

ELEMENTS OF A HABEAS PETITION

By Jonathan Grossman

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

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

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

I.

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

II.

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

III.

The petitioner must be illegally restrained. (Pen. Code, §§ 1473, subd. (a), 1474, subd. 2.) That is, the petitioner must be in custody or otherwise have his or her liberty restrained. A probationer is considered to be “restrained” for habeas corpus purposes. (*In re Catalano* (1981) 29 Cal.3d 1, 8.) A parolee is “restrained.” (*In re Sturm* (1974) 11

Cal.3d 258, 265.) A person released on bail qualifies. (*In re Geer* (1980) 108 Cal.App.3d 1002, 1004, fn. 2.) A delinquent minor declared a ward of the court qualifies. (*In re Robin M.* (1978) 21 Cal.3d 337, 341.) An involuntary civil commitment qualifies. (*In re Parker* (1998) 60 Cal.App.4th 1453, 1460, fn. 8.) An immigration hold, however, does not qualify. (*People v. Villa* (2009) 45 Cal.4th 1063, 1071-1072.)

IV.

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

V.

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

There are four exceptions to the *Waltreus* rule: (1) a fundamental constitutional error (*Harris, supra*, 5 Cal.4th at pp. 829-836; see also *In re Clark* (1993) 5 Cal.4th 750, 797-798); (2) lack of fundamental jurisdiction (*id.*, at pp. 836-838); (3) an act in excess of jurisdiction from the undisputed record (*id.*, at pp. 838-841; *In re Harris* (1989) 49 Cal.3d 131, 134, fn. 2); and (4) a change in the law concerning criminal liability (*id.*, at p. 842; see, e.g., *In re Gomez* (2009) 45 Cal.4th 650, 656-657).

VI.

Of course, the petitioner must make a legal claim why he is entitled to be released. (Pen. Code, § 1474.) “Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension.” (*Clark, supra*, 5 Cal.4th at pp. 766-767; *In re Sterling* (1965) 63 Cal.2d 486, 489 [Fourth Amendment claims

generally not cognizable in state habeas petitions].) Except for when a petition is filed purely as an attempt to expedite review, the purpose of the petition is to introduce evidence not found in the record on appeal. Thus, a petition introducing no additional evidence to a claim is pointless. In an IAC claim, there should be an affidavit from trial counsel, or from someone (sometimes the defendant) who witnessed trial counsel's deficiencies, or from appellate counsel describing how trial counsel won't respond to inquiries.

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

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

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

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

impeaching a witness or in corroborating evidence is often insufficient. (See *Clark, supra*, 5 Cal.4th at p. 766.)

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

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

A claim of juror misconduct must allege acts of misconduct and that there is a substantial likelihood of prejudice. (*In re Carpenter* (1995) 9 Cal.4th 634, 651.) Substantial likelihood of prejudice exists if "extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror" or if there is evidence the juror was actually biased. (*Id.*, at pp. 653-654.) The claim must be supported by affidavits (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256), but they cannot contain hearsay or other inadmissible evidence (*ibid.*) or comments by jurors of their subjective reasoning process (Evid. Code, § 1150).

VII.

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

VIII.

In death penalty cases, a petition is presumed timely if it is filed within 180 days of the final due date for the filing of an appellant's reply brief or within three years of appointment of counsel on habeas corpus. (See *Clark, supra*, 5 Cal.4th at p. 784.) "For noncapital cases in California, there is no express time window in which a petitioner must

seek habeas relief. (*In re Huddleston* (1969) 71 Cal.2d 1031, 1034.) Rather, the general rule is that the petition must be filed ‘as promptly as the circumstances allow’” (*In re Douglas* (2011) 200 Cal.App.4th 236, 242, quoting *Clark, supra*, 5 Cal.4th at p. 765, fn. 5.)

