

## ELEMENTS OF A HABEAS PETITION

By Jonathan Grossman

“Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. (Cal. Const., art. I, § 11. . . .)” (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

“A habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus. The petition ‘must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful.’ ” (*People v. Romero* (1994) 8 Cal.4th 728, 737; see Pen. Code, § 1474.)

Generally, a habeas petition must allege: (1) the identity of the petitioner and the location of his custody; (2) the court order which led to the petitioner’s restraint; (3) an illegal restraint on the petitioner’s liberty; (4) why the petition is being filed in the appellate court; (5) there is no plain, speedy, and adequate remedy at law; (6) the legal claim for relief and the factual predicate; (7) no previous petition had been filed, or why a successive petition should be permitted; and (8) in some cases, an allegation that the petition is timely or why delay is justified. The petition must also include a prayer for relief and a verification. A petition should contain points and authorities and exhibits.

### I.

The petition, of course, needs to identify the petitioner. The petition must name a respondent. Penal Code section 1474, subdivision 1, states the petitioner must allege “the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known.” (*Romero, supra*, 8 Cal.4th at p. 737; *In re Lawler* (1979) 23 Cal.3d 190, 194.) It is usually sufficient to name the prison in which the petitioner is housed.

### II.

The petition should identify the court order leading to the restraint in liberty. Often this would be the judgment (from the sentencing hearing or dispositional order). (See *Romero, supra*, 8 Cal.4th at p. 737.)

### III.

The petitioner must be illegally restrained. (Pen. Code, §§ 1473, subd. (a), 1474, subd. 2.) That is, the petitioner must be in custody or otherwise have his or her liberty restrained. A probationer is considered to be “restrained” for habeas corpus purposes. (*In re Catalano* (1981) 29 Cal.3d 1, 8.) A parolee is “restrained.” (*In re Sturm* (1974) 11 Cal.3d 258, 265.) A person released on bail qualifies. (*In re Geer* (1980) 108 Cal.App.3d 1002, 1004, fn. 2.) A delinquent minor declared a ward of the court qualifies. (*In re Robin M.* (1978) 21 Cal.3d 337, 341.) Involuntary civil commitment qualifies. (*In re Parker* (1998) 60 Cal.App.4th 1453, 1460, fn. 8.)

An immigration hold, however, does not qualify. (*In re Azurin* (2001) 87 Cal.App.4th 20, 26.)

#### IV.

Although appellate courts have jurisdiction to consider habeas petitions (Cal. Const., art. VI, § 10), courts expect them to normally be filed in the superior court. (*In re Hillery* (1962) 202 Cal.App.2d 293, 294; see Cal. Rules of Court, rule 56(a)(1).) Appellate counsel needs to allege why the petition is being filed in the court of appeal. It is usually sufficient to state that direct appeal is pending in the court of appeal. (*People v. Mayfield* (1993) 5 Cal.4th 220, 225; *People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 17.) A habeas petition must be an independent self-contained document. It cannot incorporate by reference the pending appellate record or the appellate briefs. (*In re Ronald E.* (1977) 19 Cal.3d 315, 322, fn. 3.)

#### V.

A habeas petition cannot be used as a vehicle to relitigate issues already resolved in an appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225) or could have been litigated in an appeal (*In re Dixon* (1953) 41 Cal.2d 756) unless there are new facts not in the record on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 825-829 & fn. 7.) The petitioner must allege there is no plain, speedy and adequate remedy at law. (*Id.*, at p. 825.) Often it is sufficient that the claim cannot be adequately presented from the record on appeal. (*Pope, supra*, 23 Cal.3d at p. 426, fn. 17.) Another reason why habeas relief may be appropriate is the need for an expedited resolution of the dispute. (*In re Duran* (1974) 38 Cal.App.3d 632, 635; see *In re Newbern* (1960) 53 Cal.2d 786, 788-789.)

