

“EXHAUSTION” PETITIONS FOR REVIEW UNDER NEW RULE 33.3

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Introduction

Effective January 1, 2004, the Judicial Council has adopted new Rule 33.3, which creates a new form of Supreme Court “exhaustion” petition for review. The purpose of Rule 33.3 is to allow an “abbreviated” form of Supreme Court petition, where the “sole purpose” of the filing is to “exhaust[] state remedies before presenting a claim for federal habeas corpus relief,” rather than to seek an actual hearing and decision of the case by the California Supreme Court. (Rule 33.3(a).) Both Rule 33.3 and the relevant provisions of the standard petition for review rules (Rules 28 & 28.1) are attached.

These materials will summarize the key provisions of Rule 33.3 and will attempt to offer a preliminary assessment of the question of greatest concern to criminal appellate counsel: Does Rule 33.3 deliver on its goal of allowing a defendant to exhaust state review of his federal claims via an “abbreviated” petition? How will an “exhaustion” petition differ from a conventional petition for review? Most importantly, what steps can counsel take to ensure that the petition is truly effective for all aspects of the defendant’s federal claims.? As the Advisory Committee Comment states, “practitioners should consult federal law to determine whether the petition's statement of the factual and legal bases for the claim is sufficient” to satisfy federal exhaustion requirements.

Of course, there is unlikely to be any Ninth Circuit case law addressing the adequacy of a California Rule 33.3 petition for several years. In the meantime, California appellate counsel will likely adopt divergent approaches to Rule 33.3 petitions, with some filing truly “abbreviated” petitions and others eschewing the Rule 33.3 format altogether in favor of traditional petitions for review. Since this rule is new and untested, these materials will offer a conservative assessment of how counsel may employ the Rule 33.3 procedure and still retain confidence that the petition successfully exhausts all the claims. However, we also encourage counsel to at least consider and evaluate in an appropriate case possible approaches which are more streamlined than the procedures described here. Only when the Ninth Circuit begins to rule on Rule 33.3 petitions will we know with more certainty just how abbreviated a petition can be and still ensure full exhaustion.

Exhaustion Basics

Necessity of presentation to highest state court in which review “available.”
Exhaustion of state remedies ordinarily requires presentation of all federal claims to the highest state court in which review is “available,” even if (as in California) state supreme court review is discretionary. (*O’Sullivan v. Boerckel* (1999) 526 U.S. 838.) However, a petition to the highest state court may be unnecessary if that court expressly provides that review is *not* available where its only purpose is exhaustion of state remedies. (*Swoopes v. Sublett* (9th Cir. 1999) 196 F. 3d 1008, 1010-1011 [construing Arizona law].)

Exhaustion of both legal grounds and factual bases. Exhaustion requires *both* that the relevant application *explicitly identify the federal constitutional nature of the claim* and that it *present the facts supporting that claim*. Those requirements have two practical implications for effective exhaustion of claims in California appeals:

First, it is essential that the petition to the highest state court refer to *specific federal constitutional provisions and/or cite federal cases*. References to state cases alone will likely be considered insufficient, even if those state cases, in turn, refer to federal constitutional principles and cases. A recent Ninth Circuit en banc opinion concluded that *a petition to the Oregon Supreme Court which alleged “inadequate assistance of counsel” and cited only to Oregon authorities merely stated a claim under the Oregon Constitution’s right to counsel provision and did not exhaust a Sixth Amendment/Strickland ineffective assistance claim*. (*Peterson v. Lampert* (9th Cir. 2003) 319 F.3d 1153 (en banc).)

The U.S. Supreme Court took an even more strict approach in *Baldwin v. Reese* (2004) 541 U.S. ___, 124 S.Ct. 1347. In *Reese*, another Oregon petitioner had use *both* terms – “ineffective assistance” and “inadequate assistance” in his petition to the state supreme court. But the U.S. Supreme Court rejected the assertion that the “ineffective assistance” nomenclature was sufficient to alert the state court to the *federal* nature of the claim. “The petition provides no citation of any case that might have alerted the court to the alleged federal nature of the claim.” (*Id.* at p. 1351.) The Court was not convinced that the Oregon state courts used “ineffective assistance” to refer exclusively to a federal constitutional claim, rather than to a similar state claim. (*Id.* at pp. 1351-1352.)

Reese suggests that even when the state petition or brief employs well-established federal terms of art – e.g., “due process,” “privilege against self-incrimination,” or (as in *Reese* itself) “ineffective assistance of counsel” – *some explicit reference to the U.S. Constitution and/or federal case law is essential*, to eliminate any ambiguity that the claim may rest only on the parallel state constitutional doctrine.

