
Keeping Habeas in Mind: What State Judges and Prosecutors Don't Know Can Hurt Them

By Jerrold Schrotenboer

INTRODUCTION

This article is neither a refutation nor a response to David Moran's and Martin Tieber's excellent article on habeas from last year. Instead, this article complements their article. Their article explains just how important what the defense does in State court is to any subsequent habeas challenge. This article explains how what the State prosecutor and/or judge does also impacts any subsequent habeas decision.

Former Eastern District Court Magistrate Marc Goldman stated at the 2001 appellate bench/bar conference that the Eastern District had granted more writs in the two preceding years than in the previous ten years combined. Nothing has changed in the intervening years. Despite 1996's AEDPA's being intended to restrict habeas availability,¹ in Michigan at least, precisely the opposite has happened. Federal courts are granting writs at record levels. Rather than explaining why so many writs are being granted, this article will concentrate on what prosecutors and State judges can do at the State level to make it less likely that the federal court will later grant a writ.

Every now and then someone who once worked in a Michigan appellate court and now either works in a federal court or does habeas tells me what I myself have said: "I wish I knew then what I know now." Just how the Michigan courts write the opinion really matters. An opinion affirming on one ground may be overturned in habeas, while the same opinion affirming on another ground might not.

I am writing this article for Michigan's judges telling them how best to avoid having a writ subsequently granted and the opinion overturned. Although anyone writing an opinion should do so based on his own perception of what the law and justice require, he should at least keep this article's advice in mind. After all, few judges wake up each morning and say: "Oh boy, I hope some federal judge grants a writ in one of my cases today."

I am also writing this article for Michigan's appellate prosecutors. Although a prosecutor can do little directly about how the opinion is written, he can hardly complain about the appellate court missing something if his own brief missed it too. Additionally, possibly, the more that prosecutors argue these points, the more the appellate courts might pick up on them.

FACTS

The federal district court, of course, being the trial level court, has inherent fact finding powers. Those fact finding

powers do not disappear merely because the original civil lawsuit is a habeas action. On the other hand, to preserve federal/state comity, the district court's fact finding powers have been limited. 28 USC 2254(e)(1) states that any State court factual finding "shall be presumed to be correct." This presumption can be overcome by only "clear and convincing evidence."

Therefore, to protect the State decision on habeas, the State's court should at least consider (when feasible) basing its decision on factual findings, rather than exclusively on the law. Legal decisions, of course, are far more likely to be second-guessed than factual findings.

An additional way for the State courts to protect themselves deals with allowing a criminal defendant to develop a factual record. A habeas petitioner may not present evidence in a habeas proceeding that he did not present to the State courts unless he exercised due diligence in trying to present that evidence to the State courts.² For example, a petitioner claiming the ineffective assistance of counsel will not receive an evidentiary hearing in federal court if he did not bother making such a request in the State court.

Matters become a little tricky, however, where the habeas petitioner actually requested an evidentiary hearing in the State court. Michigan's rules require "an affidavit or offer of proof regarding the facts to be established at a hearing."³ Hence, a person who does not file an adequate offer of proof has not exercised due diligence.

Yet, the federal courts might conceivably disagree with the State courts as to what is an adequate offer of proof. In *Sanyer v Hofbauer*,⁴ the Sixth Circuit concluded that the Michigan courts had unreasonably declined to give the petitioner an evidentiary hearing. It concluded that the petitioner was in fact diligent in pursuing his claim in the State courts. It then granted the writ.⁵

In other words, where the defendant requests an evidentiary hearing and supplies some type of an offer of proof, the prosecutor should not necessarily oppose the motion. In addition, the courts should not necessarily deny it. When in doubt, on a close question, the State courts should probably order an evidentiary hearing. After all, fact findings in the State courts are entitled to the presumption of correctness, while fact findings in federal court are not. Further, if an evidentiary hearing is going to be held anyway, a prosecutor might conceivably prefer it to be held in his own circuit court rather than, a few years later, in federal court. To summarize, where a raised issue requires additional facts, the court and prosecutor should follow these steps:

- 1) If defendant is not asking to develop a factual record, fault him for it.⁶
- 2) If defendant is asking for an evidentiary hearing but has not attached an offer of proof, fault him for it.
- 3) If defendant has provided an offer of proof for his request for an evidentiary hearing, ask whether or not the offer of proof is adequate. If not, fault him for it. If so, give him the evidentiary hearing. In the close case, everyone is probably better off just holding the hearing now.

PROCEDURAL DEFAULT

Procedural default affords even more opportunities for the State courts to protect their decisions from habeas review. On a direct appeal, a procedural default is a failure to preserve an issue on appeal. To once again preserve federal/state comity, the federal rules, to a certain extent, recognize State procedural defaults.

