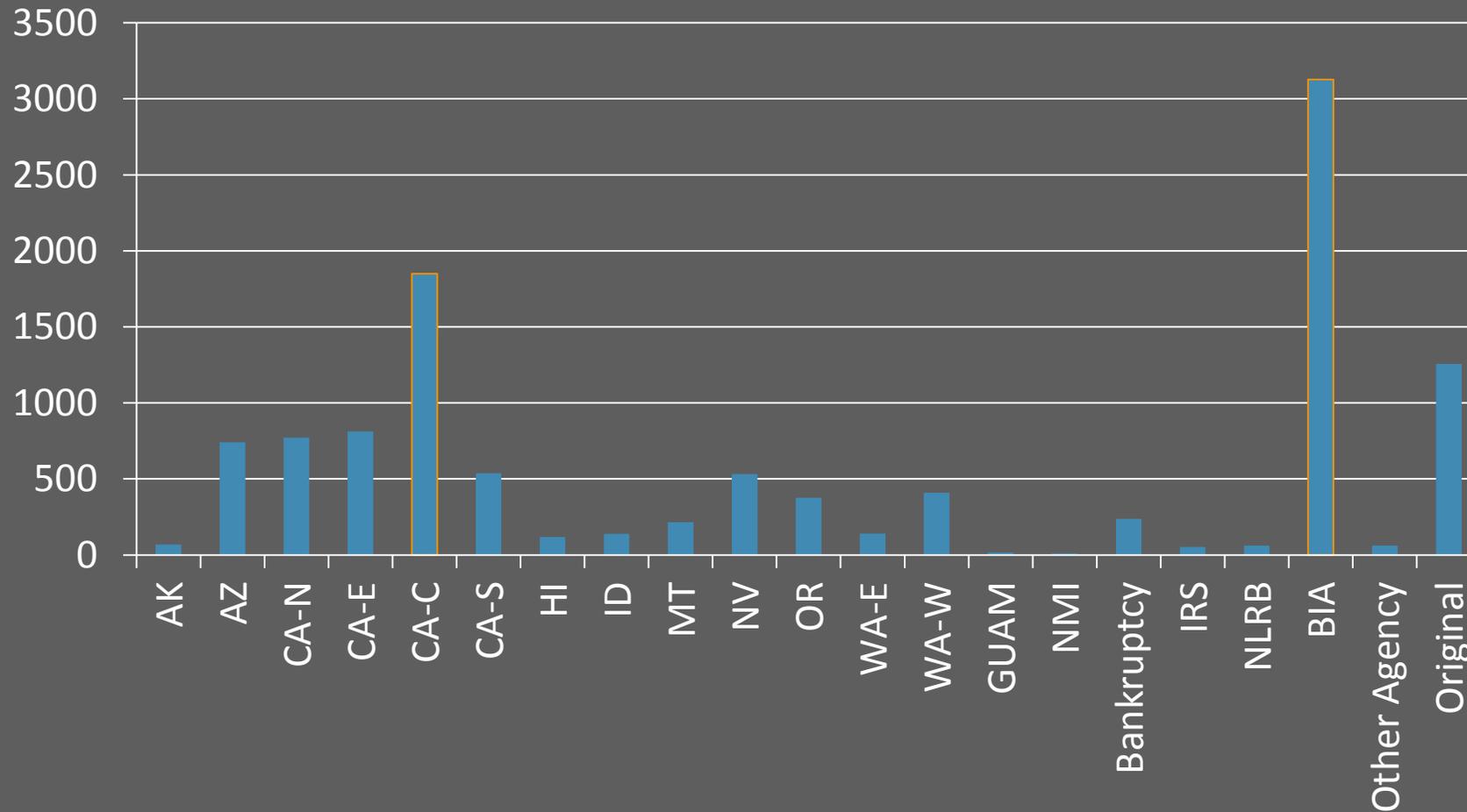
# BACKLOG

AS OF AUGUST 31, 2016



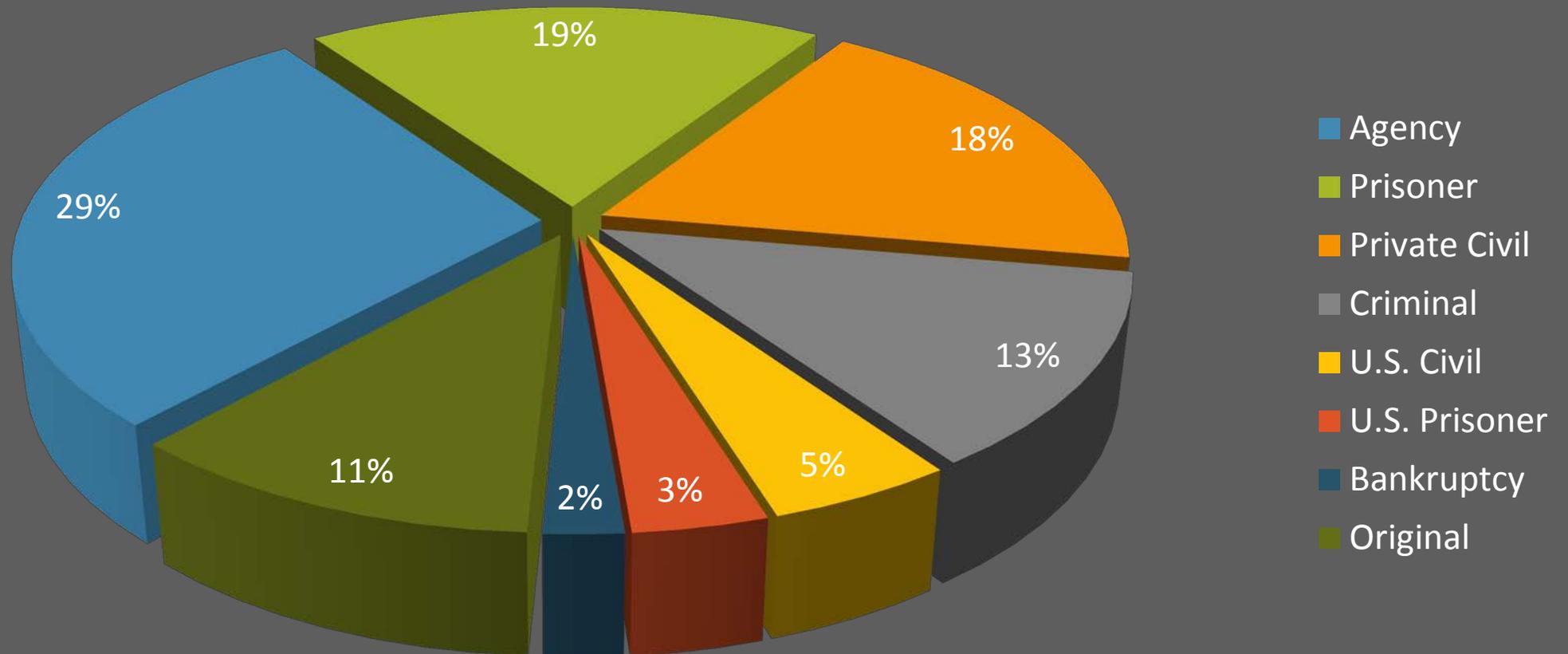
- No Opening Brief
- Briefing
- Screening
- Argument

# WHERE DO OUR APPEALS COME FROM?

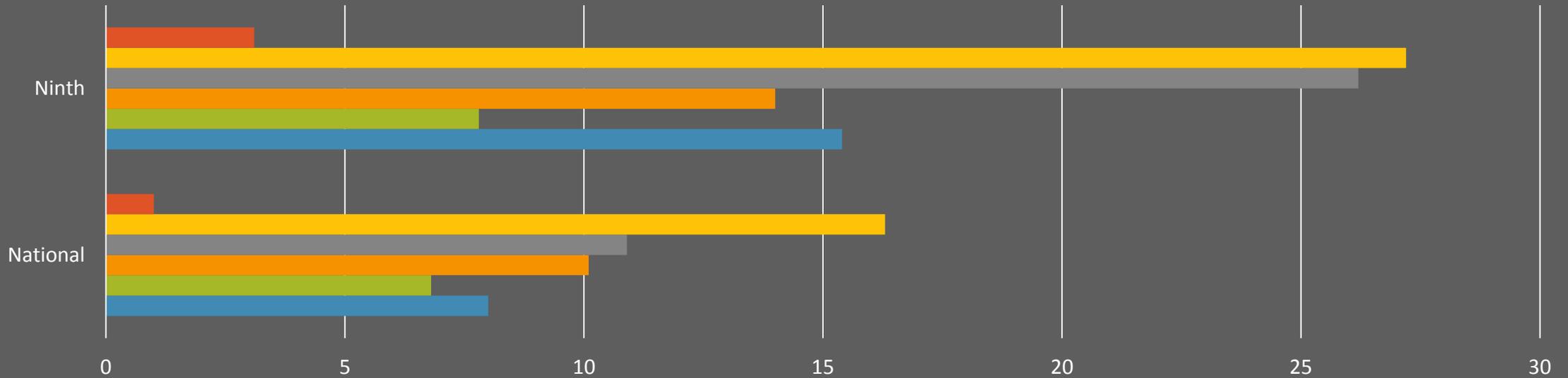


# CASE TYPES

FOR THE 12 MONTHS ENDING 6/30/16



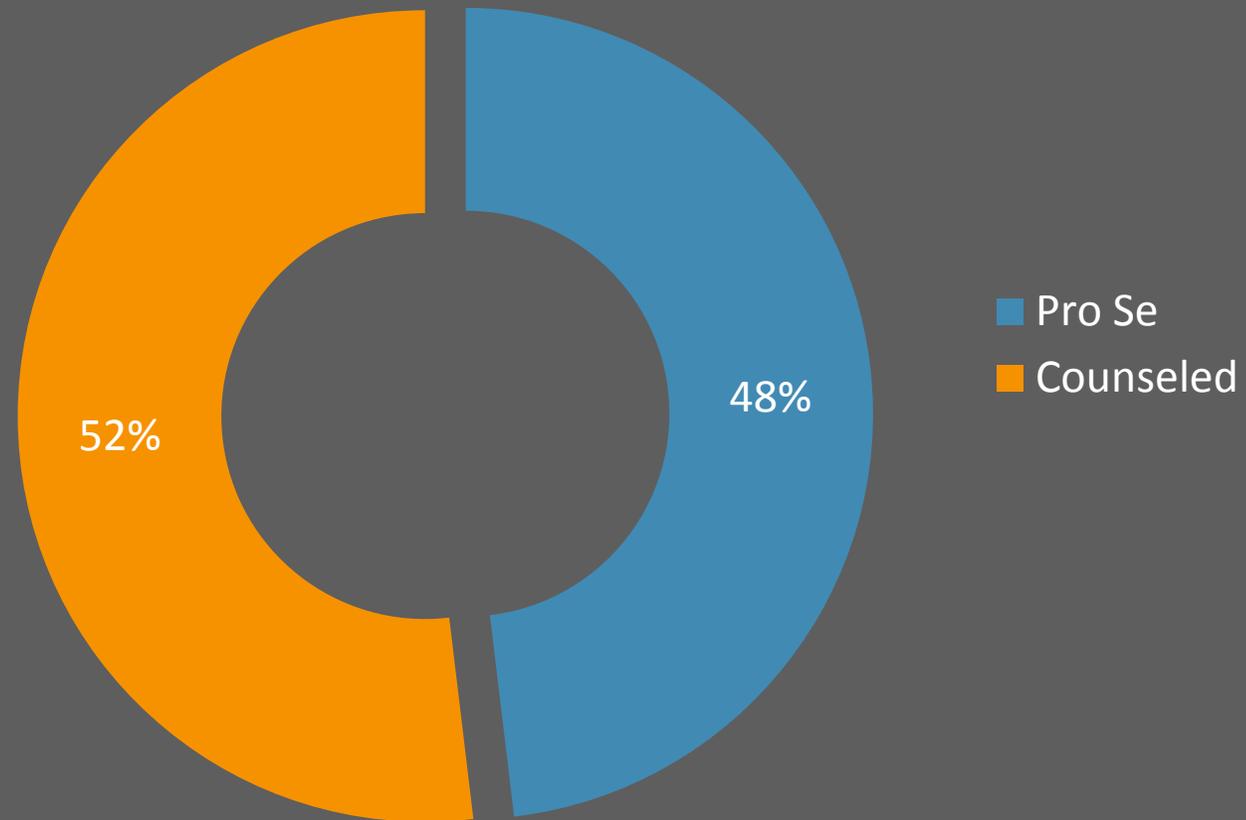
# MEDIAN PROCESSING TIMES (NOA – DECISION)



