– CHAPTER NINE –

THE COURTHOUSE ACROSS THE STREET: FEDERAL HABEAS CORPUS

CALIFORNIA CRIMINAL APPELLATE PRACTICE MANUAL
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THE COURTHOUSE ACROSS THE STREET: FEDERAL HABEAS CORPUS

I. INTRODUCTION [§ 9.0]

This chapter provides basic information about federal habeas corpus law and procedure. (Comprehensive coverage can be found in Hertz and Liebman, Federal Habeas Corpus Practice and Procedure (5th ed. 2005 & 2006 supp.) The focus here is on post-appeal review of noncapital California state convictions – a remedy of last resort for those who have failed to achieve relief in state courts.[1] The discussion addresses custody and mootness issues, time limitations, grounds, exhaustion of state remedies and procedural default, successive petitions, and basic habeas corpus procedures in federal court.

Although an appointment to a California appeal does not cover federal habeas corpus petitions or appearances, the appointed attorney nevertheless has a responsibility to be familiar with the law governing those proceedings. One reason is that the attorney must properly preserve federal issues throughout the state appellate process; failure to do so likely means loss of the remedy. Further, counsel will need to advise the client about pursuing federal habeas corpus in pro per, if the client shows interest in it or there is a

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[1]Federal habeas corpus may also be used to challenge state pretrial proceedings, extradition orders, and other proceedings that implicate federal constitutional rights. (E.g., *Stow v. Murashige* (9th Cir. 2004) 389 F.3d 880 [pretrial]; *Shelby v. Bartlett* (9th Cir. 2004) 391 F.3d 1061 [prison discipline]; see *Skinner v. Switzer* (2011) ___ U.S. ___ [131 S.Ct. 1289, 179 L.Ed.2d 233] and authorities cited [comparing federal habeas corpus with other remedies, such as 42 U.S.C. § 1983 actions, for various post-conviction actions, such as a motion for DNA testing]; cf. *Brown v. Ahern* (9th Cir. 2012) 676 F.3d 899 [absent extraordinary circumstances, principles of federalism and comity prohibit federal district court from entertaining pre-conviction habeas petition that raises speedy trial claim as affirmative defense to state prosecution]; *Carden v. Montana* (9th Cir. 1980) 626 F.2d 82.) Decisions such as parole denials that involve a right under *state* law may be reviewed only for compliance with federal procedural due process requirements, such as notice and opportunity to be heard. (*Swarthout v. Cooke* (2011) ___ U.S. ___ [131 S.Ct. 859, 178 L.Ed.2d 732].)

Federal courts lack jurisdiction to review state convictions by means of *coram nobis*. (*Finkelstein v. Spitzer* (2d Cir. 2006) 455 F.3d 131, 133-134.)

reasonable chance the federal court would grant relief. This requires solid understanding of such fundamentals as federal habeas corpus jurisdiction, time limitations, grounds for relief, and procedural requirements. Finally, many state appellate practitioners will at some time or another find themselves in federal court on a habeas corpus matter, and in that case thorough familiarity with the governing law is essential.

Habeas corpus is explicitly recognized in the federal Constitution. (U.S. Const., art. I, § 9, cl. 2.) The statute governing federal habeas corpus review of state convictions is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), at Title 28 United States Code section 2241 et seq.

II. CUSTODY AND MOOTNESS [§ 9.1]

Federal habeas corpus jurisdiction requires both that the petitioner be in "custody" (28 U.S.C. § 2254(a)) – in other words, be under the present constraint of the criminal judgment challenged – and that the proceedings be a "case or controversy" (U.S. Const., art. III, § 2) – in other words, not moot.[2]

A. Custody Requirements [§ 9.2]

For federal habeas proceedings reviewing a state judgment under Title 28 United States Code section 2254(a), the petitioner must be "in custody pursuant to the judgment of a State court." The custody requirement is satisfied by actual custody or constructive custody, such as release on parole. (*Jones v. Cunningham* (1963) 371 U.S. 236.) It is also satisfied when the petitioner is currently serving another sentence but is facing future incarceration on the challenged one (*Maleng v. Cook* (1989) 490 U.S. 488 [state had lodged detainer against petitioner while in custody of another sovereign]) or seeks to prevent retrial on prior jeopardy grounds (*Wilson v. Belleque* (9th Cir. 2009) 554 F.3d 816, 824 [28 U.S.C. § 2241 petition].) Federal habeas corpus review does not cover a "fine only" state sentence. (*Edmunds v. Won Bae Chang* (9th Cir. 1975) 509 F.2d 39, 41; see also *Bailey v. Hill* (9th Cir. 2010) 599 F.3d 976 [restitution fine issue does not challenge lawfulness of custody]; *United States v. Metts* (9th Cir. 1995) 65 F.3d 1531, 1533.)

The filing date of the petition determines whether the custody requirement is met. If the petitioner was constrained, actually or constructively, under the challenged

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[2]California has similar requirements for state habeas corpus. (See § 8.6 et seq. of chapter 8, "Putting on the Writs: California Extraordinary Remedies.")

conviction or other state decision when the petition was filed, the requirement is satisfied even though he is released during the habeas corpus proceedings.[3] (*Spencer v. Kemna* (1998) 523 U.S. 1, 7 [petitioner in custody under challenged parole revocation when petition filed, but released before adjudication of petition]; *Carafas v. LaVallee* (1968) 391 U.S. 234, 237.)

If at the time the petition is filed the petitioner presently is neither incarcerated nor subject to incarceration under the conviction, the conviction is fully "expired," and so the custody requirement is not met. This rule applies even though the petitioner may continue to suffer collateral consequences from the conviction. Thus the fact the expired conviction is (or may be) used to enhance a later sentence does not make the petitioner in custody on it for purposes of attacking the expired conviction directly.[4] (*Maleng v. Cook* (1989) 490 U.S. 488, 492-493.)

B. Mootness Questions [§ 9.3]

Federal courts have jurisdiction only over a "case or controversy" under article III, section 2 of the United States Constitution and may not decide moot cases that have no consequences for the litigants.[5] Even if a petitioner is in custody when a petition is filed,

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[3]Although the *custody* requirement is satisfied when the petitioner was in custody when the petition was filed, there may be a *mootness* issue if the petitioner is suffering no current consequences of the challenged decision at the time habeas corpus relief might be ordered. (See § 9.3, *post.*)

[4]If the petitioner challenges a *later* sentence on the ground it is enhanced with the invalid expired conviction, the custody requirement is technically satisfied because the petitioner is under the constraint of the *presently challenged* sentence (the later, enhanced one). However, to promote finality of judgments and ease of administration, an older conviction no longer subject to collateral attack in its own right is conclusively presumed valid in an attack on a later sentence. (*Lackawanna County District Attorney v. Coss* (2001) 532 U.S. 394, 403-404; see *Zichko v. Idaho* (9th Cir. 2001) 247 F.3d 1015, 1019-1020 [habeas petitioner may challenge underlying, expired rape conviction while in custody for failing to comply with sex offender registration law].)

[5]California state courts do have discretion to consider cases that are moot as to the litigants but raise an issue of continuing and serious public interest. (See § 8.8 of chapter 8, "Putting on the Writs: California Extraordinary Remedies.")

therefore, the court may not entertain it if the petitioner no longer suffers any consequences from it.[6]

In habeas corpus proceedings attacking a criminal conviction, the case or controversy requirement normally is satisfied, even after all potential custody has expired. Collateral consequences from a state judgment or order may be used to establish that the case is not moot. (*Carafas v. LaVallee* (1968) 391 U.S. 234, 237-238 [defendant released while habeas corpus petition pending; not moot because defendant still suffering civil disabilities such as ineligibility to vote or hold certain positions]; *Zal v. Steppe* (9th Cir. 1992) 968 F.2d 924, 926 [contempt citations could result in State Bar discipline against petitioner]; see also *Moore v. Ogilvie* (1969) 394 U.S. 814, 816 [election issue likely to recur and affect the parties in future].)

Continuing collateral consequences from a criminal conviction ordinarily may be presumed. (*Sibron v. New York* (1968) 392 U.S. 40, 55-56.) For other types of cases, however, such consequences must be "specifically identified, . . . concrete disadvantages or disabilities that had in fact occurred, that were imminently threatened, or that were imposed as a matter of law (such as deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses)." (*Spencer v. Kemna* (1998) 523 U.S. 1, 8; see also *Lane v. Williams* (1982) 455 U.S. 624, 632-633 [no presumption of collateral consequences from parole revocation; thus no case or controversy exists after defendant released], followed in *Spencer v. Kemna*, at pp. 11-12.

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[6] "[F]ederal courts may adjudicate only actual, ongoing cases or controversies. To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. . . . This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. The parties must continue to have a personal stake in the outcome. . . ." (*Lewis v. Continental Bank Corp*. (1990) 494 U.S. 472, 477-478, citations and interior quotation marks omitted.)

III. TIME LIMITS FOR FILING FEDERAL PETITION [§ 9.4]

AEDPA[7] imposes a one-year statute of limitations after the state appeal process is complete in which a federal habeas corpus petition must be filed (28 U.S.C. § 2244(d)(1)):

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or the laws of the United States is removed, if the applicant was prevented from filing by such State action;[8]
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.[9]

A. Starting the Clock [§ 9.5]

The most common trigger for starting the limitations clock is the conclusion of direct review or expiration of the time for seeking it.[10] (28 U.S.C. § 2244(d)(1)(A).) As applied to California, the state direct review process includes time for petitioning for review in the California Supreme Court and for certiorari in the United States Supreme Court. The state appeal process is final at the end of the 90-day period in which to file a certiorari petition after the denial of review or, if certiorari is sought, at the time the court

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[7]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[8]Cf. *Bryant v. Arizona* (9th Cir. 2007) 499 F.3d 1056,

[9]See *Hasan v. Galaza* (9th Cir. 2001) 254 F.3d 1150.

[10]In habeas corpus cases challenging state administrative decisions, the one-year limitation period begins when the state administrative proceedings are final. The period is tolled during any state habeas corpus proceedings attacking the decision. (E.g., *Shelby v. Bartlett* (9th Cir. 2004) 391 F.3d 1061, 1065-1066 [prison discipline].)

acts on it.[11] (E.g., *Beard v. Banks* (2004) 542 U.S. 406, 411; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390; *Bowen v. Roe* (9th Cir. 1999) 188 F.3d 1157, 1158-1159; see also *Clay v. United States* (2003) 537 U.S. 522, 525, 532 [similar timing for a 28 U.S.C. § 2255 motion for relief from federal convictions];[12] caveat: see *Lawrence v. Florida* (2007) 549 U.S. 327 and *White v. Klitzkie* (9th Cir. 2002) 281 F.3d 920, 924-925 [in contrast to rule applicable to appeal, certiorari from denial of state habeas petition is not part of state *collateral* proceedings].)[13]

If there are further trial court proceedings, such as resentencing after a remand on appeal, the AEDPA period begins after appellate finality of the later proceedings. (See *Burton v. Stewart* (2007) 549 U.S. 147; *Ferreira v. Secretary for the Department of Corrections* (11th Cir. 2007) 494 F.3d 1286; *Robbins v. Secretary for the Department of Corrections* (11th Cir. 2007) 483 F.3d 737.) If the state permits the filing of a late appeal, the AEDPA clock starts at the conclusion of the belated appeal period, not the original period. (*Jimenez v. Quarterman* (2009) 555 U.S. 113; see also *Thompson v. Lea* (9th Cir. 2012) 681 F.3d 1093 [after original appeal and later U.S. Supreme Court decision, California Supreme Court granted review from denial of remittitur recall, then held case pending resolution of lead case; AEDPA time from finality of later proceeding].

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[11]It is unclear whether a state defendant *may* file a federal habeas corpus petition when the state courts no longer have appellate jurisdiction, even if the certiorari period is not over. (See *Kapral v. United States* (3d Cir. 1999) 166 F.3d 565, 570, and *Feldman v. Henman* (9th Cir. 1987) 815 F.2d 1318, 1321 [federal court should not entertain habeas corpus petition when petition for certiorari from a *federal* appellate decision is pending]; cf. *Roper v. Weaver* (2007) 550 U.S. 598 (*per curiam*) [defendant could have filed federal habeas corpus petition after state denied *collateral* relief, even though petition for certiorari was pending from the state decision].) These cases do not necessarily answer the question whether a *state* prisoner must wait for the conclusion of the certiorari period on *direct appeal* to file the federal petition.

[12]*United States. v. Plascencia* (5th Cir. 2008) 537 F.3d 385 [when a federal prisoner fails to file an effective notice of appeal, the prisoner's conviction becomes "final," for purposes of calculating the one-year period for seeking collateral review, upon expiration of period for filing direct appeal, and prisoner not entitled to 90-day period for certiorari].)

[13]One circuit has held that the 90-day certiorari period is allowed even when no federal issue was presented in the lower state appellate court. (*Nix v. Secretary for the Department of Corrections* (11th Cir. 2004) 393 F.3d 1235, 1237.) The Supreme Court and Ninth Circuit have not addressed this issue.

If a timely state appeal or petition for review is not filed, the statute of limitations begins to run when the time for such a filing expires. (*Gonzalez v. Thaler* (2012) ___ U.S. ___ [132 S.Ct. 641, 653-654]; *Roberts v. Marshall* (9th Cir. 2010) 627 F.3d 768, 771.)

If the petition is based on a newly recognized constitutional right, then under subdivision (C) of Title 28 United States Code section 2254(d)(1), the clock starts on the date the right is recognized, not the date of a decision expressly finding it retroactive to cases on collateral review. (*Dodd v. United States* (2005) 545 U.S. 353 [interpreting analogous provision of 28 U.S.C. § 2255].)[14]

If the petition is based on the recent discovery of the factual predicate of the claim, the clock starts when that fact could have been discovered through the exercise of due diligence. This standard does not require the defendant to use the maximum diligence possible, but only due or reasonable diligence. (*Souliotes v. Evans* (9th Cir. 2010) 622 F.3d 1173.)

If no petition for review is filed, the clock starts 40 days after the appellate court files its opinion (the time within which review could have been sought). (*Smith v. Duncan* (9th Cir. 2002) 297 F.3d 809.)

B. Time of Filing [§ 9.6]

Ordinarily, amendments to a federal pleading "relate back" to the filing date of the original pleading – in other words, are considered to have been filed at the same time as the petition – if they arise from the same "conduct, transaction, or occurrence." (Fed. Rules Civ.Proc., rule 15(c)(2), 28 U.S.C.; see 28 U.S.C. § 2242 [rules of civil procedure apply when amending habeas corpus petition]; *Anthony v. Cambra* (9th Cir. 2000) 236

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[14]Section 2244(d)(1)(C) on the statute of limitations requires the rule to have been "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." In contrast, section 2244(b)(2)(A) on successive petitions requires the new rule to have been "made retroactive . . . by the Supreme Court." (See § 9.85 et seq., *post*; *Tyler v. Cain* (2001) 533 U.S. 656, 662-663.)

The *Dodd* majority opinion assumes without deciding that a decision of a lower federal court on retroactivity would be sufficient in the statute of limitations context. *Ashley v. United States* (7th Cir. 2001) 266 F.3d 671, 674-675, and *United States v. Lopez* (5th Cir. 2001) 248 F.3d 427, 431-432, so held. The dissent in *Dodd* by Justice Stevens concludes the retroactivity decision must be made by the Supreme Court in both instances. (*Dodd v. United States, supra,* 545 U.S. 353, 365, fn. 4.)

F.3d 568, 576 [district court acted properly in dating subsequent petition nunc pro tunc as of previous filing that was mistakenly dismissed]; cf. *Rasberry v. Garcia* (9th Cir. 2006) 448 F.3d 1150, 1154 [relation back does not apply when first petition dismissed because it contained unexhausted claims].)

An amendment to a petition asserting a new ground for relief supported by facts different in both time and type from those in the original petition, however, does not relate back to the original time for purposes of determining compliance with the limitations period. (*Mayle v. Felix* (2005) 545 U.S. 644, 650; see *Schneider v. McDaniel* (9th Cir. 2012) 674 F.3d 1144; *Hebner v. McGrath* (9th Cir. 2008) 543 F.3d 1133.) Relation back requires the claims in the original and amended petitions be "tied to a common core of operative facts." (*Mayle*, at p. 664.)[15]

The federal courts recognize the "mail box filing," or "prison delivery," rule. A prisoner who delivers the petition to the prison mail system before the one year has expired has timely filed it. (*Campbell v. Henry* (9th Cir. 2010) 614 F.3d 1056, 1058-1059; *Taylor v. Williams* (11th Cir. 2008) 528 F.3d 847; *Huizar v. Carey* (9th Cir. 2001) 273 F.3d 1220.) This rule applies to the filing of state petitions, as well. (*Anthony v. Cambra* (9th Cir. 2000) 236 F.3d 568, 575).

