STATE HABEAS CORPUS UPDATE AND PRACTICE TIPS

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INTRODUCTION

These materials provide a short sketch of the various stages of state habeas corpus proceedings. Among other points, they touch on California Supreme Court cases which have altered or clarified some of the procedural rules governing habeas proceedings, including state procedural defaults (*Clark*, etc., Part I-B, *infra*) and the rules governing OSC's and post-OSC pleadings (*Romero* and *Duvall*, Parts IV-B and V-B, *infra*). However, *this is not intended to be a comprehensive primer on state habeas practice*. Numerous topics (e.g., format of the petition, logistics of an evidentiary hearing) are not covered or are noted only passingly.

These materials were originally prepared for a seminar sponsored by the First District Appellate Project in 1996. They have been updated in March 2004, with particular emphasis on recent changes in California's habeas statutes and court rules (Part VII, *infra*) and on the interplay between California's unique habeas procedures and crucial *federal* habeas doctrines, including exhaustion, calculation of the AEDPA statute of limitations, and the federal status of California procedural default rules (Part VIII, *infra*).

I. JURISDICTION AND PROCEDURAL BARS

A. Where to File

1. During Pendency of Direct Appeal

The superior courts, the Courts of Appeal, and the Supreme Court all have original jurisdiction over habeas corpus proceedings. Where the defendant already has a direct appeal pending, a habeas petition should generally be filed in the Court of Appeal. In the First District and some other districts, the usual practice is for the appellate court to accept jurisdiction over the petition and to consider it concurrently with the direct appeal (though the court will not necessarily "consolidate" the petition with the appeal). The practices vary in other districts. Sometimes an appellate court will decline to exercise its original jurisdiction, despite the pendency of an appeal, and will direct counsel to re-file the petition in superior court. (See e.g., *In re Baker* (1988) 206 Cal.App.3d 493.)

Usually appellate counsel will prefer to file the habeas petition in the Court of Appeal in the first instance, especially if the habeas claims overlap or complement arguments raised in the direct appeal. Occasionally, however, appellate counsel may believe that the trial court will be more receptive to a particular habeas claim or counsel may have other tactical reasons for preferring a superior court forum. Two recent Supreme Court decisions have addressed whether the pendency of an appeal bars the superior court from exercising jurisdiction over a petition.

--*People* v. *Mayfield* (1993) 5 Cal.4th 220: Where the habeas claim is also raised or could be raised on direct appeal, on the basis of the appellate record, the superior court lacks authority to

entertain the writ petition. In that situation, superior court writ relief would interfere with the appellate court's jurisdiction over the pending appeal. As *Mayfield* reflects, the asserted inclusion of "new evidence" will not necessarily remove a writ petition from this rule, where the same basic issue is being raised on appeal. Dictum in a previous case suggests that the test is whether the habeas claim is "inextricably connected" with an issue on direct appeal. (*In re Ketchel* (1968) 68 Cal.2d 397, 399 n. 2.) (The *Mayfield* court found it unnecessary to "revisit" the *Ketchel* dictum since it found that the putative "new evidence" was irrelevant to the legal merits of the issue. (*Mayfield, supra*, at p. 226.))

--*In re Carpenter* (1995) 9 Cal.4th 634, 645-646: However, where the habeas claim rests on matters outside the appellate record and could not be raised on direct appeal, superior court consideration of a habeas petition does not interfere with the appellate court's jurisdiction. (E.g., in *Carpenter*, a juror misconduct claim "that did not appear of record" (italics omitted).)

Carpenter simply holds that a habeas petition *may* be filed in superior court where the claim rests on matters outside the record and is not related to the direct-appeal issues; it does not require a superior court filing. Again, in several districts, the usual practice is to file the habeas petition in the appellate court, even in the *Carpenter* situation where the habeas claim does not parallel one of the appellate arguments.

2. When No Direct Appeal is Pending

An appellate court may decline to exercise its original habeas jurisdiction in the first instance, especially if there is no direct appeal currently pending before it. (E.g., *In re Ramirez* (2001) 89 Cal.App.4th 1312.) Unless a currently pending appeal provides a "hook" for appellate court jurisdiction, the superior court is considered the place to initiate a habeas proceeding. (Of course, where there was no direct appeal or where the conviction has already been affirmed on appeal, the habeas petition may also have to overcome some of the procedural obstacles discussed in Part I-B, *infra*.) On the other hand, if the habeas claims relate closely to a previously decided appeal (e.g., a claim of ineffective assistance of appellate counsel or a bid for reconsideration of a previously-rejected direct appeal claim in light of intervening Supreme Court authority), the appellate court would be the logical place to file the habeas petition. (For example, appellate courts have entertained post-affirmance habeas petitions based on *People v. Lasko* (2000) 23 Cal.4th 101, which held that specific intent to kill is *not* an element of voluntary manslaughter (contrary to prior cases and standard CALJIC instructions).)

However, there is also the option of filing a habeas petition in the first instance in the original jurisdiction of the California Supreme Court. Although the Supreme Court is not hesitant about invoking other procedural bars (e.g., unreasonable delay) in its habeas orders, anecdotal reports suggest that the Supreme Court is less likely than the appellate courts to dismiss an original petition for failure to file it in the lower courts. Thus, as a practical matter, where no appeal is currently pending, there is a choice between filing first in superior court and then going “up the ladder” with petitions in the appellate court and the Supreme Court or skipping the lower courts altogether and filing first in the Supreme Court. The latter course may be appropriate when the state habeas petition is viewed simply as an “exhaustion” vehicle and the main objective is to clear the way for a *federal* hearing on the claims. Obviously, however, if there are reasons to believe that a superior court judge might be especially receptive to a particular claim (e.g., the trial judge has a very dim view of the attorney who’s the subject of the IAC claim or has previously found misconduct on the part of the same prosecutor or police officers), it makes sense to follow the traditional route of filing in that court first.

B. Delay and Other Procedural Bars

The worst fate for a state habeas petition is a procedural default — i.e., a denial on some ground other than the merits— at least if the federal courts deem the state rule "adequate and independent." (See Part VIII-C for discussion of current federal status of California's procedural default rules.) Not only does the petitioner lose the opportunity for state court consideration of the merits of his habeas claims, the state procedural default will continue to haunt him in any subsequent *federal* habeas proceeding based on the same claims.

In a pair of decisions issued on the same day in 1993, the California Supreme Court summarized the principal state procedural bars to habeas claims, as well as the exceptions to those rules. (*In re Clark* (1993) 5 Cal.4th 750; *In re Harris* (1993) 5 Cal.4th 813.)

1. *Clark* & *Robbins*--Delayed or Successive Petitions

In *Clark*, *supra*, 5 Cal.4th 750, the Supreme Court declared its hostility to "piecemeal presentation" of habeas claims and adopted an "abuse of the writ" doctrine, borrowed in part from U.S. Supreme Court cases limiting successive federal writ petitions.[1] *Clark* basically establishes a "one bite at the apple" policy. A petitioner is expected to include *all* habeas claims in his first habeas petition. A petitioner must demonstrate "due diligence in pursuing potential claims." (*Id*. at p. 775.) A second or "successive" petition will be considered an "abuse of the writ" if the petitioner or his counsel knew or should have known of the factual bases for the new claims at the time of the original petition.[2] "However, where the factual basis for the claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible." (*Ibid*.)

Though *Clark*'s "successive petition" rule has had a profound effect in death penalty cases, it has had relatively little impact on appellate practice in the Courts of Appeal. In non-capital cases, appointed counsel's role generally ends with the "first round" of habeas proceedings, and it is rare for counsel to attempt to file a second habeas petition, raising new claims or offering new evidence in support of the previously-rejected claims. In any event, *Clark's* lesson for appellate counsel is clear. Counsel should marshall all the habeas claims in a single petition.

The other procedural bar discussed in *Clark* has greater potential relevance for non-capital habeas petitions. "`[A] habeas corpus petition should be filed as promptly as the circumstances of the case allow.... [O]ne who seeks extraordinary relief... must point to particular circumstances sufficient to justify *substantial delay*...."' (*Clark, supra*, 5 Cal.4th at p. 786 [emphasis added], quoting *In re Stankewitz* (1985) 40 Cal.3d 391, 397 n. 1.)

Under the Supreme Court's standards for *capital* cases, a habeas petition is presumptively timely if filed within 180 days of the final due date for the reply brief in the direct appeal or within

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[1] E.g., *McCleskey* v. *Zant* (1991) 499 U.S. 467.

[2] A habeas petition filed within an appellate court's original jurisdiction to obtain review of a superior court's denial of a petition raising the same claims is not considered a "successive petition" within the meaning of *Clark*, nor is a Supreme Court habeas petition following an appellate court's denial. (*Clark, supra,* at p. 767 n. 7.)

24 months of the appointment of separate habeas counsel.[3] *However, counsel should not assume that a petition filed within that period will automatically be considered timely in a non-capital case*. Outside the capital context, there are no bright-line rules for determining the timeliness of a habeas petition.

Whenever possible, counsel should attempt to file the habeas petition concurrently with or within a short time after the opening brief on appeal. At any rate, the petition should be filed before the direct appeal is heard and decided. Counsel "should not await the outcome of the appeal" to determine whether to file a habeas petition. (*Clark*, *supra*, at p. 784 n. 20.)

Exceptions to *Clark*--"Fundamental Miscarriage of Justice." A reviewing court will still consider an "untimely" or "successive" petition on the merits, despite the absence of justification for the delayed presentation of the claim, where the petition's allegations, if proven, would establish a "fundamental miscarriage of justice" concerning either the conviction or sentencing proceedings. (*Clark*, *supra*, 5 Cal.4th at p. 797.) For purposes of this rule, however, "fundamental miscarriage of justice" is narrowly defined as consisting of four categories:

> (1) [T]hat error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [fn.] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [fn.] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [fn.] (4) that the petitioner was convicted or sentenced under an invalid statute. (*Id.* at pp. 797-798.)