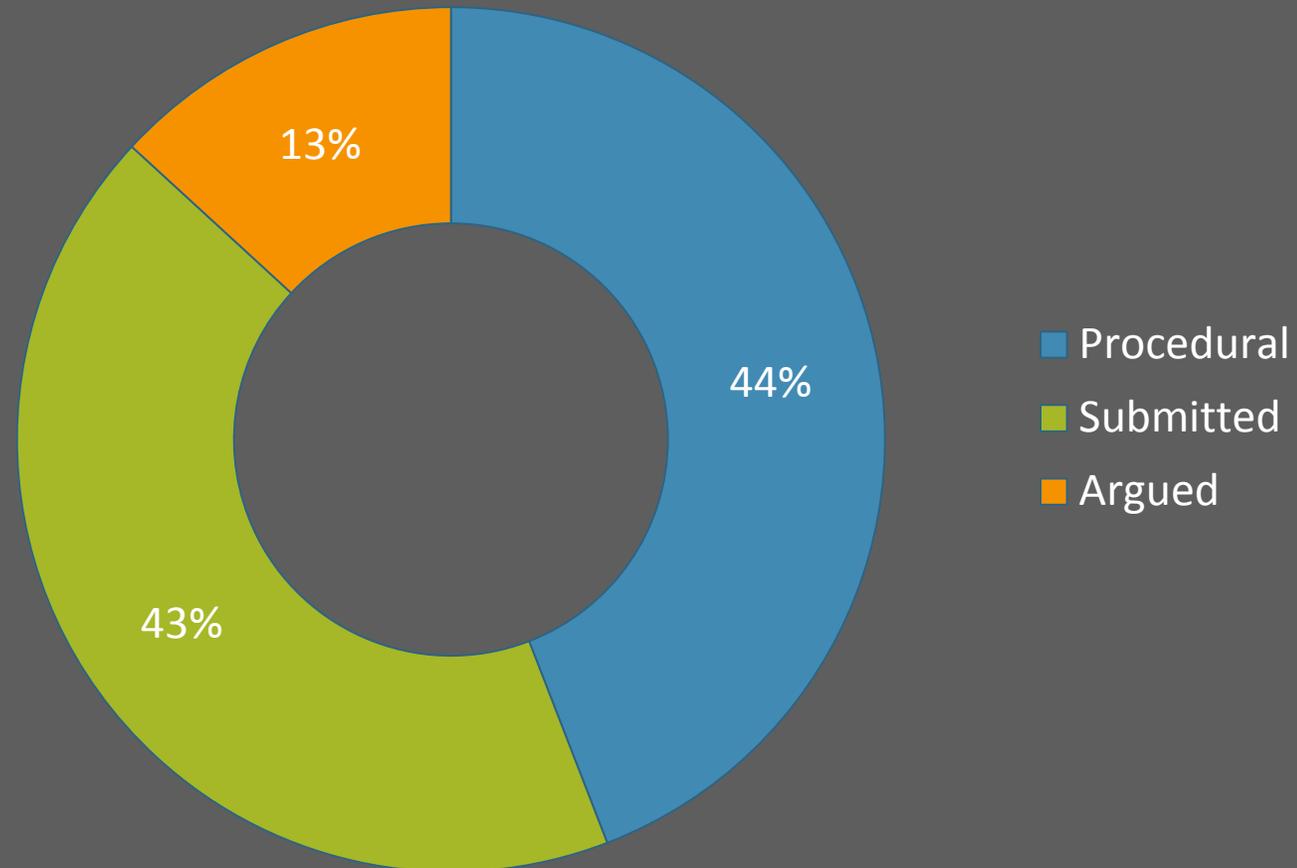
	National	Ninth
Original	1	3.1
BIA	16.3	27.2
Bankruptcy	10.9	26.2
Criminal	10.1	14
Prisoner	6.8	7.8
General	8	15.4