C. Tolling [§ 9.7]

The one-year AEDPA[16] limitations period can be tolled both on statutory grounds and under special judicially recognized doctrines. Probably the most frequently applied statutory ground is the pendency of state habeas corpus proceedings reviewing the conviction. Tolling based on case-specific equitable factors is occasionally available, and a claim that a fundamental miscarriage of justice caused the conviction of a factually innocent person may overcome late filing in certain, very rare situations.

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[15]A different rule may apply when determining compliance with the AEDPA successive petitions rule. (See § 9.84B, *post*, and *Woods v. Carey* (9th Cir. 2008) 525 F.3d 886.)

[16]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

1. State collateral proceedings [§ 9.8]

The limitations clock is tolled by statute during the pendency of state habeas corpus proceedings.[17] Title 28 United States Code section 2244(d)(2) provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

A properly filed state petition as to one claim tolls the running of the time as to all claims. (*Campbell v. Henry* (9th Cir. 2010) 614 F.3d 1056.)

State "collateral review" includes, not only habeas corpus, but other forms of judicial post-conviction review that are not part of the direct review, or appeal, process. (*Wall v. Kholi* (2011) ___ U.S. ___ [131 S.Ct. 1278, 1284, 179 L.Ed.2d 252].) A petition that challenges the underlying judgment constitutes a collateral attack for purposes of tolling, no matter how the state denominates the proceeding. (*Wall*, 131 S.Ct. at pp. 1286-1287 [post-conviction motion to reduce sentence]; *Moore v. Cain* (5th Cir. 2002) 298 F.3d 361 [mandate petition]; see also *Hutson v. Quarterman* (5th Cir. 2007) 508 F.3d 236 [motion for DNA testing].)

The state collateral proceeding must be made "with respect to the pertinent judgment" under section 2244(d)(2), not to some other matter, such as a prison administrative decision. (*Collins v. Ercole* (2d Cir. 2012) 667 F.3d 247.)

a. Properly filed state petition [§ 9.9]

Tolling applies if the petition is properly "filed," even though the state court finds that the underlying claim is procedurally barred. (*Artuz v. Bennett* (2000) 531 U.S. 4, 8-11 [claims allegedly violating state procedural bars against raising claims that had been, or could have been, raised on appeal do not prevent tolling for properly filed application containing those claims: "[o]nly individual *claims*, and not the application containing those claims, can be procedurally defaulted under state law"], emphasis original; see also *Smith v. Duncan* (9th Cir. 2002) 297 F.3d 809, 812.)

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[17]The statute of limitations is not tolled during the pendency of a federal petition. (*Duncan v. Walker* (2001) 533 U.S. 167, 181-182.)

A petition is properly filed if there are no unfulfilled conditions for *filing* (in contrast to conditions necessary for relief).[18] The Supreme Court explained in *Artuz v. Bennett* (2000):

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. [Citations.] . . . And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

(*Id.* at p. 8, fn. omitted.) Although *Artuz* mentioned "the court and office" prescribed for filing, *Cross v. Sisto* (9th Cir. 2012) 676 F.3d 1172, without discussion, allowed the time from the filing of a habeas corpus petition in the state Court of Appeal, which denied it without prejudice to refiling in the trial court, to its filing in the superior court to toll the statute.[19]

The primary ground for finding a petition not properly filed is untimeliness. If a petition in the state court was untimely, the petition will not toll the statute. (*Pace v. DiGuglielmo* (2005) 544 U.S. 408, 412-414; see also *Lakey v. Hickman* (9th Cir. 2011) 633 F.3d 782 [where state court denied habeas corpus relief and state supreme court rejected claims as untimely, statutory tolling for intervening time is unavailable since supreme court petition was not properly filed]; *Waldrip v. Hall* (9th Cir. 2008) 548 F.3d 729 [unjustified delay of more than six months between denial of habeas corpus relief and filing of subsequent petition in higher court]; *Bonner v. Carey* (9th Cir. 2005) 425 F.3d 1145, 1148-1149; cf. *Trigueros v. Adams* (9th Cir. 2011) 658 F.3d 983, 989 [California Supreme Court's request for informal response on merits was a finding of timeliness under circumstances of case].)

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[18]In California death penalty cases, because of the chronic shortage of counsel, the California Supreme Court will accept an initial skeletal petition, raising only one claim and attaching no supporting documents, and will permit later supplementation once counsel is appointed. (*In re Jimenez* (2010) 50 Cal.4th 951; *In re Morgan* (2010) 50 Cal.4th 932.)

[19]The state Court of Appeal in *Cross* had subject matter jurisdiction and *could* have entertained the petition, even though California policy is generally to require filing in the trial court first. (See *In re Kler* (2010) 188 Cal.App.4th 1399.)

A petition is not properly filed until it is verified, if required under state law. (*Zepeda v. Walker* (9th Cir. 2009) 581 F.3d 1013 [date of filing verification, not submitting unverified petition to California Supreme Court, was relevant filing date under AEDPA[20]].)

b. Pendency of petition [§ 9.10]

A petition for reconsideration of the state Supreme Court's denial of a motion for leave to appeal, in a post-appeal review proceeding, tolls the statute of limitations. (*Sherwood v. Prelesnik* (6th Cir. 2009) 579 F.3d 581.)

The word "pending" includes the time between a lower state court's habeas corpus decision and the filing for subsequent relief in a higher state court, as long as the interval between court filings is "reasonable" within the meaning of state procedural requirements.[21] (*Carey v. Saffold* (2002) 536 U.S. 214, 216-227; see *Noble v. Adams* (9th Cir. 2012) 676 F.3d 1180; *Lakey v. Hickman* (9th Cir. 2011) 633 F.3d 782 [where state court denied habeas corpus relief and state supreme court rejected claims as untimely, statutory tolling for intervening time is unavailable since supreme court petition was not properly filed].) If it is unclear whether the state court found the interval unreasonable, the federal court must decide whether the filing was made within what the state would consider a "reasonable time." (*Evans v. Chavis* (2006) 546 U.S. 189, 199; see *Velasquez v. Kirkland* (9th Cir. 2011) 639 F.3d 964 [multiple delays between state filings; petitioner not entitled to either statutory or equitable tolling]; *Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486 [14-month period between denial in lower court and filing in higher court was reasonable when latter addressed merits without citing to untimeliness and unusual nature of case showed good cause]; *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046; *Waldrip v. Hall* (9th Cir. 2008) 548 F.3d 729; *Gaston v. Palmer* (9th Cir. 2006) 447 F.3d 1165.)

If a second petition is filed purporting to correct problems with the first, the defendant is entitled to "gap (or interval) tolling" between the two petitions only if the second is limited merely to curing deficiencies in the first or elaborating on those claims. If the new petition goes beyond that, it is not considered to be part of the same proceedings, and the interval does not toll the clock. (*Banjo v. Ayers* (9th Cir. 2010) 614 F.3d 964, 969-970; *Hemmerle v. Arizona* (9th Cir. 2007) 495 F.3d 1069; *King v. Roe* (9th Cir. 2003) 340 F.3d 821, 823.)

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[20]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[21]Time is not tolled in the period between a final decision on direct state appeal and the filing of the first state collateral challenge.

c. End of tolling period [§ 9.11]

The tolling ends when the last state decision becomes final. (*Bunney v. Mitchell* (9th Cir. 2001) 262 F.3d 973-974.)[22] The 90-day time during which a petition for certiorari is pending or may be filed at the conclusion of state collateral proceedings does not toll the statute. (*Lawrence v. Florida* (2007) 549 U.S. 327; see also *White v. Klitzkie* (9th Cir. 2002) 281 F.3d 920, 924-925.)

At the end of the tolling period, the clock restarts where it left off; it does not start all over again. A petitioner who needs to seek state habeas corpus in order to exhaust state remedies[23] should therefore file the state petition sufficiently early to ensure that, once exhausted, the claims can be presented in federal court before expiration of the federal one-year limitations period.

2. Equitable tolling [§ 9.12]

Equitable tolling of the AEDPA[24] statute of limitations occasionally can be invoked when external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim. (*Holland v. Florida* (2010) ___U.S.___ [130 S.Ct. 2549].[25]) The prerequisites for equitable tolling include (1) the petitioner diligently pursued his rights and (2) extraordinary circumstances stood in his way. (See *Pace v. DiGuglielmo* (2005) 544 U.S. 408, 418.)

One example might be the failure of prison officials to handle the petition properly. (See *Miles v. Prunty* (9th Cir. 1999) 187 F.3d 1104, 1107 [acting with due

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[22]At the time of *Bunney*, former rule 24 of the California Rules of Court contained language suggesting denial of a petition for habeas corpus by the California Supreme Court is final in 30 days. (*Bunney*, at p. 974.) The state rules have since been amended; now a denial without issuance of an alternative writ or order to show cause is final immediately. (Rule 8.532(b)(2)(C).) An order denying a petition for review from a Court of Appeal decision denying a habeas corpus petition is also final immediately. (Rule 8.532(b)(2)(A).)

[23]See § 9.44 et seq., *post*, on exhaustion of state remedies and procedural default.

[24]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[25]In *Holland* the United States Supreme Court for the first time expressly recognized the applicability of equitable tolling to AEDPA. However, as the following discussion shows, the Ninth Circuit has applied equitable tolling in a number of AEDPA cases.

diligence, petitioner depended on prison authorities to prepare check for filing fee and to mail petition]; see also *Stillman v. Lamarque* (9th Cir. 2003) 319 F.3d 1199, 1202-1203 [prison delays in handling petition].) Lack of access to legal papers or legal resources for reasons beyond the petitioner's control might also result in equitable tolling. (*Roy v. Lampert* (9th Cir. 2006) 455 F.3d 945 [prison library "consisted of only three outdated legal books, which contained no information about AEDPA"]; *Mendoza v. Carey* (9th Cir. 2006) 449 F.3d 1065 [lack of assistance to Spanish-speaking inmates]; *Lott v. Mueller* (9th Cir. 2002) 304 F.3d 918, 924-925, and *Espinoza-Matthews v. California* (9th Cir. 2005) 432 F.3d 1021, 1026-1028 [no access to legal papers while in administrative segregation]; *Whalem/Hunt v. Early* (9th Cir. 2000) 233 F.3d 1146, 1148 [AEDPA not in prison library].)

Another possible ground may be district court error. (*United States v. Buckles* (9th Cir. 2011) 647 F.3d 883, 891-893 [inaccurate advice from district court clerk may entitle defendant to equitable tolling]; *Corjasso v. Ayers* (9th Cir. 2002) 278 F.3d 874.) The petitioner's reliance on then-valid law later overruled may toll the statute. (*Nedds v. Calderon* (9th Cir. 2012) 678 F.3d 777; *Harris v. Carter* (9th Cir. 2008) 515 F.3d 1051.)

The defendant's mental incompetence may establish tolling. (*Bills v. Clark* (9th Cir. 2010) 628 F.3d 1092; *Laws v. Lamarque* (9th Cir. 2003) 351 F.3d 919, 922-923; cf. *Roberts v. Marshall* (9th Cir. 2010) 627 F.3d 768 and *Gaston v. Palmer* (9th Cir. 2005) 417 F.3d 1030 [physical and mental disabilities not amounting to incompetence].) Another ground may be a prisoner's lack of knowledge that the state courts have reached a final resolution of his case. (*Ramirez v. Yates* (9th Cir. Cir. 2009) 571 F.3d 993, 997-998.)

Counsel's egregious misconduct may be cause for equitable tolling. (*Holland v. Florida* (2010) ___U.S.___ [130 S.Ct. 2549] [gross negligence of counsel]; *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001 [prior counsel's actions were egregious and petitioner used reasonable diligence; petitioner not responsible for counsel's affirmative misrepresentations]; *Spitsyn v. Moore* (9th Cir. 2003) 345 F.3d 796, 801 [attorney's failure to file habeas corpus petition and refusal to return client file].)

However, equitable tolling does not extend to "garden variety" claims of excusable neglect. Examples might be lateness caused by counsel's absence from the office (*Irwin v. Department of Veteran Affairs* (1990) 498 U.S. 89, 96), counsel's miscalculation of the statute of limitations (*Frye v. Hickman* (9th Cir. 2001) 273 F.3d 1144), delay in a district court's dismissal of an unexhausted petition, when the petitioner was on notice he had to return to state court and failed to do so in a timely way (*Guillory v. Roe* (9th Cir. 2003) 329 F.3d 1015, 1017; *Fail v. Hubbard* (9th Cir. 2002) 315 F.3d 1059, 1062), the petitioner's lack of legal knowledge (*Rasberry v. Garcia* (9th Cir. 2006) 448 F.3d 1150),

counsel's miscalculation of the statute of limitations (*Frye v. Hickman* (9th Cir. 2001) 273 F.3d 1144), the petitioner's physical and mental disabilities not amounting to incompetence (*Roberts v. Marshall* (9th Cir. 2010) 627 F.3d 768; *Gaston v. Palmer* (9th Cir. 2005) 417 F.3d 1030), or the petitioner's alleged belief his state petition would be treated as timely filed and so entitle him to statutory tolling (*Waldron-Ramsey v. Pacholke* (9th Cir. 2009) 556 F.3d 1008).

3. Fundamental miscarriage of justice [§ 9.13]

In *Lee v. Lampert* (9th Cir. 2011) 653 F.3d 929 (en banc), the Ninth Circuit held the actual innocence excuse of *Schlup v. Delo* (1995) 513 U.S. 298 applies to failure to comply with the AEDPA[26] statute of limitations. (Cf. *Majoy v. Roe* (9th Cir. 2002) 296 F.3d 770, 776-778 [considered but did not reach a conclusion on whether *Schlup* excuses a violation of the AEDPA statute of limitations].)[27] The *Schlup* doctrine creates a "gateway" into federal court, allowing a federal court to consider otherwise procedurally barred claims if the petitioner can show "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." (*Schlup,* at p. 327.) (See § 9.55, *post,* for a further discussion of this principle.)

The *Lee v. Lampert* court noted that the Sixth, Tenth, and Eleventh Circuits had reached the same conclusion, while the First, Fifth, Seventh, and Eighth had largely rejected it. The United States Supreme Court has granted certiorari in *McQuiggin v. Perkins* (Docket No. 12-126)[28] to resolve the conflict as to whether actual innocence excuses failure to meet the diligence and extraordinary circumstances requirements of equitable tolling.

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[26]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[27]The *Lee v. Lampert* opinion notes decisions on this matter in other circuits. No actual innocence gateway for statute of limitations: *Escamilla v. Jungwirth* (7th Cir. 2005) 426 F.3d 868, 871-872; *David v. Hall* (1st Cir. 2003) 318 F.3d 343, 347; *Cousin v. Lensing* (5th Cir. 2002) 310 F.3d 843, 849; *Flanders v. Graves* (8th Cir. 2002) 299 F.3d 974, 976-978. Contra: *Souter v. Jones* (6th Cir.2005) 395 F.3d 577, 585.

[28]The lower court decision was *Perkins v. McQuiggin* (6th Cir. 2012) 670 F.3d 665.

D. Assertion of Statute of Limitations by State [§ 9.14]

A statute of limitations defense is not jurisdictional and may be waived. (*Holland v. Florida* (2010) ___U.S.___ [130 S.Ct. 2549].) An appellate court abuses its discretion by using a timeliness bar when the state is aware of a limitations defense and intelligently chooses not to rely on it in the court of first instance; in the absence of exceptional circumstances, a court is not at liberty to bypass, override, or excuse a deliberate waiver of a limitations defense. (*Wood v. Milyard* (2012) ___ U.S. ___ [132 S.Ct. 1826]; see also *Nardi v. Stewart* (9th Cir. 2004) 354 F.3d 1134, 1135-1136, 1141-1142 [statute of limitations is affirmative defense; state waived it by failing to assert it, although expressly invited to do so in court's order to file answer]; see *Day v. McDonough* (2006) 547 U.S. 198, 202 ["we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense" (dictum)].) However, a federal district court has discretion sua sponte to dismiss a petition for untimeliness, even if the state has not asserted the statute of limitations as a defense, if the state's failure is evidently due to an inadvertent miscalculation of dates. (*Id*. at p. 209.)

The state must assert the defense in its first responsive pleading, meaning its answer to the petition, not preliminary pleadings. (*Randle v. Crawford* (9th Cir. 2009) 578 F.3d 1177, 1182.)

IV. GROUNDS FOR FEDERAL HABEAS CORPUS RELIEF [§ 9.15]

AEDPA[29] limits the grounds for federal habeas corpus relief for persons convicted in a state court. Title 28 United States Code section 2254(d) provides relief can be granted only if the state decision was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts. Section 2254(e) establishes a presumption that a state factual determination was correct, rebuttable only by clear and convincing evidence.

