No. S106906

In the Supreme Court of the State of California

The People,

Plaintiff and Respondent,

vs.

Jose Guadalupe Reyes Pena,

Defendant and Appellant.

REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS BRIEF OF THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF APPELLANT

On Review of a decision of the California Court of Appeal
Fourth Appellate District, Division Two, No. E029490

On Appeal from a Judgment of the Superior Court of California
San Bernardino County Superior Court No. FSB026870
The Honorable Patrick J. Morris and Brian S. McCarville

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REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICUS CURIAE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 29.1(f) of the California Rules of Court, the California Academy of Appellate Lawyers ("the Academy") applies for permission to file an amicus curiae brief in this action, *People v. Pena*, S106906.

The Academy is a non-profit, statewide organization of experienced appellate practitioners. Academy members' common goals include promoting and encouraging sound appellate procedures designed to ensure fair and effective disposition of cases at the appellate level. The Academy has long been interested in any procedural or substantive development affecting the right to oral argument in California's appellate courts. It filed an amicus brief regarding the scope of that right in *Lewis v. Superior Court*, 19 Cal. 4th 1232 (1999).

This case provides this Court with an opportunity to comment on the role of oral argument in the appellate process. However it resolves the issue on which review has been granted, the Court's opinion will shape how intermediate appellate courts view

their obligation and responsibilities with respect to providing opportunities for oral argument. This issue—how a court of appeal should approach the right to oral argument—is a critical one for the Academy and its members.

The Academy has read the petition for review and the briefs filed in this Court, and is familiar with the arguments made by the parties. The Academy's amicus brief does not repeat arguments made by the parties, but instead presents its own views on the importance of oral argument in the administration of justice at the appellate level. Accordingly, the Academy respectfully requests that this Court accept the attached amicus brief.

DATED: April 10, 2003.

Respectfully submitted,

Elliot L. Bien, Michael M. Berger,
Jay-Allen Eisen, Robert S. Gerstein,
Rex S. Heinke, Wendy C. Lascher,
Gerald Z. Marer
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BRIEF OF AMICUS CURIAE THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF APPELLANT

I
INTRODUCTION

Whatever else might be said about the argument notice at issue here, it certainly does not encourage counsel to exercise his or her client's right to present oral argument. On the contrary, the notice pointedly discourages counsel from exercising that right and provides that the right, if exercised, likely will prove ineffectual. The Academy appreciates that every case cannot be orally argued without sacrificing the timely disposition of cases. It likewise understands why some might view oral argument as an inefficient use of scarce resources, particularly when counsel argue at length in a case that does not deserve it or when they fail to address the specific concerns that the court has in mind.

From the Academy's perspective, however, a preoccupation with resolving cases on the one hand, or on the ineffectiveness of oral advocacy on the other, should not displace the pivotal role that oral advocacy plays in the public and private perceptions of the appellate process. Oral argument's intrinsic value is, for example, well-described by Justice Kennard in her dissenting opinion in *Lewis v. Superior Court*, 19 Cal. 4th 1232, 1265-66 (1999):

> The right to oral argument holds a cherished position in our legal tradition, and rightly so. As our society becomes increasingly depersonalized, it becomes even more important to keep those methods of procedure that personalize and humanize the administration of justice. When advocates appear in a courtroom to explain their positions to the judge or judges who decide their case, the judicial process loses its arid, abstruse, and remote character. A lively interchange between counsel and the bench, not possible by the submission of written briefs, may lead a judge to rethink his or her position and even alter the outcome of the proceeding.

Later in her opinion, Justice Kennard also explained why oral argument should be championed, not demeaned, given its unique place in the appellate process:

> Oral argument in the Courts of Appeal promotes confidence in those courts' decisions, on the part of the litigants, counsel, and the public, by ensuring that the justices whose decisions will bind the litigants have indeed heard and considered, and perhaps debated, the merits of the litigants' argument. The tremendous growth in the caseload of the Courts of Appeal, and their increasing use of professional legal staff, may give litigants cause to doubt that justices personally read all the briefs the litigants submit and personally write all the opinions the court issues. But oral argument removes all intermediaries and gives counsel an opportunity to make personal contact with the justices who will decide their case and to engage them in a dialogue on the merits of their respective positions. *Id.* at 1273.

