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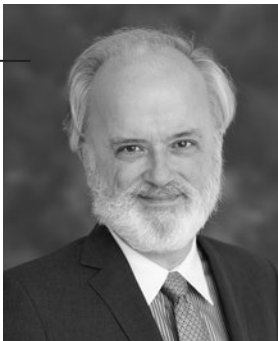
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THE CALIFORNIA SUPREME COURT IN JUDICIAL YEAR 2024: THE C.J. GUERRERO ERA IS UNDERWAY

Written by Kirk C. Jenkins



With the pandemic over and California courts once again operating normally, the Judicial Year 2023-2024 represented an opportunity to begin taking the measure of the Justices of the current California Supreme Court. With Chief Justice Patricia Guerrero in her first full Judicial Year in the center seat and Justice Kelli Evans in her first full Judicial Year on the Court, the Court now has 6 of 7 Justices appointed by Democratic governors. The last time the Court was so dominated by appointees of a single party was September 3, 1991 to April 5, 2014, when the Court had 6 appointees of Republican governors.

Appellate filings picked up in Fiscal Year 2023. The Court of Appeal logged 5,904 new civil notices of appeal, an increase of 9.5% over 2022. The Court received 6,665 new criminal notices of appeal, an increase of a whopping 54.2% over the previous year. Only juvenile filings were down, with new notices of appeal off by 5.8%. The Second District led the way as always, accounting for 40% statewide of the new notices of appeal across all categories for the year. The Sixth District was the smallest district, with only 4.4% of the new filings statewide. Things are picking up in the trial courts as well, with total filings in all divisions of the Superior Court statewide up 12.7% for Fiscal Year 2023.

The Supreme Court's caseload for JY2024 was up slightly, as the Court decided 32 civil cases and 26 criminal matters. Although this represents a small increase over JY2023 (21 civil cases, 34 criminal) and JY2022 (21 civil cases, 28 criminal), it is still a large drop-off from previous years — for example, as recently as JY2017 — when Court of Appeal filings were much higher — the Court's output was roughly double what it is today.

The slowdown in the death penalty docket continued in JY2024, with the Court once again deciding only 5 death penalty cases. The Court affirmed in 4 of those 5 cases and vacated 1 death judgment. As I noted last year, it is not entirely clear where this slowdown is coming from. California is now 5 years into a moratorium on executions via an Executive Order signed by Governor Gavin Newsom, and this has predictably led to a substantial decrease in death judgments statewide — only 5 were returned in 2023, 2 in 2022 and 3 in 2021. But death penalty appeals don't reach decision in only a few years. Looking back at the years of judgment for the Court's most recent death decisions, the state was regularly imposing as much as four times as many death judgments per year (20 in 2003). Although one can never be certain of cause-and-effect looking at the Court from the outside,

the slowdown in death cases — a massive drag on the Court's time — may have made room on the docket for an uptick in the number of civil cases the Court is deciding.

I'm asked occasionally why I track the length of the Court's opinions. There are several reasons. Depending on the Justice, a longer opinion can suggest a more broad-based victory or a more devastating defeat for the parties as the Court reaches out to decide additional issues. Depending on the Justice, a longer opinion can eliminate all interpretive doubts in the lower courts, or perhaps create some. Of course, writing styles differ among the Justices as well. For JY2024, the Court published exactly 1,200 pages of majority opinions in civil cases and 1,178 pages of criminal majorities. The criminal output was almost identical to the previous year, but this represents an 80% increase in the output of civil majority opinions. The Justices added another 27 pages of concurrences and 48 pages of dissents in civil cases, and 22 pages of concurrences and 248 pages of dissents in criminal cases.

The average majority opinion in a civil case was longer this year — 37.5 pages — than it has been in the past several years. Between JY2020 and JY2023, the average civil majority opinion was 6 to 7 pages shorter. Nondeath criminal cases saw a similar increase in length. The average nondeath criminal majority was 33.7 pages, compared to 28.72 pages for JY2023. The average death penalty majority grew longer this year too — majority opinions in the Court's 5 death cases averages 94 pages apiece.

As always, Los Angeles County led the civil docket, accounting for 12 cases. There were 3 cases each from San Francisco and Alameda counties. Orange, Placer, Riverside, San Diego and Santa Clara counties produced 1 civil case apiece. One case arose from the Public Utilities Commission, 5 were on certified questions from the Northern District of California and 1 certified question case came from the Central District of California.