#### VI.

Of course, the petitioner must make a legal claim why he is entitled to be released. (Pen. Code, § 1474.) “Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension.” (*In re Clark* (1993) 5 Cal.4th 750, 766-767; *In re Sterling* (1965) 63 Cal.2d 486, 489 [Fourth Amendment claims generally not cognizable in state habeas petitions].) Except for when a petition is filed purely as an attempt to expedite review, the purpose of the petition is to introduce evidence not found in the record on appeal. Thus, a petition introducing no additional evidence to a claim is pointless. In an IAC claim, there should be an affidavit from trial counsel, or from someone (sometimes the defendant) who witnessed trial counsel’s deficiencies, or from appellate counsel describing how trial counsel won’t respond to inquiries.

“The petition should both . . . state fully and with particularity the facts on which relief is sought and the legal grounds for relief.” (*Duvall, supra*, 9 Cal.4th at p. 474.) “Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief . . . .” (*Ibid.*, emphasis in original.) As in any advocacy for a criminal defendant, claims should be federalized whenever possible. Thus, the legal claim needs to contain (a) the legal error; (b) the factual predicate; (c) prejudice; and (d) if possible, federal authority.

Consequently, it is not enough to simply allege ineffective assistance of counsel. You need to expressly state a violation of the Sixth and Fourteenth Amendments, the factual predicate demonstrating how counsel's performance was deficient, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

New evidence, which was not discovered because of ineffective assistance of counsel, must completely undermined the prosecution case and could not have been discovered at trial. (*Clark, supra*, 5 Cal.4th at pp. 766, 797; *In re Fields* (1990) 51 Cal.3d 1063, 1078.) Prejudice cannot be proven by speculation of what evidence could have been discovered with proper investigation. (*Clark, supra*, at p. 766; *People v. Williams* (1988) 44 Cal.3d 883 937; accord, *Lockhart v. Fretwell* (1993) 506 U.S. 364, 369.) The petitioner must identify in the pleadings what facts would have been discovered upon proper investigation, and the allegation should be supported by some evidence attached to the petition. (*Fields, supra*, 51 Cal.3d at pp. 1071, 1075.) Similarly, it is not enough to say there was a witness who was never discovered or never called. An affidavit from the witness should be attached to the petition describing the testimony he or she would have presented. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1005; *People v. Webster* (1991) 54 Cal.3d 411, 437.)

New evidence, which was not disclosed by the prosecution or could not have been discovered by trial counsel, must be material to a relevant issue at trial such that it is "reasonably probable" a different result would have occurred. (*In re Sassounian* (1995) 9 Cal.4th 535, 544; see *Kyle v. Whitney* (1995) 514 U.S. 419, 534-435.) By contrast, a claim that the new evidence could have been useful in impeaching a witness or in corroborating evidence is normally insufficient. (*Clark, supra*, 5 Cal.4th at p. 766.)

A claim of perjured testimony or a claim of the prosecution presenting false evidence must show the falsity was not apparent to the trier of fact from the trial record and the defendant had no opportunity at trial to show the evidence was false (usually because the prosecution suppressed evidence). (*In re Waltreus* (1965) 62 Cal.2d 218, 221.)

A claim the defendant's plea was involuntary needs to allege the defendant was misadvised or otherwise had his will overborne and that he would not have entered the plea. (*Hill v. Lockhart* (1985) 474 U.S. 52, 59; *In re Resendiz* (2001) 25 Cal.4th 230, 251-253 (lead opn.); *In re Moser* (1993) 6 Cal.4th 342, 345; *In re Alvernaz* (1992) 2 Cal.4th 924, 933-934.) Consequently, a petition to attack a plea cannot be shown without at least an affidavit from the defendant.