A. General Standards for Reviewing State Court Decision [§ 9.16]

As the Supreme Court has repeatedly stated, AEDPA "dictates a highly deferential standard for evaluating state-court rulings, . . . which demands that state-court decisions be given the benefit of the doubt." (*Bell v. Cone* (2005) 543 U.S. 447, 455 (*per curiam*), internal quotation marks omitted; *Williams v. Taylor* (2000) 529 U.S. 362, 403; *Woodford*

[29]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

v. Viscotti (2002) 537 U.S. 19, 24 (*per curiam*); *Lindh v. Murphy* (1997) 521 U.S. 320, 333, fn. 7.)

This means the state court decision is presumed to be valid. It can be overturned only under exacting standards that give the benefit of the doubt to the decision in terms of interpreting its grounds and reviewing its conclusions of law and fact. As to matters of *law*, these standards require that the state court decision on the applicable law have been both wrong and unreasonable in light of clearly established federal law, as determined by the Supreme Court. (28 U.S.C. § 2254(d)(1).) As to matters of *fact*, the state decision must have been unreasonable (28 U.S.C. § 2254(d)(2)) and rebutted by clear and convincing evidence (28 U.S.C. § 2254(e)).[30]

1. State decision to be reviewed [§ 9.17]

In applying AEDPA,[31] the federal courts examine the state court's last reasoned decision, such as an opinion of the California Supreme Court or Court of Appeal, not simple orders such as a "postcard denial" of a petition for review by the Supreme Court. (*Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803; *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1052, fn. 7.) See § 9.63, *post*, for a fuller discussion of this matter.

2. Deference to state decisions on matters of *law* [§ 9.18]

AEDPA calls for federal courts to defer to state court decisions on matters of federal law except under tightly restricted conditions. (*Bell v. Cone* (2005) 543 U.S. 447, 455 (*per curiam*).)

a. AEDPA standards for relief [§ 9.19]

Ordinarily a federal court may grant relief only if the state court decision on the applicable law is both *wrong* and *unreasonable* in light of clearly established federal law, as determined by the Supreme Court. (28 U.S.C. § 2254(d)(1).) § 9.24 et seq., *post*, analyzes this provision in detail.

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[30]The clear and convincing evidence standard applies only to the proof needed to rebut a state finding of fact. It does not apply to the showing needed to prove unreasonableness. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 341.)

[31]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

b. Exceptions to AEDPA standards [§ 9.20]

AEDPA's highly deferential standard of review does not apply under all circumstances. For it to apply, the federal claim must be (1) adjudicated (2) on the merits (3) in a state proceeding (4) that resulted in a decision. (*Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1089.)

When it is clear that a state court has not reached the merits of a properly raised issue, there is no state decision to defer to. The federal court must decide the issue de novo. (*Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1167; see *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028 [state court never fulfilled affirmative duty to determine whether defendant had established purposeful discrimination in jury selection; federal court must conduct analysis de novo, rather than remanding for state court to do so]; *Frantz v. Hazey* (9th Cir. 2008) 513 F.3d 1002 [state decision on prejudice invalid as "contrary to" established federal law because failed to apply reversible per se standard; de novo federal review on issue of whether there was constitutional error, because state never decided that question]; *Medley v. Runnels* (9th Cir. 2007) 506 F.3d 857, 863, fn. 3.)

If the state decision was on the merits but without stated reasons or analysis (as often happens in a *Wende*[32] situation), AEDPA still applies. (*Harrington v. Richter* (2011) ___ U.S. ___ [131 S.Ct. 770].) In such a situation the Ninth Circuit has used a "relaxed" deference standard:

> [A]lthough we cannot undertake our review by analyzing the basis for the state court's decision, we can view it through the "objectively reasonable" lens ground by *Williams* [*v. Taylor* (2000) 529 U.S. 362] . . . . Federal habeas review is not *de novo* when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law . . . . Only by that examination may we determine whether the state court's decision was objectively reasonable.

(*Delgado v. Lewis* (9th Cir. 2000) 223 F.3d 976, 982; see also *Medley v. Runnels* (9th Cir. 2007) 506 F.3d 857, 863, fn. 3; *Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1167 ["although we independently review the record, we still defer to the state court's ultimate decision"]; see *Bell v. Jarvis* (4th Cir. 2000) 236 F.3d 149, 158-163; cf. *Ferguson v. Culliver* (11th Cir. 2008) 527 F.3d 1144 [for federal court to review finding of fact

[32] *People v. Wende* (1979) 25 Cal.3d 436 (no-merit briefs).

deferentially, it must have adequate record of *trial*; state appellate court decision will not suffice].)

Interpretation of ambiguous or unexplained state decisions in the context of procedural default issues is treated in detail in § 9.57 et seq., *post*.

c. Interpretation of state decision [§ 9.21]

The state court decision must be given the benefit of the doubt. If it can reasonably be interpreted so as to uphold it, the federal court must do so. In *Bell v. Cone* (2005) 543 U.S. 447 (*per curiam*), the federal circuit court found the state court had failed to apply the state court's own earlier decision narrowing the meaning of a capital aggravating factor that, without the narrowing interpretation, was unconstitutionally vague. This ruling was based on the lack of explicit reference in the state's opinion to its earlier decision. The Supreme Court held the circuit court had failed to give sufficient deference to the state court's conclusions:

> We do not think that a federal court can presume so lightly that a state court failed to apply its own law . . . . Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.

(*Id.* at 455; *Holland v. Jackson* (2004) 542 U.S. 649, 655 (*per curiam*); *Woodford v. Visciotti* (2002) 537 U.S. 19, 24 ["readiness to attribute error is inconsistent with the presumption that state courts know and follow the law"].)

d. Meaning of state law [§ 9.22]

Deference tends to be absolute when it comes to interpretation of *state* law. (*Bradshaw v. Richey* (2005) 546 U.S. 74.) Indeed, the state court's interpretation is binding on a federal court sitting in habeas corpus. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67-68; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 691; *Oxborrow v. Eikenberry* (9th Cir. 1989) 877 F.2d 1395, 1399.)[33]

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[33]There are a very few exceptions. "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' (*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). See *Ward v. Love County*, 253 U.S. 17 (1920); *Terre Haute & I.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579 (1904)." (*Mullaney v. Wilbur*, at p. 691, fn. 11; see also *Bush v. Gore* (2000) 531 U.S. 98, 112-115 (conc. opinion. of Rehnquist, C.J.).)

3. Deference to state decisions on matters of *fact* [§ 9.23]

The AEDPA standards for federal habeas corpus relief require considerable federal deference to state court decisions:[34]

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, 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 . . . .

(28 U.S.C. § 2254(e)(1).)

State court findings of fact are to be presumed correct unless the petitioner shows the findings were unreasonable and rebuts the presumption with clear and convincing evidence. (28 U.S.C. § 2554(d)(2), (e)(1); *Pollard v. Galaza* (9th Cir. 2002) 290 F.3d 1030, 1033.) The clear and convincing evidence standard applies only to the proof needed to rebut a state finding of fact. It does not apply to the showing needed to prove unreasonableness. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 341.)

For the federal court to review a finding of fact using the deferential standard of AEDPA, it must have an adequate record of the trial. A state appellate court decision will not suffice. (*Ferguson v. Culliver* (11th Cir. 2008) 527 F.3d 1144.)

In the absence of any factual determinations, there is no finding entitled to deference. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 363.) Also, deficiencies in the state court fact-finding process or misapprehension of material facts or correct legal standards may constitute an unreasonable determination of facts. (*Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1000-1001.) This subject is discussed further in § 9.35 et seq., *post*.)

B. Grounds for Relief Enumerated in AEDPA [§ 9.24]

AEDPA[35] limits the substantive grounds for granting federal habeas corpus relief to a person convicted by a state court decision. Section 2254 provides:

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[34]Pretrial cases are not subject to the deferential standard of review required by 28 United States Code section 2254 for post-conviction cases. (*Stow v. Murashige* (9th Cir. 2004) 389 F.3d 880 [de novo rather review under U.S.C. § 2241 applies in pretrial habeas corpus to bar state proceeding as violation of double jeopardy].)

[35]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The United States Supreme Court explained these grounds in *Williams v. Taylor* (2000) 529 U.S. 362. For AEDPA purposes, Justice O'Connor's concurring opinion, Part II, is the opinion of the court. (See also *Bell v. Cone* (2002) 535 U.S. 685.)

1. "Federal law" [§ 9.25]

Claims based on the federal Constitution generally are cognizable on federal habeas corpus. (*Wilson v. Corcoran* (2010) ___ U.S. ___ [131 S.Ct. 13] (*per curiam*) [federal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law].) An exception is search and seizure under the Fourth Amendment, assuming "the State has provided an opportunity for full and fair litigation" of the claims. (*Stone v. Powell* (1976) 428 U.S. 465, 494; cf. *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375-377 [*Stone v. Powell* does not bar review of ineffective assistance of counsel claim based on counsel's failure to file timely suppression motion].)

2. "Clearly established" federal law [§ 9.26]

The phrase "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)) means (1) holdings, as opposed to dicta, (2) by the United States Supreme Court, not lower federal courts, (3) that are well developed and not in substantial conflict with other Supreme Court precedent and (4) that were established at the time of the state court decision being challenged. (*Williams v. Taylor* (2000) 529 U.S. 362, 412.)

a. Holdings [§ 9.27]

A federal law can be "established" only by *holdings* of the Supreme Court, not dicta. (*Williams v. Taylor* (2000) 529 U.S. 362, 412; see 28 U.S.C. § 2254(d)(1).) Holdings consist of "the final disposition of a case and the preceding determinations 'necessary to that result.'" (*Tyler v. Cain* (2001) 533 U.S. 656, 663, fn. 4, citing *Seminole Tribe of Fla. v. Florida* (1996) 517 U.S. 44, 67.)

b. Decisions by United States Supreme Court [§ 9.28]

Given the requirement that the federal law be "determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)), the only judicial precedents that can determine federal law under AEDPA[36] are decisions by the United States Supreme Court. Constitutional jurisprudence developed by lower federal courts but not adopted by the Supreme Court is not binding precedent under section 2254(d). (*Kane v. Espitia* (2005) 546 U.S. 9 (*per curiam*) [circuit court split on whether *Faretta v. California* (1975) 422 U.S. 806 requires pro per prisoner access to legal materials cannot be resolved in federal habeas corpus, when neither *Faretta* itself nor any other Supreme Court decision has addressed the topic]; *Boyd v. Newland* (9th Cir. 2006) 455 F.3d 897, 909-910 [bar on use of juvenile adjudication as prior not clearly established under Supreme Court precedents]; *Duhaime v. DuCharme* (9th Cir. 2000) 200 F.3d 597, 600-601; see also *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 264.)

However, circuit court precedent can be a guide in interpreting Supreme Court law and in determining whether a rule is clearly established. (*Duhaime v. DuCharme* (9th Cir. 2000) 200 F.3d 597, 600.)

c. Well developed and unconflicting precedents [§ 9.29]

Most cases interpreting the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)) focus on whether a particular rule is "clearly established."

The Supreme Court in *Williams v. Taylor* (2000) 529 U.S. 362, 412, suggested that, at the least, "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)." The court was referring to *Teague v. Lane* (1989) 489 U.S. 288, 301, which, in laying down principles for applications of "new rules of law," pointed out that a decision dictated by, and not changing or extending, an

[36]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

established rule is not "new law" at all.[37] (See also *Saffle v. Parks* (1990) 494 U.S. 484, 487-488.)

"AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" (*Panetti v. Quarterman* (2007) 551 U.S. 930, 953.)[38] However, if there is no Supreme Court precedent that dictates a particular result, the state court's decision usually cannot be contrary to or an unreasonable application of clearly established federal law. (*Kane v. Espitia* (2005) 546 U.S. 9 (*per curiam*) [issue whether *Faretta v. California* (1975) 422 U.S. 806, requires pro per prisoner access to legal materials cannot be basis for federal habeas corpus relief when neither *Faretta* itself nor any other Supreme Court decision has addressed the topic]; *Mitchell v. Esparza* (2003) 540 U.S. 12, 17 [federal court erred in saying state court may not apply harmless error test for lack of jury instruction or finding on whether defendant was the "principal offender" provision of capital statute, when crime was committed by only one person; a "federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous"]; *Murdoch v. Castro* (9th Cir. 2010) 609 F.3d 983 (en banc) [because supremacy of 6th Amend. over attorney-client privilege is not clearly established by Supreme Court holding, petitioner not entitled to federal habeas relief]; *Moses v. Payne* (9th Cir. 2009) 555 F.3d 742 [whether court's exercise of discretion to exclude expert testimony violates federal right to present relevant evidence is not clearly established]; *Boyd v. Newland* (9th Cir. 2006) 455 F.3d 897, 909-910 [bar on use of juvenile adjudication as prior not clearly established under Supreme Court precedents]; *Brewer v. Hall* (9th Cir. 2004) 378 F.3d 952, 955-956; see *Lockyer v. Andrade* (2003) 538 U.S. 63, 71-73 [divergent Supreme Court decisions on cruel and unusual punishment].)

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[37] "Old law" under *Teague* and "clearly established law" under AEDPA are related concepts. (See *Smith v. Robbins* (2000) 528 U.S. 259, 302, dis. opn. of Souter, J. [when applicable standards have already been articulated, habeas corpus petitioner is not seeking "new" rule; "the same point, of course, would answer any objection under the AEDPA'"]; *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624 [when result in *Cunningham v. California* (2007) 549 U.S. 270 was dictated by precedent under *Teague*, state court decision was contrary to clearly established law under AEDPA]; *Schardt v. Payne* (9th Cir. 2005) 414 F.3d 1025, 1036-1037 [stating inverse of *Williams v. Taylor*: "if a case creates a new rule under *Teague*, then it is not a clearly established rule under 28 U.S.C. § 2254(d)(1)"]; *Vasquez v. Strack* (2d Cir. 2000) 228 F.3d 143, 149-150 [same conclusion as *Schardt*; noting *Teague* establishes "some guidance" as to whether rule is clearly established].)

[38] Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

d. Established at the time of the state court decision [§ 9.29A]

For a state court decision to be an unreasonable application of federal law, as interpreted by *Williams v. Taylor* (2000) 529 U.S. 362, the law must have been in existence at the time of the state court decision. (*Id*, at pp. 390, 412; *Greene v. Fisher* (2011) ___ U.S. ___ [132 S.Ct. 38] ["AEDPA's backward-looking language requires an examination of the state-court decision at the time it was made"]; see *Ponce v. Felker* (9th Cir. 2010) 606 F.3d 596, 604-606 [when cases were in conflict at time of state decision and issue was not resolved until later, in *Giles v. California* (2008) 554 U.S. 353, state decision not unreasonable application of clearly established federal law].) The *Williams v. Taylor* decision left uncertainty as to the time of the state court decision, variously phrasing it: "as of the time of the relevant state-court decision" (*id*. at p. 412, O'Connor, J., for the court) and when the "state-court conviction became final" (*id*. at p. 390, Stevens, J., for the court). (Ambiguity noted but not resolved in *Smith v. Spisak* (2010) 558 U.S. 139.)

3. "Contrary to" federal law [§ 9.30]

Under AEDPA,[39] federal habeas corpus relief may be granted if a state court decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." As *Williams v. Taylor* (2000) 529 U.S. 362, 412-413, explained:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

A state court decision is contrary to federal law when the state court applies a rule that contradicts a legal test established by the United States Supreme Court or adds, deletes, or alters a factor in such a test. (*Early v. Packer* (2002) 537 U.S. 3, 8; *Sessoms v. Runnels* (9th Cir. 2011) 650 F.3d 1276; *Frantz v. Hazey* (9th Cir. 2008) 513 F.3d 1002; *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1051, fn. 5.) A decision is also contrary to federal law if the state court fails to apply controlling authority from the United States Supreme Court or to use the correct analysis required by this authority. (*Butler v. Curry* (9th Cir. 2008) 528 F.3d 624 [when result in *Cunningham v. California* (2007) 549 U.S. 270 was dictated by precedent, state court decision was contrary to clearly established

[39]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

law]; *Van Lynn v. Farmon* (9th Cir. 2003) 347 F.3d 735, 737, 741-742 [state court used test for allowing self-representation explicitly rejected by Supreme Court];[40] *Avila v. Galaza* (9th Cir. 2002) 297 F.3d 911, 918 [state referee did not apply any law, much less *Strickland*'s[41] two-prong test, in deciding ineffective assistance of counsel petition].)

"AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" (*Panetti v. Quarterman* (2007) 551 U.S. 930, 953.) However, if Supreme Court precedents have reached different results depending on the fact situation, and the state case falls in the "twilight zone" between the Supreme Court cases, a state court decision cannot be said to have "'confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] at a result different from our precedent.'" (*Lockyer v. Andrade* (2003) 538 U.S. 63, 74, quoting *Williams v. Taylor* (2000) 529 U.S. 362, 406.)

