

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

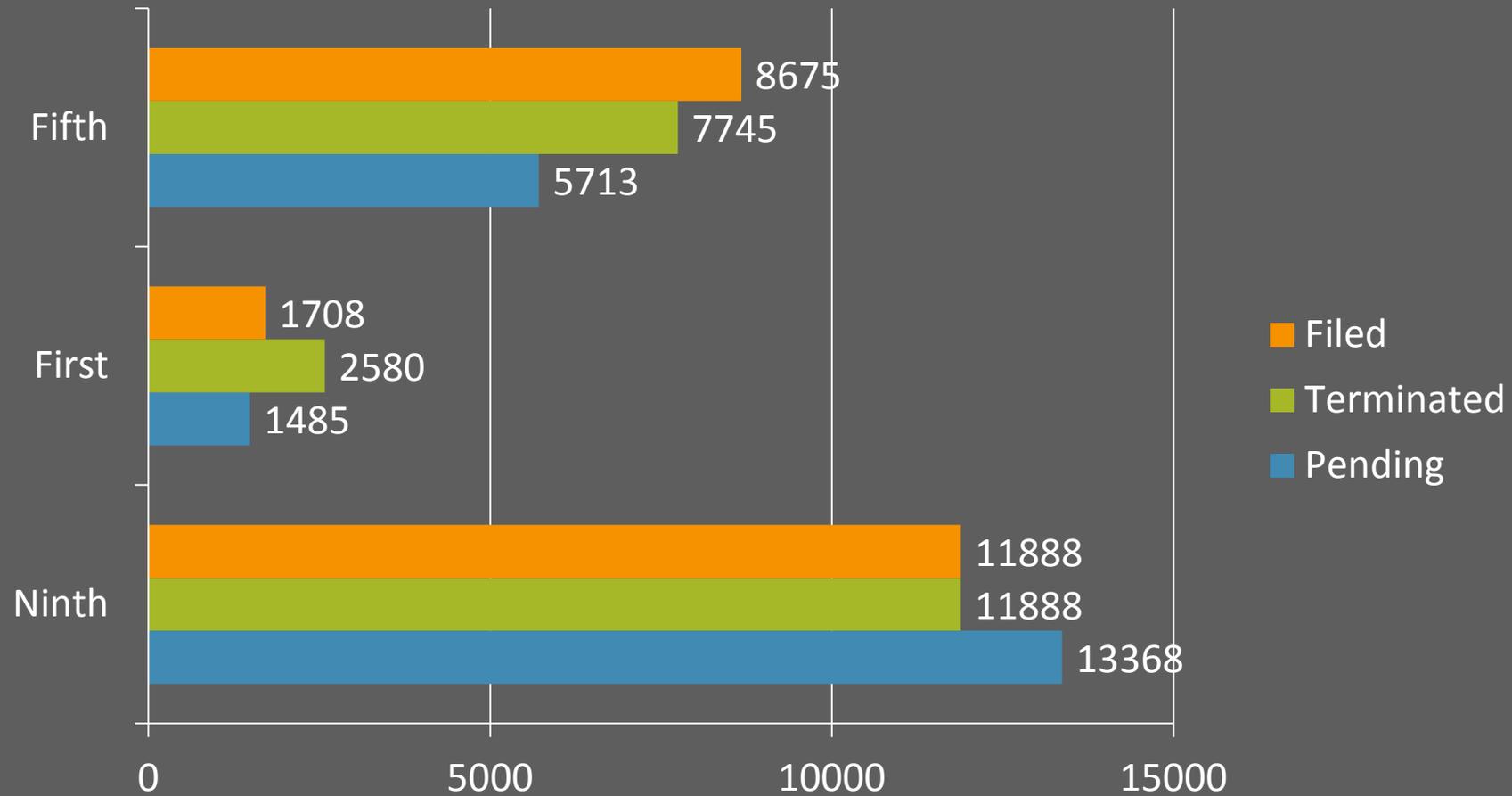


A FEW NUMBERS

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

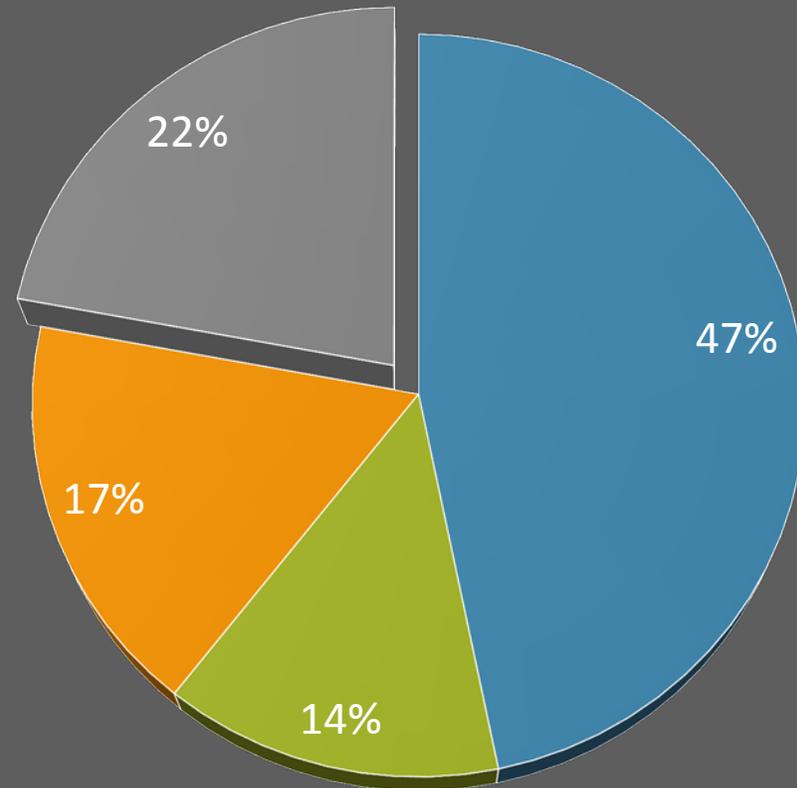
CASELOAD

AS OF JUNE 30, 2016



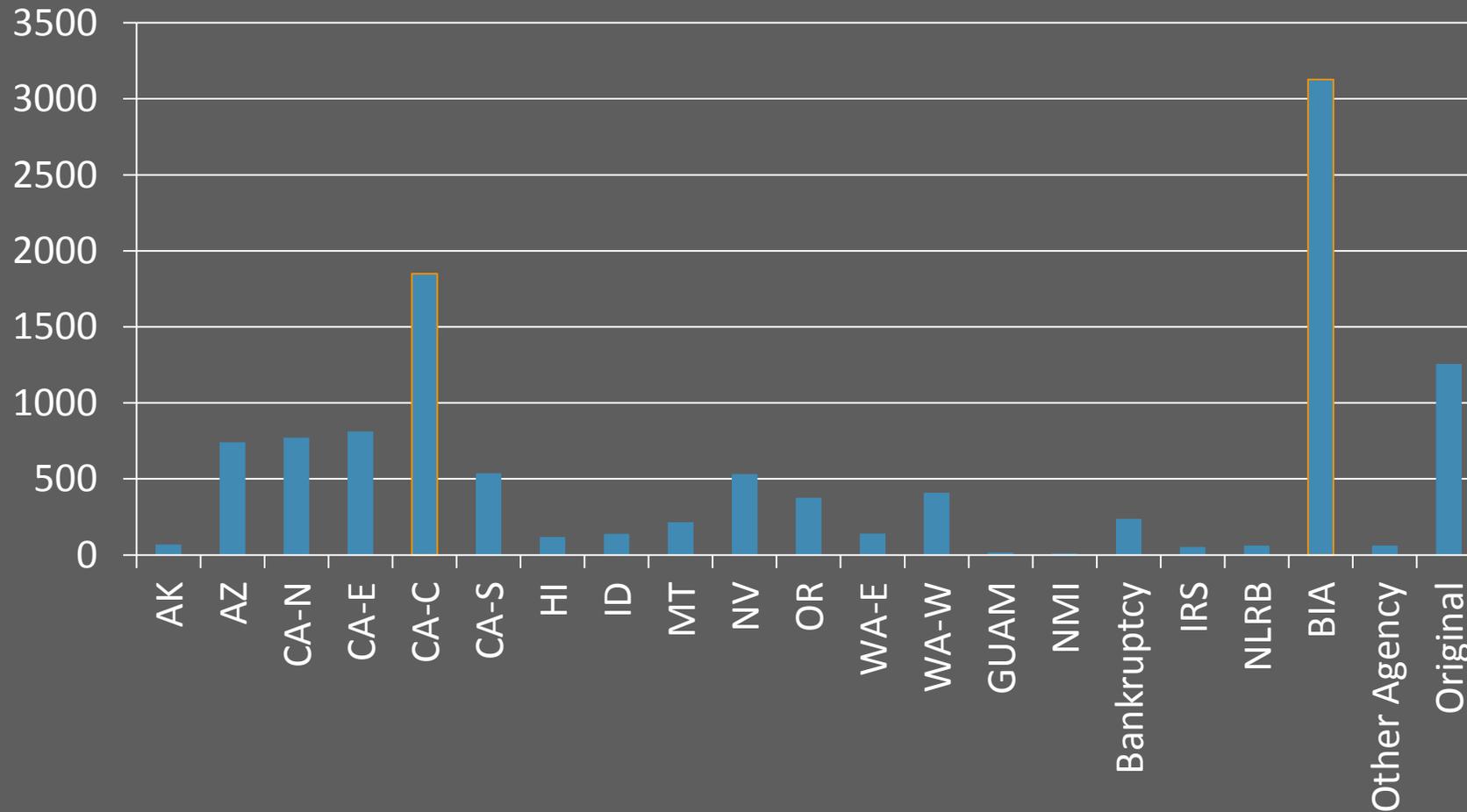
BACKLOG

AS OF AUGUST 31, 2016



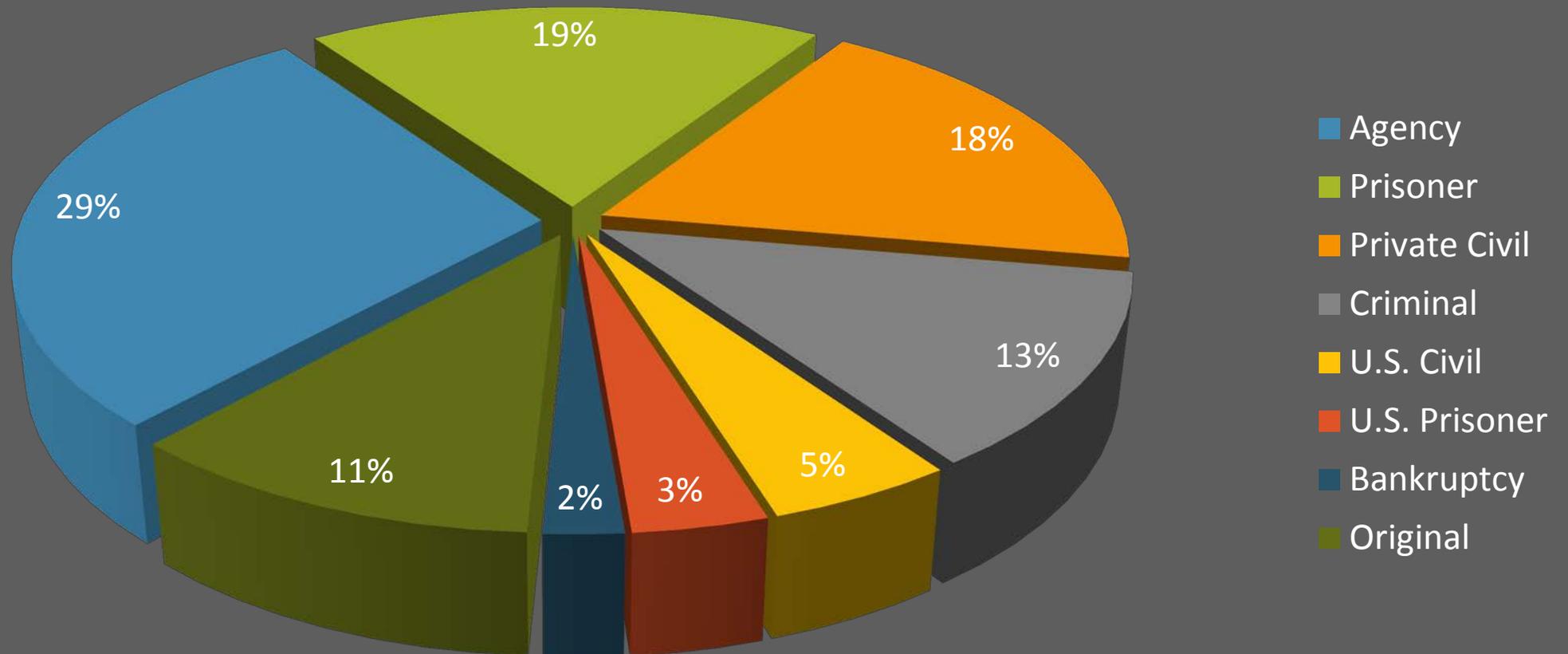
- No Opening Brief
- Briefing
