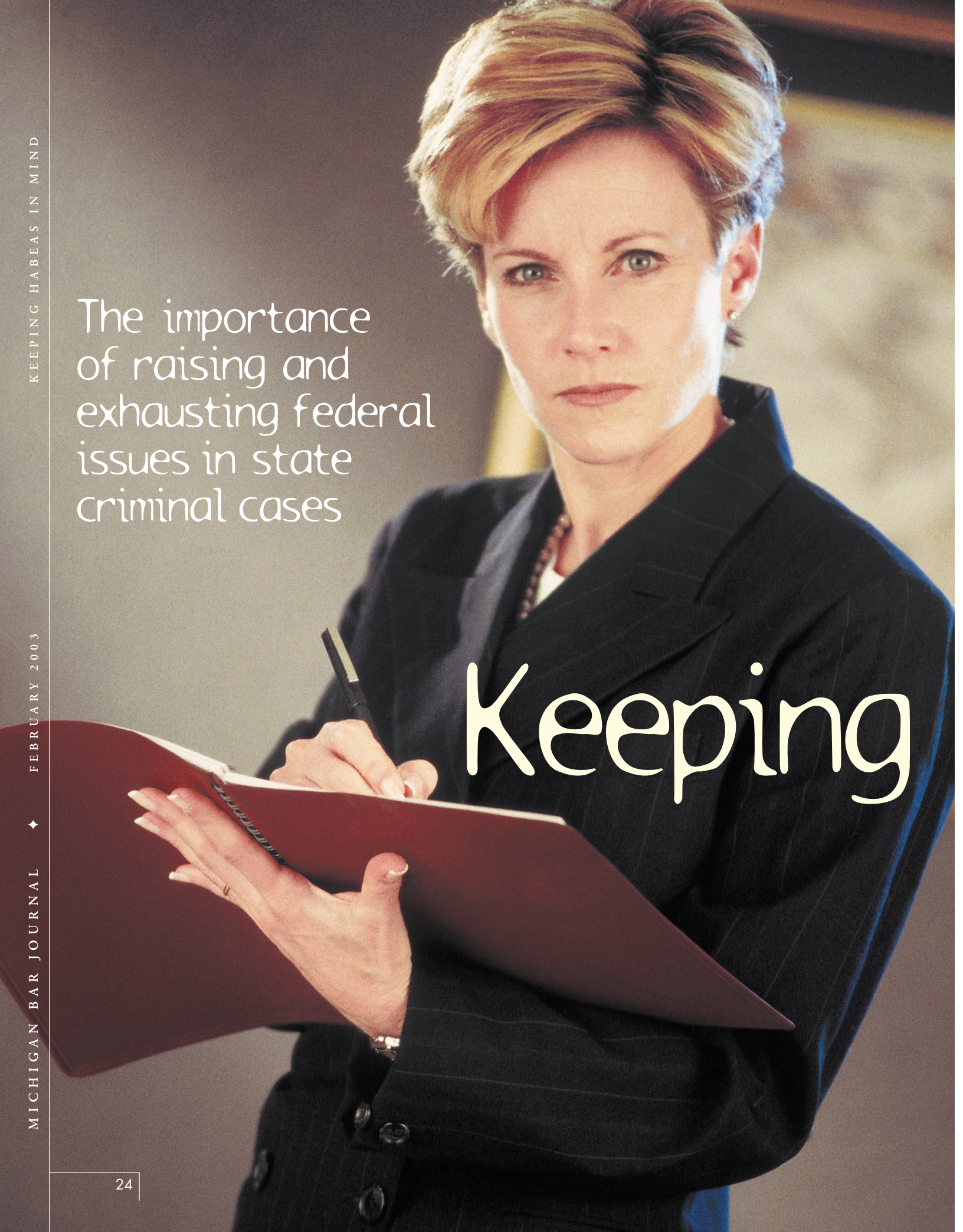

Keeping

The importance of raising and exhausting federal issues in state criminal cases

Habeas in Mind

By David A. Moran and F. Martin Tieber

In the last decade, a criminal defendant's chances of winning in the Michigan appellate courts have declined markedly.[1] Consequently, many criminal defendants with strong appellate issues that formerly would have resulted in new trials or resentencings are now completing their direct state appeals without obtaining any relief at all.

