

# THE IMPORTANCE OF FEDERALIZING YOUR CLAIMS IN STATE COURT

By Paul Couenhoven

## A. INTRODUCTION

When a state court conviction is challenged in federal court, that court will only decide questions of federal constitutional law. It will not consider questions of state law. Federalization is the technique of framing appellate issues as federal issues either exclusively or alternatively, to preserve them for federal court review.

Increasingly, one may wonder what purpose is served by federalizing issues we argue in state court. Despite the difficulty of obtaining any relief in federal court after a state court rejects meritorious arguments and affirms convictions and sentences, we should continue to make every effort to federalize our claims. It gives our clients another chance to obtain relief, and it provides them some hope while serving long sentences.

## B. ANY FEDERAL CLAIM MUST BE “FAIRLY PRESENTED” IN STATE COURT

Properly raising federal questions in state court to preserve the defendant’s option to raise the same federal question later in federal habeas or on a petition for certiorari, is called “exhaustion of state remedies.” Federal courts will only consider habeas claims which were “fairly presented” in the state court. (*Duncan v. Henry* (1995) 513 U.S. 364, 365.) In other words, a state prisoner must exhaust available state remedies (28 U.S.C. § 2254(b)(1)), thereby giving the State the “‘opportunity to pass upon and correct’ alleged violations of its prisoners’ federal rights.” (*Ibid.*, quoting *Picard v. Connor* (1971) 404 U.S. 270, 275.) The exhaustion requirement is based on “comity,” meaning federal courts do not interfere needlessly in state court proceedings. This is designed to “avoid[] the ‘unseemliness’ of a federal district court’s overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.” (*O’Sullivan v. Boerckel* (1999) 526 U.S. 838, 845.)

Exhaustion requires presenting both the federal constitutional principle that controls each claim *and* the operative facts underlying the claim to the state court. (*Davis v. Silva* (9th Cir. 2008) 511 F.3d 1005, 1008-1009; *Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 364; see *Picard v. Connor*, *supra*, 404 U.S. at pp. 277-278.) It is not enough to state abstract principles of law;

an actual legal argument, tied to the facts of the case, must be made.

Some issues are so closely connected with a specific Supreme Court case that the reference to the case will “federalize” the claim. For example, raising a *Miranda* issue in reliance on *Miranda v. Arizona* (1966) 384 U.S. 436 will automatically be federalized. Raising a claim of discrimination in jury selection in reliance on *Batson v. Kentucky* (1986) (1986) 476 U.S. 79 is automatically federalized.

A review of some cases illustrates the pitfalls of the exhaustion requirement:

In *Duncan v. Henry*, *supra*, 513 U.S. 364, on appeal the defendant argued the admission of testimony that he had molested someone 20 years earlier violated Evidence Code section 352. In federal court, he argued the admission of that evidence violated federal due process. The Supreme Court held he had failed to exhaust state remedies because he never raised the federal due process claim in state court. The defendant, a priest convicted of child molestation, had obtained relief in the federal district court. The failure to federalize his claim of state law error deprived him of reversal.

In *Picard v. Connor*, *supra*, 404 U.S. 270, Connor argued in state court the procedure under which he was brought to trial violated Massachusetts law. The state court of appeal mentioned the equal protection clause in rejecting that claim. In federal court, Connor—for the first time—alleged an equal protection violation. The federal court of appeal agreed the procedure violated equal protection. The Supreme Court reversed because the equal protection claim was never fairly presented in state court.

In *Anderson v. Harless* (1982) 459 U.S. 3, a Michigan man convicted of murder argued a jury instruction permitting the jury to imply malice from use of a weapon was an improper mandatory presumption. He cited a published Michigan case to support his argument. He obtained a federal habeas corpus grant, but the Supreme Court reversed. Even though the cited Michigan case referred to the Sixth and Fourteenth Amendments, the claim that the instruction unconstitutionally shifted the burden of proof to respondent and was inconsistent with the presumption of innocence under *Sandstrom v. Montana* (1979) 442 U.S. 510 was not fairly presented to the state court. As appellate counsel did not cite *Sandstrom* or expressly cite the underlying Sixth and Fourteenth Amendment bases for the claim, the federal reversal of the murder conviction was lost.

In *Petersen v. Lempert* (9th Cir. 2002) 319 F.3d 1153, the defendant claimed:

Failure of trial defense counsel to specifically advise a defendant that a letter he proposes to submit to the Court as a part of the sentencing process contains admissions of facts constituting irrefutable evidence of aggravating factors justifying an upward departure sentence is not adequate assistance of counsel, within the meaning of Article 1, Section 11 of the Oregon Constitution, *Chew v. State of Oregon*, 121 Or App 474, 477, 855 P.2d 1120 (1993) and *Krummacher v. Gierloff*, 290 Or 867, 627 P.2d 458 (1981).

In federal court his Sixth Amendment claim was rejected because the federal claim had not been fairly presented in state court.

In *Baldwin v. Reese* (2004) 541 U.S. 27 Reese filed a habeas petition in an Oregon appellate court raising an ineffective assistance of counsel claim and cited federal law. When the petition was denied, he sought review with the Oregon Supreme Court. The review petition asserted that Reese had received “ineffective assistance of both trial court and appellate court counsel” and added, “his imprisonment is in violation of [Oregon state law].” The U.S. Supreme Court held the federal claim was not fairly presented to the state's highest court.

**PRACTICE POINTER:** To satisfy the exhaustion requirement, you should expressly cite the applicable federal constitutional amendment at stake along with controlling United States Supreme Court precedent. Include the same express citations in your petition for review. A useful technique is to cite the applicable federal constitutional provision in your argument heading. By doing so, you will never inadvertently fail to exhaust your claim in state court.