The Academy believes that these observations are right on the mark. They capture the value that oral argument brings to the adjudicative process, the litigants, and, indeed, to the court itself. They further illustrate how our system of justice would suffer if it evolved to the point where the right to oral argument is waived

in all but a handful of cases because the courts have created the impression that it has no value at all.

No matter what the outcome of the constitutional question posed here, this Court's opinion will be a guidepost for how oral argument is perceived. This Court has an opportunity to take a stand for oral argument in this case and to preserve its singular place in the appellate process. The public, litigants and counsel will benefit by such a stand. Our courts ultimately will as well.

II

ORAL ARGUMENT PLAYS AN ESSENTIAL ROLE IN THE APPELLATE PROCESS AND ITS PIVOTAL ROLE IN THE PROCESS SHOULD BE RECOGNIZED FOR THE BENEFIT OF LITIGANTS, THE PUBLIC AND THE COURTS

"Appellate review in the United States has traditionally included the right to have counsel appear in person before the appellate tribunal to present oral arguments for the court's consideration." J. Clark Kelso, *Special Report of California Appellate Justice*, 45 Hastings L.J. 433, 464 (March 1994).

In accord with this view, the right to oral argument before rendition of an appellate court judgment is "well established" by California's Constitution, Rules of Court, Penal Code and this Court's case law. *Lewis*, 19 Cal. 4th at 1243 & 1253 (citing *Moles*

v. Regents of Univ. of Cal., 32 Cal. 3d 867, 871-72 (1982) and *People v. Brigham,* 25 Cal. 3d 283, 285, 289 (1979)); *see also* Cal. Const. art. VI, § 3; Cal. R. Ct. 29.2; *People v. Medina*, 6 Cal. 3d 484, 489-90 (1972) (important incidents of the right to appeal a superior court judgment are the right to present oral argument and the right to a written opinion).

The reasons supporting the right to oral argument are well-established:

> Deep within the Anglo-American legal psyche, mixed in with notions about the opportunity to be heard and the concept of due process, is the idea that a litigant and his lawyer should be able to face their judges and communicate directly to them. Nothing else affords the same assurance that the judges in fact have been confronted with the theories and arguments of the parties and have put their minds to the case. The acceptability and the integrity of the judicial process may be heavily affected by such assurance, and only the visible, orally presented appellate proceedings can provide it.[1]

This Court's clearest exposition of the importance of argument in the adjudicative process appears in *Moles*. After oral argument in the intermediate appellate court in *Moles*, the panel was altered to include one justice who did not attend argument. The appellant objected that it was "inherently unfair" for a judge who did

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[1] Daniel J. Meador, Symposium: The Appellate Judiciary—Its Strengths, Its Woes, And Some Suggestions For Reform: Toward Orality And Visibility In The Appellate Process, 42 Md. L. Rev. 732, 736-37 (1983) (footnote omitted).

not attend oral argument to participate in deciding his case. This Court agreed, holding that "a judge who has not participated in all the stages of the decision-making process may not be permitted to participate in the final decision" and "[t]o hold otherwise would inevitably infringe the right of litigants to oral argument on appeal." *Id.* at 870-71.

This Court grounded its analysis in the importance of oral argument, noting the right to oral argument "would be an empty right indeed if it did not encompass the right to have one's case decided by the justices who heard the argument." *Id.* at 872. This is because "[o]ral argument provides the only opportunity for a dialogue between the litigant and the bench," and "'it promotes understanding in ways that cannot be matched by written communication.'" *Id.*

The respondent in *Moles* argued that any error in swapping one justice who had heard oral argument for another who had not, was harmless because the other two justices who heard argument had the power alone to decide the appeal. *Id.* at 873. This Court rejected that argument in particularly strong terms, emphasizing that the lost opportunity for personal persuasion of each justice is crucial. *Id.* at 874. Because "the opportunity for a personal exchange" may make a difference in the result, the right to argument is "extremely valuable to litigants." *Id.* at 872; *see Lewis*, 19 Cal. 4th at 1253-55 (citing and quoting *Moles*).