In determining whether the state decision was contrary to federal law, the federal court must give the state court the benefit of the doubt as to possibly ambiguous language in its decision. (See *McDaniel v. Brown* (2010) 558 U.S. 120, fn. 4 (*per curiam*) [use of term "reasonable jury" instead of "rational jury" in state court decision of no moment]; *Bell v. Cone* (2005) 543 U.S. 447, 455 (*per curiam*); *Holland v. Jackson* (2004) 542 U.S. 649, 655 (*per curiam*) ["'readiness to attribute error is inconsistent with the presumption that state courts know and follow the law'"]; see § 9.21, *ante*.)

4. "Unreasonable application" of federal law [§ 9.31]

The AEDPA[42] grounds for federal habeas corpus relief include a state court decision that "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." (28 U.S.C. § 2254(d)(1).) *Williams v. Taylor* (2000) 529 U.S. 362, 413, explained:

> Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal

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[40]In *Van Lynn v. Farmon, supra,* 347 F.3d 735, 737, the state court used an incorrect legal test in denying right to self-representation – namely, defendant's lack of legal skills. The federal court rejected the argument that the motion could appropriately have been denied if the state court had relied on the fact it was made in mid-trial.

[41]*Strickland v. Washington* (1984) 466 U.S. 668.

[42]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

(See also *Berghuis v. Thompkins* (2010)___ U.S. ___ [130 S.Ct. 2250]; *Renico v. Lett* (2010) ___ U.S. ___ [130 S.Ct. 1855]; *Wood v. Allen* (2010) 558 U.S. 290 [130 S.Ct. 841, 175 L.Ed.2d 738]; *Waddington v. Sarausad* (2009) 555 U.S. 179; *Wiggins v. Smith* (2003) 539 U.S. 510; *Sessoms v. Runnels* (9th Cir. 2011) 650 F.3d 1276, 1286-1289.)

A state court's decision must be assessed for reasonableness only in light of the record properly before the state court, not external evidence outside the record. (*Cullen v. Pinholster* (2011) ___ U.S. ___ [131 S.Ct. 1388, 179 L.Ed.2d 557]; *Holland v. Jackson* (2004) 542 U.S. 649, 655; see also *McDaniel v. Brown* (2010)558 U.S. 120 (*per curiam*); cf. *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965 [new evidence may be reason to stay federal proceedings to give petitioner opportunity to return to state court].)

a. "Objectively unreasonable" test [§ 9.32]

The test under the "unreasonable application" provision (28 U.S.C. § 2254(d)(1)) is whether the state court's decision was objectively unreasonable. "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." (*Williams v. Taylor* (2000) 529 U.S. 362, 410, italics original; see also *Harrington v. Richter* (2011) ___ U.S. ___ [131 S.Ct. 770][43]; see *Rompilla v. Beard* (2005) 545 U.S. 374, 389 [objectively unreasonable not to find ineffective assistance of capital counsel in failure to review court file on key prior conviction]; cf. *Edwards v. LaMarque* (9th Cir. 2007) 475 F.3d 1121.) Thus, even if the federal court disagrees with the state court's conclusion and determines it applied federal law incorrectly, relief is appropriate only if the state court decision was also objectively unreasonable. (*Wood v. Allen* (2010) 558 U.S. 290; *Rice v. Collins* (2006) 546 U.S. 333; *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-76; *Penry v. Johnson* (2001) 532 U.S. 782, 793; see also *Premo v. Moore* (2011) ___ U.S. ___ [131 S.Ct. 733] [with ineffective assistance of counsel claim, deference is "double": deference to trial counsel's judgment and then to state court's judgment about trial counsel.)

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[43]Often federal habeas corpus claims involve ineffective assistance of counsel issues. *Harrington* cautions that the question for the federal court under § 2254(d) is not whether counsel acted unreasonably within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668: "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." (131 S.Ct. at p. 788.)

b. Application of precedent to new factual situation [§ 9.33]

An unreasonable application of federal law (28 U.S.C. § 2254(d)(1)) occurs when the state court fails to apply established Supreme Court authority to a new set of facts within the logical scope of the authority, if the factual differences do not weaken the force of the authority. (*Weighall v. Middle* (9th Cir. 2000) 215 F.3d 1058, 1062, fn. 7.) It includes the unreasonable refusal to apply the governing legal principle to a context in which the principle unquestionably should have controlled. (*Ramdass v. Angelone* (2000) 530 U.S. 156, 166.)

An application of Supreme Court precedent to new facts, even if incorrect, does not establish grounds for habeas corpus relief when it is not unreasonable. (*Brown v. Payton* (2005) 544 U.S. 133, 143, 147; see also *Smith v. Spisak* (2010) 558 U.S. 139.) In *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664, the court wrote:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

c. Unresolved legal issues [§ 9.34]

In determining whether the state court decision involved an unreasonable application of federal law (28 U.S.C. § 2254(d)(1)), a federal court may not go beyond Supreme Court precedent and resolve issues not previously decided, or resolve differences among Supreme Court precedents if the state court reasonably applied those precedents. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 70-71; *Alvarado v. Hill* (9th Cir. 2001) 252 F.3d 1066, 1068-1069.)

5. Unreasonable determination of facts [§ 9.35]

AEDPA[44] permits habeas corpus relief if the state court decision was based on "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (28 U.S.C. § 2254(d)(2).)

a. Presumption of correctness [§ 9.36]

The "unreasonable determination of the facts" provision of section 2254(d)(2) is subject to the general rule of deference to state court findings and a presumption of their correctness:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, 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.

(28 U.S.C. § 2254(e)(1); see § 9.23, *ante*.)[45]

The Supreme Court explained this provision in *Miller-El v. Cockrell* (2003) 537 U.S. 322, 340:

> Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2); see also *Williams* [*v. Taylor* (2000) 529 U.S. 362], 399 (opinion of O'Connor, J.).

Thus, for example, on a sufficiency of the evidence claim, a federal court must determine whether the state court could reasonably have found sufficient evidence upon viewing the record in the light most favorable to the prosecution. (*McDaniel v. Brown* (2010) 558 U.S. 120 (*per curiam*).)

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[44]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[45]The clear and convincing evidence standard applies only to the proof needed to rebut a state finding of fact. It does not apply to the showing needed to prove unreasonableness. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 341.)

Deference to the state means relief under section 2254(d)(1) may not be ordered on the basis of evidence developed at a federal habeas corpus hearing if the evidence was not before the state court that adjudicated the claim on the merits. (*Cullen v. Pinholster* (2011) 558 U.S. 120; cf. *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965 [new evidence may be reason to stay federal proceedings to give petitioner opportunity to return to state court] .)

b. Unreasonableness [§ 9.37]

The presumption that state court findings of fact are correct is not unlimited. As the Supreme Court cautioned:

> Even in the context of federal habeas, deference 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* (2003) 537 U.S. 322, 340.)

An unreasonable determination of fact may be found when the state court failed to make a necessary finding, used the wrong legal standard in making findings, mistook or overlooked critical facts, or failed to provide an adequate opportunity for presentation. (*Ali v. Hickman* (9th Cir. 2009) 571 F.3d 902; Taylor *v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1000-1001 [state court disregarded uncontradicted evidence supporting petitioner].)

c. Absence of factual showing in state court [§ 9.38]

When the factual basis for a claim was not developed in state court, the federal court ordinarily cannot make its own findings of fact. Section 2254(e)(2) of Title 28 United States Code provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(See *Cullen v. Pinholster* (2011) ___ U.S. ___ [131 S.Ct. 1388, 179 L.Ed.2d 557]; *Holland v. Jackson* (2004) 542 U.S. 649, 652-653; *Breard v. Greene* (1998) 523 U.S. 371, 376-377 (*per curiam*); cf. *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965 [new evidence may be reason to stay federal proceedings to give petitioner opportunity to return to state court].)

Failure to develop the factual basis of a claim is not established unless there is lack of diligence or a greater fault on the part of the prisoner or his counsel. (*Williams v. Taylor* (2000) 529 U.S. 420, 431-437 [rejecting state's "no fault" interpretation]; see *Schad v. Ryan* (9th Cir. 2009, amended 2010) 606 F.3d 1022 [proper standard for due diligence as prerequisite for evidentiary hearing is reasonableness of efforts to develop record in state court, not lack of success in developing record].)

Exceptions to the limitation of section 2254(e)(2) include new and retroactively applicable law (see *Reyes-Requena v. United States* (5th Cir.2001) 243 F.3d 893, 904-906), newly discovered evidence (see *Noel v. Norris* (E.D. Ark. 2002) 194 F.Supp.2d 893, 915), or a claim that the facts prove defendant would have been acquitted if the constitutional error had not occurred (see *Griffin v. Johnson* (9th Cir. 2003) 350 F.3d 956, 966).

C. Prejudicial Error Standard [§ 9.39]

1. AEDPA standards and *Brecht* test [§ § 9.40-9.42[46]]

Before AEDPA,[47] the federal habeas corpus test for prejudice was that of *Brecht v. Abrahamson* (1993) 507 U.S. 619, 623, 637: whether the federal constitutional error had a "substantial and injurious effect" on the jury's verdict – a standard less onerous for the state than *Chapman*, the test used on direct appeal.[48] Under the *Brecht* test, if the habeas

[46]Original § § 9.40, 9.41, and 9.42 have been consolidated.

[47]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[48]*Chapman v. California* (1967) 386 U.S. 18, 24 (federal constitutional error is reversible unless the state has shown beyond a reasonable doubt that it did not affect the

corpus judge has a "grave doubt" as to whether the error had a substantial and injurious effect on the outcome, the error is prejudicial. (*O'Neal v. McAninch* (1995) 513 U.S. 432, 435 ["grave doubt" means the matter is so evenly balanced that in the judge's mind it is in "virtual equipoise" as to prejudice].)

In *Mitchell v. Esparza* (2003) 540 U.S. 12, the court held that, under AEDPA, a federal court must not upset a state court's application of the prejudicial error standard unless the state court's decision was both wrong and unreasonable. "We may not grant respondent's habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the Ohio Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner." (*Id*. at p. 18.)

In *Fry v. Pliler* (2007) 551 U.S. 112, the Supreme Court analyzed the interplay between the *Brecht* analysis and AEDPA and resolved conflicting interpretations among the federal circuits as to what standard applies when the state court did not engage in a prejudicial error analysis.[49] The state court found no error and said, vaguely, "no possible prejudice" could have occurred. The lower federal courts determined the state court's finding of no error was objectively unreasonable under AEDPA; they nevertheless denied relief, concluding that, although there was a possibility of prejudice, the *Brecht* test for prejudicial error was not met. The Supreme Court agreed, holding the *Brecht* test "actual prejudice" test was not superseded by AEDPA's "unreasonable application of *Chapman*" test and must be applied. It also found that *Brecht* includes the AEDPA standard and thus "it certainly makes no sense to require formal application of both tests." *Brecht* is the test, regardless of whether the state court engaged in a prejudicial error analysis.

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outcome).

[49]See *Inthavong v. LaMarque* (9th Cir. 2005) 420 F.3d 1055, 1059; *Gutierrez v. McGinnis* (2d Cir. 2004) 389 F.3d 300, 305, footnote 3; *Medina v. Hornung* (9th Cir. 2004) 386 F.3d 872, 877; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 976-977.

2. Prejudicial per se error [§ 9.43]

Certain kinds of errors are not susceptible to harmless error analysis at all. Structural error is an example.[50] Failure to exercise discretion in making some decisions may also fall into that category.[51] (*Williams v. Roe* (9th Cir. 2005) 421 F.3d 883, 887-888 [when ex post facto use of wrong sentencing standard may have eliminated opportunity for court to use discretion to impose lesser sentence, error requires habeas corpus relief without determination of prejudice]; see § 4.51 of chapter 4, "On the Hunt: Issue Spotting and Selection.")

3. Cumulative error [§ 9.43A]

Cumulative error may be grounds for federal habeas corpus relief, even when any single error would not. (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-929, citing *Chambers v. Mississippi* (1973) 410 U.S. 284.)

V. PROPER PRESENTATION TO STATE COURTS: EXHAUSTION AND PROCEDURAL DEFAULT [§ 9.44]

This section discusses two separate but closely related doctrines affecting the availability of federal habeas corpus – exhaustion of state remedies and procedural default. Broadly speaking, these doctrines require a defendant seeking federal habeas corpus relief first to take advantage of available state remedies and to give the state courts a fair opportunity to consider the federal issue. Both are based on the principles of comity and federalism and are intended to ensure the federal courts respect the authority of the state courts and their interest "in correcting their own mistakes." (*Coleman v. Thompson* (1991) 501 U.S. 722, 732.[52])

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[50]See *Hedgpeth v. Pulido* (2008) 555 U.S. 57 [instructing on improper theory of criminal liability is not structural error; "reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict'"].)

[51]*Arizona v. Fulminante* (1991) 499 U.S. 279, on suppressible confessions, does not create a per se rule of prejudice. (*Premo v. Moore* (2011) ___ U.S. ___ [131 S.Ct. 733].)

[52]Similar principles prevent federal intervention in pretrial claims such as speedy trial. (*Carden v. Montana* (9th Cir. 1980) 626 F.2d 82.)

Both requirements predate AEDPA.[53] (See e.g., *Wainwright v. Sykes* (1977) 433 U.S. 72, 80; *Francis v. Henderson* (1976) 425 U.S. 536, 538-539; *Ex parte Royall* (1886) 117 U.S. 241, 250-253.) Before AEDPA the Supreme Court had mandated the exhaustion doctrine be strictly applied. (*Rose v. Lundy* (1982) 455 U.S. 509, 518, 520.) In 1948 and again with the enactment of AEDPA, Congress codified the exhaustion doctrine in Title 28 United States Code section 2254(b) and (c):

> (b)(1) 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 unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

A. Some Definitions [§ 9.45]

The terms "exhaustion" and "procedural default" are often confused.

- Exhaustion: Technically and historically, the exhaustion doctrine looks at the present situation and asks whether there are available state remedies *at the time of the federal petition.* If the defendant currently has an available state mechanism to raise claims, a federal court will abstain from intervening.[54] (*Engle v. Isaac* (1982) 456 U.S. 107, 125, fn. 28.)

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[53]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[54]Formal exhaustion is not required when recourse to state remedies would be futile; federal courts must assess the likelihood that a state court will provide a hearing on the merits of the claim. (*Harris v. Reed* (1989) 489 U.S. 255, 263, fn. 9; *id.* at pp. 268-269

- Procedural default: This doctrine looks at the past and asks whether the defendant *waived* the federal claims by failing to assert them properly in the state court and thus give the court a fair opportunity to decide them. If the defendant did not seek a state remedy when it was available or failed to observe state procedural requirements in seeking a remedy, the issue may have been waived, or procedurally defaulted, for federal purposes. (See 0generally *Coleman v. Thompson* (1991) 501 U.S. 722, 732.)

Despite these distinctions, courts often merge the concepts linguistically under "exhaustion": they ask whether the petitioner has "exhausted" state remedies, when the real issue is whether and in what manner the defendant asserted the claim in the state courts. In the exchange between the majority and dissent in *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, for example, the dissent took the majority opinion to task for saying that, in failing to petition the state supreme court, the defendant had not exhausted state remedies, although he indisputably had no current state remedies; the majority should have analyzed the issue as one of procedural default. (*Id.* at pp. 850-856 (dis. opinion. of Stevens, J.).) The *O'Sullivan* majority opinion agreed with the dissent's general description of the terms, then unrepentantly added: "[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." (*Id*. at p. 848, italics original.)

In death penalty litigation, which typically involves both state and federal habeas corpus proceedings, exhaustion in its "pure" sense of current availability of state remedies is usually a key issue. In many noncapital post-appeal cases, however, federal habeas corpus is sought on issues reviewable on *appeal*. In such cases, the lack of presently available state remedies is uncontested,[55] and any "exhaustion" question is whether the defendant properly presented the issue to the state courts.

In many cases, the semantic label is immaterial, as long as the issue is analyzed correctly under applicable law. For convenience and in recognition of the terminology

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(conc. opn. of O'Connor, J.); *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 974 [state had already denied a number of defendant's petitions].)

[55]State habeas corpus is considered "unavailable" if the federal issue was decided on direct appeal. (*Brown v. Allen* (1953) 344 U.S. 443, 447.) That is a realistic presumption in California in light of the *Waltreus-Dixon* doctrine discussed in § 8.11 of chapter 8, "Putting on the Writs: California Extraordinary Remedies."(*In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Dixon* (1953) 41 Cal.2d 756, 759; see also *In re Harris* (1993) 5 Cal.4th 813, 829-841.)

used in many cases – and with the preceding discussion as a caveat – this analysis frequently refers to "exhaustion" in the looser meaning of fully and properly presenting an issue to the state courts in order to preserve it for federal review.