The common misconception that constitutional claims are always preserved for appeal is just that—a misconception. As stated in *Greer v Mitchell*,⁷ “even constitutional errors will not be noticed if an adequate and independent state-law ground [a procedural default] exists for upholding the conviction.” Thus, as pointed out in *Simpson v Jones*,⁸ “if a petitioner procedurally defaults a claim in State court, that procedural default carries over to federal court and precludes habeas review of that claim in federal court.” To obtain the preclusion, however, four things have to occur.⁹

First, the State must have a firmly established and regularly followed procedural default rule that the petitioner failed to comply with. A procedural default rule established in that case¹⁰ or subsequently established¹¹ is not good enough. It must have been firmly established in State law when the procedural default occurred.

Second, the last reasoned State decision must have relied on the procedural default in denying relief. In other words, it really does matter how the opinion is written. In fact, this is the area where the State courts fail the most to protect themselves.¹²

To put it simply, if the last reasoned State court decision relies on the procedural default, habeas review is barred. If, on the other hand, it ignores the procedural default (as often happens), then habeas review is wide open. In other words, no matter how badly the criminal defendant procedurally defaulted and no matter that the federal courts would have barred relief if the case were a direct appeal, the federal courts will ignore a procedural default if the State courts earlier ignored it. In other words, where the State directly addresses the merits despite a procedural default, the issue “is ripe for federal habeas review.”¹³ Such wide open review, of course, is not good news for the State

courts. Such cases as *Boyle v Million*,¹⁴ have granted habeas relief despite a procedural default merely because the highest State court addressing the issue relied exclusively on the merits and ignored the procedural default.

Where the State courts say no more than the issue has not been preserved for appeal, federal procedural default analysis applies. Further, where the State courts deny relief in the alternative (the issue is not preserved and, in any event, has no merit), procedural default analysis applies.¹⁵ It applies if the appellate courts either deny relief for failure to show manifest injustice¹⁶ or find no plain error.¹⁷ On the other hand, it does not apply when the decision merely mentions procedural default and then actually decides on the merits.¹⁸

Unfortunately, occasionally some opinions are ambiguous. They do not clearly state one way or the other that relief is being denied based on the procedural default (at least in part) as opposed to on the merits. For example, on what ground does an opinion that says nothing more than “[w]e conclude that the court did not commit error, plain or otherwise,” rest? For procedural default analysis to apply, the last reasoned State opinion must have “clearly and expressly” relied on it. Hence, in this situation, the Sixth Circuit concluded that the State’s opinion was based on the merits, rather than on the procedural default.¹⁹

One often (till lately) overlooked procedural default is objecting on one ground and then appealing on another. For example, a defendant may object on hearsay grounds and then appeal on both hearsay and Confrontation Clause grounds. In this situation, however, the constitutional claim is not preserved for appeal.²⁰ Enforcing this particular procedural default will do a lot to barring subsequent habeas review.²¹

Third, a procedural default must be based on a rule that is both adequate and independent. In other words, it must be fair.²² As a general rule, the State courts need not worry about the federal courts declaring a State procedural default rule inadequate if the federal courts themselves have the same rule.

Fourth, the petitioner must show both “cause and prejudice.” As anyone familiar with the “cause and prejudice” standard knows, this is a very difficult standard to meet. Thus, for all intents and purposes, if procedural analysis applies, the issue is barred in federal court.

FEDERAL REVIEW

Under normal circumstances, a federal court, in a habeas lawsuit, will not review the State courts’ decision de novo. Instead, it will grant the writ only if the State court’s decision is contrary to or an unreasonable application of Supreme Court case law.²³ In other words, a writ will not be granted merely because the decision is incorrect. It must be objectively unreasonable.²⁴

This deferential standard, however, conceivably does not apply where the State courts fail to address the claim at all.²⁵ In such a situation, the federal courts might review the issue de novo. Therefore, to conceivably avoid losing the very favorable review standard, the State courts should be careful to not just ignore a federal constitutional issue that is being raised.

SUMMARY

Therefore, in sum, whenever a State reviews a criminal defendant's appellate issue, it should follow this checklist:

- 1) Is the defendant in any way raising a constitutional issue? If not, then do not worry about anything. Non-constitutional claims are not cognizable in habeas.²⁶ If he is, proceed to the next step.
- 2) Is the constitutional claim defaulted? If so, at least in the alternative, deny relief based on the procedural default. If not, proceed to the next step.
- 3) Does the constitutional claim entitle the defendant to relief? If not, specifically address it as a constitutional claim and explain why not.

State court opinions affirming a defendant's criminal conviction that follow this advice will less likely be later overturned in federal court. Opinion writers (and appellate prosecutors) ignore this advice at their own risk.

