

# How To Get Ahead In Federalizing

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## Introduction

Federalization is usually very easy, it can almost always be done very unobtrusively and quickly, and it is an essential skill of good appellate briefing. Yet it is sometimes missed, even by very experienced attorneys. It should not be; it can make all the difference in the world to the client.

### I. What Is Federalization?

- A. The technique of framing appellate issues as federal issues either exclusively or alternatively, in order to preserve them for federal court review, is called “federalization.”
- B. Federal habeas courts will only adjudicate issues properly raised under federal law (almost always under the U.S. Constitution); they will not adjudicate pure state-law issues. The U.S. Supreme Court’s certiorari jurisprudence is similar.

- C. The process of properly raising federal questions in state court, for the purpose of preserving the defendant's option to raise the same federal question later in federal habeas or on a petition for certiorari, is called "exhaustion of state remedies" (or "exhaustion of state court remedies," or just "exhaustion").
1. Exhaustion is based on "comity," by which federal courts do not interfere needlessly in state court proceedings. This is designed to "avoid[] the 'unseemliness' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845 ["*O'Sullivan*".])
  2. Toward that end, federal courts will "give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." (*Ibid.*)
  3. This requires presenting to the state courts both the operative facts and the federal legal principles that control each claim to the state judiciary. (*Davis v. Silva* (9th Cir. 2008) 511 F.3d 1005, 1008-1009; *Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 364; see *Picard v. Connor* (1971) 404 U.S. 270, 277-278.) It is not enough to state abstract principles of law; an actual legal argument, tied to the operative facts of the case, must be made. (See also discussion *post*, Part V(H).)
  4. Viewed in that light, "federalization" is merely a method of properly exhausting state remedies on a federal question. It involves presenting an issue to the state courts as a federal issue, in a manner that complies with the requirements of federal exhaustion law, and that is most likely to preserve the option of further review in a federal court.
- D. Some issues are self-federalizing or close to it, and there is no real question of "federalization." Examples:
1. *Miranda* issues - *Miranda* is a U.S. Supreme Court case on the U.S. Constitution, so those issues are automatically federalized.
  2. Search and seizure issues - Since under state law, a

California criminal conviction can only be reversed based on a search and seizure issue that violates the Fourth Amendment to the U.S. Constitution, those issues are also self-federalizing. (See *Sanders v. Ryder* (9th Cir. 2003) 342 F.3d 991, 1000.) (For different reasons, they cannot be raised in federal habeas corpus, but they can be raised in a certiorari petition to the U.S. Supreme Court [see *Stone v. Powell* (1976) 428 U.S. 465, 494].)

3. *Batson* issues - Issues regarding discrimination in jury selection arise under the Fourteenth Amendment equal protection clause and a U.S. Supreme Court case, *Batson v. Kentucky* (1986) (1986) 476 U.S. 79, and are automatically federalized by a simple reference to *Batson*. Even when trial counsel only cited a state-law analog of *Batson*, such as *People v. Wheeler* (1978) 22 Cal.3d 258, that is good enough. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

- E. Self-federalizing issues as in (D) above are uncommon. To exhaust state remedies on most issues, a conscious effort must be made to federalize explicitly and clearly. This is further discussed in Part V below.

Even a straightforward issue like the right to counsel, which most of us think of as arising under the Sixth Amendment, or equal protection, which most of us think of under the Fourteenth Amendment, may have state-law versions that are slightly different and therefore must be expressly federalized. (See, e.g., *Peterson v. Lampert* (9th Cir. 2003) 319 F.3d 1153, 1159-1160 [ineffective assistance claim based on Oregon state law did not exhaust Sixth Amendment claim, though state and federal doctrines were very similar].) And federalization questions are usually construed quite strictly by the federal courts. (See, e.g., *Baldwin v. Reese* (2004) 541 U.S. 27 [where petition for review to state's highest court had federalized IAC claim as to trial counsel but not as to appellate counsel, claim as to appellate counsel was not exhausted, even though state lower court opinion had made clear the federal nature of both claims].)

- F. In short, all doubts should be resolved in favor of express federalization.

- G. But that is why we are here ... and federalizing is so easy!

## II. Why Federalize?

- A. Federalization is necessary if appellate counsel wishes to preserve the client's option of filing a petition for federal habeas corpus. This is the most common purpose of federalization in criminal cases, particularly in cases with relatively severe prison sentences.
- B. It is also necessary if appellate counsel wishes to preserve the client's option of filing a petition for certiorari to the U.S. Supreme Court, after denial of a petition for review to the California Supreme Court. Although a certiorari petition is usually a longshot at best, there are occasionally reasons why appellate counsel would want to preserve the certiorari options:
1. Some issues cannot be raised in federal habeas. (E.g., *Stone v. Powell, supra*, 428 U.S. at p. 494; see Part VIII(D), *post.*)
  2. On rare occasions, issues that might once have seemed cut-and-dried – even when that is because of a rejection by the California Supreme Court – can take on a new life in the U.S. Supreme Court. (For example, compare *People v. Geier* (2007) 41 Cal.4th 555 with *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. \_\_ [129 S.Ct. 2527, 174 L.Ed.2d 314] [*“Melendez-Diaz”*]; *People v. Giles* (2007) 40 Cal.4th 833 with *Giles v. California* (2008) 554 U.S. \_\_\_\_ [128 S.Ct. 2678, 171 L.Ed.2d 488]; *People v. Johnson* (2003) 30 Cal.4th 1302 with *Johnson v. California* (2005) 545 U.S. 162; *People v. Frazer* (1999) 21 Cal.4th 737 with *Stogner v. California* (2003) 539 U.S. 607; etc.) It is better for a client to have that option, even if in real life, he or she can only use it pro. per.
  3. If an issue might possibly become a hot-button issue, giving the client the option of a certiorari petition increases the possibility that the U.S. Supreme Court might hold the client's case as a trailing case. Examples:
    - i. *People v. Barba* (B185940), in which appellant's counsel raised a *Crawford* Confrontation Clause issue [*Crawford v. Washington* (2004) 541 U.S. 36] in his October 2006 AOB; saw the issue rejected by the California Supreme Court in its July 2007 *Geier* opinion; lost in the Court of Appeal in November 2007; petitioned for certiorari anyway; waited while his petition was held

for over a year and a half; and was rewarded when the U.S. Supreme Court granted certiorari on June 29, 2009, vacated the Court of Appeal opinion, and remanded in light of its June 25, 2009 *Melendez-Diaz* opinion.

ii. *People v. Banos* (B194272), in which the defendant accomplished the same thing with the U.S. Supreme Court's opinion in *Giles v. California, supra – pro. per.*, from state prison.