Original BIA Bankruptcy Criminal Prisoner General

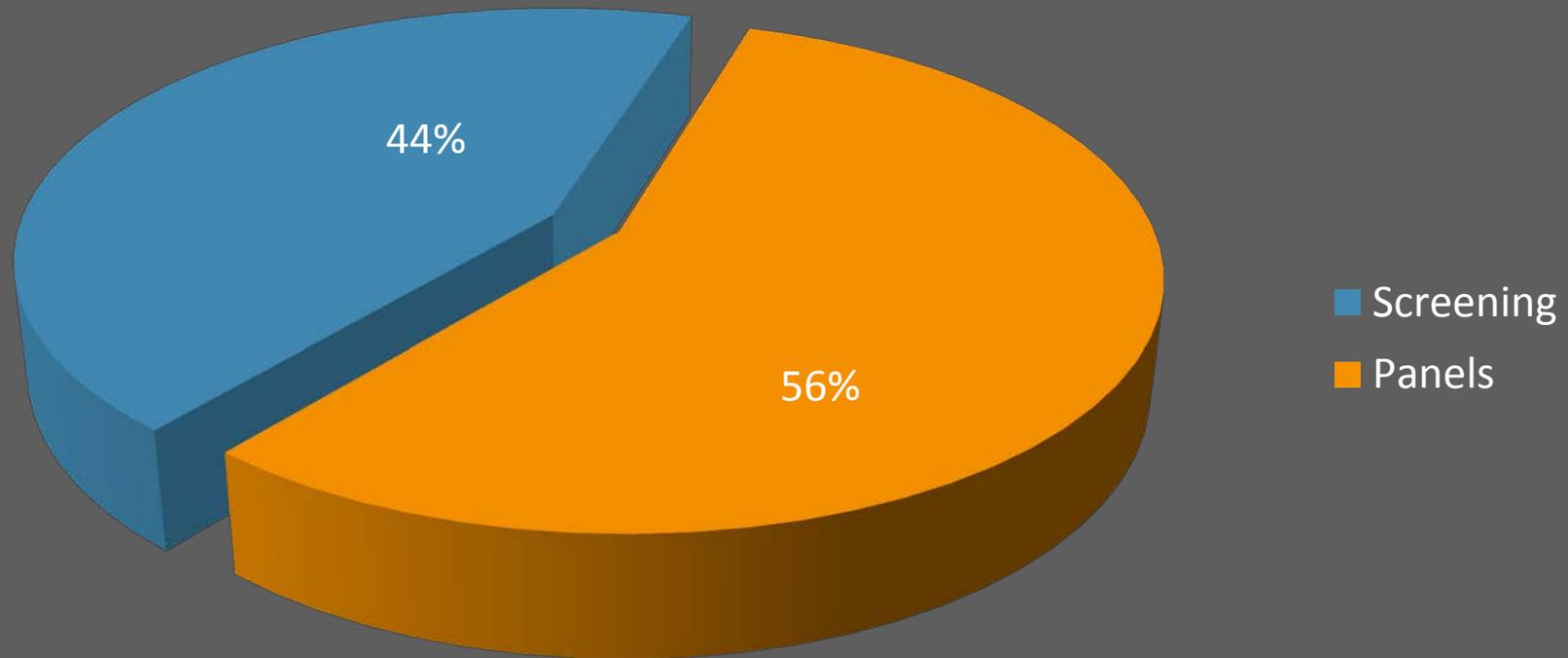
# PRO SE CASES



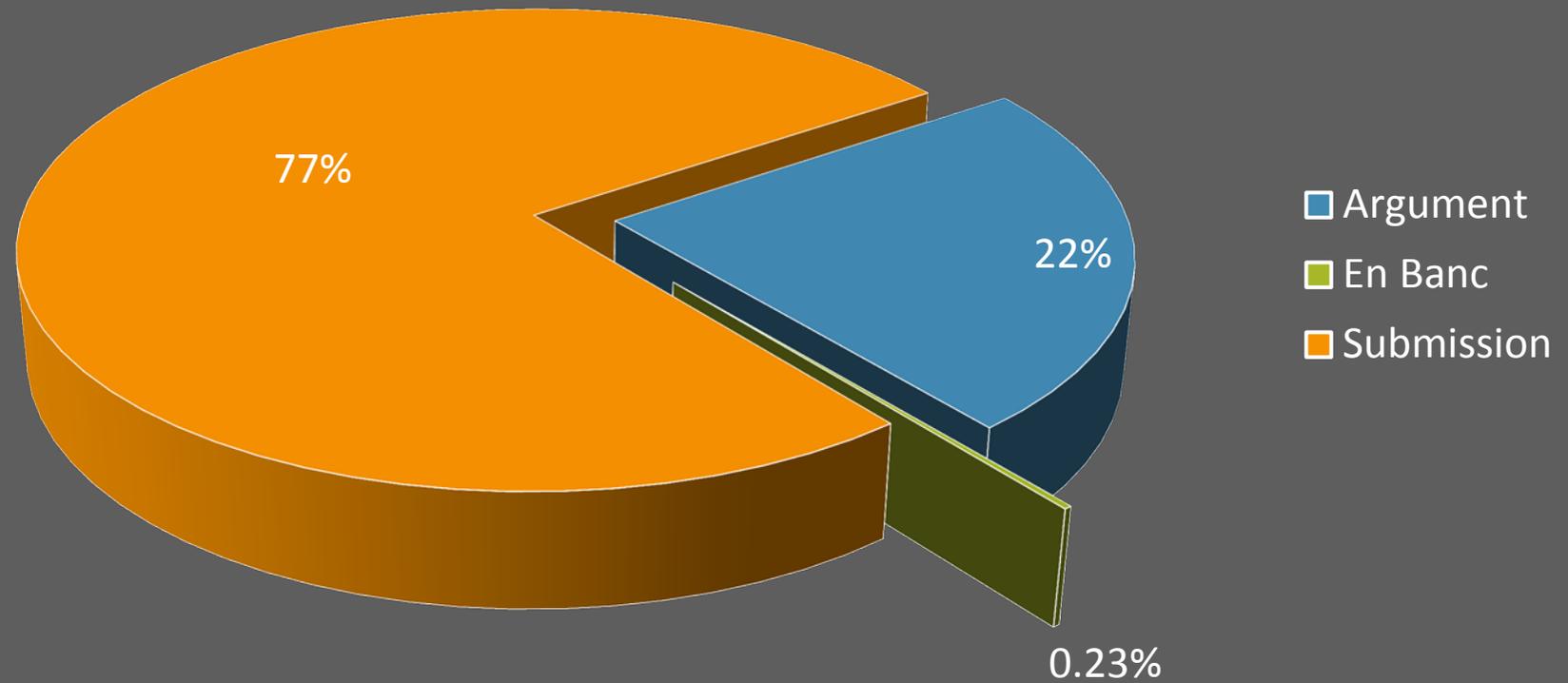
# TYPES OF TERMINATIONS



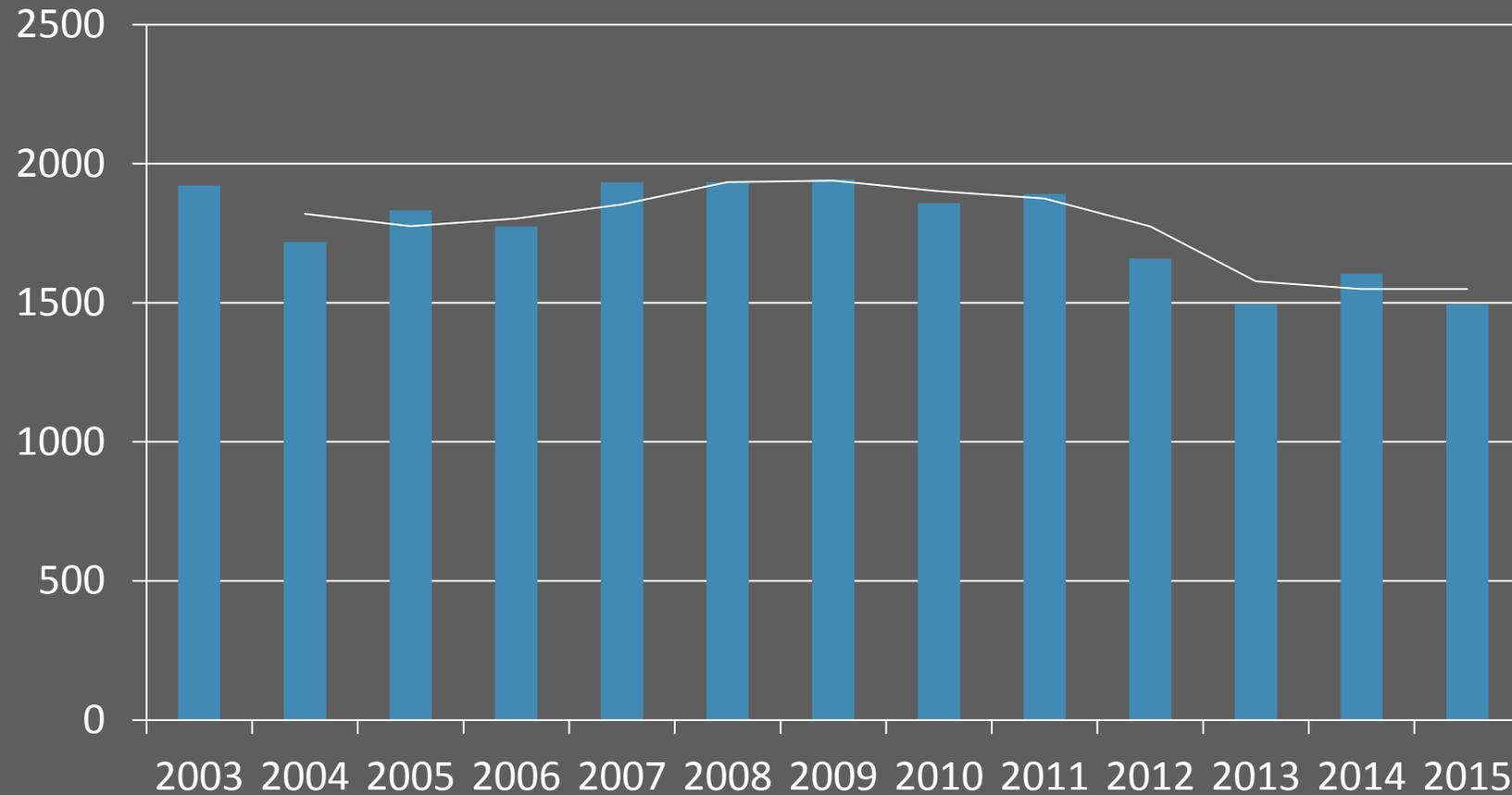
# SUBMISSION ON THE BRIEFS



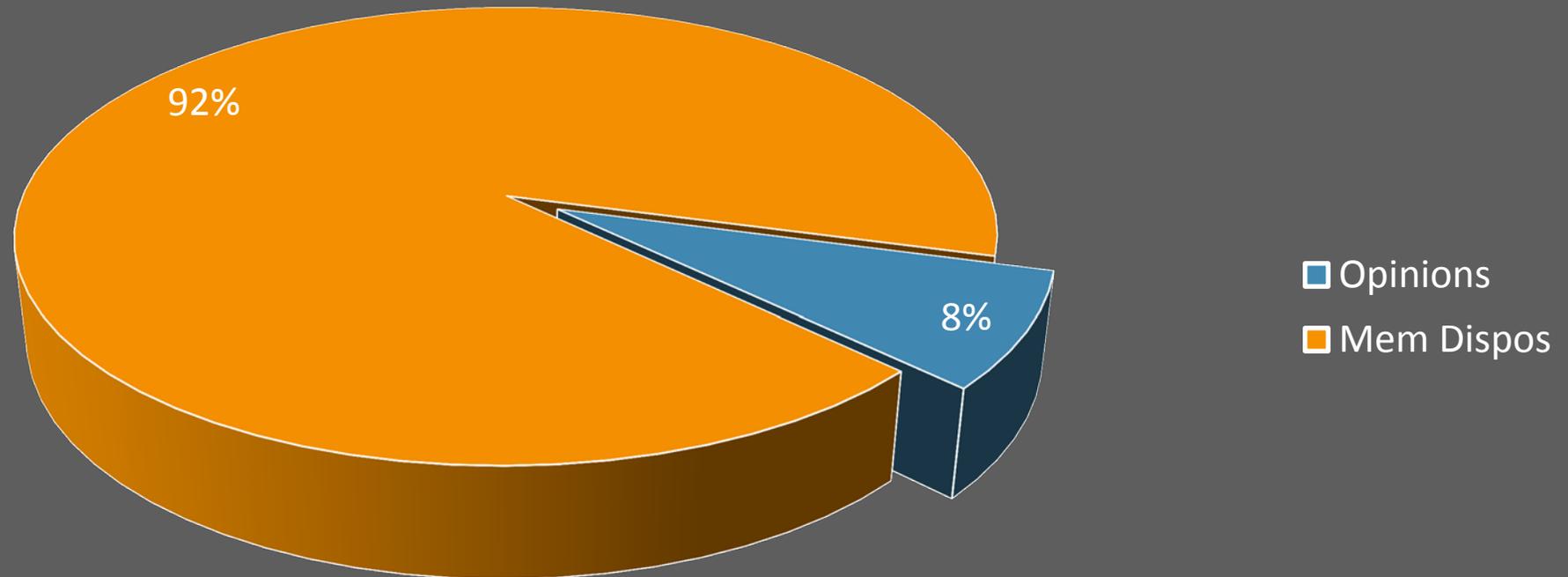
# MERIT TERMINATIONS



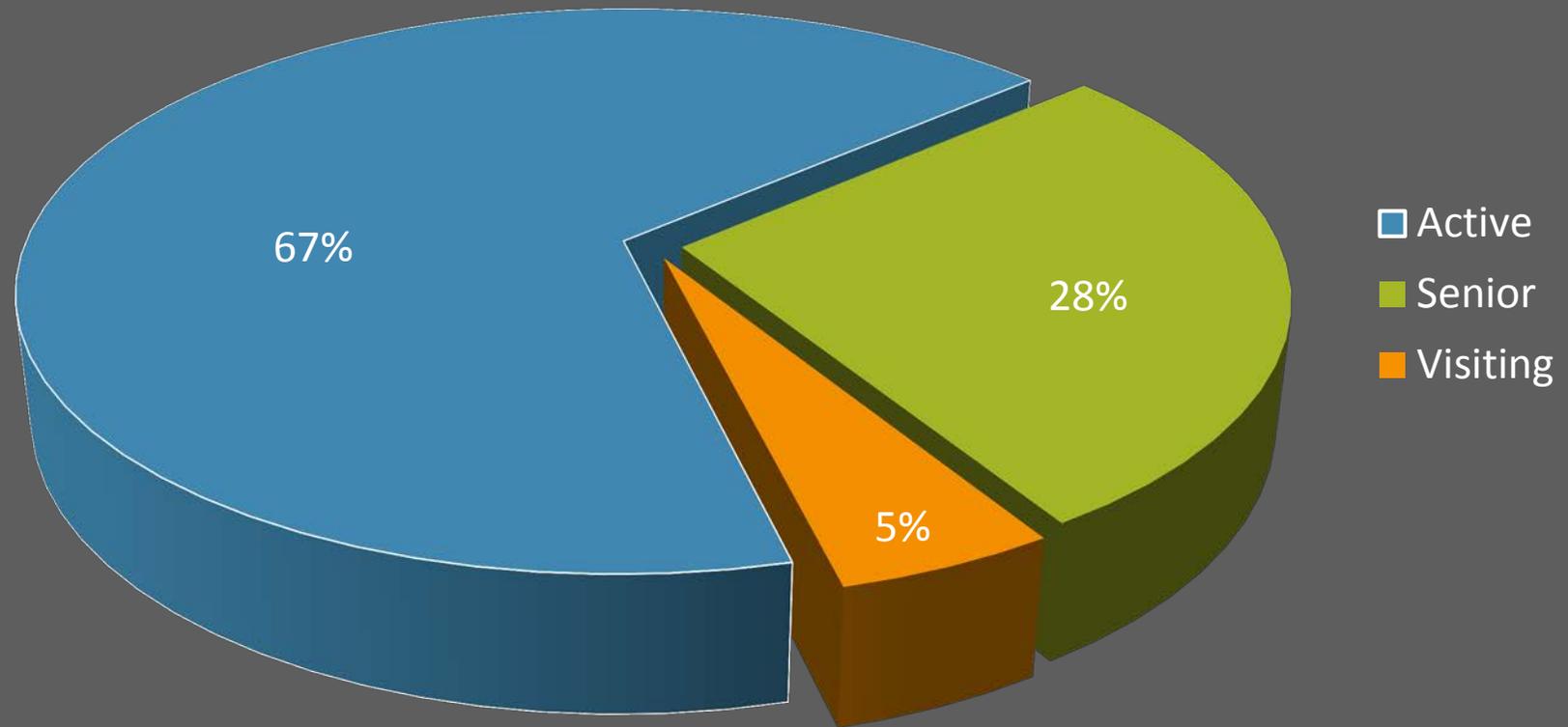
# NINTH CIRCUIT ARGUMENTS



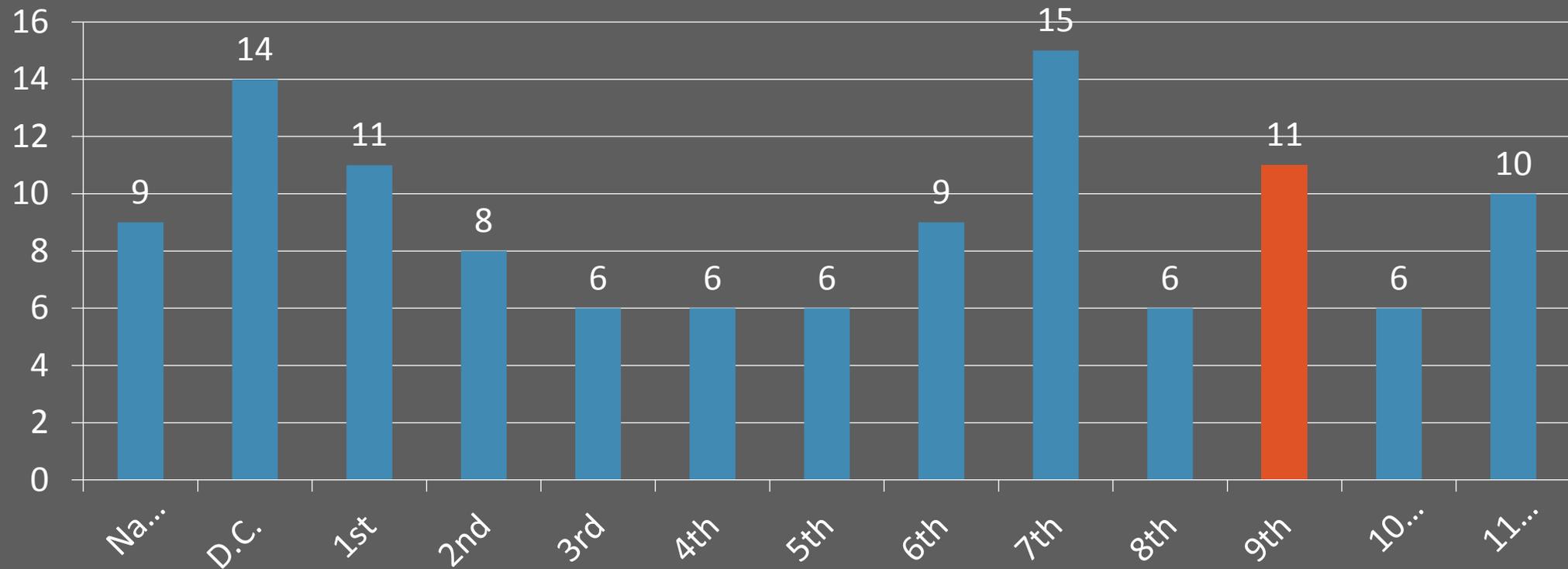
# DECISIONS



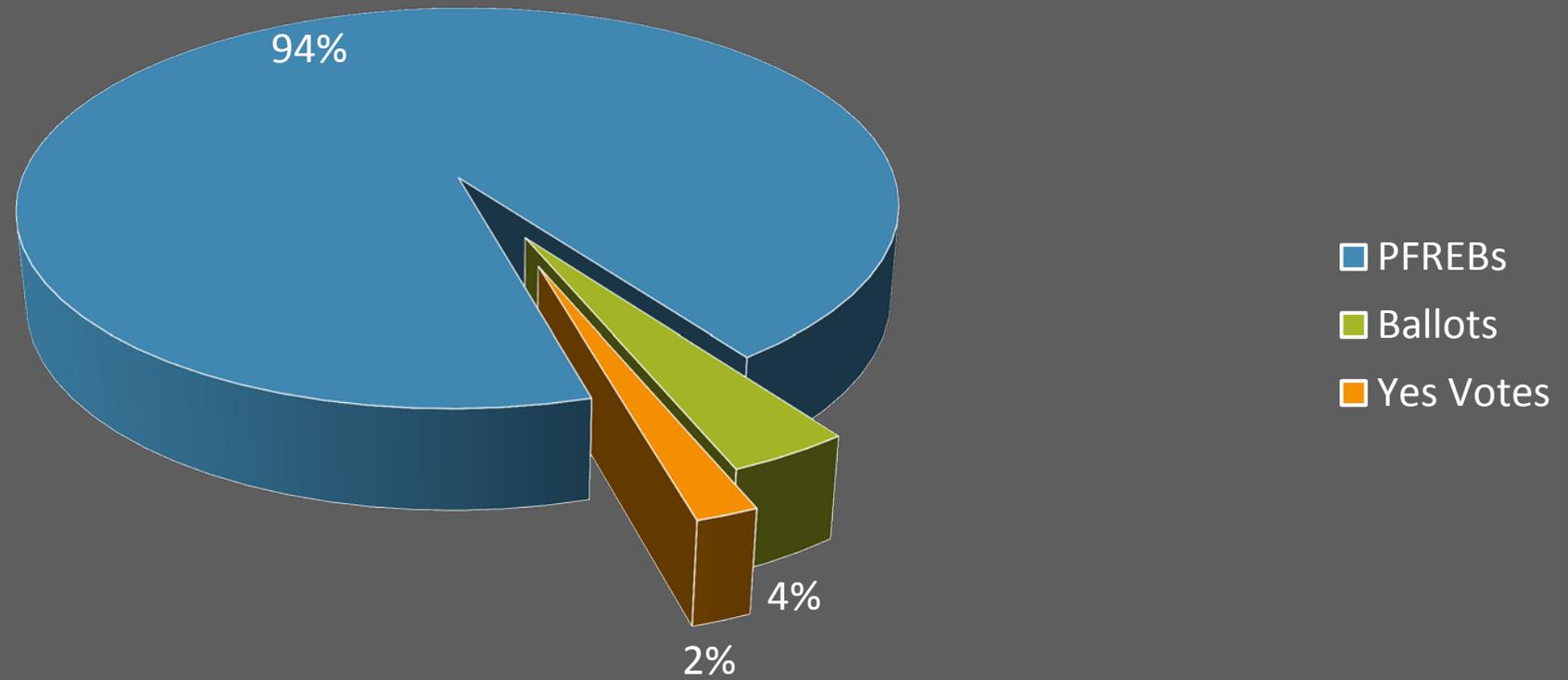
# SENIOR & VISITING JUDGES



# % REVERSALS

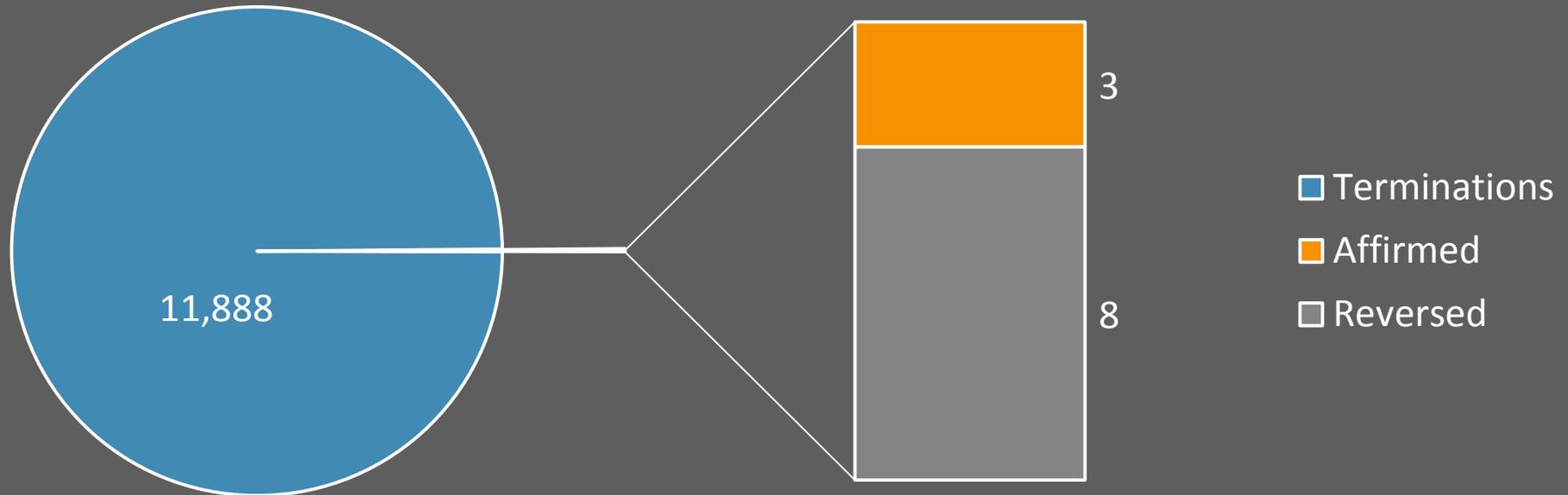


# EN BANCS 2015



# REVERSALS BY SUPREME COURT

2015-2016 TERM



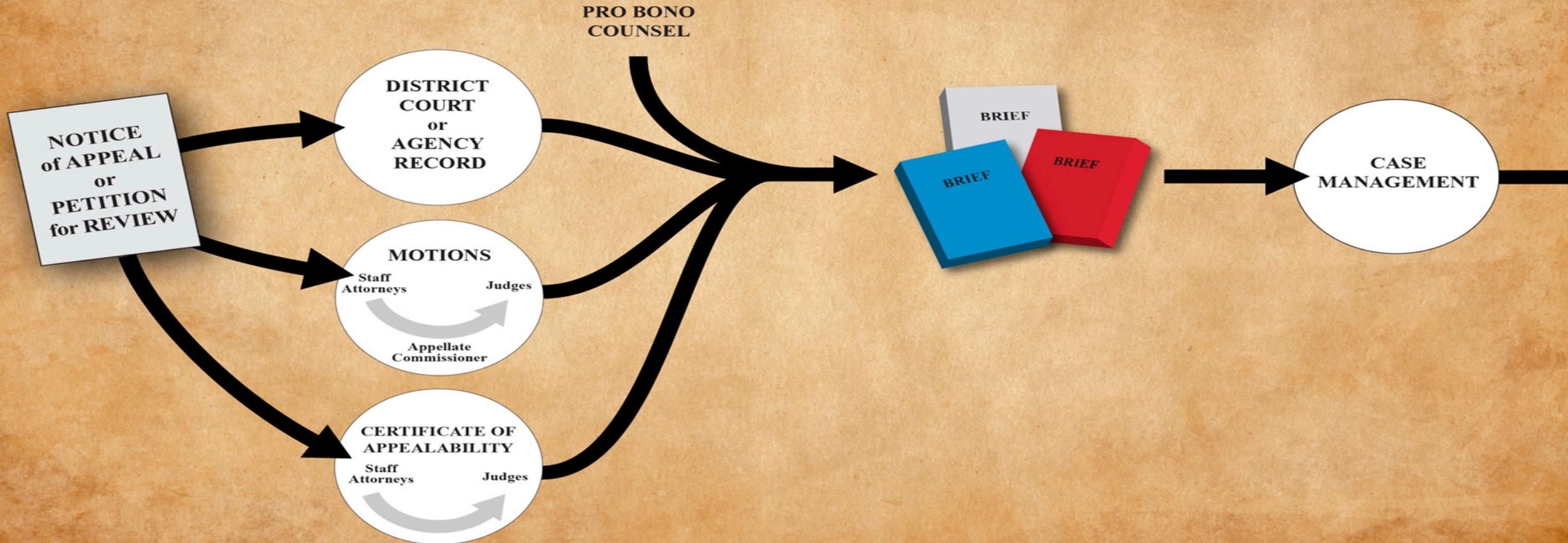
# OUR PROCESS

A Quick Guide to Who, What, When, How, and Why

# THE APPELLATE PROCESS

## PRE-BRIEFING

MEDIATION - - - - -

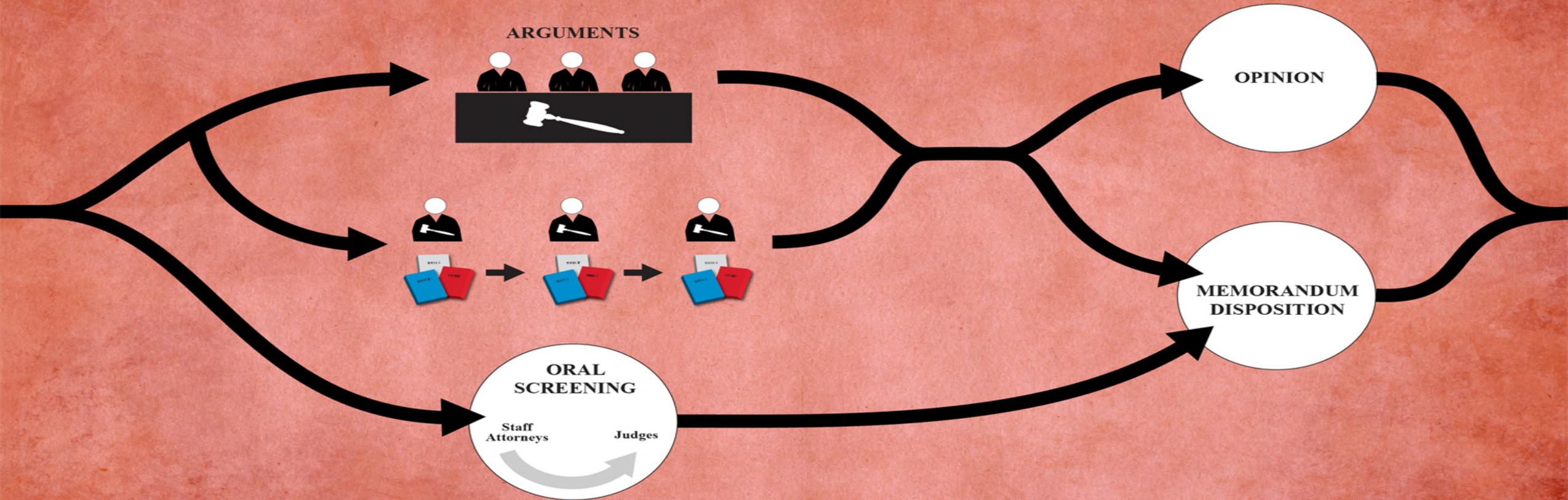


# THE APPELLATE PROCESS

**SUBMISSION**

**DECISION**

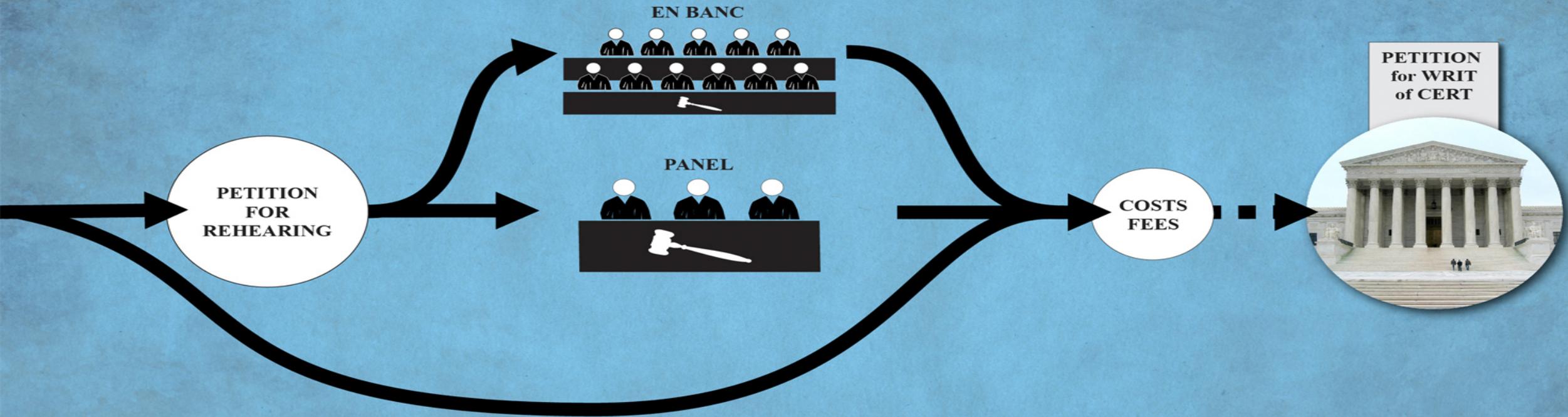
**MEDIATION** - - - - -



# THE APPELLATE PROCESS

## POST JUDGMENT

MEDIATION



# CALL EARLY, CALL OFTEN

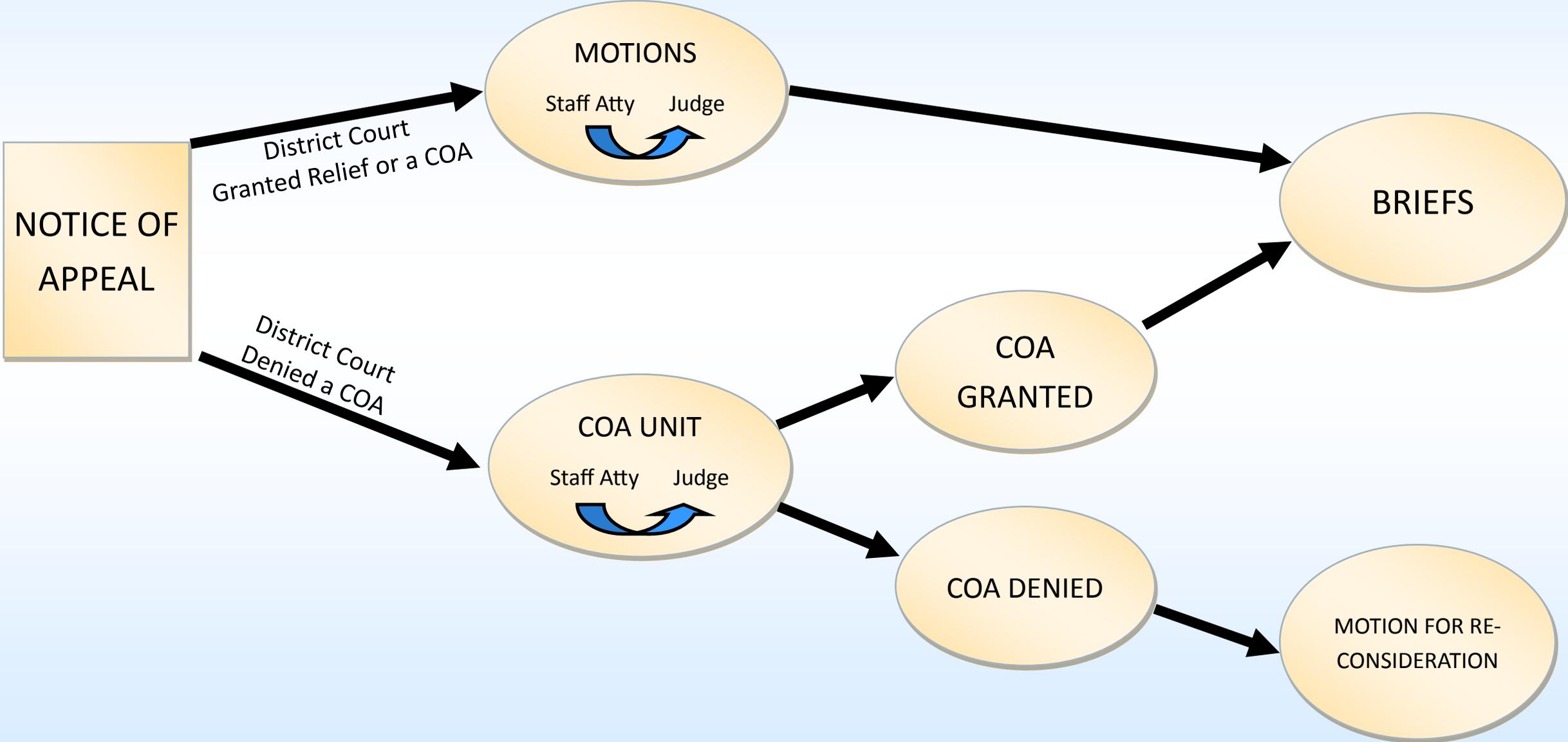
We Really Are Here to Help You

# The Insider's View from Beginning to End

**Karen Burton**, Lead Staff Attorney, Ninth Circuit Certificate of Appealability Unit

**Sara Morimoto Swain**, Reviewing Staff Attorney, Ninth Circuit

# HABEAS APPEALS—PRE-BRIEFING



# Rules Governing § 2254 Cases

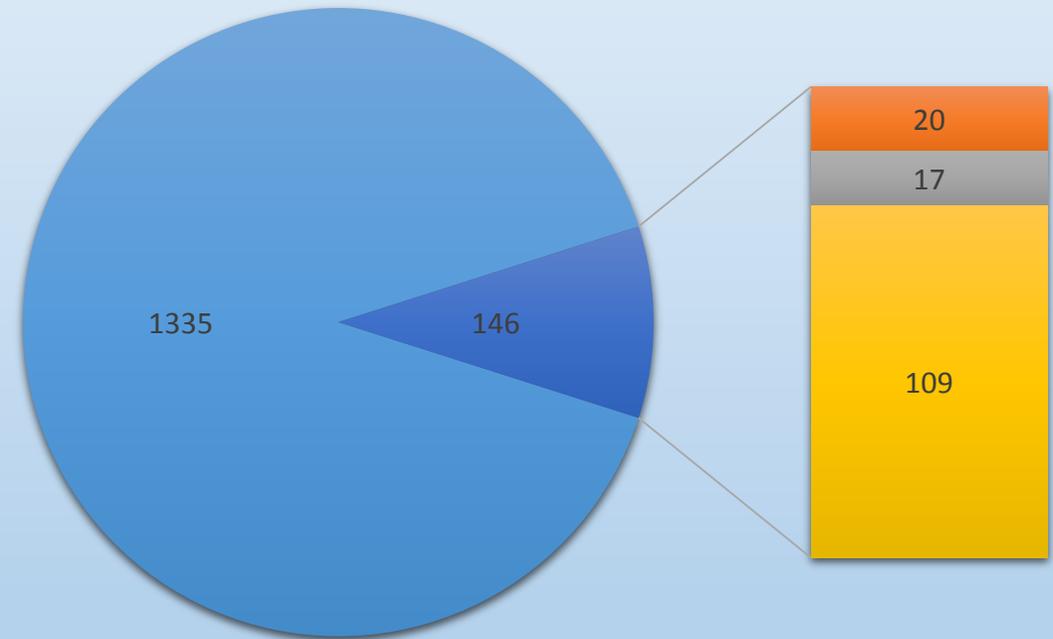
