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KEEPING THE FEDERAL DOOR OPEN...

FEDERAL HABEAS CHEAT SHEET
FOR THE STATE APPELLATE PRACTITIONER

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For the State Appellate Practitioner

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CHEAT SHEET DISCLAIMER

- This is a "cheat sheet." It's intended as a quick reference guide for avoiding defaults in state practice which could come to haunt the client on any future federal habeas petition. It deals with the most common situations and is definitely not intended as a comprehensive guide to these topics.
- Because this guide is intended for *state* practice, it takes a conservative approach, focusing on avoiding defaults and exhaustion questions in the first place. It does not deal with potential federal court arguments challenging a state court's invocation of a procedural default (e.g., state procedural rule is not "adequate and independent").
- For more comprehensive treatment of topics noted here, see these articles, all of which are posted on FDAP's web site, www.fdap.org, under "Research Resources" - "Articles & Outlines":
  - Soglin, "Avoiding Procedural Default & Protecting Clients for Future Post-Affirmance Pro-Per Remedies," Jan. 2008.
  - O'Connell & Rudman, "Elusive Exceptions to Waiver & Forfeiture Bars," Jan. 2004, revised May 2009.
  - O'Connell, "State Habeas Corpus Update & Practice Tips," March 2004.

EXHAUSTION

- **Explicitly federalize claims**, citing U.S. Supreme Court cases, federal cases, and/or specific provisions of U.S. Constitution.
  - Horror stories: *Duncan v. Henry* (1995) 513 U.S. 364 (Supreme Court summarily reverses Ninth Circuit's grant of habeas relief; due process challenge to "other offenses" evidence not exhausted where state arguments framed only in Cal. Evid. Code § 352 terms); *Baldwin v. Reese* (2004) 541 U.S. 27 (state supreme court petition citing Oregon authorities on inadequate counsel didn't apprise state court of federal nature of claim and consequently didn't exhaust federal IAC claim).

- Don't forget the obvious: e.g., *Strickland*, not *Pope* for IAC*;* 6th Amen. for any *Marsden* claim; due process (*Pate v. Robinson*, etc.) for § 1368; *Jackson v. Va.* for sufficiency.
- Ideally, federalize in heading or sub-heading, but it doesn't have to be cumbersome.
    - E.g., "Federal Due Process" is fine and much more readable tha "in Violation of the Due Process Clause of the Fourtheenth Amendment of the United States Constitution."

- **Must raise in Court of Appeal briefing, not enough to raise for first time in petition for review**, *Castille v. Peoples* (1989) 489 U.S. 346. (Presumably, this rule also applies to argument raised for first time in rehearing petition.)
    - Possible exception: no opportunity to raise until after appellate opinion.
        - E.g., landmark Supreme Court case decided after appellate opinion (how many *Blakely* claims were preserved in 2004).
        - State appellate opinion gives rises to a distinct claim, such as due process violation for unforeseeable judicial enlargement of penal statute (e.g., if state appellate opinion explicitly rejects prior state precedent supporting claim).
    - Distinction: for habeas claims, it's not necessary to "go up the ladder." Claim raised for first time in original habeas petition to Cal. Supreme Court is exhausted (provided Cal. Supreme Court doesn't explicitly deny it on procedural grounds).
- **Must raise in California Supreme Court**. *O'Sullivan v. Boerckel* (1999) 526 U.S. 838. (For direct appeal claims: by timely petition for review; for habeas claims: by either petition for review or new "original" habeas petition.)

PROCEDURAL DEFAULT (a.k.a. WAIVER)

- Any time Court of Appeal describes a claim as "waived" or "forfeited," you've got a procedural default which may bar federal review of that claim.
    - Procedural default whenever appellate opinion explicitly describes claim as waived, even if it goes on to reject claim on merits, as alternative basis. *Harris v. Reed* (1989) 489 U.S. 255, 264 fn. 10.
- **Trial-level defaults – overcoming the other guy's mistakes.**
    - Master the in's and out's of California waiver law. See O'Connell & Rudman, "Elusive Exceptions to Waiver & Forfeiture Bars" (posted on FDAP's web site).
    - Case-by-case judgment whether to anticipate waiver in AOB or wait and see whether AG asserts waiver.
    - Where adequacy of preservation is doubtful, IAC is one fallback, but not the

only one. As outlined in "Elusive Exceptions, etc.," also consider alternative grounds for cognizability. E.g.:

- Pen. Code § 1259, instructional error affecting "substantial rights."
- *People v. Partida* (2005) 37 Cal.4th 428 (federal claim cognizable where state law objection below apprised judge of correct standard and constitutional claim only concerns "consequences" of the error (e.g., due process violation from Evid. Code § 352 error)).
- Futility, *People v. Hill* (1998) 17 Cal.4th 800, 820.
- Appellate discretion and the "*Williams* footnote." Except for evidentiary errors, which must be raised below (Evid. Code §§ 353, 354), appellate court has inherent discretion to consider most other kinds of claims, even if inadequately preserved. *People v. Williams* (1998)17 Cal.4th 148, 161-162 & fn. 6.
- Change in the law, *People v. Black* (2007) 41 Cal.4th 799 ("*Black II*").