Clark's companion case, *Harris*, suggests that the jurisdictional claims discussed there are also exceptions to the bars on delayed or successive petitions. In particular, claims of "lack of fundamental jurisdiction" (i.e., subject matter jurisdiction) or judicial acts "in excess of jurisdiction" may be raised at any time, and the petitioner is not required to justify any delay in asserting the claim. (*Harris*, *supra*, 5 Cal.4th at pp. 836-842.)

Also note that a "substantial delay" objection is itself subject to waiver and estoppel limitations. The People may effectively waive this procedural bar by failing to assert the timeliness objection in a timely fashion. (E.g., *In re Moser* (1993) 6 Cal.4th 342, 350 n. 7; see also *In re Sassounian* (1995) 9 Cal.4th 535, 551 n. 15.)

Robbins' Refinement of the *Clark* rules. The Supreme Court revisited *Clark* in a pair of 1998 opinions and attempted to explain how it measured "substantial delay" and other aspects of the timeliness inquiry. (*In re Robbins* (1998) 18 Cal.4th 770; *In re Gallego* (1998) 18 Cal.4th 825.) Both opinions are unusually dense and fact-specific, and (perhaps contrary to the Court's intention) it is difficult to extract any "bright line" principles from them. However, several aspects of the *Robbins* opinion are particularly noteworthy: The primary consideration in measuring whether a petition was filed without "substantial delay" is when the defendant or his counsel knew *or should have known* of "triggering facts" putting the defense on notice of a potential habeas claim warranting further investigation. In *Robbins*, the Court addressed the "substantial delay" question on a claim-by-claim basis. In fact, it sub-divided the claims much more minutely than the petition itself had. It broke some claims into multiple "sub-claims," based on statements from different witnesses and

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[3] See Cal. Supreme Court Policies Regarding Cases Arising From Judgments of Death, std. 1-1.1 (as revised through Nov. 20, 2002).

separately analyzed counsel's diligence in investigating and presenting each "sub-claim." (See *Robbins*, *supra*, at pp. 784-815 [breaking "Claim I" of the petition into 4 "sub-claims"].) Throughout the opinion, the Court emphasized that "the *petitioner* has the burden of establishing (i) the absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness." (*Id.* at p. 780, emphasis in original.)

The *Robbins* Court also addressed the role of investigation of *other claims* (including claims which do not ultimately materialize) in assessing the timeliness of the claims which are ultimately presented in a habeas petition. Ordinarily, a claim will be deemed untimely if the petitioner or his counsel had already obtained sufficient facts to state a prima facie case on that claim or could have obtained such information through a diligent investigation at an earlier time. However, the Court also appeared to recognize some tension between the objectives of presentation of a fully-developed claim at the earlier opportunity and avoidance of "piecemeal litigation. "A claim or a part thereof that is substantially delayed nevertheless will be considered on the merits if the petitioner can demonstrate good cause for the delay. Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an *ongoing investigation* into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims ....." (*Robbins*, *supra*, at p. 780, emphasis in original.)

Finally, in *Robbins*, the Supreme Court announced a change in the way in which it applied the "miscarriage of justice" exceptions to the timeliness bar. It stated that henceforth it would look only to California law, rather than federal law, in assessing whether a claim came within any of the first three exceptions identified in *Clark*.[4] (*Robbins*, *supra*, at pp. 811-812 & fn. 32.) As the *Robbins* opinion acknowledged, the purpose of the curious resort to "state law" only deciding whether a petitioner's *federal* claims rise to a miscarriage of justice was to disentangle the timeliness procedural bar from federal law, so that the state rule would be considered "adequate and *independent*" of federal law for federal habeas purposes. (See Part VIII-C, *infra*, for discussion of the impact of *Robbins* on federal courts' review of pre- and post-*Robbins* habeas denials.)

Appellate applications of *Clark* and *Robbins*. Although some aspects of *Clark*'s and *Robbins*' timeliness rules apply to all habeas petitions, capital and non-capital, both were capital cases and concerned the more well-established duties of capital counsel to conduct a habeas investigation. Additionally, as noted earlier, both cases dealt with the Supreme Court's "presumptive" guidelines for measuring the timeliness of a capital habeas petition. There are no comparable benchmarks for non-capital petitions. Consequently, it is very difficult to translate those the *Clark* and *Robbins* holdings into the non-capital context. And the published case law does not spell out the specific application of those standards to the timing of a habeas petition related to a conventional non-capital appeal.

At least in the First District, it is rare for a writ denial to cite *Clark* and *Robbins* or otherwise refer to a timeliness bar. A habeas petition filed during the course of the briefing or within a short time after the completion of briefing will generally be considered timely. A petition filed months after briefing or around the time of oral argument may encounter problems, but it is difficult to

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[4] Constitutional error resulting in trial "so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner"; actual innocence; and error resulting in such a "grossly misleading profile of the petitioner ... that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*Clark*, *supra*, 5 Cal.4th at pp. 797-798.)

predict whether the court will say anything about the petition's timing.[5] In some cases, of course, the circumstances surrounding the habeas claim will also provide the justification for its delayed presentation--e.g., a witness' sudden recantation or the fortuitous discovery of new exculpatory evidence.

Even where the habeas petition is filed during the briefing of the current appeal, it is likely to face laches-like objections of unjustified delay where the claimed error actually relates to some prior proceeding in the same case rather than the one which is the subject of the current appeal. (E.g., in a probation revocation case, a habeas challenge to the validity of the original guilty plea underlying the conviction; in an extension of an NGI commitment (Pen. Code, § 1026.5), a claim of defective advisements surrounding the original NGI plea. In each situation, it will be necessary to justify why the plea challenge was not raised at the time of the previous disposition (the order granting probation or the original NGI commitment).)

2. *Dixon, Waltreus & Harris*--Claims Which Were or Could Have Been Raised on Appeal

The Supreme Court has often said that "`[habeas corpus will not serve as a second appeal.' [Citations]" (*In re Harris* (1993) 5 Cal.4th 813, 825.) First, a reviewing court ordinarily will not consider, on habeas corpus, a claim which was raised and rejected on direct appeal (the "*Waltreus* rule"[6]). (*Harris, supra,* at pp. 824-829.) Neither will it consider a habeas claim which *could have been but was not* raised on direct appeal (the "*Dixon* rule"[7]). (*Id*. at pp. 825 n. 3, 829.)

Robbins adds an important qualification to the *Dixon* and *Waltreus* rules. Because habeas corpus is the preferred vehicle for consideration of IAC claims, "We do not apply those bars [*Dixon* & *Waltreus*[to claims of ineffective assitance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record. [Citation.]" (*In re Robbins* (1998) 18 Cal.4th 770, 814 fn. 34.)

Like *Clark*, the *Harris* opinion also identifies the exceptions to these procedural bars: (a) a constitutional error which "is both clear and fundamental *and strikes at the heart of the trial process*" (*id*. at p. 834 [emphasis added]);[8] (b) "a true lack of fundamental jurisdiction" (i.e., subject matter jurisdiction) (*Harris, supra,* 5 Cal.4th at pp. 836-838); (c) acts "in excess of jurisdiction;" and (d)

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[5] Even if the state court does complain about the timing of the petition, those statements will represent a "procedural default" *only if the court explicitly invokes the delay as a ground for denial of the petition.* (Cf. *Harris v. Reed* (1989) 489 U.S. 255 (federal court will find state "procedural default" only if state court "clearly and expressly" relied on procedural bar as ground for denial).)

[6] See *In re Waltreus* (1965) 62 Cal.2d 218.

[7] See *In re Dixon* (1953) 41 Cal.2d 756.

[8] *Harris* emphasizes that merely characterizing a constitutional claim as "fundamental" is not enough to bring it within this narrow category. By its citation and short parenthetical description of *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 309, the *Harris* opinion implies that the "fundamental constitutional error" exception is equivalent to *Fulminante's* concept of "structural defect." (*Harris, supra,* at p. 834.)

claims affected by a change in the law (e.g., an intervening U.S. or California Supreme Court decision establishing a new rule).[9]

The "in excess of jurisdiction" exception deserves special note. Imposition of an unauthorized sentence is an act in excess of jurisdiction. (*Id*. at p. 839.) Just as the Attorney General (or the appellate court itself) may raise an "unauthorized sentence" issue in the context of a defense appeal, despite the prosecution's failure to notice an appeal, a defendant's "unauthorized sentence" claim is cognizable on habeas corpus even where it could have been raised on appeal.[10] However, the "excess of jurisdiction" exception to the *Waltreus* and *Dixon* rules applies only to purely legal claims which do not require any "redetermination of the facts underlying the claim." (*Id*. at pp. 840-841.)