## Rule 11, 28 U.S.C.A. foll. § 2254

- Rule 11. Certificate of Appealability; Time to Appeal
- **(a) Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
- **(b) Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

# Habeas Appeal Statistics (2015)

Total Habeas Appeals: 1,481

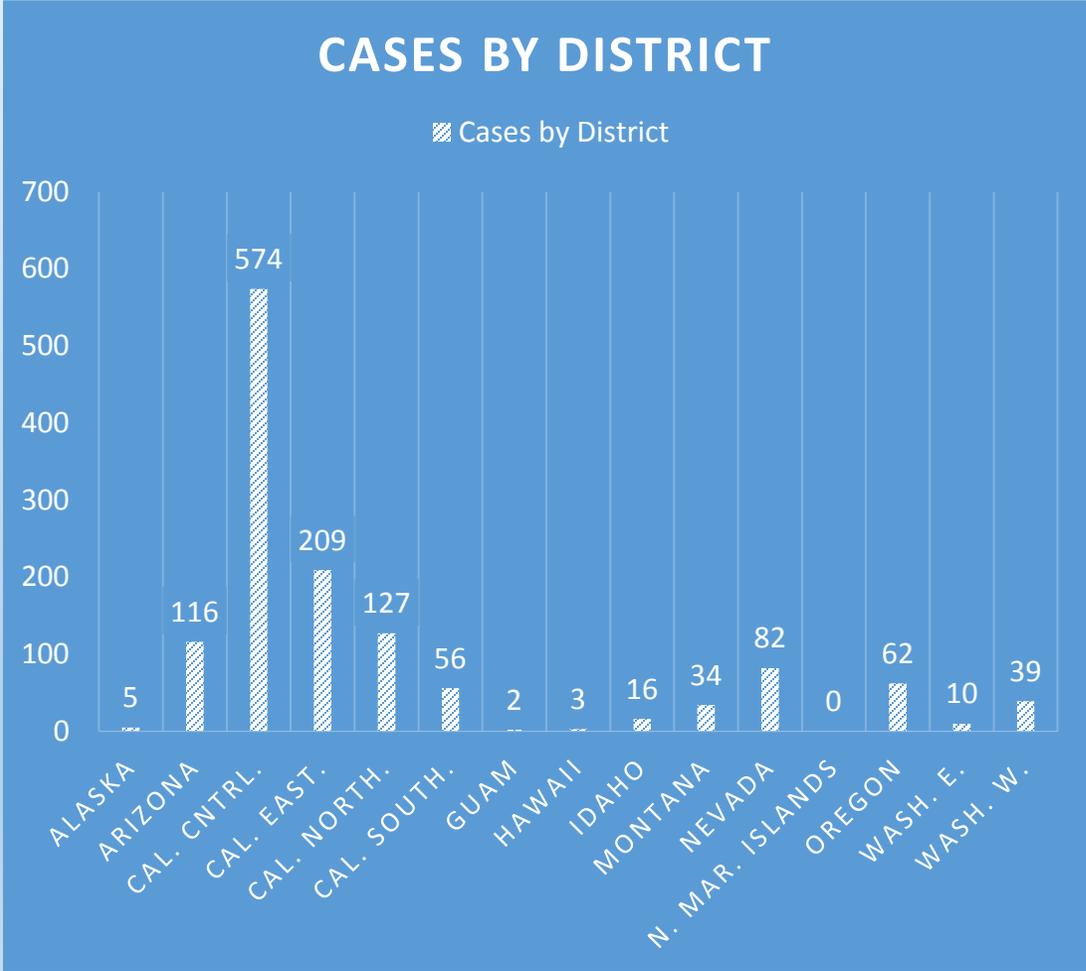
- COA Requests: 1,335
- D. Ct. granted relief/COA: 146
  - 20 – Death Penalty
  - 17 – 2255 Motions
  - 109 – 2254 Petitions



■ COA Requests ■ Death Penalty ■ 2255 Motions ■ 2254 Petitions

# COA Requests Opened by District (2015)

DISTRICT	Cases
Alaska	5
Arizona	116
California Central	574
California Eastern	209
California Northern	127
California Southern	56
Guam	2
Hawaii	3
Idaho	16
Montana	34
Nevada	82
Northern Mariana Islands	0
Oregon	62
Washington Eastern	10
Washington Western	39
TOTAL	1,335



# Ninth Circuit Rule 22-1: Certificate of Appealability (COA)

**(c) Grant in Part or in Full by District Court.** If the district court grants a COA as to any or all issues, a briefing schedule will be established by the Court at case opening and petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. (Rev. 1/1/04; 3/11/04)

**(d) Denial in Full by District Court.** If the district court denies a COA as to all issues, petitioner may file a motion for a COA in the court of appeals within 35 days of the district court's entry of its order (1) denying a COA in full, or (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court of appeals appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion. (Rev. 1/1/04; 12/1/09)

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within 35 days from service of the COA motion. . . . (New 1/1/04; Rev. 12/1/09)