It should not be surprising, therefore, that in recent years there has been a striking number of Michigan prisoners who have obtained federal habeas corpus relief. Even though the Antiterrorism and Effective Death Penalty Act (AEDPA)[2] was designed to make it more difficult for state prisoners to obtain habeas corpus relief, federal district and appellate courts have granted habeas petitions to Michigan prisoners more than 35 times since AEDPA took effect in 1996.[3] In each of those cases, the district or appellate court found, as required by AEDPA, that a Michigan appellate court had issued a decision that was contrary to, or an unreasonable application of, binding United States Supreme Court precedent.

Given this trend, it is very important for criminal defense attorneys, both at the trial and the appellate levels, to understand federal habeas corpus law and procedure and to anticipate the possibility that their clients may have to go all the way to federal court to obtain relief for a serious constitutional error. The purpose of this article, therefore, is to raise awareness among practitioners about the need to litigate criminal trials and criminal appeals with habeas corpus in mind.

A Basic Introduction to Habeas Corpus and AEDPA

A criminal defendant who has unsuccessfully appealed his or her conviction or sentence in state court may file a petition for a writ of habeas corpus in federal district court. Before the federal district court will hear the petition on the merits, the petitioner must meet five requirements. First, the petitioner must be "in custody" at the time the petition is filed.[4] That is, the petitioner must be in prison, on parole, on bond, or under some other type of correctional restraint as a direct result of the challenged state court criminal judgment.[5]

Second, the petition must allege that the petitioner's custody is "in violation of the Constitution or laws or treaties of the United States."[6] Since federal statutes and treaties do not normally govern state criminal cases, this means that a Michigan petitioner must show that the state court decision he or she is attacking is wrong as a matter of federal constitutional law.

Third, the petitioner must demonstrate that all of the federal constitutional issues in the petition were completely "exhausted" in state court.[7] In other words, the petitioner must have presented each of the federal constitutional issues to both the Michigan Court of Appeals and the Michigan Supreme Court.

Fourth, the petitioner must show that the federal constitutional issues were not "procedurally defaulted" in state court. That is, the petitioner must prove that each of the state courts to reject the issue did so not because of an adequate and independent state law ground, such as failure to properly preserve the issue or failure to timely perfect an appeal.[8]

Fifth, the petitioner must have filed the petition in federal district court within one year of the conclusion of direct appellate review in state court.[9] This one-year period is tolled, but not reset to zero, if the petitioner pursues state collateral relief after the end of his or her direct appeals in order to raise a federal constitutional issue in state court.[10]

Preserving Federal Issues in the Trial Court

Most federal habeas corpus petitions are denied not for lack of merit but because the issues in the petition were procedurally defaulted or not exhausted in state court. By far the most common form of procedural default is failure to object in the trial court.

In order to preserve any type of issue for appeal, a party must normally raise the issue in a timely fashion in the trial court and create an adequate record for appellate review. In other words, the Michigan Court of Appeals generally refuses to reach the merits of an issue that was not adequately raised in the trial court. That refusal constitutes an adequate and independent state ground for the denial of relief that will preclude a federal court from reaching the merits of the federal constitutional issue.

It is imperative, therefore, that trial counsel in a criminal case recognize a constitutional error when one occurs, make a timely objection to the error, and alert the trial judge to the constitutional nature of the error. If necessary, counsel must also make an offer of proof or create a factual record sufficient for appellate review.

The first of these requirements is the most basic; a good trial attorney must keep abreast of federal case law, particularly United States Supreme Court decisions, so that he or she knows when a constitutional error occurs. As a good example of the importance of keeping up-to-date, Michigan trial and appellate courts sometimes admit, as substantive evidence of guilt, the out-of-court declarations of non-testifying codefendants under Michigan's version of the "statement against interest" hearsay exception, even though the United States Supreme Court has clearly and repeatedly held that the admission of such statements violates the Sixth Amendment Confrontation Clause.[11]

After recognizing the error, the trial attorney must, of course, make a timely objection or the issue will be unpreserved for appellate review. For federal habeas corpus purposes, however, a simple objection may not be sufficient. If, for example, the prosecution attempts to introduce a statement from a nontestifying 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. On the other hand, the defense attorney does not need to deliver a lecture on constitutional law. It is enough for the attorney to raise the constitutional nature of the error by simply mentioning the constitutional right at stake or by citing a state or federal case deciding the constitutional issue: "objection, violates my client's right to confront the evidence against her," or "objection, *Bruton* violation."

Finally, the attorney must, if necessary, make an adequate factual record for appellate and habeas corpus review. If, for example, the allegedly erroneous ruling excludes certain defense testimony or evidence, the attorney must normally make an offer of proof in order to establish exactly what the testimony or evidence would have proved. It is critical that the trial attorney make such a record because AEDPA provides that, except in extremely rare circumstances, a federal court cannot hold an evidentiary hearing if the defendant failed to create an adequate factual record for review of the constitutional issue in state court.