- If you're going to raise IAC to get around potential waiver problem, do it right: AOB, Supp. AOB or habeas petition, not ARB (see below).

- **Appellate-level defaults – avoiding mistakes of your own.**
  - Direct appeal: **Don't even think about raising IAC or any other new claim for first time in reply brief.** E.g., *People v. Dunn* (1996) 40 Cal.App.4th 1039, 1055.
    - If caught off-guard by AG's waiver argument and need to assert IAC, seek leave to file a supplemental brief and/or raise IAC in a habeas petition.
    - Same goes for any distinct sub-claim not raised in AOB.
      - E.g., if AOB characterized evidentiary error as confrontation violation, adding a due process rationale in ARB would likely be considered a "new claim."
      - Even outside IAC context, Cal. appellate courts seem to be taking a stricter line on when a new line of argument in an ARB will be deemed a "new claim."
  - Avoid state habeas defaults. See O'Connell, "State Habeas Corpus Update, etc." (on FDAP's web site).
    - File your habeas petition without any arguably unreasonable delay (even though we don't really know exactly what the time limit is).
      - Rule of thumb for habeas petition in appellate court during pendency of appeal: will likely be considered concurrently with appeal, so long as petition comes in during the briefing (before or not too long after ARB).
      - Risk of timeliness rejection or refusal to exercise appellate jurisdiction if argument has been calendared and/or decision is

imminent.

- Consult with FDAP if, despite diligence, aren't able to complete petition until very late in the appeal .
  - If legitimate explanation for delay, petition shouldn't be barred, but possibly appellate court won't exercise jurisdiction and will require a superior court filing.

- Other state habeas procedural bars: Most claims which were or could have been raised on direct appeal.
  - But that bar doesn't apply to IAC claims, even ones based on appellate record. *In re Robbins* (1998) 18 Cal.4th 770, 814 fn. 34.
  - Other important exceptions:
    - "Unauthorized sentence"/"excess of jurisdiction" claims.
    - Change in the law, e.g. new Cal. Supreme Court case altering substantive criminal law.

CERT. PETITIONS, RETROACTIVITY, AND "CLEARLY ESTABLISHED" SUPREME COURT LAW UNDER AEDPA

- General rule: a cert. petition to U.S. Supreme Court is not necessary to exhaust a claim. Proper presentation of a federal claim to state supreme court is enough.
- But, under some circumstances, may need to file a cert. petition, where claim based on a recently-decided or still pending Supreme Court case.
- *Teague* retroactivity: With some exceptions, no federal habeas relief if claim rests on a "new rule," established by Supreme Court opinion issued after state decision became final on direct review. *Teague v. Lane* (1989) 489 U.S. 288.
  - Finality: Date on which Supreme Court denies a timely cert. petition or *last day on which a timely cert. petition could have been filed* (90 days after state supreme court denial of review on direct appeal).
- The AEDPA "clearly established" conundrum.
  - Federal habeas relief available only if state decision was "contrary to" or "unreasonable application" of "clearly established" federal law, as declared by U.S. Supreme Court. 28 U.S.C. § 2254(d)(1).
    - Note that claim must rest on *Supreme Court precedents*, not just federal circuit cases.
  - Timing of "clearly established" comparison. Supreme Court has given two formulations *in the same opinion*:
    - "time ... state-court conviction became final," *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (Stevens, J., for the Court) (i.e., the same as *Teague* retroactivity standard); or

    - "time of the relevant state-court decision," *Williams* at 412 (O'Connor, J., for the Court) (also passingly quoted in some subsequent opinions).
    - Ninth Circuit opinions too have employed both formulations
  - Uncertain whether federal habeas relief available, where claim relies on a Supreme Court opinion decided *after state appellate decision but before that decision became "final" upon expiration of the cert. deadline*. Cf. *Thompson v. Runnels* (9th Cir. 2010) 621 F.3d 1007 (majority declines to resolve issue because state hadn't raised it). A petition for rehearing en banc (in which state is attempting to raise issue) is currently pending in *Thompson*.
  - Circuit split: Third and Sixth Circuits have reached opposite conclusions and cert. petitions are currently pending in both cases. Likely Supreme Court will grant cert. and decide issue during 2011-2012 Term.
- Safest course in the meantime.
  - Still-pending lead Supreme Court case: **If your claim may depend on the disposition of a not-yet-decided Supreme Court case, should definitely petition for certiorari** (just as many California practitioners did during pendency of *Cunningham v. California*)**.** Otherwise, even if lead Supreme Court case comes out favorably, claim is likely to be *Teague*-barred because your case became "final" prior to issuance of the Supreme Court opinion
  - Recently-decided Supreme Court case**. If favorable Supreme Court case decided during interval between your state appellate decision and the "finality" date, claim *may* be barred under AEDPA** on ground that the rule wasn't "clearly established" at time of "relevant state court decision" (Justice O'Connor's formulation in *Williams v. Taylor*). To avoid that risk, **should file a cert. petition and ask Supreme Court for "GVR"** (Grant, Vacate & Remand to state court).