The *Reese* opinion did leave open one possibility. The majority did not decide whether reference to a state standard that was, in all respects, *identical to the federal standard* might be considered “adequate to present the corresponding federal claim.” (*Reese, supra*, 124 S.Ct. at p. 1352.) But the Court found *Reese* had waived that argument by not presenting it in the lower federal courts.¹ In the absence of any holding on this point by either the Supreme Court or the Ninth Circuit, it would be very dangerous for counsel to assume that references to California authorities employing the same standard as a federal doctrine will be sufficient to exhaust the federal claim.

In short, **California practitioners should proceed on the assumption that references to “*Pope*,” “*Marsden*,” “1368/competency” claims and the like will likely *not* be enough to exhaust the corresponding Sixth Amendment and due process claims.** As to each such claim, the petition should also explicitly indicate its federal basis by citations to leading federal authorities (e.g., *Strickland v. Washington*; *Pate v. Robinson*; etc.) and/or the relevant federal constitutional provision. In the words of the Supreme Court:

A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim “federal.” (*Baldwin v. Reese, supra*, 124 S.Ct. at p. 1351.)

Second, even when the legal character of the claim is expressly “federalized,” a mere pro forma statement of that claim to the state supreme court is not enough, by itself, to exhaust the *factual basis* for the claim. “A *thorough description of the operative facts* before the highest state court is a necessary prerequisite to satisfaction of the [exhaustion] standard...” (*Kelly v. Small* (9th Cir. 2003) 315 F.3d 1063, 1069, emphasis added.)

Lower court opinion can’t cure defective presentation of federal claim in petition for review. Finally, in its recent *Reese* opinion, the U.S. Supreme Court ruled out the possibility that an explicit description of the federal nature of the claim in the lower court opinion could cure a failure to make the federal basis clear in the body of the petition to the state’s highest court. (*Baldwin v. Reese, supra*, 124 S.Ct. 1347, 1350-1351.) The fact that a state high court

¹ Justice Stevens, the lone *Reese* dissenter, would have overlooked the defective presentation of that issue. He concluded that, because there was “no significant difference” between Oregon and federal ineffective assistance standards, “the state courts did have a fair opportunity to assess [*Reese*’s] federal claim.” (*Reese, supra*, at p. 1352 (dis. opn., Stevens, J.).)

has the “opportunity” to review the lower court opinion in deciding whether to exercise discretionary review does not mean that “they necessarily do so in every case.” (*Id.* at p. 1350.) Consequently, it remains essential that the state supreme court petition itself explicitly frame the claim as a federal one.

In view of the requirement that the petition exhaust the factual as well as the legal basis of each claim (see *Kelly v. Small*, discussed above), *Reese* also implies that it may be risky for a petition for review to rely too much on the appellate opinion’s exposition of the factual circumstances surrounding a claim. That does not mean that a petition for review needs a full-blown Statement of Facts summarizing the entire trial; indeed, in most instances, a petition for review can probably dispense with any overall summary of trial evidence. But, putting the “factual exhaustion” requirement together with *Reese*’s refusal to look to the lower court opinion, prudent appellate counsel should make certain that the review petition itself briefly states the facts supporting each claim. (For example, on a confrontation claim concerning restrictions on cross-examination of a witness, the petition should go beyond generalized assertions and should identify the particular lines of inquiry which the court foreclosed.)

Implications for Rule 33.3 Exhaustion Petitions

At least in this author’s opinion, Rule 33.3 appears to do much less to reduce length of an “exhaustion” petition for review and the work necessary to prepare it than the drafters of the rule may have hoped. The only conventional petition-for-review requirements that Rule 33.3 plainly eliminates are “compl[iance] with rule 28.1(b)(1)-(2).” (See Rule 33.3(b)(3).) Those are the subdivisions requiring a Questions Presented section (“a concise nonargumentative statement of the issues presented for review, etc.” (Rule 28.1(b)(1)) and a discussion addressing why the issues are worthy of Supreme Court review (“The petition must explain how the case presents a ground for review under rule 28(b)” (Rule 28.1(b)(2))). To be sure, the elimination of the latter requirement will save some time. It will no longer be necessary to draft new text addressing the broader importance of the issues or otherwise attempting to fit them within the criteria for Supreme Court review (“to secure uniformity of decision or to settle an important question of law” (Rule 28(b)(1)) – which is often a futile task where the case does not involve any split of authority or broad unresolved question but simply a mistaken application of a governing standard to the case’s facts. However, even this time savings may be somewhat illusory because, in practice, many petitions filed for exhaustion purposes under the old rules do not include any significant new text on the review-worthiness of a case but only a pro forma recitation. The new rule also does allow for a very truncated Statement of the Case (“a brief statement of the underlying proceedings, including the nature of the conviction and the punishment imposed” (Rule 33.3(b)(3)(B))), but this too is largely consistent with current practice under the old rules. Finally, fewer numbers of filing copies are necessary– an original plus 8 copies for a Rule 33.3 exhaustion petition, rather than the

original plus 13 needed for a conventional petition for review.