4. A certiorari petition can also extend the direct appeal and its date of finality, which can have favorable federal habeas implications by permitting retroactive application of new U.S. Supreme Court authority issued while the certiorari petition is pending. (See *Griffith v. Kentucky* (1986) 479 U.S. 314, 322-323.)
5. Since in most cases, federalization can be accomplished as easily for purposes of preserving a certiorari option as for preserving a federal habeas option, appellate counsel need not give it a lot of thought ... all counsel needs to do is federalize!

C. There is also an ethical duty to preserve the client's options.

1. "Counsel should promptly advise his client of his rights and take all actions necessary to preserve them . . . ." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "An attorney has the duty to protect the interests of his client." (*Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, 796.) "An attorney's duty . . . is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances." (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147.)
2. It does not necessarily matter whether counsel believes the federal argument is currently likely or unlikely to succeed (as long as it is not patently frivolous). "Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful . . . . An attorney . . . has the right to press legitimate argument and to protest an erroneous ruling." (*Gallagher v. Municipal Court, supra*, 31 Cal.2d at pp. 789, 796.) Counsel may even

make a federal claim that is guaranteed to lose in state court (as long as adverse authority is recognized), solely for the purpose of preserving further review. (See *ibid.*; *People v. Baughman* (2008) 166 Cal.App.4th 1316, 1323, fn. 2; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 450, fn. 7.)

3. In other words, even doubtful cases should be resolved in favor of federalization, as a cost-free method of preserving the client's options. And because no one has a crystal ball, we never know for sure what doors might be opened in the future, irrespective of whether they might appear to be closed today. After all, few could have predicted the new watershed rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, until shortly before *Apprendi* was decided. (See also, e.g., *Batson v. Kentucky, supra*, 476 U.S. 79 [overruling prior authority from 21 years before]; *Erie Ry. Co. v. Tompkins* (1938) 304 U.S. 64 [overruling prior authority from 96 years before].) Since it is so easy to federalize, and there is no reason not to, counsel might as well preserve the client's federal options as best as possible.

#### D. Preserving a Client's Options Can Matter!

1. There are plenty of cases where an attorney came up with an argument or set of arguments that failed in state court, but because the attorney thoughtfully framed the argument(s) in federal terms as well as state-law terms, the argument ultimately prevailed in federal habeas or on certiorari.
2. EXAMPLES:
  - a. *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, in which the Ninth Circuit affirmed a federal habeas grant that was based on five state-law errors, because the defendant's counsel had added an argument that the combined state-law errors deprived the appellant of Fourteenth Amendment federal due process.
  - b. *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, in which the Ninth Circuit granted federal habeas based in part on an issue of the trial court's failure to give a lesser-included offense instruction, because it was also couched as a Fourteenth Amendment violation for

depriving the defendant of an opportunity to present his defense.

- c. *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, where the Ninth Circuit granted federal habeas based on an error in application of Evidence Code section 782, because it was also federalized in the state courts as federal confrontation or compulsory process error.
  - d. Cases such as *Rock v. Arkansas* (1987) 483 U.S. 44 and *Crane v. Kentucky* (1986) 476 U.S. 683, in which the defendant prevailed under the Compulsory Process Clause by challenging the federal constitutionality of an established state evidentiary statute or procedure.
3. The converse is also true – failing to properly federalize can defeat federal habeas relief that the defendant may otherwise have been entitled to.
- a. One of the better-known cases in this area involved a priest convicted of child molestation, of course losing his career and being forced to register as a sex offender for life. He ultimately obtained federal habeas relief in federal district court, which the Ninth Circuit affirmed. But the U.S. Supreme Court reversed, on the ground that the defendant did not properly federalize his argument, and merely labelled it as a state-law argument in his state-law appeal. (*Duncan v. Henry* (1995) 513 U.S. 364.) Oops...
  - b. But this is not new. For example, in 1982, the U.S. Supreme Court reversed a grant of federal habeas to a defendant who was challenging what is easily recognizable as an improper mandatory presumption, which is commonly known as “*Sandstrom* error” for a U.S. Supreme Court case of the same name. This defendant’s appellate attorney relied on a state court opinion in his briefing, and while that opinion said the defendant’s argument was based on the federal Constitution, it did not clearly decide the issue under the federal Constitution. So because the appellate attorney did not use the right label, his client lost a federal habeas grant. (*Anderson v. Harless* (1982) 459 U.S. 4.)

Another oops...

4. This kind of problem still happens a lot. It even happens as to claims that are routine to federalize, such as insufficiency of evidence, which is easily federalized under the Fourteenth Amendment or *Jackson v. Virginia* (1979) 443 U.S. 307 – but in all likelihood, still have to be expressly federalized. (See, e.g., *Hiivala v. Wood* (9th Cir. 1999) 195 F.3d 1098, 1106-1107; *Pearson v. Secretary, Department of Corrections* (No. 07-12828, 11th Cir. Apr. 15, 2008, nonpub. opn.) 2008 U.S. App. LEXIS 8559, p. 8 [273 Fed. Appx. 847, 850].) Of course, it happens on many other types of claims as well. (See, e.g., *ante*, Part I(E) [discussing an IAC claim that was found to be nonfederalized because it didn't cite the Sixth Amendment].)
  5. Nobody wants to be the attorney whose client lost his or her opportunity to have a federal habeas petition so much as considered, because the attorney put the wrong label on it! Conversely, putting the right label on it is very easy, and can often be done in a short paragraph or even a sentence or two.
- E. Clients who will have to be *pro. per.* in federal habeas need all the help they can get.
1. The vast majority of federal habeas petitions are filed by incarcerated defendants *in pro. per.*, because counsel are not appointed for noncapital defendants filing federal habeas petitions.
  2. When we see their cases in the state court appeal, these defendants have an appellate attorney who has significant legal knowledge and writing skills, as well as access to computer databases or law libraries. But when they are *pro. per.* in federal habeas, they are usually alone and living in prison, with no attorney, no access to computer research, little or no accurate legal knowledge, and often a mental disorder or scant education, English language, or intellectual skills. Yet they have to frame proper federal habeas arguments, in a manner that will surmount the ever-higher bars of federal habeas procedure. In many if not most cases, they cannot possibly do it on their own.
  3. If they have appellate counsel's properly federalized argument as a template, they can basically copy that argument for

federal habeas. They may even be able to simply attach counsel's properly federalized state appellate argument to their federal habeas petition, and make clear and repeated references to that argument in the petition. (See *Dye v. Hofbauer* (2005) 546 U.S. 1, 4.) (That approach cannot be used for federalizing in the state courts, but it can be used for the federal habeas petition itself.)

4. No matter what, though, the *pro. per.* federal habeas litigant is in a far better position if state appellate counsel gave sufficient attention to proper federalization.