II. ISSUES COGNIZABLE ON STATE HABEAS CORPUS--COMMON CLAIMS

Appellate counsel most commonly utilize habeas petitions where a claim rests in part on facts "outside the record" of the direct appeal or where direct appellate review is unavailable for some other reason (such as a defaulted appeal). Just as with federal habeas practice, Fourth Amendment claims are not cognizable on state habeas corpus. (*Clark*, *supra*, 5 Cal.4th at p. 767, citing *In re Sterling* (1965) 63 Cal.2d 486.)[11] With that exception, virtually any other claim may be raised via a habeas petition (subject, of course, to the procedural limitations discussed in Part I-B, *supra*.) Unlike federal habeas corpus review, state habeas review is not limited to federal constitutional violations, but also includes state law claims. (Notably, some of the state law bases for habeas relief do not involve any error or misconduct on the part of any of the participants in the trial. such as

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[9] Two recent U.S. Supreme Court decisions have provided opportunities for invocation of the last of these grounds. First, of course, last year the Supreme Court struck down, as a violation of the ex post facto clause, the California statute which had "revived" the prosecution of sex offenses on which the statute of limitations had run prior to the revival statute's enactment (Pen. Code § 803(g)). (*Stogner v. California* (2003) 539 U.S. ____, 123 S.Ct. 2446.) For many California defendants whose cases had otherwise become final, a state habeas petition provided the mechanism through which they obtained relief under *Stogner*. Though not yet as well known as the *Stogner* decision, the U.S. Supreme Court's decision this month in *Crawford v. Washington* (March 8, 2004; No. 02-9410) 541 U.S. ___, 2004 WL 413301, may provide a similar basis to reopen the cases of a number of California defendants whose appeals are long over. The *Crawford* opinion overhauls the confrontation clause analysis of admission of out-of-court "testimonial" statements by absent witnesses. A number of new hearsay exceptions enacted over the past decade or so may well be deemed unconstitutional under *Crawford*'s analysis, including the special statutes allowing admission of "reliable" or "trustworthy" extrajudicial statements concerning "child abuse," "elder abuse" or domestic violence. (Cf. Evid. Code §§ 1360, 1370, 1380.) Attorneys should consider whether the *Crawford* analysis could change the result of any prior appeals involving the admission of evidence under one of those statutes. If so, the "change in the law" exception to *Dixon* and *Waltreus* should provide an avenue for reopening those cases via a habeas petition.

[10] Numerous cases outside the habeas context, including the Supreme Court's *Scott* opinion, elaborate on the distinctions between an "unauthorized sentence," which can be corrected at any time, and ordinary sentencing error, which can be waived. (*People* v. *Scott* (1994) 9 Cal.4th 331; see also, e.g., *People v. Smith* (2001) 24 Cal.4th 849.)

[11] However, this limitation does not bar habeas consideration of an ineffective assistance claim, based on counsel's failure to raise a Fourth Amendment argument. (E.g., *People* v. *Howard* (1987) 190 Cal.App.3d 41; see *Kimmelman* v. *Morrison* (1986) 477 U.S. 365.)

newly discovered evidence or the new statutory provision on “Battered Women’s Syndrome” (Pen. Code § 1473.5; see Part VII-B).) Counsel should consider the possibility of a writ petition, not only where a claim rests entirely on matters outside the record, but also in situations where an additional factual showing can provide further support for an argument being raised on direct appeal (e.g., to establish prejudice from *Boykin-Tahl* error or other defects in plea advisements). The following list notes some of the most common uses of habeas corpus petitions in conjunction with criminal appeals; the list is by no means exhaustive:

--Ineffective assistance of trial counsel (e.g., *In re Sixto* (1989) 48 Cal.3d 1247.)

--Counsel's conflict of interest (e.g., *In re Hochberg* (1970) 2 Cal.3d 870).

--Ineffective assistance of *appellate* counsel (e.g., *In re Smith* (1970) 3 Cal.3d 192 [failure to raise crucial potentially meritorious issues on appeal]).

--Reinstatement of a late or otherwise defaulted appeal (e.g., *In re Serrano* (1995) 10 Cal.4th 447; *In re Jordan* (1992) 4 Cal.4th 116; *In re Vallery* (1992) 3 Cal.App.4th 1125).

--Prosecutorial suppression of exculpatory evidence ("*Brady* error") or presentation of testimony which the prosecutor knows or should know is false or misleading ("*Agurs* error") (e.g., *In re Sassounian* (1995) 9 Cal.4th 535; *In re Jackson* (1992) 3 Cal.4th 578).

--Prosecutorial presentation of false evidence (Pen. Code, § 1473; e.g., *In re Hall* (1981) 30 Cal.3d 408, 424; see also *Sassounian*, *supra*, 9 Cal.4th at p. 546).[12]

--Prosecutorial intimidation of defense witness (e.g., *In re Martin* (1987) 44 Cal.3d 1).

--Vindictive or discriminatory prosecution (e.g., *In re Bower* (1985) 38 Cal.3d 865).

--Newly discovered evidence (e.g., *Hall*, *supra*, 30 Cal.3d at p. 417).[13]

--Juror misconduct (e.g., *In re Hitchings* (1993) 6 Cal.4th 97).

--Statute of limitations (e.g., *In re Demillo* (1975) 14 Cal.3d 598).

--*Boykin-Tahl* error or other defects in the advisements and waivers attending a plea or admission (e.g., *In re Moser* (1993) 6 Cal.4th 342).

--Claims that the prior convictions fail to satisfy the enhancement statute (e.g., *In re Harris* (1989) 49 Cal.3d 131 [erroneous imposition of two enhancements (under Pen. Code, § 667(a)) where the prior cases were not brought and tried separately]).

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[12] Note that a statutory "false evidence" claim requires neither proof that the falsity amounted to perjury nor any showing that the prosecutor knew or should have known of the falsity. (Pen. Code, § 1473(c); *Hall*, *supra*, at p. 424.)

[13] A habeas claim of "newly discovered evidence" faces a more daunting standard than a similar claim in a new trial motion. On habeas, the new evidence must "undermine[] the entire prosecution case" (*Hall*, *supra*, at p. 417; *Clark*, *supra*, 5 Cal.4th at p. 766)--that is, it must "cast[] fundamental doubt on the accuracy and reliability of the proceedings" (*People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1246).

--Custody credits issues (e.g., *In re Joyner* (1989) 48 Cal.3d 487).

--Appellate review of a denial of bail (either pre-trial bail or bail pending appeal) (e.g., *In re Pipinos* (1982) 33 Cal.3d 189).

–Sentencing judge's mistaken belief that he or she lacked discretion regarding imposition of a "strike" or other enhancement (in "silent record" cases where that mistake is not evident from the sentencing transcript) (*People* v. *Fuhrman* (1997) 16 Cal.4th 930, 945-946);

--See Part VII-B for discussion of new statute authorizing habeas relief for "Battered Women's Syndrome" in pre-1992 murder cases. (Pen. Code § 1473.5)

III. INVESTIGATIVE TOOLS

A. Obtaining Information from Trial Counsel

Trial counsel is ethically obliged to cooperate with successor counsel--including appellate counsel investigating a possible habeas issue of ineffective assistance of counsel. (State Bar of California, Standing Committee on Professional Responsibility & Conduct, Formal Opinion No. 1992-127) Upon request, "the attorney must turn over all papers and property in the client's file to the client or successor counsel. [Fn.]" (*Id*., p. 2) Trial counsel has no "work product privilege" vis a vis his former client; consequently, successor counsel is entitled to "the entire contents of the file, not just the pleadings, depositions and exhibits." (*Ibid.*)

The Supreme Court's recent *Steele* opinion (discussed further below) also lends some support to that view. "A trial attorney is obligated to turn over the litigation file to the client or new counsel once that attorney's representation has terminated. [Citation.]" (*In re Steele* (Mar. 8, 2004; S114551) 32 Cal.4th __, slip opn, pp. 8-9.)

Finally, trial counsel should also cooperate with appellate counsel in providing any requested information which has not been reduced to writing. (State Bar, Standing Com., etc., *supra,* Formal Opn. 1992-127 at pp. 2-3.) Although the State Bar Opinion did not specifically mention this point, this principle appears especially applicable to a common problem encountered by appellate counsel: Under the reasoning of the opinion, trial counsel should be obliged to respond to appellate counsel's inquiries concerning counsel's *reasons* (if any) for particular acts or omissions before or during trial (e.g., failure to object to particular evidence). Also, of course, appellate counsel is entitled to information on the extent of trial counsel's out-of-court preparation and investigation.

B. Obtaining Information from the Prosecution

General rule: no post-judgment, pre-OSC discovery mechanism: Some types of habeas claims frequently depend on extracting additional materials from prosecutors and police--e.g., a *Brady* claim concerning suppression of exculpatory evidence such as inducements offered to an informant. In *People v. Gonzalez* 1990) 51 Cal.3d 1179, 1255-1261, the Supreme Court squarely held that the trial court has no jurisdiction to entertain a post-judgment "discovery" motion during the pendency of an appeal. Moreover, *Gonzalez* also appears to foreclose a pre-petition discovery motion in the Court of Appeal as a means of obtaining evidence to be included in the petition. Under *Gonzalez*, a reviewing court has no authority to order discovery unless the petition is already on file *and the court has already found a prima facie case*--the standard for issuance of an order-to-show-cause (OSC).

New statutory procedure for post-judgment discovery in capital and LWOP cases. In 2002, the Legislature partially abrogated *Gonzalez* by enacting a new statute for post-judgment discovery by appellate counsel of any materials that were or could have been provided in discovery during trial. (Pen. Code § 1054.9.) However, *the discovery statute is limited to cases in which a defendant received either the death penalty or an LWOP sentence* (i.e., special circumstance cases). Upon a showing that "good faith efforts to obtain discovery materials from trial counsel have been made and were unsuccessful,"a defendant may file a motion seeking discovery of any "materials in the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial."

In a decision filed just as these materials are "going to press," the California Supreme Court has given a fairly expansive construction to section 1054.9. (*In re Steele* (Mar. 8, 2004; S114551) 32 Cal.4th __.) Although the statute begins, "Upon prosecution of a postconviction petition for writ of habeas corpus or a motion to vacate a judgment," *Steele* holds that the actual pendency of a habeas petition is not a prerequisite for filing a discovery motion. Instead, "prosecution" of a habeas petition includes pre-filing investigation and preparation. "Defendants are now entitled to discovery to assist in stating a prima facie case for relief. But the only way this modification of the *Gonzalez* rule makes sense is to permit defendants to seek discovery *before* they file the petition ...." (*Steele, supra*, slip opn., p. 6.) Although either the trial court or the reviewing court has jurisdiction to consider a section 1054.9, ordinarily the superior court is the proper forum for the motion.[14]

Turning to the substantive scope of "discovery materials," the Supreme Court rejected the notion that section 1054.9 is simply a "file reconstruction" mechanism, limited to replacing materials which were previously disclosed to trial counsel. Instead, the Court emphasized that the statute covered both materials actually disclosed and anything "to which the defendant *would have been entitled* at time of trial." (§ 1054.9, emphasis added.)

