

## EXHAUSTING STATE REMEDIES

by Howard Cohen

California defendants have increasingly turned to the federal courts for post-conviction relief. Although an appointment in the Court of Appeal does not extend to federal habeas corpus, appellate counsel for the defendant should take all necessary steps to preserve appropriate federal issues, since exhaustion of state remedies is a prerequisite for federal habeas corpus. (28 U.S.C. § 2254; *Ex parte Royall* (1886) 117 U.S. 241, 250-253 [6 S.Ct. 734, 29 L.Ed. 868]; see also *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1].) To ensure exhaustion of state remedies, appellate counsel must carefully “federalize” appropriate issues and must present the federal claims explicitly in both the Court of Appeal briefing and the petition for review to the California Supreme Court. Failure to do so could cost the client the opportunity for federal review.

1. Adequate identification and presentation of a federal claim: state the factual bases for the claim, explicitly cite federal constitutional provisions and other federal authority, and explain how the facts constitute a violation of those provisions

The argument must set forth the *factual bases* giving rise to the federal issue in sufficient detail to permit the court to understand and evaluate the issue in the particular case. Asserting a violation of a federal constitutional right is inadequate in a factual vacuum. “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.)

The argument must also state the *specific federal legal basis* for the claim. This includes citation of the federal constitutional provisions relied on, decisions of the United States Supreme Court supporting the argument, and any other relevant federal authorities. (*Gray v. Netherland* (1996) 518 U.S. 152, 162-163 [116 S.Ct. 2074, 135 L.Ed.2d 457] [claim must include reference to a specific federal constitutional guarantee as well as a statement of the facts entitling petitioner to relief]; *Picard v. Connor* (1971) 404 U.S. 270, 278 [92 S.Ct. 509, 20 L.Ed.2d 438].) It also includes articulation of a federal legal theory explaining why the facts amount to a violation of those federal provisions.

Limiting an argument to state evidentiary law is insufficient, even though the state law may have federal constitutional implications. Citation to state cases that discuss or apply federal law is likewise inadequate. (*Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 912, fn. 12; *Castillo v. McFadden* (9th Cir. 2004) 370 F.3d 882; *Peterson v. Lampert* (9th

Cir. 2003) 319 F.3d 1153 [petition for review referring solely to state constitutional provisions on ineffective assistance of counsel does not exhaust remedies on that federal issue].)

The federal constitutional provision relied on should be *cited* – for example, the “due process of law (U.S. Const., 14th amend.)” or “the right to confront witnesses under the Sixth Amendment of the federal Constitution.” Making vague references to “due process” or a “fair trial” or “the right to present a defense” does not apprise the state court of the federal nature of a claim and does not satisfy the fair-presentation prong of the exhaustion requirement. (*Anderson v. Harless* (1982) 459 U.S. 4, 7 [103 S.Ct. 276, 74 L.Ed.2d 3] [exhaustion requirement not satisfied by mere circumstance that “due process ramifications” might be “self-evident”]; *Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987 [it is not enough to make “naked reference . . . or a general appeal to a constitutional guarantee as broad as due process to present the ‘substance’ of such a claim”]; *Hiivala v. Wood* (1999) 195 F.3d 1098, 1106; *Johnson v. Zenon* (9th Cir. 1996) 88 F.3d 828, 830-831; compare *Wilcox v. McGee* (9th Cir. 2001) 241 F.3d 1242, 1244 [federal claim preserved when reliance in the state court was almost entirely on state law but conclusion and petition for review argued both state and federal constitutional violations].)

Merely *citing* provisions of the federal Constitution is insufficient unless that citation is linked to a theory of federal law connecting the operative facts of the case to the constitutional provisions. In *Castillo v. McFadden*, *supra*, 370 F.3d 882, the defendant challenged a videotape of his interrogation on state evidentiary grounds in the trial court. In the Oregon Court of Appeals, the last sentence of his brief asserted “the gross violations of Appellant’s Fifth, Sixth, and Fourteenth Amendment rights requires [sic] that his convictions and sentences be reversed and that he be granted a new trial consistent with due process of law.” The Ninth Circuit found this “conclusory, scattershot citation of federal constitutional provisions” inadequate (*id.* at pp. 889-890):

Castillo . . . left the Arizona Court of Appeals to puzzle over how the Fifth, Sixth, and Fourteenth Amendments might relate to his three foregoing claims . . . . Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.

Thus the brief should not only *assert* that the facts amounted to a federal constitutional violation, but also should *argue* that point. Citation to relevant federal case law, especially decisions of the United States Supreme Court, is valuable in this effort.

2. Exhaustion in Court of Appeal: raise the federal issue in the opening brief and make sure the court addresses the federal claim in its opinion

The defendant must fairly present the federal claims to the Court of Appeal in the first instance, as well as to the California Supreme Court. In other words, the defendant may not wait to federalize a claim for the first time in a petition for review. (*Castille v. Peoples* (1989) 489 U.S. 346, 351 [103 L. Ed. 2d 380, 109 S. Ct. 1056].) In *Baldwin v. Reese* (2004) 541 U.S. 27, 29 [124 S.Ct. 1347, 158 L.Ed.2d 64], the court stated:

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim.