AEDPA STATUTE OF LIMITATIONS

- Unlike "procedural default" or inadequate exhaustion, which may bar discrete claims, a limitations time-bar *will bar the entire federal petition.*
  - E.g., if federal petition is deemed untimely on ground that a state habeas petition didn't toll the statute, the entire federal petition will be barred (including claims from both the state appeal and the state habeas).
- Usual AEDPA deadline is **one year from date conviction became "final" on direct review**. 28 U.S.C. § 2244(d)(1)(A). Where no cert. petition, **AEDPA deadline will ordinarily be one year from date cert. petition could have been filed (90 days from Cal. Supreme Court denial).**
  - Generally, this is the only date on which you should advise client considering a pro. per. federal petition.

- Other, much less common, dates for commencement of the one-year period. See Soglin, "Avoiding Procedural Default, etc." (on FDAP site) for further discussion:
  - Removal of state-created impediment to filing, 28 U.S.C. § 2254(d)(1)(B).
  - Date on which constitutional right "newly recognized" by Supreme Court, *id.*, § 2254(d)(1)(C).
  - Date "factual predicate" could have been discovered, *id.*, § 2254(d)(1)(D).
- Federal limitations period "tolled" during pendency of a "properly filed" state habeas petition, 28 U.S.C. § 2244(d)(2).
  - **Don't count on "tolling"!** Too much room for miscalculation on petitioner's part and uncertainty how courts will treat periods of pendency of a state petitions and "gaps" between state filings.
  - Most frequent cause of petitioners, especially pro. per. inmates, blowing the federal deadline is confusion regarding effect of post-affirmance state habeas petitions.
  - Even where state petition is deemed "properly filed," **it only tolls the federal statute, it doesn't restart it.**
  - If state court denies habeas petition as untimely (such as by a cite to *Clark* or *Robbins*) or on some other procedural ground, the federal statute won't be tolled during pendency of that state petition. *Pace v. DiGuglielmo* (2005) 544 U.S. 408.
    - And the petitioner may not know until it's too late. E.g., *Lakey v. Hickman* (9th Cir. Jan. 5, 2011) __ F.3d __, 2011 WL 13922. (For example, if petitioner files state petition before the one-year post-finality period runs (e.g., 11 months after finality date) but state court denies it on timeliness grounds after that deadline (e.g, 13 months after finality), there's no tolling for the time in which state petition was pending, and any later federal petition will be time-barred.)
  - The perils of "gap tolling."
    - If petitioner goes up the ladder of California courts in a timely fashion (i.e., superior court, appellate court, Cal. Supreme Court), federal statute will be tolled for entire period from filing of superior court petition through Cal. Supreme Court denial (including during the "gap" between a lower court denial and filing in higher court). *Carey v. Saffold* (2002) 536 U.S. 214.
    - **But, even if state court denial didn't cite timeliness, no "gap tolling" if federal court believes there's been unreasonable delay between state court filings**.
    - **Six-month gap** between lower court denial and next state court filing is **presumptively untimely**. *Evans v. Chavis* (2006) 546 U.S. 189.
    - **Any gap of more than 30-60 days runs risk of being considered**

unreasonable. E.g., *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046, 1048 (unexplained gaps of 115 days and 101 days between state court filings); see also *Lakey v. Hickman* (9th Cir. Jan. 5, 2011) __ F.3d __, 2011 WL 13922.

- *May* be able to justify greater interval before appellate habeas filing, where superior court conducted an extensive evidentiary hearing. See *Maxwell v. Roe* (9th Cir. Nov. 30, 2010) __ F.3d __, 2010 WL 4925429.

- Possible solution where uncertain whether state habeas filings will be consider untimely. *Rhines v. Weber* (2005) 544 U.S. 269.
  - Can **file a "mixed" federal petition**, containing both exhausted and unexhausted claims, **and ask the federal court to stay proceedings** on it until completion of state exhaustion.
    - If state court ultimately denies habeas petition as untimely, the other claims of the federal petition (such as those exhausted on direct appeal) can still proceed
    - Risk: *Rhines* does not authorize such stays as a routine procedure. Petitioner must show "good cause" why he didn't complete exhaustion process earlier, and federal court has discretion in evaluating sufficiency of "good cause" showing. E.g., *Wooten v. Kirkland* (9th Cir. 2008) 540 F.3d 1019.
    - Also, *Rhines* stay procedure is only available for "mixed" petitions – i.e., petitions in which some claims *are* fully exhausted. Federal court can't grant a stay if none of the claims has been exhausted. *Raspberry v. Garcia* (9th Cir. 2006) 448 F.3d 1150.

MAKING IT EASY FOR THE CLIENT

- Always **advise client of the federal deadline** (90 days plus 1 year).
- **Tell him or her where to file**, including address: Eastern Dist. for cases from Solano County; Northern Dist. for all other cases from First Dist. counties.)
- **Send client federal habeas forms** designed for pro. per. filings (available on FDAP's web site and on the federal courts' respective sites)
- **Suggest that client attach your Cal. Supreme Court petition for review and incorporate its arguments by reference** when filling out the federal form.