On the criminal side, the docket was more spread out geographically. Los Angeles, Orange and Santa Clara counties accounted for 4 criminal cases apiece. San Diego County produced 3 cases. Contra Costa sent 2 cases to the Court. Alameda, Kern, Napa, Riverside, Sacramento, San Bernardino, San Mateo, Ventura and Yolo counties accounted for 1 case each.

Six cases arose from the First District Court of Appeal (specifically, Divisions One and Two, and 2 each from Divisions Four and Five). All but one of those decisions — a Division Four matter — were reversed. From the Second District, Division One produced 2 cases (both reversed), Division Two produced 2 (1 affirmed, 1 reversed), Division Four sent 5 cases up (3 affirmed, 2 reversed), Division Five accounted for 3 (2 reversed, 1 affirmed), and Division Eight sent 1, which was reversed. The Third District's lone civil decision was reversed. Four cases came from the Fourth District, 3 from Division One (1 affirmed, 2 reversed) and 1 from Division Three (affirmed). The Court decided 6 cases on certified question review from the Ninth Circuit.

On the criminal side, 2 of the Court's cases came from the First District — a reversal from Division Three and an affirmance from Division Five. Five cases arose from the Second District, an affirmance from Division Two and a reversed decision each from Divisions Three, Six, Seven and Eight. Two Third District criminal decisions were reversed. There were 7 decisions from the Fourth District. Division One accounted for 3 (1 reversed, 2 affirmed), Division Two sent 1 (reversed) and Division Three sent 3 cases (2 reversed, 1 affirmed). The Fifth District accounted for 1 criminal case, which was reversed. The Sixth District produced 4 criminal cases: 1 affirmed, 2 reversed and 1 affirmed in part, reversed in part. As noted above, the 4 death cases which arrived straight from the trial courts produced 4 affirmances and 1 partial reversal.

We turn next to totaling up the lower court actions which led to the appeals this year. Eleven civil cases arose from final judgments. Six were certified questions from the Ninth Circuit. Four cases were petitions for writ of mandate — 3 administrative and 1 non-administrative. Three cases arose from denial of motions to compel arbitration. Two cases arose from orders terminating parental rights, and the remaining orders and judgments accounted for only one case each.

On the criminal docket, 9 cases arose from final judgments below. Five were death penalty automatic appeals. Four arose from denial of petitions for resentencing under Penal Code section 1170.95. Four arose from nondeath habeas petitions (I recognize, of course, that habeas is technically civil, but it biases the analytics to treat it that way for our purposes). One case each arose from a motion to dismiss a sexually violent predator finding, an order denying a motion for preservation of evidence, and motion to dismiss

an incompetency petition and a postjudgment order of restitution.

A theme of my analytics work has always been testing anecdotal conventional wisdom. A prime example: “don’t bother seeking review of a unanimous opinion, and it has to be published, or the Supreme Court won’t care.” As I’ve shown every year, at least with respect to dissents, this bit of conventional wisdom is just wrong: this year, only 6 of 32 civil cases had a dissent below, and only 7 of 26 criminal cases did. It’s closer to the mark on publication, but still far from anything a lawyer can reasonably base a decision on: only 20 of the Court’s 32 civil cases were published below, and only 18 of 26 criminal cases were.

Turning to appellate lag times, once again we check in on Proposition 66. That voter-passed proposition provided that the appeals and habeas corpus petition process from death judgments should be concluded within 5 years after the death judgment is issued. By any measure, Prop 66 has been a total failure. For JY2024, the average lag time from filing of a certified death judgment to the Supreme Court’s decision was 7,119.8 days — *over 19 years*. Even accounting for the data distortion caused last year by *People v. Waldon*, which took nearly 31 years from sentence to decision, this suggests that the death penalty docket may actually be slowing down. Even if we measure lag time from the filing of the reply brief to the Court’s decision, the average lag time is 2,937.8 days — slightly over 8 years, and an increase of nearly a year from JY2023.

The Supreme Court’s other cases move significantly faster, of course. The average lag time from the end of briefing in nondeath criminal cases to oral argument (which is almost inevitably within 90 days of decision) is 244.095 days. Civil cases move even faster — the average lag time from the end of briefing to oral argument is 215.63 days, a significant decrease from JY2023 (283.33 days).