> [W]e interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them. (*Steele, supra*, slip opn., at p. 14.)

In *Steele* itself, the Court held that the statute authorized discovery of information in the possession of the Department of Corrections concerning Steele's previous behavior in prison because that information would have been discoverable at trial if the defense had specifically requested it (due to its relevance to the defense's mitigation theory).

Prosecutors' continuing post-judgment *Brady* duty to disclose exculpatory evidence. Since section 1054.9 applies only to special circumstance cases, *Gonzalez* continues to present a potential

[14] Either party may seek appellate review of the superior court's discovery ruling via a petition for writ of mandate.

Catch-22 to obtaining discovery and making an adequate showing for habeas relief in all other cases. Without the requested evidence, appellate counsel may be unable to present the "prima facie showing" necessary to obtain an OSC. Nonetheless, although there is no authority for any pre-petition procedure denominated a "discovery motion," counsel should be creative in devising alternative means for obtaining documents from the prosecution--at least where counsel has specific reason to believe that such materials exist. *People* v. *Garcia* (1993) 17 Cal.App.4th 1169, may provide the necessary lever. *Garcia* holds that the prosecutorial duty to disclose any exculpatory evidence (including impeachment evidence) does not end with the pronouncement of sentence. *Garcia* found a *Brady* violation based on the prosecution's failure to disclose post-judgment information significantly impeaching the credibility of a key expert witness.

The California Supreme Court has passingly endorsed the same principle in both its *Gonzalez* and *Steele* opinions. "[P]rosecutors have a continuing duty to disclose information favorable to the defense, and we expect and assume that they will perform this duty promptly and fully ...." (*Steele, supra*, S114551, slip opn., p. 9; see also *Gonzalez*, *supra*, 51 Cal.3d at pp. 1260-1261.)

Where appellate counsel has reason to believe that the prosecutor or the police may possess information coming within the disclosure rules outlined in *Garcia, Gonzalez,* and *Steele,* counsel can direct a "Post-Trial Disclosure Request" to the relevant prosecutors citing those cases (especially *Garcia*). Depending on the circumstances, the disclosure request can take the form of a letter or of a more formal pleading.[15] It would be advisable to serve the request on both the Attorney General and the District Attorney who prosecuted the trial. Additionally, though the request is for voluntary prosecutorial disclosure and does not require any immediate judicial action, it may be wise to lodge a copy with the appellate court in case disputes arise during later proceedings over the adequacy of the prosecution's response.

C. Investigation and Other Ancillary Services

The appellate districts vary in their procedures for authorizing ancillary expenses (investigators, experts, etc.) for a habeas investigation during the pendency of a direct appeal. But, in all districts, appointed appellate counsel generally must obtain some kind of pre-clearance from either the relevant appellate project (FDAP, CAP-LA, CCAP, SDAP, or ADI) or from the appellate court itself. For example, in the First District, FDAP is authorized to pre-clear up to $900 in total ancillary expenses; any expenses in excess of that amount require pre-clearance by the Court of Appeal.

IV. THE PETITION--STATING A PRIMA FACIE CASE

A. The Factual Showing

Technically, a habeas petition is a "pleading." It must be verified (Pen. Code, § 1474(3)) (by petitioner or counsel), and the verification cannot be on information or belief (*People* v. *McCarthy* (1986) 176 Cal.App.3d 593). But otherwise there is no explicit statutory requirement that it be supported by declarations or other evidence. Even the Supreme Court's cases stop short of requiring that the petition itself include competent proof of every allegation. Instead, the Court has stated simply that a petition should "include copies of *reasonably available* documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations."

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[15] *Garcia* itself did not involve a formal written request from the defense such as the one attached, but the opinion does provide strong authority for the prosecutors' ethical obligation to disclose exculpatory evidence, with or without a specific request.

(*People* v. *Duvall* (1995) 9 Cal.4th 464, 474 (emphasis added) accord *In re Clark* (1993) 5 Cal.4th 750, 781 n. 16.) Elsewhere the Court has described the function of supporting affidavits as simply "to persuade the court of the bona fides of the allegations." (*In re Fields* (1990) 51 Cal.3d 1063, 1070 n. 2.)

In practice, however, the appellate courts do generally require that the petition's factual allegations be supported by competent proof (usually declarations or court records or other judicially-noticeable documents). Wherever possible, the showing should take a form which avoids hearsay objections--i.e., the declarations should contain matters to which the declarants could testify on the stand.[16] The most common impediment is an uncooperative trial attorney. In that situation, appellate counsel should submit his own declaration detailing his efforts to communicate with or obtain a declaration from trial counsel. (See *People* v. *Duvall* (1995) 9 Cal.4th 464, 485, where the Supreme Court described the allegations which a *respondent's return* should set forth where respondent's counsel has been unable to communicate with trial counsel or to obtain other crucial information.)[17] Where trial counsel has discussed his claimed tactical reasons (or lack of reasons) with appellate counsel but has refused to sign a declaration, appellate counsel's declaration should summarize those discussions.

B. Informal Briefing and the Pivotal Role of an OSC

Two recent Supreme Court opinions have addressed the procedural rules governing post-petition proceedings in appellate courts. (*People* v. *Duvall, supra*, 9 Cal.4th 464; *People* v. *Romero* (1994) 8 Cal.4th 728.) Both *Romero* and *Duvall* were defense losses in the sense that, in each case, the Supreme Court concluded that the appellate court had prematurely granted the petition without affording the Attorney General an adequate opportunity to dispute the petition's allegations. However, both opinions may prove useful to petitioners since they underscore the crucial function of an order to show cause (OSC).

On most habeas petitions, the appellate courts solicit "informal briefing" only (Cal. Rules of Court, rule 60). Usually, as of the time of oral argument on the direct appeal, the appellate court still has not issued an OSC. This is a procedural posture in which the habeas petitioner can lose but he can't win. An appellate court can deny a petition on the basis of the informal briefing (or even without soliciting opposition), but it cannot grant the petition. Under *Romero*, an appellate court cannot grant relief unless it has first issued an OSC, affording the respondent an opportunity to file a formal return. (*Romero*, *supra*, 8 Cal.4th at pp. 740-744.) *Romero* reversed and remanded an appellate decision which had granted a writ petition on the basis of the informal briefing.

A crucial lesson of *Romero* for appellate counsel is this: *The immediate object of the habeas petition and the informal reply should be the issuance of an OSC.* Counsel should be careful to frame the arguments in terms of the prima facie case standard for issuance of an OSC and should argue that it would be premature for the appellate court to decide potentially meritorious claims at

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[16] Thus, for instance, for a juror misconduct claim, the petition should include a declaration from one of the jurors, rather than just an investigator's declaration describing his interview with the juror.

[17] However, the *Duvall* Court noted that the relaxed pleading rule for a respondent "does not relieve the petitioner, in his or her petition for a writ of habeas corpus, from alleging facts that, if true, would entitle the petitioner to relief." (*Duvall, supra,* at p. 486 n. 8.) Nonetheless, in light of the Court's previous comment that the petition should include supporting affidavits if "reasonably available" (*id.* at p. 474), the *Duvall* footnote appears to apply to the specificity of the petition's factual allegations rather than the form which the supporting proof takes.

this "preliminary" stage of the habeas proceeding. *Romero* makes clear that where a petition does state a prima facie case for relief, "the issuance of the writ (or order to show cause) is mandatory, not optional." (*Romero, supra,* 8 Cal.4th at p. 740.) Additionally, both *Romero* and *Duvall* reiterate that, for purposes of evaluating whether the petition states a prima facie case, *the appellate court should take the petition's factual allegations as true and consider whether those claims, if proven, would support habeas relief.* (*Id*. at p. 737; *Duvall, supra,* 9 Cal.4th at pp. 474-475.)

C. Supreme Court Habeas Review After a Summary Denial

A habeas denial without issuance of an OSC is a "summary denial." The appellate court may discuss the merits of the petition in the opinion deciding the direct appeal, or it may deny it in a separate minute order (usually with no statement of the court's reasons). A petitioner can seek Supreme Court review following such a denial either by refiling the habeas petition within the Supreme Court's original jurisdiction or by filing a conventional petition for review as to the habeas denial.[18] Although either procedure is permissible, in some past cases the Supreme Court expressed a preference for the petition for review alternative--at least in cases where the appellate court denied the writ petition in a written opinion following full briefing. (*In re Michael E.* (1975) 15 Cal.3d 183, 193 n. 15; *In re Reed* (1983) 33 Cal.3d 914, 918 n. 2.)

Regardless of which procedure is employed to bring the habeas petition before the Supreme Court, counsel should remain focused on the necessity of an OSC and frame the arguments accordingly. Bear in mind that the Supreme Court has the power to issue an OSC *returnable in a lower court*, either the appellate court or a superior court. In contrast to a grant of review on a direct appeal, this form of relief does not commit the Supreme Court to placing the case on its own docket and hearing and deciding the petition itself. However, an OSC returnable in a lower court gives the petitioner another day in court (and also communicates to the lower court that the higher court views the petition's allegations as very serious).

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[18] Where an appellate court issues an OSC but later denies the petition in an opinion, the time for petitioning for Supreme Court review is the same as for a regular opinion in a direct appeal--i.e., 40 days after the opinion--even if the opinion deals only with the habeas proceeding. However, the deadline for a petition for review following a *summary denial* of a habeas petition depends on the timing of the summary denial vis a vis the disposition of the direct appeal. If the habeas denial if filed on the same date as the opinion in the related direct appeal, it will become "final" on the same schedule, so the petition for review should be filed within 40 days of the denial. (See Cal. Rules of Court, rule 24(b)(4).) (Note, however, that if the petition was denied in a separate order, filed the same date as the appellate opinion, and counsel wishes to petition for review in both proceedings, it will be necessary to file <u>separate</u> petitions for review for the appeal and for the habeas. (Rule 28(d).) If the summary habeas denial was on a different date than the opinion in the direct appeal, then the petition for review must be filed within *10 days* of the denial order.