Oral argument thus fosters the appearance of justice. It promotes accountability, visibility, and public understanding of the judicial process. It demonstrates the justices' personal attention to the case before the court. Oral argument also establishes a connection between the court, the attorneys and the litigants. It allows litigants, through their counsel, to emphasize the important parts of their case and to identify and correct any misperceptions the court may have. *See* ABA, Committee on Stds. Of Jud. Admin., Stds. Relating to App. Cts. § 3.35 at 56 (1977) ("Oral argument is normally an essential part of the appellate process. It is a medium of communication which for many appellate counsel and many judges is superior to written expression. It provides a fluid and rapidly moving method of getting at essential issues.").[2]

Similarly, oral argument allows the court to explore its own doubts or questions about the record and the issues, and allows both the court and the parties to explore the possible consequences of the court's decision. *See* Justice Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25, 26-29 (Winter 1999) (outlining the importance of oral argument in serving the public

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[2] *See* Chief Judge Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1978) (oral argument clarifies issues, reduces a case to its essentials, and "enables counsel to add the stress and verbal emphasis that cannot be easily communicated on the cold page of the printed brief. The oral argument is counsel's opportunity to persuade, to turn the heads of the judges a little, to leave them with the working hypothesis that his client deserves to win. An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!").

interest, assisting in decision-making, exploring issues overlooked or inadequately briefed, and providing for an interchange of ideas between counsel and judges and between judges; concluding that oral argument is of "crucial significance").

In short, as U.S. Supreme Court Justice William Brennan observed, "oral argument is the absolutely indispensable ingredient of appellate advocacy," providing a "Socratic dialogue between Justice and counsel." Harvard Law School, Occasional Pamphlet No. 9 at 22-23 (1967); *see also* Justice John Marshall Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 Cornell L.Q. 6, 7 (1955) (expressing the same sentiment).

As the foregoing observations from courts, judges, and commentators reflect, oral argument plays a significant and even vital role in our system of appellate jurisprudence. Many appellate justices informally have observed that they believe it is malpractice to waive oral argument. The Academy members overwhelmingly subscribe to that view.

But whether one goes this far, the right to oral argument is worth preserving and should be preserved. Like all basic rights that are integral to a meaningful opportunity to be heard, courts should approach oral argument with a view towards maintaining its vitality in our adjudicative process. Concomitantly,

courts should not encourage its waiver based on a perception that it lacks any value at all.

III

AN ORAL ARGUMENT WAIVER NOTICE NEED NOT AND SHOULD NOT UNNECESSARILY DISCOURAGE OR INFRINGE ON THE EXERCISE OF THE RIGHT TO ORAL ARGUMENT

The various districts and divisions of the California Court of Appeal typically provide some form of oral argument notice mentioning waiver to litigants. The Academy's concerns arise over argument notices that do more than merely alert a party to the option of waiving the right to oral argument and instead, actively discourage a party from exercising that right. The notice at issue here, for example, provided that:

> The court has determined that . . . oral argument will not aid the decision-making process, and [] the tentative opinion should be filed as the final opinion without oral argument in the interests of a quicker resolution of the appeal and the conservation of scarce judicial resources.

The notice similarly intoned (in bold text) that scheduling oral argument "**delays filing of the opinion**"; that "**Counsel may not repeat arguments made in counsel's briefs**"; and warned that "**Sanctions may be imposed** for noncompliance with this notice."

This strongly-worded phrasing certainly could lead some litigants to believe that oral argument would be useless, and indeed may not only impede the prompt resolution of the case, but also subject counsel to a monetary penalty simply for appearing in court or reiterating a point made in briefing. In addition to discouraging oral argument with the "stick" of threatened sanctions, the notice also encourages waiver of oral argument by offering the "carrot" of faster issuance of a decision on the merits.

The Attorney General argues that Division Two's notice is no different than that used by other Court of Appeal Districts. In making this argument, the Attorney General points out how Division Two's letter contains valid policies, such as establishing a 15-minute time limit. While this is true, isolating selected portions of the notice does nothing to mollify the thrust of its message.