Particularly with a new Chief Justice early in her tenure, unanimity rates are a subject of interest. Last year, all 21 civil cases were unanimous, so the Court was inevitably in for a decline, and sure enough, “only” 93.75% of the Court’s JY2024 civil decisions were unanimous. Criminal cases were a good bit more divided though. Only 68.75% of the Court’s criminal decisions were unanimous, compared to 88.24% in JY2023. For JY2022, 75% were unanimous. The Court’s criminal unanimity rate was 91.89% in JY2021, 88.37% in JY2020, 81.4% in JY2019 and 73.47% in JY2018.

For JY2024, the Court reversed in 69.23% of all civil cases, 71.43% of all nondeath criminal cases (including one case reversed only in part), and the Court reversed the penalty in 1 of 5 death penalty cases. This represented a slight decrease — the overall reversal rate for nondeath criminal cases was 72.41% for JY2023. Nevertheless, the reversal rate in nondeath criminal cases continues to increase, from 61.54% in JY2022 to 68.18% in JY2021, to 64% in JY 2020, to 56.52% in JY 2019, to 50% in JY2018.

We turn next to the areas of law reflected on the Court’s civil and criminal dockets. On the civil docket, the Court decided 6 employment law cases, 4 civil procedure cases, 4 insurance, 3 cases each involving arbitration law, government law, juvenile law and tort law. The Court decided 1 civil case each involving environmental law, property law, tax law, and wills and estates.

On the criminal side of the docket, the Court decided 9 criminal procedure cases, 5 death penalty cases, 5 involving sentencing law, 3 constitutional law cases, 2 cases involving violent crime, and 1 case each involving mental health and process crimes.

Turning to the authors of the Court’s majority opinions, on the civil side, Chief Justice Guerrero wrote 6 opinions, Justice Leondra Kruger wrote 6 cases, Justices Evans and Goodwin Liu wrote 5 decisions apiece, Justice Carol Corrigan wrote 4 decisions, Justices Joshua Groban and Martin Jenkins wrote 3 decisions apiece.

Chief Justice Guerrero led the Court with 7 majority opinions in criminal cases. Justices Corrigan and Kruger wrote 4 decisions apiece. Justices Groban, Evans and Liu wrote 3 decisions each. Justice Jenkins wrote 2 decisions.

As for concurrences, on the civil side, Justice Kruger wrote 3 and Justice Groban wrote 1.

On the criminal side, Justice Liu wrote 2 concurrences and Justices Corrigan, Groban, and Evans wrote 1 apiece.

There were only 2 dissents filed in civil cases — one by Justice Groban and one by Justice Liu.

But there were 10 dissents in criminal cases — 4 each by Justices Liu and Evans and 1 each by Chief Justice Guerrero and Justice Kruger.

It's well known that the California Supreme Court is more welcoming to amicus briefs than practically anyone in the country except for the U.S. Supreme Court. This year, the Court received exactly the same number of amicus briefs in civil affirmances and reversals — 39 apiece. For affirmance, the Court accepted 15 petitioner briefs, 24 respondent briefs and zero “supporting nobody” briefs. For civil reversals, the Court accepted 23 petitioner briefs, 14 respondent briefs, and 2 “nobody” briefs. Given that the winning party in civil cases tended to have more amicus support, these results suggest that amicus briefs may indeed help.

Perhaps it's time for a brief review of the history of oral argument analytics to explain why I track these data points. Although the history of academic research into judicial analytics in general stretches back a century, oral argument analytics are a much more recent phenomenon. The earliest studies were investigations of U.S. Supreme Court arguments, one of them by John Roberts before he joined the bench. Each of those studies concluded the same thing: both Justice-by-Justice and for the entire court, the party which gets more questions is likely to lose — the often heard “they're just playing devil's advocate” is a myth. Indeed, one study went so far as to count the total number of words in each Justice's questions and ask whether getting *longer* questions was an indication that the litigant would lose, and the answer was “yes.” I did a multi-year study of oral arguments at the Illinois Supreme Court and arrived at the same conclusion: more questions meant you were losing, and the predictive power of the variable increased as the margin between your questions and your opponent's increased — 5 more, 10 more, and so on. After several years of studying the California Supreme Court, our results are broadly in line with these other courts.

