

**FIRST DISTRICT APPELLATE PROJECT
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**AVOIDING PROCEDURAL DEFAULT
AND PROTECTING CLIENTS FOR
FUTURE POST-AFFIRMANCE
PRO-PER REMEDIES**

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INTRODUCTION

The scope of a court appointment in a California direct criminal appeal does not include preparing, or litigating, a federal habeas corpus petition. This may be a source of relief for some because federal habeas, in the words of Ninth Circuit Judge Andrew J. Kleinfeld, is “a subject that challenges the most capable lawyers and judges.”¹

But, as state court practitioners, we’re not entirely off the hook. Effectively representing a criminal defendant on appeal in state court involves preserving federal claims for possible federal court habeas review. While state practitioners have been implored time and again to federalize their appellate claims and to exhaust those claims by presenting them to the California Supreme Court, properly preparing a client for federal habeas requires an understanding of federal habeas law beyond federalization and exhaustion. A working knowledge of procedural default, federal habeas standards of review, and the federal statutes of limitations also improve the level of representation provided to our clients in state court.

Below is a brief outline of federal habeas corpus topics which are of use to state-court practitioners, including: cognizable claims, exhaustion, procedural default, statute of limitations, and the substantive AEDPA standards of review.

Federal Habeas Corpus Tools and Resources

- Hertz & Liebman, *Federal Habeas Practice and Procedure* (5th ed. 2005)
- ADI, California Criminal Appellate Practice Manual, Chap. 9, *The Courthouse Across the Street: Federal Habeas Corpus*
- [Gail Weinheimer's Federalization Table](#) (rev. 9/06)
- Capital Defense Network: www.capdefnet.org/
- [Federal Habeas Forms](#): <http://www.fdap.org/t-forms.shtml#habeas>
- [PACER](#) - online dockets for federal cases: <http://pacer.psc.uscourts.gov/>

¹ *Mendoza v. Carey* (9th Cir. 2006) 449 F.3d 1065, 1075 (Kleinfeld, J., dissenting).

I. Cognizable Claims

- A. Federal Claims Only:** Federal habeas relief is available only for violations of the federal constitution (and, rarely, violations of federal statutes or treaties). 28 U.S.C. § 2254(a).
- B. Fourth Amendment Claims:** Not Cognizable on federal habeas if state provided opportunity for full and fair litigation. (*Stone v. Powell* (1976) 428 U.S. 465, 494.)

II. Exhaustion: Habeas relief is only available when the petitioner has exhausted state remedies (28 U.S.C. 2254(b)(1)(A)) by presenting the federal claim to the state high court.

A. How to Exhaust

1. At a minimum, cite the applicable federal constitutional provisions.
2. Also cite *federal* cases based on the federal constitutional provision.
3. Do not rely on state statutes or state cases.
4. Consult the federalization charts.
5. Exhaust facts and law.

B. Exhaustion Caselaw

1. *Presentation Only; Decision on the Merits Not Required.* A claim is exhausted if it is fairly presented in the state high court. All that is required is *presentation* of the claim. If the state supreme court rejects the claim on procedural grounds, without reaching the merits, the claim is exhausted.
2. Federal Claim Must be Fairly Presented to State High Court

- a. Federal claim must be “fairly presented” to state courts in order to give the state an opportunity to correct violations of federal rights. (*Picard v. Connor* (1971) 404 U.S. 270, 275.)
- b. Federal claim must be presented to state high court in petition for discretionary review. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 839-840.)
- c. Examples
 - (1) State court Evidence Code section 352 and state-constitutional miscarriage of justice claims did not exhaust federal due process argument. (*Duncan v. Henry* (1995) 513 U.S. 364 (per curiam).)
 - (2) Sixth Amendment IAC-of-appellate-counsel claim was not fairly presented in discretionary petition for review to state high court where (1) petition contained claims of trial-counsel and appellate-counsel IAC, and (2) petitioner alleged trial-counsel IAC, *but not* appellate-counsel IAC, violated federal constitution. The claim was not exhausted although federal nature of appellate IAC claim was apparent from lower state trial court opinion. (*Baldwin v. Reese* (2004) 541 U.S. 27, 39-32.)
 - (3) 8th amend claim for failure to give jury instruction on LIO in capital case not exhausted where petitioner did not cite the federal constitution, only cited state cases, and “petitioner’s daisy chain---which depends upon a case that was cited by one of the cases that was cited by one of the cases that petitioner

cited---is too lengthy” (*Howell v. Mississippi* (2005) 543 U.S. 440, 443 (per curiam).)

d. Supreme Court has not decided whether a federal claim is exhausted when the corresponding state law claim is presented to state high court and state and federal standards on issue are identical. (*Baldwin*, 541 U.S. at 33-34 declining to decide question); *Howell*, 543 U.S. at 444 (assumes, without deciding, that identical standards would suffice).)

e. Fact Exhaustion.