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to Circuit Rule 27-10, may file a motion for reconsideration. (New 1/1/04)

When a motions panel grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. (New 1/1/04)

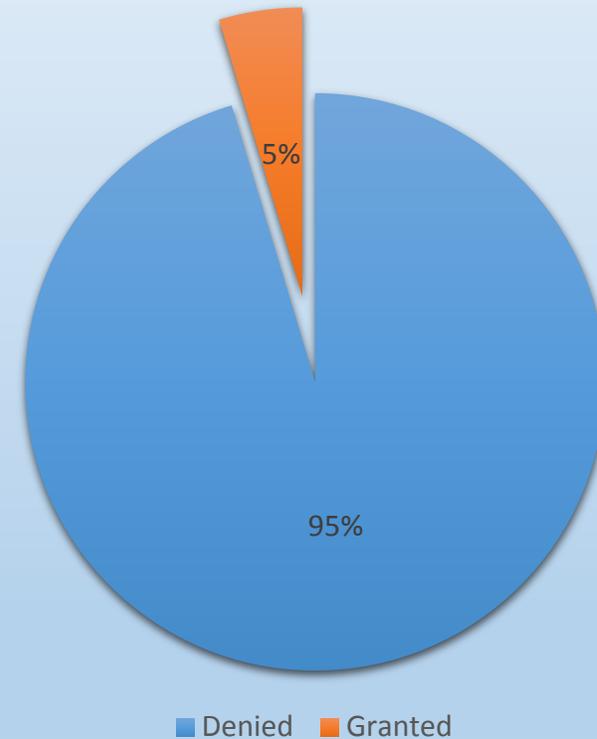
**(e) Briefing Uncertified Issues.** Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the extraordinary case, the Court will not permit a longer brief to accommodate uncertified issues. (New 1/1/04; Rev. 7/1/16)

# Submitted COAs (2015)

Presented to panel: 1,399

Denied: 1,334

Granted: 65



# Best Practices

- File a timely notice of appeal
- Accurately cite and follow the Habeas Rules Governing 2254 and 2255 proceedings, and Ninth Circuit Rule 22-1
- File a request for a certificate of appealability pursuant to 9th Cir. R. 22-1(d)
  - Attach relevant state opinion
  - Brief appropriate standard (28 U.S.C. § 2253(c))
  - Address the underlying substantive issues when seeking a COA on a procedural issue. *See Gonzalez v. Thaler*, 132 S. Ct. 641 (2012)
  - Identify related cases
- Respond to jurisdictional OSCs (both appellants and appellees)
- Avoid filing an *Anders* brief after a court has granted a COA
- File an opening brief within a reasonable time after a briefing schedule is set