A claim of juror misconduct must allege acts of misconduct and that there is a substantial likelihood of prejudice. (*In re Carpenter* (1995) 9 Cal.4th 634, 651.) Substantial likelihood of prejudice exists if "extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror" or if there is evidence the juror was actually biased. (*Id.*, at pp. 653-654.) The claim must be supported by affidavits (*People v. Hayes* (1999) 21 Cal.4th

1211, 1256), but they cannot contain hearsay or other inadmissible evidence (*ibid.*) or comments by jurors of their subjective reasoning process (Evid. Code, § 1150).

## VII.

A habeas petition should allege no other habeas petition had been filed or, if another had been filed, when the previous petition was filed and the court's ruling. (Pen. Code, § 1475, par. 2; see *In re Lynch* (1972) 8 Cal.3d 410, 439, fn. 26.) To justify a successive petition, it must be shown that the factual basis for the claim was not known and the petitioner had no reason to believe the claim might be made at the time of the previous habeas petition. (*Clark, supra*, 5 Cal.4th at pp. 774, 782.) A change in law is a sufficient reason for a successive petition. (*Id.*, at p. 775.) When the superior court denies a petition, seeking appellate review with a new petition in the court of appeal is not considered a successive petition. (*Id.*, at p. 767, fn. 7.)

## VIII

There is no time limit for filing a habeas petition. (*Clark, supra*, 5 Cal.4th at p. 795, fn. 30.) The equitable defense of laches, however, is available if there had been an inexplicable delay in bringing a petition. (*In re Swain* (1949) 34 Cal.2d 300, 302.) There is no time limit for alleging an illegal sentence. (See, e.g., *In re Hoddinott* (1996) 12 Cal.4th 992, 1005.) A petition can be summarily denied for being untimely. (See *Clark, supra*, 5 Cal.4th at pp. 764-765, 769, fn. 9.) I am not aware of case law requiring timeliness must be alleged in non-capital cases. In the form habeas petition for inmates, one of the questions requires an explanation for any delay in bringing the petition. Thus, if the petition is clearly timely or if the petition is obviously delayed but there is a very good explanation why, it may be prudent to plead that petition was diligently presented. In marginal situations, it may be better not to bring up the issue.

In death penalty cases, a habeas petition is presumed timely if it is filed within 90 days after the reply brief is filed. (*Clark, supra*, 5 Cal.4th at p. 797.) These rules do not apply in non-capital cases, but appellate judges sometimes look to these rules for guidance on a claim of laches. The petitioner may demonstrate good cause for delay if she shows when she knew or should have known the facts for the claim and when she became or should have become aware of the legal basis for the claim. (*In re Robbins* (1998) 18 Cal.4th 770, 780; *Clark, supra*, at pp. 778-779, 797.) An untimely claim brought without good cause can be considered if the claim shows the trial was materially not fair in that no reasonable jury would have convicted the petitioner; the petitioner is actually innocent; the death penalty resulted from grossly misleading evidence; or the statute in question is unconstitutional. (*In re Sanders* (1999) 21 Cal.4th 697, 704-705; *Clark, supra*, at pp. 797-798.)

## PRAYER FOR RELIEF

The petitioner must make a prayer for relief. (Pen. Code, § 1474.) The prayer normally requests the granting of the writ, alternatively the issuance of an order to show cause, and any other relief which may be appropriate in the interest of justice. Commonly, appellate counsel requests the case be consolidated with the appeal or requests expedited review. It is also common to request the Court of Appeal to take judicial notice of the record in the concurrent

appeal. California Rules of Court, rule 14.5 states a request for judicial notice in the appellate courts must be filed in a separate motion, and on its face, the rule would apply to habeas petitions. The practice in the Sixth District has been that it is sufficient to request judicial notice only in the prayer for relief.

In *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, the court of appeal said the lower court should have granted an evidentiary hearing, despite claims by the Attorney General the petitioner was not entitled to one, because, in part, the petitioner requested it in his prayer for relief. (*Id.*, at p. 574.) Do not request or purport to reserve the right to supplement or amend the petition; any change to the original petition may be made only by leave of court. (*Clark, supra*, 5 Cal.4th at pp. 781-782 & fn. 16.)