First, the notice is in a non-letter format and titled "NOTICE." Second, the use of all capitals and boldface type give the contents and words greater force. Third, the language that "The court has determined that . . . oral argument will not aid the decision-making process," is more definitive than language used in similar notices from other courts.

For instance, the "suggested-waiver" letter used by the Third District reads, in its entirety: "The court is prepared to render a decision in the above case without hearing oral argument. Oral argument may be waived by failure to file a written request

with proof of service on or before [date]. If no request is made, the case will be submitted for decision on written order upon approval of the waiver by the court."

Although the Third District's Internal Operating Procedures also notes that this "suggested-waiver" letter "advises counsel the court believes oral argument is not necessary," the actual letter itself does not include this language; that is, it does not state "the court believes oral argument is not necessary." (See 3d Dist. Internal Operating Procedures VIII) Indeed, the letter says nothing about the court's evaluation or characterization of oral argument at all. It states only that the court is prepared to decide without argument, which "may be waived." The Third District's notice also does not say that oral argument will delay filing of the opinion.

The letter from the Fifth District states that "the court, after consideration of the record and briefs, now informs you that it is willing to accept submission of the case without oral argument." A letter with this more muted language that a court is "prepared" or "willing" to rule without oral argument certainly is different than a notice providing that the court has "determined" that oral argument "will not aid the decision-making process."

The Academy recognizes that a balance needs to be struck. Every case should not be orally argued. The Academy also recognizes that oral argument often is not helpful to a court in its

resolution of a case and that the time devoted to argument might be better spent on other aspects of the adjudicatory process. The Academy believes, however, that these realities should not become the springboard to drive parties away from the courtroom or to leave the impression that they face sanctions if they come.

As the quoted samples indicate, an argument notice can advise counsel and parties of their right to waive argument without providing a message deterring them from exercising the right. Many of the published notices from the various districts explain that the court is ready to decide the case and more neutrally convey the ability to waive argument. There is, from the Academy's perspective, marginal benefit and much risk from going further.

Steering people away from the door, or leaving the door only slightly ajar, does nothing to promote the efficacy of the judicial process. It instead leaves the impression that justice on appeal can be administered without the need for public interchange or a day in court. Leaving the door open to facilitate a dialogue of whatever appropriate length between court and counsel does much to improve the impression that a fair resolution has been achieved in a case. And, in those instances where the dialogue produces a change in thinking or result in any respect, justice truly is served as well.

IV

CONCLUSION

There is, as this Court several times has observed, a right to present oral argument on appeal in this state. This Court further has noted that, where the appellate process is concerned, attorneys should not be unduly deterred from the "vigorous assertion" of their clients' rights. *Coleman v. Gulf Ins. Group*, 41 Cal. 3d 782, 790 (1986). This principle should apply with full force to oral argument and to the contents of an argument notice that advises of the opportunity to exercise the right.

DATED: April 10, 2003.

Respectfully submitted,

Elliot L. Bien, Michael M. Berger,
Jay-Allen Eisen, Robert S. Gerstein,
Rex S. Heinke, Wendy C. Lascher,
Gerald Z. Marer
and

REED SMITH CROSBY HEAFEY LLP

By _____
James C. Martin
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Attorneys for Amicus Curiae
The California Academy
of Appellate Lawyers

Certification of Word Count Pursuant To

California Rules Of Court, Rule 14(c)

I, James C. Martin, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am the appellate attorney principally responsible for the preparation of the Amicus Curiae Brief in this case.

3. The Amicus Curiae Brief was produced on a computer, using the word processing program Microsoft Word 97.

4. According to the Word Count feature of Microsoft Word 97, the Petition for Rehearing contains 2,713 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the Amicus Curiae Brief complies with the requirement set forth in Rule 14(c)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing in true and correct and that this declaration is executed on April 10, 2003 at Los Angeles, California.

James C. Martin

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH CROSBY HEAFEY LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On April 10, 2003, I served the following document(s) by the method indicated below:

REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS BRIEF OF THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF APPELLANT

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 10, 2003, at Los Angeles, California.

Veronica Barreto

SERVICE LIST

The People v. Pena

No. S106906

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