- Screening
- Argument

WHERE DO OUR APPEALS COME FROM?

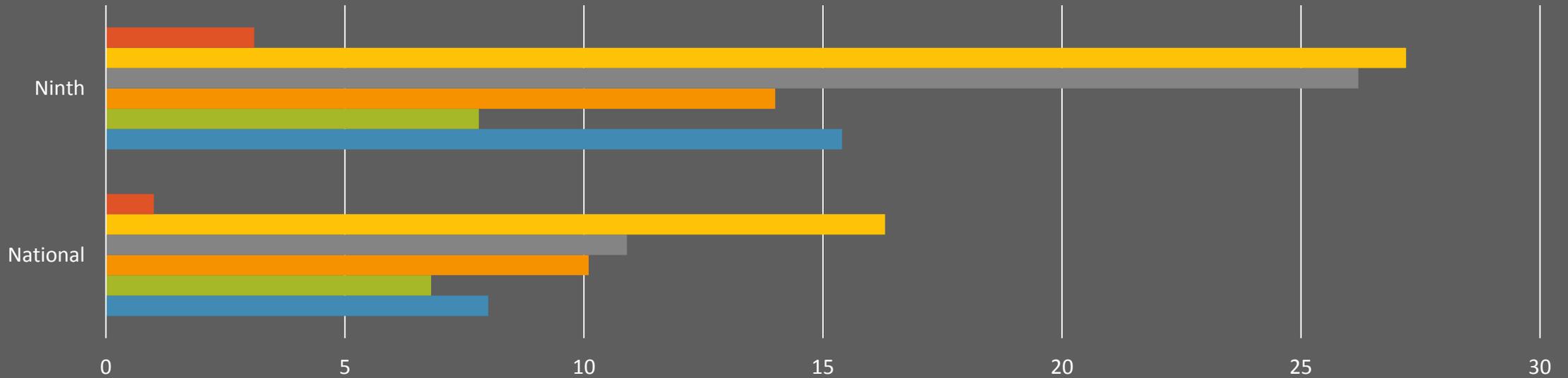


CASE TYPES

FOR THE 12 MONTHS ENDING 6/30/16



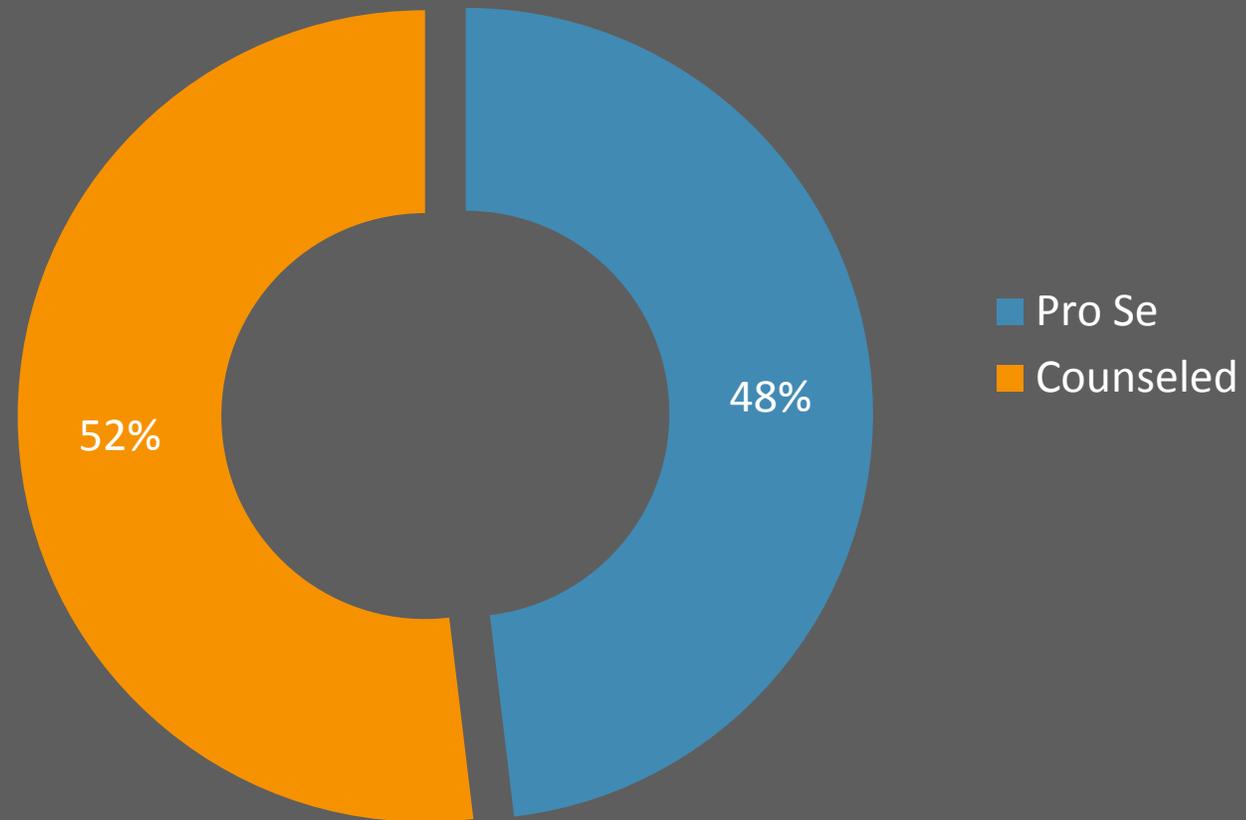
MEDIAN PROCESSING TIMES (NOA – DECISION)



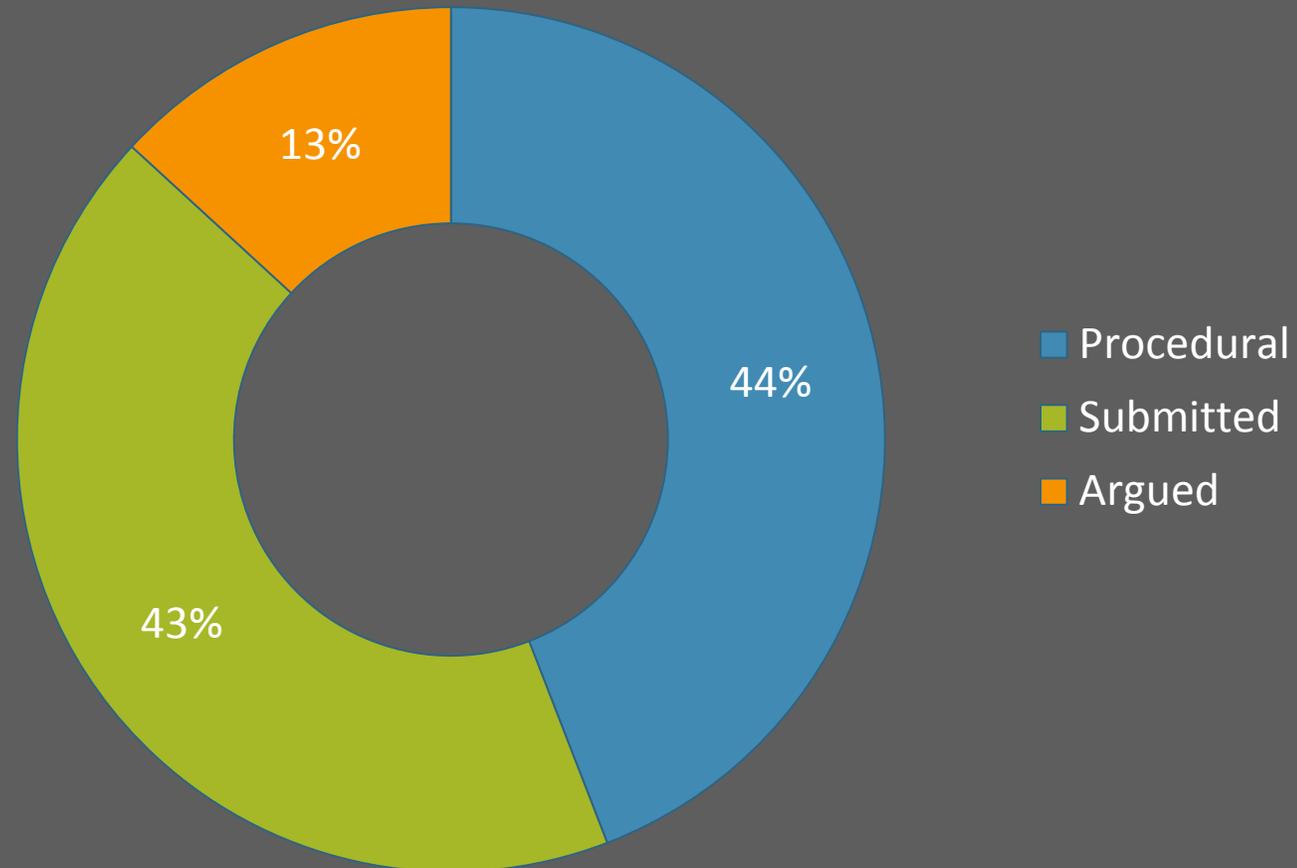
	National	Ninth
Original	1	3.1
BIA	16.3	27.2
Bankruptcy	10.9	26.2
Criminal	10.1	14
Prisoner	6.8	7.8
General	8	15.4