B. Independent and Adequate State Grounds [§ 9.46]

The procedural default doctrine is a corollary of the general rule that federal courts have no jurisdiction over a state case if the state court decision rests on adequate and independent state grounds:

> [A federal court] 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.

(*Coleman v. Thompson* (1991) 501 U.S. 722, 729; see also *Florida v. Powell* (2010) 559 U.S. 50; *Harris v. Reed* (1989) 489 U.S. 255, 260-261; *Calderon v. United States District Court* (9th Cir. 1996) 96 F.3d 1126, 1129.)[56] A defendant who has failed to obtain relief in state court on a federal issue because he did not follow state procedural requirements has been denied relief under *state* law and is considered to have waived the issue for purposes of federal relief.[57] (*Gray v. Netherland* (1996) 518 U.S. 152, 161-162.) For example, rejection by a state high court on grounds of waiver, untimeliness, or lack of due diligence is an independent and adequate state ground that will preclude federal habeas relief. (*Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 580.)

Federal review is not barred every time a state court invokes a procedural rule. In *Cone v. Bell* (2009) 556 U.S. 449, for example, the state court erroneously denied post-conviction relief on the reason the issue had been already been raised and decided, when in fact it had not; the Supreme Court declined to find this ruling a barrier to federal habeas corpus jurisdiction. In addition, waiver was not a bar because the state court had not found

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[56]The independent and adequate state grounds doctrine applies to substantive as well as procedural grounds and to the certiorari jurisdiction of the United States Supreme Court as well as federal habeas corpus. (*Coleman v. Thompson*, at pp. 729-732; *Harris v. Reed*, at pp. 261-262.) The present discussion deals with procedural default in the habeas corpus context.

[57]If a defendant has failed to raise the issue in the state courts at all, there is no state decision, and the federal courts look at state law to determine whether the issue is procedurally defaulted. (*Harris v. Reed* (1989) 489 U.S. 255, 269-270 (conc. opn. of O'Connor, J.).)

the issue waived: "we have no . . . duty to apply state procedural bars where state courts have themselves declined to do so." (*Id*. at p. 1782.)

1. Independence of state ground [§ 9.47]

To be "independent" of federal law, a state procedural rule must stand on state law only. If its application requires interpretation of federal law, the state rule is interwoven with federal law, and a state court's invocation of the rule does not bar federal review. An example of an independent state ground would be a rule on the timeliness of filing petitions. (*Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 581-582; see also *In re Robbins* (1998) 18 Cal.4th 770, 811-812.) An example of a state ground intertwined with federal law would be a procedural rule that failure to object waives an error unless it involves a fundamental federal constitutional right. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 74-75; see *Florida v. Powell* (2010) 559 U.S. 50; *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1152; see also *Robbins*, at p. 812, fn. 32.)

2. Adequacy of state ground [§ 9.48]

For the procedural default doctrine to bar federal relief, the state rule must be consistently applied and must be clear and well established. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 587; *James v. Kentucky* (1984) 466 U.S. 341, 348-349.)

a. Consistently applied and established rule [§ 9.49]

Rules too inconsistently or arbitrarily applied to be adequate include "(1) rules that have been selectively applied to bar the claims of certain litigants . . . and (2) rules that are so unsettled due to ambiguous or changing state authority that applying them to bar a litigant's claim is unfair." (*Scott v. Schriro* (9th Cir.2009) 567 F.3d 573, 580-582; *Wood v. Hall* (9th Cir. 1997) 130 F.3d 373, 377; see *High v. Ignacio* (9th Cir. 2005) 408 F.3d 585, 590 [in absence of authority showing inconsistent application of state rule, federal court must presume rule is adequate]; *Protsman v. Pliler* (S.D. Cal. 2003) 318 F.Supp.2d 1004, 1014 [finding bar to federal habeas corpus when California Supreme Court relied on *Dixon*[58] rule prohibiting writ relief where issue could have been but was not raised on appeal]; cf. *Lambright v. Stewart* (9th Cir. 2001) 241 F.3d 1201, 1203-1204 [ineffective assistance of counsel issue usually not cognizable on appeal because based on off-record facts].)

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[58] *In re Dixon* (1953) 41 Cal.2d 756, 759. See also *In re Waltreus* (1954) 62 Cal.2d 218, 225 (rule prohibiting use of habeas corpus to relitigate issues raised and decided on appeal).

The fact that a rule is flexible or discretionary or that occasional exceptions are made does not necessarily mean it is inadequate to serve as a procedural bar, if the rule is applied in the vast majority of cases. (*Walker v. Martin* (2011) ___ U.S. ___ [131 S.Ct. 1120, 179 L.Ed.2d 62]; *Beard v. Kindler* (2009) 558 U.S. 53; *Dugger v. Adams* (1989) 489 U.S. 401, 410, fn. 6; *Byrd v. Collins* (6th Cir. 2000) 209 F.3d 486, 521.)

California's habeas corpus timeliness rule – providing that a claim substantially delayed without justification may be denied as untimely – is sufficiently well established and consistently applied to qualify as an independent state ground adequate to bar habeas corpus relief in federal court. (*Walker v. Martin* (2011) ___ U.S. ___ [131 S.Ct. 1120, 179 L.Ed.2d 62].)

b. Determination of adequacy [§ 9.50]

To determine whether a rule is firmly and consistently applied, the court may review an array of cases both enforcing and declining to enforce it. (*James v. Kentucky* (1984) 466 U.S. 341, 345-348; *Barr v. City of Columbia* (1964) 378 U.S. 146, 149-150; see also *Powell v. Lambert* (9th Cir. 2004) 357 F.3d 871, 872, 879 [determination of state practice requires examination of unpublished as well as published state cases].) The fact a law is relatively new may suggest it is not yet well-established. (*Collier v. Bayer* (9th Cir. 2005) 408 F.3d 1279, 1284-1286, but see *id*. at p. 1288 et seq. (dis. opinion. of Bea, J.).)

The state has the burden of pleading and ultimately proving the adequacy of an asserted bar to federal review. As *Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 586, explained:

> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so. . . the ultimate burden is the state's.

(See also *Insyxiengmay v. Morgan* (2005) 403 F.3d 657, 666-667 [Washington law as to filing date of petition sent from prison not firmly established].) Codification in a statute or rule creates at least a presumption that a procedural policy is strictly enforced. (*Wenglikowski v. Jones* (E.D. Mich. 2004) 306 F.Supp.2d 688, 698.)

California's habeas corpus timeliness rule – providing that a claim substantially delayed without justification may be denied as untimely – is sufficiently well established

and consistently applied to qualify as an independent state ground adequate to bar habeas corpus relief in federal court. (*Walker v. Martin* (2011) ___ U.S. ___ [131 S.Ct. 1120, 179 L.Ed.2d 62].)

C. Excuse from Procedural Default [§ 9.51]

A defendant may be excused from state procedural default under the equitable doctrine of "cause and prejudice" – good cause for the default and actual prejudice from it – or fundamental miscarriage of justice, such factual innocence or constitutional error in capital sentencing. (*Coleman v. Thompson* (1991) 501 U.S. 722, 752-757; *Murray v. Carrier* (1986) 477 U.S. 478, 496; *Francis v. Henderson* (1976) 425 U.S. 536, 542.)

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

(*Coleman v. Thompson,* at p. 750.)

1. Cause [§ 9.52]

The petitioner must demonstrate that some factor external to the defendant frustrated his ability to comply with state procedural requirements. For the most part, defense counsel's decisions and actions are attributable to the defendant personally, and so the mere fact counsel's choices resulted in the default does not create good cause.

An exception is constitutionally ineffective assistance of counsel. (*Martinez v. Ryan* (2012) ___U.S.___ [132 S.Ct. 1309] [when state law required any ineffective assistance of counsel issue to be reviewed only in collateral proceedings, ineffectiveness of counsel handling those proceedings may constitute cause for a prisoner's procedural default of a claim of ineffectiveness of counsel at trial]; *Maples v. Thomas* (2012) ___ U.S. ___ [132 S.Ct. 912, 927] [abandonment by attorneys during appeal period without petitioner's knowledge was cause excusing procedural default]; *Edwards v. Carpenter* (2000) 529 U.S. 446, 451-452; *Engle v. Isaac* (1982) 456 U.S. 107, 133-134; *Wainwright v. Sykes* (1977) 433 U.S. 72, 91, fn. 14; *Murray v. Carrier* (1986) 477 U.S. 478, 488; see also *Towery v. Ryan* (9th Cir. 2012) 673 F.3d 933 [counsel did not engage in "egregious" professional misconduct or leave petitioner "without any functioning attorney of record"].)

Given the policy of comity underlying the exhaustion rule, ineffective assistance of counsel generally must be presented to the state courts as an independent claim before it may be used as cause for a default. (*Murray v. Carrier* (1986) 477 U.S. 478, 489.) The ineffective assistance claim itself must not be procedurally defaulted. (*Edwards v. Carpenter*, at pp. 452-453.) If there is no right to counsel (as in collateral proceedings), ineffective assistance cannot constitute cause. (*Coleman v. Thompson* (1991) 501 U.S. 722, 755; see also *Smith v. Idaho* (9th Cir. 2004) 392 F.3d 350, 357-358.)

An example of an objective, external factor would be that the factual basis for the claim was not reasonably knowable to counsel. Another would be that the constitutional claim was so novel its arguability was not reasonably foreseeable. (*Reed v. Ross* (1984) 468 U.S. 1, 16.) Others would be actions attributable to the state that interfered with or prevented the defendant's observance of the state procedural rule – such as prosecutorial suppression of evidence (*Banks v. Dretke* (2004) 540 U.S. 668, 694-696; *Strickler v. Greene* (1999) 527 U.S. 263, 283, fn. 24), a prison ban on sending mail (*Dowd v. United States* (1951) 340 U.S. 206, 207), or a stipulation that led petitioner to conclude it was unnecessary to pursue the state procedure (*Robinson v. Ignacio* (9th Cir. 2004) 360 F.3d 1044, 1050-1053). The prisoner's own mental condition cannot serve as cause for a procedural default, if the petitioner remains "able to apply for post-conviction relief to a state court." (*Schneider v. McDaniel* (9th Cir. 2012) 674 F.3d 1144; *Tacho v. Martinez* (9th Cir. 1988) 862 F.2d 1376; *Hughes v. Idaho State Board of Correction* (9th Cir. 1986) 800 F.2d 905.)

2. Prejudice [§ 9.53]

The second prong of the cause-and-prejudice test requires a showing, "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (*Murray v. Carrier* (1986) 477 U.S. 478, 494, italics original.) This burden is "significantly greater" than the plain error test used on direct review. (*Id.* at pp. 493-494; see also *United States v. Frady* (1982) 456 U.S. 152, 166; *Henderson v. Kibbe* (1977) 431 U.S. 145, 154.)

In cases involving prosecutorial suppression of evidence, the test is whether it is "reasonably probable" that a different and more favorable result would have occurred if the suppressed evidence had been disclosed. It asks whether the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Strickler v. Greene* (1999) 527 U.S. 263, 289-290; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 435-436.)

If the cause of procedural default is ineffective assistance of counsel, then the prejudice standard is *Strickland's* – "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *Robinson v. Ignacio* (9th Cir. 2004) 360 F.3d 1044, 1054-1055; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1133.)

3. Fundamental miscarriage of justice [§ 9.54]

A defendant may be excused from procedural default on a showing that a fundamental miscarriage of justice was perpetrated.

a. Actual innocence: *Schlup* gateway [§ 9.55]

A federal court may consider otherwise procedurally barred claims under the doctrine of *Schlup v. Delo* (1995) 513 U.S. 298, which creates a procedural "gateway" into federal court for certain cases involving a claim of actual innocence. (*House v. Bell* (2006) 547 U.S. 518; *Murray v. Carrier* (1986) 477 U.S. 478, 496.); see *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 478 (en banc).) It applies where the defendant shows constitutional errors probably resulted in the conviction of a person who is actually innocent, so that a federal court's refusal to hear the defaulted claims would be a manifest injustice. (*Schlup*, at pp. 326-327.)

To meet the *Schlup* standard, the petitioner must produce reliable new evidence and show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in the habeas corpus petition. (*House v. Bell* (2006) 547 U.S. 518, 537; *Calderon v. Thompson* (1998) 523 U.S. 538, 559; see also *Jaramillo v. Stewart* (9th Cir. 2003) 340 F.3d 877, 881.) The federal court must evaluate the petitioner's claim of innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." (*Schlup v. Delo* (1995) 513 U.S. 298, 327-328, internal quotation marks omitted.)

The *Schlup* gateway doctrine is distinct from a free-standing claim of innocence used as an *independent and substantive* basis for habeas corpus relief, apart from any showing of errors that might have produced the original conviction. Such a showing requires an "extraordinarily high standard of review." (*Herrera v. Collins* (1993) 506 U.S. 390, 426; *Schlup v. Delo* (1995) 513 U.S. 298, 313-316.) The United States Supreme Court has not yet decided whether federal courts may grant relief on the ground of convincing proof of actual innocence, even though the trial was error-free. (*House v. Bell* (2006) 547 U.S. 518, 554-555.)

b. Constitutional error in imposing death penalty [§ 9.56]

In a capital case, constitutional error in the sentencing process may qualify as a fundamental miscarriage of justice. Here the test is more stringent than the "more likely than not" one used in factual innocence cases: the defendant must produce "clear and convincing evidence" that, but for constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law. (*Sawyer v. Whitley* (1992) 505 U.S. 333, 336; see also *Calderon v. Thompson* (1998) 523 U.S. 538, 559-560; cf. *Dretke v. Haley* (2004) 541 U.S. 386, 393 [declining to decide whether to extend the *Sawyer* doctrine to non-capital sentencing error].)

D. Interpreting Ambiguous and Unexplained State Decisions [§ 9.57]

A recurring problem has been applying the procedural default doctrine to state court decisions that do not explicitly and exclusively rely on state procedural grounds. A state court may resolve the federal issue and also mention a state procedural bar. Or the court may provide no reason at all, as is typical of the California Supreme Court in denying review. (See § 9.20, *ante*, on standards of review in absence of explained state court ruling.)

1. Standards when state court resolves federal issue and also refers to state procedural default [§ 9.58]

In cases where the state court *both* resolved the federal issue and referred to a state procedural bar, the federal courts use a presumption in interpreting the state court decision:

> [F]ederal courts . . . will presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion."

(*Coleman v. Thompson* (1991) 501 U.S. 722, 734-735, explaining the holding of *Harris v. Reed* (1989) 489 U.S. 255; see also *Michigan v. Long* (1983) 463 U.S. 1032, 1040-1041 [same rule for certiorari review].) Under this test, a federal issue sufficient to dispose of the case will be presumed *necessary*, unless the state court expressly states its decision is alternatively based on an adequate and independent state procedural ground.

The *Harris v. Reed* presumption means, conversely, that a claim is deemed defaulted when the state court expressly relies on state procedural failure to deny relief,

even if the court alternatively resolves the federal issue on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10; *Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 580.)

An example of a state ground "interwoven with federal law" would be a state procedural rule that failure to object waives an error unless it involves a fundamental federal constitutional right. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 74-75; see *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1151.)

If a state court fails to specify which claims are barred for which reasons, the state court will not have clearly and expressly relied upon an independent and adequate state ground. (*Valerio v. Crawford* (9th Cir. 2002) 306 F.3d 742, 775; see also *Koernar v. Grigas* (9th Cir. 2003) 328 F.3d 1039, 1049.)

2. Standards when state court does not resolve federal issue [§ 9.59]

The presumption of *Harris v. Reed* (1989) 489 U.S. 255 – that the state decision rests on the merits of a federal issue in the absence of explicit state court reliance on procedural default – applies "only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." (*Coleman v. Thompson* (1991) 501 U.S. 722, 739.) The presumption does not arise when this factual premise is absent – that is, when the state court decision does not appear to rest primarily on federal ground. (See *Hunter v. Aispuro* (9th Cir. 1992) 982 F.2d 344, 346-347.)

a. Properly presented issues [§ 9.60]

If the federal issue was properly presented but was not decided in any of the state decisions, the issue is preserved for federal review. A state court may not evade federal review by ignoring a federal issue. (*Smith v. Digmon* (1978) 434 U.S. 332, 333; see also *Dye v. Hofbauer* (2005) 546 U.S. 1 (*per curiam*).)

b. Evidence of procedural default in presenting issue [§ 9.61]

When the state court does not expressly resolve the federal issue on the merits and there is evidence of procedural default in presenting the issue, the issue is not preserved for federal review. Compliance with state procedural requirements is part of "proper presentation," and the federal court must ascertain such compliance for itself. (*Coleman v. Thompson* (1991) 501 U.S. 722, 736.)