The more crucial question is the extent to which the petition must set out and argue the substance of the claims. The new rule requires “a brief statement of the factual and legal bases of the claim.” (Rule 33.3(b)(3)(C).) But the Advisory Committee Comment also correctly cautions that “practitioners should consult federal law to determine whether the petition’s statement of the factual and legal bases for the claim is sufficient for that purpose.” Taken together, the Rule and the Comment beg the key question of how “brief” the “statement of the factual and legal bases” can be and still satisfy the federal case law’s requirement of “a thorough description of the operative facts before the highest state court” (*Kelly v. Small, supra*, 315 F.3d at p. 1069.)

One thing is clear. It will not be enough to provide a super-abbreviated description of a claim and to incorporate by reference or otherwise refer the reader to the Court of Appeal briefs for a more complete description. The rule expressly provides that “[e]xcept as provided in [Rule 33.3(b)(3)], the petition must comply with rule 28.1.” (Rule 33.3(b)(2).) Among other things, rule 28.1 provides that “[n]o incorporation by reference is permitted except a reference” to another *Supreme Court* review petition or answer (Rule 28.1(e)(2)) – i.e., the rule for a conventional petition for review plainly does not allow an incorporation by reference of a party’s *Court of Appeal* briefs. In contrast to the Rule 33.3’s express exemption from the usual Rule 28.1 requirements of Questions Presented and Reasons for Granting Review sections (Rule 33.3(b)(3) referencing Rule 28.1(b)(1)-(2)), the new rule contains no comparable exemption from the Rule 28.1 subdivision barring incorporation by reference. Consequently, that aspect of Rule 28.1 applies equally to a Rule 33.3 exhaustion petition. In light of the California Rules’ prohibition on incorporation by reference in a conventional petition for review, the Ninth Circuit has squarely held that a federal court cannot look to a defendant’s Court of Appeal brief to cure a defect in the presentation of a claim in the Supreme Court petition for review. (*Gatlin v. Madding* (9th Cir. 1999) 189 F.3d 882, 888-889; see also *Kelly v. Small, supra*, 315 F.3d at p. 1069 & fn. 3.) Because that prohibition carries over to Rule 33.3, the same is true of an “exhaustion petition” under the new rule. The Supreme Court petition itself must contain an adequate description of the factual and legal bases of each claim.

In summary, the new rule does eliminate any need for new text on “review-worthiness.” But (notwithstanding the nominal purpose of an “abbreviated” petition) it could be dangerous to “abbreviate” too much the description of the substance of the claims, for doing so could inadvertently forfeit federal preservation of some of the “bases” of the claims (e.g., the breadth of the claim as to which excluded jurors, which cross-examination subjects or prosecutorial statements, or other particular facts helpful to a claim).

Some Cautious Suggestions

So what is to be done? Though experienced appellate practitioners may come up with different solutions to the Rule 33.3 dilemma, we offer the following cautious suggestions. Assuming that the Court of Appeal brief explicitly “federalized” each claim and adequately set out its factual and legal bases (as required by *Castille v. Peoples* (1989) 489 U.S. 346), **the safest course is to cut-and-paste the opening brief arguments into the body of the petition for review.** In the past, this has sometimes been viewed as the “lazy” approach to a petition for review because such recycled arguments do not explicitly address the Court of Appeal’s discussion of the issues nor do they make the case for why the Supreme Court should hear and decide the issues. But since the AOB usually represents the most “thorough” (*Kelly v. Small, supra*, 315 F.3d at p. 1069) presentation of each argument written over the course of the case, reiteration of that same thorough argument in the Supreme Court petition may be the safest (as well as the quickest and most efficient) means of ensuring full exhaustion of the bases of each claim.