In a noncapital case, the petitioner needs to show there was not an unreasonable delay, or there was (1) no substantial delay, (2) good cause, or (3) a fundamental miscarriage of justice. (*In re Sanders* (1999) 21 Cal.4th 697, 703-704 [even in non-capital cases, petitions must show good cause for delay]; see also *In re Gallego* (1998) 18 Cal.4th 825; *In re Robbins* (1998) 18 Cal.4th 770; see *In re Reno* (2012) 55 Cal.4th 428, 473-476 [narrowly defining what constitutes a “fundamental miscarriage of justice”]; *Clark, supra*, 5 Cal.4th 797-798 & fns. 32-35 [same].) “Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.” (*Robbins, supra*, at p. 787.) The petitioner must allege with particularity the due diligence in bringing the claims. (*Ibid.*; *Clark, supra*, 5 Cal.4th at pp. 781, 786; see also *In re Reno* (2012) 55 Cal.4th 428, 460.) Because the court prefers only one habeas petition, good cause for delay can be that one of the claims could not have been brought earlier. (*Id.* at p. 780.)

There are practical problems with delays in bringing habeas petitions. In the Sixth District Court of Appeal, if the petition is filed after the filing of the reply brief, the court might not give it full consideration. Further, a delay can cause the client to endure unjust imprisonment. A prolonged delay might lead to the claim becoming moot or the court losing jurisdiction because the client is no longer in constructive custody. (See, e.g., *In re Mehdizadeh* (2003) 105 Cal.App.4th 995, 997.) Finally, one must be mindful of the federal one year statute of limitations for bringing a federal habeas corpus petition and the federal jurisdictional requirement that the client be in constructive custody when the federal habeas corpus petition is filed.

PRAYER FOR RELIEF

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

In *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, the court of appeal said the lower court should have granted an evidentiary hearing, despite claims by the Attorney General the petitioner was not entitled to one, because, in part, the petitioner requested it in

his prayer for relief. (*Id.*, at p. 574.) Do not request or purport to reserve the right to supplement or amend the petition; any change to the original petition may be made only by leave of court. (*Clark, supra*, 5 Cal.4th at pp. 781-782 & fn. 16.)

VERIFICATION

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

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

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

POINTS AND AUTHORITIES

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

SUBSEQUENT PROCEEDINGS

Initial judicial review. The court may summarily deny the petition if it does not allege a prima facie case for relief. (*Duvall, supra*, 9 Cal.4th 464, 475.) A prima facie case exists when, assuming the factual allegations are true, the petitioner would be entitled to relief. (*Id.*, at pp. 474-475; *Clark, supra*, 5 Cal.4th at p. 769, fn. 9.) A petition may also be summarily denied if it is procedurally barred. (*Clark, supra*, at p. 769, fn. 9.) If the petition is filed in the superior court, the court must issue a written ruling within 60 days. (Cal. Rules

of Court, rule 4.551(a)(3)(A).)

Informal response. Before ruling on the petition, an appellate court may request an informal response. An informal response serves as a “screening function” whereby the government responds before the court decides whether to summarily deny or grant the petition. (*Romero, supra*, 8 Cal.4th 728, 741.) After the Attorney General’s response, the petitioner may file a reply.

Order to show cause. If the court is satisfied the petition states on its face a prima facie case for relief, and the petition is otherwise not defective, the court is required to issue an order to show cause or issue the writ. (Pen. Code, §§ 1480, 1483; *Duvall, supra*, 9 Cal.4th at p. 475; *Romero, supra*, 8 Cal.4th at p. 737, 740.) Granting the writ is not the same as granting relief; it merely begins the process of litigating the claims. (*Romero, supra*, at p. 740.) Normally, granting the writ involves transporting the petitioner to court for a hearing. (*Ibid.*) An order to show cause permits the court to order a return and hold a hearing without transporting the petitioner. (*Ibid.*; *Duvall, supra*, at p. 475; *Lawler, supra*, 23 Cal.3d at p. 194.) The issues are limited to those listed in the order to show cause. (*Duvall, supra*, at p. 475; *Clark, supra*, 5 Cal.4th at p. 781, fn. 16.)