Original BIA Bankruptcy Criminal Prisoner General

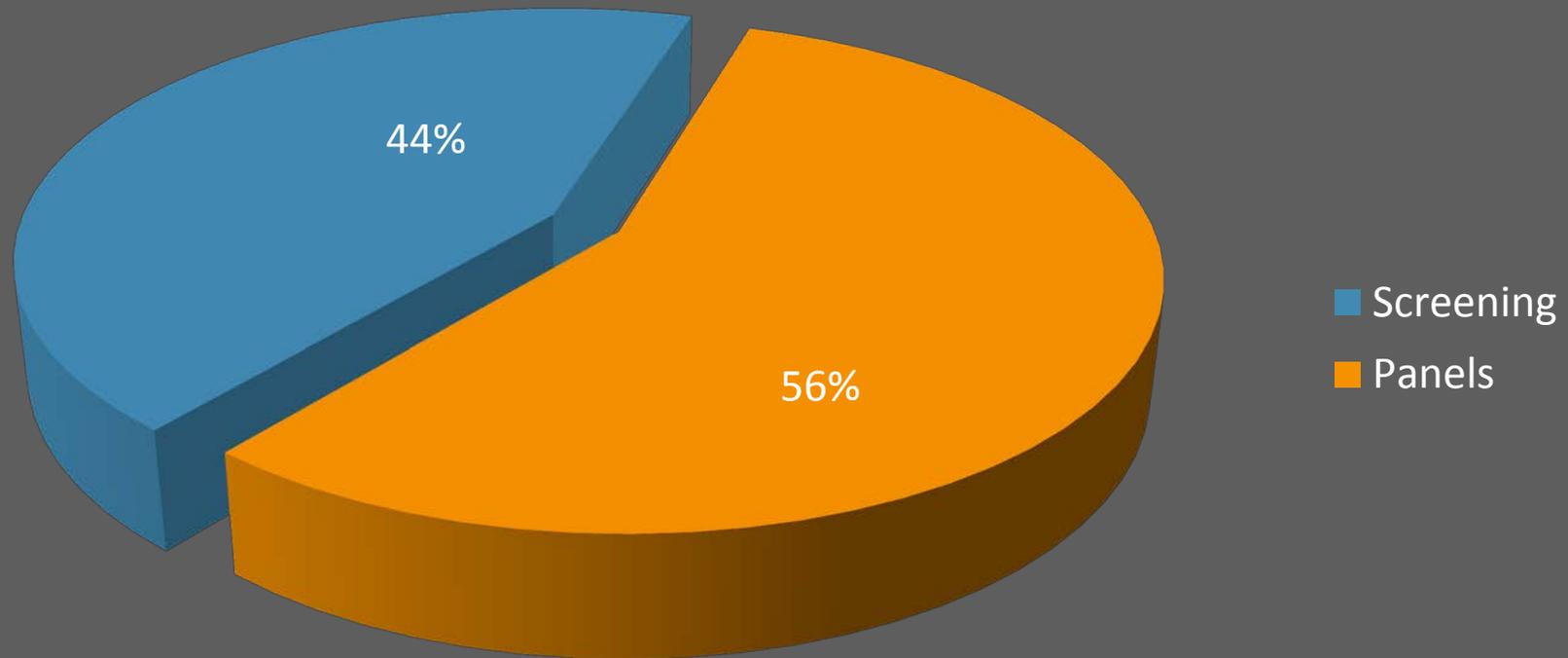
PRO SE CASES



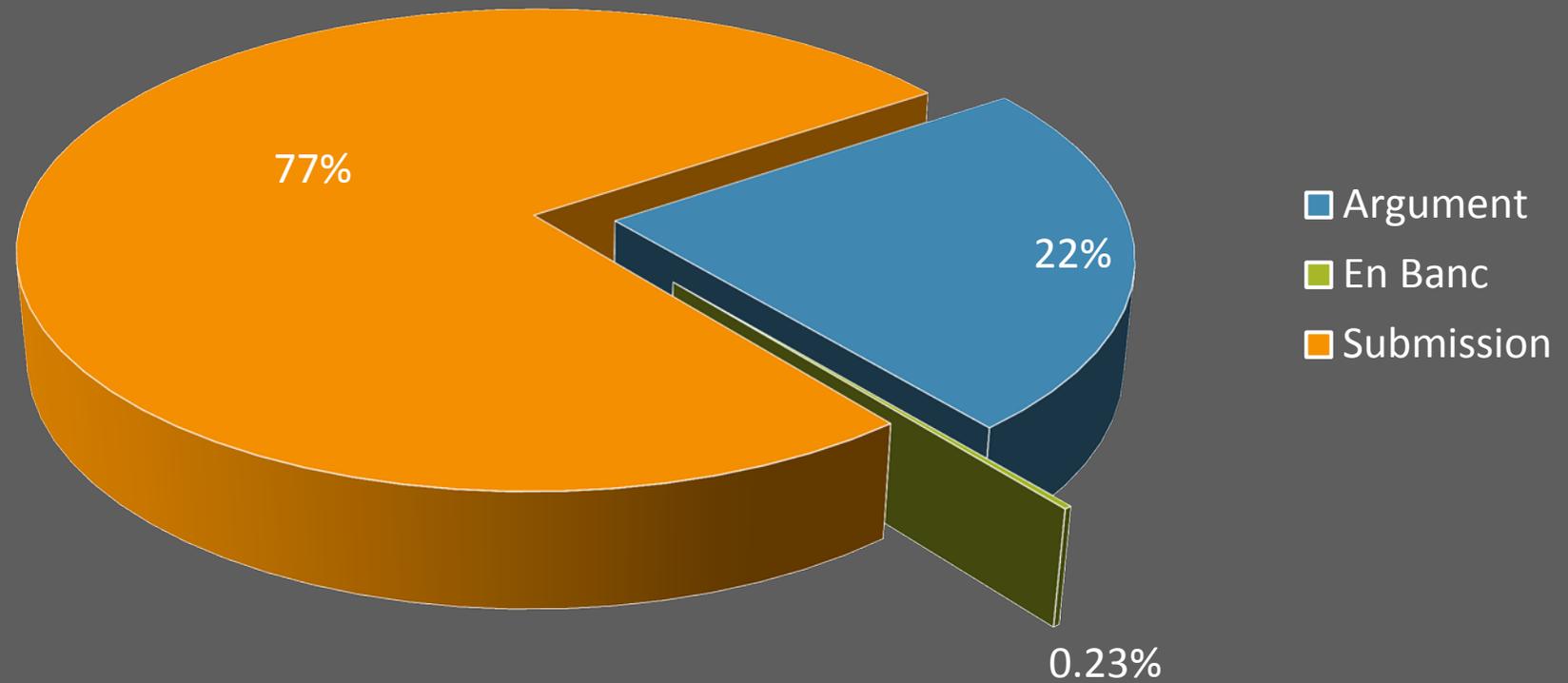
TYPES OF TERMINATIONS



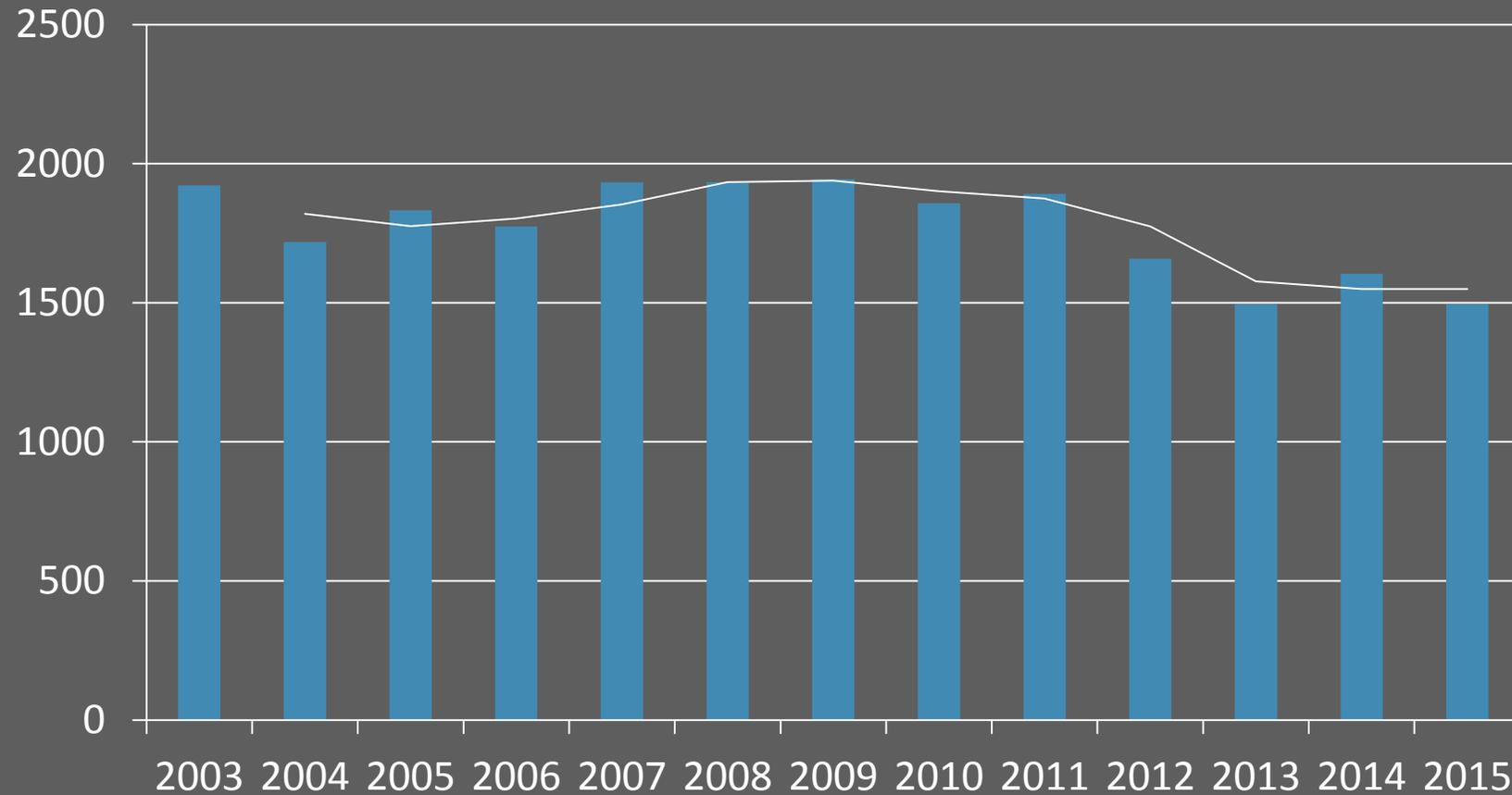
SUBMISSION ON THE BRIEFS



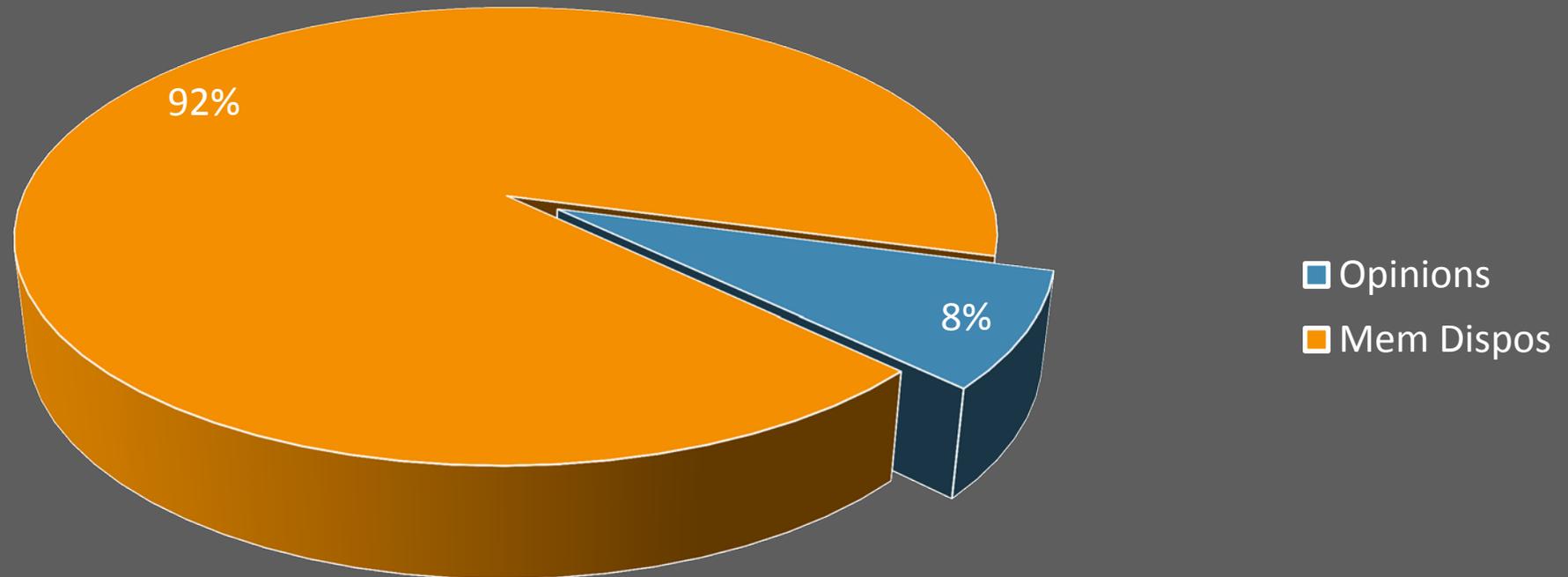
MERIT TERMINATIONS



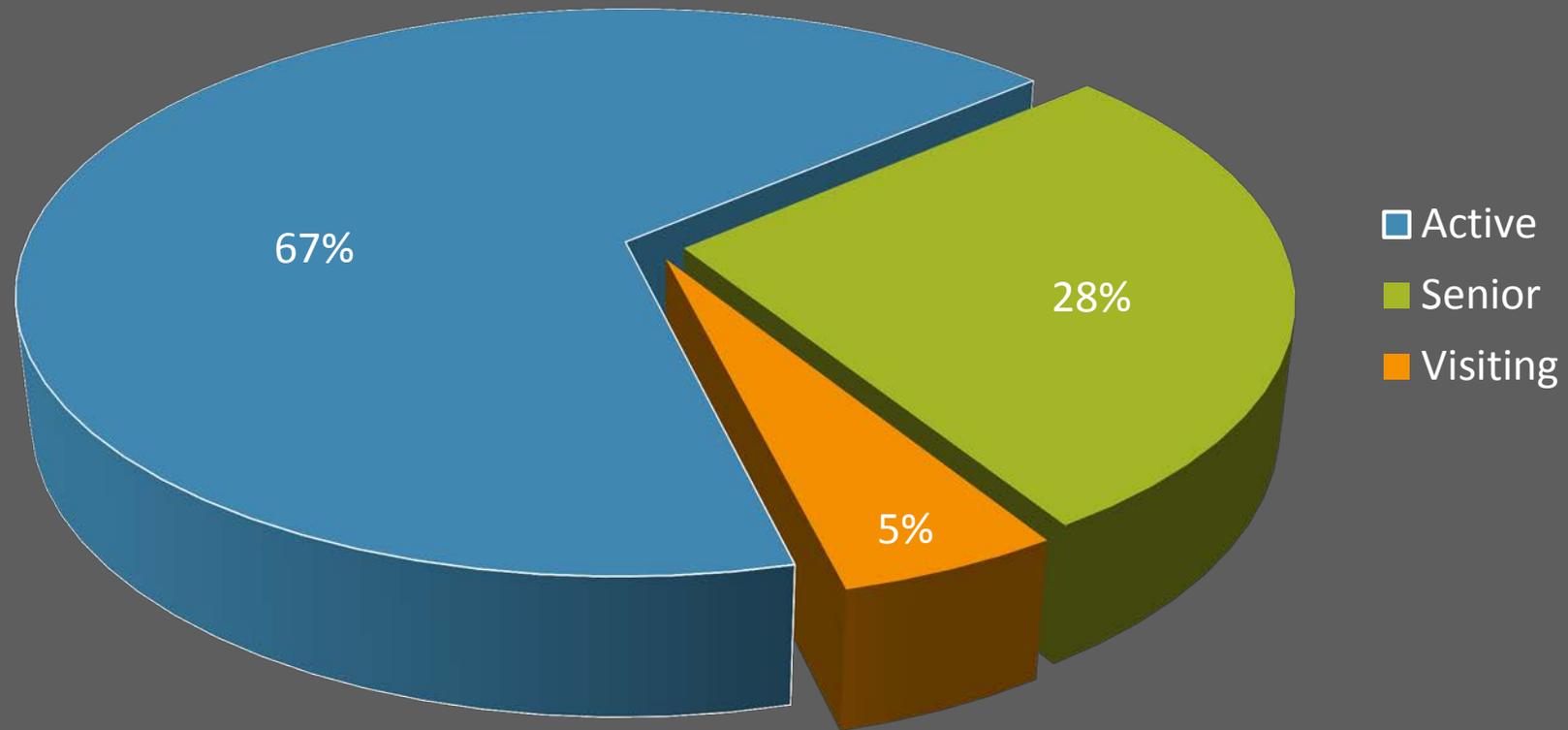
NINTH CIRCUIT ARGUMENTS



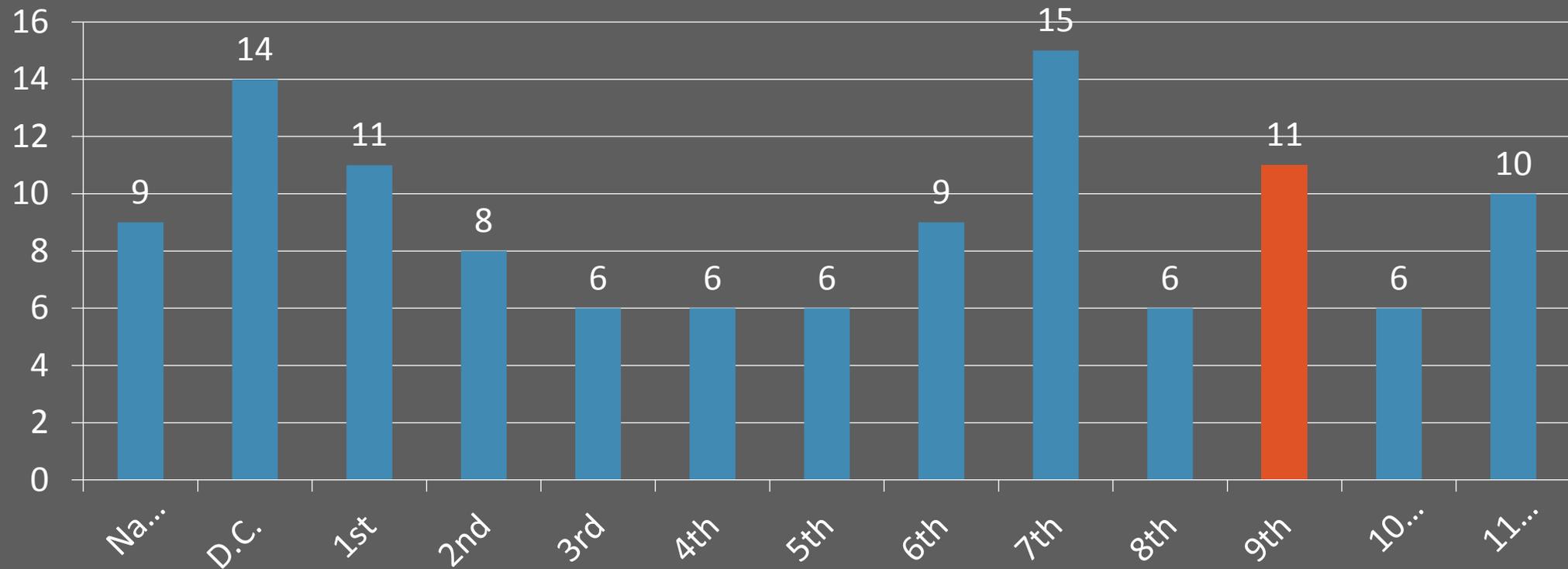