In *Coleman*, after denial of a habeas corpus petition in a Virginia lower court, the petitioner filed an appeal in the state supreme court. The appeal was several days late. After briefing on the merits and on the untimeliness issue, the Virginia Supreme Court dismissed the appeal without explanation. The United States Supreme Court declined to apply the *Harris v. Reed*[59] presumption that a state decision rested on the merits of the federal issue in the absence of explicit state court reliance on procedural default. The factual predicate for that presumption – the state decision appears to have rested primarily on federal grounds – was absent, and so "it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." (*Coleman v. Thompson* (1991) 501 U.S.722, 737; see also *Teague v. Lane* (1989) 489 U.S. 288, 298-299.)

3. State court decision to be reviewed for resolution of federal issue [§ 9.62]

A federal issue must always be presented to the state's highest court in which review is available. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.) If that court denies review summarily, without explanation, the question becomes how to interpret that denial.

a. "Look through" doctrine [§ 9.63]

A federal court normally looks to the last *explained* decision of the state courts. Thus, if the California Supreme Court denies a petition for review summarily, the federal court will review the opinion of the Court of Appeal deciding the federal issue, and the California Supreme Court's denial will be presumed to be on the same basis. (*Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803 ["look through" doctrine]; *Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 918, fn. 23; *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1052, fn. 7.)

If, for example, the Court of Appeal relies on procedural default and the California Supreme Court denies review summarily, the federal court will consider the claim procedurally defaulted. (*Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803; *McQuown v. McCartney* (9th Cir. 1986) 795 F.2d 807, 809.) Conversely, if the Court of Appeal does not rely on procedural default, federal review is not barred even though there is evidence of procedural default the Court of Appeal might have invoked. Summary denial of review by the California Supreme Court then is presumed to be on the merits. (*Lambright v. Stewart* (9th Cir. 2001) 241 F.3d 1201, 1205; *Thompson v. Procunier* (9th Cir. 1976) 539 F.2d 26, 28; cf. *Trigueros v. Adams* (9th Cir. 2011) 658 F.3d 983, 989 [California

[59] *Harris v. Reed* (1989) 489 U.S. 255.

Supreme Court's request for informal response on merits was finding of timeliness under circumstances of case, even though superior court had found petition untimely].)

b. Procedural default in presenting issue to state high court [§ 9.64]

As *Coleman v. Thompson* (1991) 501 U.S.722, 736, illustrates, the inquiry does not always end at the intermediate appellate court stage. Even if the issue is properly presented to the lower appellate court and that court does not rely on procedural default, a proper petition to the high court is an additional requirement.[60] Failure to comply with procedural requirements for such review can create procedural default *after* the intermediate court decision. In *Coleman* the default was untimely filing of the petition to the state high court.

Proper presentation to the California Supreme Court includes compliance with rules requiring presentation of issues to the Court of Appeal as a prerequisite for review in the Supreme Court. Raising a federal issue for the first time in a petition for discretionary review to a state high court is not sufficient to preserve it. (*Castille v. Peoples* (1989) 489 U.S. 346, 351; *Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 917; see Cal. Rules of Court, rule 8.500(c)(1) [Supreme Court will ordinarily refuse to consider issue not raised in Court of Appeal]; cf. *Chambers v. McDaniel* (9th Cir. 2008) 549 F.3d 1191 [this bar does not apply if state court denial offers comment indicating it considered merits]; *Harris v. Superior Court* (9th Cir. 1974) 500 F.2d 1124 [if state court has practice of identifying procedural defects when that is basis for denial of habeas corpus, simple "postcard denial" is considered to be on merits].) Additionally, in California, if the Court of Appeal omits an issue in its opinion, the Supreme Court normally will decline to review it unless the omission is called to attention of the Court of Appeal in a petition for rehearing. (See Cal. Rules of Court, rule 8.500(c)(2).) To avoid possible procedural default, it is therefore advisable to file a petition for rehearing.[61]

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[60] To be preserved for future federal review, an issue must be presented to the state's highest court in which review is available. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

[61] Attorneys Clifford Gardner and Richard Neuhoff raised contrary considerations in *Exhaustion of State Remedies and Petitions for Rehearing* (Jan. 30, 2005), originally on the California Appellate Defense Counsel website. ADI continues to adhere to the position stated here. We have researched this issue extensively and prepared an analysis, which is available to criminal appellate defense attorneys on request, so that they can make an informed decision. Staff attorney Cindi Mishkin or executive director Elaine Alexander can provide a copy.

E. Assertion of Exhaustion or Procedural Default Defense by State [§ 9.65]

The state does not waive failure to exhaust by failure to plead it unless the waiver is express. (28 U.S.C. § 2254(b)(3).) In contrast, a procedural default defense is an affirmative defense and may implicitly be waived if the state fails to assert it in a pleading to the district court. (*Scott v. Schriro* (9th Cir.2009) 567 F.3d 573, 580.) Its failure to assert it in a motion to dismiss does not constitute waiver. (*Morrison v. Mahoney* (9th Cir. 2005) 399 F.3d 1042, 1046-1047; *Vang v. Nevada* (9th Cir. 2003) 329 F.3d 1069, 1073 [waiver found when state briefing did not explain failure to assert procedural default defense or argue why its failure should be excused].)

F. Steps to Preserving a Federal Issue in California State Court [§ 9.66]

An issue must be presented to the state courts in proper sequence and proper form in order to ensure a federal court will consider it on the merits.

1. Raising issue in each state court [§ 9.67]

To exhaust state remedies and protect against procedural default, the defendant must raise a federal issue in each court where it can reasonably be asserted:

> Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary opportunity, the prisoner must fairly present his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim.

(*Baldwin v. Reese* (2004) 541 U.S. 27, 29, internal quotation marks and citations omitted.)

In the typical progression of a California appeal, the federal issue should be raised in the trial court, Court of Appeal, and California Supreme Court.

a. Trial court [§ 9.68]

When state law requires the defendant to have made a timely objection in the trial court in order to secure appellate review on an issue and the defendant has failed to do so, federal habeas corpus is generally foreclosed. (E.g., *Francis v. Henderson* (1976) 425 U.S. 536, 540-541; *Wainwright v. Sykes* (1977) 433 U.S. 72, 86-91.) California has such a requirement. (See § 4.39 of chapter 4, "On the Hunt: Issue Spotting and Selection," and § 5.27 of chapter 5, "Effective Written Advocacy: Briefing.")

This matter is of course beyond appellate counsel's control. However, there may be ways around the waiver problem – e.g., lack of necessity for objection, substantial compliance, futility, fundamental due process, and ineffective assistance of counsel. (See § 5.27 of chapter 5, "Effective Written Advocacy: Briefing.")

If appellate counsel succeeds in persuading the Court of Appeal (or Supreme Court) to consider the issue on the merits, then the procedural defect at trial is no longer a barrier to federal review, unless the state court in addition expressly relies on the defect as an independent ground. (*Francis v. Henderson* (1976) 425 U.S. 536, 542, fn. 5; *Sandgathe v. Maass* (9th Cir. 2002) 314 F.3d 371, 376-377; *Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1088.)

b. Court of Appeal [§ 9.69]

A federal issue should be raised on the first appeal as of right – meaning, with respect to California noncapital cases, on appeal in the Court of Appeal. Raising an issue for the first time in a petition for discretionary review to the California Supreme Court is not sufficient to preserve it. (See Cal. Rules of Court, rule 8.500(c)(1) [Supreme Court will ordinarily refuse to consider issue not raised in Court of Appeal].) Exhaustion is not satisfied "where the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor.'" (*Castille v. Peoples* (1989) 489 U.S. 346, 351; *Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 917; *Taylor v. Ayers* (N.D. Cal. 2002, No. C99-5435) 2002 U.S.Dist. Lexis 14615, *4, unpublished[62] [federal issues not exhausted when mentioned only in pro per brief, which Court of Appeal refused to file because defendant had counsel, and California Supreme Court denied review without comment; under Cal. Rules of Court, rule 8.500(c) "it is fair to assume that the Supreme Court considered itself procedurally barred from reviewing the issues presented in the pro se supplemental brief"].)

Additionally, in California, if the Court of Appeal omits an issue in its opinion, the Supreme Court normally will decline to review it unless the omission is called to the attention of the Court of Appeal in a petition for rehearing. (Cal. Rules of Court, rule

[62]An unpublished case decided by a court in the Ninth Circuit before January 1, 2007, may not be cited to the courts of that circuit. It is citable in California courts and in other courts, depending on the law of the jurisdiction. (See § 7.8 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision.")

8.500(c)(2).) To avoid possible procedural default, it is therefore advisable to file a petition for rehearing.[63]

c. California Supreme Court [§ 9.70]

To be preserved for future federal review, an issue must be presented to the state's highest court in which review is available. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845, 848.) Thus in California a petition for review raising the issue must be filed in the Supreme Court.[64] (*Roberts v. Arave* (9th Cir. 1988) 847 F.2d 528, 530.) Some states have adopted an explicit policy stating it is unnecessary to petition the state high court.[65]

Presentation of the issue to the California Supreme Court also must be procedurally proper. The petition for review must be timely (*Coleman v. Thompson* (1991) 501 U.S.722, 736) and, as noted in § 9.69, normally must be based on issues properly presented to the Court of Appeal.[66]

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[63]Attorneys Clifford Gardner and Richard Neuhoff raised contrary considerations in *Exhaustion of State Remedies and Petitions for Rehearing* (Jan. 30, 2005), originally on the California Appellate Defense Counsel website. ADI continues to adhere to the position stated here. We have researched this issue extensively and prepared an analysis, which is available to criminal appellate defense attorneys on request, so that they can make an informed decision. Staff attorney Cindi Mishkin or executive director Elaine Alexander can provide a copy.

[64]In *Scott v. Schriro* (9th Cir. 2009) 567 F.3d 573, 582, held that including the federal claims in an appendix in a petition for review to the Arizona Supreme Court satisfied the fair presentation requirement.

[65]Federal courts including the Ninth Circuit have recognized such rules as adequate to satisfy the exhaustion requirement. (*Swoopes v. Sublett* (9th Cir. 1999) 196 F.3d 1008, 1010-1011; see *O'Sullivan v. Boerckel, supra,* 526 U.S. 838, 849 (conc. opn. of Souter, J.).) California has elected not to do so, but the Rules of Court do provide for an abbreviated petition for review when the primary intention is to exhaust state remedies rather than seek review. (Cal. Rules of Court, rule 8.508.)

[66]To avoid any question of the adequacy of exhaustion, the issues should be presented unambiguously and at the first opportunity. (But see *Styers v. Schriro* (9th Cir. 2008) 547 F.3d 1026 [issue presented to state's highest court in motion for reconsideration adequately informed court of factual and legal basis of claim].)

2. Briefing the issue [§ 9.71]

Although federalizing an issue need not be time-consuming or elaborate, the issue needs to be sufficiently highlighted and well developed to give the state court notice it is being raised as a separate ground for relief.

a. Mention of federal issue in heading or subheading [§ 9.72]

It is important to state the federal claim in a heading or subheading of the argument. This will forestall any later contention the issue was a "throw-away," hidden somewhere in the text of a non-federal issue, and not adequately flagged for the state court. It will also preclude any claim of procedural default for failure to comply with California Rules of Court, rule 8.204(a)(1)(B), which requires each brief to "state each point under a separate heading or subheading summarizing the point."[67]

b. Operative facts supporting federal issue [§ 9.73]

The argument must set forth the *factual* basis for the federal issue in sufficient detail to permit the court to understand and evaluate the issue in the particular case. Asserting a violation of a federal constitutional right is inadequate in a factual vacuum. "A thorough description of the operative facts" is a prerequisite to preservation. (*Kelly v. Small* (9th Cir. 2003) 315 F.3d 1063, 1069; see *Davis v. Silva* (9th Cir. 2008) 511 F.3d 1005, 1011 [petitioner provided state with all facts "necessary to state a claim for relief"].)

c. Specific reference to federal law [§ 9.74]

The argument must state the specific *federal legal basis* for the claim. This includes citation of the federal constitutional provisions relied on. (*Gray v. Netherland* (1996) 518 U.S. 152, 162-163 [claim must include reference to a specific federal constitutional guarantee, as well as statement of facts entitling petitioner to relief]; *Picard v. Connor* (1971) 404 U.S. 270, 278.)

Making vague references to "due process" or a "fair trial" or "the right to present a defense" does not apprise the state court of the federal nature of a claim and does not satisfy the fair-presentation requirement. (*Anderson v. Harless* (1982) 459 U.S. 4, 7; *Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987; compare *Wilcox v. McGee* (9th Cir. 2001) 241 F.3d 1242, 1244.)

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[67]The state court may disregard a point not mentioned in a heading or subheading. (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 84, fn. 1.)

Citation to state cases that merely cite cases that in turn discuss or apply federal law is likewise inadequate. (*Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 912, fn. 12 ["we decline to conclude that state supreme court justices may be charged with reading all cases that are cited in the cases on which a petitioner relies, and instead the burden must be on the petitioner to be explicit in asserting a federal constitutional right"].)

d. Argument linking operative facts to legal theory [§ 9.75]

Merely citing a provision of the federal Constitution is insufficient unless the citation is linked to a theory of federal law connecting the operative facts of the case to the constitutional provision and explaining why the facts amount to a violation of that provision.

In *Castillo v. McFadden* (9th Cir. 2005) 399 F.3d 993, the defendant challenged a videotape of his interrogation on state evidentiary grounds in the trial court. On appeal the last sentence of his brief asserted "the gross violations of Appellant's Fifth, Sixth, and Fourteenth Amendment rights requires [sic] that his convictions and sentences be reversed and that he be granted a new trial consistent with due process of law." The Ninth Circuit found this "conclusory, scattershot citation of federal constitutional provisions" inadequate (*id.* at pp. 1002-1003):

> Castillo . . . left the Arizona Court of Appeals to puzzle over how the Fifth, Sixth, and Fourteenth Amendments might relate to his three foregoing claims . . . . Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.

Thus the brief should not only *assert* that the facts amounted to a particular federal constitutional violation, but also should *argue* that point. Ideally, of course, the argument should analyze relevant federal case law, especially decisions of the United States Supreme Court. Again, it is also strongly advisable to refer to the federal nature of the issue in a *heading* and not to bury it in a section labeled as something else.

3. Petitioning for review [§ 9.76]

The petition for review *itself* must be sufficient – that is, include explicit reference to federal constitutional provisions and other federal authorities and a description of all the operative facts giving rise to the federal claim. It should not incorporate by reference any material facts or law argued in other documents, or rely on the California Supreme Court's opportunity to read the record or Court of Appeal opinion. (See *Baldwin v. Reese* (2004)

541 U.S. 27, 31-32;[68] *Gatlin v. Madding* (9th Cir. 1999) 189 F.3d 882, 887-889 [state rules (now California Rules of Court, rules 8.204(a)(1)(B), 8.504(a)) require each issue be raised specifically in petition for review and supported by argument and authority; rule (now 8.504(e)(3)) forbids incorporation by reference]; *Kibler v. Walters* (9th Cir. 2000) 220 F.3d 1151, 1153.) The petition should indicate how the issue was raised and resolved in the Court of Appeal and should comply strictly with the requirements of rules 8.500 and 8.504 of the California Rules of Court or with rule 8.508 if an abbreviated petition is filed.

4. Later proceedings [§ 9.77]

It is not necessary to file a petition for certiorari with the United States Supreme Court in order to exhaust state remedies before filing a federal habeas petition. (*Fay v. Noia* (1963) 372 U.S. 391, 435-437, overruled on other grounds in *Wainwright v. Sykes* (1977) 433 U.S. 72, 84-85.)

Similarly, a state habeas corpus petition is unnecessary if the federal issue was exhausted on direct appeal. (*Brown v. Allen* (1953) 344 U.S. 443, 447.) State habeas corpus would be necessary to exhaust issues not within the scope of the appeal, such as those based on facts outside the record.

G. Mixed Petitions with Both Exhausted and Unexhausted Claims [§ 9.78]

If a petition contains at least one unexhausted claim, the district court is required to dismiss the petition without prejudice, leaving the petitioner with the option of amending the petition to delete the unexhausted claim or returning to state court to exhaust the unexhausted claim.[69] (*Rose v. Lundy* (1982) 455 U.S. 509, 510.)

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[68]"[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." (*Baldwin v. Reese, supra,* 541 U.S. at p. 32.)

[69]In providing the petitioner the option of dismissing the mixed petition or pursuing it with only exhausted claims, the district court need not warn about such consequences as the statute of limitations. (*Pliler v. Ford* (2004) 542 U.S. 225, 231.) The court need not consider, sua sponte, the option of staying and abeying the petition in the absence of a request. (*Robbins v. Carey* (9th Cir. 2007) 481 F.3d 1143.)