F. Federalization can also permit counsel to use a more lenient standard of prejudice in the state court direct appeal.

1. In a direct appeal, if an error can be claimed under the federal Constitution as well as state law, the federal constitutional claim receives a much more favorable standard of prejudice analysis in state court, under *Chapman v. California* (1967) 386 U.S. 18, 24. On occasion, that much more favorable standard can be the difference between losing and winning an appeal.
2. Unless the federalization is 100% clear, counsel who argues prejudice under *Chapman* should usually also argue prejudice under the state-law *Watson* standard (or argue an error is prejudicial under either). But even if a legal point (here, federalization) is uncertain, counsel can still make the point, as long as it is at least minimally arguable.

### III. In What Courts Must One Federalize?

- A. Federal Habeas: In a system such as California, a defendant who takes a direct appeal from a conviction generally must present his federal claims to both available appellate courts – to the state Court of Appeal, and then once again in a petition for discretionary review to the state Supreme Court. (*O'Sullivan v. Boerckel, supra*, 526 U.S. at p. 845.) This is based on the requirement that federal habeas petitioners must “invok[e] one complete round of the State's established appellate review process” (*Ibid.*) (This rule does not apply in a tiny minority of states that have “opted out” (see *id.* at p. 847), but California has not, and the rule does apply in California.)

- B. Certiorari petition to U.S. Supreme Court: The rules are similar; a defendant who takes a direct appeal from a conviction generally must present his claims to both the state Court of Appeal, and again in a petition for discretionary review to the state Supreme Court. (28 U.S.C. § 1257; see, e.g., *Howell v. Mississippi* (2005) 543 U.S. 440, 443.)
- C. There is no federal exhaustion requirement that the federal issue be presented to the state trial court. Considerations that may arise if an issue was presented only as a state-law issue in the trial court, with no federal label, are discussed in Part XI below.

#### IV. In What Pleadings Must One Federalize?

- A. A claim raised on direct appeal must be federalized in an appellant's opening brief in the state Court of Appeal.
- B. The same federal claim must then be properly raised again (i.e., federalized) in a petition for review to the California Supreme Court. In the vast majority of cases, (A) and (B) together are required for the claim to be properly exhausted for federal review. (*O'Sullivan v. Boerckel, supra*, 526 U.S. at p. 845.)

WARNING # 1: If a petition for review in the California Supreme Court purports to incorporate by reference arguments made in the Court of Appeal briefing – which is prohibited by the California Rules of Court (rule 8.504(e)(3)) – that is not sufficient for federalization. (*Gatlin v. Madding* (9th Cir. 1999) 189 F.3d 882, 888-889.) The petition for review must contain its own federalized argument. (However, it can be copy-and-pasted from the AOB or any other briefing, to the extent otherwise appropriate.)

WARNING # 2: If a petition for review in the California Supreme Court relies on the assumption that the Supreme Court can read the Court of Appeal opinion to figure out the federal basis of the argument, that is also not sufficient for federalization. (*Baldwin v. Reese* (2004) 541 U.S. 27, 31-32.)

WARNING # 3: Consequently, a properly federalized argument in the petition for review must be self-contained. In other words, it must set forth adequate facts and law to provide the state's highest court with a full and fair opportunity to determine the factual and legal bases and federal nature of the claim, solely from looking at

the argument, without reference to the opinion or any of the appellate briefs.

As discussed elsewhere in this article (*ante*, Part I(C)(3) and *post*, Part V(H)), merely stating what the legal claim is, without both stating its federal nature and tying it to operative facts, does not suffice for federalization. A petition for review argument can be streamlined a great deal, and usually can be a lot shorter than the same argument was in the AOB (if desired). But if it is stripped down so much that there is no self-contained federal argument, there is a serious risk that the argument will not be adequate for proper federalization.

- C. If a claim is federalized in the state court AOB, it need not be “re-federalized” in the appellant’s reply brief. It can be, of course, but that is not required.
- D. If a defendant inadvertently fails to federalize a claim in the state court AOB, but requests and receives permission to file a supplemental AOB, that is a proper filing under state procedure. A supplemental AOB filed with permission of the court will support exhaustion as much as the original AOB.
- E. By contrast, if a claim that was made in the state court AOB is not federalized until the appellant’s reply brief, the defendant is at serious risk for a finding of nonexhaustion in federal court.
  - 1. Exhaustion requires that a federal claim be “fairly presented” in the state appellate courts (*Picard v. Connor, supra*, 404 U.S. at p. 275), which means the claim must be “properly presented” (*O’Sullivan v. Boerckel, supra*, 526 U.S. at p. 848) – i.e., presented in a proper procedural context in which the state court would be expected to decide the claim. (*Castille v. Peoples* (1989) 489 U.S. 346, 351.)
  - 2. Under established California practice, claims raised for the first time in a reply brief are deemed waived absent a showing of good cause. (E.g., *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) This follows from the fact that a respondent has no opportunity to respond to such a claim. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) Federal practice is no different. (E.g., *United States v.*

*Gianelli* (9th Cir. 2008) 543 F.3d 1178, 1184, fn. 6.)

3. Therefore, if a federal claim – the only kind cognizable in federal habeas – was raised for the first time in a state court reply brief, a federal habeas court may decline to consider the claim at all. (*Spreitzer v. Schomig* (7th Cir. 2000) 219 F.3d 639, 646-647; see *Castille v. Peoples, supra*, 489 U.S. at p. 351.)
- F. For the same reasons, a federal claim that was not in the state court AOB, and is raised for the first time in the state court reply brief, is not properly federalized. (The most common example is when appellate counsel sees a claim of waiver or forfeiture in the RB, and wants to raise an IAC claim to overcome it. An IAC claim raised for the first time in a reply brief is subject to being deemed waived.) Once again, the proper method of federalization for the new federal claim is to request permission to file a supplemental AOB.
- G. A claim cannot be federalized for the first time in a petition for rehearing or review. Federal courts will usually dismiss such a claim as unexhausted. (*Castille v. Peoples, supra*, 489 U.S. at p. 351; see, e.g., *Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 915 [claim federalized in petition for discretionary review to the state’s highest court, that had not been federalized in briefing to the appellate court, was not exhausted].) (If an appellant is fortunate enough to get something approaching a ruling on the merits of such a belated claim, that might be exhaustion (*Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1086-1088); but obviously, nobody should rely on the lucky possibility of this rare occurrence.)

EXCEPTION: In an aberrant case where a Court of Appeal renders a decision based on a federal constitutional issue that falls under Government Code section 68081 (an issue “not proposed or briefed by any party”), a petition for rehearing would be the established means of raising this issue for the first time in the Court of Appeal under section 68081. (*Accord Calif. Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1149.) It therefore can be used for exhaustion.