### **C. HOW TO FEDERALIZE A CLAIM**

Federalization is relatively simple. “A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’” (*Baldwin v. Reese, supra*, 541 U.S. at p. 32.)

The federal claim should be explicit and clear. An appellant only has to set forth a clearly stated federal-law basis for his or her claim, along with the basic operative facts on which it is founded. The claim’s federal nature need not be in any particular place in the argument nor in the argument caption.

Some maintain it is necessary to federalize in the caption and body of the argument. However, the United States Supreme Court has never taken that position. Further, including everything in the caption can make it long and unwieldy. The caption's function is to make clear the nature of the claim for the court of appeal. Focusing on federalizing in the caption can detract from the force of the heading.

It is best to cite a controlling United States Supreme Court case and a constitutional amendment. The constitutional provision makes the federal source of the argument instantly clear. The case authority, in conjunction with the cited provision, usually makes the analysis clear. It is not enough to only refer to the right to due process and allege the trial was unfair. (See *Duncan v. Henry, supra*, 513 U.S. 364.)

FOR EXAMPLE: "Because there is no substantial evidence to support the conviction, it violates the Due Process guarantee in the Fourteenth Amendment (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)" The substantial evidence claim is properly federalized; nothing more is needed.

Some claims will be grounded on factual predicates and will require more elaboration. For example, to make a *Miranda* claim you must show the defendant was in custody and subjected to interrogation. Merely asserting a confession was obtained in violation of the Fifth Amendment and *Miranda* will not suffice to exhaust the federal claim.

### **C. THE HABEAS LIMITATION IN AEDPA**

In addition to the exhaustion requirement, in federal court you can only raise claims that are contrary to controlling United States Supreme Court precedent or where the state rejection of a federal claim is based on an unreasonable interpretation of the facts in the record. Therefore, an appellant will not have a realistic chance of pursuing a claim in federal court unless you can show the state appeals' court rejection of the claim is an unreasonable application of a United States Supreme Court opinion.

In 1996 Congress passed the Anti-Terrorist and Effective Death Penalty Act ("AEDPA"). The stated purpose of the parts relevant to our practice was to stop convicted criminals from thwarting justice and avoiding punishment by filing endless frivolous appeals in federal court.<sup>1</sup>

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<sup>1</sup> Since our clients are in prison while pursuing these appeals, it is unclear how filing a federal habeas thwarts justice or avoids punishment.

In the years since 1996, the Supreme Court has issued opinions that progressively narrow the scope of federal review of state court decisions.

The limitation on considering federal claims arising in state court criminal convictions is found in 28 U.S.C § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, federal habeas corpus functions as a “guard against extreme malfunctions in the state criminal justice systems and not as a means of error correction.” (*Greene v. Fisher* (2011) 565 U.S. 34, 38, internal quotation marks omitted.)

The AEDPA standard is “difficult to meet.” (*Harrington v. Richter* (2011) 562 U.S. 86, 102.) It is a “highly deferential standard” that “demands ... state-court decisions be given the benefit of the doubt.” (*Woodford v. Visciotti* (2002) 537 U.S. 19, 24.) A habeas petitioner must show “there was no reasonable basis for the state court to deny relief.” (*Harrington v. Richter, supra*, 562 U.S. at p. 87.)

#### **D. LIMITATIONS ON HABEAS REVIEW UNDER AEDPA**

Since AEDPA was passed, and particularly since 2000, the Supreme Court has interpreted § 2254(d) to increasingly limit the scope of federal review in cases involving state convictions. Year after year, the hope of obtaining federal habeas relief dims. As described in the following eight sections, the Supreme Court takes every opportunity to further limit federal review of state court convictions.

## 1. “CONTRARY TO” IS EXTREMELY LIMITED

“The word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character or nature,’ or ‘mutually opposed.’” (*Williams v. Taylor* (2000) 529 U.S. 362, 405.) A state-court decision is contrary to clearly established Supreme Court precedent if “the state court applies a rule that contradicts the governing law set forth in [those] cases.” (*Ibid.*)

For example, if a state court rejects an IAC claim on the basis the petitioner did not establish *by a preponderance of the evidence* that the result of his trial would have been different, “that decision would be ‘diametrically different,’ ‘opposite in character or nature,’ and ‘mutually opposed’ to our clearly established precedent” because *Strickland v. Washington* (1984) 466 U.S. 668 held a person claiming IAC only needs to establish a “reasonable probability that . . . the result of the proceeding would have been different.” (*Williams v. Taylor, supra*, 529 U.S. at pp. 405-406.)

A state decision is also “contrary to” controlling precedent “if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” (*Id.* at p. 406.)

## 2. “UNREASONABLE” MEANS NO FAIRMINDED JURIST COULD DISAGREE

Since “contrary to” has such a limited meaning, most federal habeas claims are based on the contention the state court decision is an unreasonable application of controlling precedent. Yet, the Supreme Court’s interpretation of “unreasonable” makes it difficult, though not impossible, to obtain federal habeas relief. A state court decision is “unreasonable” under AEDPA only if “there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents.” (*Harrington v. Richter* (2011) 562 U.S. 86, 88.)

You can argue a state court decision is an unreasonable application of controlling precedent in two ways: “First, a state-court decision involves an unreasonable application of this Court’s precedent if the state court identifies the correct governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case. Second, a state-court decision also involves an unreasonable application of this Court’s precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” (*Williams v. Taylor, supra*, 529 U.S. at p. 407.)

### **3. INSUFFICIENT EVIDENCE CLAIMS UNDER AEDPA**

The federal test for evaluating insufficient evidence claims is stated in *Jackson v. Virginia* (1979) 443 U.S. 307, 319: “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

But, on federal habeas review you do not apply that test. Rather, the standard is whether the state court’s conclusion a rational trier of fact could have found all elements proven beyond a reasonable doubt was “objectively unreasonable.” (*Cavazos v. Smith* (2011) 565 U.S. 2, 2.)