(1) Where district court considered supplemental information that “did not fundamentally alter the legal claim already considered by the district court,” exhaustion requirement satisfied. (*Vasquez v. Hillery* (1986) 474 U.S. 254, 260.)

(2) No exhaustion where new evidence regarding audibility of request for counsel had not been presented to state courts. (*Aiken v. Spalding* (9th Cir. 1988) 841 F.2d 881.)

C. Litigating Unexhausted Claims in Federal Court: How to litigate a federal petition containing an unexhausted claim is beyond the scope of the materials. It is suffice to say that it is unlikely that the failure to exhaust will be excused by the federal court or waived by the state, and the client will have to either abandon the unexhausted claim or return to state court to exhaust the claim, while at the same time making sure that all of the claims—unexhausted and exhausted—are presented in a federal petition which complies with the one-year statute of limitations discussed below.

D. Exceptions to Exhaustion: There are only limited and infrequently-applicable exceptions to the exhaustion requirement. The exceptions are:

1. “there is an absence of available State corrective process.” 28 U.S.C. § 2254(b)(1)(B)(I)
2. “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(ii)
3. *express* waiver of the exhaustion requirement by the state (28 U.S.C. § 2254(b)(3))

E. Can an Exhausted Claim Become Unexhausted Upon a Change in Law?

1. Federal Habeas Statute: “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State... if he has the right under the law of the State to raise, by any available procedure, the question presented.” (28 U.S.C. § 2254(c).)
2. After *Cunningham*, must previously exhausted *Blakely* claims be presented again to state courts?

III. Procedural Default: Subject to several important exceptions, federal court review is generally unavailable for claims defaulted in state court.

A. Plain Statement Rule: “[I]f ‘it fairly appears that the state court rested its decision primarily on federal law’ this court may reach the federal question on review unless the state court’s opinion contains a ‘plain statement’ that its decision rests upon adequate and independent state grounds.” (*Michigan v. Long* (1983) 463 U.S. 1032, 1042, and n. 7 (direct appeal case); see also *Harris v. Reed* (1989) 489 U.S. 255 (habeas case).)

B. Last-Reasoned Decision: In assessing whether the state court applied a procedural bar, the federal court analyzes the last reasoned decision. (*Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803-04.)

C. Does the State Rule Hold Up, I.e. is it Adequate and Independent? A state procedural bar is not enforceable in federal court unless the state rule is both adequate and independent. (*Coleman v. Thompson* (1991) 501 U.S. 722, 729.)

D. Adequate? State procedural bar must be adequate, i.e. clear and consistently applied.

1. In order for a state procedural rule to preclude federal review, the rule must be, firmly established, regularly followed, and consistently applied. (*Ford v. Georgia* (1991) 498 U.S. 411, 423-24; *Collier v. Bayer* (9th Cir. 2005) 408 F.3d 1279, 1283-84; *Calderon v. United States District Court (Bean)* (9th Cir.1996) 96 F.3d 1126, 1129.)

2. California’s contemporaneous objection rule for evidentiary issues has been deemed adequate.

a. Evidence Code section 353 bars reversal on appeal for evidentiary error in absence of

Practice Tip

In some circumstances, a state-court procedural default improves the petitioner’s chances for federal habeas relief. (See the practice tip on page 14.)

objection. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-162 & n. 6.)

- b. Ninth Circuit has deemed California's contemporaneous objection rule for evidentiary claims adequate. (*Melendez v. Piler* (9th Cir. 2002) 288 F.3d 1120, 1124-25.)
3. California's contemporaneous objection rule for non-evidentiary issues is not adequate.
 - a. Rule is not consistently applied because reviewing courts have discretion to reach merits of non-evidentiary claims despite the lack of a contemporaneous objection in the trial court. (*Williams*, 17 Cal.4th at 161-162 & n. 6.)
 - b. In practice, California courts variably decline to decide merits because of failure to object or reach merits despite lack of objection.
 4. **State Habeas Defaults.** For a discussion of the adequacy and independence of state habeas procedural defaults rules, see O'Connell, *State Habeas Corpus Update and Practice Tips* (March, 2004), at pp. 24-25. <http://www.fdap.org/downloads/tools/state_habeas_materials_CADC_March_2004.pdf>. (Caveat: the referenced article was produced in 2004 and any authority should be checked for currency.)

E. Independent? State rule must be independent of the federal question.

1. A state procedural rule that is interwoven with federal law cannot be the basis for a procedural bar upon federal habeas review. (*Carter v. Giurbino* (9th Cir. 2004) 385 F.3d 1194, 1197; *Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 581.)