EXCEPTION: In other exceptional situations where a claim could not have been raised until the petition for rehearing – such as where the opinion itself is claimed to do something so grossly unfair as to constitute a violation of the Fourteenth Amendment – it can be

federalized in that manner, because there was no earlier opportunity to raise the federal claim in state court. (See, e.g., *Green v. Catoe* (4th Cir. 2000) 220 F.3d 220, 223-224; *Paulding v. Allen* (D. Mass. 2004) 300 F.Supp.2d 247, 249-250 [cases where this was held adequate for exhaustion]; see generally *Bouie v. City of Columbia* (1964) 378 U.S. 347, 354-355 [one type of federal claim where this scenario might exist]; *Hunt v. Tucker* (N.D. Ala. 1995) 875 F.Supp. 1487, 1507 [exhaustion of *Bouie* claim in this context].) The U.S. Supreme Court expressly held a petition for rehearing adequate for state court exhaustion of this very unusual type of federal claim, in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930) 281 U.S. 673, 677-678.

However, a petition for review without a petition for rehearing would not suffice in such a setting. In that situation, the defendant would be bypassing the only “available procedure” (28 U.S.C., § 2254, subd. (c)) for presenting the issue to the Court of Appeal.

## V. How Does One Federalize?

- A. “A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’” (*Baldwin v. Reese, supra*, 541 U.S. at p. 32.)
- B. Consequently, an appellant only has to set forth a clearly stated federal-law basis for his or her claim, along with the basic operative facts on which it is founded – and no more! The federal nature of the claim does not have to be in any particular place in the argument, nor does it have to be in the argument’s caption, and it need not be belabored.
- C. As is also discussed in Part I(E) above, federalization must be explicit and clear.
- D. The best way to federalize is to state expressly in the text of an argument the provision of the U.S. Constitution on which the appellant relies, or cite a U.S. Supreme Court case which clearly bases its ruling on a particular provision of the U.S. Constitution relevant to the argument – or preferably, both. Why both?

1. The constitutional provision makes the federal source of the argument instantly clear. The case authority, in conjunction with the cited provision, usually makes the analysis clear.
  2. Citing a constitutional provision alone might not clarify what the analysis is, and could leave a federal argument open to ambiguity or claims of waiver. Citing a case alone might be confusing, because many cases deal with more than one provision of law.
  3. Also, providing the extra citation might be helpful to the client, who may have to pursue his federal court remedies *pro. per.*; or to future federal court counsel, in the event a federal court appoints counsel after issuance of an order to show cause or the client is able to otherwise obtain federal counsel.
- E. An example, from the very last paragraph of an insufficiency of evidence argument: “Because there is no substantial evidence to support the conviction in Count 3, the conviction violates state law and the Fourteenth Amend (1980) 26 Cal.3d 557, 576-578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)” In other words, a single sentence, with a citation to a U.S. constitutional provision and a U.S. Supreme Court case construing that provision ... usually, it is that easy!
- F. There is no prohibition against using multiple sources for federalization, including multiple cases or constitutional amendments. However, whenever possible, it is almost always best to include at least one solid U.S. Supreme Court opinion in the federalization.
1. Why? Because federal habeas can only be granted for a violation of the U.S. Constitution based on “clearly established federal law, as determined by the Supreme Court of the United States.” (28 U.S.C., § 2254, subd. (d)(1).) If your client ends up using your federal authority in federal court, you want him or her to have readily available at least some authority which could be a proper basis for a federal habeas court to grant relief.
  2. When there is a choice of good U.S. Supreme Court opinions, it will not matter which one is selected. For example, a *Melendez-Diaz* confrontation issue can also be federalized by

citing *Crawford* (the original source of *Melendez-Diaz*), or by citing the Sixth Amendment Confrontation Clause. However, citation to the most specific case on point (in this example, *Melendez-Diaz*) will help the client in any *pro. per.* efforts to focus the federal court on the issue.

- G. However, it usually is not enough merely to say that “the defendant was denied due process and a fundamentally fair trial,” or recite other vague language that does not clearly and necessarily point to a federal argument. Because this type of overgeneralized language can be used for state-law claims as well, federal courts will usually hold it insufficient for exhaustion purposes. (See, e.g., *Gray v. Netherland* (1996) 518 U.S. 152, 163; *Castillo v. McFadden* (9th Cir. 2004) 399 F.3d 993, 1000-1001; see also discussion *post*, Part VI(E)(2) [federal precedent indicating this line of nonexhaustion authority might be extended to situations where the unexplained deprivation of “due process and a fundamentally fair trial” is coupled with the equally unexplained words “Fourteenth Amendment,” in what otherwise looks like a state-law claim].)
- H. In addition, exhaustion requires that a defendant present the state courts with the factual as well as the legal basis of the federal issue. (See discussion *ante*, Part I(C)(3).) A properly federalized claim is not made in the abstract; it must be applied in some way to the facts of the particular case. It is therefore insufficient merely to recite federal constitutional provisions or caselaw; rather, there has to be some statement of why those authorities entitle the defendant to the relief sought. (See also *Castillo v. McFadden*, *supra*, 399 F.3d at pp. 1002-1003.) This standard is not onerous, and can be met by routine appellate briefing or a streamlined claim in the petition for review. But it still needs to be met.
- I. Federalizing should be done in the text of the argument; arguably, it might not be enough to federalize only in the argument’s caption. However, it is easy to federalize in text.

(Some sources believe that if the argument is federalized in text, it is unnecessary to federalize in the caption as well because U.S. Supreme Court authority does not require that much, and doing so can make for an unwieldy caption which can be contrary to sound appellate practice. However, other sources consider it advisable to federalize in the caption as well as in text. This outline takes no position on the question, except to say that federalization should not

be done in a manner that needlessly impairs the presentation of the argument.)

- J. There is no prohibition against federalizing on more than one federal-law basis, as long as the grounds are specific enough to make clear what the federal nature of each argument is.

## **VI. How Does One Determine What U.S. Constitutional Provisions To Rely On When Federalizing?**

- A. Sometimes it is easy to the point of being self-evident. *Examples:* Denial of counsel or ineffective assistance - Sixth Amendment; Double jeopardy, for retrial after an acquittal - Fifth Amendment; denial of equal protection - Fourteenth Amendment; denial of due process - Fourteenth Amendment.
- B. For a few issues, the federal constitutional provision will turn up in many of the key authorities in the area. *Examples:* Modern caselaw on issues under Penal Code section 1368 often state that trial of an incompetent defendant violates the Fourteenth Amendment due process clause, cite U.S. Supreme Court authority, or both. (See, e.g., *People v. Hale* (1988) 44 Cal.3d 531, 538-539.) Modern caselaw on insufficiency of evidence often cites either the Fourteenth Amendment, or *Jackson v. Virginia* (1979) 443 U.S. 307 (which construes the Fourteenth Amendment), or both.
- C. For other issues, knowing the Fifth, Sixth, Eighth and Fourteenth Amendments very well (and on rare occasion, the First Amendment), and thinking through the problem at hand, will yield a basis for federalization.