There are no strict deadlines as such for filing an original Supreme Court habeas petition following the appellate court's denial of habeas relief. However, like any habeas petition, the petition must be filed without "substantial delay." (See Part I-B, *supra.*) To be on the safe side, counsel would be well advised to file any such habeas petition within the petition for review deadlines described above. As discussed in Part VIII-B, if a California reviewing court explicitly finds "substantial delay" in refiling a petition after a denial by a lower court, that ruling may also affect whether the state habeas proceeding is considered "pending" during that interval for purposes of tolling the federal statute of limitations.

V. POST-OSC PROCEEDINGS

A. Forum

A reviewing court can make its OSC returnable either before itself or before a lower court. Where the OSC is made returnable in the appellate court, the post-OSC proceedings (including any evidentiary hearing before a referee appointed by the appellate court) come within appellate counsel's appointment. Where the appellate court makes the OSC returnable in superior court, it effectively transfers or remands the entire writ proceeding to that court. In that situation, the superior court will be responsible for appointing counsel.

B. Post-OSC Pleadings--Return and Traverse

Regardless of where the OSC is made returnable, the next step is for the respondent to file a formal pleading, a "return," in answer to the petition's allegations. The petitioner then files a reply pleading, a "traverse" (also known as a "denial") responding to the return. The function of the return and the traverse is to define and narrow the contested issues. After comparing the return and the traverse, the court determines whether there are any disputed issues of material fact requiring an evidentiary hearing.

1. Sufficiency of the Return

A critical question in post-OSC proceedings is whether a counter-showing, in the form of opposing declarations or other evidence, is necessary to bring the opposing party's factual showing into dispute. Under previous case law, a return consisting only of "general denials" not supported by specific factual allegations and supporting proof was deemed insufficient to bring a petition's factual allegations into dispute. Under those cases, the habeas court was entitled to view the petition's factual showing as uncontroverted and to decide the petition without the necessity of an evidentiary hearing.[19] However, in *People* v. *Duvall*, *supra*, 9 Cal.4th 464, the Supreme Court significantly relaxed the respondent's pleading responsibilities and made it substantially easier for the respondent to obtain an evidentiary hearing on the petition's "disputed" factual allegations, without tendering any counter-declarations or other factual showing. The Supreme Court emphasized that "[a]t this early stage,... the People's burden is one of pleading not proof. [Fn.]" (*Id.* at p. 483.) Although *Duvall* retained the general requirement that the return plead specific facts where possible, it excused that requirement under circumstances where crucial facts are unavailable to respondent's counsel, such as where trial counsel refuses to speak with him or (as in *Duvall* itself) trial counsel is dead. The *Duvall* opinion articulated the following standards:

> When one party (respondent for the return, petitioner for the traverse) can allege: (i) he or she has acted with due diligence; (ii) crucial information is not readily available; and (iii) that there is good reason to dispute certain alleged facts or question the credibility of certain declarants, courts evaluating the return and traverse should endeavor to determine whether there are facts legitimately in dispute that may require holding an evidentiary hearing. [¶] To assist the court in making the determination, the return should set forth with specificity: (i) why information is not readily available; (ii) the steps that were taken to try to obtain it; and (iii) why a party believes in good faith that certain alleged facts are untrue. (*Id.* at p. 485.)

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[19] See e.g., *In re Lewallen* (1979) 23 Cal.3d 274, 278 & n. 2.

2. Sufficiency of the Traverse

After an OSC issues, the traverse,[20] not the petition, becomes the petitioner's principal pleading. The petition itself, having served its purpose by obtaining the OSC, essentially drops out of the case. Consequently, it is essential that the traverse incorporate the petition and its supporting exhibits by reference; the traverse should also incorporate by reference any other documents previously filed in support of the petition (including, in particular, the informal reply and any supporting exhibits). Alternatively, petitioner's counsel may enter into a stipulation with respondent's counsel that the original petition be deemed a traverse. Usually, however, counsel will prefer to file a new pleading in order to respond more specifically to the return.

As the foregoing excerpt from *Duvall* indicates, a petitioner's traverse is subject to similar pleading rules as the return. (*Duvall, supra,* 9 Cal.4th at p. 485.) Where the return does include a counter-showing (e.g., a declaration from trial counsel asserting legitimate tactical reasons for a challenged omission), the onus is on the petitioner to rebut those allegations in his traverse, and unsubstantiated "general denials" will not suffice. (*People* v. *Karis* (1988) 46 Cal.3d 612, 653-656.) Often, of course, the declarations already filed in support of the petition will directly contradict the return's counter-showing, and the traverse need only refer to those previously-filed declarations to show that an evidentiary hearing is required. In other cases, it may be necessary for counsel to submit additional declarations or other evidence in order to rebut the return's allegations. Finally, where the information necessary to rebut the return's showing is unavailable to counsel, the traverse should follow the guidelines in *Duvall* and describe counsel's efforts to obtain the information, the reasons for its unavailability, and counsel's reasons for believing the return's allegations are untrue. (*Duvall, supra,* at p. 485.)

C. The Evidentiary Hearing

Where an evidentiary hearing is ordered, the court will generally issue an order framing the specific factual issues which are disputed. If the return and the traverse have fulfilled their function of framing *and narrowing* the factual issues which are genuinely disputed, the evidentiary hearing may well cover fewer issues than the OSC. (For instance, a court might order an evidentiary hearing limited to trial counsel's reasons for a particular omission, but could conclude that the other aspects of the ineffective assistance claim posed purely legal questions not requiring an evidentiary proceeding.)

As noted earlier, once an OSC has issued, a habeas court does have authority to order discovery (even in non-special circumstance cases not covered by the new post-conviction discovery statute, Pen. Code § 1054.9 (discussed in Part III-B)). "The nature and scope of discovery in [post-OSC] habeas proceedings has generally been resolved on a case-by-case basis. [Citation.]" (*In re Scott* (2003) 29 Cal.4th 783, 813.) In *Scott*, the Supreme Court suggested that a habeas court (or referee) has discretion over the precise terms and scope of discovery, but may appropriately look to the Prop. 115 reciprocal discovery statutes (Pen. Code § 1054 et seq.) Although it agreed that those statutes cover only "the underlying criminal proceeding" and do "not apply to habeas proceedings," the Court held that they represent "a logical place for the [habeas] referee to look to fashion a fair discovery rule." (*Scott, supra,* at pp. 813-814.) Consequently, throughout the investigation and preparation of a habeas petition, counsel should assume that, in the event the matter ever reaches an evidentiary hearing, his or her investigative materials (witness statements, etc.) are likely to be

[20] The superior court habeas rules (see Part VII-A, *infra*) describe this pleading as a "denial," rather than a "traverse." (Cal. Rules of Court, rule 4.550(b)(4).)

subject to reciprocal discovery on terms similar to those facing defense trial attorneys under the Prop. 115 statutes.

Where a reviewing court made its OSC returnable in superior court, the superior court will be responsible for deciding all issues posed in the OSC, both factual and legal. However, where an appellate court retains jurisdiction over the petition and appoints a superior court judge to sit as referee on the appellate court's behalf, the judge's role will be more limited. The reference order should direct the referee to make factual findings only. (*In re Cordero* (1988) 46 Cal.3d 161, 171 n. 1.)

A habeas evidentiary hearing is, in essence, a bench trial on the specific issues framed in the reference order. The petitioner bears the burden of proving his factual allegations by a preponderance of the evidence. (*In re Cox* (2003) 30 Cal.4th 974, 997-998; *People* v. *Ledesma* (1987) 43 Cal.3d 171, 218.)[21] The parties may utilize the usual trial tools for the production of evidence, including subpoenas, and the court is authorized "to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." (Pen. Code, § 1484) In contrast to the pleading stage of the writ proceeding, the rules of evidence apply with full force, including the hearsay rule. (*Fields*, *supra*, 51 Cal.3d at p. 1070.) A declaration or other document previously appended to the petition will not be considered at the evidentiary hearing unless it satisfies the rules of evidence (or the parties stipulate to its admission).

In its recent *Scott* opinion, the Supreme Court held that, because a habeas hearing is a "special proceeding" rather than a "criminal" case, *the prosecution may call the defendant-petitioner to the stand*. In contrast to a criminal trial, "the petitioner does not have the privilege not to be called as a witness. However, if called as a witness, the petitioner does have the right to assert the privilege against self-incrimination as to individual questions, as does any witness in any proceeding. [Citations.]" (*In re Scott* (2003) 29 Cal.4th 783, 815.)[22] Moreover, "as in other hearings, the trier of fact may not draw adverse inferences from any witness' invocation of the right against self-incrimination." (*Scott*, *supra*, at p. 816.)

VI. SUBSEQUENT APPELLATE REVIEW

A. Appellate Review Following a Superior Court Habeas Denial

A superior court's denial of a habeas corpus petition is a non-appealable disposition, regardless of whether there was an OSC on the petition. The mechanism for appellate review of a superior court's habeas denial is a new habeas petition, filed within the original jurisdiction of the Court of Appeal. (*Clark*, *supra*, 5 Cal.4th at p. 767 n. 7.) Consequently, even where the superior

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[21] However, what it is petitioner must prove by a preponderance will depend upon the substantive standard applicable to the underlying legal claim.

[22] As a practical matter, the right to assert the privilege "as to individual questions" should bar the prosecutor from examining the defendant on the facts of the underlying criminal case. But the prosecutor's right to question the defendant on nominally non-incriminating matters still can pose serious problems. Among other things, in a hearing on an ineffective assistance claim, *Scott* would probably allow a prosecutor to examine a defendant on certain aspects of his discussions with trial counsel (even if the defense was not otherwise planning to put on the defendant's own testimony during the hearing).

court heard the petition pursuant to an OSC from the appellate court, it is necessary to file a new petition in the appellate court to obtain review of that decision.