The *Rose v. Lundy* policy was articulated before AEDPA[70] imposed a statute of limitations on federal habeas corpus filings, and the federal courts have made some accommodations. In limited circumstances, a "stay and abeyance" procedure is available. Under one form of this procedure, a mixed petition is filed (thus complying with the federal statute of limitations), but then stayed while the unexhausted issues are taken to state court. (*Rhines v. Weber* (2005) 544 U.S. 269, 273-276.)[71] The stay procedure requires the petitioner to demonstrate the potential merit of the unexhausted claims and show good cause for the previous failure to go to state court; there must be no indication the petitioner is engaged in intentionally dilatory litigation tactics. (*Id.* at p. 277; see *Wooten v. Kirkland* (9th Cir. 2008) 540 F.3d 1019 [motion to stay mixed petition properly denied; petitioner's "impression" that his counsel had exhausted claim did not constitute good cause for failure to do so].)

Another stay-and-abeyance procedure, sanctioned by the Ninth Circuit, involves withdrawal of the unexhausted claims and stay of the remaining petition to permit the petitioner to exhaust the withdrawn claims and then add them back to the stayed petition. (*Kelly v. Small* (9th Cir.2003) 315 F.3d 1063; *Calderon v. United States Dist. Court* (9th Cir. 1998) 134 F.3d 981, 985-986.) This procedure increases the risk of missing the AEDPA statute of limitations on the refiled claims, especially in light of *Mayle v. Felix* (2005) 545 U.S. 644, 650, which held an amendment to a petition asserting claims based on different operative facts from those in the original petition does not relate back to the first filing date. (See § 9.6, *ante*.) The *Kelly-Calderon* procedure was adopted before *Rhines v. Weber,* which held *Rose v. Lundy* permits stay of a mixed petition. The *Rhines v. Weber* approach eliminates the need for the middle step of dismissing the unexhausted claims. However, it requires a finding of good cause for staying the unexhausted petition, whereas the *Kelly-Calderon* procedure does not. (*King v. Ryan* (9th Cir. 2009) 564 F.3d 1133, 1140-1141.)

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[70]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[71]The state may not take an interlocutory appeal from an order staying proceedings to allow the petitioner to exhaust state claims. (*Thompson v. Frank* (9th Cir. 2010) 599 F.3d 1088.)

VI. SUCCESSIVE PETITIONS [§ 9.79]

Generally, a petitioner must include all available claims in a single petition. Later petitions asserting new claims or reasserting the previous ones will not be considered. This rule is codified in AEDPA,[72] Title 28 United States Code section 2244(b):

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2244(b) sets up a "gate-keeping" mechanism that codifies some of the pre-existing judicially declared limits on successive petitions, including the doctrines of res judicata and abuse of the writ. (*Felker v. Turpin* (1996) 518 U.S. 651, 664; see also *Stewart v. Martinez-Villareal* (1998) 523 U.S. 637, 641; see *McCleskey v. Zant* (1991) 499 U.S. 467, 493-95.) It is "grounded in respect for the finality of criminal judgments." (*Calderon v. Thompson* (1998) 523 U.S. 538, 558.) The AEDPA successive petition requirements are "extremely stringent." (*Babbitt v. Woodford* (9th Cir. 1999) 177 F.3d 744, 745.) They are also jurisdictional. (*Burton v. Stewart* (2007) 549 U.S. 147.)

A. Meaning of "Successive Petition" [§ 9.80]

Not every application presented to a federal court related to the same state conviction that was the subject of a prior application is a successive petition subject to AEDPA[73] limitations. "The phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases." (*Slack v. McDaniel* (2000) 529 U.S. 473, 477; see also *Magwood v. Patterson* (2010) ___ U.S. ___ [130 S.Ct. 2788] [first petition alleged ineffective assistance of counsel because of failure to file timely notice of appeal;

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[72]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[73]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

second application challenging new judgment for the first time was not "second or successive"].)

In a capital habeas matter, the Eleventh Circuit's reversal of a grant of petitioner's petition is reversed where, because petitioner's habeas application challenged a new judgment for the first time, it was not "second or successive" under 28 U.S.C. section 2244(b). *Aaron v. United States* (2d Cir. 2010) 607 F.3d 318 [petition following earlier petition alleging ineffective assistance of counsel for failure to file timely notice of appeal not successive].)

1. Types of applications treated as successive petition [§ 9.81]

Examples of a successive petition might be one that seeks to raise a new claim, that reasserts the same claim, or that alleges the prior decision resolved the merits incorrectly. (*Gonzalez v. Crosby* (2005) 545 U.S. 524, 532.) An application that seeks to reconsider the same matters already resolved on the merits in a habeas corpus proceeding is a successive petition, even though cast in some other procedural form. (E.g., *Rodwell v. Pepe* (1st Cir. 2003) 324 F.3d 66, 71-72 [motion to vacate previous habeas corpus decision]; *Vanlitsenborgh v. United States* (10th Cir. 2006, No. 05-8114) 2006 U.S.App. Lexis 10934, *2, unpublished[74] [petition for writ of error *audita querela*].)

Denial of the first petition on the grounds of state procedural default is considered a denial on the merits for purposes of the successive petition doctrine. (*Henderson v. Lampert* (9th Cir. 2005) 396 F.3d 1049, 1053.)

2 Subsequent applications considered not to be successive petition [§ 9.82]

Some types of subsequent applications are not treated as a successive petition subject to AEDPA limitations. If the original claim was not resolved on the merits but was dismissed on procedural grounds, for example, under some circumstances the petitioner may reassert it in a new petition or seek to reopen the original proceedings without having to meet AEDPA successive petition requirements. Lack of ripeness of the subsequent claim at the time of the original petition is another consideration.

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[74]The rules of some circuits prohibit citation of an unpublished circuit case decided before January 1, 2007, to the courts of that circuit. An unpublished federal opinion is citable in California courts and in other courts, depending on the law of the jurisdiction. (See § 7.8 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision.")

a. First petition dismissed for lack of exhaustion [§ 9.83]

A habeas corpus petition filed after the initial one was dismissed for failure to exhaust state remedies is not a successive petition within the meaning of AEDPA. (*Slack v. McDaniel* (2000) 529 U.S. 473, 478.)

b. Federal procedural defect [§ 9.84]

The successive petitions rule also may not be implicated when the later application alleges there was "some defect in the integrity of the federal habeas proceeding." (*Gonzalez v. Crosby* (2005) 545 U.S. 524, 532.) In *Gonzalez* the district court erroneously dismissed the prior petition as untimely. The Supreme Court held a motion under Federal Rules of Civil Procedure, rule 60(b) to reopen the case is not successive when it asserts, not entitlement to ultimate habeas corpus relief, but procedural error by the federal court in failing to consider the merits. (*Id.* at p. 534; see also *Phelps v. Alameda* (9th Cir. 2009) 569 F.3d 1120 [motion based on subsequent clarification of underlying law]; *Ortiz-Sandoval v. Clarke* (9th Cir. 2003) 323 F.3d 1165, 1168-1169; cf. *Rodwell v. Pepe* (1st Cir. 2003) 324 F.3d 66, 72, cited with approval in *Gonzalez*, at p. 531 [rule 60(b) motion to reopen case, alleging discovery of new evidence impeaching prosecution case, is successive petition as "paradigmatic habeas claim"].) The petitioner may not rely on the exception for federal procedural defect unless the original petition asserted the claim distinctly. (*Cooper v. Calderon* (9th Cir. 2001) 274 F.3d 1270, 1273).

c. Claim not ripe at time of original petition [§ 9.84A]

A subsequent petition is not successive when it reasserts a claim that was dismissed as premature in the first proceeding. (*Stewart v. Martinez-Villareal* (1998) 523 U.S. 637, 643-644 [execution of insane person, in violation of *Ford v. Wainwright* (1986) 477 U.S. 399].) Similarly, AEDPA does not bar a claim as successive if at the time of the original petition it was not raised because it would have been premature. (*Panetti v. Quarterman* (2007) 551 U.S. 930 [also *Ford v. Wainwright* claim].)[75]

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[75]In *United States v. Lopez* (9th Cir. 2009) 577 F.3d 1053, the Ninth Circuit considered whether claims of prosecutorial suppression of evidence under *Brady v. Maryland* (1963) 373 U.S. 83, where the evidence was discovered after the first post-conviction petition, are exempt (under a *Panetti* rationale) from AEDPA's requirements for successive petitions based on newly discovered evidence. (See 28 U.S.C. § 2255(h)(1); cf. 2244(b)(2)(B).) It held that not *all* such claims are exempt, including the claim in that case. The petitioner was unable to establish the materiality of the evidence and thus would have been barred under pre-AEDPA abuse-of-the-writ law. The court had no

d. Successive filing construed as motion to amend when original petition not yet adjudicated [§ 9.84B]

If a new pro per petition is filed before the adjudication of a prior petition is complete, the new petition is construed as a motion to amend the pending petition rather than as a successive application. (*Woods v. Carey* (9th Cir. 2008) 525 F.3d 886; see also *Grullon v. Ashcroft* (2d Cir.2004) 374 F.3d 137, 138 (*per curiam*); *Ching v. United States* (2d Cir. 2002) 298 F.3d 174, 177.)[76]

e. Motion for reconsideration based on intervening change in law [§ 9.84C]

A motion under Federal Rules of Civil Procedure, rule 60(b) for reconsideration because of an intervening change in the law may be warranted if the reliance on prior law deprived the defendant of a fundamental right. (E.g.,

B. New Rule of Law Retroactively Applicable to Cases on Collateral Review [§ 9.85]

The first ground on which AEDPA[77] permits a successive petition is that the petition relies on a new constitutional rule that the Supreme Court has declared retroactive to cases on collateral review.[78] (28 U.S.C. § 2244(b)(2)(A).) As the court explained in *Tyler v. Cain* (2001) 533 U.S. 656, 662: "This provision establishes three prerequisites to obtaining relief in a second or successive petition: First, the rule on which the claim relies must be a 'new rule' of constitutional law; second, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court'; and third, the claim must have been 'previously unavailable.'"

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occasion to determine whether an exemption might apply if the petitioner could establish a right to the writ under pre-AEDPA law.

[76]A different rule may apply when determining compliance with the AEDPA statute of limitations. (See § 9.6, *ante*, and *Mayle v. Felix* (2005) 545 U.S. 644, 650 "relation back" doctrine].)

[77]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[78]The general topic of retroactivity is addressed in a memo on the ADI website at http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf

1. "New" rule [§ 9.86]

Teague v. Lane (1989) 489 U.S. 288 governs the determination of whether a case announces a "new rule" of law:

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

(*Id.* at p. 310; see *In re Holladay* (11th Cir. 2003) 331 F.3d 1169, 1172-1173 [claim of mental retardation under *Atkins v. Virginia* (2002) 536 U.S. 304 based on new law since that case overruled *Penry v. Lynaugh* (1989) 492 U.S. 302]; cf. *Yates v. Aiken* (1988) 484 U.S. 211, 216-217 [*Francis v. Franklin* (1985) 471 U.S. 307 not a new rule]; *Paulino v. United States* (6th Cir. 2003) 352 F.3d 1056, 1059-1060 [*Richardson v. United States* (1999) 526 U.S. 813 not a new rule]; see also *Ponce v. Felker* (9th Cir. 2010) 606 F.3d 596 [*Giles v. California* (2008) 554 U.S. 353 was new law and so cannot be used on habeas corpus for cases final before that decision].)

2. Supreme Court determination of retroactivity [§ 9.87]

The requirement that the United States Supreme Court have "made" the new rule retroactive to cases on collateral review means the court must explicitly have *held* that:[79]

> The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "make" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.

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[79]Section 2244(b)(2)(A) on successive petitions requires the new rule to have been "made retroactive . . . by the Supreme Court." This language differs from that of section 2244(d)(1)(C) on the statute of limitations, which requires the right to have been "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." While the requirement of a Supreme Court ruling on retroactivity in the successive petitions context is unambiguous, the statute of limitations provision has been the subject of differing interpretation. (See § 9.5, *ante*, fn. 10).

(*Tyler v. Cain* (2001) 533 U.S. 656, 663; see *In re Holladay* (11th Cir. 2003) 331 F.3d 1169, 1172-1173; cf. *In re Rutherford* (11th Cir. 2006) 437 F.3d 1125, 1128; *Green v. United States* (2d Cir. 2005) 397 F.3d 101, 102-103 [*Blakely*[80] claim may not be subject of successive petition when Supreme Court has not made it retroactive].)

The Supreme Court can make the retroactivity holding *before* it declares the substantive rule. On the question of whether execution of the mentally ill constitutes cruel and unusual punishment under the Eighth Amendment, for instance, *In re Holladay* (11th Cir. 2003) 331 F.3d 1169 found *Penry v. Lynaugh* (1989) 492 U.S. 302 had determined any decision the Supreme Court made on the subject would be retroactive. *Penry* was a habeas corpus case, and generally, under *Teague v. Lane* (1989) 489 U.S. 288, a new rule of law – as this would have been – cannot be created on collateral review. The *Penry* court nevertheless determined the issue came under *Teague*'s "substantive law" exception to the general rule:

> [I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and *would be applicable to defendants on collateral review*. Accordingly, we address the merits of Penry's claim.

(*Penry*, at p. 330, emphasis added.) In *Atkins v. Virginia* (2002) 536 U.S. 304, the court overruled *Penry* on the substantive merits, but had no occasion to re-examine the retroactivity decision.

C. New Factual Predicate [§ 9.88]

The second ground for a successive petition under AEDPA[81] is newly discovered evidence. Two requirements must be met: 1) the petitioner must show the evidence could not have been discovered before by the exercise of due diligence and 2) the new facts must establish by clear and convincing evidence that in the absence of constitutional error no reasonable factfinder would have convicted him. To put it another way, the petitioner must make a prima facie showing of both cause and prejudice: excusable cause for failure to discover the evidence in a timely manner and prejudice in that the new evidence would sufficiently undermine confidence in the judgment. (*Evans v. Smith* (4th Cir. 2000) 220 F.3d 306, 323; see § 9.51 et seq., *ante*.)

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[80] *Blakely v. Washington* (2004) 542 U.S. 296.

[81] Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

Although similar to the *Schlup v. Delo* (1995) 513 U.S. 298 "gateway" for excusing procedural default (see § 9.55, *ante*), the AEDPA successive petitions "new factual predicate" rule is stricter in two ways:

> First, § 2244(b)(2)(B)(i) requires that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." There is no requirement under *Schlup* that the factual claim was not discoverable through the exercise of due diligence. Second, § 2244(b)(2)(B)(ii) requires that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (Emphasis added.) *Schlup* requires only that an applicant show that it is "more likely than not" that no reasonable fact-finder would have found him guilty.

(*Cooper v. Woodford* (9th Cir. 2004) 358 F.3d 1117, 1119; see also *Calderon v. Thompson* (1998) 523 U.S. 538, 558.)

1. Due diligence [§ 9.89]

As one prong of the "new factual predicate" standard for a successive petition, section 2244(b)(2)(B)(i) requires that the new evidence "could not have been discovered previously through the exercise of due diligence." This provision creates an objective standard as measured by the availability of the evidence, not a more personal one based on fault on the part of the individual petitioner or his counsel. (*Bible v. Schriro* (9th Cir. 2011) 651 F.3d 1060, 1064; *Johnson v. Dretke* (5th Cir. 2006) 442 F.3d 901, 908.)

To establish due diligence, the petitioner must show he or his attorney did not know or could not have known about the evidence, or would not have been able to get access to it. (E.g., *Johnson v. Dretke* (5th Cir. 2006) 442 F.3d 901 [petitioner knew about potential exculpatory evidence before trial]; *Morales v. Ornoski* (9th Cir. 2006) 439 F.3d 529, 533 [petitioner had known about problems with witness' testimony for years]; see also *Williams v. Taylor* (2000) 529 U.S. 420, 442 [interpreting similar language of 28 U.S.C. § 2254(e)(2); trial record contains no evidence that would have put reasonable attorney on notice of juror bias or prosecutorial misconduct].)

2. Clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found applicant guilty of the underlying offense [§ 9.90]

This prong of the "new factual predicate" ground establishes a higher hurdle for the petitioner to clear than "more likely than not." (*In re Rutherford* (11th Cir. 2006) 437 F.3d 1125, 1127; *Cooper v. Woodford* (9th Cir. 2004) 358 F.3d 1117, 1119; see also *Calderon v. Thompson* (1998) 523 U.S. 538, 560 [in death penalty case, petitioner must show "no reasonable juror would have found him eligible for the death penalty in light of the new evidence," citing *Sawyer v. Whitley* (1992) 505 U.S. 333, 348].)

The standard cannot be met if the evidence at trial was strong and the new evidence only marginally undermines it (*Bible v. Schriro* (9th Cir. 2011) 651 F.3d 1060, 1064-1066; *Evans v. Smith* (4th Cir. 2000) 220 F.3d 306, 323-324), or if the petitioner is alleging legal insufficiency of the evidence as opposed to factual innocence (see *Bousley v. United States* (1998) 523 U.S. 614, 623; *Johnson v. Dretke* (5th Cir. 2006) 442 F.3d 901, 911; *Morales v. Ornoski* (9th Cir. 2006) 439 F.3d 529, 533). (See § 9.55, *ante*, on the *Schlup v. Delo* (1995) 513 U.S. 298 "gateway" for excusing procedural default.)

