Federal Habeas Practice -- Statutes and Cases

A. Statutes

1. Federal Habeas Corpus Statute: 28 U.S.C. § 2254(d)(1) & (2), (e)(1)

2. One Year Statute of Limitations (SOL): 28 U.S.C. § 2244(d)(1)(A)-(D).

3. Exhaustion Requirement: 28 U.S.C. § 2254(b)

4. Evidentiary Hearings. 28 U.S.C. § 2254 (e)(2)

5. Second or Successive Petitions: 28 U.S.C. § 2244(b)(1)-(4)

B. Cases/Application

Federal Habeas Corpus: 28 U.S.C. § 2254(d)(1) & (2), (e)(1)

1. "Contrary to, or unreasonable application of, clearly established Supreme Court law."

   a. "Contrary to" means the state court applied a rule different from the governing law set forth in Supreme Court cases, or decided a case differently than the Supreme Court on materially indistinguishable facts *Bell v. Cone*, 535 U.S. 685 (2002)

   b. "Unreasonable application of" means the state court correctly identified the governing legal principle from Supreme Court decisions, but unreasonably applied them to the case; must be objectively unreasonable, not simply incorrect. *Bell*, *supra*.

   c. Where state court denies the federal claim but gives no reasoning, independent review to determine whether denial is contrary to or unreasonable application of. *Himes v. Thompson*, 336 F.3d 848 (9th Cir. 2003)

   d. Where state does not reach merits, de novo review. *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002).

2. "Clearly established Supreme Court law."

   a. The holdings, not dicta, of Supreme Court decisions at the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362 (2000).

b. May look to 9th Cir. law for guidance. *Duhaime v. Ducharme*, 200 F.3d 587 (9th Cir. 2000); *LaJoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000)

3. State court factual findings are presumed correct. 28 U.S.C. § 2254(e)(1).

4. "Unreasonable determination of the facts."

a. The factual findings upon which the state court's adjudication rests are objectively unreasonable. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

5. No clear statement on how these two provisions interact. *Wood v. Allen*, 130 S. Ct. 841 (2010).

One Year Statue of Limitations: 28 U.S.C. § 2244(d)(1)(A)-(D)

1. "Judgment became final at conclusion of direct review"

a. No appeal, 60 days after conviction. *Roberts v. Marshall*, – F.3d – , No. 08-55901 (9th Cir. Dec. 13, 2010)

b. No pet. for review, 40 days after app. court files opinion (time within which review could have been sought). *Smith v. Duncan*, 297 F.3d 809 (9th Cir. 2002)

c. If pet for review filed and denied, 90 days after Cal. Supreme Court denies pet. (time within which pet for cert in USSC could be filed). *Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999)

d. If pet for cert filed in USSC, when USSC denies pet.

2. "Impediment to filing." *Bryant v. Arizona*, 499 F.3d 1056 (9th Cir. 2007)

3. "Date which constitutional right was recognized by USSC and made retroactive." *Dodd v. United States*, 545 U.S. 353 (2005)

4. "Factual predicate could have been discovered through due diligence." *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001)

5. SOL is an affirmative defense, must be raised in Answer. *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004)

6. Petition is deemed filed on date prisoner signs it. *Houston v. Lack*, 487 U.S. 266 (1998); applies to state habeas petitions, too. *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000).

7. Statutory tolling

a. "Properly filed"

i. Not properly filed and no tolling when state court rejects petition for being untimely. *Pace v. DiGugllelmo*, 544 U.S.408 (2005)

ii. Federal courts must examine timeliness of state court filings. *Evans v. Chavis*, 546 U.S.189 (2006); *Bonner v. Carey*, 425 F.3d 1145 (9th Cir. 2005) (applying *Pace* to a Cal. state petition which was ultimately dismissed as untimely).