In contrast, where a superior court judge conducted the evidentiary hearing in the capacity of a referee, the referee's conclusions are simply an interim stage in the ongoing habeas proceeding still pending in the appellate court. After the referee submits a report summarizing his or her findings, the reviewing court will typically receive supplemental briefs from the parties supporting or objecting to the findings.

B. Standards for Appellate Review Following an Evidentiary Hearing

The standards for appellate review of a judge's conclusions in a habeas hearing are the same regardless of the manner in which the case reaches the appellate court. That is, it does not matter whether the case comes before the reviewing court following its referee's submission of findings or on a new original habeas petition following the superior court's denial of a petition pending in that court. (*In re Wright* (1978) 78 Cal.App.3d 788, 801-802; see also *In re Fountain* (1977) 74 Cal.App.3d 715, 717-718.)

The standard of review of a habeas court's or referee's findings, including factual findings, is significantly less deferential than the standard applicable to a trier-of-fact's findings in an ordinary appeal. Although a judge's or referee's factual determinations in a habeas corpus evidentiary hearing are entitled to "great weight" if supported by "ample credible evidence," they are not binding on the appellate court. (*Martin, supra*, 44 Cal.3d at p. 32; *Ledesma, supra*, 43 Cal.3d at p. 219.) As the Supreme Court has summarized on several occasions:

> A referee's findings of fact are, of course, not binding on this court, and *we may reach a different conclusion on an independent examination of the evidence produced at the hearing he conducts even where the evidence is conflicting*. [Citation] *(In re Branch* (1969) 70 Cal.2d 200, 203 n. 1 [emphasis added]; accord e.g., *People* v. *Mozingo* (1983) 34 Cal.3d 926, 934; *Hall, supra*, 30 Cal.3d at p. 416; *In re Cox* (2003) 30 Cal.4th 974, 998.)

For a recent example, see *Hitchings, supra*, 6 Cal.4th at pp. 109-110, 119-122, where the Supreme Court rejected a referee's conclusion that a juror had not prejudged the case.

Finally, as in other appellate contexts, a superior court's or referee's conclusions on legal questions, including mixed questions of law and fact, are subject to independent review. (*Hitchings, supra*, at p. 109; *Ledesma, supra*, 43 Cal.3d at p. 219; see e.g., *In re Ross* (1995) 10 Cal.4th 184, 205 [prejudice component of ineffective assistance of counsel test is mixed question of fact and law, subject to independent review].)

VII. NEW CALIFORNIA STATUTES AND RULES ON HABEAS PROCEDURE AND OTHER POST-CONVICTION REMEDIES

A. Court Rules

Superior court. Recent revisions in the California Rules of Court have substantially fleshed out the procedures governing superior court habeas procedures. (Rules 4.550, 4.551, 4.552 (as amended eff. Jan. 1, 2004).) While appellate courts commonly solicit informal oppositions and replies to habeas petitions (rule 60), until recently there was no statute or rule explicitly authorizing a superior court to solicit informal briefing. The superior court's only apparent options were to deny a habeas petition summarily or to issue an OSC (requiring a formal return and traverse (or "denial"

in superior court parlance (rule 4.550(b)(4))). The revised rules do authorize pre-OSC informal responsive briefing (rule 4.551(b))[23] and also set timelines for the superior court to act on a habeas petition. Within 60 days of the filing of the habeas petition, the superior court must either: (a) issue an OSC, (b) deny the petition summarily, or (c) solicit an informal response. (Rule 4.551(a)(3)(A) & (a)(4))[24] If the court chooses the latter option, it must either issue an OSC or deny the petition within 45 days of filing of the informal response. (Rule 4.551(a)(5))

The superior rules also explicitly restate some of the substantive habeas standards and procedural rights developed in leading California Supreme Court opinions, including the standard for determining whether a petition states a prima facie case: "[T]he court takes the petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." (Rule 4.551(c)(1)) The rule also restates that issuance of an OSC requires the superior court to appoint counsel for all subsequent proceedings (if the petitioner is indigent). (Rule 4.551(c)(2))

The superior court rules' standard for an evidentiary hearing seems to depart somewhat from the language of Supreme Court decisions: "An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends upon the resolution of an issue of fact." (Rule 4.551(f)) In contrast, the Supreme Court's leading cases do not employ the "reasonable likelihood" of relief terminology, but instead speak of "material facts in dispute" as the crucial factor in ordering an evidentiary hearing. (E.g., *People v. Duvall* (1995) 9 Cal.4th 464, 478.)

Finally, regardless of whether a superior court issues an OSC or denies a petition summarily, "Any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be 'denied' is insufficient." (Rule 4.551(g))[25] Thus, unlike an appellate court or the Supreme Court, a superior court may not dispose of a habeas petition with a one-line "postcard denial." This reasons requirement may be a mixed blessing for habeas petitioners. On one hand, it does require a superior court judge to accord a habeas petitioner the dignity of some discussion of his claims. But it could also come back to haunt a petitioner who later tries to pursue those claims in federal court. A superior court's statement of a reasoned basis

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[23] Like an appellate court (rule 60(1)), a superior court is also authorized to obtain relevant records "pertaining to the petitioner's case" from the responsible "custodian" of those records. (Rule 4.551((b)(1)(b))

[24] A short-lived version of this rule (eff. 2001-2003) actually provided that, if the superior court failed to take any of these actions within the specified time, an OSC was deemed to have issued by operation of law. (Former rule 4.551(a)(3).) The most recent round of revisions, however, provides a far less substantive remedy if the superior court fails to act. The petitioner may file "a notice and request for ruling" stating that he has not received a timely ruling. Upon receipt of that notice, the presiding judge "must assign the petition to a judge and calendar the matter for a decision without appearances within 30 days of the filing of the notice and request for ruling." (Current rule 4.551(a)(3)(B)(ii).)

[25] Unlike the other points covered here, this "statement of reasons" requirement is not new. It is a carry-over from the pre-2001 superior court habeas rule, former rule 260.

for its denial of a claim will presumably invoke greater federal deference to that ruling under the AEDPA standard of review (28 U.S.C. § 2254(d)) than an uninformative postcard denial.

Appellate rules. There have also been some minor changes in the rules governing appellate habeas petitions, but these only concern matters of form. Any habeas petition filed by an attorney in an appellate court or in the Supreme Court "must be accompanied by a lodged copy of any related petition (excluding exhibits) previously filed in any lower state court, or in any federal court...." (Rule 56.5(c)(3)) Also, under a strict reading of the rules governing original writ petitions, "any supporting documents accompanying the petition") (rule 56.5(c)(4)) (i.e., declarations, transcripts and other exhibits) must be "index tabbed by number or letter" *and* be "consecutive[ly] paginat[ed] throughout" (rule 56(d)).[26]

B. Battered Women's Syndrome

In 2001, the Legislature enacted a special statute, Penal Code section 1473.5, authorizing habeas relief in certain murder cases where there is a "reasonable probability" that evidence of "battered women's syndrome" (BWS) could have altered the verdict, had it been introduced. The statute applies only to defendants convicted of murder, either by trial or plea, prior to January 1, 1992, the effective date of Evidence Code section 1107, the statute which explicitly recognized the admissibility of BWS.[27] A habeas petitioner is entitled to relief if the BWS evidence is "of such substance that, had it been introduced, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction, that the result of the proceedings would have been different." (§ 1473.5(a)) That formulation, of course, correspond to the prejudice prong of the *Strickland* test for ineffective assistance of counsel. The difference is that section 1473.5 provides an independent state law ground for habeas relief, which does *not* require any finding that trial counsel's failure to introduce BWS evidence fell below professional standards as of the time of trial (which may well have occurred prior even to the recognition of BWS).

To date, there have been no appellate constructions of section 1473.5. But several women have reportedly obtained some form of relief under the statute (though the author is not familiar with the number of cases or with any of the details).

C. False Evidence or Fraudulent Governmental Conduct as Grounds for Vacating a Conviction

In 2001, in the wake of some well-publicized scandals involving police fabrication of evidence (most notably, the Ramparts cases in Los Angeles), the Legislature enacted a special statute authorizing collateral relief *even for convicted defendants no longer in custody*. (Pen. Code § 1473.6.) Newly discovered evidence of false testimony by a "government official" provides grounds for vacating a conviction if that testimony "was substantially probative on the issue of guilt

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[26] As a practical matter, if the exhibits are clearly index-tabbed and internally paginated (allowing for easy reference), it is doubtful that the appellate clerks will insist upon the additional step of consecutive pagination of the entire volume.

[27] Though the choice of January 1, 1992, as the cut-off date is understandable, that date represents less of a demarcation in the state of California law than the enactment of Evidence Code section 1107 might imply. By the time of the enactment of that statute, case law had already recognized the admissibility of BWS testimony by analogy to other recognized forms of "syndrome" evidence, so the statute was largely declaratory of existing law. (Cf. *People v. Aris* (1989) 215 Cal.App.3d 1178 [disapproved in part, *People v. Humphrey* (1996) 13 Cal.3d 1073].)

or punishment." Similarly, governmental "fabrication of evidence" entitles a defendant to relief is that evidence was "substantially material and probative." Finally, "fraud" by a governmental official (short of false testimony or fabricated evidence) also provides grounds for relief but the standard is more difficult (paralleling the habeas standard for newly discovered evidence) – i..e, evidence which "completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence." (§ 1473.6(a)) Of course, prosecutorial presentation of false testimony or fabricated evidence are already well-recognized grounds for habeas relief under both federal constitutional and state statutory law. But *habeas* relief is available only to a defendant who was in actual custody (prison, jail, etc.) or constructive custody (probation, parole, etc.) at the time of his petition. Section 1473.6 authorizes such relief for an unjustly-convicted defendant who has already completed his custody.