This could be called the unreasonable<sup>2</sup> (“unreasonable squared”) test.

### **4. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS UNDER AEDPA**

The federal test for evaluating ineffective assistance of counsel claims is stated in *Strickland v. Washington* (1984) 466 U.S. 668. A petitioner must first show that counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms. (*Id.* at p. 687.) He must then establish that there is a reasonable probability the outcome would have been different if his attorney had not committed the claimed unprofessional error. (*Id.* at pp. 693-94.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.)

The Supreme Court demands federal courts guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). “Surmounting *Strickland*’s high bar is never an easy task.” (*Padilla v. Kentucky* (2010) 559 U.S. 356, 371.) “Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.” (*Harrington v. Richter, supra*, 562 U.S. at p. 105.) When § 2254(d) applies, the question is not whether counsel’s actions were unreasonable; it is whether there is any reasonable argument to reject the finding counsel acted unreasonably. (*Id.* at p. 105.)

As with a sufficiency claim, the test is unreasonable<sup>2</sup> (“unreasonable squared”). In other words, not only must you prove counsel acted unreasonably, you must establish the state court’s rejection of that claim also was unreasonable.

**5. REVIEW IS LIMITED TO SUPREME COURT OPINIONS AS OF THE DATE THE STATE COURT REJECTS THE CLAIM**

If the United States Supreme Court decides a case which supports your claim *after* the state appeal is decided, that new case will not be considered under AEDPA review. This is because “clearly established Federal law, as determined by the Supreme Court of the United States” includes only those Supreme Court decisions as of the time of the state-court adjudication on the merits. (*Greene v. Fisher* (2011) 565 U.S. 34, 40.)

Therefore, a Supreme Court opinion issued after review is denied cannot be used to argue the state court’s decision was contrary to, or an unreasonable application of, controlling United States Supreme Court precedent.

**6. LIMITED TO THE RECORD DEVELOPED IN STATE COURT**

In addition to being limited to the cases published before the state appeal is decided, you are limited to the state court proceedings’ record. You cannot add more evidence to support a claim at an evidentiary hearing in federal court. A claim on federal habeas corpus under § 2254(d)(1) “is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that ‘resulted in’ a decision that was contrary to, or ‘involved’ an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time—i.e., the record before the state court.” (*Cullen v. Pinholster* (2011) 563 U.S. 170, 182.)

Any other conclusion would be unfair to the state court. “It would be contrary to [the] purpose [of Section 2254(b)] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.” (*Ibid.*)

**PRACTICE POINTER:** A state habeas petition only needs to establish, not prove, a prima facie case for relief. (See *In re Martinez* (2009) 46 Cal.4th 945, 955.) If the state court denies a habeas petition without an evidentiary hearing, when reviewing the denial the federal court will presume the facts alleged are true. Therefore, in any habeas petition filed in state court you *must* allege every fact that is essential to establish the claim you make. New facts cannot be alleged in the federal habeas petition.



**7. INTERMEDIATE APPELLATE DECISIONS ARE NOT CONTROLLING PRECEDENT**

While circuit court opinions, particularly those from the Ninth Circuit, may be helpful to your argument, they are not controlling. Opinions from intermediate appellate courts do “not constitute ‘clearly established Federal law, as determined by the Supreme Court.’ § 2254(d)(1).” (*Renico v. Lett* (2010) 559 U.S. 766, 779.)

If the facts of a circuit opinion are quite close to yours, it could be used effectively to argue the state court’s rejection of a claim is an unreasonable application of the controlling Supreme Court case. However, legal analysis in a federal appellate decision is not controlling.

**8. IT DOES NOT MATTER IF THERE IS NO STATE COURT OPINION OR REASONING**

Review on federal habeas is deferential even if there is no analysis from the state court to review. For example, if you file a habeas petition in state court and it is summarily denied by the court of appeal and the Supreme Court, the federal court must apply the deferential standard required under AEDPA. It does not matter if there is no reasoned decision to review.

“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” (*Harrington v. Richter, supra*, 562 U.S. at p. 99.)

**E. UNREASONABLE INTERPRETATION OF THE FACTS**

AEDPA also permits federal habeas relief if the state court opinion is “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” The Ninth Circuit has sometimes relied on this prong to grant habeas relief. If you believe the state court opinion omits or skews the facts in order to deny a federal claim, this prong could prove helpful in federal court.

## **G. PRACTICE POINTERS FOR FEDERALIZING YOUR CLAIMS**

### **1. DON'T GIVE UP! FEDERALIZE!**

Given the standards delineated in Supreme Court opinions, you may think federalizing issues in state court is a waste of time. Giving up federalizing would be a mistake. You never know what the appellant's chance is in federal court. Much depends on the district court judge or the Ninth Circuit panel assigned to a case. Attached is a list of recent wins in federal court, a list far from exhaustive. Despite the highly deferential standard, there are federal judges who will reverse when they believe injustice has occurred. Even if a reversal is unlikely in your case, the pendency of a further appeal can give our clients hope and help them survive each day in prison.

### **2. FULLY AND CAREFULLY PRESENTING YOUR FEDERAL CLAIM**

When you federalize your claim in your AOB, cite the constitutional amendment that applies, the right violated (e.g., "confrontation," "effective assistance of counsel," "right to present a defense," "presentation of false evidence"), and cite the controlling Supreme Court case. A list of cases you can cite in reference to specific federal claims is attached. Don't rely on a federal appellate decision unless the facts of that case are analogous to your case, or it cogently explains the Supreme Court precedent you cite. There is little point in citing federal appellate decisions since the California courts are not bound by them, even on federal questions (*People v. Bradley* (1969) 1 Cal.3rd 80, 86), and they do not preserve any issue for federal habeas review. Do so sparingly and only if the analysis or facts in the federal appellate decision strongly support your argument.

### **3. FILE A PETITION FOR REVIEW TO EXHAUST ALL ISSUES YOU FEDERALIZED**

In your review petition, as in your briefs on appeal, you *must* expressly cite the federal constitutional principle involved and the controlling Supreme Court precedent. You cannot merely refer to the AOB argument and incorporate it.

**4. IF YOU HAVE A STRONG IAC CLAIM, FILE A HABEAS PETITION AND OBTAIN A DECLARATION FROM COUNSEL AND OTHER SUPPORTING DOCUMENTATION NEEDED TO ESTABLISH THE CLAIM**

Keep in mind your client will not be allowed to add to the record once she or he gets to federal court. If you think you have a strong IAC claim, you should investigate it and file a habeas petition in state court if you have any additional information that will strengthen the claim. If you do not do this, an IAC claim in federal court has virtually no chance. Additional helpful information may include a declaration from the client, a declaration from trial counsel, and declarations from experts.

**5. IF THE ISSUE YOU RAISED IS PENDING IN THE UNITED STATES SUPREME COURT, FILE A CERT. PETITION.**

Keep in mind Supreme Court cases decided after the appeal is final are inapplicable in your client's federal habeas case. Check to see if there are pending cases relevant to the claim you have made on appeal. If so, file an application for certiorari asking the Supreme Court to grant cert. and hold the case until the primary case is decided.

For example, in *People v. Barba* (B185940) appellate counsel raised a *Crawford* Confrontation Clause issue [*Crawford v. Washington* (2004) 541 U.S. 36] in 2006. The California court of appeal rejected the claim in 2007, relying on a California Supreme Court case. By the time review was denied, the United States Supreme Court had granted certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591. Appellate counsel filed a petition for certiorari. The petition was held for over a year and a half, and on June 29, 2009, the Supreme Court granted cert., vacated the Court of Appeal opinion, and remanded in light of its June 25, 2009 *Melendez-Diaz* opinion. This is no guarantee a conviction will be reversed. In *Barba* the court of appeal reached the same result after the case was remanded by the United States Supreme Court. (See *People v. Barba* (2013) 215 Cal.App.4th 712.) However, counsel preserved the possibility of a better result by filing a cert. petition.

6. **CONSIDER PREPARING A *PRO PER* HABEAS PETITION FOR YOUR CLIENT**

If, in your opinion, your client has a strong federal claim, take the time to complete a *pro per* habeas form. A fillable form which you can save as a .pdf file can be found at <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO241.pdf>. It should take less than an hour to complete this. Send it to your client for his/her signature, along with the application to proceed *in forma pauperis* which is part of the form. The court might deny the request to proceed *in forma pauperis* since the filing fee in federal district court is only \$5. If so, you can afford to pay the \$5 filing fee. The *in forma pauperis* application will be in the federal court file and can be cited in support of an application to appoint counsel or to seek leave to proceed *in forma pauperis* in the Ninth Circuit, where the filing fee is \$455.

Using your “federalized” portion of the AOB or review petition, prepare a brief argument to support the habeas. Simply add the following to your argument: “The court of appeal opinion is an unreasonable application of (or contrary to) [the Supreme Court case you cite].” Or, if the opinion ignores or skewers the facts to reject a federal claim, allege the state court opinion is “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

After you mail the *pro per* habeas petition for your client, ask your client to keep you posted on the status of the federal habeas. When the client sends you a copy of the return filed by the Attorney General, request a continuance on your client’s behalf and prepare an application for appointment of counsel. Some federal district judges will appoint counsel in habeas cases, though it is increasingly rare. If you are appointed, prepare the traverse; you will be compensated by the federal court for your time. If the court refuses to appoint you, send the client a letter that states he or she wants the court to treat the habeas petition as the traverse, and instruct the client to send the letter to the district court.

If the district court denies the habeas, file a notice of appeal with the district court and ask that court to issue a certificate of appealability. Once the appeal is filed and if a certificate of appealability is issued by the district court or the Ninth Circuit, file an application for appointment of counsel with the Ninth Circuit. The Ninth Circuit, unlike the federal district court, will always appoint counsel if it decides issues should be briefed.

NB: you must be admitted to practice in federal district court and the Ninth Circuit to be appointed. Check those web sites for instructions.

**7. WHEN YOU DO NOT PREPARE THE PRO PER HABEAS PETITION, GIVE YOUR CLIENTS DETAILED INSTRUCTIONS ABOUT WHAT THEY MUST DO TO PROCEED**

*If you do not prepare a federal pro per habeas petition for your client, give them detailed information on how to proceed. Send him or her a pro per federal habeas form. These are available on the websites for every federal district court in California. Advise your client of the one-year (and 90-day) time limit for filing a federal habeas petition.*

"Counsel should promptly advise his client of his rights and take all actions necessary to preserve them[.]" (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "An attorney has the duty to protect the interests of his client." (*Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, 796.)

If you have properly federalized your arguments, a *pro per* habeas petitioner can, using appellate counsel's federalized argument as a template, copy that argument in the habeas petition. They can also attach the federalized state appellate argument to their federal habeas petition, and make clear and repeated references to that argument in the petition. (See *Dye v. Hofbauer* (2005) 546 U.S. 1, 4 [repeated references in a federal habeas petition to an appended appellate brief were sufficient to raise a federal claim].)

**NON-EXHAUSTIVE LIST OF U.S. SUPREME COURT CASES  
FOR FEDERALIZING ISSUES ON APPEAL**

**A. YOU SHOULD CITE TO FEDERAL CONSTITUTIONAL RIGHT AND  
CONTROLLING UNITED STATES SUPREME COURT PRECEDENT**

**Federal Constitutional Issues Must Be Explicitly Stated:** A mere reference to "due process" is insufficient to state a federal claim. (*Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987.) Sufficient statement includes the operative facts and the reference to the federal constitutional right at issue.

**Federal Constitutional Issues Must Be Fully Exhausted:** Constitutional issues must be raised at every level, including in a petition for review to the California Supreme Court. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

## **B. LIST OF FEDERAL RIGHTS AND CONTROLLING SUPREME COURT AUTHORITY**

### **1. GENERAL RIGHTS**

**Right to Counsel or Self-Representation at Trial and on Appeal:** The Sixth Amendment guarantees counsel at all critical stages of trial level proceedings. (*Faretta v. California* (1975) 422 U.S. 806; *United States v. Cronin* (1984) 466 U.S. 648, 653-54.) On appeal, Fourteenth Amendment due process provides a right to counsel if the state gives defendants the right to appeal. (*Douglas v. California* (1963) 372 U.S. 353.)

**Right to Effective Assistance of Counsel:** Sixth Amendment. (*Strickland v. Washington* (1984) 466 U.S. 668.)

**Right to Conflict-Free Counsel:** Sixth Amendment and Fourteenth Amendment Due Process Clause. (*Wood v. Georgia* (1981) 450 U.S. 261, 271; *Cuyler v. Sullivan* (1980) 445 U.S. 335; *Holloway v. Arkansas* (1978) 435 U.S. 475, 481.)

**Competency:** Fourteenth Amendment Due Process violation to try a criminal defendant who is mentally incompetent. (*Medina v. California* (1992) 505 U.S. 437, 439; *Pate v. Robinson* (1966) 383 U.S. 375.) Failure to adequately inquire when presented with substantial evidence of incompetency is a procedural due process incompetency claim. (*Drope v. Missouri* (1975) 420 U.S. 162.)

**Right to be Present at All Critical Stages:** Sixth Amendment confrontation right and Fourteenth Amendment due process. (*Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Massachusetts* (1934) 291 U.S. 97; *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745 and fn. 17.)

**Right to a Record of All Critical Stages:** Fourteenth Amendment right to due process and equal protection. (*Mayer v. City of Chicago* (1971) 404 U.S. 189; *Evitts v. Lucey* (1985) 469 U.S. 387 [right to adequate appeal].)

**Right to a Neutral Arbitrator (Unbiased Judge):** Fourteenth Amendment due process. (*Bracy v. Gramley* (1997) 520 U.S. 899; *Smith v. Phillips* (1982) 455 U.S. 209; *Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

**Waiver of Rights:** Fourteenth Amendment due process requires a knowing, voluntary, and intelligent waiver of all constitutionally protected rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458; *Boykin v. Alabama* (1969) 395 U.S. 238.)

## 2. PRETRIAL ISSUES

**Searches Without a Warrant or Probable Cause:** Fourth Amendment. However, Fourth Amendment claims cannot be raised in federal habeas corpus petition absent unusual circumstances. (*Stone v. Powell* (1976) 428 U.S. 465.)

**Custodial Interrogation Without Warnings or Other Involuntary Statements:** Fifth and Fourteenth Amendments. (*Miranda v. Arizona* (1966) 384 U.S. 436; *Yarborough v. Alvarado* (2004) 541 U.S. 652 [discussion of custody standards]; *Arizona v. Fulminante* (1991) 499 U.S. 279 [coercion as mental and physical, including false promises].)

**Continued Interrogation after Request for Counsel:** Sixth Amendment. (*Edwards v. Arizona* (1981) 451 U.S. 477.)

**Subsequent Comment on the Exercise of Fifth Amendment Rights During Interrogation:** Fourteenth Amendment due process—even if client subsequently takes the stand at trial. (*Doyle v. Ohio* (1976) 426 U.S. 610.)

**Demurrers/Lack of Notice:** Sixth Amendment right “to be informed of the nature and cause of the accusation.” (*In re Oliver* (1948) 333 U.S. 257, 273.)

**Double Jeopardy:** Fifth Amendment. (*Blockburger v. United States* (1932) 284 U.S. 299; *Ashe v. Swenson* (1970) 397 U.S. 436; *Brown v. Ohio* (1977) 432 U.S. 161.)

**Vindictive Prosecution:** Fourteenth Amendment due process. (*Blackledge v. Perry* (1974) 417 U.S. 21; *North Carolina v. Pearce* (1969) 395 U.S. 711.)

**Ex Post Facto/Bills of Attainder:** U.S. Constitution, art. I, § 10. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42.)

**Pre-Indictment Delay:** Fourteenth Amendment due process (not speedy trial). *United States v. Lovasco* (1977) 431 U.S. 783.

**Post-Indictment Delay:** Sixth Amendment right to a speedy trial. (*United States v. Marion* (1971) 404 U.S. 307; *Barker v. Wingo* (1972) 407 U.S. 514.)

**Discovery Issues:** Sixth Amendment rights to notice, confrontation, and to present a defense. Fourteenth Amendment due process precludes prosecutorial misconduct and withholding of exculpatory evidence. (*Brady v. Maryland* (1963) 373 U.S. 83.) Exculpatory evidence is relevant to guilt or sentencing and includes impeachment. Misconduct does not require bad faith; prosecutors have affirmative duty to obtain information in the custody of all law enforcement agencies assisting prosecution. (*Kyles v. Whitley* (1995) 514 U.S. 419.) Also, *United States v. Bagley* (1985) 473 U.S. 667, 676 [impeachment evidence falls within

*Brady* rule].)

**Funding of Defense:** Sixth Amendment right to present a defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68; *Britt v. North Carolina* (1971) 404 U.S. 226, 227 [indigent defendant is entitled to “the basic tools of an adequate defense”]; *McWilliams v. Dunn* (2017) 137 S.Ct. 1790, 1792 [“*Ake* [due process and right to effective counsel] requires the State to provide the defense with ‘access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense.’”].)

**Unduly Suggestive Identifications:** Fourteenth Amendment due process. (*Manson v. Braithwaite* (1977) 432 U.S. 98; *Neil v. Biggers* (1972) 409 U.S. 188.)

**Destruction or Failure to Preserve Evidence:** Fourteenth Amendment Due Process. The state's bad faith failure to collect potentially exculpatory evidence, like the bad faith failure to preserve such evidence, violates due process. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

### 3. PLEA ISSUES

**Voluntary, Knowing, Intelligent Plea:** Fourteenth Amendment due process and equal protection, generally must know the nature of the charges and the potential consequences (including collateral) of the guilty plea. (*Padilla v. Kentucky* (2010) 559 U.S. 356; *Boykin v. Alabama* (1969) 395 U.S. 238.)

**Plea Agreements:** Fourteenth Amendment due process right to enforce terms of plea agreement. (*Santobello v. New York* (1971) 404 U.S. 257.)

### 4. TRIAL ISSUES

**Sufficient Evidence to Prove Every Element of Crime Beyond a Reasonable Doubt:** Fourteenth Amendment due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *In re Winship* (1970) 397 U.S. 358, 363-364.)

**Denial of a Continuance:** Fourteenth Amendment due process. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 590.)

**Jury Trial — including Representative Cross-Section and Impartial/Not Impacted by Pre-Trial Publicity or Outside Influences:** Sixth Amendment jury trial and Fourteenth Amendment due process. (*Sheppard v. Maxwell* (1966) 384 U.S. 333; *Rideau v. Louisiana* (1963) 373 U.S. 723; *Duren v. Missouri* (1979) 439 U.S. 357.)

**Right to Adequate Voir Dire:** Sixth Amendment right to impartial jury and Fourteenth Amendment right to due process. Trial court MUST ask sufficient questions during voir dire so that "fundamental fairness" is guaranteed. (*Mu'min v. Virginia* (1991) 500 U.S. 415; See *Turner*



*v. Murray* (1986) 476 U.S. 28, 36, n. 9 [in an interracial case, trial court's refusal to voir dire the jury on racial prejudice violated petitioner's right to an impartial jury, guaranteed by the Sixth Amendment, as well as the Due Process Clause].)

**Prosecutorial Exclusion of Class of Jurors by Peremptory Challenge:** Equal Protection Clause. (*Batson v. Kentucky* (1986) 476 U.S. 79; *Johnson v. California* (2005) 545 U.S. 162.)

**Unanimous Jury:** Sixth, and potentially Fifth, Amendment. (*Ramos v. Louisiana* (2020) \_\_\_ U.S. \_\_\_ [140 S.Ct. 1390, 1397]; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *McDonald v. City of Chicago, Ill.* (2010) 130 S. Ct. 3020.)

**To Be Free of Restraints or Excessive Courtroom Security:** Fourteenth Amendment due process. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *Deck v. Missouri* (2005) 544 U.S. 622 (even after guilt determination).)

**To Appear in Street Clothes:** Fourteenth Amendment due process. (*Estelle v. Williams* (1976) 235 U.S. 501.)

**To Testify (or Not):** Fifth and Sixth Amendment. (*Rock v. Arkansas* (1987) 483 U.S. 44.)

**Public Trial:** Sixth and Fourteenth Amendment rights to public trial. Closure of courtroom without consideration of alternatives violates defendant's Sixth Amendment right to a public trial. (*Waller v. Georgia* (1984) 467 U.S. 39.) Trial court's exclusion from voir dire of a single observer related to defendant violated defendant's Sixth and Fourteenth Amendment rights to a public trial. (*Presley v. Georgia* (2010) 558 U.S. 209.)

**False or Perjured Testimony:** Prosecutor's knowing use of perjured testimony violates due process. (*Mooney v. Holohan* (1935) 294 U.S. 103, *Pyle v. Kansas* (1942) 317 U.S. 213; *United States v. Agurs* (1976) 427 U.S. 97.) This includes failure to correct false testimony (*Alcorta v. Texas* (1957) 355 U.S. 28), including false testimony concerning a witness' plea bargain agreement (*Napue v. Illinois* (1959) 360 U.S. 264).

**Evidentiary Errors – Improper Admission of Testimonial Hearsay:** Sixth Amendment confrontation clause. (*Crawford v. Washington* (2004) 541 U.S. 36 [admission of testimonial hearsay violates confrontation clause].)

**Evidentiary Errors - Right to Cross-Examine Witnesses to Show Bias:** Sixth Amendment confrontation clause. (*Michigan v. Lucas* (1991) 500 U.S. 145, 151; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679; *Davis v. Alaska* (1974) 415 U.S. 308, 316-317; *Oden v. Kentucky* (1988) 488 U.S. 277 [refusal to permit cross-examination of the victim regarding her motive to lie, and exclusion of evidence proffered by the defendant on the same issue, violated the Sixth Amendment right of confrontation].)

**Evidentiary Errors - Admission of Lab Reports via Testimony of Others:** Sixth Amendment Confrontation Clause. (*Williams v. Illinois* (2011) 567 U.S. 50; *Bullcoming v. New Mexico* (2011) 564 U.S. 647; *Melendez Diaz v. Massachusetts* (2009) 557 U.S. 305.)

