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December 3, 2014



VIA FACSIMILE - 8 HARD COPIES TO FOLLOW

Chief Justice Gibbons
Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701

Re: *Public Comment on ADKT 501*

Dear Chief Justice Gibbons:

Last month, Michael Pescetta, Chief of the Capital Habeas Unit with the Office of the Federal Public Defender, submitted a memorandum to this Court addressing concerns with any proposed modifications to the Nevada Rules of Appellate Procedure. Shortly after he submitted his memorandum, this Court issued ADKT 501.

This public comment is submitted on Proposed Rule 40(B) in ADKT 501, which will be heard by the Court on December 4, 2014. A representative from the Court indicated that faxed hard-copies of the comments would be accepted. As a result, given the short turnaround time provided in the Order, and the hard-copy requirement, the 8 copies required by the Order are being mailed the Court. This original letter is being faxed to the Court.

We respectfully request that a representative from the Office of the Federal Public Defender be permitted to participate in the hearing.

1. **Exhaustion**

We request that Proposed Rule 40(B) be amended to include the following bolded language:

In all appeals from criminal convictions or post-conviction relief matters, a party



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> shall not be required to petition for review of an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when a claim has been presented to the Court of Appeals and relief has been denied, the party shall be deemed to have exhausted all available state remedies. **Review of decisions of the Court of Appeals by the Nevada Supreme Court is limited to the circumstances set forth in these Rules, and is an extraordinary remedy, outside the normal process of appellate review, which is not available as a matter of right.**

We do not believe the current rule complies with the exhaustion doctrine. Whether "a party is deemed to have exhausted all available state remedies" is a federal question. The exhaustion doctrine requires that a federal constitutional claim be "fairly presented to the state courts," Picard v. O'Connor, 404 U.S. 270, 275 (1971), before a federal court can rule on it. "Fair presentation" to the state courts in general requires that the petitioner give the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). The United States Supreme Court held in O'Sullivan that exhaustion required a habeas petitioner to seek review of a decision of the Illinois appellate court by filing a petition for leave to appeal in the Illinois Supreme Court, even though granting review was entirely discretionary. Id. at 845-47; accord Baldwin v. Reese, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)"); see also Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999) (filing petition for discretionary review to California Supreme Court required for exhaustion); Peterson v. Lambert, 319 F.3d 1153, 1156 (9th Cir. 2003) (same; Oregon).

In order to avoid having a petition for certiorari to the Nevada Supreme Court be required for exhaustion of federal remedies, the court must make clear that filing such a petition is not "a normal, simple, and established part of the State's appellate review process," O'Sullivan, 526 U.S. at 845, and thus is normally not an "available" remedy as of right. See 28 U.S.C. § 2254(c) (habeas relief can not be granted if petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." (Emphasis supplied)); cf. O'Sullivan v. Boerckel, 526 U.S. at 845 (exhaustion does not require petitioner to invoke "extraordinary procedures" to accomplish exhaustion, or to invoke "any specific state remedy when a State has provided that the remedy is unavailable.").

States that have made it clear that seeking discretionary review from the state supreme court is not part of the normally "available" appellate process have been able to avoid this exhaustion problem. In Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999) (per curiam), on remand from the Supreme Court for reconsideration under O'Sullivan v. Boerckel, the Ninth Circuit addressed the Arizona system of discretionary review by the Arizona Supreme Court. The Court of Appeals held that resort to that remedy was not required for exhaustion because

the Arizona Supreme Court had decided that, in cases not involving the death penalty or a life sentence, "a decision by the Court of Appeals . . . exhausts a defendant's right to appeal in this jurisdiction." Id. at 1010, quoting State v. Shattuck, 684 P.2d 154, 157 (Ariz. 1984), accord State v. Sanborn, 777 P.2d 220, 221 (Ariz. 1989) ("'Once the defendant has been given the appeal to which he has a right, state remedies have exhausted,'" quoting Shattuck, 684 P.2d at 157). The Ninth Circuit also cited an Arizona Supreme Court decision, answering a certified question, holding that "a petition for review from the Arizona Supreme Court is not part of defendant's right of appeal." Swoopes, 196 F.3d at 1010, citing Moreno v. Gonzales, 962 P.2d 205, 207-08 (Ariz. 1998).

Other circuits have found similar statements sufficient to exempt discretionary review from the exhaustion requirement. In Lambert v. Blackwell, 387 F.3d 210 (3d Cir. 2004), the Third Circuit reviewed an administrative order issued by the Pennsylvania Supreme Court. The order stated that review of a final order of the superior court in a criminal or post-conviction case

> is not a matter of right but of sound judicial discretion, and an appeal to this court will be allowed only when there are special important reasons therefor. . . .
>
> . . .
>
> In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been denied relief in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief. This order shall be effective immediately.

Lambert, 387 F.3d at 233, quoting In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000). In Adams v. Holland, 330 F.3d 398 (6th Cir. 2003), the Sixth Circuit held that a Tennessee Supreme Court rule, holding that "once the Court of Criminal Appeals has denied a claim of error, 'the litigant shall be deemed to have exhausted all available state remedies available for that claim,' Tenn. Supp. Ct. R. 39," eliminated any necessity for seeking review from the Tennessee Supreme Court to accomplish exhaustion. Adams, 330 F.3d at 403. Adams held that, based on O'Sullivan v. Boerckel, "a state supreme court can preserve discretionary review of criminal appeals while still dictating that review to be 'unavailable' for habeas purposes," because, under O'Sullivan, "the question of what constitutes the body of 'available state remedies' is one of state law, not one of federal law: 'there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not

available. . . .'" Id., quoting O'Sullivan, 562 U.S. at 847-48. See also Randolph v. Kemna, 276 F.3d 401, 404 (8th Cir. 2002) (Missouri Supreme Court rule providing that "[t]ransfer by this court is an extraordinary remedy that is not part of the standard review process for purposes of federal habeas corpus review," removed motion to transfer from procedures necessary for exhaustion).

This language should bring the exhaustion question within the rules of Swoopes, Lambert, Adams, and Randolph, and within the "unavailability" exception of O'Sullivan v. Boerckel.

Thank you for your consideration of this issue. I look forward to the hearing.

Sincerely,

Rene Valladares
Federal Public Defender, District of Nevada