VIII. INTERPLAY BETWEEN CALIFORNIA HABEAS RULES AND FEDERAL HABEAS DOCTRINES

The Byzantine law of federal habeas corpus – which has grown even more complex with the enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) – is beyond the scope of these materials.[28] However, it is vital for anyone litigating a California habeas petition to be aware of the basic exhaustion requirements for any later pursuit of federal habeas relief and to pay particular note to the current status of certain California habeas procedures and doctrines under federal law.

A. Exhaustion Basics

In a state habeas petition, as in a direct appeal, it is essential that a defendant's pleading and briefs make crystal clear the federal constitutional bases of the claims (*Duncan* v. *Henry* (1995) 513 U.S. 364) *and* that he present those claims to the state's highest court (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838). Just this week, the U.S. Supreme Court delivered another sharp reminder of the necessity of close attention to explicit "federalization" of each claim throughout the state proceedings. A post-conviction petition to the Oregon Supreme Court alleging "ineffective assistance of appellate counsel" was found insufficient to exhaust that claim because the argument did not make clear that the petitioner was asserting a *federal constitutional claim,* rather than a claim under the Oregon Constitution's right to counsel provision. (*Baldwin v. Reese* (March 2, 2004; No. 02-964) 541 U.S. ___, 2004 WL 372501.)

Baldwin has clear implications for any state appellate or habeas counsel who might be inclined to frame their claims in familiar California shorthand – "*Pope* writ," "*Marsden* motion," "*Wheeler* motion," "Pen. Code § 1368 hearing"). Of course, counsel should always *explicitly refer to the relevant federal constitutional right* (e.g., "ineffective assistance of counsel under the Sixth Amendment," "the federal due process clause," etc.) and leading *federal* authorities on that right (e.g., *Strickland v. Washington* for any IAC claim, *Pate v. Robinson* for any competency-to-stand-trial claim, etc.).[29]

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[28] For a comprehensive treatment of federal habeas law, see Liebman & Hertz, Federal Habeas Corpus Practice & Procedure (4th ed. 2001).

[29] The *Baldwin* opinion did leave open the possibility that references to state authorities must suffice if the state standard is *identical* to the federal one. If counsel finds him or herself in federal court defending a poorly exhausted claim, that argument may provide a ray of hope. But when one is still in the process of exhausting state remedies, there is no reason to take that risk. Counsel should simply take care to cite federal authorities, as well as any state ones. (Also, even assuming

In order to present a claim in a subsequent federal habeas petition, the defendant must first have presented it to the California Supreme Court. To exhaust a federal claim on *direct appeal*, the defendant must raise it both in his briefs in the Court of Appeal and in a timely petition for review to the California Supreme Court.[30] However, as noted earlier, a habeas claim may be presented to the California Supreme Court either as a petition for review from the appellate court's denial *or as a new habeas petition within the Supreme Court's original jurisdiction*. (See Part IV-C, *supra*)

Whichever method is chosen, the Supreme Court petition must both state the federal constitutional claim and the facts supporting that 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.) Frequently, the "original petition" procedure will provide an easier (and possibly even a more reliable) exhaustion method than a petition for review from the appellate habeas denial. That is especially so if the appellate court summarily denied the habeas petition without any discussion of the merits. In that case, counsel can simply add to allegations regarding the filing and denial of the appellate habeas petition and then repackage that petition for filing in the Supreme Court.

Indeed, while proper exhaustion of a direct appeal claim ordinarily requires its presentation to *both* the Court of Appeal and the California Supreme Court (*Castille v. Peoples* (1989) 489 U.S. 346), exhaustion of state habeas claims does not require presentation of those claims in any lower state court. A petitioner may skip both the superior and appellate courts and simply file his habeas petition in the Supreme Court in the first instance.

B. Calculation of the AEDPA Statute of Limitations for a California Petitioner

AEDPA's one-year statute of limitations ordinarily runs from the date a conviction became final on direct review. (28 U.S.C. § 2244(d)(1)(A))[31] Assuming that there was a petition for review in the direct appeal, a California case becomes final on direct review either (a) on the date the U.S. Supreme Court denies a certiorari petition, or (b) on the last date on which the defendant *could have filed a cert. petition*–i.e., 90 days after the date of the California Supreme Court's order denying review. (*Bowen v. Roe* (9th Cir. 1999) 188 F.3d 1157.)[32]

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that reliance on state authorities applying an identical standard will suffice, it is not clear that California and federal standards are necessarily identical in some crucial areas. For example, *Pope* and other pre-*Strickland* California cases (as well as a few post-*Strickland* ones) frame the ineffective assistance test in terms that do not neatly correspond to *Strickland*. (such as "withdrawal of a potentially meritorious defense").

[30] For this author's analysisof the new court rule allowing a supposedly-streamlined "exhaustion" petition for review (Cal. Rules of Court, rule 33.3), see the January 2004 seminar materials posted on FDAP's web site, www.fdap.org.

[31] There are three other potential triggering events: the date on which a state-created "impediment to filing," in violation of the federal constitution, is removed; "the date on which constitutional right asserted was initially recognized by the [U.S.] Supreme Court...," if that right is made "retroactively applicable to cases on collateral review"; or "the date on which the factual predicate for the claim or claims ... could have been discovered through the exercise of due diligence." (28 U.S.C. § 2244(d)(1)(B)-(D))

[32] Two important caveats: (1) In calculating the deadline for filing a cert. petition (and thus the date on which a case becomes "final" in the absence of a cert. petition), the 90 days runs from the

The AEDPA statute of limitations is tolled (i.e., excluded from the limitations calculation) during the during the period in which a "properly filed" state post-conviction petition (such as a state habeas petition) is "pending." (28 U.S.C. § 2244(d)(2)) Most of the litigation and uncertainty surrounding calculation of the AEDPA limitations period have concerned this tolling provision for state post-conviction petitions, and, in particular, its application to California's unusual procedures for "original" habeas petitions in reviewing courts. But, most of the basic questions have now been answered, and, in the majority of California cases (even ones involving post-affirmance state habeas petitions), counsel should be able to calculate the statute of limitations deadline by reference to a few key rules. Even if state appellate counsel is not planning to attempt to prepare a federal habeas petition on the client's behalf, it is essential that appellate counsel provide the client with *accurate* advice on calculation of the deadline for any pro. per. petition.

The tolling provision applies only to a *state* post-conviction petition. There is no tolling during the pendency of a federal habeas petition which is later dismissed. (*Duncan v. Walker* (2001) 533 U.S. 167.) Consequently, in the common situation, in which a federal court dismisses a "mixed" petition for incomplete exhaustion, there is no tolling during the period between the initial federal filing and the dismissal.[33]

A state post-conviction petition "tolls" the statute of limitations, it does not re-start the one-year period. The one-year period starts running when the conviction becomes final on direct appeal, as outlined above (usually the date of a cert. denial or the last date on which a cert. petition could have been filed). If a defendant files a later state habeas petition, that filing stops the clock as long as state habeas petition remains "pending." When there is a final denial of relief in that state habeas proceeding, the AEDPA clock resumes running where it left off.

A California habeas petition is ordinarily considered "pending" throughout the entire "round" in which a California petitioner is pursuing particular claims through successive petitions in superior court, the Court of Appeal and the California Supreme Court. *Carey v. Saffold* (2002) 536 U.S. 214. As the U.S. Supreme Court recognized in *Saffold*, unlike most states' post-conviction regimens, California has no procedure for "appealing" a superior court's denial of a habeas petition. Instead, a petitioner seeks appellate review of that denial by refiling those claims in a new "original" petition in the Court of Appeal, and, he may seek review of an appellate court's habeas denial either via a petition for review or through yet another "original" habeas petition in the California Supreme Court. Because these "original" petitions in the appellate court and in the Supreme Court represent the mechanism for state appellate review of a habeas denial, the state habeas proceeding is considered "pending" and continues to "toll" the statute of limitations for the entire period from the filing a habeas petition in superior court through the filing and final disposition of a habeas petition by the California Supreme Court, including the "gaps" between superior court denial and filing of the

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date of the California Supreme Court's review denial *order*, not from the date of remittitur. (2) A cert. petition or the time in which a cert. petition could have been filed is only relevant to calculation of the date on which the case become final *on direct review. The pendency of a cert. petition or the time in which one could have been filed from the denial of a state habeas petition does not "toll" the statute of limitations.*

[33] The U.S. Supreme Court has granted certiorari in a Ninth Circuit case concerning whether the federal court must advise a pro. per. petition of the option of deleting unexhausted claims from a mixed petition and then asking the federal court to stay proceedings while he returns to state court to exhaust the remaining claims. (*Ford v. Hubbard* (9th Cir. 2003) 330 F.3d 1086, cert. granted, Jan. 9, 2004, sub. nom., *Pliler v. Ford*, No. 03-221.)

appellate habeas petition and between appellate court's denial and filing of Supreme Court habeas petition. But there are two caveats:

- Under California law, a petitioner seeking review of a lower court's habeas denial should file an original petition in the next highest court withing a "reasonable" time. If a California appellate court or the California Supreme Court denies a habeas petition on the ground of unreasonable delay between the lower court denial and the new filing, the habeas petition will not be considered "pending" during that gap. In *Saffold* itself, the California Supreme Court had denied the habeas petition based on "lack of diligence." The U.S. Supreme Court could not tell whether this referred to the 4½-month delay between the appellate court's denial and the Supreme Court filing (which would mean that the habeas proceeding could not be considered "pending" during that interval) or to the much longer delay (5 years) between the judgment and the filing of Saffold's initial petition in superior court. The "lack of diligence" reference would affect the limitations calculation only if it referred to the relatively short delay in refiling the petition in the Supreme Court.[34] The Supreme Court remanded the case to the Ninth Circuit for consideration of that question. On remand, the Ninth Circuit decided that the "lack of diligence" denial referred to the delay between judgment and the superior court filing, rather than to the timing of the California Supreme Court filing. Consequently, the habeas petition was still considered to have been pending throughout the entire period from the filing of the superior court petition through the California Supreme Court's habeas denial. (*Saffold v. Carey* (9th Cir. 2003) 312 F.3d 1031.)