Of course, in multi-argument cases, it may be impossible to reprint the full AOB arguments for each claim while still staying with the petition for review word-count limit of 8400 words. In that situation, some trimming and other editing of the arguments will obviously be necessary. But where to cut? In view of the exhaustion principles summarized earlier, counsel should be careful to retain the portions laying out the facts and procedural circumstances underlying each claim. And, of course, the petition must also frame the legal argument with express reference to federal constitutional provisions and case law. But, since the prime function of an exhaustion petition is to *state* the federal constitutional claims and their bases (much like a pleading), rather than to persuade the reader, it should be possible to delete the more “rhetorical” passages from the original AOB argument. Also, in many instances, it may be adequate to state a proposition (e.g., “the denial of cross-examination on probation status violated the confrontation clause”) and to *cite* supporting authorities (e.g., *Davis v. Alaska*, etc.) but to omit any detailed description of the facts and analysis of the cited cases.

Finally, of course, counsel must also decide which kind of petition to file – a Rule 33.3 exhaustion petition or a conventional Rule 28.1 petition affirmatively seeking a hearing before the California Supreme Court. Obviously, in many cases, there will be tactical reasons for filing a conventional petition under the old rule – such as where the most promising issue is really a state law claim. Also, bear in mind that some federal constitutional claims *depend on a favorable resolution of a state law issue* and disappear if the state appellate opinion rejects the state law premise. (For example, a federal constitutional claim that the instructions misstated the specific intent element of an offense may founder if the state appellate opinion says that it’s a general intent crime in the first place.) Also, mere recycling of AOB arguments

will be insufficient if the appellate opinion itself gives rise to a different type of constitutional claim than argued in the appellate briefing. (For example, if the appellate opinion rejects prior state law on the elements of an offense or the availability of a particular defense, the opinion may represent an unforeseeable “judicial enlargement” of criminal liability – which would be a different type of due process claim than initially presented in the AOB.)

Finally, there is no explicit provision in the rules for a hybrid petition which actively seeks a Supreme Court hearing on one review-worthy issue but asserts other claims for exhaustion purposes only. Consequently, in those instances, counsel will have to file a conventional petition for review under Rules 28 and 28.1 (with a conventional caption and the full number of copies). (However, the petition could still follow the guidelines above in its actual presentation of the exhaustion arguments.)

Final Thoughts

There are at least two kinds of revisions of petition for review procedures that, if adopted, could have very significantly reduced the attorney time and judicial resources associated with Supreme Court petitions filed solely for exhaustion purposes. First and most dramatically, California could have adopted the approach of Arizona and some other states and explicitly provided that California Supreme Court review is *not available*. (See *Swoopes v. Sublett, supra*, 196 F. 3d 1008.) Such a rule would have eliminated the need to file any petition for review (even an “abbreviated” one) in the California Supreme Court in order to exhaust state remedies. But the California Judicial Council has squarely rejected that approach by its adoption of Rule 33.3. Thus, in the absence of any rule rendering Supreme Court review unavailable, California appeals remain subject to the usual requirement of a petition to the state’s highest court.

Alternatively, California could have adopted an intermediate approach which would have still entailed an exhaustion filing in the California Supreme Court but would have truly allowed an “abbreviated” document to do the job. **The rule could have explicitly allowed an exhaustion petition to incorporate portions of the Court of Appeal briefing by reference; the rule could further have stated that, in passing on the exhaustion petition, the Supreme Court will be deemed to have read considered any such incorporated portions of the appellate briefs.** A rule along those lines could have allowed a very brief document to complete the exhaustion process – perhaps even a 1-2 page letter stating the federal claims and referencing the relevant sections of the Court of Appeal brief. But Rule 33.3 plainly does not allow for any such streamlined process; as discussed above, as with a conventional petition for review, the rules prohibit any such incorporation by reference in an exhaustion petition.

In the years ahead, we will no doubt see Ninth Circuit opinions passing on the adequacy

of Rule 33.3 petitions to exhaust particular claims, and it is conceivable that those opinions will construe such petitions more liberally than conventional ones. It is also possible that California will tinker further with Rule 33.3 or other aspects of the petition for review rules. However, in the meantime, the cautious approach outlined above seems the safest best for ensuring that an exhaustion petition adequately fulfills its function of preserving all aspects of a defendant's federal claims.

APPENDIX—New Rule 33.3 and Relevant Portions of Rules 28 & 28.1

Rule 33.3. Petition for review to exhaust state remedies

(a) Purpose

After decision by the Court of Appeal in a criminal case, a defendant may file an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief.

(b) Form and contents

(1) The words "Petition for Review to Exhaust State Remedies" must appear prominently on the cover of the petition.

(2) Except as provided in (3), the petition must comply with rule 28.1.

(3) The petition need not comply with rule 28.1(b)(1)-(2) but must include:

(A) a statement that the case presents no grounds for review under rule 28(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;

(B) a brief statement of the underlying proceedings, including the nature of the conviction and the punishment imposed; and

(C) a brief statement of the factual and legal bases of the claim.