2. The state procedural rule is interwoven with a federal rule if application of the procedural bar depends upon a determination of whether there was federal constitutional error. (*Carter*, 385 F.3d at 1197 (citing *Park v. Calif.* (9th Cir. 2000) 202 F.3d 1146, 1152 and *Ake v. Oklahoma* (1985) 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53).)
3. California’s contemporaneous objection rule is not independent because application of the waiver rule is based, at least in part, upon federal constitutional grounds. California cases note the “importance” of constitutional claims and “issues of public policy” as grounds for exercising discretion to reach the merits of a claim, in spite of the lack of objection. (*In re Sheena K.*, (2007) 40 Cal.4th 875, 887, esp. n.7; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)
4. The Ninth Circuit has enforced California’s contemporaneous objection rule. But in such cases the court did not address whether the contemporaneous objection rule was adequate and independent. (E.g. *Van Sickle v. White* (9th Cir. 1999) 166 F.3d 953, 957-58; *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 653-54; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1092-93.) In *Paulino*, the court made clear that the petitioner had not even argued that the rule was unclear, inconsistently applied or not well-established. (*Paulino*, 371 F.3d at 1092.)

F. Cause & Prejudice - A petitioner can overcome a procedural default by making a showing of cause for the default and actual prejudice.

1. “Cause” is an external objective factor which cannot fairly be attributed to the petitioner. If the default was at a stage when there was a constitutional right to counsel, attorney ineffectiveness will constitute cause

for the default. (*Murray v. Carrier* (1986) 477 U.S. 478, 488.) But, If the default was in a post-conviction proceeding, attorney ineffectiveness is not cause. (*Coleman v. Thompson* (1991) 501 U.S. 722, 752-755.)

- G. Actual Innocence** - A procedural default will be excused if, in light of all available evidence, it is more likely than not that no reasonable juror would convict petitioner of the relevant crime. (*Schlup v. Delo* (1995) 513 U.S. 298; see also *House v. Bell* (2006) --- U.S. ----, 126 S.Ct. 2064, 2076-77.)

IV. Statute of Limitations

- A. General Rule:** One-year limitations period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” (28 U.S.C. § 2244(d)(1)(A).)

1. If no certiorari petition is filed, judgment final—and one-year clock starts—after time to file certiorari petition runs, i.e. 90 days after denial of review
2. If certiorari petition filed, judgment final—and one-year clock starts—upon denial of certiorari.
3. The prison mailbox rule applies to the filing of a pro per federal habeas petition by an incarcerated petitioner. The petition will be deemed filed as of the date the inmate turned it over to prison officials for mailing.

B. Exceptions - one-year period alternatively runs from ...

1. “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action” (28 U.S.C. § 2244(d)(1)(B));

2. “the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review” (28 U.S.C. § 2244(d)(1)(C)); or
3. “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” (28 U.S.C. § 2244(d)(1)(D).)

C. Statutory Tolling

1. “The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” (28 U.S.C. § 2244(d)(2).)
2. Statutory tolling doesn’t restart the clock at “0” days; clock re-starts where it left off
3. “Properly Filed”: Only “properly filed” state post-conviction petition suspends clock.
 - a. “an application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.” (*Artuz v. Bennett* (2000) 531 U.S. 4, 8-9.)
 - b. Untimely state petition is not “properly filed” and does not toll the limitations period. (*Pace v. DiGuglielmo* (2005) 544 U.S. 408, 417.)
4. “Is Pending”: federal clock is tolled only while state petition is “pending.”
 - a. **Gap Tolling.** In Cal., a state petition is “pending” during the intervals between denial at one court level and timely filing of new petition

at next higher court. (*Carey v. Saffold* (2002) 536 U.S. 214.)

- b. In *Carey*, the Court also stated that petitions are not pending during “unreasonable” delays between levels. And a denial “on the merits” does not necessarily mean a petition was timely filed.
- c. Six-month delay between California court of appeal habeas denial and filing of new habeas petition in Cal Supreme court was unreasonable. (*Evans v. Chavis* (2006) 546 U.S. 189.)
- d. In *Evans v. Chavis*, the Court also held that a silent denial by the Cal. Supreme Court is not necessarily a denial on the merits.
- e. Gap tolling applies to a single trip up the state-court ladder; it does not apply to gaps between different rounds of habeas petitions.
- f. A state post-conviction petition is not “pending” during cert. proceedings from denial of state post-conviction petition. (*Lawrence v. Florida* (2007) 127 S.Ct. 1079.)

Practice Tip

It is best to assume that the time between the denial at a lower level and the filing of a new petition at a higher level is tolled only for the typical period for an appeal between the two levels (e.g. 60 days for going from superior court to court of appeal). Assume that the federal courts will deem unreasonable the portion of any interval beyond that typical time to appeal.