- The *Saffold* rule applies to a "one full round" of habeas petitions on a claim or set of claims, but does not apply the time between different "rounds" of state habeas petitions concerning different claims. (*Carey v. Saffold, supra*, 536 U.S. at p. 222.). In other words, if a California court denies a habeas petition raising one set of claims and several months later the defendant files a new state habeas petition raising different claims, the latter petition is considered to be the commencement of a new "round" of habeas review rather than a continuation of the earlier petition. Consequently, the habeas petition is not considered "pending" and the AEDPA limitations period is not tolled during the gap between the denial of the last state petition raising the one set of claims and the initial filing of a state petition raising different claims. E.g., *Welch v. Carey* (9th Cir. 2003) 350 F.3d 1079 (en banc); *King v. Roe* (9th Cir. 2003) 340 F.3d 821.).[35]

Be careful in calculating the finality date of a habeas denial order by the California Supreme Court. When does a California Supreme Court order denying a habeas petition (without issuance of an OSC) become "final" as to that Court – immediately or only after 30 days? The Ninth Circuit

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[34] A denial on grounds of unreasonable delay in filing the initial petition would represent a "procedural default" (*Clark*, *Robbins*) but would not affect the statute of limitations calculation, because California's timeliness rules are not a "condition to filing." So a state petition is still considered "properly filed" and pending, even if it is later denied as untimely. (Cf. *Smith v. Duncan* (9th Cir. 2002) 297 F.3d 809.)

[35] The calculation becomes still more complicated where there is an overlap between the different "rounds" – e.g., where the defendant begins a "second" round as to a new habeas claims, while he is still in the midst of his first "round" of review as to his initial claims. (Cf. *Delhomme v. Ramirez* (9th Cir. 2003) 340 F.3d 817.)

attempted to obtain the answer from the California Supreme Court itself by certifying the question to it, but the Supreme Court declined to accept the certification. The Ninth Circuit proceeded to decide the question itself. Construing the then-applicable California Rules of Court, the Ninth Circuit concluded that (unlike an appellate court's habeas denial without issuance of an OSC) a California Supreme Court order summarily denying a habeas petition became "final" 30 days after the date of the order. Consequently, the state habeas proceeding was still considered pending throughout that 30-day period. (*Bunney v. Mitchell* (9th Cir. 2001) 261 F.3d 973.) However, *Bunney's holding applies only to California Supreme Court habeas denials through December 31, 2002.* Effective January 1, 2003, the Judicial Council revised the rules to provide explicitly that the Supreme Court's denial of a habeas petition without issuance of an OSC becomes final immediately. (Cal. Rules of Court, rule 29.4(b)(2)(C).)[36] Consequently, for all habeas denials after that date, there is no additional 30-day finality window, and the AEDPA clock resumes running immediately upon issuance of the California Supreme Court's denial order.

The "prison mailbox" rule applies to pro. per. habeas filings in both state and federal court. Consequently, a state habeas petition is considered "pending" as of the date that an inmate submits it for mailing through the appropriate prison channels for inmate legal mail, and a federal petition is also deemed "filed" as of the date the inmate submits it into the prison mail. (*Anthony v. Cambra* (9th Cir. 2000) 236 F.3d 568, 574-575; *Stillman v. LaMarque* (9th Cir. 2003) 319 F.3d 1199, 1201) Of course, this "mailbox" rule applies only to an inmate's pro. per. filings, there is no counterpart for petitions filed with the assistance of counsel. (*Stillman, supra.*)

C. Current Federal Status of California's Habeas "Procedural Default" Rules.

The "adequate and independent" inquiry. Generally, a state habeas denial which does not include any statement of reasons or citation of authorities--such as the typical minute order "summary denial"--will be considered a denial on the merits rather than on procedural grounds. But if a state habeas order or opinion explicitly cites a state procedural bar (e.g., untimeliness, failure to raise the ground on appeal, etc.) as a ground for the denial, that state "procedural default" ruling may raise daunting barriers to federal habeas consideration of those claims. But the preliminary federal question is whether the state procedural rule is "adequate and independent – that is, whether the state rule was clearly established and consistently applied at the relevant time and whether it was "independent" of the merits of the underlying federal constitutional claim.[37] In the mid-1990's, numerous Ninth Circuit decisions held that, at least until the 1993 decisions in *In re Clark* (1993) 5 Cal.4th 750, and *In re Harris* (1993) 5 Cal.4th 813, California's various "procedural default" rules (both the *Dixon* rule concerning claims which could have been raised on direct appeal and the *Clark* rules on untimely or successive petitions) had not been "adequate," because, as acknowledged in the *Clark* and *Harris* opinions, those rules and their exceptions were not clearly defined and consistently applied. (E.g., *Morales v. Calderon* (9th Cir. 1996) 85 F.3d 1387, 1390-1391; *Fields v. Calderon* (9th Cir. 1997) 125 F.3d 757, 764); *Calderon v. U.S. Dist. Court (Hayes)* (9th Cir. 1996) 103 F.3d 72,

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[36] The Advisory Committee Comment to the revised rule states that the "immediate finality" provision "reflects settled Supreme Court practice" (citing unpublished Supreme Court minutes concerning lack of jurisdiction to consider a rehearing petition from a summary habeas denial). But the Comment's suggestion that the revision does not change anything is flatly wrong, since the *only* published opinion on the topic, *Bunney*, had held that such a denial is not final immediately.

[37] Of course, even if the state rule is considered "adequate and independent," that finding only leads to another more case-specific inquiry into whether there are grounds for overcoming the "procedural default" ("cause and prejudice," "miscarriage of justice," etc.). Those topics are beyond the scope of these materials on California habeas standards.

75; *Calderon v. U.S. Dist. Court (Bean*) (9th Cir. 1996) 96 F.3d 1126, 1129-1131.) Those Ninth Circuit rulings left open the question whether, guided by *Clark* and *Harris*, the California courts were applying the various procedural rules with the requisite clarity and consistency after 1993.

Neither *Dixon* nor *Clark* rules were "independent" prior to August 3, 1998. The California Supreme Court's further attempt at clarification of the timeliness rules in *In re Robbins* (1998) 18 Cal.4th 770, essentially mooted the question of the "adequacy" of the state procedural rules during the 1993-1998 interval by revealing a different deficiency. In *Robbins*, the California Supreme Court suggested that, in applying the "miscarriage of justice" exceptions to its various procedural default rules, it had formerly considered the merits of the underlying federal constitutional claims. But it stated that, in the future, it would look to state law only in deciding whether the procedural default could be excused on "miscarriage of justice" grounds. (Cf. *Robbins*, *supra*, at pp. 811-812 & fn. 32; see also p. 814 fn. 34.)

In light of *Robbins*' implicit acknowledgment that, prior to that opinion, the California Supreme Court had considered federal law in applying the exceptions to its procedural default rules, the Ninth Circuit subsequently decided that (until *Robbins*) the California procedural default rules had been entangled with the merits of the underlying federal constitutional claims. That is, pre-*Robbins* procedural default denials necessarily reflected some consideration of the merits of the federal claims, because the California courts looked in part to federal law in evaluating whether the claim presented a "miscarriage of justice." Consequently, prior to August 3, 1998 (the date of *Robbins*), neither California's *Dixon* rule (claims that should have been raised on direct appeal) nor the *Clark/Robbins* rules (untimely or successive petitions) were "independent" of federal law. For that reason, pre-*Robbins* procedural default denials are not recognized as "adequate and independent"grounds and do not call into play the rules limiting federal habeas consideration of defaulted claims ("cause and prejudice," etc.). (*Park v. California* (9th Cir. 2000) 206 F.3d 1146; *LaCrosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, 704-707.)

As of August 3, 1998, California's procedural default rules *are* "independent." In *Robbins*, the California Supreme Court stated that henceforth it would look only to *state* law in applying the "miscarriage of justice" exceptions to the procedural default rules. (*Robbins*, *supra*, 18 Cal.4th at pp. 811-812, 814 & fns. 32, 34.) That promise effectively decoupled the application of the state procedural rules from the merits of the federal claims. Consequently, the Ninth Circuit has ruled that post-*Robbins* procedural default denials *are* "independent" of federal law for purposes of the "adequate and independent" inquiry. (*Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 581-583.)

Unresolved question whether post-*Robbins* denials on timeliness grounds are "adequate." That still leaves the question whether post-*Robbins* denials are considered "adequate." That is, during the post-*Robbins* period, have the procedural default rules been sufficiently clear, and have the California courts applied them consistently? In *Bennett*, the Ninth Circuit found that there was sufficient uncertainty regarding the consistency of application of the timeliness standard to require a remand for further development of the record of the California courts' practices. (*Bennett v. Mueller*, *supra*, 322 F.3d at pp. 583-586.)[38] Consequently, pending further word from the federal courts, the "adequacy" of the *Clark/Robbins* rules remains an open question.

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[38] As the Ninth Circuit recognized in *Bennett*, the California Supreme Court's standards for capital habeas petitions provide presumptive timeliness guidelines, but there is no counterpart for measuring the timeliness of a non-capital petition. Consequently, even assuming that the California Supreme Court has been demonstrating consistency in its post-*Robbins* application of those standards in capital cases (another unresolved question), that would not answer the question whether the California courts have shown similar consistency in invoking the timeliness rules on non-capital petitions. (See *Bennett v. Mueller*, *supra*, 322 F.3d at pp. 583-584.)