Some bases can be relatively easy. As examples:

1. Denial of cross-examination of a juvenile witness with respect to a prior juvenile adjudication: Denial of cross-examination is a violation of the right to confrontation, and therefore falls under the Sixth Amendment Confrontation Clause. (See, e.g., *Davis v. Alaska* (1974) 415 U.S. 308.)
2. Admission of hearsay from a witness whom the trial court declared unavailable, but whom the prosecution could easily have produced for trial: Hearsay issues, when cognizable under the federal Constitution, often present Sixth Amendment

Confrontation Clause questions. This one does as well, because the witness was never available for trial, and the defense was thereby denied the opportunity for cross-examination. (See, e.g., *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

3. Mandatory conclusive presumption: That takes a question away from the jury, and therefore can be argued as a violation of the Sixth Amendment right to a jury trial, as well as the Fourteenth Amendment Due Process Clause. (This is known as “*Sandstrom* error,” and citing *Sandstrom v. Montana* (1979) 442 U.S. 510 will also federalize the claim.)
4. Instruction omitting or misstating key elements of a charged offense or the burden of proof: This too takes a question away from the jury (in a different manner), and can be argued as a violation of the Sixth and Fourteenth Amendments. (See, e.g., *Neder v. United States* (1999) 527 U.S. 1, 12.)
5. Refusal to permit the defendant to call key witnesses who could corroborate the defendant’s case, or prosecutorial interference with the defendant’s ability to call such witnesses, without a constitutionally adequate justification: The defense’s ability to call witnesses generally falls under the Sixth Amendment Compulsory Process Clause; that is the very nature of this clause. (See, e.g., *Braswell v. Wainwright* (5th Cir. 1972) 463 F.2d 1148, 1155-1156; *People v. Warren* (1984) 161 Cal.App.3d 961, 971-972.)
6. Attorney conflict of interest: That involves the impairment of the defendant’s representation by counsel, which is a Sixth Amendment right to counsel question. (See, e.g., *Wood v. Georgia* (1981) 450 U.S. 261, 271.)

Some are harder, but thinking the problem through – and consulting sources such as those in section (D) below, if need be – will usually at least lead counsel in the right direction.

D. For less obvious or more difficult federalizations, there are plenty of other options. Some resources discussing these options include:

1. [Federalization Table](#) (current revision December 2008, as of this writing), by Gail Weinheimer, formerly of the California

Appellate Project in San Francisco.

2. [Federalization Chart](#) (February 2005), by the First District Appellate Project in San Francisco. This is the same general type of resource, but with somewhat different organization.
  3. [“Making a Federal Case Out of It”](#) (March 2002), by Brad O’Connell of the First District Appellate Project. Parts III and IV of this article offer some useful tips and suggestions for more difficult federalizations.
- E. Less obvious or more difficult federalizations should usually have at least some basic explanation of *why* the issue can properly be characterized as federal.
1. As discussed earlier, a federal claim must be “fairly presented” in the state appellate courts. (*Picard v. Connor, supra*, 404 U.S. at p. 275.) This may require a basic explanation of how a federal constitutional provision would apply to the claim, when it is not otherwise self-evident. Otherwise, it could be argued that the state courts were not given an adequate opportunity to decide the federal claim, because they were not adequately advised of how the federal claim applies to the case.
  2. Furthermore, at least one court has held that a federal claim is unexhausted when the petitioner frames it on direct appeal as a state-law claim, accompanied by a wholly unsupported assertion that the error also violated the Sixth and Fourteenth Amendments. (See *Slaughter v. Parker* (6th Cir. 2006) 450 F.3d 224, 235-236 [2-1 opinion so holding]; but cf. *id.* at pp. 251-252 [dis. opn. of Cole, J.] [contending this contravenes U.S. Supreme Court authority]; *Gonzales v. Wolfe* (No. 06-4437, 6th Cir. Aug. 20, 2008, nonpub. opn.) 2008 U.S. App. LEXIS 17808, p. 31 [290 Fed. Appx. 799, 811] [suggesting the *Slaughter* dissent might be correct].) While this article cannot predict whether that view will be widely accepted over time, it further highlights the concern addressed here.
  3. No more than a brief explanation would be needed. (*Example*: “For the same reasons, the consecutive sentence violates not only section 654, but also the Fourteenth Amendment prohibition against deprivation of liberty beyond that authorized by state statute (*Board of Pardons v. Allen*

(1987) 482 U.S. 369, 373-378; *Wasko v. Vasquez* (9th Cir. 1987) 820 F.2d 1090, 1091, fn. 2), and the Fifth Amendment prohibition against multiple punishment unauthorized by state law (*Department of Revenue of Montana v. Kurth Ranch* (1994) 511 U.S. 767, 769, fn. 1).”) But as a matter of prudence and caution in these types of situations, usually there should at least be one.

**VII. Could The Substantive Legal Standards Used In Federal Habeas Corpus Have Any Effect On How I Should Federalize In The State Appellate Courts Or On How I Should Frame A Certiorari Petition?**

- A. YES. Since the purpose of federalization is almost always to help preserve the client’s potential federal habeas options, it can only help to have at least a basic understanding of the legal standards that are used by federal courts in federal habeas cases, in order to understand what can happen if the client later tries to exercise that option.
- B. Under 28 U.S.C. § 2254, subdivision (d)(1), it is not enough for a federal habeas petitioner to try to show that the state courts were incorrect in their interpretation of federal constitutional law. Rather, the federal habeas petitioner can only prevail based on a state court error of law if the state court’s decision is contrary to (or involves an unreasonable application of) clearly established federal law as determined by the Supreme Court of the United States. (All emphasis added.) This means that the federal district courts and courts of appeals are not free to construe the U.S. Constitution on their own; rather, they must look for a holding – not mere dicta – of the U.S. Supreme Court that construes the constitutional guarantee at issue to include the legal principle on which the petitioner relies.
- C. While this is a restrictive standard which prohibits lower federal courts from relying on non-U.S. Supreme Court interpretations of the U.S. Constitution to grant federal habeas relief, it does have two helpful caveats.
  - 1. First, “[t]here need not be a narrow Supreme Court holding precisely on point . . . – a state court can render a decision that is ‘contrary to’ or an ‘unreasonable application’ of Supreme Court law by ‘ignoring the fundamental principles established by [that Court’s] most relevant precedents.’”

(*Moore v. Czerniak* (9th Cir. 2009) 574 F.3d 1092, 1100 [citing *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 258-259].)