DECISIONS



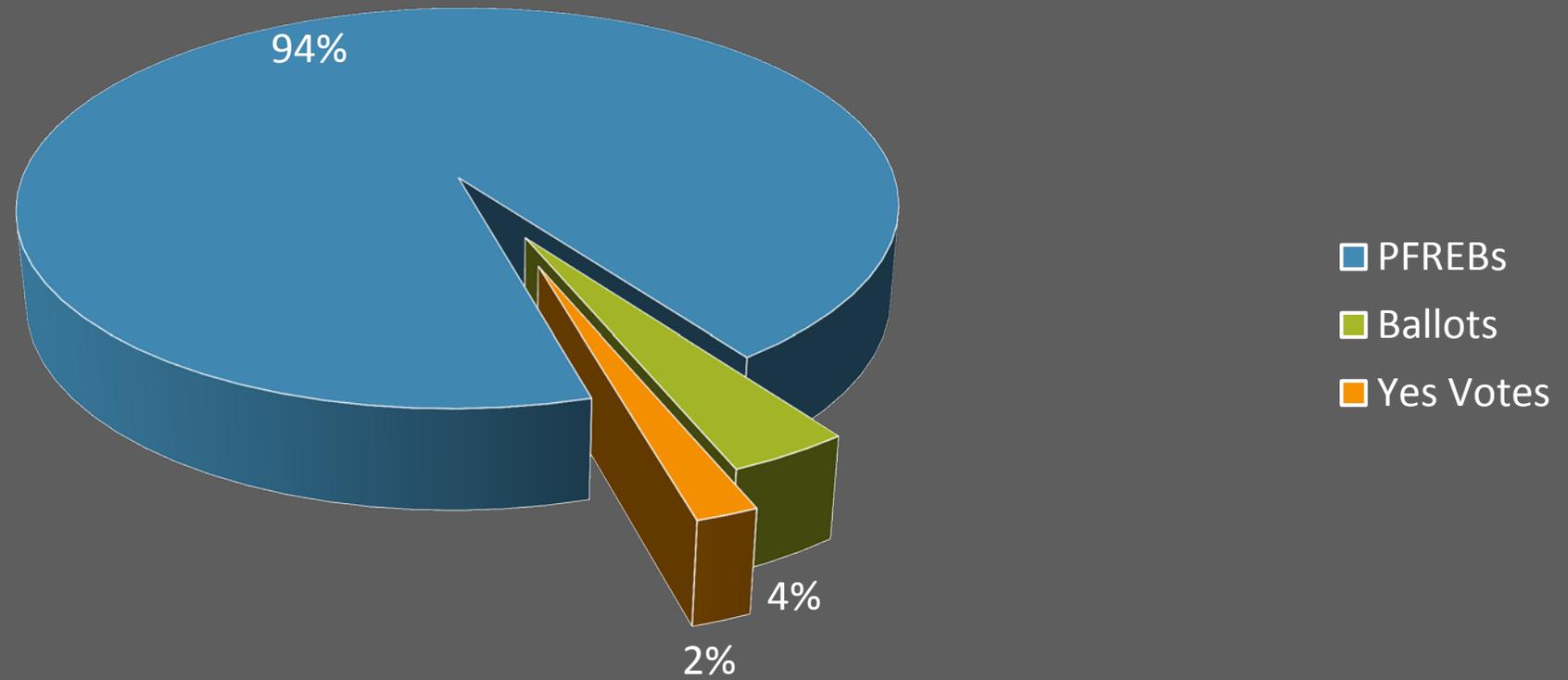
SENIOR & VISITING JUDGES



% REVERSALS

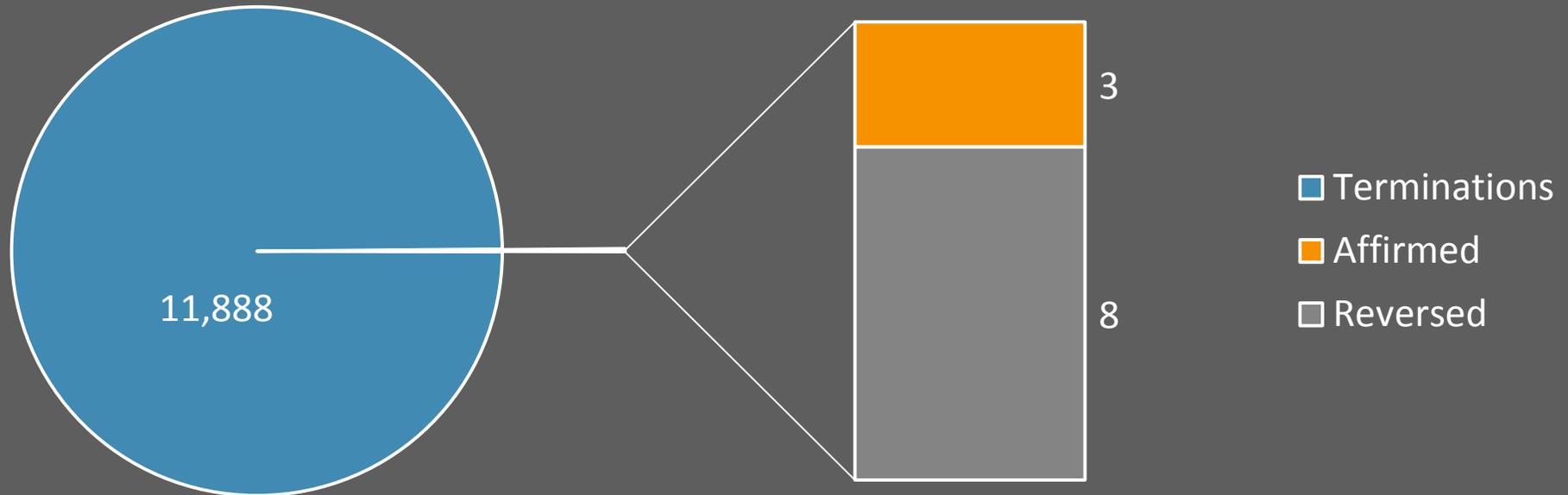


EN BANCS 2015



REVERSALS BY SUPREME COURT

2015-2016 TERM



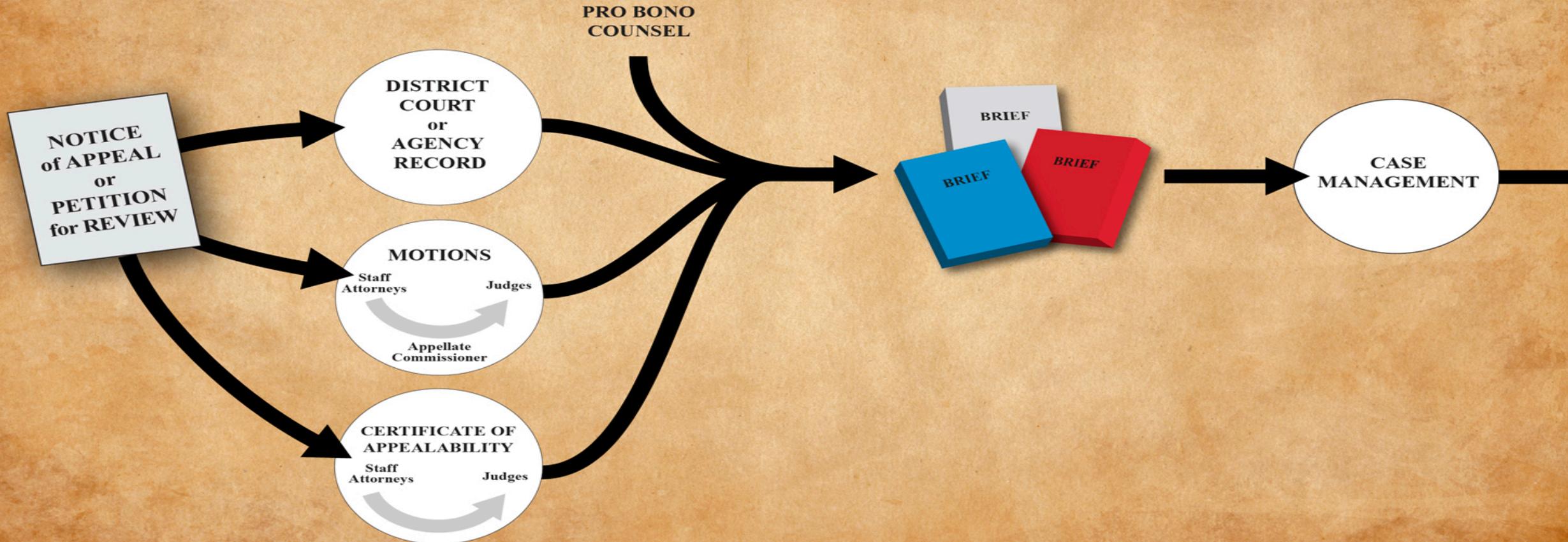
OUR PROCESS

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

THE APPELLATE PROCESS

PRE-BRIEFING

MEDIATION - - - - -

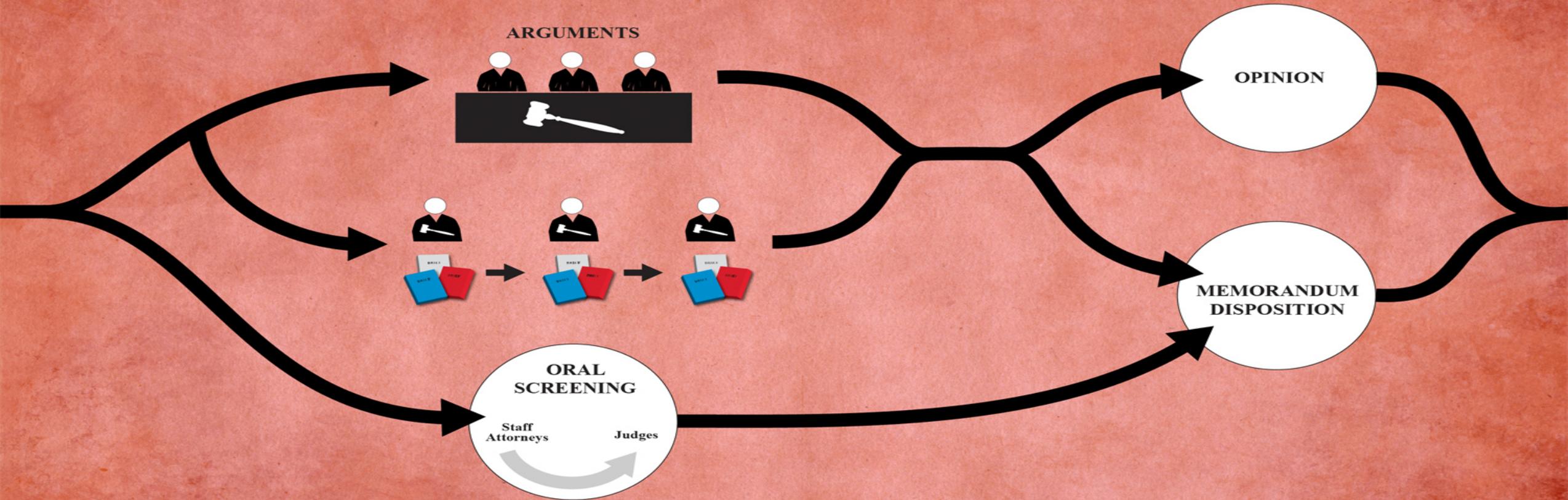


THE APPELLATE PROCESS

SUBMISSION

DECISION

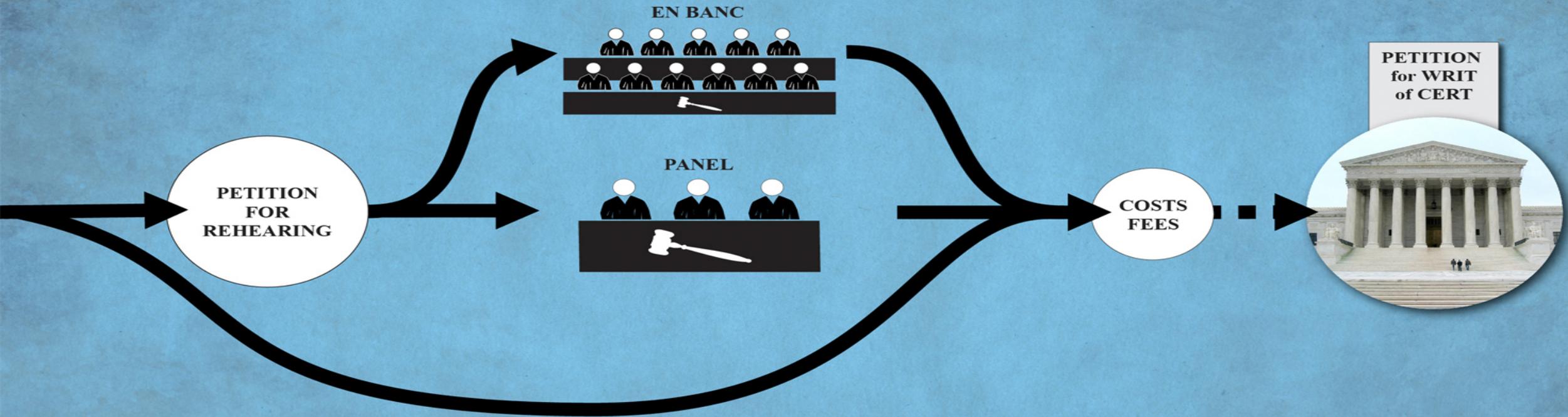
MEDIATION - - - - -



THE APPELLATE PROCESS

POST JUDGMENT

MEDIATION



CALL EARLY, CALL OFTEN

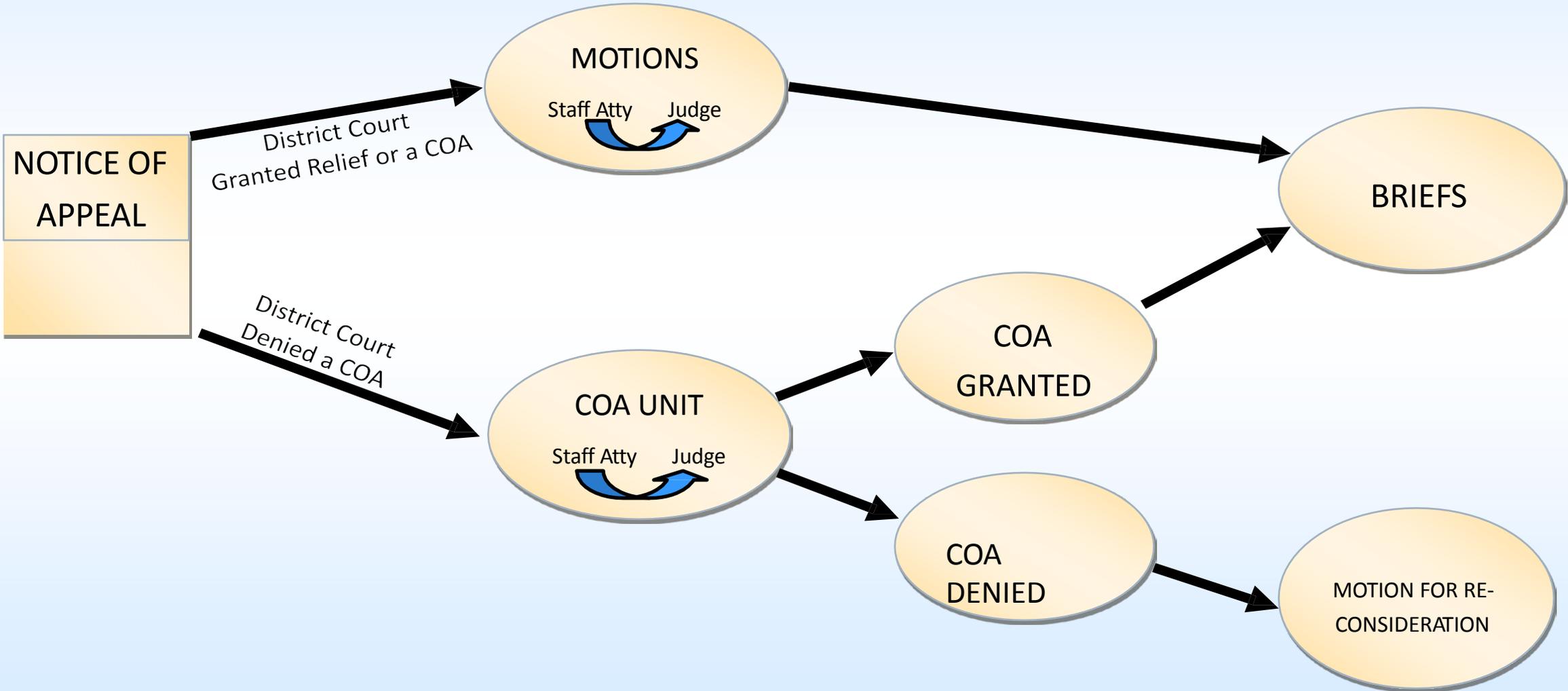
We Really Are Here to Help You

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

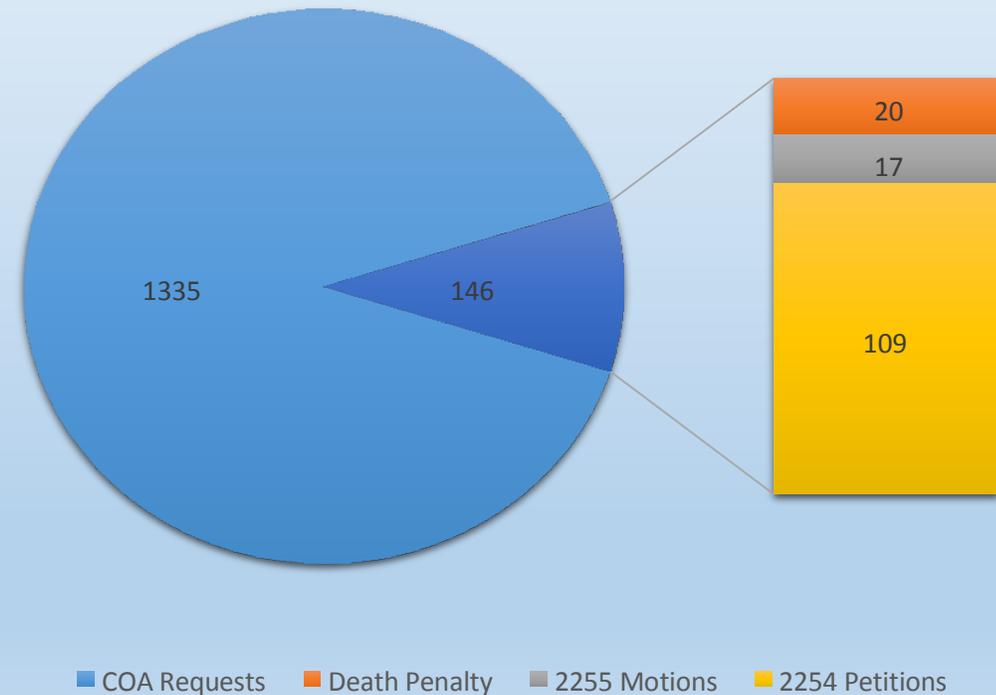
Rule 11, 28 U.S.C.A. foll. § 2254

