

**THE GREAT WRIT: A PRIMER ON THE MEANS
BY WHICH FEDERAL HABEAS CORPUS
RELIEF MAY BE OBTAINED**

By: Dallas Sacher

Inspiration

In his 1975 song “Hurricane,” Bob Dylan chronicled the fundamental miscarriage of justice by which Rubin “Hurricane” Carter was falsely convicted of a triple murder. At the time that the song was written, Mr. Carter was serving a life sentence. Frustrated by this state of affairs, Mr. Dylan wrote:

“To see him obviously framed couldn’t help but make me feel ashamed to live in a land where justice is a game.”

Regrettably, fair minded Americans continue to feel shame as we enter the new century. Having toiled in the appellate courts for over twenty years, I can bear witness that criminal defendants are often convicted at trials where their constitutional rights are not honored. While it is a rare case where the government actively frames a defendant known to be innocent, it is a fact that some prosecutors will violate their ethical duties in order to secure a conviction in a close case. For these unscrupulous prosecutors, the trial process is indeed a game.

It is equally true that direct appeal or state habeas corpus is often a frustrating procedure as some appellate judges refuse to grant remedies by invoking doctrines such as waiver or harmless error. Through expansive application of these doctrines, some appellate courts have also become game parlors.

While it is not a panacea, the federal writ of habeas corpus is a mechanism by which justice can often be done. For whatever reason, federal judges seem less inclined to view criminal trials as game shows. Although I have suffered severe disappointment in several federal habeas cases, I have seldom felt that my case was not seriously considered.

Due to the integrity of the federal courts, Rubin Carter was eventually exonerated. (*Carter v. Rafferty* (3rd Cir. 1987) 826 F.2d 1299.) During a talk at Santa Clara University in the early 1990's, Mr. Carter strenuously argued that the federal writ of habeas corpus is one of the bulwarks of our democracy. Given the immediate relevance of the writ to his own life, Mr. Carter advised the audience that he never leaves his home without a copy of the writ which secured his freedom. To prove his point, Mr. Carter pulled the writ from his pocket and proudly displayed it.

For Mr. Carter, justice was done. It is my hope that this article will, in some

small measure, aid in the pursuit of justice for other wrongfully convicted defendants.

Introduction

This article is not intended to be a thorough resume on the intricacies of federal habeas corpus law. Rather, the purpose of the article is to provide a road map whereby an inexperienced state practitioner can preserve federal constitutional issues in state court and then take them on to federal court where they can be won on the merits.

Section I is devoted to the role of state appellate counsel. It is impossible to prevail in federal court unless the winning federal issue has been properly raised and exhausted in state court. As will be shown, skillful lawyering in state court will always result in satisfying the procedural requirements for a grant of federal relief.

Section II of the article discusses the basic procedural rules attendant to federal habeas corpus. It is a reality that the procedural nuances found in some cases are arcane in the extreme. Such nuances are far beyond the scope of this article. However, the essential framework of the federal rules can be gleaned by reading this article.

Finally, it must be noted that counsel need only resort to a single resource in handling federal habeas cases. Professors James Liebman and Randy Hertz have prepared and periodically updated an outstanding book which is a godsend for the federal habeas practitioner. (Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001).) The present edition is available from Matthew Bender. I can truly attest that I have never found a legal book which is of greater practical use. The book is not only filled to the brim with up-to-date case citations but it also clearly and concisely explains the theoretical basis for the concepts at issue. Any lawyer who intends to do federal habeas work must obtain a copy of this book.

I.

A FEDERAL WRIT OF HABEAS CORPUS IS WON BY LAYING THE GROUNDWORK IN STATE COURT.

Winning a case on federal habeas is much like building a house: A foundation must be laid before the structure can be erected. The foundation for a federal writ of habeas corpus is the work performed in state court. In the sections which follow, the duties of state appellate counsel will be discussed.

A. State Appellate Counsel must Be Knowledgeable Concerning the Requirements for Obtaining Federal Habeas Relief.

In the past, federal habeas was of little interest to most state inmates since they were serving short sentences which would lapse shortly before or after their state appeal was concluded. This is no longer true. In the wake of the Three Strikes Law and other sentencing “reforms,” many California prisoners are facing sentences of enormous length. Thus, a large number of state prisoners must turn to federal habeas in order to have any chance of obtaining their freedom. Given this reality, it is incumbent upon appellate counsel to ensure that a prisoner’s state appeal is properly handled so that federal habeas remains a viable remedy.

Stripped to the essentials, appellate counsel must be versed in the following requirements: (1) if at all possible, an issue must be raised under the federal constitution or a federal statute; (2) if the federal issue was defaulted by trial counsel, a claim of ineffective assistance of trial counsel must be made; (3) the appellate briefing must include express references to the federal Constitution and U.S. Supreme Court case law; (4) each and every federal issue must be expressly raised by petition for review or petition for writ of habeas corpus in the California Supreme Court; and (5) counsel must scrupulously comply with all state procedural requirements. Each of these topics will be separately addressed below.

B. Federalize, Federalize, Federalize.

Pursuant to 28 U.S.C. section 2254(a), a state prisoner may obtain relief from a federal court only when “he is in custody in violation of the Constitution or laws or treaties of the United States.” This provision is strictly construed. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67-68; “[t]oday, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. [Citations.]”)

There may be an occasional state case which raises an issue under a federal statute or treaty. However, the typical case will require the prisoner to state a claim under the federal Constitution. Of course, this duty must be directly shouldered by appellate counsel.

In the usual case, it is easy to federalize an issue. For example, if the trial court erred by failing to instruct on an element of the offense, appellate counsel need only show the omission and then cite U.S. Supreme Court case law for the proposition that the error violates the due process clause of the federal Constitution. (*Neder v. United States* (1999) 527 U.S. 1, 15.) Similarly, if the defense attempted

to suppress the defendant's statement on voluntariness grounds, a simple citation to the due process clause and applicable case law will suffice. (*Malloy v. Hogan* (1964) 378 U.S. 1, 13-14.)

A more difficult problem arises when the federal basis for a claim is unclear. Although the following discussion is not intended to be exhaustive, the cardinal principle is that counsel should make every effort to federalize a claim. While creativity may not be its own reward in this context, the client's chances of getting out of prison may hang in the balance.

Evidentiary error provides the most fertile area for transforming generic state error into a federal constitutional claim. In this regard, the constitutional foundation is found in either the Sixth Amendment's compulsory process and confrontation clauses or the Fourteenth Amendment's due process clause. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Under these provisions, a state court commits federal constitutional error when it excludes highly relevant and necessary defense evidence. (*Ibid.*, see also *Rock v. Arkansas* (1987) 483 U.S. 44, 53-56.) Importantly, a federal claim may be made even if no error was made under state law.

Chambers v. Mississippi (1973) 410 U.S. 284 illustrates this principle. There, the defendant sought to admit a confession made by a third party. Under state law, the confession was inadmissible under the hearsay rule. Notwithstanding this well established state rule, the Supreme Court held that exclusion of the confession constituted a violation of the due process clause.

"The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers, supra*, 410 U.S. at p. 302.)

Chambers establishes a clear rule. So long as the defendant can demonstrate that he cannot receive a fair trial absent the admission of important evidence, the federal Constitution is implicated. This is so regardless of the exact form which the evidence takes. (*Rock v. Arkansas, supra*, 483 U.S. 44, 56-62; exclusion of defendant's hypnotically enhanced testimony was violative of her constitutional right to testify; *Crane v. Kentucky, supra*, 476 U.S. 683, 687-692; exclusion of evidence regarding the circumstances surrounding the defendant's confession violated his right to confront the witnesses against him.)

A case handled by SDAP further illustrates the usefulness of the foregoing

authorities. In *People v. Franklin* (1994) 25 Cal.App.4th 328, the defendant was charged with molesting a friend's daughter. In order to impeach the daughter's testimony, the defendant sought to introduce her prior false claim that her mother had molested her. Although it found that the trial court had erred by excluding the evidence, the Sixth District declared the error to be harmless under Evidence Code section 354. (*Id.*, at pp. 336-337.) Importantly, the court failed to address the defense contention that the error rose to the level of a federal constitutional violation. Thankfully, the Ninth Circuit did not ignore the claim. Instead, finding that "[e]xclusion of the evidence deprived Franklin of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful testing" [citations]," the court reversed the judgment. (*Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273.)

As *Franklin* shows, a diligent effort can sometimes yield a dramatic victory. In *Franklin*, a claim of evidentiary error was carefully federalized in state court. For reasons unknown, the state court failed to acknowledge the federal nature of the error. Nonetheless, the Ninth Circuit later granted relief. While most of our clients will not be as lucky as Mr. Franklin, appellate counsel should still use the case as an inspirational model. (See *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062-1065; citing *Franklin* and reversing a California judgment where critical defense evidence was excluded.)

Although the law is much less certain in this area, it is also possible to argue that the erroneous admission of irrelevant and prejudicial evidence may constitute a federal due process violation. (See *Estelle v. McGuire*, *supra*, 502 U.S. 62, 68-70; court considers such an issue.) A case from the Ninth Circuit provides an example of this type of error.