2. Second, “[a]lthough a federal court can overturn a state court's decision only if it is contrary to, or an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court, lower federal court decisions ‘are of persuasive weight in regard to “whether a particular state court decision is an ‘unreasonable application’ of Supreme Court law, and . . . what law is ‘clearly established.’”’ [Citations.] This is especially true if the fact pattern of the lower court decision is substantially similar to the case being decided.” (*Moore v. Czerniak, supra*, 574 F.3d at p. 1100, fn. 5.)
  3. That said, the federal courts must still look to clearly established federal law as determined by the U.S. Supreme Court, as the one permissible ultimate source of law on which a federal habeas petitioner can base his or her federal claims.
- D. This presents a potential hidden trap for appellate counsel – possibly a fatal trap; and at the least, a very significant conflict with the techniques which have traditionally been used to seek discretionary review in the California Supreme Court (petition for review) or U.S. Supreme Court (petition for certiorari).
1. One of the most common techniques for seeking discretionary review in the highest court of a jurisdiction (state or federal) is to try to demonstrate that there is a conflict among lower courts, or some other form of uncertainty in the state of the caselaw. (See, e.g., Cal. Rules of Court, rule 8.500(b)(1); U.S. Supreme Ct. Rules, rule 10.) The stronger the conflict among relevant published opinions, the more likely it is that discretionary review may be granted.
  2. But if you are considering that approach, **USE EXTREME CAUTION!!** For if appellate counsel files a petition for review in the California Supreme Court (or a petition for certiorari in the U.S. Supreme Court) in which counsel overly emphasizes conflicts among lower courts and uncertainty in the law, that may impair or even destroy the defendant’s later ability to show the existence of clearly established authority of the U.S. Supreme Court in federal habeas corpus. This is because a claim of conflict or uncertainty in the caselaw is inherently

inconsistent with the “clearly established authority of the U.S. Supreme Court” standard for federal habeas, at least absent any further explanation of how the two can be reconciled.

3. As a practical matter, the options for appellate counsel in such a situation may be:
  - a. Give up on the (usually very slim) possibility of obtaining discretionary review from the California Supreme Court (and/or decide not to file a certiorari petition with the U.S. Supreme Court), and focus the petition for review on preservation of the federal habeas remedy, emphasizing the best argument possible that clearly established authority of the U.S. Supreme Court is controlling.
  - b. Emphasize the conflict in authority to increase the (usually very slim) possibility of obtaining discretionary review, cognizant that it may present a serious risk to the defendant’s federal habeas chances. This is not recommended except in unusual and extreme circumstances, at least in situations involving long sentences, or where there is any other realistic possibility that the client might later wish to petition for federal habeas corpus.
  - c. Try to do both, if the caselaw warrants such an argument: Contend that there is a conflict of authority or that the caselaw is otherwise uncertain in the lower courts, but that this is essentially a “false conflict” or “false uncertainty” because the proper resolution can be found in existing clearly established authority of the U.S. Supreme Court.
    - i. An excellent example can be found in Prof. Jeffrey Fisher’s petition for certiorari to the U.S. Supreme Court in *Pendergrass v. Indiana* (No. 09-866, cert. petn. filed Jan. 19, 2010), which begins its discussion by saying “State high courts and federal courts of appeals are deeply and intractably divided . . . .,” then goes into detail about the various decisions nationwide on both sides; but ultimately, reaches the conclusion that

*Melendez-Diaz* and *Crawford v. Washington* compel the reversal sought by the petition.

- ii. It is certainly possible that the U.S. Supreme Court could grant certiorari on this issue. But if it denies certiorari, Mr. Pendergrass's federal habeas option should be preserved as well as it can be.
  - iii. As of this writing, the petition can be found on line at: <http://www-personal.umich.edu/~rdfrdman/PendergrasCertPetition.pdf> .
  - iv. This may often be the best approach when it can be utilized, because it usually will not risk or impair the defendant's federal habeas options, yet it will still present a traditional ground discretionary review.
- E. In short, appellate counsel should make sure that in preserving the client's federal options in appellate briefing and petitions for discretionary review, counsel is very mindful of the legal standards that will govern the client's hypothetical eventual federal habeas petition (which is the primary reason for federalizing in the first place). This is done to avoid needlessly impairing or destroying those options by techniques that might have been solid appellate advocacy in the pre-AEDPA era, but sometimes might not work as well under the very restrictive standards of AEDPA.

**VIII. Can I File A Petition For Review Solely To Preserve A Federal Issue For Federal Review (i.e., Exhaust), Even If My Petition Does Not Meet The Criteria Of Rule 8.500(b) ["Grounds For Review"], And I Cannot Conceive Of Any Chance It Will Be Granted?**

- A. YES!!!!!!!!!!
- B. As discussed in Part II(C) above, an attorney has a duty to protect the interests of his client. Furthermore, as discussed in Part III(A) above, federal habeas exhaustion in California requires fair presentation of the federal claims in one complete round of appellate review, which includes a petition for review to the state Supreme Court. (*O'Sullivan v. Boerckel, supra*, 526 U.S. at p. 845; see 28

U.S.C. § 2254, subd. (c) [federal claim is not exhausted if there is “any available procedure” to raise it in state court, construed in *O’Sullivan* to mean one full round of appellate review including a petition for discretionary review to the state’s highest court].)

- C. Under U.S. Supreme Court authority, a petition for review is a necessary part of the exhaustion process in the manner contemplated by established California procedure. Therefore, appellate counsel may file such a petition in order to preserve the client’s federal habeas option, even if counsel considers it certain that the petition will be denied, because the denial of the petition is irrelevant to preservation of the client’s federal habeas option.
1. Exhaustion requires providing state appellate courts with a full and fair opportunity to resolve federal claims, “by invoking one complete round of the State’s established appellate review process.” (*O’Sullivan v. Boerckel, supra*, 526 U.S. at p. 845.) It does not matter whether counsel thinks there is a realistic possibility that a petition for review might be successful; the key is that the state appellate courts – including the California Supreme Court – must be given the opportunity.
  2. In *O’Sullivan v. Boerckel, supra*, 526 U.S. 838, the U.S. Supreme Court rejected an argument that federal habeas exhaustion could be accomplished without a petition for discretionary review in Illinois’ highest court, when that court had a rule akin to California’s rule 8.500(b)(1) [governing criteria for review] and considered its role to be limited to deciding questions of statewide significance. (*Id.*, 526 U.S. at pp. 845-847.) If a state wants to “opt out,” and declare by its own rules that petitions for discretionary review are not needed for federal exhaustion, it can. But Illinois had not, so the normal exhaustion rules applied.
  3. This rationale would apply equally to petitions for discretionary review in California. Even if a petition would not meet the criteria of rule 8.500(b)(1)-(3), and even though our Supreme Court generally only decides noncapital questions of statewide significance, California has not “opted out” of the federal rules governing exhaustion under *O’Sullivan*.
  4. Furthermore, our Supreme Court also has a “catchall” rule by which it can transfer any case back to the Court of Appeal for

redecision (Rule 8.500(b)(4)). This is an additional indication, beyond the considerations in *O'Sullivan*, that established appellate procedure permits the California Supreme Court to adjudicate federal claims as a court of last resort. Even if it might be very unlikely in any particular case, it is still possible in all cases.