- 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)

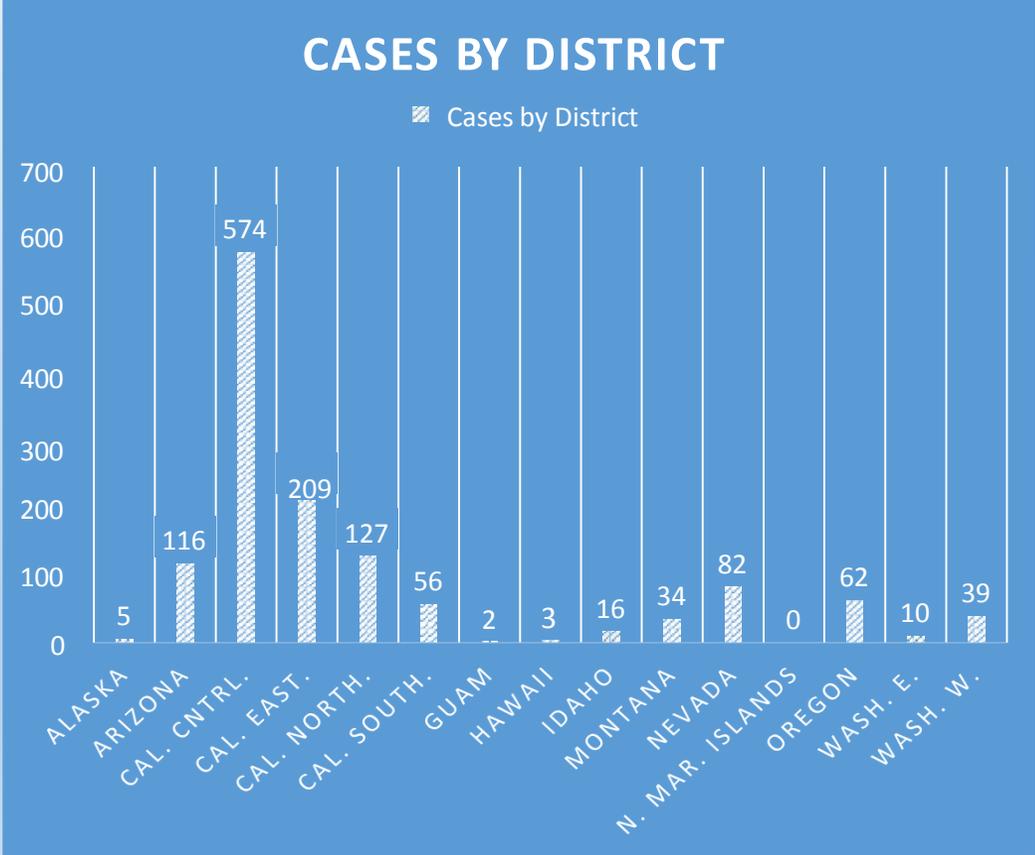
Total Habeas Appeals: 1,481

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



COA Requests 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)

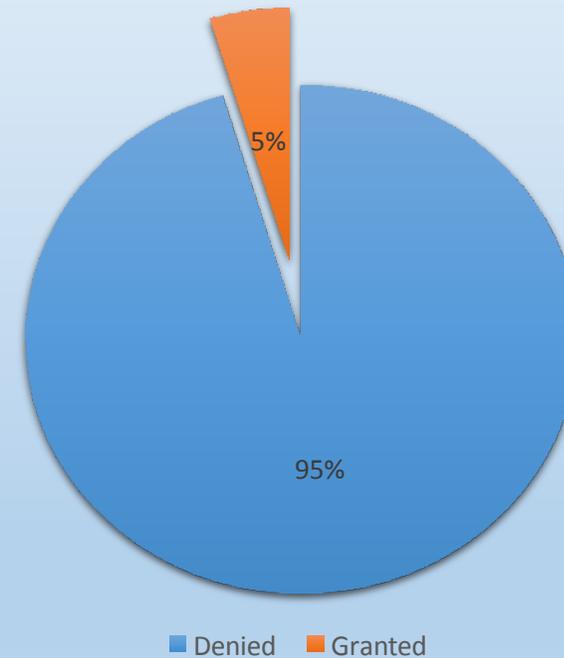
(e) Briefing Uncertified Issues. Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first 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)