In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the defendant was charged with murdering his mother who had died after her throat was slit. The forensic evidence showed that almost any kind of knife could have inflicted the fatal wound. At trial, the government presented evidence that the defendant: (1) had owned a Gerber knife in the past (but not at the time of the crime); (2) was a knife aficionado; (3) wore a knife in the past; and (4) scratched "Death is his" on his closet door with a knife. After finding that this evidence was completely irrelevant, the Ninth Circuit reversed the defendant's conviction.

"His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the

district court awarded him." (*McKinney v. Rees, supra*, 993 F.2d at p. 1386, fn. omitted, emphasis in original.)

As *McKinney* makes clear, a defendant may be deprived of due process when the government seeks to shore up a weak case with a dose of highly prejudicial evidence. Thus, in an appropriate case, *McKinney* can serve as persuasive authority in support of a claim of federal error.

Another example of turning state error into a federal contention may be found in the area of prosecutorial misconduct (or the more sanitized term "prosecutorial error"). (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) In this regard, two possible theories exist.

First, as the U.S. Supreme Court has indicated, a prosecutor's misconduct may be so egregious that it rises to the level of a due process violation. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Thus, in any case where the prosecutor engages in substantial misconduct, a federal claim should be advanced. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841; "" [a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct `so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" [Citations.]")

Aside from a global due process claim, it is essential to note that some types of prosecutorial misconduct may violate specific constitutional rights. For example, if the prosecutor refers to facts outside the record, he or she is effectively acting as an unsworn witness who has not been subjected to cross-examination. (*People v. Bolton* (1979) 23 Cal.3d 208, 214-215, fn. 4.) Under these circumstances, a Sixth Amendment violation is shown. (*Ibid.*; accord *People v. Johnson* (1981) 121 Cal.App.3d 94, 104.)

Finally, it should not be overlooked that there is authority for the proposition that cumulative prejudice flowing from mere state error can result in a federal due process claim. For example, this can occur "where the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process, . . ." (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; see also *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6.) Thus, when the record shows that substantial error infected the proceedings, counsel should not hesitate to argue that the defendant was denied a fair trial under the federal due process clause.

In short, garden variety state error can often be the basis for a viable federal contention. As a result, defense counsel should strive to be as creative as is reasonably possible in order to develop and preserve federal constitutional claims.

As a helpful resource, counsel should obtain a copy of Brad O'Connell's

article “Making A Federal Case Out of It.” The article appears in the materials for the June 7, 2002 seminar held by FDAP and SDAP. The article includes an 11 page table setting forth a number of viable federal claims.

C. If a Federal Issue Was Defaulted in the Trial Court, Appellate Counsel Must Advance a Claim of Ineffective Assistance of Trial Counsel.

A claim which is procedurally defaulted under state law cannot ordinarily be raised on federal habeas corpus. (*Coleman v. Thompson* (1991) 501 U.S. 722, 729-732.) A common example of a procedurally defaulted claim is one where trial counsel made an evidentiary objection but failed to state the federal constitutional basis for the objection.

People v. Gordon (1990) 50 Cal.3d 1223 is an illustrative case. There, defense counsel strenuously sought to exclude an extrajudicial statement proffered by the prosecution. In so doing, a hearsay objection was made. On appeal, the defense categorized the error as a violation of the Sixth Amendment. The Supreme Court held that the claim had been forfeited since “defendant failed to object on the ground that the admission of Rauch’s statement would violate his federal constitutional right of confrontation.” (*Id.*, at p. 1254, fn. 6; see also *People v. Benson* (1990) 52 Cal.3d 754, 788; although a relevancy objection was advanced at trial, the Supreme Court found that several constitutional theories were procedurally defaulted since defendant “failed to put forth a sufficient constitutional argument when he made his motion in limine;” accord, *People v. Burgener* (2003) 29 Cal.4th 833, 871, fn. 6.)

The lesson to be derived from the cited cases is a simple one: If there is any doubt that trial counsel has properly preserved a federal constitutional objection, it is incumbent upon appellate counsel to raise a claim of ineffective assistance of counsel. Absent such an argument, the state Court of Appeal can easily find that the underlying federal issue has been procedurally defaulted. While no one enjoys bringing such a claim, the unfortunate reality is that this step is often necessary to ensure that the client’s case can be cleanly brought to federal court. The failure to raise a claim of ineffective assistance of counsel will often doom the defendant’s hope of success on federal review. (See *Chein v. Shumsky* (9th Cir. March 14, 2003) 323 F.3d 748 [03 DAR 2921, 2922]; federal claim was procedurally defaulted since trial counsel “failed to explicitly interpose a due process objection.”)

D. The State Appellate Briefs Must Contain Express References to Both the Federal Constitution and U.S. Supreme Court Case Law.

As a matter of comity, a federal court will not entertain a case arising in state court unless the state court has first had “the opportunity to correct alleged violations of prisoners’ federal rights,” (*Duncan v. Henry* (1995) 513 U.S. 364, 365.) Given this principle, the U.S. Supreme Court has held that a state prisoner must cite to both the federal Constitution and Supreme Court precedent in his state appellate briefs. This rule is strictly enforced.

In *Duncan v. Henry, supra*, 513 U.S. 364, a California defendant argued on appeal that the trial court had abused its discretion under Evidence Code section 352 by allowing the admission of certain evidence. In arguing the prejudice flowing from the error, the defendant relied solely on the state test found in *People v. Watson* (1956) 46 Cal.2d 818. After the Ninth Circuit granted relief on federal due process grounds, the Supreme Court summarily reversed since the defendant “did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.” (*Id.*, at p. 366.)

It is essential to note that the *Duncan* rule cannot be satisfied by implication. As a matter of strict practice, the federal Constitution and U.S. Supreme Court case law must be expressly cited. (*Peterson v. Lampert* (9th Cir. 2003) 319 F.3d 1153, 1157-1159; federal claim would not be entertained even though the state petition for review cited state cases which applied federal case law.)

In preparing a petition for review, counsel must be careful to include both the operative facts and sufficient legal discussion to establish the substance of the issue. While this may be difficult to do in some cases given the 8400 word limit on a petition for review (California Rules of Court, rule 28.1(e)(1)), the task must be accomplished. (*Kelly v. Small* (9th Cir. 2003) 315 F.3d 1063, 1066; “state prisoner must describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based . . .”).

For the moment, the Ninth Circuit has taken the position that the mere statement of a federal issue in a petition for review “without further discussion” may be deemed sufficient if the Court of Appeal opinion discussed the federal issue “in a manner sufficient to put a reviewing court on notice of the specific federal claims. [Citation.]” (*Kelly v. Small, supra*, 315 F.3d at p. 1067.) However, counsel should not tempt fate by relying on this rule. Rather, counsel should be sure to provide a sufficient discussion of the legal issue in the petition for review. (See *Chein v. Shumsky, supra*, 03 DAR 2921, 2924; issue was not exhausted by “brief references” in petition for review.)

With respect to the requirement that Supreme Court case law must be cited, the controlling federal habeas statute provides that relief may not be granted unless the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;” (28 U.S.C. section 2254(d)(1).) Under this statute, a defendant does not have to demonstrate that his case bears the identical facts as a Supreme Court precedent. (*Lockyer v. Andrade* (2003) ___ U.S. ___, [155 L.E.2d 144, 158].) However, the defendant must establish that a “governing legal principle” found in a Supreme Court precedent is applicable to his case. (*Williams v. Taylor* (2000) 529 U.S. 362, 413; *Alvarado v. Hill* (9th Cir. 2001) 252 F.3d 1066, 1068; the ““Supreme Court need not have addressed a factually identical case [;] § 2254(d) only requires that the Supreme Court clearly determine the law.’ [Citation.]”)

In light of the requirements of section 2254(d)(1), state appellate counsel is duty bound to cite the U.S. Supreme Court authority which is most closely on point. While a federal court may later hold that section 2254(d)(1) has not been satisfied, counsel should do everything possible to give the defendant a fighting chance in federal court.

E. The Defendant’s Federal Claim Must Be Expressly Exhausted in the California Supreme Court by Way of Either a Petition for Review or a Petition for Writ of Habeas Corpus.

The U.S. Supreme Court has held that a state prisoner may not advance a claim of federal constitutional error on a federal petition for writ of habeas corpus unless that issue has first been presented to the state Supreme Court on a petition for discretionary review. (*O’Sullivan v. Boerckel* (1999) 526 U.S. 838, 839-840.) In California, an issue can be brought to the state Supreme Court’s attention by way of either a petition for review or a habeas petition.

In the usual case, the defendant’s claim of federal constitutional error will arise on direct appeal. After the Court of Appeal affirms the judgment, the defendant’s claim can be brought to the California Supreme Court on a petition for review. In framing the claim, counsel must, of course, cite both the federal Constitution and U.S. Supreme Court case law. (See pp. 14-17, *supra*.)