5. Therefore, the *O'Sullivan* rules apply in California (*accord Gatlin v. Madding, supra*, 189 F.3d at p. 888): If appellate counsel wishes to preserve the defendant's federal habeas option for a federal claim, counsel's only choice after an appellate affirmance is a petition for review to the California Supreme Court – even if counsel subjectively considers it 100% certain the petition will be denied.

D. *Exception (sort of) – federal claims that cannot be raised in federal habeas:*

1. A petition for review should not be filed solely to exhaust state remedies for federal habeas purposes with respect to Fourth Amendment issues, because those issues cannot be raised in federal habeas. (*Stone v. Powell, supra*, 428 U.S. at p. 494.) However, it can be filed for exhaustion purposes if counsel believes that either there is any chance at all of a certiorari petition being granted by the U.S. Supreme Court, or if the client may wish to file a certiorari petition *pro. per.* or through other counsel. Certiorari is the only federal remedy available for violations of the Fourth Amendment in state courts.
2. The same is true for issues that seek solely to challenge fines, fees, or other orders with no arguable loss of liberty as defined by federal law. Such issues are also not cognizable in federal habeas, because they do not meet the requirement of “custody” under 28 U.S.C. § 2254. (See *Moore v. Nelson* (9th Cir. 2001) 270 F.3d 789, 791-792.) Therefore, a petition for review should not be filed solely to exhaust state remedies for federal habeas on such issues. However, a petition for review can be filed to preserve the option of a certiorari petition to the U.S. Supreme Court, which again is the only federal remedy available.

E. *Exception to the exception – certain ineffective assistance claims:*

1. If the federal claim is that there was a meritorious Fourth Amendment issue, but trial counsel did not raise it and on that basis was constitutionally ineffective in violation of the Sixth Amendment, that type of claim can be raised in federal habeas because it is a Sixth Amendment claim. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382-383.)
  2. So too with a Sixth Amendment claim which alleges ineffective assistance of trial counsel in failing to raise a meritorious state-law issue relating to a conviction or resulting deprivation of liberty: Those claims can also be brought to federal habeas, even though state-law claims cannot, because the ineffective assistance claim itself falls under the Sixth Amendment. (See, e.g., *Mosby v. Senkowski* (2d Cir. 2006) 470 F.3d 515, 521; *Carpenter v. Vaughn* (3d Cir. 2002) 296 F.3d 138, 159; *Alvord v. Wainwright* (11th Cir. 1984) 725 F.2d 1282, 1291.)
- F. Counsel may also file a petition for review to the California Supreme Court in order to preserve a client's right to file a petition for certiorari to the U.S. Supreme Court, even *pro. per.* That right may be of particular importance if (as examples) the federal question is one for which (i) federal habeas review is unavailable (see section (D), *ante*); (ii) California caselaw may be in conflict with caselaw from other jurisdictions (see, e.g., *Giles v. California, supra*, 554 U.S. \_\_\_\_ [128 S.Ct. 2678, 171 L.Ed.2d 488]; (iii) California caselaw may be in direct and obvious conflict with opinions of the U.S. Supreme Court (see, e.g., *Johnson v. California* (2006) 545 U.S. 162; *Stansbury v. California* (1994) 511 U.S. 318); or the federal question (iv) is based in California law and itself presents an important question of nationwide importance (see, e.g., *Stogner v. California* (2003) 539 U.S. 607).

## **IX. What Is An "Exhaustion Petition"? Does It Suffice For Exhaustion?**

- A. Optional "exhaustion petition" procedures under rule 8.508:
1. Rule 8.508 of the California Rules of Court provides a special procedure for "an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief."

2. Rule 8.508(b)(3)(C) states the most essential component of such an abbreviated exhaustion petition – “A brief statement of the factual and legal bases of the [federal] claim.” However, the requirements of such a “brief statement” have not yet been defined.
3. As of this writing, current federal authority provides that the exhaustion requirement is satisfied “when the petitioner has presented the state court with the [federal] issue’s factual and legal basis.” (*Weaver v. Thompson, supra*, 197 F.3d at p. 364; see *ante*, Parts I(C)(3), V(H).)
  - a. This standard appears to be similar to the substance of rule 8.508(b)(3)(C).
  - b. It is also not an onerous standard: Exhaustion of the legal basis of a claim need only meet the minimal standard described in Part V(A)-(B) above; and “to exhaust the factual basis of the claim, the petitioner must only provide the state court with the operative facts, that is, all of the facts necessary to give application to the constitutional principle upon which [the petitioner] relies.” (*Davis v. Silva, supra*, 511 F.3d at p. 1009.)
4. Consequently, if an exhaustion petition under rule 8.508 meets this minimal federal habeas standard of stating the facts upon which the federal claim is predicated, along with the basis of the federal claim, that appears likely to suffice for exhaustion.
5. Although there is never any guarantee of what courts will hold in the future, as of this writing it appears federal courts have approved of the abbreviated rule 8.508 procedure, when the federal habeas requirements are otherwise complied with. (See *Castillo v. Clark* (C.D. Cal. 2008) 610 F.Supp.2d 1084, 1100; *Elster v. Wong* (No. C 08-03279 WHA, N.D. Cal. June 5, 2009, nonpub. opn.) 2009 U.S. Dist. LEXIS 48196, at pp. 12-13.)
6. While a California Supreme Court grant of review on an exhaustion petition may be very unlikely, it has been known to

happen on rare occasion.

- B. However, it is not necessary to invoke rule 8.508 in order to file a petition solely for the purposes of exhaustion.
  - 1. See Part VIII(B)-(C) above.
  - 2. Some experienced practitioners believe that the rule 8.508 procedures should rarely or never be invoked, even for a petition for review that is filed solely for the purpose of exhausting. Their view is that labeling a petition on the cover as an “exhaustion petition” is tantamount to saying that the issue inside is not very important, and is therefore a sort of argument against the client in situations where Supreme Court review would otherwise be desirable. Other experienced practitioners believe it is appropriate for counsel to use common-sense judgment in determining whether to invoke rule 8.508. This outline takes no position on the debate.
  - 3. Either way, rule 8.508 is optional, not mandatory, so there is no requirement that counsel utilize it. In addition, some cases may be more suitable for invoking rule 8.508 than others, for purposes of preserving a federal issue for federal review. Each situation should be evaluated individually on its own merits.