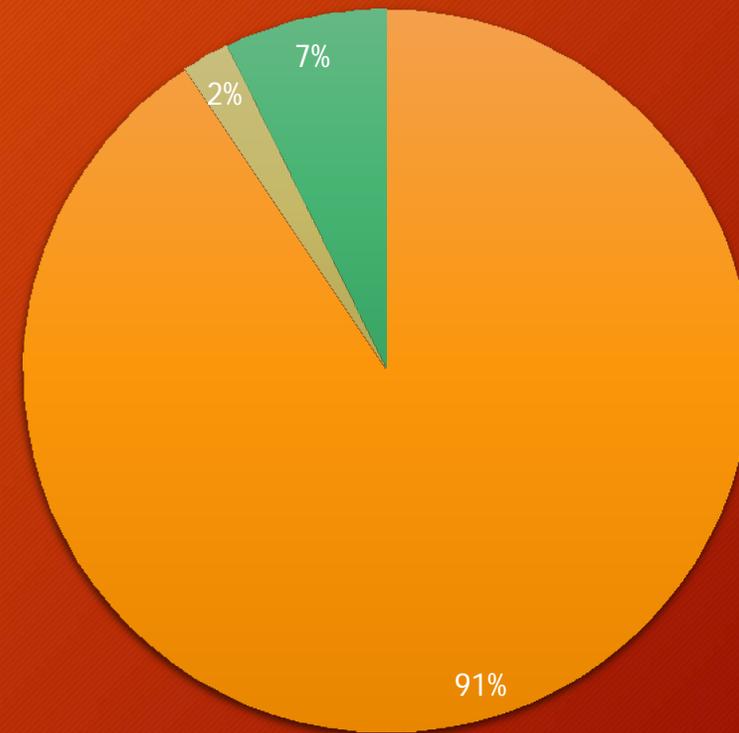
Sara Morimoto Swain

Reviewing Staff Attorney, Ninth Circuit

Second or Successive Applications (2015)

2015

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

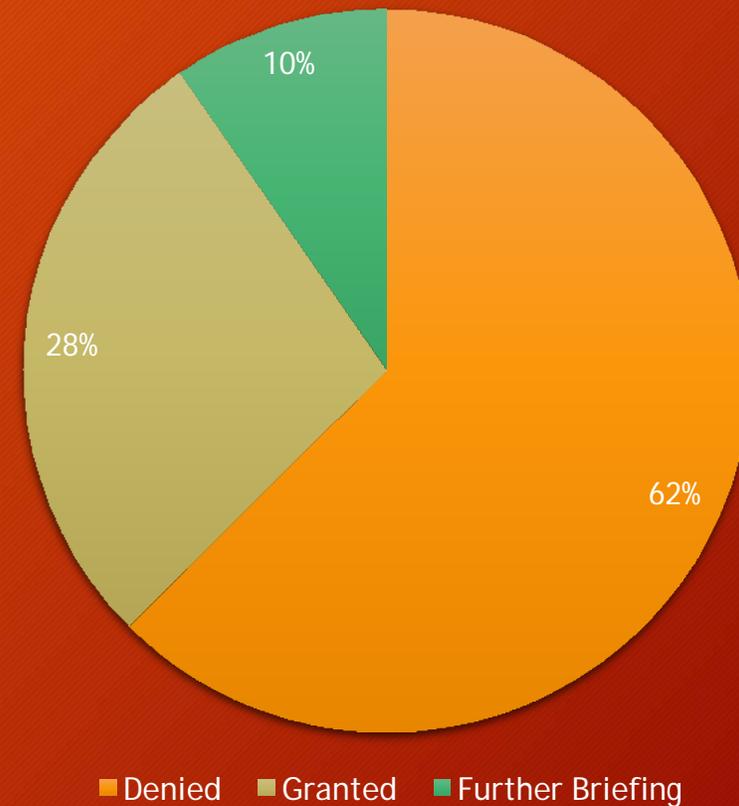


■ Denied ■ Granted ■ Further Briefing

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
Cathy A. Catterson, Circuit & Court of Appeals Executive
Molly C. Dwyer, Clerk of Court

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Cases of Interest

- (10/24/16) 16-16865, Feldman v. Arizona Secretary of State's Office **NEW**
- (10/21/16) 16-16698, Feldman v. Arizona Secretary of State's Office **NEW**
- (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

Announcements

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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.

Ninth Circuit News

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International prosecutors observe 70th anniversary

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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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- Chief Judge

How do I register for electronic filing?



1 2 3 4 5

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- After Opening a Case - Attorneys
- After Opening a Case - Pro Se
- Forms
- Fee Schedule
- Glossary

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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

Electronic Lodging

Why we Seal



What is the Record in a 2254 appeal?

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



14-30223 USA v. Lajai Pridgette

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



ERs and RTs

***Practice Pointer:**

- * Remember, the Court has only ONE set 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 (9th Cir. 2015)(en banc)

What is lodged?

- * Central District Local Rules
 - * Specify lodgments in Capital Cases
 - * Lodgments in non-capital by order and rule
 - * Not the complete superior court file, usually the CT, RT and appellate briefing and orders, including the opinion

Outside the CD

- * Habeas Rules
- * 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, probation report under seal, verdict forms, priors packet, motion to vacate the judgment, and minute orders

RT Contents

- * Rule 8.320(c)
 - * Guilty and nolo pleas, motions in limine, trial (excluding voir dire and opening statements), instructions, sentencing, new trial proceedings, closing arguments

Procedural Posture

- * The district court record will vary depending on the procedural posture of the proceedings below
 - * Dismissal (no appearance by Respondent)
 - * Motion to Dismiss granted
 - * Answer Filed

Lodging with Answer

- * 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 opinion
- * Court's order Controls and Often Expands

Beyond the district court

- * When you get the case, your record is what was filed, lodged and admitted at the district court

Beyond the district court

- * Filings and lodgments in district court will likely encompass at most the state appellate file
 - * Complete superior court file
 - * Exhibits
 - * Probation Report, other sealed records (*Marsden, Faretta, Pitchess*)
 - * Other cases (additional state habeas and motion filings)

Verifying Completeness of CT



Superior Court of California County of San Bernardino

Our Court exists to preserve and protect rights and to effect fair resolutions of all disputes brought to the Court.



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Criminal/Traffic Court Case Information

Court Case information is available at no charge.

The Superior Court of California, County of San Bernardino, ("Court") is implementing a new case management system. As part of that implementation, the Court is converting its court records from paper to electronic format.

All court records are handled with extreme care and confidentiality during the conversion process and the Court believes and is confident all records, and information contained therein, converted to electronic format and available through the Court's hosted online access service are accurate and reliable. However, all records and other data provided by the Court through its online access service is provided "as is" with no warranties, express or implied, including but implied warranty for fitness for a particular purpose.

The Court assumes no liability or responsibility for technical inaccuracies or typographical errors in records, information, and related graphics included in the Court's online access service.

The Court, furthermore, does not guarantee or warrant the correctness, completeness or utility for any general or specific purpose of the records or other data available through access to its online access service. In no event shall the Court be liable for any damages, of any nature whatsoever, arising from the use of this service.

The Court does not represent or warrant that access to its online access service or any records or information contained therein will be uninterrupted or that there will be no failures, errors or omissions or loss of transmitted information during the conversion process or at any other time. In no event shall the Court be liable for the inability to access its online access service.

Limited case data is available on cases filed prior to 1998. Please contact the appropriate Court District for access to information on older cases.

System will be unavailable from 3:30 to 4:30 AM for case updating.

ACCEPT

RIVERSIDE SUPERIOR COURT

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The Criminal and Traffic Cases systems are intended to assist the public in accessing available case data without having to visit the courthouse. The information provided on and obtained from this site does not constitute the official record of the Superior Court of Orange County. The case information provided is based on the search criteria entered. Search criteria results may not always reflect accurate name/case association. Please read and accept the terms described below before proceeding.

Note: Traffic citations may not be available through this online case access for up to 21 days from the date the citation was issued. A courtesy notice may be mailed to you at the address listed on your citation which contains general information and options available for resolving the citation. If you do not receive a courtesy notice in advance of your citation appearance date, contact the court as failure to receive a courtesy notice is not a legal excuse for failing to take care of the citation. When submitting payments and/or documents by mail, allow 10 days for delivery and processing.

[Case Search](#) | [Calendar](#) | [Tutorial](#)**Case Detail****Case Number:** 06NF2588**OC Pay Number:** 3824307**Originating Court:** North[Printable Version](#) **Defendant:** Gray, Darrell Martin Demographics... Names...**Case Status:** Appeal Details...

Case Stage: -

Release Status: Remanded

DMV Hold: N

Charging Document: Information Mandatory Appearance: Y

Amendment #:
1



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Any cases not available in the system(s) can be researched through the Records Department by calling (805) 289-8668. You can provide a credit card and perform searches on names for \$15.00 if the search requires longer than 10 minutes. For specific case information, you must contact the appropriate department where the case is filed (e.g. Criminal/Traffic, Civil, Family Law, etc.).

Santa Barbara – e-mail request

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

October 26, 2016

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- Death certificates
- Marriage lic./ceremonies

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If you are interested in viewing a file please visit the Records window during normal business hours.

SOUTH COUNTY RECORDS

If you are interested in viewing a file please visit the Records window during normal business hours. The South County Record's Department is open:

Monday – Friday from 8am – 3pm

NORTH COUNTY RECORDS

If you are interested in viewing a court file please visit the Records window during normal business hours. The North County Record's Department is open:

Monday – Friday from 8am – 3pm.

To obtain copies of court records, please mail or e-mail the following information to us:

- Case Number and names of the parties. * If case number is unknown, please refer to the [Civil Records Search](#) on the court's website. An online Criminal index is not available at this time.
- Specify which documents are needed and if it needs to be certified.
- Fax number / E-mail address / mailing address where you would like your copies sent
- Visa or Mastercard number
- Expiration date
- 3 digit security code on back of card
- Name, billing address, and phone number of the card holder

Mail requests can be sent to:

312-C East Cook Street
Attn: Records
Santa Maria, CA 93454

COURT RECORDS LOCATIONS:

SOUTH COUNTY:
Anacapa Division
CIVIL
1100 Anacapa Street
Santa Barbara, CA 93121-1107
805-882-4684

Figueroa Divison
CRIMINAL/MINOR OFFENSE
118 E. Figueroa Street
Santa Barbara, CA
805-882-4778

NORTH COUNTY:

312-E East Cook Street
Santa Maria, CA 93454
805-614-6414
northcountyrecords@sbcourts.org

San Luis Obispo

SUPERIOR COURT
SAN LUIS OBISPO

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All requests for information must include either a case number or the full name and date of birth.