Jerrold Schrottenboer is the Jackson County Prosecuting Attorney's Office Chief Appellate Attorney, a Special Assistant Attorney General (handling Jackson County federal habeas cases), and a Special Assistant U. S. Attorney. He graduated from the UCLA School of Law in 1981. He has since clerked for the Michigan Court of Appeals and the Eastern District U. S. District Court (writing habeas opinions). He handles all of his office's appeals and extraditions.

Endnotes

- ¹ *Miller-El v Cockrell*, 537 US 322; 123 S Ct 1029, 1039-1040; 154 L Ed 2d 931 (2003).
- ² *Cooley v Coyle*, 289 F3d 882, 893 (CA 6, 2002).
- ³ MCR 7.211(C)(1)(a)(ii). A motion for a new trial under MCR 7.208(B) is similar. MCR 2.611(D)(1) requires, in a motion for a new trial, that any facts outside the record "must be supported by affidavit."
- ⁴ 299 F3d 605, 610 (CA 6, 2002).
- ⁵ Thus, in essence, it vacated *People v Sawyer*, 215 Mich App 183; 545 NW2d 6 (1996), lv den 451 Mich 851; 546 NW2d 254 (1996).
- ⁶ Ineffective assistance of counsel claims come to mind. The United States Supreme Court, the Sixth Circuit, and the Michigan Supreme Court have all pointed out that, because the trial counsel's reasons for doing what he did are not part of the record, without an evidentiary hearing, the appellate court will have no real way of knowing

whether sound strategy was involved or not. *Massaro v United States*, __ US __; 123 S Ct 1690, 1694; 155 L Ed 2d 714 (2003); *Hutchison v Bell*, 303 F3d 720, 749 (CA 6, 2002); *People v Mitchell*, 454 Mich 145, 169-170; 560 NW2d 600 (1997). Therefore, on appeal, a defendant who does not request an evidentiary hearing should be faulted for not doing so.

- ⁷ 264 F3d 663, 672 (CA 6, 2001), cert den 535 US 940; 122 S Ct 1323; 152 L Ed 2d 231 (2002).
- ⁸ 238 F3d 399, 406 (CA 6, 2000).
- ⁹ *Maupin v Smith*, 785 2d 135, 138 (CA 6, 1986), set up this four-step test.
- ¹⁰ *Mitchell v Mason*, 325 F3d 732, 739 (CA 6, 2003).
- ¹¹ *Rogers v Howes*, 144 F3d 990, 994 (CA 6, 1998).
- ¹² On the other hand, procedural default analysis works the same whether the State courts find a waiver or a forfeiture.
- ¹³ *Manning v Huffman*, 269 F3d 720, 724 (CA 6, 2001).
- ¹⁴ 201 F3d 711 (CA 6, 2000).
- ¹⁵ *Clifford v Chandler*, __ F3d __ (CA 6, #01-5296, 06/25/03).
- ¹⁶ *Paprocki v Foltz*, 869 F2d 281, 285 (CA 6, 1989).
- ¹⁷ *Lancaster v Adams*, 323 F3d 423, 437 (CA 6, 2003).
- ¹⁸ *Williams v Coyle*, 260 F3d 684, 696-697 (CA 6, 2001), cert den 536 US 947; 122 S Ct 2635; 153 L Ed 2d 816 (2002).
- ¹⁹ *Patterson v Haskins*, 316 F3d 596, 604 (CA 6, 2003). Of course, because the State courts had accordingly not relied on the procedural default, the Sixth Circuit in *Patterson* decided the matter on the merits as well. It then granted habeas relief (something that might conceivably have not occurred had the Ohio Court of Appeals been a little clearer in denying relief based on the procedural default).
- ²⁰ *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), lv den 467 Mich 854; 650 NW2d 338 (2002).
- ²¹ I am not the only one making this point. Moran's and Tieber's article says:

If, for example, the prosecution attempts to introduce a statement from a non-testifying co-defendant, the defense attorney would have to do more than simply say, "objection," or "objection, hearsay," since these objections would not alert the trial judge to the constitutional nature of the error.

- ²² *Lee v Kemna*, 534 US 362; 122 S Ct 877; 151 L Ed 2d 820 (2002).
- ²³ *Woodford v Visciotti*, 537 US 19; 123 S Ct 357, 360; 154 L Ed 2d 279 (2002).
- ²⁴ *Price v Vincent*, 538 US __; 123 S Ct 1848; 155 L Ed 2d 877 (2003).
- ²⁵ *Mc Kenzie v Smith*, 326 F3d 721, 727 (CA 6, 2003), (de novo review) is difficult to reconcile with *Clifford*, supra (AEDPA standard), on this point.
- ²⁶ *Pulley v Harris*, 465 US 37, 41; 104 S Ct 871; 79 L Ed 2d 29 (1984).