## **X. What About A Petition For Rehearing - Is It Ever Necessary For Exhaustion?**

- A. There are differing views on what happens in situations covered by rule 8.500(c)(2) of the California Rules of Court, where the Court of Appeal’s opinion either omits a federal issue raised in the briefing, or makes a misstatement or omission of a fact that is arguably material to the determination of a federal issue.
  - 1. Some experienced practitioners believe that a petition for rehearing may be necessary in many situations of this nature in light of rule 8.500(c)(2). They believe the risks of such a petition are relatively minimal, and that not filing such a petition could possibly risk a failure to meet exhaustion requirements, which could prevent the client from getting the merits of a claim heard in federal habeas. This view has been

expressed in the Appellate Defenders, Inc. Panel Manual (“ADI Manual”), Chapter 9, [“The Courthouse Across The Street: Federal Habeas Corpus,”](#) p. 36 & fn. 45.

2. Other experienced practitioners believe that a petition for rehearing is counterproductive in such situations, the risks of not filing one are relatively minimal, and the advantages in federal habeas – most notably, a more favorable standard of federal habeas review – are significant. This view has been expressed in an article on the CADC website by Cliff Gardner and Richard Neuhoff, “Exhaustion of State Remedies and Petitions for Rehearing” (Jan. 30, 2005).
  3. This outline takes no formal position on the debate. However, of the two positions, the only one that is guaranteed not to create a bar to federal habeas is the first one. If counsel believes that such a guarantee is of paramount importance, then filing a petition for rehearing is the safer course of action. Also, it may not be certain that the decisional foundations of the second position, *Smith v. Digmon* (1978) 434 U.S. 332, 333 and *Dye v. Hofbauer, supra*, 546 U.S. at p. 3, are automatically dispositive of the somewhat different and California-specific question of how rule 8.500(c)(2) would be applied to the requirements of *O’Sullivan v. Boerckel, supra* – the question underlying this discussion. Finally, the considerations underlying this debate as of the time this article was posted (April 2010) may be somewhat different than they would have been in 2005 or would be in the future.
  4. If you believe you may be in such a situation and find yourself in doubt as to what to do, or would like to discuss the competing alternatives in greater detail, please do not hesitate to contact the CCAP staff attorney on your case.
- B. In the rare situations discussed in the “Exceptions” in Part IV(G) above (claims that arise as a result of the Court of Appeal opinion, which could not reasonably have been anticipated or raised before that), a petition for rehearing is necessary for exhaustion, and the issue cannot be raised for the first time in a petition for review.

**XI. What Happens If The Federal Claim I Want To Raise In The Court Of Appeal Was Not Specifically Argued As A Federal Issue In The Trial Court?**

- A. Under state law, many types of issues that are raised for the first time in the Court of Appeal may be considered waived, including federal issues. Even potential federal issues that were not expressly raised in federal terms in the trial court may be subject to a federal waiver finding (and the AG often makes such federal-only waiver arguments).
- B. If the state Court of Appeal finds a waiver of a federal issue, that may sometimes constitute a federal “procedural bar” which can impair the defendant’s ability to seek federal habeas. (For a fuller discussion of federal “procedural bars,” see, e.g., ADI Manual, Chapter 9, [“The Courthouse Across The Street”](#), ante, section V, pp. 25-43.)
- C. So when an issue was not clearly raised and labelled as a federal issue in the trial court, appellate counsel should still be federalizing, but should also be thinking about how to try to avoid a finding of waiver (forfeiture) – or at least, avoid a finding of waiver (forfeiture) that would stick in federal court. (See *Ford v. Georgia* (1991) 498 U.S. 411, 423-424 [state procedural bar only precludes federal habeas in situations where it is “firmly established and regularly followed”].)

As a matter of strategy, in some cases it may be best simply to federalize in the AOB without discussing the (hypothetical) possibility of a procedural problem, since the RB might not raise a federal waiver claim, and such a claim if made can often be dealt with in the reply brief. On the other hand, some cases warrant dealing with the issue in the AOB, especially if there is seemingly adverse authority that a reader might believe to be on point and controlling. Each case presents different considerations.

- D. A few types of issues do not have this problem, i.e., the respondent cannot make a federal waiver claim even if the issue was not raised in federal terms in the trial court. A federal law issue may be raised

as such for the first time in the appellate court if it is based on a *sua sponte* trial court requirement that implicates federal law, such as instructions on the elements of an offense, or on other instructional claims affecting substantial federal rights under Penal Code section 1259. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; see, e.g., *People v. Dunkle* (2005) 36 Cal.4th 861, 929 [claim that an instruction's erroneous underinclusiveness violated the Eighth Amendment, not raised in the trial court].) It can also be raised for the first time on appeal if the argument involves the same legal and factual considerations as a state-law issue that was raised in the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [claim made at trial under *People v. Wheeler* (1978) 22 Cal.3d 258, raised on appeal under *Batson v. Kentucky* (1986) 476 U.S. 79]; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [admission of prior abuse evidence, raised on appeal as Fourteenth Amendment due process claim]; see generally *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [analyzing the parameters of this nonwaiver doctrine].)

Counsel should be very alert to these lines of authority in deciding how to respond to a federal waiver claim, or to deal with the potential of one.

- E. It may also be possible in a few cases to argue that trial counsel's failure to attach a federal label to a state-law objection was Sixth Amendment ineffective assistance, with no tactical basis because counsel was seeking to have the objection granted. (See *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366.) That would itself be a federal claim. However, such a claim could not be raised for the first time in a reply brief, and it might sometimes be inappropriate unless the respondent's brief had claimed a federal waiver. A request to file a supplemental AOB may be appropriate in such situations; in other situations, the claim could be made in the AOB. Each appeal presents different considerations, and the ultimate determination would be made by appellate counsel on a case-by-case basis.

## **XII. Are There Any Other Readily Available Federalization Resources?**

Further discussions of federalization may be found in ADI Manual, Chapter 9, "[The Courthouse Across The Street](#)," *ante*, section V, pp. 25-43; and Brad

O'Connell's article "[Making a Federal Case Out of It: 'Federalization' Reminders, Tips & Exhortations.](#)"

### **XIII. Do You Have Any Parting Words Of Wisdom?**

A real estate agent will often say that the three most important words in her field are "location, location, location." An appellate defense lawyer's analog is: "federalize, federalize, federalize." It can never hurt, it can only help, it may be the difference between a grant and a denial of federal habeas, and it is often quite easy (and when it isn't, there are excellent materials available to help in the process). Finally, it can give your client an extra measure of hope – or at the least, can ensure you are not the one who takes the client's hope away.