REQUESTING COPIES OF COURT RECORDS

Copies of court records cost \$0.50 / page. Matters stored off-site or requiring more than 10 minutes research will also carry a \$15 file research fee. Most criminal case files are stored off site unless there is a pending court date. If certified copies are required, there is an additional charge of \$25 per document to certify.

You will need the defendant's name and case number *or* the defendant's name and date of birth to make the request. The case number can be obtained by visiting or calling the court.

Requesting records/information for one person

Most information on a case can be obtained by requesting a case summary print out. This document is available at a cost of \$0.50/page at any of our court locations. Defendants and attorneys of record can request copies of the case summary on a given case for free. These requests must be accompanied by proof of valid ID for the defendant or a business/bar card for the attorney of record. You can make this request either in person or by mail. This document can also be certified for a fee of \$25 per case. Our court considers this to be the most accurate and easy to read form of information for our cases. Unless you need case information for Homeland Security, Immigration & Customs Enforcement, for a formal hearing or have been specifically told that a case summary print out is unacceptable, then this may be the best option for you.

Requesting a docket print out instead of copies of documents from a case file may streamline your request.

Complete the [Request for Case Information Form](#) and mail or bring it in to the court with payment. If you are requesting case summary print out, you will also need to

Order Form

Request for Criminal Case Information

San Luis Obispo Superior Court (revised 6/25/2014)

Fill out one request for each defendant.

<input type="text"/>	<input type="text"/>	<input type="text"/>
Case Number(s)	Defendant's Name	Defendant's date of birth
<input type="text"/>	<input type="text"/>	<input type="text"/>
Your Name	(Area Code) Your Phone number	Date of Request
<input type="text"/>	<input type="text"/>	<input type="text"/>
Your Address	Your City	State Zip

Make payments/requests :

- **San Luis Obispo Branch** 1050 Monterey Street, Rm. 220, San Luis Obispo, CA 93408 (805) 781-5670

The clerk's office **cannot** provide copies of:

- Police/arrest/incident reports • Transcripts • Warrants • Confidential documents as designated by law

Please **check one**:

- I wish to **view the file only** (\$15 research fee applies for files stored off-site)
- I am requesting a copy of the case summary – **FREE** (Available only to the defendant named on a case or his/her attorney; Request must include a copy of valid ID and a Self-addressed stamped envelope)
- I wish to **purchase copies** of items indicated below. I have enclosed a check for payment.
 - I wish to **pick up** the requested items in person. The clerk will call above number when request is ready for pick up.
 - Please **mail** the requested items. Self Addressed Stamped Envelope is **required**.

Specify items to be copied: **I need Certified copies (\$25 per document charge)**

- Case Summary—50cents/page available for any member of the public/free to defendant & attorney of record.
- Complaint/Citation
- Disposition: Conviction / Plea/Tahl Waiver
- Sentencing Order
- Protective Order
- Minute orders or other documents (please list file date, date of hearing or attach a copy of docket indicating documents needed)
- Probation Order
- PC1203.4/expungement order

OR

- Entire File—Please call clerk's office prior to submitting a request for entire file.

Los Angeles County



ONLINE SERVICES

Criminal Case Summary

Case Number: LACBA321933-01
Defendant Name: CABRALES, JAIME
Violation Date: April 27, 2007
Filing Date: May 1, 2007
Courthouse: Clara Shortridge Foltz Criminal Justice Center

Print

Case Information

Events

Bail

Sentencing Information

Upcoming Scheduled Events

None

Past Events

Date	Time	Location	Dept/Room Number	Event
May 11, 2007	09:00 AM	Clara Shortridge Foltz Criminal Justice Center	032	PRELIMINARY HEARING
May 31, 2007	09:00 AM	Clara Shortridge Foltz Criminal Justice Center	032	PRELIM SETTING/RESETTING
June 21, 2007	08:30 AM	Clara Shortridge Foltz Criminal Justice Center	032	PRELIM SETTING/RESETTING
July 2, 2007	05:00 PM	Clara Shortridge Foltz Criminal Justice Center	CLK	PACE CLAIM

Locating Other Records

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Tulare County Courthouse, 1870

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Find information, tools, and resources to help resolve many common legal issues. [Centro de ayuda en línea.](#)



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Learn all about jury basics or find links to your local court. For employers, learn about how you can support jury service.



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Chaired by the Chief Justice of California, the Judicial Council establishes policies and priorities for the statewide administration of justice in the California Courts.



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California has 58 superior courts to hear civil and criminal cases, as well as the Courts of Appeal and Supreme Court.

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OF CURRENT INTEREST

Oct 04, 2016

Supreme Court Streams This Week

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

Sep 22, 2016

Funding for Fines & Fees Study

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



JUDICIAL BRANCH ADMINISTRATION

\$25 Million Grant Program for Trial and Appellate Courts

The Judicial Council is administering a \$25 million grant program intended to promote innovation, modernization, and efficiency in trial and appellate courts. Grant applications must be submitted to the Judicial Council by October 31, 2016. For information about how to apply for a grant, please visit the [program page](#).

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OF CURRENT INTEREST

[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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San Francisco, CA 94102-4797

Office of the Clerk
Telephone: 415-865-7000

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- Search by Attorney
- Search by Case Caption (e.g., "Smith v. Jones")

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Last Name/Organization:

First Name:

Middle Name:

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Middle Name:

Law Firm:

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Last Name or Organization: gates
First Name: oscar

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Click on the case number for more information about a case.

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

Filename	Description
SAUG3116.PDF	Supreme Court minutes of 8/31/16
SAUG3016.PDF	Supreme Court minutes of 8/30/16
SAUG2916.PDF	Supreme Court minutes of 8/29/16
SAUG2616.PDF	Supreme Court minutes of 8/26/16
SAUG2516.PDF	Supreme Court minutes of 8/25/16
SAUG2416.PDF	Supreme Court minutes of 8/24/16
SAUG2316.PDF	Supreme Court minutes of 8/23/16
SAUG2216.PDF	Supreme Court minutes of 8/22/16
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SAUG0116.PDF	Supreme Court minutes of 8/1/16
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SJUL2816.PDF	Supreme Court minutes of 7/28/16
SJUL2716.PDF	Supreme Court minutes of 7/27/16
SJUL2516.PDF	Supreme Court minutes of 7/25/16
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SJUL1216.PDF	Supreme Court minutes of 7/12/16
SJUL1116.PDF	Supreme Court minutes of 7/11/16
SJUL0816.PDF	Supreme Court minutes of 7/8/16
SJUL0716.PDF	Supreme Court minutes of 7/7/16
SJUL0616.PDF	Supreme Court minutes of 7/6/16
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SJUN2116.PDF	Supreme Court minutes of 6/21/16
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SJUN1716.PDF	Supreme Court minutes of 6/17/16
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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 trial and/or appellate counsel
- * Ask client
- * Ask client's family
- * Ask co-defendant's counsel

“New” record on appeal

*Practice Pointer:

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

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, 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 (9th 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 (9th 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 (9th Cir. 2006)

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

-*Lambert v. Blodgett*,
393 F.3d 943, 965 (9th 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 is titled "Standards of Review" and is dated "Revised May 2012". The main content area contains a disclaimer: "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." Below this, there is a list of outlines with links to HTML and PDF versions:

- 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
- Immigration Training - Powerpoints and Materials

The "Standards of Review" and "Section 1983 Outline" items have green bars next to them, indicating they are the focus of the resource. The "Standards of Review" item has links for HTML and PDF. The "Section 1983 Outline" item also has links for HTML and PDF. The "Appellate Practice Guide" item has a link for PDF. The "Ninth Circuit Immigration Outline" item has links for HTML and PDF. The "Perfecting Your Appeal" item has links for HTML and PDF. The "Social Security Outline" item has links for HTML and PDF.

The left sidebar contains a navigation menu with the following items:

- Electronic Filing - CM/ECF
- Opinions
- Calendar
- Case Information
- FAQs, Forms and Instructions
- Rules
- Guides and Legal Outlines
- Audio and Video
- RSS Feeds
- Clerk's Office
- Mediation
- Appellate Commissioner
- Bankruptcy Appellate Panel

The top navigation bar includes: Home, About the Court, Attorneys, News Media, Employment. The top right corner lists the court's leadership: Chief Judge Sidney R. Thomas, Cathy A. Catterson, Circuit & Court of Appeals Executive, and Molly C. Dwyer, Clerk of Court.

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 (9th 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 (9th 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 (9th 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. 4th 771, 780 (1998) or
 - *In re Clark*, 5 Cal. 4th 750, 765 n. 5 (1993)/*Robbins*
 - Independent – *Bennett v. Mueller*, 322 F.3d 573, 582-83 (9th 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 (9th 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 (9th Cir. 2013); *Rich v. Calderon*, 187 F.3d 1064, 1070 (9th Cir. 1999)

Bennett 3-Step Procedure

- *Bennett v. Mueller*, 322 F.3d 573 (9th 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
- 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 (9th 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 (9th 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 (9th 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 (9th 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

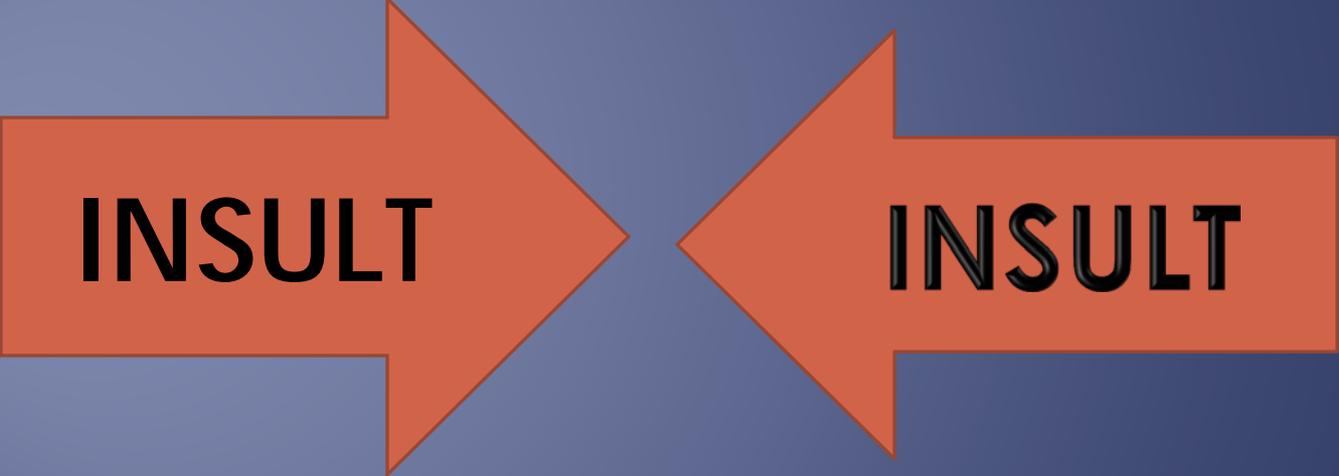
- Construct A Logical Structure
 - Tell The Whole Story
 - Leave No Unanswered Questions
- Highlight Useful Facts Or Law
 - Do Not Hide From Bad Facts Or Law
- Writing for the iPad

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



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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