iii. No clear cut length of time is timely. 6 mos presumptively unreasonable. *Chaffer v. Prosper*, 592 F.3d 1046 (9th Cir. 2010); *Banjo v. Ayers,* 614 F.3d 964 (9th Cir. 2010)

b. "Application for State post-conviction or other collateral relief"

i. "Collateral review" means judicial reexamination of judge or claim outside direct review process. *Wall v. Kholi*, 562 U.S. –, No. 09-868 (Mar. 7, 2010).

ii. Application to federal or USSC are not state collateral review. *Lawrence v. Florida*, 549 U.S. 327 (2007); *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002) (pet for cert from denial of habeas not tolled); *Duncan v. Walker*, 533 U.S. 167 (2001) (time during which federal habeas petition is pending is not tolled).

iii. Denial of habeas petition is final immediately after 1/3/03, 30 days later if before 1/3/03. *Bunney v. Mitchell*, 262 F.3d 973 (9th Cir. 2001)

c. "Pertinent judgment or claim"

i. Statute is tolled during pendency of a state challenge, even if state challenge does not contain claim later asserted in

federal petition; claim refers to conviction. *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001)

d. "Pending"

I. If petitioner chooses to invoke original jurisdiction of each level of California courts, he is properly pursuing state remedies so long as they are ultimately found to be timely. *Evans v. Chavis*, *supra*

ii. No tolling between habeas rounds. *Biggs v. Duncan*, 339 F.3d 1045 (9th Cir. 2003)

e. No actual innocence exception to SOL. *Lee v. Lampert*, 610 F.3d 1125 (9th Cir. 2010), *rh'g granted*, 2/8/11.

8. Equitable Tolling

a. Equitable tolling is available under § 2244(d). *Holland v. Florida*, 130 S.Ct. 2549 (2010)

b. Cases finding equitable tolling:

— *Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002) (delay caused by District Court's error)

— *Miles v. Prunty*, 187 F.3d 104 (9th Cir. 1999) (prison officials delayed request to prepare check for filing fees);

— *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998); *Bills v. Clark*, 628 f.3d 1092 (9th Cir. 2010) (petitioner's mental incompetence)

c. Cases not finding equitable tolling:

— *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999), *Raspberry v. Garcia*, 448 F.3d 1150 (9th Cir. 2006), *Chaffer v. Prosper*, 592 F.3d 1046 (9th Cir. 2010) (petitioner's ignorance of the law)

— *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001) (IAC for failing to file federal petition because no right to habeas counsel)

— *Fail v. Hubbard*, 272 F.3d 1133 (9th Cir. 2001) (one year delay by District court to dismiss federal petition on procedural grounds because delay was routine)

— *Gaston v. Palmer*, 417 f.3d 1030 (9th Cir. 2005) (physical and mental disabilities not amounting to incompetence)

Exhaustion Requirement: 28 U.S.C. § 2254(b)(1)(A) & (b)(1)(2)

1. Federal claim must have been "fairly presented" to state court. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996)

2. Legal and factual component:

a. Legal: references to specific provisions of federal constitution or federal case law. *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000); *Peterson v. Lamper*, 319 F.3d 1153 (9th Cir. 2003) & *Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004) (cites to state law that applies federal law may or may not be sufficient); *Shumway v. Payne*, 223 F.3d 982 (9th Cir. 2000) (general references to "due process" or "fair trial" insufficient)

b. Factual: must alert state court to facts supporting claim and any new facts alleged in federal court must not fundamentally alter nature of the claim. *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994)

3. Claims are exhausted if obviously procedurally barred. *Gray v. Netherland*, 518 U.S. 152 (1996); *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)

4. Mixed petitions and stays

I. Stay and abeyance. *Rhines v. Webber*, 544 U.S. 269 (2005) (must show good cause for failure to exhaust and claims are not plainly meritless)

ii. Withdrawal and abeyance. *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2003) (no need to show good cause but claims must "relate back" under *Mayle v. Felix*, 545 U.S. 644 (2005))