**Evidentiary Errors – Erroneous Application of State Hearsay Rules Can Violate Confrontation Clause:** Fifth and Fourteenth Amendments. *Lilly v. Virginia* (1999) 527 U.S. 116: admission of the untested confession of an accomplice incriminating petitioner as a declaration against interest under state law violated the Confrontation Clause, where neither the accomplice’s words nor the setting in which he was interrogated provided any basis to conclude that his comments about petitioner’s guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting. *Idaho v. Wright* (1990) 497 U.S. 805: admission of child’s hearsay statement violated the Confrontation Clause even though admissible under a state law exception to the hearsay rule and corroborated by other evidence.

**Evidentiary Errors: Evidence Admitted Having no Relevance and High Probability of Prejudice:** Fourteenth Amendment due process and fundamental fairness. (Cf. *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [admission of evidence might offend due process if the evidence is so prejudicial as to render the defendant's trial fundamentally unfair].) NOTE: Since *Estelle* only said the erroneous admission of evidence *might* offend due process it is impossible to argue a state court’s rejection of an argument challenging the admission of evidence is directly contrary to a United States Supreme Court case. Generic evidentiary rulings challenged on appeal cannot effectively be federalized at this point. That is, you can cite *Estelle* and federal court of appeal cases, but the claim will have no change in a federal habeas corpus proceeding.

**Right to Present a Defense – Improper Exclusion of Defense Evidence:** Confrontation, compulsory process, and defense clauses of the Sixth Amendment, due process and fundamental fairness provisions of the Fourteenth Amendment. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Crane v. Kentucky* (1986) 476 U.S. 683; *Chambers v. Mississippi* (1973) 410 U.S. 284 [evidentiary rules may not be mechanically applied in manner that impugns right to present a defense]; *Green v. Georgia* (1979) 442 U.S. 95 [constitutional error to exclude testimony of witness who would have said co-defendant admitted killing the victim].)

**Prosecutorial Misconduct – Particularly in Argument:** Fourteenth Amendment due process and fundamental fairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637.)

**Jury Instructions, Particularly if Essential Element Omitted or Incorrectly Described:** Sixth Amendment jury trial and Fourteenth Amendment due process, fundamental fairness. (*Neder v. United States* (1999) 527 U.S. 1, 15; *California v. Roy* (1996) 517 U.S. 2, 5; *Yates v. Evatt* (1991) 500 U.S. 391; *Cage v. Louisiana* (1990) 498 U.S. 39; *Carella v. California* (1989) 491 U.S. 263 [mandatory conclusive presumption]; *Pope v. Illinois* (1987) 481 U.S. 497 [misstatement of element]; *Rose v. Clark* (1986) 478 U.S. 570 [mandatory rebuttable presumption]; *Cool v. United States* (1972) 409 U.S. 100 [instructional error reducing

prosecution's burden of proving every element beyond reasonable doubt].)

**Juror Misconduct:** Sixth and Fourteenth Amendments. (*Mattox v. United States* (1892) 146 U.S. 140 and *Remmer v. United States* (1954) 347 U.S. 227, 229.)

## 5. SENTENCING

**Ex-Post Facto Right Against Increased Punishment:** The Ex-Post Facto Clause (Art. I, § 10, clause 1; 14th Amendment) bars government from passing laws that impose new or increased punishment for crime committed before law's passage. (*Calder v. Bull* (1798) 3 U.S. (Dall.) 386; *Collins v. Youngblood* (1990) 497 U.S. 37, 43; *Weaver v. Graham* (1981) 450 U.S. 24, 28.)

**Sixth Amendment Right to Confront Evidence Relied On:** Possibly right to jury trial on contested facts. (*Blakely v. Washington* (2004) 542 U.S. 296; *Gardner v. Florida* (1979) 430 U.S. 349 (*plurality*).)

**Cruel and Unusual Punishment:** Eighth Amendment right to be free from cruel and unusual punishment or excessive fines. Fourteenth Amendment due process and equal protection, including accurate information. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

## 6. DIRECT APPEAL

**Right to Counsel:** Fourteenth Amendment due process. (*Douglas v. California* (1963) 372 U.S. 353.)

**Right to Complete Record:** Fourteenth Amendment due process and equal protection. (*Mayer v. City of Chicago* (1971) 404 U.S. 189, 198; *Evitts v. Lucey* (1985) 469 U.S. 387 [right to adequate appeal].)

## WINS IN FEDERAL COURT HABEAS CASES

***Jones v. Shinn*** (9<sup>th</sup> Cir. 2019) 943 F.3d 1211: IAC. Child abuse causing death case. Affirmed grant of habeas based on IAC for failing to sufficiently investigate the police work, medical evidence, and timeline between child's fatal injury and her death.

***Williams v. Sterling*** (4<sup>th</sup> Cir. 2019) 914 F.3d 302: IAC. Habeas granted reversing death penalty where trial counsel provided deficient performance in failing to present evidence of fetal alcohol syndrome in mitigation.

***Harris v. Sharp*** (10<sup>th</sup> Cir. 2019) 941 F.3d 962: IAC. Where there was evidence defendant's IQ was under 70, counsel provided ineffective assistance in failing to pursue an *Atkins* hearing;

defendant entitled to evidentiary hearing to prove prejudice.

**Godoy v. Spearman** (9<sup>th</sup> Cir. 2017) 861 F.3d 956: Juror misconduct. State court's failure to find presumption of prejudice upon showing of juror misconduct (juror discussed case with a friend who was a judge) was contrary to clearly established law in *Mattox v. United States*, *supra*, 146 U.S. 140 and *Remmer v. United States*, *supra*, 347 U.S. 227, 229.