### VERIFICATION

“The petition must be verified by the oath or affirmation of the party making the application.” (Pen. Code, § 1474, subd. 3; *Clark, supra*, 5 Cal.4th at p. 778, fn. 15.) The verification may be signed by the client. Alternatively, it may be signed by the attorney if the client is in another county. (Code Civ. Proc, § 446, subd. (a).) The verification must be based on personal knowledge. (*Clark, supra*, at p. 778, fn. 15; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865; *People v. McCarthy* (1986) 176 Cal.App.3d 593, 596-597.)

The verification is not an affidavit; it does not serve as evidence or establish any facts in evidence. (Code Civ. Proc, § 446, subd. (a).) Thus, exhibits ordinarily must be attached to the petition. (*Clark, supra*, 5 Cal.4th at p. 766; *Fields, supra*, 51 Cal.3d 1063, 1071.)

The declarations attached to the petition do not initially serve as evidence but only to help persuade the court there is a sufficient factual basis to support the claim for relief. (*Fields, supra*, at p. 1070, fn. 2.) To be admitted into evidence, declarations must comply with the rules in the Evidence Code. Thus, declarations must be based on personal knowledge and not contain inadmissible hearsay (e.g., “on information and belief”). (*Id.*, at p. 1070 & fn. 3.) Declarations should be factual only and should not include any legal analysis.

### POINTS AND AUTHORITIES

Points and authorities is the “legal brief” of the document. Some practitioners allege in the in the pleadings to incorporate by reference the point of authorities and te exhibits, just in case the pleadings fail to mention an element contained in the legal argument. (See, e.g., *Fields, supra*, 51 Cal.3d at p. 1070, fn. 2.)

### SUBSEQUENT PROCEEDINGS

The court may summarily deny the petition as frivolous if it does not allege a prima facie case for relief. (*Duvall, supra*, 9 Cal.4th 464, 475.) A prima facie case exists when, assuming the factual allegations are true, the petitioner would be entitled to relief. (*Id.*, at pp. 474-475;

*Clark, supra*, 5 Cal.4th at p. 769, fn. 9.) A petition may also be summarily denied if it is procedurally barred. (*Clark, supra*, at p. 769, fn. 9.) If the petition is filed in the superior court, the court must issue a written ruling within 30 days. (Cal. Rules of Court, rule 4.500(a).)

Before ruling on the petition, an appellate court may request an informal response. (Cal. Rules of Court, rule 60.) An informal response serves as a “screening function” whereby the government responds before the court decides whether to summarily deny or grant the petition. (*Romero, supra*, 8 Cal.4th 728, 741.) The superior court cannot request an informal response. (*Durdines v. Superior Court* (1999) 76 Cal.App.4th 247, 250.) After the Attorney General’s response, the petitioner may file a reply to the response. (Rule 60.) Frequently, appellate courts have permitted oral arguments on the habeas petition when counsel orally argues the appeal. “The failure to file a response shall be deemed to constitute consent that, if this court determines upon the merits of said application that relief should issue without further proceedings. (*People v. Gray* (1990) 225 Cal.App.3d 1336, 1338-1340.)

If the court is satisfied after receiving the informal response that a prima facie case exists or if the petition states on its face a prima facie case for relief, and the petition is otherwise not defective, the court is required to issue an order to show cause or issue the writ. (Pen. Code, §§ 1480, 1483; *Duvall, supra*, 9 Cal.4th at p. 475; *Romero, supra*, at p. 737, 740.) Granting the writ is not the same as granting relief; it merely begins the process of litigating the claims. (*Romero, supra*, 8 Cal.4th at p. 740.) Normally, granting the writ involves transporting the petitioner to court for a hearing. (*Ibid.*) An order to show cause permits the court to order a return and hold a hearing without transporting the petitioner. (*Ibid.*; *Duvall, supra*, at p. 475; *Lawler, supra*, at p. 194.) The issues are limited to those listed in the order to show cause. (*Duvall, supra*, at p. 475; *Clark, supra*, 5 Cal.4th at p. 781, fn. 16.)