For JY2024, there were 475 questions asked of appellants and 451 to respondents in civil cases. In criminal cases, there were 480 questions to appellants and 389 to respondents. Dividing this data up by winners and losers, our result was as expected for civil affirmances: losers averaged 16.875 questions while winners got only 9 questions. Reversals were similar: 16.47 questions to losers and 12.47 to winners. Criminal affirmances were in line with the others: 22.3 questions to losers and 14.3 to winners. Only criminal reversals were out of line with the usual result: losers 15.375 questions, winners 16.06 questions.

The most active questioner in civil cases was Justice Liu, averaging 5.53 per case, followed by Justice Kruger (5.29), Chief Justice Guerrero (4.72), Justices Corrigan (4.375), Groban (3.87), Jenkins (3.375), and Evans (2.71). For the criminal side of the docket, Justice Corrigan led (9.35), followed by Justice Liu (6.35), Justice Kruger (4.81), Justice Evans (3.88), Justice Groban (3.62), Chief Justice Guerrero (3.38), and Justice Jenkins (2.54).

So which Justices were bellwethers — meaning that by the largest margin, they asked more questions of the side which would lose the case? Justice Corrigan was the most reliable indicator of civil affirmances, averaging 2.375 questions to the losing appellant and 0.125 to the respondent. The Chief Justice was next, averaging 2.86 questions to losers and 1 to winners. The least predictive Justice was Justice Evans at 1.125 to losers and 0.875 to winners. For civil reversals, Justice Corrigan was once again the most predictive, averaging 3.29 questions to losers and 1.35 to winners. Justice Jenkins was next at 2.29 to losers and 1.17 questions to winners. Justice Kruger and Chief Justice Guerrero had the opposite result, with losers averaging fewer questions than winners.

For criminal affirmances, Justice Corrigan was once again our bellwether Justice, averaging 10.3 questions to losers and 1.9 to winners. Justice Kruger was next, averaging 2.9 questions to losers and 1.1 to winners. Justices Evans and Liu had contrary results, averaging more questions to winners than losers. For criminal reversals, Justice Groban was the bellwether, averaging 2.44 questions to losers and 1.44 to winners. Justice Kruger was next, with 2.625 questions to losers and 2.125 to winners. Chief Justice Guerrero and Justices Jenkins, Evans, and Liu had results contrary to our expectations, averaging more questions to winners.

For JY2024, the Court acted on 3,073 petitions for review — exactly 100 more than last year. There were 965 civil petitions and 2,108 criminal petitions. On the civil side, 1.97% were granted, 3.21% were granted-and-held and 1.24% were granted-and-transferred. For the criminal docket, 0.62% were granted, 9.25% were granted-and-held and 0.95% were granted-and-transferred.

So what was the “best” District to come to the Supreme Court with a petition for review? The answer, of course, is “none of them,” since the odds against a litigant are very long no matter what part of the state you arrive from. But the highest grant rate for JY2024 in civil cases was the Sixth — the smallest District in the state — with

5.55% grants. Division Three of the Fourth District and the Fifth District brought up the rear, with no petitions at all granted.

For the criminal side of the docket, Division Two of the Fourth District is the highest grant rate at 1.67%. The Third District and Division One of the Fourth District had a grant rate of zero.

Dissents from grant-of-review decisions are interesting and may suggest some of the philosophical divisions on the Court. There were 6 dissents from civil decisions: Justices Groban, Kruger, and Evans dissented in 1 matter apiece. Justices Groban and Evans dissented together in 1 case and Justices Liu and Evans dissented in 1 case.

But there were 27 dissents from grant-of-review decisions on the criminal side of the docket. Justice Liu dissented solo 4 times, Justice Evans twice and Justice Groban twice. Justices Liu and Evans dissented together from 12 decisions. Justices Liu, Jenkins, and

Evans dissented together 3 times. Justices Liu, Groban, and Evans dissented once and Liu, Jenkins, and Evans dissented once. Three pairs of Justices dissented once each: Justices Liu and Groban, Liu and Jenkins, and Groban and Evans.

Ultimately, JY2024 did not represent the departure from the Court's recent years that we were expecting. Reversal rates dipped, at least a bit, on both sides of the docket. Unanimity remained very high, and there were no decisions which stood out as surprisingly liberal-leaning. Justices Liu and Evans clearly are the left wing of the Court, with Justices Jenkins and Groban joining them occasionally. Although the Supreme Court can clearly be characterized as a liberal-leaning court, a clearly discernible shift further left may have to wait another year-and-a-half to determine whether Governor Newsom gets an opportunity to appoint a seventh Justice before leaving office in 2026.

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