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

Traverse. After the return, the “habeas corpus petitioner may either file a traverse or the parties may stipulate that the original habeas corpus petition be treated as a traverse.” (*Duvall, supra*, 9 Cal.4th at p. 477.) The traverse must reassert the allegations of the petition. (*In re Marquez* (2007) 153 Cal.App.4th 1, 12.) The traverse may do so by incorporating the allegations of the petition. by reference. (*Romero, supra*, 8 Cal.4th at p. 739; see, e.g., *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1173, fn. 6 [the traverse made certain denials and incorporated by reference the amended habeas petition and the exhibits, the exhibits of the traverse, and the informal reply].)

The traverse should deny allegations made in the return; any allegations in the return not denied are deemed admitted. (Pen. Code, § 1484; *Duvall, supra*, 9 Cal.4th at p. 477; *Romero, supra*, 8 Cal.4th at p. 739; *Lawler, supra*, 23 Cal.3d at pp. 194-195.) The traverse may also demur on allegations in the return because of insufficient evidence, raise objections to the return, and allege additional facts, but it may not raise new issues. (*Duvall, supra*, 9 Cal.4th at pp. 477-478.) Again, general denials and “conclusionary statements” are disfavored. (See *Duvall, supra*, at p. 479; *In re Lewallen* (1979) 23 Cal.3d 274, 278.)

A habeas petitioner may not raise additional issues in the traverse. “While the traverse may allege additional facts in support of the claim on which an order to show cause has issued, attempts to introduce additional claims or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief.” (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16; *Board of Prison Terms v. Superior Court (Ngo)* (2005) 130 Cal.App.4th 1212, 1235, internal quotation marks omitted; accord *In re Lawley* (2008) 42 Cal.4th 1231, 1248.) “To bring additional claims before the court, petitioner must obtain leave to file a supplemental petition for writ of habeas corpus.” (*Board of Prison Terms, supra*, at p. 1235, citing *People v. Green* (1980) 27 Cal.3d 1, 43, fn. 28.) The petition should explain why there was a delay in bringing the new claim. (See *Clark, supra*, 5 Cal.4th at pp. 797-798.)

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

Discovery. In cases where the defendant receives a sentence of death or life without the possibility of parole, Penal Code section 1054.9 permits discovery to the defendant in preparation of a habeas corpus petition, of (1) material the prosecutor gave at trial but the defendant lost, (2) material the prosecutor should have given, and (3) material the defendant would have been entitled to at jury trial but did not specifically request. (*In re Steele* (2004) 32 Cal.4th 682, 688, 697.) The motion should be filed in the superior court unless a date for the execution has been set; otherwise, the supreme court will deny the motion without prejudice to filing it in the superior court. (*Id.*, at pp. 691, 692, 693.) Review is by petition for writ in the court of appeal filed within a reasonable time (about 20 days). (*Id.*, at p. 692.)

Further review. The government may appeal to the court of appeal an order by the superior court granting relief. (Pen. Code, § 1506.) If the petitioner loses in the superior court, he must file a new petition for writ of habeas corpus in the court of appeal. (*Clark, supra*, 5 Cal.4th at p. 767, fn. 7.) If the court of appeal denies relief, the petitioner may file a new petition for writ of habeas corpus in the supreme court. (See, e.g., *In re Catalano* (1981) 29 Cal.3d 1, 7.) The supreme court, however, prefers a petition for review. (*In re Reed* (1983) 33 Cal.3d 914, 918, fn. 2, overruled on other grounds in *People v. Castellanos* (1999) 21 Cal.4th 785, 798 (lead opn.); *In re Michael E.* (1975) 15 Cal.3d 183 193, fn. 15.) When the court of appeal summarily denies a habeas petition, it is final immediately unless the court of appeal also resolves a related appeal the same day. (Cal. Rules of Court, rule 8.387(b).)