Mental Incompetence at Federal Level

1. No right to counsel for federal habeas, but incompetent petitioners can get guardian ad litem and possibly attorney *Allen v. Calderon*, 408 F.3d 1150 (9th Cir. 2005)

Evidentiary Hearings: 28 U.S.C. § 2254 (e)(2)

1. Federal court must first determine whether a sufficient factual basis exists in the record to decide the claim. *Insyxiengmay v. Morgan*, 403 F.3d 657 (9th Cir. 2005)

2. If not, court must determine whether Petitioner "failed to develop" the factual basis in state court. *Insyxiengmay*, *supra*. Failure to develop means some lack of diligence attributable to petitioner or petitioner's counsel. *Williams v. Taylor*, 529 U.S. 420 (2000). At a minimum, must ask for an evidentiary hearing in state court. *Williams*, *supra*. If petitioner failed to develop factual basis, no hearing in federal court. *Insyxiengmay*.

3. If petitioner has not failed to develop factual basis in state court, petitioner gets an evidentiary hearing in federal court if he meets the factors outlined in *Townsend v. Sain*, 372 U.S. 293 (1963) and makes allegations which, if true, would entitle him to relief. *Insyxiengmay*; *Gonzalez v. Pliler*, 341 F.3d 897 (9th Cir. 2003).

Second or Successive Petitions: 28 U.S.C. § 2244(b)(1)-(4)

1. Cannot file a successive petition in federal court without permission of 9th Cir. 28 U.S.C. § 2244(b)(3)(A).

2. Claims previously presented will be dismissed. § 2244(b)(1)

2. Claims not previously presented must rely on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable or factual predicate for the claim could not have been previously discovered through due diligence and those facts, if proven would be sufficient to establish by clear and convincing evidence that no reasonable factfinder could have found the petitioner guilty. 28 U.S.C. § 2244(b)(2)

Procedural Default

1. If last state court decision addressing claim imposes an "independent and adequate" state procedural bar, the federal court cannot review it. Harris v. Reed, 489 U.S. 255 (1989).

2. "Independent" means the state law basis for the decision must not be interwoven with federal law. *Harris*, 489 U.S. at 265. A ground is "interwoven" with federal law if "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1975)

3. "Adequate" means "'firmly established and regularly followed' at the time is was applied by the state court." *Poland v. Stewart*, 169 F.3d 573, 585 (9th Cir. 1999)

4. Burden of proof: *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003)

5. All cases cited in state court order must be independent and adequate. *Washington v. Cambra*, 208 F.3d 832 (9th Cir. 2000)

6. Petitioner can show cause and prejudice or fundamental miscarriage of justice to excuse default.

> I. Cause: and "objective factor" that precluded him from raising his claims in state court. *McClesky v. Zant*, 499 U.S. 467, 493-94
>
> ii. Prejudice: "Prejudice [sufficient to excuse procedurally barred claims] is actual harm resulting from the alleged error." *Vickers v. Stewart*, 144 F.3d 613 (9th Cir. 1998)
>
> iii. Fundamental miscarriage of justice: petitioner must demonstrate that a constitutional conviction has resulted in a conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298 (1995); *Wood v. Hall*, 130 F.3d 373 (9th Cir. 1997)

7. Bars that are not independent and adequate:

> — *Waltreus* is not independent and adequate. *Calderon v. District Ct.*, 96 F.3d 1126 (9th Cir. 1996); *Hill v. Roe*, 321 F.3d 787 (9th Cir. 2003)

8. Bars that are independent and adequate

> — timeliness rule of *Clark, Swain*, & *Robbins* independent and adequate as of August 3, 1998. *Walker v. Martin*, – U.S. –, No.09-996 (Feb. 23, 2011).
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> — contemporaneous objection rule, *Melendez v. Plier*, 288 F.3d 1120 (9th Cir. 2002); *Rich v. Calderon*, 187 F.3d 1064 (9th Cir. 1999)