D. Procedures for Filing Successive Petition [§ 9.91]

The procedures to file a successive federal petition under AEDPA[82] are somewhat circuitous. The petitioner must first obtain permission from a court of appeals to file the petition, by making a prima facie showing the statutory grounds for a successive petition *can* be met. He then must demonstrate to the district court that the grounds *actually are* met. Thus a petitioner "must get through two gates before the merits of the motion can be considered." (*Bennett v. United States* (7th Cir. 1997) 119 F.3d 468, 469-470.)

Title 28 United States Code section 2244(b)(3) and (4) provides:

> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

[82] Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

1. Authorization by court of appeals to file petition [§ 9.92]

The petitioner must first obtain authorization from the circuit court of appeals to file the petition. The standard is whether the petitioner has made a prima facie showing that at least one of the two statutory grounds for successive petitions – new rule of law or new factual predicate – can be met. (28 U.S.C. § 2244(b)(3)(C).)

"Prima facie showing" is a lenient standard. It means showing a reasonable likelihood of possible merit, sufficient to warrant a fuller exploration by the district court. This requires sufficient allegations of fact together with some documentation. (*In re Lott* (6th Cir. 2004) 366 F.3d 431, 432-433; *Cooper v. Woodford* (9th Cir. 2004) 358 F.3d 1117, 1119.)

> If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application.

(*Bennett v. United States* (7th Cir. 1997) 119 F.3d 468, 469-470.)

If the application makes a prima facie showing as to one of the claims, the court authorizes the filing of the entire successive petition. (See 28 U.S.C. § 2244(b)(4); *Woratzeck v. Stewart* (9th Cir. 1997) 118 F.3d 648, 650; *Nevius v. McDaniel* (9th Cir. 1996) 104 F.3d 1120, 1121.)

The emphasis is on a fast resolution: the decision of the court of appeals must be made in 30 days and cannot be reconsidered or reviewed. (28 U.S.C. § 2244(b)(3)(D) & (E); see *In re Lott* (6th Cir. 2004) 366 F.3d 431, 433; *Bennett v. United States* (7th Cir. 1997) 119 F.3d 468, 469.)

2. Determination by district court whether statutory grounds for successive petition have been met [§ 9.93]

If the appellate court authorizes the filing of the successive petition, the district court then determines whether the petition in fact satisfies either statutory ground. (28 U.S.C. § 2244(b)(4).) The district court must conduct a thorough review of all allegations and evidence. The court may rule summarily when the record is conclusive as to whether the successive petition requirements are met, but otherwise should order a response from the government and hold an evidentiary hearing. (*United States v. Villa-Gonzalez* (9th Cir. 2000) 208 F.3d 1160, 1165.)

If the district court concludes at least one ground permitting a successive petition has been met, it may consider the petition on the merits. If the district court concludes that the petitioner has failed to satisfy any ground, the district court must dismiss the petition without reaching the merits. (28 U.S.C. § 2244(b)(2).)

The petitioner may seek review of an order dismissing a petition as successive for failure to meet the statutory requirements. The court of appeals reviews the ruling de novo, as a legal conclusion, and reviews the district court's factual findings for clear error. (See *LaFevers v. Gibson* (10th Cir. 2001) 238 F.3d 1263, 1266; *United States v. Villa-Gonzalez* (9th Cir. 2000) 208 F.3d 1160, 1165.)

VII. FEDERAL HABEAS CORPUS PROCEDURES [§ 9.94]

Federal habeas corpus proceedings reviewing state court judgments in the federal district court are regulated by the Rules Governing Section 2254 Cases. Appeals from denial of a petition are governed by the Federal Rules of Appellate Procedure.

A. Petition [§ 9.95]

1. Counsel [§ 9.96]

State appellate counsel who file a federal petition should do so with the understanding their efforts will be pro bono unless they are appointed by the federal court; this service is not within the scope of the state appellate appointment.[83] If the petition seeks federal review of a matter of pure law, the petitioner is not entitled to counsel appointed by the federal court. If a question of fact requires resolution in an evidentiary hearing in the district court, then counsel will be appointed. The counsel appointed for this purpose need not be the attorney who initially filed the petition.

2. Filing formalities [§ 9.97]

a. District [§ 9.98]

A federal habeas corpus petition should be filed in the district in which the defendant was convicted and sentenced, although it may be filed in the district of incarceration. (See 28 U.S.C. § 2241(d).)[84] The federal districts have preprinted habeas corpus forms for state prisoners to help petitioners meet these requirements.

b. Respondent [§ 9.99]

The petition should name the warden or other state officer having custody of the petitioner as respondent. The absence of a named individual custodian deprives the court of personal jurisdiction, but failure of the state to object waives this defect. (*Smith v. Idaho* (9th Cir. 2004) 392 F.3d 350, 354-356.)

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[83]A de minimis amount of time might be compensated for helping a client fill out and file a pro per federal habeas corpus petition. Counsel should consult with the assigned ADI staff attorney before spending time on this function.

[84]Section 2241(d) provides:

> (d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

c. Fees [§ 9.100]

Filing fees are waived if the petition is filed in forma pauperis, as prescribed in rule 3(a) of the Rules Governing Section 2254 Cases and Title 28 United States Code section 1915.

3. Content [§ 9.101]

Forms for federal habeas corpus petitions are available.[85] All known grounds for relief and must be set forth a to avoid successive petitions problems. (Rules Gov. § 2254 Cases, rule 2(a) & (c); see § 9.79 et seq., *ante*.)

B. Process in District Court [§ 9.102]

Once the petition is filed in the district court, it is assigned to a district court judge and, in many federal district courts, a magistrate judge. (See 28 U.S.C. § 636; Rules Gov. § 2254 Cases, rule 8(b).)

Counsel may be appointed for the habeas corpus proceedings, if the court or magistrate judge determines "the interests of justice so require."[86] (18 U.S.C. § 3006A(a)(2)(B).)

1. Summary denial [§ 9.103]

If it appears from the face of the petition and its attachments that the petitioner is not entitled to relief, the judge may summarily dismiss it after notifying the petitioner of the court's intention and giving the petitioner an opportunity to respond.[87]

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[85]Links to forms for the central and southern districts of California are available on the ADI website at http://www.adi-sandiego.com./practice_forms_motion.html .

[86]The same standard governs motions to substitute counsel. (*Martel v. Clair* (2012) ___U.S.___ [132 S.Ct. 1276].)

[87]The district court may not sua sponte dismiss a petition as untimely without giving adequate notice and an opportunity for the petitioner to respond to the court's inclination to dismiss. (*Herbst v. Cook* (9th Cir. 2001) 260 F.3d 1039, 1043.)

2. Post-petition pleadings and discovery [§ 9.104]

If a prima facie claim has been made, the judge must order the respondent to file an answer. (Rules Gov. § 2254 Cases, rule 4.) The answer must address the allegations of the petition, state whether the petitioner has exhausted state remedies, and provide the pertinent parts of the transcript, the Court of Appeal briefs and opinion, and "dispositive orders," such as the California Supreme Court's denial of review.[88] (Rules Gov. § 2254 Cases, rule 5; see also rule 7 on expansion of the record.)

The petitioner may file a reply (i.e., a traverse) if the judge's order for an answer permits it. (Rules Gov. § 2254 Cases, rule 5(e).)

A party may request the court to permit discovery that might be available under the Federal Rules of Civil Procedure. (Rules Gov. § 2254 Cases, rule 6.)

3. Evidentiary hearing [§ 9.105]

AEDPA[89] restricts the power of the district court to grant an evidentiary hearing. Section 2254(e)(2) of Title 28 United States Code provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

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[88]Rule 5(d)(3) states: "These provisions are intended to ensure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition."

[89]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

The court may order an evidentiary hearing if, after review of the pleadings and record, it appears to be required. (Rules Gov. § 2254 Cases, rule 8(a); see *Schriro v. Landrigan* (2007) 550 U.S. 465 [federal court must consider whether hearing could enable applicant to prove factual allegations which if true would require relief and in doing so must take AEDPA standards into account]; *West v. Ryan* (9th Cir. 2010) 608 F.3d 477 [no colorable claim under *Strickland v. Washington* (1984) 466 U.S. 668; hence, no abuse of discretion in declining to hold an evidentiary hearing].) *Baja v. Ducharme* (9th Cir. 1999) 187 F.3d 1075, 1078, laid out the procedure for determining whether an evidentiary hearing is necessary:

> [A] district court presented with a request for an evidentiary hearing, as in this case, must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court." If so, the court must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in § 2254(e)(2)(A) & (B). If, on the other hand, the applicant has not "failed to develop" the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under [*Townsend v. Sain* (1963) 372 U.S. 293].

(See also *Schriro v. Landrigan*, 550 U.S. at p. 473; *Insyxiengmay v. Morgan* (9th Cir. 2005) 403 F.3d 657, 669-670.)

Relief under section 2254(d)(1) may not be ordered on the basis of evidence developed at a federal habeas corpus hearing if the evidence was not before the state court that adjudicated the claim on the merits. (*Cullen v. Pinholster* (2011) ___ U.S. ___ [131 S.Ct. 1388, 179 L.Ed.2d 557]; cf. *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965 [new evidence may be reason to stay federal proceedings to give petitioner opportunity to return to state court].)

An evidentiary hearing may be appropriate to determine procedural matters such as defendant's competence to file a timely state petition (*Laws v. Lamarque* (9th Cir. 2003) 351 F.3d 919, 922-923; cf. *Roberts v. Marshall* (9th Cir. 2010) 627 F.3d 768 [not required when record amply developed]) or the bases for filing a successive petition (*United States v. Villa-Gonzalez* (9th Cir. 2000) 208 F.3d 1160, 1165).

If an evidentiary hearing is ordered, the court must appoint qualified counsel for a petitioner who is indigent. (Rules Gov. § 2254 Cases, rule 8(c) referring to 18 U.S.C. § 3006A; see *Martel v. Clair* (2012) ___U.S.___ [132 S.Ct. 1276].)

The judge often refers the petition to a magistrate judge to conduct the hearing. (Rules Gov. § 2254 Cases, rule 8(b).) The judge (or magistrate judge) must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. (Rules Gov. § 2254 Cases, rule 8(c).)

4. Decision [§ 9.106]

If a magistrate has been conducting the hearings, the magistrate must file proposed findings of law and recommendations. (Rules Gov. § 2254 Cases, rule 8(b).) Within 10 days a party may file objections as provided by local rule. (*Ibid.*)[90]

The district court judge must review de novo any findings or recommendations to which objection has been made. The judge may adopt, reject, or modify the magistrate's recommendation in whole or part in granting or denying the petition. (Rules Gov. § 2254 Cases, rule 8(b).)

If the district court renders a favorable ruling, it often will be a "conditional writ," such as, "release or re-try the petitioner [or modify the judgment]" within a certain time." (See *Hilton v. Braunskill* (1987) 481 U.S. 770, 775.) The court has broad discretion in conditioning a judgment granting habeas corpus relief "as law and justice require." (Ibid.; see *Stanley v. Cullen* (9th Cir. 2011) 633 F.3d 852, 864-865.)) The remedies should put the defendant back in same position as if the constitutional violation never occurred. (*Nunes v. Mueller* (9th Cir.2003) 350 F.3d 1045, 1057; cf *Chioino v. Kernan* (9th Cir. 2009) 581 F.3d 1182 [district court erred in modifying sentence instead of allowing state court to resentence].)

[90]For local rules, see http://www.adi-sandiego.com/legal_rules.html.

C. Appeal [§ 9.107]

If the district court denies a habeas corpus petition, the petitioner may appeal to the circuit court of appeals. The requirements for prosecuting an appeal in the federal appellate courts are set out in the Federal Rules of Appellate Procedure.[91]

1. Filing requirements [§ 9.108]

To appeal the denial, the petitioner must file in the district court: (1) a notice of appeal within 30 days of the entry of judgment denying the petition (Fed. Rules App. Proc., rule 4(a)(1)); (2) a motion to proceed *in forma pauperis*, if the petitioner is indigent (Fed. Rules App. Proc., rule 24(b)); and (3) a request for a certificate of appealability (28 U.S.C. § 2253(c);[92] Fed. Rules App. Proc., rule 22).

The 30-day time limit is jurisdictional and may not be extended except as Congress has provided. There is no equitable exception to the rule. (*Bowles v. Russell* (2007) 551 U.S. 205; cf. *Mackey v. Hoffman* (9th Cir. 2012) 682 F.3d 1247 [district court may grant petitioner relief from judgment if attorney's abandonment causes failure to file timely notice of appeal].)

2. Certificate of appealability [§ 9.109]

A certificate of appealability is required for a habeas corpus petition under Title 28, United State Code section 2241, as well as one under section 2254. (*Wilson v. Belleque* (9th Cir. 2009) 554 F.3d 816, 824-825; cf. *Harbison v. Bell* (2009) 556 U.S. 180 [certificate not needed to appeal denial of motion that federal counsel represent petitioner in state clemency proceedings, since requirement applies only to decisions dealing with challenge

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[91] Both the Federal Rules of Appellate Procedure and the Ninth Circuit Local Rules may be found at the Ninth Circuit's website, http://www.ca9.uscourts.gov/.

[92] 28 United States Code section 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

to underlying conviction].) A notice of appeal may be construed as a request for a certificate of appealability if there is no separate request. (*United States v. Asrar* (9th Cir. 1997) 116 F.3d 1268, 1270.)

a. Standards for granting [§ 9.110]

The standard for granting a certificate of appealability is a "substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253(c)(2).) This means reasonable judges could disagree with the district court's decision or conclude the issue merits further proceedings. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 327; see *Slack v. McDaniel* (2000) 529 U.S. 473, 484.) The standard is a modest one: the court should issue the certificate unless the issue is utterly without merit. (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 832-833.)

b. Application to circuit judge [§ 9.111]

If the district court denies the certificate of appealability, the petitioner may apply to a circuit judge. (See Fed. Rules App. Proc., rule 22, and Notes of Advisory Com. on 1998 amend. for subd. (b)(1); see *Hanson v. Mahoney* (9th Cir. 2006) 433 F.3d 1107, 1112; *Tiedeman v. Benson* (8th Cir. 1997) 122 F.3d 518, 522.)

c. Scope of appellate review [§ 9.112]

On appeals under AEDPA,[93] issues are preserved on an issue-by-issue basis – that is, appellate review is restricted to the issues specified in the certificate of appealability.[94] (28 U.S.C. § 2253(c)(3); *Hiivala v. Wood* (9th Cir. 1999) 195 F.3d 1098, 1103; see also *Cockett v. Ray* (9th Cir. 2003) 333 F.3d 938, 941.) However, the requirement that a certificate of appealability specify the particular issues is not a jurisdictional one; a judge's failure to "indicate" the requisite constitutional issue in the certificate does not deprive the appellate court of subject matter jurisdiction to adjudicate the appeal. (*Gonzalez v. Thaler* (2012) ___U.S.___ [132 S.Ct. 641, 646].) It is sufficient if the issue briefed is fairly encompassed within the issue for which the certificate was issued. (*Jorss v. Gomez* (9th Cir. 2002) 311 F.3d 1189, 1192-1193.)

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[93]Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

[94]In contrast, under California procedure, appellate issues are not limited to the issues for which a certificate of probable cause has been granted. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1176-1177; see § 2.106 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

To brief an issue not included in a certificate, the petitioner must first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, discuss any uncertified issues under the heading, "Uncertified Issues." The inclusion of uncertified issues in this way will be construed as a motion to expand the certificate; the court will consider those issues as it deems appropriate. (U.S. Cir. Ct. Rules (9th Cir.), rule 22-1(e).)

3. Standard of review [§ 9.113]

On appeal, legal questions are reviewed de novo. (*Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1000 (en banc).) The district court's findings of fact are reviewed for clear error. (*Lopez v. Thompson* (9th Cir. 2000) 202 F.3d 1110, 1116.) The district court's refusal to order an evidentiary hearing to resolve issues of fact is reviewed for abuse of discretion. (*Davis v. Woodford* (9th Cir. 2003) 384 F.3d 628, 637-638; *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1225-1226.)

The appellate court may affirm on any ground supported by the record, even if it differs from the rationale of the district court. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 823.) It may also address issues the district court did not resolve on the merits. (*Styers v. Schriro* (9th Cir. 2008) 547 F.3d 1026.)

4. Certiorari [§ 9.114]

The non-prevailing party may petition the United States Supreme Court for a writ of certiorari. The decision of that court normally concludes the process, unless the court remands for further proceedings. Certiorari is covered in § 7.100 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision."