No. 02-964

In the Supreme Court
of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

By statute and the Court's case law, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. The Court has held that exhaustion requires a state prisoner to fairly present his claim to the State's highest court and that fair presentment requires the prisoner to have alerted the state court that the claim is a federal one.

Does a state prisoner "alert" the State's highest court that he is raising a federal claim when—in that court—he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

OPINIONS BELOW

The June 8, 2000 unpublished opinion of the magistrate judge of the United States District Court for the District of Oregon is reprinted in the supplemental appendix to the petition for writ of certiorari. The November 27, 2000 unpublished opinion of the United States District Court for the District of Oregon is reprinted in the appendix to the petition. App. to Pet. for Cert. 25-37. The March 12, 2002 decision of the United States Court of Appeals for the Ninth Circuit is published at 282 F.3d 1184 (9th Cir. 2002), and is reprinted in the appendix to the petition. App. to Pet. for Cert. 1-23.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 12, 2002. The State[1] timely filed a petition for rehearing and suggestion for rehearing *en banc*, which the court denied on September 3, 2002. App. to Pet. for Cert. 39. The State timely filed the petition for writ of certiorari on December 2, 2002. The Court granted the petition on May 27, 2003. The State invokes the Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

28 U.S.C. § 2254 provides, in part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

[1] This case involves numerous proceedings below and the labels attached to the parties changed accordingly. To avoid confusion, petitioner Baldwin refers to the parties as "Reese" and "the State" rather than by their roles in the various proceedings.

> (A) the applicant has exhausted the remedies available in the courts of the State; * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

In this federal habeas corpus case, Reese alleged that he received constitutionally ineffective assistance of counsel in the direct appeal from his third sentencing. The State responded that he had failed to exhaust his state-court remedies and is now procedurally barred from doing so. The question in this case is whether Reese fairly presented that claim to each of the State's appellate courts. The State sets out the relevant procedural history of Reese's case, focusing on the factual and legal grounds Reese asserted relating to the ineffective appellate counsel claim.

A. State court proceedings

1. Criminal conviction and direct appeal

Reese was convicted in state court of two counts of kidnapping and one count of attempted sodomy. The trial court imposed a determinate sentence of 30 years on the kidnapping convictions. On appeal, the Oregon Court of Appeals affirmed the convictions but remanded for resentencing because the trial court had left out a step in the sentencing process. *State v. Reese*, 114 Or. App. 557, 836 P.2d 737 (1992). The trial court resentenced Reese, Reese again appealed, and again the Oregon Court of Appeals remanded for resentencing because the trial court had not properly performed the additional step that

it had omitted from the first sentencing. *State v. Reese*, 128 Or. App. 323, 876 P.2d 317 (1994).

Following the third sentencing, Reese again appealed. His federal habeas corpus claim concerns the performance of Jesse Barton, Reese's court-appointed appellate counsel at this stage in the proceedings. Barton could find no non-frivolous issues in the appeal, so he filed a "*Balfour*" brief, which is Oregon's analogue to an *Anders* brief.[2] *See State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991). As required in a *Balfour* brief, Barton assisted Reese in presenting the issues Reese wished to raise on appeal; Reese raised five assignments of error. The Oregon Court of Appeals affirmed, without a written opinion. *State v. Reese*, 134 Or. App. 629, 894 P.2d 1268 (1995). Reese did not file a petition for review in the Oregon Supreme Court.

2. State post-conviction relief[3]

In Oregon, complaints about the performance of trial or appellate counsel are raised in a petition for post-conviction relief (PCR) in the state trial court. Or. Rev. Stat. §§ 138.510-138.680.[4] Reese initiated this process by filing a *pro se* peti-

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[2] *Anders v. California*, 386 U.S. 738 (1967).

[3] In Oregon, there are two means of obtaining state-court review of state criminal convictions: the direct appeal and the post-conviction challenge. After completing the direct appeal, the state prisoner has two years to initiate post-conviction proceedings in the state trial courts. Or. Rev. Stat. § 138.510. The prisoner may not seek relief on an issue that reasonably could have been raised in the trial court and direct appeal. *Palmer v. State of Oregon*, 318 Or. 352, 354, 867 P.2d 1368 (1994). Those claims may be raised only in the context of an inadequate assistance of counsel claim. *Ibid.*

[4] The pertinent statutes and state rules of appellate procedure discussed in this brief are set out in the appendix.

tion. The PCR trial court appointed counsel, who filed an amended PCR petition asserting, among other claims, ineffective assistance of both trial and appellate counsel. The amended petition specifically cited provisions of the federal and state constitutions in support of Reese's claim that he had received ineffective assistance of appellate counsel in the direct appeal from his third sentencing:

> [Reese] was denied adequate[5] assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that counsel on appeal failed to:
>
> a. Withdraw as attorney for [Reese] due to conflict of interest in that her husband, Fred Avera, had been the attorney for prosecution three times on [Reese's] cases;[6]

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[5] Article I, section 11, of the Oregon constitution provides, in part, "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" In applying this provision, Oregon courts often refer to "*inadequate* assistance of counsel" instead of "*ineffective* assistance of counsel," the term usually employed by state and federal courts in applying the analogous provision of the Federal Constitution. *See Krummacher v. Gierloff*, 290 Or. 867, 872 n. 3, 627 P.2d 458, 462 n. 3 (1981) ("[T]he term 'adequate' assistance of counsel may be more accurate than 'effective' assistance of counsel. Counsel cannot always be effective, but they must always be 'adequate' to the task.").

[6] In the amended petition, Reese's counsel referred to the state Public Defender, Sally Avera. Barton was the deputy public defender assigned by Avera to handle Reese's appeal from the third sentencing.

> b. Notify [Reese] in advance when she removed [Reese's] attorney David Allen, from [Reese's] case and became the attorney of record for [Reese] without [Reese's] consent;
>
> c. Raise issues that had been preserved for appeal;
>
> d. File a timely Notice of Appeal;
>
> e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

J.A. 17.

The trial court denied Reese's PCR petition in a written opinion. In denying Reese's ineffective assistance of appellate counsel claim, the trial court wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745 (1983)." J.A. 23. Based on that statement and the amended PCR petition, the parties agree that Reese presented a federal claim of ineffective assistance of appellate counsel in the post-conviction trial court, although the precise scope of the claim is unclear. The parties also agree that the trial court ruled on at least part of that claim.[7] The parties' disagreement centers on the legal significance of what happened next.

On appeal from the PCR trial court ruling, Reese's appointed counsel prepared another *Balfour* brief. As required

[7] The PCR trial court's ruling does not encompass each of the allegations of ineffective assistance of appellate counsel that Reese raised in the petition; it appears to be limited to the third claim that appellate counsel failed to raise issues that were preserved for appeal. Reese did not identify what issues he believed his appellate counsel failed to raise.

for a *Balfour* brief, counsel set forth the statement of the case and then, at Reese's request, incorporated into the brief claims of error that Reese had set out in his *pro se* PCR petition.[8] Included among the *pro se* claims was the following claim concerning the performance of Barton, Reese's appellate counsel for the third sentencing:

> Second Claim for Relief: Ineffective Assistance of Appellate Counsel.
>
> Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter [*sic*] a notice of my intention to appeal in the Oregon ruling [*sic*] to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this is per se ineffective assistance of counsel.
>
> Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's

[8] The Ninth Circuit mistakenly suggested that the responsibility for deciding to incorporate claims from Reese's original PCR petition, rather than the amended petition, into Reese's Court of Appeals brief was that of Reese's appellate counsel. App. to Pet. for Cert. 6. Under Oregon's *Balfour* procedure, it is the appellant who chooses which claims to present in the *pro se* portion of the brief, not counsel. *See Balfour*, 311 Or. at 452, 814 P.2d at 1080 ("Counsel * * * shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it."); *see also* Or. R. App. P. 5.90(1)(b) (incorporating *Balfour*'s requirements); App-7 to App-8. Reese signed the Part B portion of the brief which set out the claims from his *pro se* petition, verifying his decision to present those claims to the court. J.A. 39. *See* Or. R. App. P. 5.90(1)(b); App-7 to App-8.

> [*sic*] did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

J.A. 32.

The State moved for summary affirmance pursuant to Or. Rev. Stat. § 138.660, asserting that Reese's appeal presented "no substantial question of law." The Oregon Court of Appeals summarily affirmed the PCR trial court's judgment in an unpublished order. J.A. 42.

Reese's counsel then filed a petition for discretionary review in the Oregon Supreme Court. The petition in the Supreme Court was not submitted in accordance with the *Balfour* procedure; rather, it was fully prepared by Reese's counsel and did not include a *pro se* portion. The petition stated that one of the issues presented was the effectiveness of appellate counsel. The petition did not identify the specific manner in which appellate counsel was alleged to be constitutionally ineffective. The petition cited no constitutional provision or authority of any kind relating to that claim. The petition did not contain any factual basis for or argument in support of that claim. In its entirety, the "Argument" portion of that petition reads:

> The sentence levied upon [Reese] is improper in that [Reese] was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.
>
> [Reese] asserts that his imprisonment is in violation of [Or. Rev. Stat. §] 138.530. [Reese]

> alleges that the sentence violates his eighth amendment rights against cruel and unusual punishment. Moreover, since [Reese] asserts he was coerced and threatened by counsel to waive his right to trial by jury, [Reese] believes his 5th, 6th and 14th amendment rights have been violated.

J.A. 48. The Oregon Supreme Court denied review in an unpublished order.

B. Federal habeas corpus

1. District court

Reese next filed a *pro se* federal habeas corpus petition. The district court appointed counsel, who filed an amended petition that included a claim that Reese had received ineffective assistance of counsel on direct appeal from his third sentencing:

> Ground 4: Mr. Reese received ineffective assistance from his appellate counsel, who refused to raise any issues, failed to raise two meritorious issues, failed to withdraw, and failed to exhaust Mr. Reese's state remedies by refusing to file a petition for review in the Oregon Supreme Court.
>
> Supporting Facts: Following Mr. Reese's third sentencing proceeding, Mr. Reese again appealed. He was assigned new counsel, counsel different from counsel who had successfully appealed on two prior occasions. His new counsel informed him that he had no issues in the case, and that counsel would not be providing any legal argument in support of any issue. Rather, counsel advised Mr. Reese that he

> could file a *Balfour* brief, which would amount to preparation of the format of the brief for Mr. Reese, but Mr. Reese would have to provide any and all briefing and legal arguments of the issues he wished to raise. Mr. Reese filed a *Balfour* brief. He also advised his counsel that he wished his counsel to petition the Supreme Court for review, so that his issues would be exhausted for federal habeas corpus purposes. Mr. Reese's counsel did not file a petition for review. Instead he advised Mr. Reese that he could file his own petition, but that counsel would have to withdraw, and that counsel was familiar with the requirements for a petition for review, and Mr. Reese's issues did not meet this requirement because, in counsel's opinion, Mr. Reese had raised no issues in his *Balfour* brief.
>
> Counsel did not move to withdraw and did not provide the Court of Appeals or the Oregon Supreme Court with any possible issues which the court should consider. In short, he did not comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967).

J.A. 2, Docket number 19.

In response, the State argued that Reese had not properly exhausted his state remedies for the ineffective appellate counsel claim and that the claim was now procedurally defaulted. Supp. App. to Pet. for Cert. 32. The magistrate judge who heard the petition concluded that the claim set out above was not defaulted and, further, that Oregon's *Balfour* procedure is constitutionally defective. Supp. App. to Pet. for Cert. 32-49. The State filed objections.

The district court rejected the magistrate judge's recommendation and concluded that Reese had not properly exhausted in state court his federal claim of ineffective assistance of appellate counsel and that the claim was procedurally defaulted. The district court relied on a newly announced Ninth Circuit decision, *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). The district court explained that "the *Lyons* court concluded, '[t]he law of the law of this circuit is plainly that a federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one—regardless of whether the petitioner was proceeding pro se.'" App. to Pet. for Cert. 36 (citation omitted). The district court concluded that, "because of the holding of the Ninth Circuit in *Lyons*, I am compelled to conclude that petitioner's fourth ground for relief was not exhausted in the state courts, and is now procedurally defaulted." *Id.* The district court denied Reese's other claims and entered judgment dismissing his petition. App. to Pet. for Cert. 38.

2. Ninth Circuit Court of Appeals

Reese appealed to the United States Court of Appeals for the Ninth Circuit. The court noted that the only issue before it was the district court's determination that Reese had procedurally defaulted his claim of ineffective assistance of appellate counsel. App. to Pet. for Cert. 9. In a footnote, the court observed that, if there were procedural default, Reese could not satisfy the "cause and prejudice" requirement or demonstrate that the court's refusal to hear the claim would result in a "fundamental miscarriage of justice," excusing the procedural default. App. to Pet. for Cert. 9.

As discussed in greater detail below, the Ninth Circuit accurately described the requirements for proper exhaustion, including that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order

to exhaust it." App. to Pet. for Cert. 13. However, the court's application of those requirements clearly demonstrates that it does not consider it necessary for the state prisoner to present the federal nature of his claim to the state appellate courts in compliance with state appellate procedural rules.

The Ninth Circuit acknowledged that Reese did not cite federal authority in support of his ineffective assistance of appellate counsel claim in the state appellate courts. In spite of Reese's failure to present a clearly identified federal claim in the state courts, the Ninth Circuit concluded that Reese satisfied the exhaustion requirement because the state appellate courts "had the opportunity" to identify the federal claim through an independent review of the record. Nor did it matter to the Ninth Circuit whether the state appellate procedural rules foreclosed the state courts from reviewing Reese's claim even if those state courts had conducted the independent record review. The Ninth Circuit held that the comity concerns underlying the exhaustion requirement are satisfied where the state courts have the opportunity, in the Ninth Circuit's view, to identify and address a federal claim that the state prisoner has not presented explicitly.

The Ninth Circuit remanded the case to the district court to consider the merits of the ineffective assistance of appellate counsel claim. App. to Pet. for Cert. 19. The State filed a petition for rehearing and suggestion for rehearing *en banc*, which the court denied on September 3, 2002. App. to Pet. for Cert. 39. The State filed a petition for writ of certiorari with this Court on December 2, 2002, which the Court granted on May 27, 2003.

SUMMARY OF ARGUMENT

There is no disagreement in this case that state prisoners first must exhaust their federal claims in state court before the claim can be considered in a federal habeas corpus proceed-

ing. Nor is there any disagreement that proper exhaustion requires a state prisoner to fairly present his federal claim to the state courts through one complete round of review. This Court's decisions make that much clear. The issue presented in this case is whether a state prisoner properly exhausts a federal claim in state court when the prisoner fails to identify the federal nature of his claim to either the state's intermediate appellate court or the state's highest appellate court.

The Ninth Circuit concluded that "fair presentation" does not require a state prisoner to identify clearly the federal nature of his claim on appeal so long as that federal claim was raised in the trial court and the state appellate courts could ferret it out by searching the record. Thus, the Ninth Circuit transformed the "fair presentation" requirement, which places the burden on the state prisoner to alert the state courts to his federal claim, into a "fair opportunity" requirement that places the burden on the state appellate courts.

The Ninth Circuit's rule is wrong, at least in part, because it disregards the state's procedural requirements. Like most appellate courts, Oregon's appellate courts will not consider a claim that is not properly presented by the appellant. The Ninth Circuit's presumptions about how Oregon's appellate courts evaluate briefs and petitions such as those filed by Reese are unsupported by the state rules of appellate procedure and state case law. More importantly, while the Ninth Circuit acknowledged that the state appellate courts might have limited their review to only those issues Reese properly presented to them, the federal court concluded that any limitations on the state courts' independent identification and review of Reese's federal claim were irrelevant to the exhaustion question. That holding ignores this Court's pronouncements that comity requires the federal claim to be presented to the state court in compliance with the state court's procedural requirements. A state prisoner does not fairly present a federal

claim to the state court if he fails to follow the state court's procedural requirements and therefore presents the claim in a way that ensures the state court will not address it.

The States, state courts, state prisoners, and federal courts need clarification of the requirements for proper presentation of federal claims in state courts. The Ninth Circuit appears to have reached inconsistent conclusions about what proper exhaustion requires. It is not alone in its struggle to apply a test that readily distinguishes properly exhausted from unexhausted claims. As a result, litigants and federal courts spend a great deal of time and resources in federal habeas cases litigating and deciding whether state-court remedies were properly exhausted, and whether the claims are barred as procedurally defaulted.

Although the Court has provided much guidance about the factors that should be considered and the weight that should be given to competing factors, the Court also has left the door open to different tests for what fair presentation requires. The interests of the States, state courts, state prisoners, and federal courts would be better served by the imposition of a clear test.

The State urges the Court to clarify the rule in this area. The State proposes the following test as a clarification of the exhaustion requirement: To fairly present a federal claim in state court, a state prisoner must do two things. First, the state prisoner must present sufficient facts to support the claim. Second, the state prisoner must identify clearly the federal source of the claim by (a) citing the federal constitutional provision relied on, or (b) citing at least one reported case that expressly has decided the claim solely on a federal basis, or (c) expressly identifying a claim that necessarily must be based on a federal right. This unambiguous test satisfies the different interests of the courts and the parties, while imposing a manageable burden on state prisoners.

ARGUMENT

This case involves a question often presented to this Court: What is required for a state prisoner to properly exhaust a federal claim in state court before raising that claim in a federal habeas corpus proceeding?[9] This Court and Congress have made it clear that state prisoners must exhaust state-court remedies by fairly presenting their federal claims through one complete round of state-court review. From 1867, when Congress first extended federal habeas corpus to state prisoners, this Court has recognized the tension created when federal courts intercede in reviewing state criminal convictions. The Court consistently has cautioned federal courts to exercise carefully their discretion to hear federal habeas corpus challenges to state criminal proceedings and to refrain from disturbing the federal-state relationship "by unnecessary conflict between courts equally bound to guard and protect

[9] The exhaustion requirement refers only to remedies still available at the time of the federal habeas corpus petition. *Engle v. Isaac*, 456 U.S. 107, 126 n. 28 (1982). Technically, "exhaustion" is satisfied if the state prisoner's claim is procedurally barred under state law because no state forum is available to address the claim. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). However, that procedural bar provides an independent and adequate state-law ground for the conviction and sentence and, therefore, prevents federal habeas corpus review of the defaulted claim, unless the state prisoner can demonstrate cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). If, as the State asserts in this case, Reese failed to fairly present his federal claim of ineffective assistance of appellate counsel to the state appellate courts in the post-conviction appeal, he no longer has a state remedy available and thus has procedurally defaulted his claim. For ease of discussion, the State, at times, will refer to the "fair presentation" problem in this case as one of "exhaustion."

rights secured by the constitution." *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Since 1886,[10] the Court has addressed that federal-state tension by requiring state prisoners to exhaust their state-court remedies before a federal court may consider their claims in a federal habeas corpus proceeding. The Court has "consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" *Picard v. Connor*, 404 U.S. 270, 275 (1971) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

In spite of the direction from this Court, questions about whether a state prisoner has satisfied the exhaustion requirement continue to plague federal courts and the parties involved in federal habeas corpus litigation. This case presents the question of who carries the burden of identifying the federal nature of the claim in the state court proceedings: the state prisoner or the state court? The Ninth Circuit has taken the position that, if states are to be given a first opportunity to consider federal challenges to a state-court conviction, the state appellate courts are responsible for identifying the federal claim.

As discussed in more detail below, Reese asserted in the federal habeas corpus proceeding that he was denied his federal constitutional right to effective assistance of appellate

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[10] Soon after it expanded federal habeas corpus to state convictions in the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385-386, Congress removed the Court's jurisdiction to hear appeals from those decisions and did not restore it until 1885. Act of March 27, 1868, c. 34, § 2, 15 Stat. 44; Act of March 3, 1885, c. 353, 23 Stat. 437; *see Ex parte McCardle*, 7 Wall. 506, 74 U.S. 506, 19 L.Ed. 264 (1869).

counsel on his direct appeal. In Oregon, claims of that type are raised in post-conviction relief (PCR) proceedings. Reese did raise a federal claim of ineffective assistance of appellate counsel in the state PCR trial court. In the intermediate state appellate court, Reese presented a general claim concerning ineffective assistance of his appellate counsel. But he presented little factual development and offered nothing to alert the state court that he was presenting a claim under the federal constitution. In the state's highest appellate court, Reese again made a vague reference to the effectiveness of his appellate counsel without factual development or any indication that he was asking the state court to address a claim based on the federal constitution.

The Ninth Circuit concluded that Reese had fairly presented his claim of ineffective assistance of appellate counsel because the state appellate courts could have reviewed the state PCR trial court's opinion and discovered a federal basis for the vague claim Reese presented. As the State will address in more detail, the Ninth Circuit's ruling is wrong for two reasons. First, it transforms the requirement that the state prisoner fairly present his claim to the state courts into a burden on the state courts to identify the federal nature of an inadequately presented claim. Contrary to the Ninth Circuit's reasoning, comity cannot be satisfied by imposing an obligation on the state courts to discover federal claims, rather than on state prisoners to present the claims.

The second problem with the Ninth Circuit's reasoning is that it fails to give proper respect to state procedural rules. Oregon appellate courts, like most state and federal appellate courts, require appellants to identify clearly the claims the appellant seeks to have the court address, including a clear identification of the legal basis for any claim. Again, the Ninth Circuit wrongly concluded that comity could be satisfied by a rule that disregards the state's procedural requirements. As

this Court has explained, fair presentation means nothing less than giving the state courts one clear opportunity to address a federal claim and that means presenting the claim in a manner that invites rather than forecloses state appellate court review.

But the Ninth Circuit is not alone in its struggle to implement the Court's requirements for fair presentation and proper exhaustion. After its discussion of the inadequacies in the Ninth Circuit rule, the State sets out a test that clarifies those requirements. The State's proposed test is clear and straightforward in its application and satisfies the interests of the States, state courts, state prisoners, and federal courts.

I. Although Reese never identified a federal basis for his claim of ineffective assistance of appellate counsel in the state appellate courts, the Ninth Circuit concluded that he had fairly presented the claim.

The Ninth Circuit accurately described this Court's holdings concerning the exhaustion requirement, but announced a rule that dramatically departs from the fair presentation requirement this Court has held is necessary for proper exhaustion. The Ninth Circuit devoted several pages to explaining the proper analysis that it believed should be applied in determining the exhaustion/procedural default question. App. to Pet. for Cert. 10-13. Its description correctly captured what this Court has stated:

> A state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). Exhaustion is required by statute. *See* 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement of § 2254, habeas petitioners must fairly presen[t] federal claims to

> the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' 'federal rights.'" *Lyons v. Crawford*, 232 F.3d 666, 668 (2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)).
>
> The exhaustion requirement has long been rooted in our commitment to federalism, *see Ex Parte Royall*, 117 U.S. 241, 251-52 (1886), and it goes hand in hand with our respect for state court processes. State courts, like federal courts, may enforce rights under the federal constitution. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990).

App. to Pet. for Cert. 10.

After acknowledging the need to show "respect for state court processes" as well as the state courts' ability to "enforce rights under the federal constitution," the Ninth Circuit then turned to a discussion of its opinion in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001). The court considered "whether the *Lyons* requirement for fair presentation is met by an explicit assertion of a federal law violation at the PCR court level alone, or whether *Lyons* requires some level of explicit assertion at later stages of the state appellate process." App. to Pet. for Cert. 12. The court concluded that the latter is compelled by the comity concerns that form the foundation for the exhaustion requirement:

> The federalism policies underlying exhaustion and the concerns that underlie *Lyons* argue persuasively that explicitness is necessary not merely at any one state court level, but instead

> at the highest state court that hears such claims. Following and clarifying *Lyons*, we hold that a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it. Accordingly, presenting a federal claim explicitly at the PCR court in itself is not sufficient for exhaustion.

App. to Pet. for Cert. 13. Again, the Ninth Circuit's articulation of the exhaustion requirement appears consistent with this Court's holdings and the State does not disagree with it.

But once the Ninth Circuit began applying these accepted principles, it almost immediately went astray. The court acknowledged that Reese did not cite federal authority in support of the ineffective assistance of appellate counsel claim in the Oregon Court of Appeals. However, because the PCR trial court had cited a federal case in its denial of this claim, the Ninth Circuit concluded that the Oregon Court of Appeals was alerted to the federal nature of the claim:

> So long as the Oregon Court of Appeals read the lower court's decision, it would have seen that Reese was raising a federal issue. Whatever else a state reviewing court might do, we are confident, as a ground of our decision, that the state reviewing court reads the decision it is reviewing before summarily affirming that decision.

App. to Pet. for Cert. 15.

Thus, the Ninth Circuit concluded that Reese properly exhausted his ineffective assistance of appellate counsel claim even though the Oregon Court of Appeals would not have been alerted to the federal nature of the claim through Reese's efforts but only through the state appellate court's own review

of the record, including the PCR trial court's memorandum opinion.

Reese made even less effort to present the claim in the Oregon Supreme Court than he did in the Oregon Court of Appeals. In his petition for review to the State's highest court, Reese did not attach the PCR trial court memorandum opinion or even refer to it. Nor did he cite the Sixth Amendment to the federal constitution or any case analyzing the federal right to effective counsel. Reese merely mentioned a complaint about his appellate counsel in three places. First, in his "Statement of Legal Question(s) Presented on Review," he asserted, "Petitioner pleads several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation." J.A. 47. Then, in his "Statement of reasons for reversal of Court of Appeals," Reese included, among other reasons, "Petitioner was subject to several errors with respect to this case, including * * * ineffective assistance of both trial court and appellate court counsel * * *." J.A. 47. Finally, in his "Statement of Facts" he stated, "Moreover, Petitioner alleges claims of error with respect to * * * inadequate appellate counsel." J.A. 48. He did not expand those bare statements by presenting either the factual or legal basis for his ineffective appellate counsel claim.

Nonetheless, the Ninth Circuit concluded that Reese properly had exhausted state-court remedies for his federal claim by fairly presenting it to the Oregon Supreme Court. The court assumed that, "simply by reading the PCR court decision, the Oregon Supreme Court would have been alerted that the claim for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law." App. to Pet. for Cert. 16-17.

The court acknowledged that there was a question "whether we should presume that the Oregon Supreme Court read the PCR court decision[.]" *Id.*, at 17. The court noted that an argument could be made that a state court exercising discretionary jurisdiction might decide a petition for review based solely on what is in the petition. *Id.* Yet it answered the question it had posed in the affirmative:

> We conclude that it is appropriate to presume that, when faced with a summary affirmance from the Oregon Court of Appeals, the Oregon Supreme Court would have read the PCR court's substantive decision. Any other conclusion would not do credit to the appellate review process. For whatever variations may be appropriate under discretionary state procedures, an appellate court cannot fairly review a decision without knowing its content.
>
> * * * [E]ven if review is discretionary, there is no way for the Oregon Supreme Court to exercise an informed discretion about accepting appeal unless it considers the content of the decision under review. A discretionary review is still to be a rational review.

App. to Pet. for Cert. 17-18.

Applying its rule to this case, the Ninth Circuit concluded that Reese had fairly presented a federal claim of ineffective assistance of appellate counsel to the two state appellate courts, even though he failed to identify the federal nature of his claim for either court.

II. The Ninth Circuit's rule improperly transforms the "fair presentation" requirement—where it is the state prisoner who must fairly present his claims to the state courts—into a "fair opportunity" requirement imposing a burden on the state appellate courts.

As described above, the Ninth Circuit accurately set out general exhaustion principles, but announced a rule that relieves a state prisoner of any obligation to present the federal nature of his claim beyond the state trial court. Instead, the Ninth Circuit imposed on the state appellate courts the obligation to search out potential federal claims in the record, whether or not the state prisoner properly asks the state court to address them. Under the Ninth Circuit's rule, as long as the state prisoner presented the federal claim to the state trial court and the state trial court addressed that claim, a passing reference to the claim in the State's appellate courts, without any indication of its federal nature, properly exhausts the claim. The Ninth Circuit's transformation of proper exhaustion from "fair presentation" to "fair opportunity" is without support in this Court's jurisprudence.

A state prisoner's fair presentation of federal claims to the state courts is a vital aspect of the dual system of state and federal courts. But comity requires more than simply passing through the state courts.

> If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall*, *supra*, 177 U.S. at 251, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first op-

> portunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Picard, *supra*, 404 U.S. at 275-276. Similarly, comity requires more than the mere presentation to the state courts of the facts supporting the federal claim without providing the state courts a real opportunity to consider the merits of the claim. *Id.,* at 276-277.

If it is insufficient for a state prisoner to properly exhaust state-court remedies for a federal claim by presenting only the factual basis of his claim to the state courts, surely it is insufficient to present neither the factual basis nor the federal source for that claim. The Court need look no further than *Picard* to reject the Ninth Circuit's specific holding in this case. Just as the federal appellate court erred in *Picard*, so, too, did the Ninth Circuit err in this case by finding Reese's ineffective assistance of appellate counsel claim properly exhausted simply because the state appellate courts could have found the missing parts of that claim by an independent review of the record. In neither case is the mere opportunity for the state court to apply controlling legal principles sufficient to satisfy the requirement that the state prisoner properly exhaust his claim by fairly presenting it to the state courts.

Admittedly, the state prisoner in *Picard* never presented his federal claim at *any* level of the state courts; the federal appellate court was the first to suggest the claim. *Picard*, *supra*, 404 U.S. at 272. Here, the parties agree that Reese presented a federal claim of ineffective assistance of appellate counsel to the state PCR trial court. However, the Court's cases since *Picard* have further clarified what a state prisoner

must do to properly exhaust a federal claim in each of the available state courts; the Ninth Circuit's transformation of the fair presentation requirement cannot be squared with that case law. For example, this Court has determined that a state prisoner does not properly exhaust a federal claim by presenting the factual basis of the claim and citing a case deciding a similar issue solely on state-law grounds. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (*per curiam*). Nor can federal habeas corpus courts examine the record to determine whether the federal ramifications of the state prisoner's claim in state court "were self-evident." Instead, they must consider whether the federal argument was presented to, or considered by, the state courts. *Id.*, at 7. The Court also noted its "doubt that a defendant's citation to a state-court decision predicated solely on state law ordinarily will be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in the cited case advanced a federal claim." *Id.*, at 7 n. 3.

Twenty-four years after the Court announced in *Picard* that a state prisoner must fairly present his federal claims in state court, the Court reiterated in even stronger terms the responsibility of a state prisoner to present his federal claims first in state court.

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-366 (1995) (*per curiam*).[11] The dissent criticized the majority for "tighten[ing] the pleading screws by adding the requirement that the state courts 'must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.'" *Id.*, at 368 (Stevens, J. dissenting). Yet that is precisely what the majority determined was required for presentation to be "fair" and for state courts to have a genuine opportunity to address the state prisoner's federal claims.

Thus, the Court's case law has established that the state prisoner bears the responsibility to fairly present to the state courts any federal claim he wants to assert in federal habeas. To satisfy that responsibility, the state prisoner must present the factual allegations that support his federal claim to the state courts, but those factual allegations alone are not sufficient to raise the claim. *Picard v. Connor, supra; Anderson v. Harless, supra; see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (reaffirming the need for both the factual basis and underlying legal theory); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992) (exhaustion must be serious and meaningful, and must include "full factual development"). The state prisoner must identify plainly the federal source of his claim. *Duncan, supra*. It is not enough for the state prisoner to present the state courts with a claim that is substantially similar

[11] The Court found the failure to exhaust "especially pronounced in that respondent did specifically raise a due process objection before the state court based on a different claim[.]" *Duncan, supra*, 513 U.S. at 366. Similarly, here Reese properly exhausted in state court his claim that he received ineffective assistance of *trial* counsel in his third sentencing by specifically referring to his "5th, 6th, and 14th amendment rights." *See* J.A. 37-38, 48. As in *Duncan*, Reese's citation to federal authority in connection with his ineffective trial counsel claim makes his failure with regard to the appellate counsel claim "especially pronounced."

to, but not the same as, the federal claim he wants to raise in federal habeas; nor is it enough for the state prisoner to present the state courts with the state counterpart of the federal claim. *Harless*, *supra*.

Despite this Court's consistent emphasis on the state prisoner's obligation to fairly present federal claims in the state courts, the Ninth Circuit improperly shifted from a "fair presentation" requirement resting squarely on the state prisoner to a "fair opportunity" requirement resting instead on the state courts. The court appears to have justified this shift, in part, by its presumption of what a state appellate court will—or should—do on review of a trial court decision. But as this Court repeatedly has held, that type of presumption is wrong for two reasons. First, in Oregon, it is an appellant's obligation to identify what claim he is asking the appellate court to review. Second, federal courts must look to state procedures to determine whether state appellate courts would consider a federal issue as properly presented to them.

III. The Ninth Circuit's rule fails to give proper respect to the role of state procedural rules in the exhaustion analysis.

The Ninth Circuit did not cite any case to support its conclusion that it could presume that the state appellate courts looked back through the layers of Reese's PCR case and used the trial court's opinion to complete an otherwise incomplete claim of error. Although the court did not cite *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the presumption the court applied sounds similar to the presumption addressed in *Ylst*. There, the Court discussed the presumption that, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." 501 U.S. at 803. The Court also noted, "The maxim is that silence implies consent, not the opposite—and courts generally be-

have accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Id.*, at 804.

As in *Ylst*, the Ninth Circuit in this case looked back through two unexplained orders from the Oregon Court of Appeals and the Oregon Supreme Court to the last reasoned state judgment—from the post-conviction trial court—and presumed that the appellate courts adopted the reasoning of the trial court. However, the presumption discussed in *Ylst* applies only where the silent state court was presented with the particular federal claim. *See id.*, at 801. That is, in *Ylst*, the state prisoner actually asserted his federal claim in the state appellate courts. If the Ninth Circuit was relying on the presumption articulated in *Ylst*, it could not apply here—a court's silence in response to a brief or petition that does not fairly present a claim implies nothing about the court's reasoning on that claim.

Instead of relying on the *Ylst* presumption, it is equally likely that the Ninth Circuit relied simply on its belief about what the Oregon appellate courts did in resolving Reese's PCR appeal. To the extent that the Ninth Circuit based its ruling on that belief, its reasoning is not supported by the State's procedural rules or case law. And, to the extent that the Ninth Circuit ignored those state procedural rules, its reasoning is contrary to this Court's case law.

A. Oregon's appellate courts do not, as a matter of course, review a trial court's memorandum opinion to complete inadequately presented appellate claims.

Contrary to the Ninth Circuit's presumptions, it is clear that neither the Oregon Court of Appeals nor the Oregon Supreme Court would have used the PCR trial court's memorandum opinion to supplement the limited material Reese pre-

sented in his brief or petition. Oregon's appellate procedures are similar to those of other states as well as the federal appellate courts and this Court. For any challenge brought to state appellate courts, the appellant must meet certain procedural requirements before the appellate court will address his claims.

In the Oregon Court of Appeals, the appellant must assign a claim as error in the opening brief on appeal, must satisfy the court's preservation-of-error requirements, and must provide the argument in support of the claimed error. Or. R. App. P. 5.45; App-6 to App-7. Contrary to the Ninth Circuit's presumptions, the Oregon Court of Appeals will not review a claim that does not satisfy each of these requirements, even if the court could have located the necessary information by its own review of the record. *See Lichau v. Baldwin*, 166 Or. App. 411, 423, 999 P.2d 1207, 1214 (2000) (court refused to consider claims of error raised by state prisoner in post-conviction appeal because he did not brief the assignments of error, but "invites us to comb his post-conviction trial memorandum for support" and the rules require the appellant to present and develop appropriate appellate arguments);[12] *see also*

[12] The Oregon Supreme Court reversed the Oregon Court of Appeals on a different basis. *Lichau v. Baldwin*, 333 Or. 350, 39 P.3d 851 (2002). However, the court noted without criticism the intermediate appellate court's refusal to consider the improperly presented claims:

> [B]ecause we conclude that petitioner is entitled to a new trial as a result of his lawyer's constitutionally inadequate assistance, we need not address petitioner's cross-assignment of error with regard to the post-conviction court's dismissal of his remaining claims of trial court error, prosecutorial misconduct, and other issues. In any event, petitioner

Reynolds v. Lampert, 170 Or. App. 780, 789, 13 P.3d 1038, 1043 (2000) (court refused to consider state prisoner's post-conviction claim because he failed to comply with the procedural requirements for a cross-appeal); *Garcez v. Freightliner Corporation*, 188 Or. App. 397, 404, ___ P.3d ___ (2003) (court refused to consider a claim because "(1) that ruling is not fairly encompassed within plaintiff's assignments of error as framed in his opening brief, and (2) plaintiff's arguments pertaining to those claims are not adequately developed on appeal."). [13]

> did not properly develop or present those claims in his briefs in this court or in the Court of Appeals.

Id., 333 Or. at 365 n. 3, 39 P.3d at 800 n. 3.

[13] Oregon law requires the PCR trial court to "state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. § 138.640; App-4. In addition, the law states that a summary affirmance, such as the Oregon Court of Appeals' order in the underlying PCR case here, "constitutes a decision on the merits of the appeal." Or. Rev. Stat. § 138.660; App-5. In his response to the State's petition for writ of certiorari, Reese took the State to task for failing to mention these and related statutes. Brief in Opposition 13-16. Reese asserted that these statutes somehow alter the normal practice in the Oregon Court of Appeals. Reese is wrong in that assertion.

Neither the statutory requirement for the trial court to state the grounds presented nor the summary affirmance statute alter the state appellate rules of procedure and the requirement that the appellant properly present an issue before the Oregon Court of Appeals will consider it. *See Bennett v. Maass*, 131 Or. App. 557, 559-560, 886 P.2d 1043, 1044 (1994), *rev denied* 321 Or. 47, 892 P.2d 1024 (1995) (dismissing post-conviction appeal pursuant to Or. Rev. Stat. § 138.660 where the appellant disagreed with the trial court's findings but did not provide an argument or explanation in

Similarly, a petition for review to the Oregon Supreme Court must meet the court's procedural rules before that court will consider a claim. The petition for review must contain a concise statement of the legal question presented on review, reasons for reversing the decision of the intermediate appellate court, a short statement of the relevant facts, and a brief argument. Or. R. App. P. 9.05(4); App-12. The court will not consider a claim presented for the first time in a petition for review, but will exercise its discretionary review to consider only "questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court." Or. R. App. P. 9.20(2); App-13.

Thus, Oregon appellate courts place the burden on the party seeking review to identify the issues the party wants the court to address.[14] In this decisive respect, Oregon's appellate procedure is similar to federal procedure: before the federal appellate court will consider a claim, the appellant must satisfy certain procedural requirements and must present the court with the factual and legal basis of the claim. The federal appellant must set forth the claims, arguments, and citations

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support of his general assertion). Summarily affirming a judgment does not mean that an appellate court reached the merits of a claim that the appellant never properly raised.

[14] The Oregon Supreme Court recently reiterated its expectation that appellate counsel will winnow the claims on appeal: "Courts depend on counsel to examine the record, study the applicable law, and analyze the potentially meritorious claims that should be advanced on appeal. The exercise of professional skill and judgment often requires a lawyer to pick and choose among arguments or theories * * *. Effective appellate advocacy requires counsel to make those choices." *Pratt v. Armenakis*, 335 Or. 35, 40, 56 P.3d 920, 922 (2002). This expectation would have no effect if the court were required to independently search the record for the claims the appellant chose not to pursue.

to the authorities and parts of the record on which the appellant relies. Fed. R. App. P. 28(a)(9)(A). Federal appellate courts ordinarily will not consider matters on appeal that are not "specifically and distinctly" raised and argued in the opening brief, with the exception of certain jurisdictional issues. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim[.]"). Moreover, federal appellate courts will consider issues abandoned if the appellant raises them but does not support them by argument. *Wilkins v. United States*, 279 F.3d 782, 785-786 (9th Cir. 2002); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (court refused to address issues where the appellant's "opening brief provided only cursory mention, with virtually no discussion" of the issues).

As with the federal circuit courts of appeal, this Court will, with rare exceptions, refuse to consider claims that were not raised or addressed in the lower courts, especially in review of state court cases. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (Court refused to address issue that was not raised or briefed in the state courts); *Yee v. Escondido*, 503 U.S. 519, 533 (1992) (Court refused to consider one claim because it was not raised or addressed in the state courts and refused to consider a second claim because it was "not fairly included in the question on which we granted certiorari."). Thus, the Ninth Circuit erred in its understanding of appellate procedure by presuming that the Oregon appellate courts would have done what federal appellate courts will not do—fill in the factual and legal components that were not asserted as part of an appellate claim. More importantly, the Ninth Circuit erred in concluding that, even if the State's procedural requirements prevented the State court from identifying and

addressing Reese's federal claim, that procedural bar had no bearing on the exhaustion issue.

B. In an analysis that finds no support in this Court's federal habeas corpus jurisprudence, the Ninth Circuit disregarded the effect of the State's appellate procedural requirements, yet nonetheless concluded that its analysis satisfied comity concerns.

The Ninth Circuit based its analysis, in part, on its incorrect presumption of what the state appellate courts did, but it made clear that its analysis would have been the same even if its presumption about how the state appellate courts operated was wrong. The Ninth Circuit concluded that its analysis—and its willingness to disregard state procedural requirements for presentation of claims to the state appellate courts—satisfied the comity concerns that underlie the exhaustion requirement:

> Comity requires only that we not rule if the state court has not had the opportunity first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.
>
> Here, we conclude that the Oregon Supreme Court had that opportunity. A state supreme court certainly has the opportunity to read a petition for review and the lower court decision claimed to be in error before deciding whether to grant discretionary review. It is in this sense that we presume the Oregon Supreme Court read Reese's PCR court opinion. But assuming arguendo that the Oregon Supreme Court chooses not to read lower court opinions when deciding whether to grant review, it would not control our exhaustion

> analysis. For in that assumed case, that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue.

App. to Pet. for Cert. 18-19 (emphasis added).

The Ninth Circuit's holding is directly contrary to what this Court has determined is required for fair presentation. The Court has emphasized the state prisoner's obligation to present a federal claim in a procedural context in which the merits of the claim will be considered by the state court. *Castille v. Peoples*, 489 U.S. 346, 349-351 (1989). Thus, for example, the Court rejected the contention that "submission of a new claim to a State's highest court on discretionary review constitutes a fair presentation" because the state court would not consider a claim raised in that manner. *Id.*, at 351.

Again, in *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court emphasized the need to consider state procedural rules. "We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. * * * The Court has long understood the vital interest served by federal procedural rules, even when they serve to bar federal review of constitutional claims. * * * No less respect should be given to state rules of procedure." *Id.*, at 751.[15] The Court has made it clear that exhaustion requires

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[15] An additional point from *Coleman* is worth mention. In addressing the independent-and-adequate-state-ground doctrine, the Court noted that that doctrine, too, is grounded in concerns of comity and federalism:

> Without the rule, a federal district court would be able to do in habeas what the Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and

that the state prisoner present the federal claim through one complete cycle of state-court review and that he satisfy the procedural requirements at each point in the process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848-849 (1999) (comity requires presentation to the State's highest appellate courts, even where that review is discretionary; the state prisoner must "use the State's established appellate review procedures before he presents his claims to a federal court").

As the Court has emphasized repeatedly, the inquiry in cases such as this one is whether the state prisoner *properly exhausted* his federal claim in the state courts by *fairly presenting* the claim to the state courts. Fair presentation requires compliance with state procedural rules and the Ninth Circuit was wrong to conclude that comity and fair presentation could be satisfied by presenting a claim in a manner that would foreclose rather than invite state appellate court review.

> adequate state grounds an end run around the limits of the Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

501 U.S. at 730-731. The Ninth Circuit's rule in this case would allow the same type of end run. Because the Court will not review a claim that was not properly presented to the state's highest court, it could not have reviewed Reese's ineffective assistance of appellate counsel claim if Reese had sought this Court's direct review of the Oregon Supreme Court's denial of the petition for review in the PCR proceeding. The same concern for comity that led the Court in *Coleman* to reject the rule that permitted a state prisoner to skip the state's highest court should lead it to reject the Ninth Circuit's rule in this case.

IV. The Court should use this case as an opportunity to clarify its test for fair presentation of federal claims to state courts.

The Ninth Circuit has struggled over the Court's requirements for fair presentation and proper exhaustion. In his brief in opposition to the petition for writ of certiorari, Reese pointed to several Ninth Circuit cases in which that court applied the exhaustion requirement more rigorously than it did in this case. Brief in Opposition 17-20. Comparing those decisions with the one in this case does suggest that the Ninth Circuit has been inconsistent in its application of the exhaustion requirement. Moreover, the Ninth Circuit is not alone in finding it difficult to articulate and consistently apply a clear rule that satisfies this Court's precedent, as the State discussed in its petition for writ of certiorari.

Judicial efforts to explain the fair presentation requirement have led to colorful descriptions of what is and is not adequate, but little in the way of an easily and consistently applied test. *See Petrucelli v. Combe*, 735 F.2d 684, 689 (2nd Cir. 1984) ("Federal judges will not presume that state judges are clairvoyant"); *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994) (a petitioner must make more than a "perfunctory jaunt through the state court system"); *Nadworny v. Fair*, 872 F.2d 1093, 1101 (1st Cir. 1989) ("an isolated federal-law bloom in a garden thick with state-law references" will not suffice to put a reasonable state jurist on notice of a federal claim); *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988) ("The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick."). Or, as Judge Nelson put it in his dissent in this case, "Judges are not like pigs hunting for truffles buried in briefs. At least federal appellate judges are not, according to our precedent. Yet the majority would hold

state supreme court justices to a different standard—requiring them to root through the record for rare truffles of legal support that may complete an incompletely raised claim * * *." App. to Pet. for Cert. 20 (internal quotation marks and citation omitted).

The inconsistent tests applied by the circuits appear to spring, in part, from language this Court used in *Picard*. Although the holding of *Picard* seems clear enough, litigants and some federal courts have seized on the Court's caution that a state prisoner need not cite "book and verse on the federal constitution" to properly exhaust a federal claim in state court. *Picard, supra,* 404 U.S. at 278 (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)). But since *Picard*, the Court has clarified that statement and has identified the concerns that underlie the exhaustion requirement. Nonetheless, the federal appellate courts have not modified their various approaches in response to those more recent decisions. Many, like the Ninth Circuit in this case, have adopted a view of comity that does not give proper consideration to the States' interests in having a first fair opportunity to consider the federal claims of state prisoners.

The States, state courts, state prisoners, and federal courts each have an interest in a clearly defined rule of exhaustion and, for the most part, those interests are not in conflict. For the States and the state courts, the primary interest is the comity concern that this court long has recognized as the foundation of the exhaustion requirement: state courts should have a full and fair opportunity to resolve federal constitutional claims before state prisoners present those claims to the federal courts. *O'Sullivan, supra,* 526 U.S. at 845. As the Court has noted, the cost of federal review falls heavily on the States:

> [M]ost of the price paid for federal review of state prisoner claims is paid by the State. When

> a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction.

Coleman, *supra* at 738-739. There also is a significant social cost of concern to the States, as the Court recognized in *Engle v. Isaac*, 456 U.S. 107, 127-128 (1982):

> We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

In addition, States have a strong interest in seeing that there is finality in criminal convictions.

For state prisoners, the primary interest is in having their meritorious federal claims speedily reviewed and resolved. *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Those interests also are best served by a clear recognition that state courts are fully equipped to address federal issues and an equally clear recognition that state courts will vindicate meritorious federal claims sooner than federal courts possibly can reach them. This Court has noted also that a rigorously enforced exhaustion rule gives state courts even greater familiarity with federal constitutional issues and adds to their ability to resolve

these claims promptly and properly. *Rose, supra*, 455 U.S. at 518-519. Thus, state prisoners will obtain appellate review sooner by presenting those federal claims clearly in the state courts and, if the claims are meritorious, will obtain relief sooner. As the Court stated in adopting a complete exhaustion rule, an explicit rule provides state prisoners with "simple and clear instruction * * *: before you bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement." *Rose, supra*, 455 U.S. at 520. Moreover, the Court concluded that the more stringent rule it adopted—requiring complete exhaustion—would neither "complicate and delay" the resolution of habeas petitions nor "trap the unwary *pro se* prisoner." *Id.*, at 520 (quoting from dissenting and concurring opinions).[16]

The benefits of a clear exhaustion rule for federal courts are almost as great. A rule that emphasizes the need for proper presentation of issues in the state courts reduces the claims the federal courts must address, makes it easier to identify claims that properly are before the federal court, and provides a more complete record when it is necessary to address a federal habeas claim. In the 12-month period ending March 31, 2002, state prisoners filed almost 20,000 habeas cases in the federal

[16] Justice Blackmun, in his concurrence, expressed concern that the requirement that mixed petitions (containing both exhausted and unexhausted claims) be returned to state courts would be "more destructive than solicitous of federal-state comity" because state courts would face an increased number of patently frivolous claims. *Id.*, at 525. Congress addressed that concern in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) by providing federal courts the authority to address and deny unexhausted claims rather than send these claims back to the state courts for exhaustion. 28 U.S.C. § 2254(b)(2).

district courts and sought appellate review of approximately 7,000 cases.[17] While not every case raises questions of exhaustion, many—if not most—do. As Justice Stevens noted in his dissent in *Anderson, supra*, 459 U.S. at 8, "Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus." A fair presentation rule that requires a plain statement of the factual grounds and federal legal source of each claim obviously will reduce the time spent litigating and deciding questions of exhaustion and procedural default. In addition, a rule that focuses on the state prisoner's brief in the state courts furthers "the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it." *Harris v. Reed*, 489 U.S. 255, 265 (1989). Finally, for those issues that are properly exhausted and then presented to the federal courts, the federal courts will have a more complete record to review.[18]

The States, state courts, state prisoners, and federal courts each would benefit if this Court used this case as an opportunity to clarify the requirements for fair presentation that will satisfy the interests described above. The State proposes the following as a clear and straightforward description of what the Court previously has suggested is required:

> To fairly present a federal claim in state court, a state prisoner must

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[17] Federal Judicial Caseload Statistics for March 31, 2002; published by the Administrative Office of the United States Courts.

[18] When a record has been developed in state court, federal courts must defer to a state court's factual findings. 28 U.S.C. § 2254 (e)(1) creates a presumption that factual determinations by state courts are correct unless the state prisoner rebuts that presumption by clear and convincing evidence.

> (1) present sufficient facts to support the claim; and
>
> (2) identify clearly the federal legal source of the claim by
>
> > (a) citing the federal constitutional provision(s) relied on;[19] or
> >
> > (b) citing at least one reported case that expressly has decided the claim solely on a federal basis; or
> >
> > (c) expressly identifying a claim that necessarily must be based on a federal right.

Consistent with this Court's precedents, the test applies at each level of available state court review. Under the test, the state prisoner also must comply with the mandatory state rules of appellate procedure.

Application of the proposed test should be guided by the overriding question: Did the state prisoner fairly present the federal claim to the state courts? Thus, under section (2)(a) of the proposed test, if a broad federal provision is cited—one that could serve as the basis for multiple distinct federal claims—the state prisoner must alert the state court to the precise federal claim either through the facts presented or the argument. For example, simply asserting a "Sixth Amendment claim" is insufficient to identify for the state court the precise federal claim raised, because the constitutional provision en-

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[19] There may be some claims based on alleged violations of federal statutes or treaties, in which case the state prisoner would need to identify the federal source of law. Nearly all federal habeas claims, however, are based on alleged violations of rights guaranteed by the federal constitution.

compasses rights to counsel, confrontation, and compulsory process. The state prisoner may narrow that broad reference by the facts presented or by the discussion of the claim; if the facts or discussion do not clearly identify the precise federal claim, a reference to a broad federal constitutional provision would be insufficient to satisfy the test.

Under section (2)(b) of the State's proposed test, if a case is used as the basis for presenting the state court with the federal authority, the case cited must be one that will put the state court on notice of the specific federal claim the state prisoner is raising. If it is not a decision from this Court, the case "must play a prominent part in [the state prisoner's] state court argument"[20] and cannot be buried in a string citation of several cases that address the issue on state grounds alone or on both state and federal grounds.

Under section (2)(c) of the proposed test, a state prisoner could identify a federal claim through an accepted short-hand reference without expressly identifying the federal constitutional provision, such as "my federal right to effective counsel." Similarly, some claims may necessarily be federal where there is no state counterpart. For example, the Oregon Constitution does not contain a due process clause;[21] a reference to a "due process violation" in Oregon courts necessarily alerts the state courts that a federal claim is being presented.

By way of example, consider how a state prisoner could satisfy the state's proposed test and fairly present an ineffective assistance of appellate counsel claim. At each level of available state review, the state prisoner would have to:

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[20] *Dougan v. Ponte*, 727 F.2d 199, 202 (1st Cir. 1984).

[21] *See, e.g., State v. Miller*, 327 Or. 622, 635 n. 10, 969 P.2d 1006, 1013 n. 10 (1998) ("the Oregon Constitution contains no due process clause").

> (1) identify the facts that establish what counsel did or failed to do; and
>
> (2) alert the state court to the federal legal source of the claim by
>
> (a) citing to the Sixth Amendment ("my appellate attorney violated my right to effective counsel under the Sixth Amendment"); or
>
> (b) citing to a reported case ("my appellate attorney violated my right under *Strickland* to effective counsel"); or
>
> (c) expressly identifying the federal source of the claim ("my appellate attorney violated my federal right to effective counsel").

With respect to Reese's federal claim of ineffective appellate counsel, Reese failed to satisfy the State's proposed test either in the Oregon Court of Appeals or the Oregon Supreme Court. In the Oregon Court of Appeals, Reese failed to present the facts necessary to support his ineffective appellate counsel claim because he never identified the specific issues he believed appellate counsel should have raised in the PCR appeal. All Reese presented to the intermediate appellate court was a claim labeled "ineffective assistance of appellate counsel" and a tangled description of Reese's complaint. The closest Reese came to presenting the issue he later sought to raised in the federal habeas corpus proceeding was his statement that "Mr. Jesse Wm. Barton did fail to raise issues on appeal."[22] J.A. 32. This description is inadequate to inform

[22] The State and the Ninth Circuit have treated the problem in this case primarily as a question whether, in state court, Reese identified his ineffective appellate counsel claim as a federal claim. Arguably, the problem is not simply that Reese presented a claim but failed to identify a federal source for the legal right asserted.

the state appellate court of any specific claim of ineffective assistance of counsel. In addition, Reese did not cite the Sixth Amendment, did not cite *Strickland v. Washington*, 466 U.S. 668 (1984), or any other case analyzing the federal right to effective counsel, and did not state that his appellate counsel's performance violated his federal right to counsel.[23]

Similarly, in the Oregon Supreme Court, Reese alerted the court to neither the necessary facts nor the federal legal source of this claim. Again, Reese stated that one issue presented was the effectiveness of appellate counsel, but he failed to identify the facts necessary to explain that claim. Nor did he cite any constitutional provision or legal authority of any kind relating to that claim. Looking only at what Reese submitted to the state appellate courts, there is no basis to conclude that he gave the state courts a fair opportunity to address the claim he later sought to raise in the federal courts.

The State's proposed test readily demonstrates Reese's failure to fairly present a federal claim to the state courts. More generally, it satisfies the interests of the States, state courts, state prisoners, and federal courts by promoting comity, finality, speedy resolution of meritorious federal claims, and judicial efficiency, while not placing an onerous burden

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Rather, it could be argued that Reese failed to present adequately *any* ineffective appellate counsel claim. In that case, *O'Sullivan* would control the result because Reese simply failed to present his claim at each available stage of state-court appellate review. 526 U.S at 848-849.

[23] Because Article I, section 11, of Oregon's constitution guarantees the right to counsel in all criminal prosecutions, the mere mention of the "right to counsel" would not alert the state appellate courts that Reese was asking them to address a claim under the federal constitution.

on the state prisoner. [24] The test focuses on what the state prisoner must do to inform the state court that the prisoner is asking the court to address a federal claim; contrary to the Ninth Circuit's ruling in this case, comity is best served by nothing less. The test focuses solely on what the state prisoner files in the state court; it does not require or permit the federal habeas court to search outside of the state prisoner's state-court brief to identify the federal claim. The proposed test thereby minimizes litigation over whether the state prisoner satisfied the exhaustion requirement.

The test requires the state prisoner to give the state courts one clear and fair opportunity to address and resolve any federal claim, yet it gives the state prisoner several ways of iden-

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[24] The State's proposed test is similar to the Court's requirement for federal claims presented to it for review under 28 U.S.C. § 1257. The Court's fair presentation rule for challenges to state court decisions serves the same important interests of comity and judicial efficiency that underlie the exhaustion requirement in federal habeas. *Webb v. Webb*, 451 U.S. 493, 500 (1981). The Court requires a petitioner to demonstrate that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Id.*, at 501.

The Court has described a petitioner's burden as involving the need to demonstrate that the petitioner presented the particular claim at issue with "fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Although the Court has not insisted on "inflexible specificity" for how litigants must identify the federal nature of their claim in state court, "[a]t a minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the claim at the time and in the manner required by the state law." *Webb, supra*, 451 U.S. at 501 (emphasis in original).

tifying the federal claim for the state courts. In short, it promotes what the Court has stated is the purpose of exhaustion: "not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Keeney*, *supra*, 504 U.S. at 10.

Under the State's proposed test, the state prisoner's duty is clear. He must fairly present his claim in state court by alerting that court to the federal nature of the claim through some unmistakable reference. Elimination of guesswork satisfies the realities of practice in overburdened state appellate courts, meets the requirements of state appellate procedure, and serves the various interests of the courts and the parties. It may serve also to reduce the frequency with which this Court is asked to deal with the exhaustion question. *See Castille*, *supra*, 489 U.S. at 349-350 (1989) ("Today we address again what has become a familiar inquiry: '*To what extent* must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?'") (emphasis in original; citation omitted). The Court should reject the Ninth Circuit's approach and, instead, take the opportunity to announce a fair and easily applied test for proper exhaustion.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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July 24, 2003

APPENDIX

Or. Rev. Stat. § 138.530 When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected.

(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state.

Or. Rev. Stat. § 138.540 Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies.

(1) Except as otherwise provided in ORS 138.510 to 138.680, a petition pursuant to ORS 138.510 to 138.680 shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings upon which it is based. The remedy created by ORS 138.510 to 138.680 does not replace or supersede the motion for new trial, the motion in arrest of judgment or direct appellate review of the sentence or conviction, and a petition for relief under ORS 138.510 to 138.680 shall not be filed while such motions or appellate review remain available. With the exception of habeas corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

(2) When a person restrained by virtue of a judgment upon a conviction of crime asserts the illegality of the restraint upon grounds other than the unlawfulness of such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available under ORS 138.510 to 138.680 but shall be sought by habeas corpus or other remedies, if any, as otherwise provided by law. As used in this subsection, such other grounds include but are not limited to unlawful revocation of parole or conditional pardon or completed service of the sentence imposed.

Or. Rev. Stat. § 138.550 Availability of relief as affected by prior judicial proceedings.

The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in the petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.

(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended

petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground could reasonably have been asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in the conviction and sentence of the petitioner.

Or. Rev. Stat. § 138.640 Judgment.

After deciding the issues raised in the proceeding, the court shall deny the petition or enter an order granting the appropriate relief. The court may also make orders as provided in ORS 138.520. The order making final disposition of the petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a

final judgment for purposes of appellate review and for purposes of res judicata.

Or. Rev. Stat. § 138.650 Appeal.

Either the petitioner or the defendant may appeal to the Court of Appeals within 30 days after the entry of final judgment on a petition pursuant to ORS 138.510 to 138.680. The manner of taking the appeal and the scope of review by the Court of Appeals and the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that:

(1) The trial court may provide that the transcript contain only such evidence as may be material to the decision of the appeal; and

(2) With respect to ORS 138.081 (1), if petitioner appeals, petitioner shall cause the notice of appeal to be served on the attorney for the defendant, and, if defendant appeals, defendant shall cause the notice of appeal to be served on the attorney for petitioner or, if petitioner has no attorney of record, on petitioner.

Or. Rev. Stat. § 138.660 Summary affirmation of judgment; dismissal of appeal.

In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Court of Appeals on its own motion or on motion of respondent may summarily affirm, after submission of the appellant's brief and without submission of the respondent's brief, the judgment on appeal without oral argument if it finds that no substantial question of law is presented by the appeal. Notwithstanding ORS 2.570, the Chief Judge of the Court of Appeals may deny or, if the petitioner does not oppose the motion,

grant a respondent's motion for summary affirmation. A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal.

Or. R. App. P. 5.45 Assignments of Error and Argument.

(1) A question or issue to be decided on appeal shall be raised in the form of an assignment of error, as prescribed in this rule. Assignments of error are required in all opening briefs of appellants and cross-appellants. No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may consider an error of law apparent on the face of the record.

(2) Each assignment of error shall be separately stated under a numbered heading. The arrangement and form of assignments of error, together with reference to pages of the record, should conform to the illustrations in Appendix J.

(3) Each assignment of error shall identify precisely the legal, procedural, factual, or other ruling that is being challenged.

(4)(a) Each assignment of error shall demonstrate that the question or issue presented by the assignment of error timely and properly was raised and preserved in the lower court. Under the subheading "Preservation of Error":

(i) Each assignment of error, as appropriate, must specify the stage in the proceedings when the question or issue presented by the assignment of error was raised in the lower court, the method or manner of raising it, and the way in which it was resolved or passed on by the lower court.

(ii) Each assignment of error must set out pertinent quotations of the record where the question or issue was raised and

the challenged ruling was made, together with reference to the pages of the transcript or other portions of the record quoted or to the excerpt of record if the material quoted is set out in the excerpt of record. When the portions of the record relied on under this subparagraph are lengthy, they shall be included in the excerpt of record instead of the body of the brief.

(b) An assignment of error for a claimed error apparent on the face of the record shall comply with the requirements for assignments of error generally by identifying the precise ruling, specifying the state of the proceedings when the ruling was made, and setting forth pertinent quotations of the record where the challenged ruling was made.

(c) The court may decline to consider any assignment of error that requires the court to search the record to find the error or to determine if the error properly was raised and preserved.

(5) Under the subheading "Standard of Review," each assignment of error shall identify the applicable standard or standards of review, supported by citation to the statute, case law, or other legal authority for each standard of review.

(6) Each assignment of error shall be followed by the argument. If several assignments of error present essentially the same legal question, the argument in support of them may be combined so far as practicable. The argument in support of a claimed error apparent on the face of the record shall demonstrate that the error is of the kind that may be addressed by the court without the error having been preserved in the record.

Or. R. App. P. 5.90 "*Balfour*" Briefs filed by court-appointed counsel.

(1) If counsel appointed by the court to represent an indigent defendant in a criminal case on direct appeal has thor-

oughly reviewed the record, has discussed the case with trial counsel and the client, and has determined that the case does not raise any arguably meritorious issues, counsel shall file a brief with two sections:

(a) Section A of the brief shall contain:

(i) A statement of the case, including a statement of the facts of the case. If the brief contains a Section B with one or more claims of error asserted by the client, the statement of facts shall include facts sufficient to put the claim or claims of error in context.

(ii) A description of any demurrer or significant motion filed in the case, including, but not limited to, a motion to dismiss, a motion to suppress and a motion *in limine*, and the trial court's disposition of the demurrer or motion.

(iii) A statement that the case is being submitted pursuant to this rule, that counsel has thoroughly reviewed the record and discussed the case with trial counsel and the client, and that counsel has not identified any arguably meritorious issue on appeal. If the brief does not contain a Section B, counsel also shall state that counsel contacted the client, gave the client reasonable opportunity to identify a claim or claims of error, and that the client did not identify any claim of error for inclusion in the brief.

(iv) Counsel's signature.

(b)(i) Section B of the brief is the client's product and may contain any claim of error that the client wishes to assert. The client shall attempt to state the claim and any argument in support of the claim as nearly as practicable in proper appellate brief form. The last page of Section B of the brief shall contain the name and signature of the client.

(ii) Counsel's obligation with respect to Section B of the brief shall be limited to correcting obvious typographical er-

rors, preparing copies of the brief, serving the appropriate parties, and filing the original brief and the appropriate number of copies with the court.

[Prior to the 2003 rule amendments, this section provided: "(b) Section B of the brief shall contain any claim of error requested by the client and shall be signed by the client. Section B shall attempt to state the claim and any argument in support of the claim as nearly as practicable in the manner that the client seeks, in proper appellate form."]

(2) A case in which appellant's brief is prepared and filed under this rule shall be submitted without oral argument, unless otherwise ordered by the court.

(3) On reviewing the record and the briefs filed by the parties, if the court identifies one or more arguably meritorious issues in the case, the court shall notify appellant's counsel of the issue or issues so identified. Appellant's counsel shall have 28 days from the date of the court's notice to file a supplemental opening brief addressing those issues. In addition to addressing the issue or issues identified by the court, counsel may address any other arguably meritorious issue counsel has identified. Respondent shall have 28 days after appellant files a supplemental opening brief to file a response or supplemental response brief addressing the issues raised in the supplemental opening brief.

(4) In a case other than a criminal case on direct appeal, court-appointed counsel who determines that there are no meritorious issues on appeal may submit a brief under this rule, in which case the matter will be submitted without oral argument, unless otherwise ordered by the court.

(5) In any case in which the appellant is represented by court-appointed counsel on appeal and counsel filed a brief in the Court of Appeals under subsection (1) of this rule, counsel may submit a petition for review that contains a Section A

that complies with Rule 9.05(2), (5), and (7)(g), and a Section B that complies with paragraph (1)(b) of this rule.

Or. R. App. P. 9.05 Petition for Supreme Court review of Court of Appeals decision.

(1) Reviewable Decisions

As used in this rule, "decision" means an opinion, per curiam opinion, or memorandum opinion of the Court of Appeals, including a decision affirming from the bench or affirming without opinion, and an order ruling on a motion, own motion matter, petition for attorney fees, or statement of costs and disbursements.

(2) Time for Filing and for Submitting Petition for Review

(a) Any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days from the date of the Court of Appeals' decision. The Supreme Court may grant an extension of time to file a petition for review.

(b) (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its order deciding the petition for reconsideration.

(ii) If a petition for review is filed during the time in which a petition for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will

not be submitted to the Supreme Court until the Court of Appeals issues its order deciding the petition for reconsideration.

(c) (i) If the Administrator has issued the appellate judgment based on the Court of Appeals' disposition of a case, within a reasonable time thereafter, a party may move to reinstate the appeal for the purpose of seeking review. The party shall file in the Supreme Court a motion to recall the appellate judgment and to establish a new due date for the petition for review.

(ii) If the party requests immediate recall of the appellate judgment, the motion should identify the circumstances justifying that relief. Otherwise, the court may postpone the decision whether to recall the appellate judgment until the court decides whether to allow review.

(iii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

(3) Form and Service of Petition for Review

(a) The petition shall be in the form of a brief, prepared in conformity with Rules 5.05 and 5.35. The cover of the petition shall:

(i) Identify which party is the petitioner, including the name of the specific party or parties on whose behalf the petition is filed, if there are multiple parties on the same side in the case;

(ii) Identify the date of the decision of the Court of Appeals;

(iii) Identify the means of disposition of the case by the Court of Appeals:

(A) If by opinion, the author of the challenged opinion and the other members of the court who concurred in or dissented from the court's decision;

(B) If without opinion (affirmed from the bench, affirmed without opinion, or per curiam), the members of the court who decided the case.

(iv) Contain a notice whether, if review is allowed, the petitioner intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals.

(b) Any party filing a petition for review shall serve two copies of the petition on every other party to the appeal or judicial review, and file with the Administrator an original petition, marked as such, and 12 copies, together with proof of service.

(4) Contents of Petition For Review

(a) The petition shall contain in order:

(i) A prayer for review.

(ii) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposed be established, if review is allowed.

(iii) A concise statement of each reason asserted for reversal or modification of the decision of the Court of Appeals, including appropriate authorities.

(iv) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the Court of Appeals should not be restated.

(v) A brief argument related to each reason asserted for review, if desired.

(vi) A statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court.

(vii) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.

(b) An assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with subparagraphs 4(a)(v) and (vi) of this rule.

Or. R. App. P. 9.20 Allowance of Review by Supreme Court.

(1) A petition for review of a decision of the Court of Appeals shall be allowed if one less than a majority of the judges eligible to vote on the petition vote to allow it.

(2) If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

(3) When the Supreme Court allows a petition for review, the court may request the parties to address specific questions. Those specific questions should be addressed at oral argument and may also be addressed in the parties' briefs on the merits or by additional memoranda. If addressed by additional memoranda, the original and 12 copies of such additional memoranda shall be served and filed not less than seven days before argument or submission of the case.

(4) The parties' briefs in the Court of Appeals will be considered as the main briefs in the Supreme Court, supplemented by the petition for review and any response, brief on the merits, or additional memoranda that may be filed.

(5) The record on review shall consist of the record before the Court of Appeals.