**Barnes v. Thomas** (4<sup>th</sup> Cir. 2019) 938 F.3d 526: Juror misconduct. Death penalty reversed where a juror consulted with her pastor, told fellow jurors what her pastor had said (juror had to follow the law), and read several Bible passages to jury. State court's failure to apply presumption of prejudice contrary to *Remmer v. United States*, *supra*, 347 U.S. 227, 229.

**Lucio v. Davis** (5<sup>th</sup> Cir. 2019) 783 Fed. Appx. 313 [2019 U.S. App. LEXIS 22447; 2019 WL 3425186]: Meaningful opportunity to present a complete defense. Prejudicial error to exclude false confession experts where mother confessed to killing two-year-old daughter after aggressive questioning by police. State court rejection of claim contrary to *United States v. Scheffer* (1998) 523 U.S. 303, 329 and *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690. [NB: this opinion has been vacated and rehearing granted].)

**Richardson v. Griffin** (7<sup>th</sup> Cir. 2017) 866 F.3d 836: Confrontation Clause. Admission of police officer's testimony regarding out-of-court interviews with non-testifying witnesses was a Confrontation Clause violation.

**Haskell v. Greene** (3<sup>rd</sup> Cir. 2017) 866 F.3d 139: False Testimony. Key witness's false testimony about benefit received in exchange for testifying against defendant and prosecutor's failure to correct the false testimony violated due process.

**Hall v. Haws** (9<sup>th</sup> Cir. 2017) 861 F.3d 977: Jury Instructions. Giving CALJIC No. 2.15 and telling jury it could presume defendant murdered a man because he possessed his stolen property is a federal due process violation.

**Bennett v. Stirling** (4<sup>th</sup> Cir. 2016) 842 F.3d 319: Prosecutorial misconduct. The prosecutor's repeated appeals to racial prejudice and racially coded/animal imagery references rendered the trial fundamentally unfair.

**Dennis v. Secretary, Pennsylvania Dept. of Corrections** (3<sup>rd</sup> Cir. 2016) (en banc) 834 F.3d 263: *Brady* claim. Suppression of evidence supporting the alibi defense was *Brady* error.

**Kubsch v. Neal** (7<sup>th</sup> Cir. 2016) 838 F.3d 845 (en banc): Exclusion of Defense Evidence. Failure to allow admission of prior statements of defense witnesses was constitutional error.

**Blackston v. Rapelje** (6<sup>th</sup> Cir. 2015) 780 F.3d 340: Confrontation. Refusal to admit evidence of a prosecution witness's recantation violates Sixth Amendment Confrontation Clause.

***Dow v. Virga*** (9th Cir. 2013) 729 F.3d 1041: False evidence. Prosecutor’s deliberate elicitation of false evidence that it was defendant, not his attorney, who requested line-up participants all wear a bandage on their eye in an area where defendant had a scar, and argument that this false evidence showed defendant’s consciousness of guilt, violated due process. State court rejection of claim contrary to *Napue v. Illinois, supra*, 360 U.S. at p. 271.

***Amado v. Gonzalez*** (9th Cir. 2014) 758 F.3d 1119: *Brady* claim. Government’s failure to disclose chief witness’s probation report, showing he was on felony probation and was a member of the gang whose members defendant was charged with shooting, violated due process.

***Dixon v. Williams*** (9<sup>th</sup> Cir. 2014) 750 F.3d 1027: Instructional error. Facially erroneous self-defense instruction advising jury that reasonable self-defense would not negate malice violated due process.

***Ortiz v. Yates*** (9th Cir. 2012) 704 F.3d 1026: Confrontation Clause. Defendant accused of spousal battery was precluded from asking wife if she was afraid to deviate from story she initially told police because DA threatened her with charge of perjury, which would result in incarceration and loss of custody of her children. Arizona court's rejection of this claim was unreasonable application of *Michigan v. Lucas, supra*, 500 U.S. at p. 151, *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 678-679, and *Davis v. Alaska, supra*, 415 U.S. at p. 316-317.

***Cudjo v. Ayers*** (9th Cir. 2012) 698 F.3d 752: Right to present a defense. Murder conviction reversed where trial court excluded evidence of third party confessing to murder on basis it was “unreliable.” California Supreme Court found it was sufficiently reliable and should have been admitted as declaration against penal interest; however, ruled it was merely state law error. Ninth Circuit held state Supreme Court decision was contrary to *Chambers v. Mississippi, supra*, 410 U.S. 284 and *Green v. Georgia, supra*, 442 U.S. 95. Both cases involved exclusion under state evidentiary rules of third-party confessions to committing the crime.

***Milke v. Ryan*** (9<sup>th</sup> Cir. 2013) 711 F.3d 998: *Brady* claim. Only evidence linking Milke to murder of her four-year-old son was her confession. Police officer said she confessed. Confession was not recorded in any way, and there was no written statement. Police officer who said Milke confessed had extensive history of misconduct, including findings he had committed perjury, had obtained unlawful confessions, and had failed to provide suspects with *Miranda* warnings. None of this information was disclosed to defense. Murder conviction reversed; state court’s holding was based on unreasonable determination of facts and its decision was contrary to *Brady v. Maryland, supra*, 373 U.S. 83 and *Giglio v. United States, supra*, 405 U.S. 150.

## **OTHER RESOURCES**

[Federalization Chart](#) (February 2005) by the First District Appellate Project in San Francisco.

MAKING A FEDERAL CASE OUT OF IT. FDAP 2002 J. Bradley O'Connell seminar presentation. He addresses procedural default, a question not addressed here. Procedural default is generally a problem when federal claim was not properly presented in trial court.

[The Courthouse Across the Street: Federal Habeas Corpus](#). Appellate Defenders Inc. Panel Manual, Chapter 9. Available on ADI website.