# Second or Successive Applications

28 U.S.C. § 2244(b)

28 U.S.C. § 2255(h)

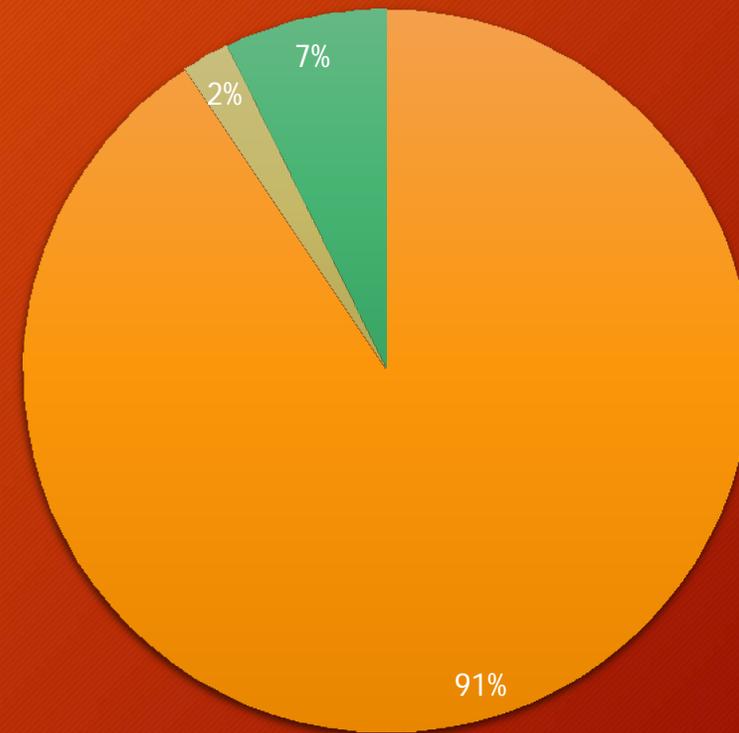
Sara Morimoto Swain

Reviewing Staff Attorney, Ninth Circuit

# Second or Successive Applications (2015)

## 2015

- Applications Filed: 464
- Applications Resolved: 512
  - Denied: 464
  - Granted: 11
  - Further Briefing: 37

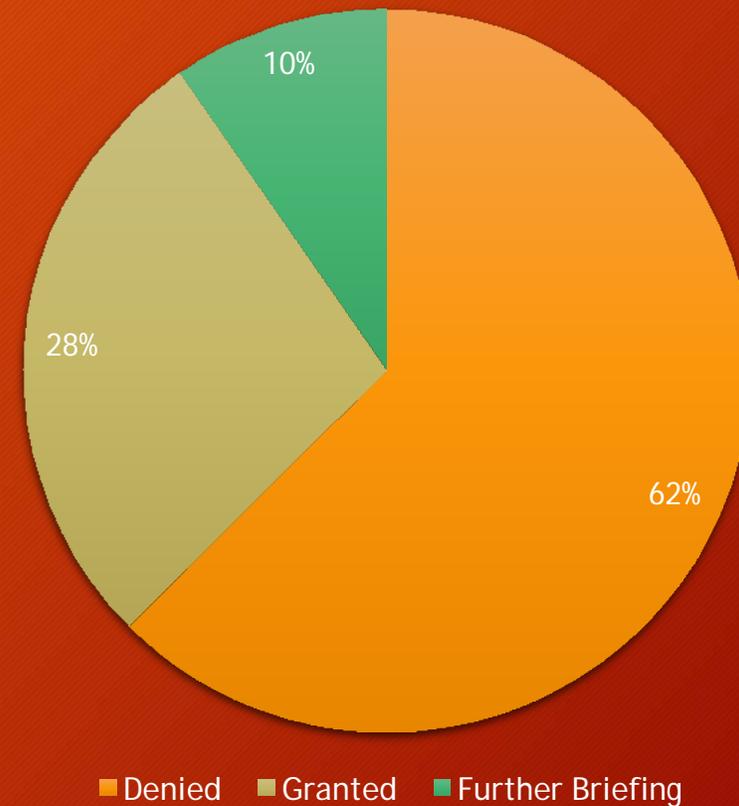


■ Denied ■ Granted ■ Further Briefing

# Second or Successive Applications (2016)

## 2016 (as of Sept. 30)

- Applications Filed: 834
- Applications Resolved: 510
  - Denied: 319
  - Granted: 142
  - Further Briefing: 49





# UNITED STATES COURTS for the NINTH CIRCUIT

Chief Judge Sidney R. Thomas  
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### Cases of Interest

- (10/24/16) 16-16865, Feldman v. Arizona Secretary of State's Office **NEW**
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- (10/21/16) 15-16178, 15-16250 Mohamed v. Uber Tech., Inc. **NEW**
- (10/19/16) 15-17497 Livingwell Medical Clinic v. Harris **NEW**
- (10/19/16) 16-15360 In re: Center for Medical Progress **NEW**
- (10/14/16) 15-17517 A Woman's Friend Pregnancy Resource Clinic v. Harris
- (09/15/16) 15-17420, O'Connor v. Uber
- (09/15/16) 15-17532, 15-17533, 15-17534, O'Connor et al. v. Uber

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- (04/30/15) View Appellate Case Statistics

### Live Streaming Oral Arguments

- Seattle CR2 10:00 AM Tuesday 10/25

### Inmates with Pending Execution Dates

There are no pending executions.

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## Federal Rules of Appellate Procedure (FRAP), Ninth Circuit Rules, Circuit Advisory Committee Notes

Effective July 1, 2016

This document contains the Federal Rules of Appellate Procedure, Ninth Circuit Rules and Circuit Advisory Committee Notes, and is provided in HTML format and as an Adobe Acrobat PDF document. To print this document, use the PDF version.

[FRAP, Circuit Rules, Circuit Advisory Committee Notes](#)

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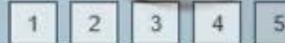
After Opening a Case - Pro Se

Forms

Fee Schedule

Glossary

## How do I register for electronic filing?



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[Form 01 - Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court](#)

07/30/2003

[Form 02 - Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court](#)

07/30/2003

[Form 03 - Petition for Review of Order of an Agency, Board, Commission or Officer](#)

07/30/2003

[Form 04 - Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis](#)

12/01/2013

[Form 05 - Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel](#)

07/30/2003

[Form 06 - Certificate of Compliance](#)

12/01/2009

Form 07 - Notice of Joint Brief Under Ninth Circuit Rule 28-4

Abrogated

[Form 08 - Certificate of Compliance Pursuant to 9th Circuit Rules 29-2\(c\)\(2\) and \(3\), 32-2 or 32-4](#)

07/01/2016

[Form 09 - Application for Attorneys Fees \(civil cases only\)](#)

09/02/2008

[Form 10 - Bill of Costs](#)

12/01/2009

[Form 11 - Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1](#)

07/30/2003

[Form 12 - Application for Leave to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255](#)

07/01/2016

[Form 13 - Initial Streamlined Request for Extension of Time to File Brief](#)

07/15/2015



# Changes to Ninth Circuit Rule 22-3 & Form 12

(effective July 1, 2016)

- “Petitioner” → “Applicant”
- Relaxes certain requirements for unrepresented litigants
- Clarifies district court’s role in responding to unauthorized second or successive § 2255 motions/ § 2254 habeas petitions
- Requests information specific to capital and non-capital cases

# SOS Applications & Emergency & Urgent Motions

- Ninth Circuit Rule 22-3 – SOS Applications
- Ninth Circuit Rule 27-3 – Emergency and Urgent Motions
  - Rule 27-3(a) – Emergency motions require a showing of irreparable harm within 21 days
  - Rule 27-3(b) – Urgent motions require a showing of irreparable harm by a specific date or event but not within 21 days

Call: 415-355-8020

# Cases of Interest

- *Orona v. United States*, 826 F.3d 1196 (9th Cir. 2016)
- *Goodrum v. Busby*, 824 F.3d 1188 (9th Cir. 2016)
- *Rishor v. Ferguson*, 822 F.3d 482 (9th Cir. 2016)
- *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016)
- *Gage v. Chappell*, 793 F.3d 1159 (9th Cir. 2015)
- *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)
- *Welch v. United States*, 136 S. Ct. 1257 (2016)

# Cases of Interest (cont'd)

## Pending before Supreme Court

- *Beckles v. United States*, No. 15-8544
- *Lynch v. Dimaya*, No. 15-1498

## Pending before Ninth Circuit

- *Clayton v. Biter*, No. 15-71566
- *Perez v. Holland*, No. 14-55815
- *Smith v. United States*, No. 15-73591



# Records

Karen Burton

Xiomara Costello

Gail Ivens

Steven Seferian

# Overview of Records Life Cycle





Capitol Digital  
916.443.3000

xerox

Martinez v. Eaves  
2007-cv-0099

12-154700

12-500

12-500

12-563

13-57102

1-4

11-56700

15-CV-010

15-CV-010

09

Jackson v. Davoy  
16-56106

16-56106

15-16000

14-56700

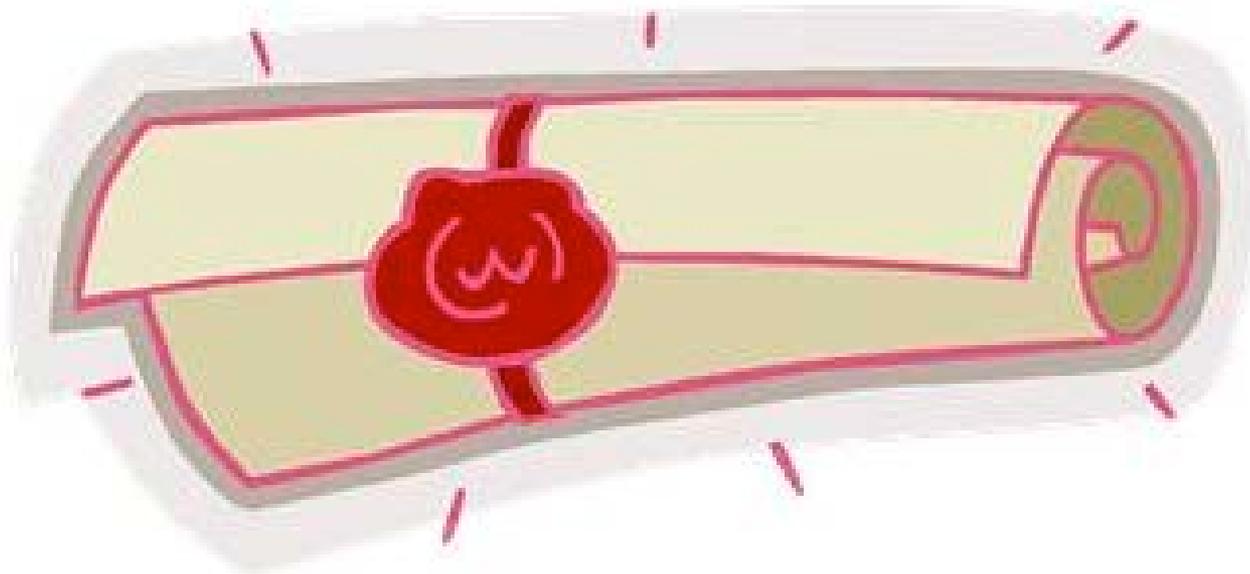
# Paper Lodged Documents

- \* Mechanics of transfer to Circuit

# Electronic Lodging



# Why we Seal



# What is the Record in a 2254 appeal?

- \* District Court filings
- \* Exhibits and Testimony from hearings
- \* Lodged Documents
- \* Other?