Upon granting the writ or order to show cause, the government must file a verified return or opposition. (Pen. Code, § 1480; *Lawler, supra*, 23 Cal.3d at p. 194.) The purpose of the return is to narrow the scope of facts the petitioner must prove in order to gain relief. (*Duvall, supra*, 9 Cal.4th at p. 486.) Any allegation made in the petition which is not denied in the return is deemed admitted. (*In re Serrano* (1995) 10 Cal.4th 447, 455.) The government cannot just deny the allegations made in the petition, it must also affirmatively allege whether the petitioner is in government custody and the state’s authority for confining the petitioner. (Pen. Code, § 1480; *Duvall, supra*, at pp. 476, 485; *Romero, supra*, 8 Cal.4th at pp. 738-739.) The government must include documentation of the order authorizing custody. (Pen. Code, § 1480.) Thus, general denials and “conclusionary statements” are disfavored. (*Duvall, supra*, at p. 479.)

After the return, the petitioner should file a traverse. The traverse should deny allegations made in the return; any allegations in the return not denied are deemed admitted. (Pen. Code, § 1484; *Duvall, supra*, 9 Cal.4th at p. 477; *Romero, supra*, 8 Cal.4th at p. 739; *Lawler, supra*, 23 Cal.3d at pp. 194-195.) The traverse may also demur on allegations in the return because of insufficient evidence, raise objections to the return, and allege additional facts, but it may not raise new issues. (*Duvall, supra*, 9 Cal.4th at pp. 477-478.) Again, general denials and “conclusionary statements” are disfavored. (See *Duvall, supra*, at p. 479; *In re*

*Lewallen* (1979) 23 Cal.3d 274, 278.) If the parties agree, the petition may serve as the traverse. (*Id.*, at p. 477.)

The court may hold an evidentiary hearing if resolution of the claims depend on resolution of disputed facts. (Pen. Code, § 1484; *Duvall, supra*, 9 Cal.4th at pp. 477-478; *Romero, supra*, 8 Cal.4th at pp. 739-740.) Because the appellate courts are ill-suited to hold evidentiary hearings, usually, they transfer the matter to the superior court by issuing an order to show cause returnable to the superior court. Sometimes appellate courts retain control over the litigation and order an evidentiary hearings occur before a referee. (*Romero, supra*, at p. 740; *Clark, supra*, 5 Cal.4th at p. 771, fn. 10.) The petitioner bears the burden of proof by the preponderance of the evidence. (*In re Visciotti* (1997) 14 Cal.4th 325, 351.)

The government may appeal to the court of appeal an order by the superior court granting relief. (Pen. Code, § 1506; Cal. Rules of Court, rule 50.) If the petitioner loses in the superior court, he must file a new petition for writ of habeas corpus in the court of appeal. (*Clark, supra*, 5 Cal.4th at p. 767, fn. 7.) If the court of appeal denies relief, the petitioner may file a new petition for writ of habeas corpus in the Supreme Court. (See, e.g., *In re Catalano* (1981) 29 Cal.3d 1, 7.) The Supreme Court, however, prefers a petition for review. (*In re Reed* (1983) 33 Cal.3d 914, 918, fn. 2, overruled on other grounds in *People v. Castellanos* (1999) 21 Cal.4th 785, 798 (lead opn.); *In re Michael E.* (1975) 15 Cal.3d 183 193, fn. 15.) When the court of appeal summarily denies a habeas petition, it is final immediately unless the court of appeal also resolves a related appeal the same day. (Cal. Rules of Court, rule 24(a).)