(c) Service

The petition must be served on the Court of Appeal clerk but need not be served on the superior court clerk.

Rule 33.3 adopted effective January 1, 2004.

Advisory Committee Comment (2004)

Subdivision (b). Although a petition under this rule must state that "the case presents no grounds for review under rule 28(b)" (rule 33.3(b)(3)(A)), this does not mean the Supreme Court cannot order review if it determines the case warrants it. The list of grounds for granting review in rule 28(b) is not intended to be exclusive, and from time to time the Supreme Court has exercised its discretion to order review in a case that does not present one of the listed grounds. (Compare U.S. Supreme Court Rule 10 [the listed grounds for granting certiorari, "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers".])

Rule 33.3(b)(3)(C) requires the petition to include a statement of the factual and legal bases of the claim. This showing is required by federal law: "for purposes of exhausting state remedies, a claim for relief [in state court] . . . must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." (*Gray v. Netherland* (1996) 518 U.S. 152, 162-163, citing *Picard v. Connor* (1971) 404 U.S. 270.) The federal courts will decide

whether a petition filed in compliance with this rule satisfies federal exhaustion requirements, and practitioners should consult federal law to determine whether the petition's statement of the factual and legal bases for the claim is sufficient for that purpose.

Rule 28. Petition for review

{{(a) omitted}}

(b) Grounds for review

The Supreme Court may order review of a Court of Appeal decision:

- (1) when necessary to secure uniformity of decision or to settle an important question of law;
- (2) when the Court of Appeal lacked jurisdiction;
- (3) when the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or
- (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

(c) Limits of review

- (1) As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.
- (2) A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.

(d) Petitions in nonconsolidated proceedings

If the Court of Appeal decides an appeal and denies a related petition for writ of habeas corpus without issuing an order to show cause and without formally consolidating the two proceedings, a party seeking review of both decisions must file a separate petition for review in each proceeding.

{{(e) - (g) & Advisory Committee Comment to Rule 28 omitted}}

Rule 28.1. Form and contents of petition, answer, and reply

(a) In general

Except as provided in this rule, a petition for review, answer, and reply must comply with the relevant provisions of rule 14.

(b) Contents of a petition

- (1) The body of the petition must begin with a concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail.
- (2) The petition must explain how the case presents a ground for review under rule 28(b).
- (3) If a petition for rehearing could have been filed in the Court of Appeal, the petition for review must state whether it was filed and, if so, how the court ruled.
- (4) If the petition seeks review of a Court of Appeal opinion, a copy of the opinion showing its filing date and a copy of any order modifying the opinion or directing its publication must be bound at the back of the original petition and each copy filed in the Supreme Court.
- (5) The title of the case and designation of the parties on the cover of the petition must be identical to the title and designation in the Court of Appeal opinion or order that is the subject of the petition.
- (6) Rule 33.3 governs the form and content of a petition for review filed by the defendant in a criminal case for the sole purpose of exhausting state remedies before seeking federal habeas corpus review.

(Subd (b) amended effective January 1, 2004.)

(c) Contents of an answer

An answer that raises additional issues for review must contain a concise, nonargumentative statement of those issues, framing them in terms of the facts of the case but without unnecessary detail.

(d) Length

- (1) If produced on a computer, a petition or answer must not exceed 8,400 words and a reply must not exceed 4,200 words. Such a petition, answer, or reply must include a certificate by appellate counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.
- (2) If typewritten, a petition or answer must not exceed 30 pages and a reply must not exceed 15 pages.
- (3) The tables, the Court of Appeal opinion, a certificate under (1), and any attachment under (f)(1) are excluded from the limits stated in (1) and (2).
- (4) On application and for good cause, the Chief Justice may permit a longer petition, answer, reply, or attachment.

(Subd (d) relettered effective January 1, 2004; adopted as subd (e) effective January 1, 2003.)

(e) Attachments and incorporation by reference

(1) No attachments are permitted except an opinion or order from which the party seeks relief and exhibits or orders of a trial court or Court of Appeal that the party considers unusually significant and do not exceed a total of 10 pages.

(2) No incorporation by reference is permitted except a reference to a petition, an answer, or a reply filed by another party in the same case or filed in a case that raises the same or similar issues and in which a petition for review is pending or has been granted.

(Subd (e) relettered effective January 1, 2004; adopted as subd (f) effective January 1, 2003.)

Rule 28.1 amended effective January 1, 2004; adopted effective January 1, 2003.

{Advisory Committee Comment to Rule 28.1 omitted}