In some cases, the defendant’s federal issue will have been raised only in a habeas petition filed in the Court of Appeal. In this situation, the issue can be exhausted by filing either a petition for review or a renewed habeas petition. However, it is the Supreme Court’s preference that a petition for review be filed. (*In re Reed* (1983) 33 Cal.3d 914, 918, fn. 2.) Of course, the federal issue must be supported by express reference to the federal Constitution and U.S. Supreme Court precedent. (See pp. 14-17, *supra*.)

F. Appellate Counsel Must Avoid All Possible Procedural Defaults with Regard to the Appellate Process.

A federal court has the discretion to deny any federal contention which has been procedurally defaulted under state law. (*Coleman v. Thompson, supra*, 501 U.S. 722, 729-732.) This principle encompasses procedural default committed by appellate counsel. Although the category of procedural default is limited only by the imagination of the Attorney General and appellate judges, there are a few obvious mistakes which defense counsel can easily avoid.

Under California Rules of Court, rule 14(a)(1)(B), an issue raised in appellant's opening brief must be supported by "argument and, if possible, by citation of authority;" The failure to comply with this rule constitutes a procedural default. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20.) Thus, it is not sufficient to merely state a claim and assert that the federal Constitution has been violated. (*Ibid.*)

Rule 14(a)(1)(B) also requires that each issue must appear "under a separate heading or subheading summarizing the point," The failure to comply with this requirement will also result in waiver of the issue. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 281-283.)

Another common procedural default is the entirely inappropriate tactic of raising an issue for the first time in the reply brief. The cases are legion which hold that the Court of Appeal may deem the issue to be procedurally defaulted. (*People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055; see cases cited in 9 Witkin, California Procedure (4th ed. 1997) Appeal, section 616, pp. 647-648.)

It is critical to note that there is an entirely proper method for raising a belatedly discovered issue. Under California Rules of Court, rule 13(a)(4), the Presiding Justice of the Court of Appeal has the authority to allow the filing of a supplemental opening brief. As a matter of practice, the Sixth District has routinely allowed the filing of supplemental briefs when new issues have been found by counsel.

As goes without saying, a supplemental opening brief is often needed to raise a claim of ineffective assistance of trial counsel. It is not uncommon for the Attorney General to raise an unexpected claim of waiver in the respondent's brief. In this situation, the obvious answer to the claim is that trial counsel erred if a sufficient objection was not made at trial. However, this claim cannot be made in the reply brief. It must be advanced in either a supplemental opening brief or a habeas petition. (See discussion at p. 21, *infra*.)

If appellate counsel does not spot an issue until after the Court of Appeal has filed its opinion, the issue cannot properly be raised for the first time in a petition for rehearing or review. (*Castille v. Peoples* (1989) 489 U.S. 346, 351-352; issues raised for the first time in a discretionary petition to the state's highest court was insufficient to exhaust the claims for purposes of obtaining federal habeas relief.) If appellate counsel belatedly discovers an issue, the proper remedy is to raise the point on state habeas corpus via a claim of ineffective assistance of appellate counsel. (See pp. 21-23, *infra*.)

Finally, the worst possible procedural default is the failure to timely file a petition for review. In this situation, counsel must seek to correct the problem by filing a motion for relief from default in the California Supreme Court. (California Rules of Court, rule 45(e).) Failing that remedy, the client must be advised regarding the necessity of curing the default by raising a claim of ineffective assistance of appellate counsel in a state habeas petition. (See pp. 21-23, *infra*.)

1. The special case of procedurally defaulting a claim of ineffective assistance of trial counsel by failing to file a state habeas petition.

Under California law, the vast majority of ineffective assistance of trial counsel claims must be adjudicated by way of a petition for writ of habeas corpus. (*People v. Tello* (1997) 15 Cal.4th 264, 266-267.) This is so since the record on appeal typically does not reveal the tactical reasons which prompted trial counsel's decision making. (*Ibid.*) Thus, a claim of ineffective assistance of trial counsel will usually fail on direct appeal. (*Ibid.*)

In this situation, it is incumbent upon appellate counsel to file a state habeas petition in order to properly exhaust the claim of ineffective assistance of counsel. If a state habeas petition is not filed, the federal court will almost certainly hold that the claim of ineffective assistance of counsel was procedurally defaulted in state court. (*Coleman v. Thompson, supra*, 501 U.S. 722, 731; “[t]his Court has long held that a state prisoner’s federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. [Citations.]”)

G. If Appellate Counsel Has Procedurally Defaulted the Case, the Default Can Be Cured by Advancing a Claim of Ineffective Assistance of Appellate Counsel in a State Habeas Petition.

As was discussed above, there are a myriad of procedural defaults which can be committed by state appellate counsel. If a procedural default is not cured in state court, it will bar future federal relief. (*Coleman v. Thompson, supra*, 501 U.S. 722, 729-732.) Fortunately, there is an easy method by which an appellate procedural default can be cured.

Under the due process clause of the federal Constitution, a criminal defendant enjoys the right to the effective assistance of appellate counsel. (*Evitts v. Lucey* (1985) 469 U.S. 387, 393-400.) Thus, if appellate counsel unreasonably fails to raise an issue or otherwise procedurally defaults an issue or the entire appeal, a defendant may pursue a claim of ineffective assistance of appellate counsel on state habeas. By exhausting this federal issue on state habeas, the defendant can then proceed to federal court on his due process claim and the underlying issues which would otherwise have been procedurally defaulted. (See *Delgado v. Lewis* (9th Cir. 2000) 223 F.3d 976, 979-981; federal writ granted where state appellate counsel performed ineffectively by filing a *Wende* brief in a case involving an arguably meritorious issue; see also *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 801; “[s]tate procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.”)

In short, a procedural default committed by appellate counsel can always be cured. However, the default must be cured prior to the filing of a federal habeas petition.

II.
THE PURSUIT OF A FEDERAL WRIT OF HABEAS CORPUS
REQUIRES CLOSE ATTENTION TO DETAIL.

The actual litigation of a federal petition for writ of habeas corpus is not substantially different from state appellate practice. In the instance of a pure question of law (e.g. a *Miranda* claim which was properly raised at trial), the federal litigation constitutes a de facto second appeal. With respect to questions of fact (e.g. ineffective assistance of trial counsel claims where an OSC was not issued in state court), the evidentiary hearing held in federal court is conducted in the same manner as such a hearing in state court. Thus, an experienced state appellate practitioner should have no trouble handling the briefing and evidentiary aspects of federal habeas practice.

The difficulty of federal habeas practice is becoming acquainted with the enormous number of procedural rules which might apply in any given case. The unfortunate reality is that the Attorney General is eager to ruthlessly employ the rules in order to avoid the merits of the case. The good news is that a careful defense lawyer can avoid all of the procedural pitfalls which might doom the case.

As was discussed in section I, the competent handling of the state appellate litigation will serve to avoid any possibility of procedural default. Thus, the skillful defense lawyer will arrive in federal court with a case which must be adjudicated on the merits.

In the discussion which follows, many of the critical aspects of federal habeas practice will be covered. However, the reader should not presume that this article touches on all possible topics or is an exhaustive treatment of the subject. As was noted in the Introduction, counsel should turn to an actual treatise for such an exposition on the law. (Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001).)

A. Relief Can Be Obtained Only When the Defendant Remains in State Custody.

A federal district court lacks jurisdiction to adjudicate a petition challenging a state conviction unless the defendant remains in state “custody.” (28 U.S.C. section 2241(c)(3).) However, “custody” is broadly defined to include those defendants who are at liberty on parole or probation. (*Maleng v. Cook* (1989) 490 U.S. 488, 491.)

Importantly, the jurisdiction of the federal court continues even if the defendant is discharged from custody during the pendency of the federal proceedings. (*Maleng, supra*, 490 U.S. at pp. 491-492.) So long as the defendant is in custody when the petition is filed in the district court, the defendant may appeal his case all the way to the Supreme Court even if he is released early in the federal proceedings. (*Ibid.*)

B. Counsel Should Be Very Cautious in Dealing With the One Year Statute of Limitations.

Under 28 U.S.C. section 2244(d)(1), a federal habeas petition must be filed within one year of the finality of the state judgment. In order to ensure compliance with section 2244(d)(1), the petition on the merits, as distinguished from a preliminary document, must be filed within the one year period. (*Woodford v. Garceau* (March 25, 2003) ___ U.S. ___ [03 DAR 3287, 3288-3289]; the filing of motions for the appointment of counsel and a stay of execution did not constitute the filing of a petition.)

On a California appeal, the judgment is final on the day when the California Supreme Court denies a petition for review. (California Rules of Court, rule 29.4(b)(2)(A).) The one year period begins to run on the date when either: (1) a petition for writ of certiorari to the U.S. Supreme Court is denied; or (2) the 90 day period in which to seek certiorari has run when no petition was filed. (*Clay v. United States* (2003) ___ U.S. ___ [155 L.E.2d 88, 94-95 and fn. 3.]) The one year period commences on the day after the judgment has become final. (*Corjasso v. Ayers* (9th Cir. 2002) 278 F.3d 874, 877.)

Importantly, the one year statute of limitations is tolled while a post-appeal state habeas petition is pending. (28 U.S.C. section 2244(d)(2).) If a California defendant files sequential habeas petitions in the Superior Court, the Court of Appeal and the Supreme Court, the time between the denial of one habeas petition and the filing of a new petition in a higher court is tolled so long as the degree of delay is reasonable. (*Carey v. Saffold* (2002) 536 U.S. 214 [153 L.E.2d 260, 267-272].) Under this rule, counsel must file each state habeas petition with great dispatch. In this way, any conceivable procedural default can be avoided.

It is worth noting that the Attorney General has taken the position that any delay beyond 60 days in the filing of a new petition is per se unreasonable. (*Saffold v. Carey* (9th Cir. 2002) 312 F.3d 1031, 1034.) While it is uncertain whether the Ninth Circuit will accept this argument, counsel should strive to avoid any problem by filing the renewed petition before 60 days has passed.

Once the California Supreme Court has denied a habeas petition, two rules come into play. If the court has not issued an order to show cause, the denial is final immediately. (California Rules of Court, rule 29.4(b)(2)(C).) In addition, the period during which a petition for writ of certiorari is pending is not tolled. (*Miller v. Dragovich* (3rd Cir. 2002) 311 F.3d 574, 578-579.)

Finally, the Ninth Circuit has allowed for equitable tolling of the statute of limitations in appropriate cases. (*Corjasso v. Ayers, supra*, 278 F.3d 874, 877.) However, the defendant bears a heavy burden in establishing grounds for relief. (*Ibid.*) Thus, counsel should do everything possible to expeditiously file a federal habeas petition long before the statute of limitations has run. (But see *Stillman v. LaMarque* (9th Cir. 2003) 319 F.3d 1199, 1201-1203; even though defense counsel waited until the last day possible, equitable tolling was allowed since the prison failed to honor its promise to immediately deliver papers to the defendant for his signature.)

- C. If a State Procedural Default Issue Arises, Counsel Should Be Aware That There Are a Number of Doctrines Which May Be Used to Address the Problem.

Under the independent and adequate state grounds doctrine, federal courts “will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. [Citations.]” (*Coleman v. Thompson, supra*, 501 U.S. 722, 729.) However, a federal court may not blindly accept a state court’s finding of procedural default. The adequacy of an alleged state procedural bar “‘is itself a federal question’” to be determined by the federal court. (*Lee v. Kemna* (2002) 534 U.S. 362, 375.)

The nature of state procedural defaults are potentially infinite. Typical examples include: (1) forfeiture of an issue due to the failure to render an adequate trial court objection; (2) failure to comply with a rule of state appellate procedure; and (3) failure to comply with a rule of state habeas procedure. Given the plethora of possible state procedural defaults, this article cannot provide a detailed analysis of the topic. However, a few general points should be kept in mind.

The doctrine of independent and adequate state grounds rests on the principles of comity and federalism: A federal court will not reverse a state court judgment which was based on a lawful state ground. (*Coleman v. Thompson, supra*, 501 U.S. 722, 730.) However, the state court judgment must demonstrably rest on state grounds. A “‘procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review.’ [Citation.]” (*Valerio v. Crawford* (9th Cir. 2002) 306 F.3d 742, 774.)

For a state procedural rule to be “independent,” the state law basis for a decision must not be interwoven with federal law. (*Michigan v. Long* (1983) 463 U.S. 1032, 1040-1041.) A state law ground is so interwoven if application of the procedural bar depends on an antecedent ruling on a federal question such as the determination of whether federal constitutional error has been committed. (*Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573 [03 DAR 2442, 2444-2445].)

An example of an independent state ground is the California Supreme Court’s announced rule that the denial of an untimely habeas petition rests on state law. (*In re Robbins* (1998) 18 Cal.4th 770, 811-812 and fn. 32.) Given the clarity of the *Robbins* rule, the Ninth Circuit has acknowledged that it is independent of federal law. (*Bennett, supra*, 03 DAR at p. 2445.) However, the issue still remains as to whether the *Robbins* rule is “adequate” to bar federal review. (*Id.*, at p. 2447; remanding the issue of adequacy to the district court.)

The Supreme Court has held that a state rule is not “adequate” unless it is strictly and regularly followed. (*Ford v. Georgia* (1991) 498 U.S. 411, 423-424.) In the Ninth Circuit, the government has the burden of proving that the state rule is strictly and regularly followed. (*Bennett v. Mueller, supra*, 03 DAR 2442, 2446-

2447.) Moreover, the government must establish that the procedural rule was “well established” at the time of the alleged default. (*Valerio v. Crawford, supra*, 306 F.3d 742, 776.)

In the context of evidentiary issues, the Courts of Appeal in California often find imaginary defects in the objections made at trial. Thus, the courts find the issue to be forfeited on appeal. In this type of case, the government cannot show that the procedural default is one which is strictly and regularly enforced.

Melendez v. Pliler (9th Cir. 2002) 288 F.3d 1120 illustrates this point. There, defense counsel rendered a Confrontation Clause objection to an insufficiently redacted tape of a co-defendant’s statement. The objection was made before the tape was played to the jury. However, the trial court overruled the objection on the basis that it came too late. The Court of Appeal held that the Sixth Amendment issue was waived. The Ninth Circuit disagreed and held that there was no consistently applied California authority in support of the finding of waiver. (*Id.*, at p. 1126.) Indeed, to the contrary, the court cited California cases where insufficient objections were deemed adequate for purposes of appellate review. (*Ibid.*)

It is also critical to note that a federal court will not credit an alleged state procedural default when it quite simply makes no sense. In this regard, the Supreme Court has cautioned that procedural default cannot be found on the basis of a state court’s resort to a “particular label” which results in “an arid ritual of meaningless form, . . . [which does not further a] perceivable state interest,” (*James v. Kentucky* (1984) 466 U.S. 341, 349.) Thus, in *James* the court held that a federal claim was not defaulted under a state law technicality when defense counsel asked for an “admonition” rather than an “instruction.” (*Id.*, at pp. 348-351; see also *Lee v. Kemna, supra*, 534 U.S. 362, 375-388; failure to make a written motion for a continuance as required by state law did not bar federal review since counsel’s oral motion “substantially complied” with the purpose of the statute.)

Under Ninth Circuit case law, a state procedural default will not be credited if the state court had discretion to make a contrary decision. In *McKenna v. McDaniel* (9th Cir. 1995) 65 F.3d 1483, the Nevada Supreme Court found a procedural default on a petition for post-conviction relief since the issue raised had not been advanced on the petitioner’s prior appeal. While acknowledging that the Nevada Supreme Court’s procedural ruling was correct under state law, the Ninth Circuit nonetheless found that it did not constitute an adequate basis for the denial of federal review. This was so because the Nevada Supreme Court also had a rule of discretion which allowed for the raising of new claims on a post-conviction petition. Thus, since the Nevada Supreme Court had simply refused “to exercise discretion to hear the claim,” federal review was not barred. (*Id.*, at p. 1489; accord, *Valerio v. Crawford, supra*, 306 F.3d at p. 778; but see *Bennett v. Mueller, supra*, 03 DAR 2442, 2445; “a state court’s exercise of judicial discretion will not necessarily render

a rule inadequate to support a state decision,”)

The *McKenna* analysis has potentially broad ramifications. For example, California law holds that constitutional issues can sometimes be raised for the first time on appeal when they involve undisputed facts. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Since this rule essentially provides an appellate court with discretion to reach the merits of an issue, *McKenna* provides a basis for arguing that federal review is not barred even if the state court found a procedural default.

Finally, it should be noted that Professors Liebman and Hertz have prepared an excellent analysis regarding the theories which might be advanced to defeat a claim of state procedural default. (2 Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure*, *supra*, chapter 26, pp. 1133-1240.) Regardless of the difficulty of the problem in a particular case, the analysis posited by the professors should be of great practical use.

1. Assuming That the Government Can Point to a Legitimate State Procedural Default, the Defense Can Still Seek to Excuse the Default by Showing Cause and Prejudice or a Miscarriage of Justice.

If a defendant has defaulted his federal claim in state court pursuant to a legitimate state procedural rule, he may still obtain federal habeas review by demonstrating “cause for the default and actual prejudice as a result of the alleged violation of federal law, or [by demonstrating] that failure to consider the claims will result in a fundamental miscarriage of justice.” (*Coleman v. Thompson*, *supra*, 501 U.S. 722, 750.) As a practical matter, it will be difficult to satisfy either of these exceptions. However, in some cases, counsel may have to make the attempt.

“Cause” for a procedural default exists if the defendant “can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” (*Strickler v. Greene* (1999) 527 U.S. 263, 283-284, fn. 24.) Although the category of “objective impediments” is difficult to define, the Supreme Court has indicated that “a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . would constitute cause under this standard.” [Citations.]” (*Ibid.*)

Strickler provides an example of a case where “cause” was shown. There, the defendant sought to bring a belated *Brady* claim in federal court. After finding that the government had impeded defense counsel’s access to the relevant information, the Supreme Court found “cause” for the failure to bring the claim in state court. (*Strickler*, *supra*, 527 U.S. at pp. 282-289.)

It is essential to note that ineffective assistance of counsel may suffice to show “cause” with respect to defaults which occurred at trial or on appeal. (*Coleman v. Thompson, supra*, 501 U.S. 722, 753-754.) However, defaults committed by counsel during habeas proceedings cannot constitute “cause” since a defendant has no constitutional right to counsel during a collateral proceeding. (*Id.*, at pp. 755-757; federal habeas relief was barred in a capital case since defense counsel failed to file a timely notice of appeal in the state habeas proceedings.)

With respect to the requisite showing of “prejudice,” the Supreme Court has yet to provide an express test. (See *Amadeo v. Zant* (1988) 486 U.S. 214, 221; leaving the question open.) However, without discussion, the court equated “prejudice” in *Strickler* with the prejudice test for the underlying constitutional claim (a *Brady* violation). (*Strickler v. Greene, supra*, 527 U.S. 263, 289-296.) Thus, it is reasonable to assume that a showing of “prejudice” will generally require the defendant to show that the underlying constitutional error “‘had substantial and injurious effect or influence in determining the jury’s verdict.’ [Citation.]” (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 623.) This is so because *Brecht* is the controlling test for prejudice in federal habeas cases. (2 Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure, supra*, chapter 26.3(c), pp. 1219-1225; see also pp. 43-46, *infra*, for a discussion of *Brecht*.)

Aside from the “cause and prejudice” test, a defendant may also contend that a procedural default should be ignored in order to avoid a “fundamental miscarriage of justice.” (*Schlup v. Delo* (1995) 513 U.S. 298, 321.) Typically, this exception applies when the defendant has a plausible claim that he is actually innocent. In order to prevail, the defendant must show “that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” (*Id.*, at p. 327.) While this is a difficult standard to satisfy, it is a fact-intensive claim which should be raised in an appropriate case.

D. If a New Claim Arises after the Federal Petition Is Filed, the Defendant Can Seek Leave to Return to State Court in Order to Exhaust the Claim.

Occasionally, a case will arise where appellate counsel becomes aware of a new issue after the federal habeas petition has already been filed. In this circumstance, the appropriate procedure is to seek an order holding the federal proceedings in abeyance while the new claim is exhausted in state court.

In this regard, a federal court is required to dismiss without prejudice a petition which includes both exhausted and unexhausted claims. (*Rose v. Lundy* (1982) 455 U.S. 509, 520-522.) However, on the defendant's motion, the court has the discretion to stay "the petition after dismissal of unexhausted claims, in order to permit Petitioner to exhaust those claims and then add them by amendment to his stayed federal petition." (*Kelly v. Small, supra*, 315 F.3d 1063, 1070.) "The exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the Petitioner to return to federal court within the one year limitation period imposed by . . . 28 U.S.C. § 2244(d)." (*Ibid.*)

As the Ninth Circuit has made clear, the district court has "discretion" to refuse a stay. (*Kelly, supra*, 315 F.3d at p. 1070.) However, the court has joined the consensus of other circuits "in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited." (*Ibid.*)

Assuming that the district court agrees to hold the case in abeyance, the defendant must, of course, pursue state relief in a diligent manner. The Ninth Circuit has suggested that a district court should allow 30 days for the filing of the state petition and 30 days for the filing of the amended federal petition following entry of final judgment by the California Supreme Court. (*Kelly v. Small, supra*, 315 F.3d at p. 1071.)

As should be readily apparent, it is a dangerous tactic to allow the dismissal of a federal petition without a stay order. This is so since the one year statute of limitations will continue to run during: (1) the period between the dismissal of the federal petition and the filing of the new petition in state court; and (2) the period between the denial in state court and the filing of the new federal petition. Thus, if the district court declines to issue a stay order, it is probably best to drop the unexhausted claims unless counsel is confident that he will have sufficient time to prepare the new state and federal pleadings before the one year statute of limitations runs out.

E. Commencing the Case in Federal District Court.

There are two methods by which the case can be commenced in the federal district court: (1) use of the official form; or (2) a pleading prepared by counsel. As a matter of law, the district court will proceed in the same manner regardless of which document is filed. However, the choice to file a pleading may have significant consequences for counsel.

Under federal law, an indigent state prisoner has no right to the appointment of counsel. (*Coleman v. Thompson, supra*, 501 U.S. 722, 756.) Thus, if counsel makes an appearance by filing a habeas petition, the court will look to him or her as counsel of record. While counsel can seek a court appointment, none may be forthcoming. Thus, counsel should not prepare and file a habeas petition unless he or she is prepared to handle the case on a pro bono basis.

One method of proceeding is for counsel to assist the defendant by filling out the official form. Along with the form, the defendant can file a motion asking that his former appellate counsel be appointed. If the motion is granted, counsel can formally appear and be compensated. If the motion is denied, counsel can then decide whether to assist the client pro bono.

If the official form is used, only the original need be filed. (Habeas Corpus Local Rules for the Northern District, rule 2254-3(g).) If counsel prepares the petition, the original and one copy must be filed. (*Ibid.*)

1. The Official Form

The official form is found in the Appendix to the Rules Governing Section 2254 Cases In The United States District Court. The form is also available at the clerk's office of each district court. Finally, the form can also be downloaded at www.cand.uscourts.gov.

It is a simple matter for appellate counsel to complete the form. The task can be accomplished in less than an hour. If counsel is not going to assist the client in federal court, it is a matter of professional courtesy to complete the form for the client and provide instructions as to how to file it.

In filling out the form, counsel (or the client) must carefully and precisely state the nature of each federal issue and the constitutional provision under which the issue arises. In order to establish the bona fides of the issue, it is appropriate to attach the petition for review as an appendix. In this way, the court will have a full understanding of the issue presented.

2. The Civil Cover Sheet

When the official form (or an attorney's pleading) is presented to the district court, it must be accompanied by a civil cover sheet. The form can be downloaded at www.cand.uscourts.gov.

3. The Application for in Forma Pauperis Status

The filing fee for a section 2254 petition is only \$5. However, if the defendant is indigent, he can avoid the filing fee by completing the In Forma Pauperis Application portion of the official form.

If the defendant is incarcerated, the application must be accompanied by: (1) the signed certificate of a prison custodian; and (2) the prison's printout reflecting the prior six months of activity in the defendant's prison account. Absent these documents, the court will not grant the application.

It is critical to note that CDC is typically quite slow in providing the requisite documentation concerning the defendant's prison account. Thus, the defendant should request the information well before the one year statute of limitations is due to run. If the information cannot be obtained in time, the petition should be filed without the in forma pauperis application. In forma pauperis status can always be sought at a later time.

Aside from avoiding the \$5 filing fee, in forma pauperis status is necessary if the defendant wishes to obtain the services of appointed counsel or ancillary services. These topics are discussed below. (See p. 42, *infra*.)

4. The Format For An Attorney Prepared Pleading.

In the Northern District, the official form need not be used. It is permissible for counsel (or the client) to file a habeas petition so long as it "contains all of the information required by the Court's form." (Habeas Corpus Local Rules for the Northern District, Rule 2254-3(d).)

The format for the petition is virtually identical to that used for a state habeas petition. The petition has three essential components: (1) the pleading; (2) the verification; and (3) the points and authorities.

The pleading section must allege: (1) an unlawful restraint on the petitioner's liberty; (2) if he is incarcerated, the place of his imprisonment and the name of the prison custodian; (3) the judgment upon which the petitioner's restraint is based; (4) the procedural facts which establish compliance with the one year statute of limitations; (5) the procedural facts establishing that the petitioner has exhausted his

state remedies; (6) the procedural facts establishing that federal claims were raised in state court; (7) the federal claims upon which relief is sought; and (8) a prayer for relief.

The verification should follow the pleading section. It should be signed by the defendant.

The memorandum of points and authorities should closely resemble an appellant's opening brief. It should commence with an appropriate statement of facts which should be followed by legal argument. There should be separate sections which discuss the federal habeas standard for prejudice and the AEDPA standard for obtaining relief. (See pp. 43-55, *infra*.)

5. The State Court Record Need Not Be Filed with the Official Form or Attorney Prepared Petition.

As a matter of practice, the Northern District does not expect the defendant to provide a copy of the state court record. When the court issues an OSC, it directs the Attorney General to lodge the state court record. (See Habeas Corpus Local Rules for the Northern District, rule 2254-6(b)(3).)

6. Venue

Noncapital petitions must be filed with the Northern District at its San Francisco courthouse at 450 Golden Gate Avenue, Box 36060, San Francisco, CA 94102. (Habeas Corpus Local Rules for the Northern District, rule 2254-3(c).) The court will then randomly assign a judge. Although most Northern District judges sit in San Francisco, some judges sit in Oakland and San Jose. Thus, the case may be heard in one of those venues depending upon which judge is assigned to the case.

7. The Motion for Appointment of Counsel.

Under 18 U.S.C. section 3006A(a)(2)(B), the district court has discretion to appoint counsel. In my experience, many federal judges will grant a motion for appointment of counsel.

If an evidentiary hearing is required to properly resolve the case, the defendant is entitled to the appointment of counsel as a matter of right. (Rules Governing Section 2254 Cases In The United States District Courts, rule 8(c).) Obviously, if counsel believes that an evidentiary hearing will be required, this fact should be made known in the motion for appointment of counsel.

8. The Motion for Ancillary Services.

Pursuant to 18 U.S.C. section 3006A(e)(1), a defendant may request fees to hire an investigator or expert witness. Obviously, a request for fees must be supported by a detailed motion which explains the necessity for the investigator or expert. The motion may be filed ex parte since the Attorney General has no legal interest in the motion.

In making the motion, it is important to advise the court whether the state court provided any ancillary services on appeal or habeas corpus. Obviously, if such services were requested and denied in state court, the federal court will be more likely to grant the motion.

F. The Defendant Must Usually Satisfy The *Brecht* Standard In Order to Obtain Relief.

In its seminal decision in *Brecht v. Abrahamson*, *supra*, 507 U.S. 619, the Supreme Court announced that a habeas petitioner may obtain relief only upon a showing that an error “‘had substantial and injurious effect or influence in determining the jury’s verdict.’ [Citation.]” (*Id.*, at p. 623.) Although there are instances where the *Brecht* test does not apply, the defendant will have to satisfy *Brecht* in the vast majority of cases.

At the outset, it is important to note that the court must “‘independently” apply the *Brecht* test “‘without consideration of burdens of proof. [Citations.]” (*Mancuso v. Olivarez* (9th Cir. 2002) 292 F.3d 939, 949, fn. 4.) However, if the court has a “grave doubt” about the harmlessness of the error (i.e. if the case is evenly balanced or in “virtual equipoise”), the court must find reversible error. (*O’Neal v. McAninch* (1995) 513 U.S. 432, 434-435.)

Unfortunately for the defendant, the *Brecht* test is “less stringent” than the *Chapman* standard. (*Brecht, supra*, 507 U.S. at p. 643 (conc. opn. of Stevens, J).) Thus, if at all possible, defense counsel should seek to avoid application of the *Brecht* standard. This can be done in an appropriate case on one of four theories.

First, *Brecht* does not apply when a defendant has shown a “structural error.” (*California v. Roy* (1996) 519 U.S. 2, 5; *Mach v. Stewart* (9th Cir. 1997) 1237 F.3d 630, 632.) A “structural error” requires per se reversal since its effect is “necessarily unquantifiable . . .” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; see also *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741; structural error found where the defense was precluded from presenting its “theory of the case” to the jury.)

Second, there are some errors (sufficiency of the evidence, *Brady*, ineffective assistance of counsel) where the nature of the claim itself requires a greater showing

of prejudice than does the *Brecht* standard. (*Kyles v. Whitley* (1995) 514 U.S. 419, 435-436 and fn. 9; if a claim of ineffective assistance of counsel is made out, “there is no need for further harmless-error review” under *Brecht*; accord, *Avila v. Galaza* (9th Cir. 2002) 297 F.3d 911, 918, fn. 7.) In these cases, a discussion of *Brecht* is unnecessary.

Third, *Brecht* leaves open the possibility that reversal per se will be required for: (1) a “deliberate and especially egregious error;” or (2) an error which “is combined with a pattern of prosecutorial misconduct, . . .” (*Brecht, supra*, 507 U.S. at p. 638, fn. 9.) Although no case has yet found reversible error under this standard, it should certainly be argued in an appropriate case. (See *Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875, 879-881; declining to find “Footnote Nine error” but indicating that such error “is thus assimilated to structural error and declared to be incapable of redemption by actual prejudice analysis.”)

Fourth, at least one federal Court of Appeals has held that the *Chapman* standard continues to apply in a section 2254 proceeding when the state appellate court did not engage in harmless error review. (*Starr v. Lockhart* (8th Cir. 1994) 23 F.3d 1280, 1292.) The basis for this position is that the less stringent *Brecht* test was justified on the grounds of respect for the judgments of state courts. (*Ibid.*) Thus, no deference can be paid to a state court when a harmless error analysis was not conducted by that court. While a number of circuits have rejected this argument (see cases cited in *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 976-977), the contention is worth raising until such time as the point is resolved by the Supreme Court.

With respect to the application of the *Brecht* test, defense counsel should focus on the important interest at stake: “an error of constitutional dimension - the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person. [Citation.]” (*O’Neal v. McAninch, supra*, 513 U.S. at p. 442.) Thus, “[t]he habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.” (*Brecht v. Abrahamson, supra*, 507 U.S. 619, 642, fn. omitted (conc. opn. of Stevens, J.)) Rather, the court must closely focus on the critical question of whether the error impermissibly influenced the jury. (*Id.*, at pp. 642-643.)

Defense counsel must compel the court to examine the impact of the error regardless of the strength of the government’s case. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892; “[r]eview for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also “the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact.”” [Citation.]”) By focusing on the prejudicial nature of the error, prosecutors can be made to pay the appropriate penalty for violating a defendant’s constitutional rights. (For a thorough resume of cases dealing with a showing of prejudice on

federal habeas, see 2 Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure*, *supra*, chapter 31, pp. 1365-1417.)

G. Under AEDPA, a Defendant Must Establish Certain Conditions Precedent in Order to Obtain Federal Habeas Relief.

Effective April 24, 1996, a new federal statute (AEDPA) set forth strict criteria which a defendant must satisfy in order to obtain federal habeas relief. In relevant part, 28 U.S.C. section 2254(d)(1) provides:

“(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;”

At the outset, it is important to note that the Ninth Circuit has asserted its authority under AEDPA to conduct “an independent review of the record” when the state Court of Appeal (or state Supreme Court) has failed to address the defendant’s claim. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1100.) While the court is precluded from granting relief unless section 2254(d)(1) is satisfied, the Ninth Circuit does not engage in the pretense of deferring “to a state court’s decision when that court gives . . . nothing to defer to,” (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1170.) In approaching section 2254(d)(1), it must be emphasized that the statute allows for relief only when “clearly established” Supreme Court precedent exists. The phrase “clearly established” refers to the holdings, as opposed to the dicta, of Supreme Court cases. (*Lockyer v. Andrade, supra*, 155 L.E.2d 144, 155.) “In other words, ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the State court renders its decision. [Citations.]” (*Ibid.*)

Section 2254(d)(1) provides two alternative tests which a defendant may attempt to satisfy. As synopsised by the Ninth Circuit, the standards are as follows:

“A state court’s decision can be ‘contrary to’ federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts ‘materially indistinguishable’ from those in a controlling case, but nonetheless

reaches a different result. [Citation.] A state court’s decision can involve an ‘unreasonable application’ of federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. [Citation.] However, the Court recognized that these categories could overlap, and that, even for purposes of precise definition, it could sometimes be difficult to determine whether a decision, for example, unreasonably extended a rule to a new context or simply contradicted controlling authority. [Citation.] Similarly, it seems apparent that in some cases it may be difficult to distinguish between, on the one hand, a state court decision that is contrary to clearly established federal law by virtue of its reaching a different result upon materially indistinguishable facts, and, on the other, a particularly unreasonable application of clearly established federal law. Thus, as we have said previously, the two concepts overlap and it will be necessary in some cases to test a petitioner’s allegations against both standards. [Citation.]” (*Van Tran v. Lindsey* (9th Cir. 2000) 212 F.3d 1143, 1150, fn. omitted; overruled on other grounds in *Lockyer v. Andrade*, *supra*, 155 L.E.2d 144, 158.)

With regard to the “unreasonable application” clause of section 2254(d)(1), the Supreme Court has made it starkly clear that relief cannot be granted unless the state court’s analysis was “objectively unreasonable.” (*Lockyer v. Andrade*, *supra*, 155 L.E.2d 144, 158.) This means that the state court judgment may be upheld even if it is erroneous. (*Ibid.*) However, since the line between a merely erroneous judgment and an objectively unreasonable one is less than clear, it is likely that fair minded federal jurists will not be deterred from granting relief in appropriate cases.

In approaching the twin tests set forth in section 2254(d)(1), defense counsel should recognize that the statute confers a great deal of discretion on federal judges. If a court becomes persuaded that a prejudicial constitutional violation has occurred, the statute confers the necessary power to grant relief. For the moment, federal judges have not been hesitant to favorably apply section 2254(d)(1). A few examples illustrate this reality.

In *Williams v. Taylor*, *supra*, 529 U.S. 362, the defendant challenged his death penalty judgment on the grounds that he was deprived of the effective assistance of counsel when his trial lawyer failed to adduce significant mitigating evidence at the penalty phase of his trial. The Virginia Supreme Court rejected the defendant’s claim on two grounds: (1) it held that U.S. Supreme Court precedent did not allow for reversal based on a “‘mere outcome determination’” standard; and (2) the omitted evidence was not sufficiently important such that it would have changed the result at trial. (*Id.*, at pp. 371-372.)

The Supreme Court found that relief was warranted under section 2254(d)(1) for two reasons. First, *Strickland v. Washington* (1984) 466 U.S. 668 requires reversal if the effective assistance of counsel would have made a difference. Thus, the Virginia Supreme Court's analysis was "contrary to" controlling precedent. (*Williams, supra*, 529 U.S. at pp. 396-397.) Second, the state court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence" (*Id.*, at p. 397.)

In *Bradley v. Duncan, supra*, 315 F.3d 1091, the defendant purchased drugs for a man who begged for help since he was suffering withdrawal. As it turned out, the addict was working as a government agent. At his first trial, defendant raised an entrapment defense which was supported by appropriate jury instructions. The jury hung. At the second trial, the court refused to give entrapment instructions and the defendant was convicted. On this record, the Ninth Circuit granted relief.

"[The California Court of Appeal] failed to consider the facts relevant to the due process prejudice prong, including the undisputed evidence that jurors in the second trial would not have convicted the defendant if the entrapment instruction had been given. It failed to explain why the second judge could unilaterally ignore the first trial judge's findings of fact and conclusion of law regarding the entrapment instructions and not compose even a single sentence to explain away the law of the case doctrine. It is clear that the California Court of Appeal's failure to address these issues constituted an objectively unreasonable determination of both the law and the facts." (*Bradley, supra*, 315 F.3d at p. 1100.)

In *Delgado v. Lewis, supra*, 223 F.3d 976, the defendant entered a guilty plea. Although the defendant obtained a certificate of probable cause, his appellate lawyer filed a no merit brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. The defendant then brought a state habeas petition contending that both his trial and appellate lawyers had failed to provide him with effective assistance. The essence of the defendant's claim was that his trial attorney had failed to provide any assistance insofar as he was not present at either the change of plea or sentencing proceedings.

In its opinion, the Ninth Circuit looked to *Strickland v. Washington, supra*, 466 U.S. 668 as the "clearly established Federal law" within the meaning of section 2254(d)(1). Having done so, the court concluded that both trial and appellate counsel had been ineffective since neither did anything. (*Id.*, at pp. 980-981.) Having found a violation of "clearly established Federal law," the court held that the state court result constituted an objectively unreasonable application of *Strickland*:

"The record before us, the same record before the California Court of

Appeal and the California Supreme Court, reveals a total failure of the legal system to provide even a modicum of acceptable representation to Delgado . . . Therefore, we conclude that the state court unreasonably applied clearly established federal law under AEDPA.” (*Delgado, supra*, 223 F.3d at p. 982.)

In *LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, the court found another unreasonable application of settled federal law. There, a defendant was convicted of sexually assaulting a child. At trial, the defense had sought to adduce evidence that the complainant had previously suffered sexual abuse. This evidence was offered to provide an alternative source for the complainant’s knowledge of sexual matters and his injuries. Under state law, the defense was required to give fifteen days notice of its intent to use the evidence. The trial court excluded the evidence since the defendant had failed to give the requisite notice.

The Ninth Circuit found that *Michigan v. Lucas* (1991) 500 U.S. 145 was the controlling federal law. Under *Lucas*, a trial court may not employ a per se standard for excluding evidence of prior sex acts involving a complainant. Rather, a case by case standard is constitutionally required. In finding that section 2254(d)(1) was satisfied, the Ninth Circuit held that *Lucas* required a remedy since “LaJoie’s Sixth Amendment rights were violated, because the sanction of preclusion of this evidence in this case was ‘arbitrary and disproportionate’ to the purposes of the 15-day notice requirement.” (*LaJoie, supra*, 217 F.3d at p. 673.)

In the course of its discussion, the *LaJoie* court made the important point that its own precedents were “‘persuasive authority for purposes of determining whether a particular state court decision is an “unreasonable application” of Supreme Court law, and also may . . . determine what law is “clearly established.”’ [Citations.]” (*LaJoie, supra*, 217 F.3d at p. 669, fn. 6.) Thus, in an appropriate case, counsel should not hesitate to look to lower federal court authority in determining the nature of the controlling Supreme Court rule.

In *DePetris v. Kuykendall, supra*, 239 F.3d 1057, the defendant was convicted of murdering her husband. In support of her theory of imperfect self defense, the defendant sought to adduce her husband’s journal in which he depicted his prior acts of violence toward his first wife and others. The relevance of the journal was to establish that the defendant had read it and was subjectively terrified of her husband. Finding that exclusion of the journal was violative of the Fifth and Sixth Amendments, the court concluded that “the state court’s error was . . . objectively unreasonable. [Citation.]” (*Id.*, at p. 1063.)

Notwithstanding the foregoing helpful cases, the Supreme Court has recently issued a disturbing precedent. In *Woodford v. Visciotti* (2002) 537 U.S. ____ [154 L.E.2d 279], the Ninth Circuit granted relief in a capital case on the grounds of

ineffective assistance of counsel insofar as counsel had failed to introduce mitigating evidence including expert testimony that the defendant was reared in a dysfunctional family in which he suffered psychological abuse. The Ninth Circuit had reversed the judgment on the grounds that the omitted evidence was significant and the aggravating factors were not overwhelming since the jury deliberated for a day and requested additional guidance concerning the jury instructions. The Supreme Court disagreed.

“[U]nder § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly.’ [Citation.] The federal habeas scheme leaves primary responsibility with the state courts for those judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable. It is not that here. Whether or not we would reach the same conclusion as the California Supreme Court, ‘we think at the very least that the state court’s contrary assessment was not “unreasonable.”’ [Citation.] Habeas relief is therefore not permissible under § 2254(d).” (*Woodford, supra*, 154 L.E.2d 279, 287-288.)

The disturbing aspect of *Woodford* is that the error at issue was fairly similar to that found in *Williams v. Taylor, supra*, 529 U.S. 362 where relief was granted. In both *Williams* and *Woodford*, trial counsel erred by failing to introduce significant mitigating evidence in a capital case. Presumably, the state court analysis in *Williams* was deemed to be “objectively unreasonable” because the quantum of omitted evidence was greater than that in *Woodford*. While the two cases can be distinguished on their facts, the reality remains that application of the “objectively unreasonable” test will often turn on subjective evaluations by federal jurists.

In any event, *Woodford* does not represent the death knell for federal habeas. (See *Bradley v. Duncan, supra*, 315 F.3d 1091, 1100; state court analysis deemed “objectively unreasonable” per *Woodford*.) Thus, appellate counsel should not hesitate to take a strong case to federal court following an unsuccessful state appeal.

1. Although A State Court’s Factual Findings Are Presumed To Be Correct, The Federal Court Has The Authority To Make Findings To The Contrary.

In the event that a state court has made a relevant factual finding concerning a contested issue, the federal court must presume that the finding is correct. In relevant part, 28 U.S.C. section 2254(e)(1) provides:

“[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

rebutting the presumption of correctness by clear and convincing evidence.”

While section 2254(e)(1) imposes a stiff burden on the defendant, it is not necessarily an insurmountable one. Rather, a federal court has ample authority to overrule factual findings which are not credible. Indeed, the Supreme Court has recently emphasized this point.

In *Miller-El v. Cockrell* (2003) 537 U.S. ___, [154 L.E.2d 931], the court considered a case where the state court had made a factual finding that the prosecutor had not improperly exercised peremptory challenges against African-American jurors. In the course of directing the Court of Appeals to grant a certificate of appealability, the Supreme Court noted:

“[D]eference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court’s credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.” (*Miller El v. Cockrell, supra*, 154 L.E.2d 931, 952.)

Avila v. Galaza, supra, 297 F.3d 911 illustrates this point. In *Avila*, the defendant alleged that he was deprived of the effective assistance of trial counsel when his attorney failed to present numerous witnesses who would have testified that it was his brother, rather than himself, who committed a shooting. At a state habeas proceeding, the court found that the witnesses were not credible. Going point by point, the Ninth Circuit found that the state court’s factual findings were inconsistent with the record. (*Id.*, at pp. 922-923, fns. 12-14.) Since the state court’s factual findings were “clearly erroneous,” relief was granted. (*Id.*, at pp. 918, 922-924.)

In short, there are some cases where a state court’s factual findings are quite simply belied by the record. In this circumstance, section 2254(e)(1) is not a bar to relief.

H. The Issuance of the Order to Show Cause.

Unlike state practice, the federal district court will always issue an order to show cause so long as the petition states a prima facie case. The order to show cause will direct the Attorney General to file an answer and a responsive pleading. (Rules Governing Section 2254 Cases In the United States District Courts, rule 4.)

It is the duty of the district court to “promptly” issue the order to show cause. (Rules Governing Section 2254 Cases in the United States District Courts, rule 4.) However, there is no set time limit within which the court must act. If the court has not issued an order to show cause within four months of the filing of the petition, it

is appropriate to write a polite letter to the court with a citation to the promptness requirement of rule 4.

In its order to show cause, the court will typically provide the Attorney General with 60 days in which to file its answer and brief. (Habeas Corpus Local Rules for the Northern District, rule 2254-6(b).) The defendant is then given 30 days in which to file a traverse. (Rule 2254-6(c).) These time periods are subject to expansion upon a request for an extension of time. (Rule 2254-6(a); Civil Local Rules for the Northern District, rules 6-1 and 6-2.)

I. The Answer And Responsive Pleading.

In the answer, the Attorney General must plead any procedural defenses such as the defendant's failure to exhaust his state remedies. (Rules Governing Section 2254 Cases In the United States District Courts, rule 5.) Otherwise, the answer will simply allege that the defendant is not entitled to relief.

The brief filed by the Attorney General will often be a rehash of the respondent's brief. If the Attorney General is performing in a competent manner, the brief should include discussion of the *Brecht* and AEDPA standards. (See pp. 43-55, *supra*.)

J. The Traverse.

Unlike state habeas practice, the traverse in federal court need not be verified. In addition, the allegations made in the answer do not have to be specifically denied. Rather, the traverse serves the same function as a reply brief on appeal.

K. The Request for An Evidentiary Hearing And The Holding Of The Hearing.

The majority of federal habeas actions can be resolved without an evidentiary hearing. In the usual case, the issues will involve pure questions of law which do not require the taking of evidence. However, there are some issues which necessitate the taking of evidence. These issues most often involve claims of ineffective assistance of counsel.

Pursuant to 28 U.S.C. section 2254(e)(2), the district court is precluded from holding an evidentiary hearing if the defendant "failed to develop the factual basis of a claim in State court proceedings," As interpreted by the Supreme Court, "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." (*Williams v. Taylor* (2000) 529 U.S. 420, 432.) Obviously, this standard will have to be litigated on a case-by-case basis.

However, it is fair to say that section 2254(e)(2) will not bar an evidentiary hearing so long as the defendant diligently sought a hearing in state court. The Ninth Circuit has so held. (*Jones v. Wood* (9th Cir. 1997) 114 F.3d 1002, 1013; “[w]here as here, the state courts simply fail to hold an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims;” see also *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1226-1228.)

Under the Rules for the Northern District, a request for an evidentiary hearing must be filed within 15 days of the filing of the traverse. (Habeas Corpus Local Rules for the Northern District, rule 2254-7(a).) The request must “include a specification of which factual issues require a hearing and a summary of what evidence the party proposes to offer.” (*Ibid.*)

The evidentiary hearing is conducted pursuant to the standard rules of evidence. In preparation for the hearing, the parties may conduct discovery with leave of the court. (Habeas Corpus Local Rules for the Northern District, rule 2254-5.) If necessary, the parties can resort to the subpoena power of the court.

Following the evidentiary hearing, the court may request supplemental briefing. (Habeas Corpus Local Rules for the Northern District, rule 2254-7(b).) In this circumstance, a reporter’s transcript of the evidentiary hearing will be made available for the use of the parties. (*Ibid.*)

L. Oral Argument.

The district court is under no obligation to conduct oral argument. A request for oral argument must be made within 15 days of the filing of the traverse. (Habeas Corpus Local Rules for the Northern District, rule 2254-8(a).) The request “shall include a specification of the issues to be addressed at the argument.” (*Ibid.*)

If the court holds oral argument, the length and nature of the hearing is completely within the court’s discretion. Hearings in the Northern District have been known to last anywhere from five minutes to three hours.

M. The Problem Of Delay In The Resolution of the Case.

Regrettably, there is no set time limit within which the court must rule once the case is fully briefed. While many district court judges act with dispatch, others take literally years before issuing an opinion. In the case of undue delay, a remedy exists.

Under Ninth Circuit authority, a habeas petitioner is entitled to the “expeditious hearing and determination” of his petition. (*Van Buskirk v. Wilkinson* (9th Cir. 1954) 216 F.2d 735, 737-738, fn. omitted.) In light of this principle, the Tenth Circuit has held that a 14 month delay in deciding a fully briefed habeas

action is unreasonable as a matter of law. (*Johnson v. Rogers* (10th Cir. 1990) 917 F.2d 1283, 1284-1285.) Thus, if this degree of delay exists, the Court of Appeals will grant a writ of mandamus and direct the district court to issue an opinion within a specified period of time. (*Ibid.*)

N. Reconsideration In The District Court.

In the Northern District, the court is required to issue a “written opinion” in resolving a section 2254 case. (Habeas Corpus Local Rules for the Northern District, rule 2254-9.) If the opinion contains factual or legal errors, reconsideration can be sought.

Pursuant to Federal Rules of Civil Procedure, rule 59(e), the district court has the power to remedy errors of law or fact in its judgment. (*McDowell v. Calderon* (9th Cir. 1999) 197 F.3d 1253, 1255, fn. 1.) A rule 59(e) motion must clearly and precisely identify the errors in the court’s opinion. Viewed from this perspective, a rule 59(e) motion effectively acts as a petition for rehearing.

A rule 59(e) motion must be filed within 10 days of the entry of judgment, not the date the judge signs the opinion. (*Browder v. Director* (1978) 434 U.S. 257, 265-266.) The timely filing of a rule 59(e) motion tolls the time for filing a notice of appeal. (Federal Rules of Appellate Procedure, rule 4(a)(4)(A)(iv).)

O. The Notice of Appeal And Application for A Certificate of Appealability.

In order to take his case to the Ninth Circuit, the defendant must: (1) file a notice of appeal within 30 days of the entry of judgment; and (2) obtain a certificate of appealability. These tasks are easily accomplished.

Insofar as a section 2254 proceeding is civil in nature, the defendant has 30 days in which to appeal once judgment is entered. (Federal Rules of Appellate Procedure, rule 4(a)(1)(A).) The notice of appeal is a pro forma document which need only specify: (1) the appealing party; (2) the judgment appealed; and (3) the court to which the appeal is taken. (Federal Rules of Appellate Procedure, rule 3(c)(1).) If the defendant has previously been granted in forma pauperis status, there is no fee for filing the notice of appeal.

In conjunction with the notice of appeal, the defendant must also file a motion for issuance of a certificate of appealability. Absent a certificate, an appeal does not lie. (28 U.S.C. section 2253(c)(1).) Pursuant to section 2253(c)(3), it is incumbent upon the district court to indicate the “specific issue or issues” being certified for appeal. Thus, defense counsel should address each and every issue in the motion.

In determining whether it should grant the certificate, the district court must consider whether the defendant has made a “substantial showing” that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner” (*Slack v. McDaniel* (2000) 529 U.S. 473, 483-484.) This standard does not require a showing that “some jurists would grant the petition for habeas corpus.” (*Miller-El v. Cockrell, supra*, 154 L.E.2d 931, 950-951.) Rather, the requisite showing is only that the issues are “debatable.” (*Ibid.*) In the Ninth Circuit, this test has been interpreted to mean that a certificate “should issue unless the claims are ‘utterly without merit.’” (*Lambright v. Stewart* (9th Cir. 2000) 220 F.3d 1022, 1025.)

If the district court denies a certificate in whole or part, the remedy is to file a renewed motion in the Ninth Circuit. (Ninth Circuit Rules, rule 22-1(c) and (d).) The motion must be filed within 35 days of the district court’s order denying the certificate. (*Ibid.*)

P. Appointment of Counsel on Appeal.

If the district court has appointed counsel to represent the defendant, the Ninth Circuit will automatically appoint the same attorney to handle the appeal. If the district court declined to appoint counsel, the Ninth Circuit will typically grant a motion for the appointment of counsel on appeal.

Q. The Handling of the Appeal.

In most respects, an appeal is similar to a California state appeal. Upon the docketing of the appeal, the court will set a briefing schedule which will be served on counsel.

Defense counsel has the duty to perfect the record on appeal. If there was an evidentiary hearing, counsel must take the necessary steps to ensure that the reporter’s transcript is transmitted to the Court of Appeals. (Ninth Circuit Rules, rule 10-3.) At the time that appellant’s opening brief is filed, defense counsel must submit an excerpt of record which contains the documents specified in rule 30-1 of the Ninth Circuit Rules.

Conclusion

It has been said that habeas corpus “is not now and has never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” (*Jones v. Cunningham* (1963) 371 U.S. 236, 243.) As we advance in the new century, there is no doubt that the Great Writ will become ever more necessary to secure justice. Defense counsel should not hesitate to apply

for the writ whenever it might conceivably be granted. In this way, the government can hopefully be made to restrain its conduct within the bounds of the Constitution.

Postscript

In “Guns on the Roof,” the late Joe Strummer wrote: “Across the human frontier, freedom is always on the run.” Consistent with Mr. Strummer’s vision, freedom lovers must constantly fight an often losing battle against those who would debase the rights of humankind. This article is dedicated to the spirit of Joe Strummer and all those who advocate for freedom and justice.