(Internal quotation marks and citations omitted.)

In *Casey v. Moore, supra*, 386 F.3d 896, the defendant alleged unlawful use of hearsay and prosecutorial misconduct in the intermediate appellate court, but relied on state law and state cases and did not mention the federal constitutional right of confrontation or due process or refer to federal law. In his petition for review to the state supreme court, however, he did specifically cite these federal provisions. The Ninth Circuit held the federal issues were not properly exhausted.

To exhaust state remedies properly and protect against possible default, counsel must ensure the Court of Appeal opinion expressly acknowledges and addresses the federal issue. If it does not and counsel fails to call the omission to the court's attention in a petition for rehearing, the California Supreme Court may well decline to consider it on procedural policy grounds. (See Cal. Rules of Court, rule 28(c)(2).) In that situation there is a risk the federal courts would consider the issue procedurally defaulted.<sup>1</sup>

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<sup>1</sup>Conversely, if the state courts actually rule on a federal issue not adequately presented in the briefing or petition for review, that may constitute exhaustion. (*Castille v. Peoples, supra*, 489 U.S. 346, 351; *Sandgathe v. Maass* (9th Cir. 2002) 314 F.3d 371, 376-377); *Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1088 [when federal claim was made for first time in a request for reconsideration in state high court, and court amended opinion in a manner that did not appear to be based on procedural default, petitioner successfully exhausted state remedies].) Counsel obviously should never rely on such a remote possibility.

3. Requirement that issue must be properly presented to the California Supreme Court: explicitly identify the federal issue, describe the operative facts, and cite federal constitutional provisions and federal authority in the petition for review itself

Exhaustion requires an issue be presented to the state's highest court in which relief is available under state law. (*O'Sullivan v. Boerckel*, *supra*, 526 U.S. 838.) Therefore a petition for review in the California Supreme Court must be filed if the issue is to be pursued in federal court. (*Roberts v. Arave* (9th Cir. 1988) 847 F.2d 528.)

The petition must include explicit reference to federal constitutional provisions and other federal authorities and a description of all the operative facts giving rise to the federal claim. It should indicate how the issue was raised and resolved below. It should comply strictly with the requirements of the California Rules of Court, including rule 33.3 if an abbreviated petition is filed.

The petition for review *itself* must present the issue in adequate federal form as to both citation of federal law and recitation of the operative facts. Incorporation by reference is prohibited by California Rules of Court, rule 28.1(e). To present the issue adequately to the California Supreme Court, it is not sufficient to present only the facts supporting the claim, nor to rely on the Supreme Court's opportunity to read the Court of Appeal opinion discussing the claim, nor to incorporate by reference briefing in the lower court. (*Baldwin v. Reese*, *supra*, 541 U.S. 27 [state high court's opportunity to review the lower court's opinion raising federal issue is insufficient presentation of federal issue to high court, which is not required to review lower court opinion]<sup>2</sup>; *Picard v. Connor*, *supra*, 404 U.S. 270, 275, 277 [92 S.Ct. 509, 30 L.Ed.2d 438]; *Gatlin v. Madding* (1999) 189 F.3d 882, 887-889 [incorporating constitutional claims by reference in petition for

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<sup>2</sup>*Baldwin* came from Oregon. In California, the opinion of the Court of Appeal must be attached to the petition for review. (Cal. Rules of Court, rule 28.1(b)(4).) However, counsel should not count on that as a substitute for proper presentation of the issue in the body of the petition for review itself. The continuing validity of *Kelly v. Small*, *supra*, 315 F.3d 1063, 1066-1069, which held the discussion of federal issues in the Court of Appeal opinion was adequate because it could be "presumed" the California Supreme Court consulted that opinion, is dubious in light of *Baldwin* ["ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so"]. There is no reason for counsel to take a chance on that matter.

review is inadequate because of Cal. Rules of Court, rule 28.1(e)]; *Kibler v. Walters* (9th Cir. 2000) 220 F.3d 1151, 1153.)

Rule 33.3 of the California Rules of Court permits an abbreviated petition for review when the sole intention is to exhaust state remedies. The petition need not begin with a statement of the issues presented for review or explain how the case presents a ground for review under rule 28(b). It must have the words “Petition for Review to Exhaust State Remedies” on the cover, must comply with rule 28.1(b)(3) through (5), and must state it presents no grounds for review under rule 28(b) and is filed solely to exhaust state remedies for federal habeas corpus purposes. It must also contain a brief statement of the underlying proceedings, including the conviction and punishment, and the factual and legal bases of the claim. These must be sufficiently developed to comply with normal exhaustion requirements – stating the factual bases for the claim, the specific federal constitutional provisions involved, and a legal theory as to how the facts constitute a violation of those provisions.

#### 4. Conclusion

Counsel need to be attentive to the possibilities for federalizing issues, be familiar with all requirements, and take care to exhaust state remedies when appropriate. It is poor practice to hope the federal courts are lax or lenient in their application of the exhaustion rules or that the state courts will “rescue” counsel from inadequate presentation of a federal issue. Conscientious attention to proper federalization from the very first can and usually will make all the difference.