D. Equitable Tolling

- 1. SCOTUS, without deciding, assumes equitable tolling applies to federal habeas limitations period. *See e.g. Lawrence v. Florida* (2007) --- U.S. ----, 127 S.Ct. 1079, 1085, fn.3.

2. Showing Required: (1) petitioner pursued rights diligently and (2) extraordinary circumstances prevented timely filing. (*Id.* at 1085.)
3. Attorney Conduct
 - a. Mere attorney mistake of law does not constitute equitable tolling. *Lawrence v. Florida* (2007) --- U.S. ----, 127 S.Ct. 1079, 1085 (“Attorney miscalculation [of deadline] is simply not sufficient to warrant equitable tolling”).
 - b. Lower federal courts have held that egregious conduct by counsel does toll the limitations period. (*Spitsyn v. Moore* (9th Cir. 2003) 345 F.3d 796, 801; *Fleming v. Evans* (10th Cir. 2007) 481 F.3d 1249, 1256 (collecting cases).)
4. Most likely successful where some force or circumstance external to the petitioner or counsel caused the delay.
 - a. E.g. Petitioner prevails in state habeas, state successfully obtains reversal by SCOTUS. Because petitioner had prevailed in state court and had no reason to seek federal review during pendency of SCOTUS proceedings and because, under *Lawrence*, there’s no tolling during SCOTUS review, the limitations period has run. This “exceedingly rare inequity ... may well be cured by equitable tolling.” (*Lawrence*, 127 S.Ct. at 1085.)
 - b. Lack of assistance to Spanish-speaking inmates was grounds for equitable tolling. (*Mendoza v. Carey* (9th Cir. 2006) 449 F.3d 1065, 1075.)
 - c. Actual Innocence Gateway - Ninth Circuit assumes actual innocence is a gateway to

federal review of a time-barred petition. (*Majoy v. Roe* (9th Cir. 2002) 296 F.3d 770.)

V. Substantive Review in Federal Court

A. State Court Decision on the Merits - Deferential Standard of Review.

1. Under AEDPA, habeas corpus relief must be granted if a state court decision on the merits is "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The "contrary to" and "unreasonable application" clauses have distinct meanings. (*Williams v. Taylor* (2000) 529 U.S. 362, 404; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1067.)
2. **“Contrary to”:** “A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result.” *Clark*, 331 F.3d at 1067 (citing *Williams*, 529 U.S. at 413-14).
3. If a state-court decision is contrary to US Supreme Court authority, no section 2254(d) deference is due the state court decision. But the federal court must still find constitutional error because it may grant a writ of habeas corpus to a state prisoner only if that prisoner “is in custody in violation of the Constitution ... of the United States.” (28 U.S.C. § 2241(c)(3); *Frantz v. Hazey* (9th Cir. no. 05-16024, Jan. 22, 2008) ___ F.3d ___, slip op. at 728 (en banc).)
4. **“Unreasonable Application of”:** “A state court's decision involves an unreasonable application of federal law if ‘the state court identifies the correct governing legal principle ... but unreasonably applies

that principle to the facts of the prisoner's case.' *Williams*, 529 U.S. at 413, 120 S.Ct. 1495. In *Williams* and in subsequent decisions the Supreme Court has repeatedly emphasized that "an unreasonable application of federal law is different from an incorrect application of federal law. [Citations.]" *Clark*, 331 at 1067.

5. Last-Reasoned Decision. In applying the AEDPA standards, the federal court reviews the state court's last reasoned decision. (*Baker v. Fleming* (2005) 423 F.3d 1085, 1091-93 and fn.3.)

B. No State Court Decision on the Merits - De Novo review: If the state court did not adjudicate the claim on the merits, then the federal court reviews the claim de novo. 28 U.S.C. § 2254(d); (*Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1167-1168.)

Practice Tip

The best scenario for federal court review may be where the state court finds the federal claim procedurally defaulted under a state procedural bar that is unenforceable in federal court (perhaps because it is not "adequate" or "independent") or excused (perhaps because of a showing of "cause and prejudice"). In that situation, the federal court will review the claim on the merits and decide it de novo, with no deference to the state court decision.

Relatedly, before seeking rehearing when the state court of appeal fails to address a federal claim, counsel might consider the competing views on seeking rehearing in C. Gardner & R. Neuhoff, *Exhaustion of State Remedies and Petitions for Rehearing*, CADC (Jan. 30, 2005) <<http://www.cadc.net/index.php?id=76>> and H. Cohen, *Exhausting State Remedies*, ADI Newsletter (Jan. 2005) at 3-4 <http://www.adi-sandiego.com/newsletters/2005_january.pdf>. Allowing the state court of appeal's failure to rule to stand uncorrected can lead to de novo review in federal court because the AEDPA deference only applies to state-court decisions on the merits.