# Helping the Court

## \***Practice Pointer:**

- \* Include all documents relevant to the claim's progression from state court to district court to Ninth Circuit, including rulings, relevant to exhaustion



14-30223 USA v. Lajai Pridgette

February 2, 2016  
Courtroom 2, 7th Floor  
Seattle, Washington  
Before: KOZINSKI, O'SCANLAIN, GOULD



# ERs and RTs

## \***Practice Pointer:**

- \* Remember, the Court has only ONE copy of the hard copy lodged documents, so if you want all the chambers to know what happened, it needs to be in the ER if not available electronically

# State Record vs. Lodged Documents

- \* *McDaniels v. Kirkland*, 813 F.3d 770, 780 (9<sup>th</sup> Cir. 2015)(en banc)

# ERs and RTs

## \***Practice Pointer:**

- \* Anything cited in the briefs must be included in the ERs, Supplemental ERs or a Request for Judicial Notice

# What is lodged?

- \* Central District Local Rules
  - \* Specify lodgments in Capital Cases
  - \* Lodgments in Non-capital by order
  - \* Not the complete record, usually the CT, RT and appellate briefing and orders, including the opinion

# Outside the CD

- \* Compare ND Cal Rules  
<http://cand.uscourts.gov/localrules/habeas>
- \* SD Cal Civil Rules HC.2, no provisions
- \* Rule 190(f) of the ED Cal Rules
  - \* Preference for electronic filing of “habeas corpus transcripts and other state court records”

# Cal Rules of Court

- \* Contents of CT and RT specified by California Rules of Court

# CT Contents

- \* Rule 8.320(b) (the “normal” record)
  - \* E.g., accusatory pleading, jury instructions, jury notes, notice of appeal, judgments, written defense motions, PSR, motion to vacate the judgment, minute orders

# RT Contents

- \* Rule 8.320(c)
  - \* Guilty and nolo pleas, motions in limine, trial, instructions, new trial proceedings, closing arguments

# Showing Prejudice

## \***Practice Pointer:**

- \* Don't cite to the state appellate opinion to demonstrate presence or absence of prejudice---cite to the actual trial record

# Habeas Rule 5

- \* Rule 5 of the Rules Governing Section 2254 Cases
  - \* 5(c) Transcripts
    - \* What's available; attach what is relevant
  - \* 5(d) Briefs on Appeal and Opinions
    - \* Petitioner's filings, respondent's responses, orders and opinions

# “New” record on appeal

## \*Practice Pointer:

- \* Must attach to a request for *judicial notice*, even if it is part of the state court appellate record. **DO NOT** include it in the ER

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Tulare County Courthouse, 1870

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Oral arguments will be streamed live from San Francisco on Oct 5 and 6.

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The U.S. Department of Justice has awarded the Judicial Council of California a grant to study and identify issues related to defendants' inability to pay fines and fees.

### FROM THE CHIEF JUSTICE

Sep 22, 2016

#### Chief Justice Tani G. Cantil-Sakauye



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[Supreme Court Issues Order Inviting Amicus Curiae Submissions Following Receipt of State Bar's Interim Special Regulatory Assessment Request](#) (Sep 30, 2016)

Chief Justice Tani G. Cantil-Sakauye, acting on behalf of the state Supreme Court, today issued an order inviting any person or entity wishing to comment on the State Bar's Request to submit an amicus curiae letter to the court by Tuesday, October 11, 2016.

[Supreme Court Temporary Webcast Archive Updated with September Cases](#) (Sep 26, 2016)

The temporary oral argument webcast archive on its section of the California Courts Newsroom has been updated to include the cases argued at the September 7 and 8 oral argument calendar session in San Francisco.

[Jorge E. Navarrete Appointed First Latino Court Administrator and Clerk of the Supreme Court](#) (Sep 14, 2016)

Chief Justice Tani G. Cantil-Sakauye today announced, on behalf of the Supreme Court of California, the appointment of Mr. Jorge E. Navarrete, the court's current Assistant Clerk Administrator, as the twenty-seventh Court Administrator and Clerk of the Supreme Court. The appointment will take effect Saturday, October 1, 2016.

[Supreme Court oral argument calendar for October 5 and 6, 2016](#) (Sep 14, 2016)

Supreme Court announces Oral Argument Calendar for October 5 and 6, 2016 in its San Francisco courtroom.

[Supreme Court Directs State Bar of California to Submit Request for Interim](#)

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Supreme Court Case Number	Court of Appeal Case Number	Trial Court Case Number
S060778 GATES (OSCAR) ON H.C.		
S060624 GATES (OSCAR) ON H.C.		
S035145 GATES (OSCAR) ON H.C.		
S028973 GATES, OSCAR		
S021208 GATES (OSCAR) ON H.C.		
S020740 GATES (OSCAR) ON H.C.		
S006631 GATES (OSCAR) v. S.C. (PEOPLE)		
S004394 PEOPLE v. GATES (OSCAR)		

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**VIDEO**

Inside the California Supreme Court

### OF CURRENT INTEREST

[Supreme Court Issues Order Appointing Justice Elwood Lui as a Special Master](#) (Oct 17, 2016)  
 Chief Justice Tani G. Cantil-Sakauye, acting on behalf of the state Supreme Court, today issued an order appointing Associate Justice Elwood Lui of the Court of Appeal, Second Appellate District, Division One, as a special master for *In re Attorney Discipline System*, S237081.

[Supreme Court Seeks Comment on Disclosure of Applicant and Examination Information](#) (Oct 7, 2016)  
 The Supreme Court of California is seeking public comment on whether to add a new rule of court providing that certain applicant and examination information may continue to be released by the State Bar of California. Comments should be submitted by Wednesday, October 26, 2016.

[Supreme Court oral argument calendar for November 1 and 2, 2016](#) (Oct 12, 2016)  
 Supreme Court announces Oral Argument Calendar for November 1 and 2, 2016 in its Stanley Mosk Library and Courts Building, Sacramento.

[Supreme Court Issues Order Inviting Amicus Curiae Submissions Following Receipt of State Bar's Interim Special Regulatory Assessment Request](#) (Sep 30, 2016)  
 Chief Justice Tani G. Cantil-Sakauye, acting on behalf of the state Supreme Court, today issued an order inviting any person or entity wishing to comment on the State Bar's Request to submit an amicus curiae letter to the court by Tuesday, October 11, 2016.

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**SUPREME COURT MINUTES  
WEDNESDAY, AUGUST 31, 2016  
SAN FRANCISCO, CALIFORNIA**

**S236208**

**HELLER ERHMANN LLP v.  
DAVIS WRIGHT TREMAINE  
LLP**

Request for certification granted

The court grants the request, made pursuant to California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Pursuant to rule 8.548(f)(5) of the California Rules of Court, this court restates the certified question as follows: Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?

For the purposes of briefing and oral argument, appellant Heller Ehrman, LLP is deemed the petitioner in this court. (Cal. Rules of Court, rule 8.520(a)(6).)

Werdegar, J., was recused and did not participate.

Votes: Cantil-Sakauye, C. J., Chin, Corrigan, Liu, Cuéllar, and Kruger, JJ.

# Getting Records

- \* Ask opposing counsel
- \* Ask former appellate counsel
- \* Ask client
- \* Ask client's family

# Order files

- \* LASC
- \* CCA
- \* CSC

# Other Options to get Records?

- \* Discussion

# Standards of Review and Legal Framework

Ninth Circuit Non-Capital Habeas Training  
October 27, 2016  
Pasadena, California

Xiomara Costello, Supervising Deputy Attorney General

Elizabeth Dahlstrom, Supervising Deputy Federal Public Defender

# Overview

- Standards of review for district court decision
- Standards of review for state court decision
- Identifying relevant state court decision
- Procedural default
- Merits and 28 U.S.C. § 2254 review

# Importance of standard of review

“The outcome of a petition for a writ of habeas corpus is frequently dictated by the applicable standard of review.”

*-Lambert v. Blodgett,*  
393 F.3d 943, 964 (9<sup>th</sup> Cir. 2004)

# Circuit Rule 28-2.5

“As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.”

# De novo review for legal issues

- Grant or denial of petition
- Dismissal for procedural default
- Dismissal for lack of exhaustion
- Dismissal based on mootness
- Whether to toll statute of limitations, if facts are undisputed

# Clear error for factual findings

- Facts underlying equitable tolling
- Facts underlying deficient performance in IAC claims
- Certain *Batson* findings
- Credibility determinations

# Clear error for findings based on documentary evidence

“Findings of fact, whether based on oral *or other evidence*, must not be set aside unless clearly erroneous.”

-Fed. R. Civ. P. 52(a)(6)

*See Crittendon v. Chappell*, 804 F.3d 998, 1006-07 (9<sup>th</sup> Cir. 2015) (applying Rule 52(a)(6) in habeas)

# Mixed questions of law and fact can be either

“[T]he standard of review turns on whether factual or legal matters predominate.”

*-Tolbert v. Page,*

182 F3d 677, 682 (9th Cir. 1999) (en banc)

# But mixed questions often *de novo*

IAC claims are mixed questions reviewed *de novo*.

-*Frierson v. Woodford*,  
463 F.3d 982, 988 (9<sup>th</sup> Cir. 2006)

Application of AEDPA is a mixed question reviewed *de novo*.

-*Lambert v. Blodgett*,  
393 F.3d 943, 965 (9<sup>th</sup> Cir. 2004)

# Abuse of discretion for procedural issues

- Grant or denial of evidentiary hearing
- Scope of hearing
- Whether to conduct discovery
- Whether to permit amendment of pleadings
- Whether to stay proceedings
- Whether to allow withdrawal and abeyance
- Dismissal for failure to submit pleadings in required time

# Resource: Ninth Circuit Standards of Review outline



The screenshot shows the website for the United States Courts for the Ninth Circuit. The page title is "Standards of Review" and the URL is [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000368](https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000368). The page features a navigation menu with links to Home, About the Court, Attorneys, News Media, and Employment. A sidebar on the left contains various resources such as Electronic Filing, Opinions, Calendar, Case Information, FAQs, Forms and Instructions, Rules, Guides and Legal Outlines, Audio and Video, and RSS Feeds. The main content area is titled "Standards of Review" and is dated "Revised May 2012". It includes a disclaimer stating that the outlines are for research purposes only and are updated annually. Below the disclaimer, there are links to various guides and outlines, including "Appellate Jurisdiction in the Ninth Circuit", "Appellate Practice Guide", "Ninth Circuit Immigration Outline", "Perfecting Your Appeal", "Section 1983 Outline", "Social Security Outline", "Standards of Review", and "Immigration Training - Powerpoints and Materials". Each of these links has corresponding HTML and PDF download options.

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Revised May 2012

None of these Outlines are intended to express the opinion of the Ninth Circuit Court of Appeals. Instead, they are offered merely as a research tool. Users are strongly encouraged to read the cases and conduct independent research. These Outlines are updated by court staff annually at best and so, legislation may change and/or the cases cited may well have been amended, withdrawn or overruled.

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# Standards of review for state court decisions

- AEDPA standards – 28 U.S.C. § 2254(d)
- Review foreclosed due to procedural default
- De novo because petitioner overcame procedural default
- De novo review because state court did not decide merits of exhausted claim

# Nature of 2254(d)

Federal court has “the obligation to apply the correct standard [under the AEDPA], for the issue is non-waivable.”

*-Amado v. Gonzalez,*

758 F.3d 1119, 1133 n.9 (9<sup>th</sup> Cir. 2014)

# 2254(d) applies to adjudications “on the merits”

A judgment is on the merits if it was “delivered after the court ... heard and evaluated the evidence and the parties’ substantive arguments.”

*-Johnson v. Williams,*  
133 S. Ct. 1088, 1097 (2013)

# Summary denials are merits decisions

Where a state court gives no reason for its denial, there is a presumption that the denial is “on the merits” for AEDPA purposes.

*-Harrington v. Richter,*  
562 U.S. 86, 99 (2011)

# Presumption in reasoned opinions

“[A] federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.”

-*Williams*, 133 S.Ct. at 1096

# Either side can rebut presumption

- Petitioner: state court overlooked or failed to address federal claim, at least where state standard is less protective than the federal.
- State: claim should be considered defaulted for petitioner's failure to develop claim in briefing.

-*See Williams*, 133 S. Ct. at 1096

# Issues not decided on the merits are reviewed *de novo*

Where state court denied *Strickland* claim on prejudice alone, the deficient performance prong is reviewed *de novo*.

-See *Wiggins v. Smith*,  
539 U.S. 510, 531 (2003)

# Exhaustion

“[T]he prisoner must ‘fairly present’ his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.”

*-Baldwin v. Reese,*  
541 U.S. 27, 29 (2004)

# “Fundamentally altered” standard

Where “supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts,” the claim has not been unexhausted.

*-Vasquez v. Hillery, 474 U.S. 254, 260 (1986)*

# *Pinholster*

Only evidence presented to state court may be considered in 2254(d)(1) analysis.

-*Cullen v. Pinholster*, 131 S. Ct. 1388 (2011)

# *Pinholster's* effect on exhaustion

“[T]he *Pinholster* court expressly declined to ‘decide where to draw the line between new claims and claims adjudicated on the merits.’”

-*Dickens v. Ryan*,

740 F.3d 1302, 1320 (9th Cir. 2014)

*citing Cullen v. Pinholster*,

131 S. Ct. 1401 n.10 (2011)

# Identifying Operative State Court Decision

*Ylst* “look through” doctrine

Court “looks through” summary or silent orders to  
“last reasoned decision.”

*Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991)

# Appellate Claim vs. Habeas Claim

- Appellate Court Opinion
- Habeas Denial Order
  - Summary v. Reasoned
- Trial Court Ruling
  - E.g., *Cannedy v. Adams*, 706 F.3d 1148, 1159 n.5 (9<sup>th</sup> Cir. 2013) (deferring to trial court's ruling on admissibility of evidence under Confrontation Clause)

# Practice Pointer

Specify operative state court decision

➤ One operative state court decision

*Curiel v. Miller*, 830 F.3d 864, 870 (9<sup>th</sup> Cir. 2016) (en banc)  
(last decision reviewed “in isolation and not  
in combination)

# Procedural Bars

- Procedural Bar precludes federal review
  - Independent
  - Adequate

*Coleman v. Thompson*, 501 U.S. 722, 729 (1991)

# Two Requirements

- Independent: not interwoven with federal law
- Adequate: firmly established and regularly followed

# California's Timeliness Bar

- California's Timeliness Bar
  - *In re Robbins*, 18 Cal. 4<sup>th</sup> 771, 780 (1998) or
  - *In re Clark*, 5 Cal. 4<sup>th</sup> 750, 765 n. 5 (1993)/*Robbins*
  - Independent – *Bennett v. Mueller*, 322 F.3d 573, 582-83 (9<sup>th</sup> Cir. 2003)
  - Adequate – *Walker v. Martin*, 562 U.S. 307 (2011)
    - Discretionary rule is adequate

# California's *Dixon* Bar

- *In re Dixon*, 41 Cal.2d 756, 759 (1953)
  - Record-based claims cannot be raised on habeas
  - Independent
  - Adequate – *Johnson v. Lee*, 136 S. Ct. 1802 (2016) (per curiam)
    - “Seeming inconsistencies” due to “missing citations” do not show inadequacy

# Other Common Bars: *Lindley*

- *Lindley* bar

- Sufficiency of the evidence claims cannot be raised on habeas

*In re Lindley*, 29 Cal. 2d 709 (1947) (in bank)

- Independent and adequate – *Carter v. Giurbino*, 385 F.3d 1194, 1197-98 (9<sup>th</sup> Cir. 2004)

# Other Common Bars: Contemporaneous Objection

- Contemporaneous objection bar
  - Failure to object at trial precludes review
  - Cited cases vary
  - Independent and adequate – *Cunningham v. Wong*, 704 F.3d 1143, 1155 (9<sup>th</sup> Cir. 2013); *Rich v. Calderon*, 187 F.3d 1064, 1070 (9<sup>th</sup> Cir. 1999)

# *Bennett* 3-Step Procedure

- *Bennett v. Mueller*, 322 F.3d 573 (9<sup>th</sup> Cir. 2003)
  - Step One: State alleges applicability of the bar
  - Step Two: Petitioner sufficiently places independence or adequacy at issue
  - Step Three: State establishes independence or adequacy

# Exceptions to Procedural Bar

- Cause & Prejudice

- Cause: external to defense

- *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012):
    - Barred claim of ineffective assistance of trial counsel reviewable if habeas counsel in first proceeding fails to raise/adequately raise IA trial counsel claim

- Prejudice

- Fundamental miscarriage of justice

# Merits review

- 2254(d) standards, if they apply
- Substantive constitutional violation under
- Any applicable prejudice standard, *i.e. Brecht*
- Remedy

# 28 U.S.C. § 2254(d): Three Separate Clauses

- (d)(1)— “contrary to” CEFL
- (d)(1) – “unreasonable application” of CEFL
- (d)(2) – “unreasonable determination of the facts in light of evidence presented at the state court proceeding”

# Practice Pointer

Each clause has its own body of law, so raise arguments under separate headings.

(d)(1) or (d)(2) arguments raised in footnotes may not be considered.

# Clearly established federal law

- Refers to the holdings (as opposed to the dicta)
- Supreme Court cases only
- Decided as of the time of the relevant state-court decision

# Role of circuit law under 2254(d)(1)

- Cannot be source of CEFL
- Can announce which Supreme Court case is CEFL
- Can be persuasive authority on applying 2254(d)
- But do not rely on direct federal criminal appeals

# Meaning of “contrary to”

- “Diametrically different”
- “Opposite in character or nature”
- “Mutually opposed”
- “Substantially different” from relevant precedent of the Supreme Court

*-(Terry) Williams v. Taylor,*  
529 U.S. 362, 405 (2000)

# Focus on elements of test

“The addition, deletion, or alteration of a factor in a test established by the Supreme Court” can be contrary to CEFL.

*-Benn v. Lambert,*

283 F.3d 1040, 1051 n.5 (9th Cir. 2002)

# Meaning of “unreasonable application”

- State court identifies correct governing legal rule . . .
- But unreasonably applies it to the facts of petitioner’s case.

*-(Terry) Williams,*  
529 U.S. at 407

# *Richter's* focus on possible reasons

“Under 2254(d) a habeas court must determine what arguments or theories supported or, as here could have supported, the state court’s decision and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.”

*-Richter, 562 U.S. at 102.*

# Types of (d)(2) errors

- State court should have made factual finding, but did not.
- State court does make finding, but uses wrong legal standard.
- Fact-finding process is defective.
  - Should have held evidentiary hearing but did not.
- Misapprehends or ignores material fact in record.
  - Taylor v. Maddox*,  
366 F.3d 992, 1000-01 (9<sup>th</sup> Cir. 2004)

# Relationship between (d)(2) and (e)(1)

- 2254(e)(1) presumes state court factual findings are correct.
- Petitioner required to rebut by “clear and convincing evidence” under AEDPA.
- Decisions vary, especially after *Pinholster*. Issue will need to be resolved by Supreme Court.

# Overcoming 2254(d) is not enough for relief

- 28 U.S.C. § 2254(d) is a “limitation on relief”
- 28 U.S.C. §§ 2241 and 2254(a) implement and define federal court’s power to grant writ for constitutional violations
- Petitioner subject to AEDPA must prove both
  - Frantz v. Hazey*,  
533 F.3d 724, 735-37 (9<sup>th</sup> Cir. 2008)(en banc)

# But 2254(d) and 2254(a) can be the same

“[A] holding on habeas review that a state court error meets the § 2254(d) standard will often simultaneously constitute a holding that the § 2254(a)/§ 2241 requirement is satisfied as well, so no second inquiry will be necessary.”

*-Frantz, 533 F.3d at 736.*

# No particular order required

AEDPA does not “require any particular methodology for ordering the § 2254(d) and § 2254(a) determination.”

*-Frantz, 533 F.3d at 737*

# Prejudice from violation

- Even if Constitution was violated, federal court does not grant relief if error was harmless.
- Harmless error standard in federal court is different, and higher, than *Chapman*.
- Federal standard applies to claims that were subject to *Chapman* in state court.

# *Brecht* is federal standard

In federal habeas, error must have “had substantial and injurious effect or influence in determining the jury’s verdict.”

*-Brecht v. Abrahamson,*  
507 U.S. 619, 623 (1993)

# *Brecht* and 2254/*Chapman*

- Federal court “need not formally apply both *Brecht* and AEDPA/*Chapman*.”
  - *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015)
- If petitioner can prove “actual prejudice” under *Brecht*, then state court’s harmlessness determination was necessarily unreasonable.
  - *Mays v. Clark*, 807 F.3d 968, 980 (9<sup>th</sup> Cir. 2015)

# Practice Pointer

Check to see if the Supreme Court or Ninth Circuit has articulated *Brecht* factors for the type of claim you are briefing.

*See, e.g., Whelchel v. Washington*, 232 F.3d 1197, 1206 (9<sup>th</sup> Cir. 2000) (discussing factors to be considered in *Brecht* analysis for Confrontation Clause claim)

# *Brecht* does not apply to certain errors

- Errors that already require prejudice
  - *Strickland* claims
  - *Brady* claims
- Structural errors
  - *Batson* violations
  - Double jeopardy
  - *Jackson v. Virginia* (sufficiency of evidence)
  - *Faretta* (denial of self-representation)

# Remedy

Habeas “remedies should be ‘tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.’”

*-Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012)*

# Possible remedies

- Remand to district court for hearing
- Resentencing in state court
- Grant conditional writ; re-trial within certain time
- Grant unconditional writ; no retrial
- Require specific performance

# Practice Pointer

Petitioners should say more than “grant relief.”

Clearly state which remedy you are seeking and why it should apply.

# Briefing and Argument

Bill Bilderback and Gail Ivens

# Briefing Basics

- MUST include:
  - Facts
  - Ruling
  - Standard of Review
  - Application of Case Law and Statutory Law
  - The Remedy Requested
  - The Rule you are asking the Court to Adopt

# Your Briefing Should be

- Accurate
- Complete
- Streamlined
- Interesting

# Accuracy

- Timely
- Follow Rules
- Meticulous Record Cites
- Proof read
- Cite check authorities EACH TIME

# Briefing *and* Excerpts



14-30223 USA v. Lajai Pridgette

February 2, 2016  
Courtroom 2, 7th Floor  
Seattle, Washington  
Before: KOZINSKI, O'SCANLAIN, GOULD



# Completeness

- Construct A Logical Structure
  - Tell The Whole Story
  - Leave No Unanswered Questions
- Highlight Useful Facts Or Law
  - Do Not Hide From Bad Facts Or Law
- Writing for the iPad

# Streamlined

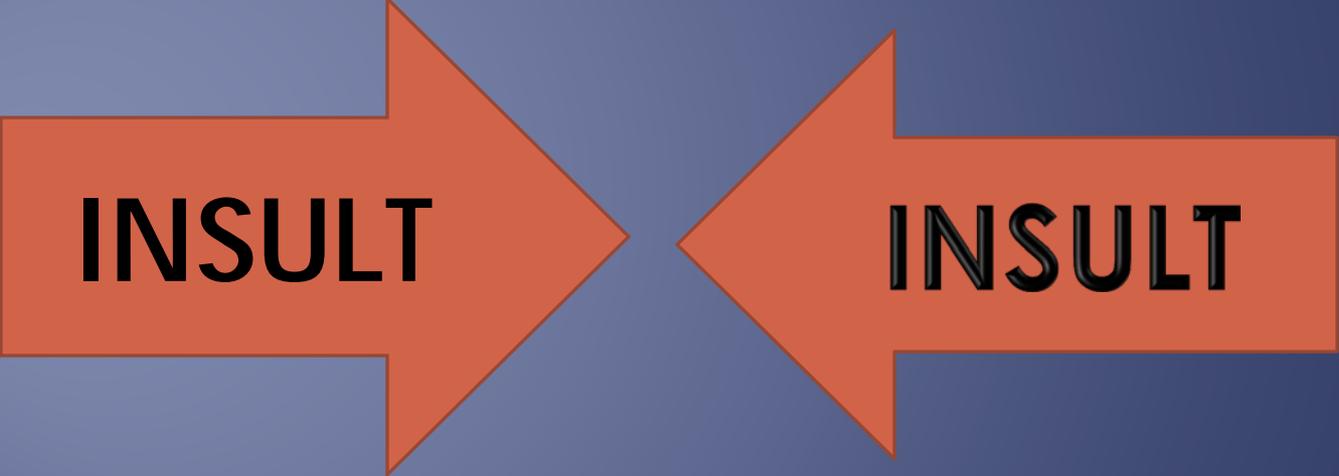
- It's Called A "Brief"
  - Less Is More
  - "Murder Your Darlings," Sir Arthur Quiller-Couch, On The Art Of Writing
  - "2nd Draft = 1st Draft – 10%," Steven King, On Writing
  - "What My Computer Needs Is An 'Adverb Delete' Key," Bill's Dad.
- Edit, Edit, Edit

# Narrative/Pathos

- Voice
- Why Should The Court Care?







**INSULT**

**INSULT**

# Briefing versus Argument

- Briefing Audience
  - Vast And Unspecified
  - Must Be Told Everything Bout Your Case
- Argument Audience
  - Known And Targeted
  - Has Specific Questions That Must Be Answered

# Mooting the Brief and Argument

- Have A Full Moot Before Writing The Reply
- Have (At Least) Two Full Moots Before The Argument
  - Include Someone Unfamiliar With The Practice Area
    - You're A Specialist; Judges Are Generalists

# Argument

- Listen
  - Answer The Question First



14-30223 USA v. Lajai Pridgette

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# Argument

- Listen
  - Answer The Question First
- Candor
  - The Bad Facts And Law Hurt You (But You Win Anyway)
- Clarity
  - Organization
  - Focus
  - Coherence

Ninth Circuit Training on 2254 Appeals  
October 27, 2016

Suggested Reading List and Resources:

Guides and Legal Outlines, available on the Ninth Circuit's website, [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov), especially the Appellate Practice Guide prepared by current and former Appellate Lawyer Representatives

*The Winning Brief*, Brian Garner

*Making Your Case*, Justice Antonin Scalia and Brian Garner

*The Art of Oral Advocacy*, David Frederick

*Effective Appellate Advocacy*, Carole C. Berry

*The Elements of Style*, William Strunk Jr. & E. B. White

*Typography for Lawyers*, Matthew Butterick

Curriculum/course materials from law school appellate advocacy programs. See <https://law.duke.edu/curriculum/appellateadvocacy/guide.html> as an example

Briefing and argument by experienced USSC advocates: Jeff Fisher, Seth Waxman. For more names, check out the recent Reuters article, *The Echo Chamber* at <http://www.reuters.com/investigates/special-report/scotus/>