Preparing for Habeas Corpus Litigation During the State Appellate Process

Unlike most other states, Michigan has a "unified" appeal process that allows a criminal defendant to raise issues such as newly discovered evidence and ineffective assistance of counsel as part of the initial round of direct appeals. It is important, therefore, to use these mechanisms to preserve all available federal constitutional issues in a timely manner. Doing so will go a long way toward avoiding procedural default.

The first step is to review and investigate everything that occurred during the trial court proceedings from inception through the beginning of the appellate process. The goal is to identify and timely raise all arguable issues and, with an eye on future habeas litigation, to identify and develop all reasonable federal constitutional issues.

Two key areas of concern are exhaustion and procedural default. The restrictive attitude of the federal courts reflected in the exhaustion and procedural default requirements is rooted in comity and federalism.[12] Federal courts will not interfere with a state's incarceration of a convicted criminal defendant unless and until the state courts have had a full and fair opportunity to determine any federal constitutional challenges to the conviction at issue.

The exhaustion doctrine is premised on the notion that, under our concepts of federalism, the state courts have the primary role in making sure federal law is enforced in state criminal cases.[13] Thus, before a state criminal defendant can seek relief from incarceration in federal court by way of a petition for writ of habeas corpus, she must "fairly present" the substance of her federal constitutional claims to the state courts.[14] Federal courts require that the federal constitutional issue be adequately identified as such in the state courts and that the factual basis for the issue be essentially identical in both forums.[15]

Thus, when appealing for relief in state court, it is critical that appellate practitioners identify the distinct federal constitutional provisions claimed to have been violated, cite appropriate United States Supreme Court caselaw, and carefully build an appropriate factual basis for the issue. Whether the federal constitutional appellate issue was raised in the trial court initially or for the first time in the Michigan Court of Appeals, the issue must be presented to the Michigan Supreme Court by way of an application for leave to appeal before it is ripe for federal habeas review under the exhaustion doctrine.[16]

Just as in the trial court, counsel for a criminal defendant must strive to avoid procedural default on appeal in order to preserve for the federal claim to be cognizable on habeas corpus.[17] The linkage with the exhaustion doctrine is clear. If a state has set up a procedural bar to reviewing the substance of a federal constitutional claim, then a hopeful habeas petitioner cannot exhaust her state court remedies and is locked out of federal court.

For example, suppose an instance of prosecutorial misconduct rises to the level of a federal constitutional due process denial as it implicates the fair trial rights of a criminal defendant. If, however, the state appellate courts refused to address the substance of the issue during the state appellate process because there was no objection at trial, the federal courts will consider the issue procedurally defaulted and will not review it, unless cause and prejudice can be shown. The issue will also be procedurally defaulted if the defendant failed to adequately raise the issue on appeal or failed to timely perfect the appeal.

A frequent example of "cause" to excuse procedural default and allow federal court review is ineffective assistance of trial or appellate counsel. Thus, in the example above the petitioner would argue that the failure to object to the prosecutorial misconduct

Fast Facts:

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In order to lay the groundwork to build a successful federal habeas claim, state appellate litigants must clearly identify federal constitutional issues and raise them at the first available opportunity.

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constitutes ineffective assistance of trial counsel or that the failure to raise the issue on appeal constitutes ineffective assistance of appellate counsel. If the habeas litigant can meet the "cause" standard using the *Strickland* test for ineffective assistance of counsel[18] and prejudice can be established for the prosecutorial misconduct, federal habeas review can proceed. It is critical to note that the cause for a procedural default can itself be procedurally defaulted and state appellate litigants therefore diligently raise their cause claims at the earliest available opportunity.[19] Finally, a state procedural rule cannot bar federal habeas review where the substantial requirements of the rule have essentially been met[20] and any state procedural bar, to be effective, must be "firmly established and regularly followed."[21]

In order to lay the groundwork to build a successful federal habeas claim, state appellate litigants must clearly identify federal constitutional issues and raise them at the first available opportunity. The factual base of the issue must be carefully built, returning to the trial court for evidentiary work if necessary, and the substance of the federal claim must be clearly identified with citation to the appropriate federal constitutional provision and citation to federal authority. The federal claim must be fully litigated at each step of the state appellate process and it should be raised in essentially the same form as it will later be litigated in federal court.

Preparing and Filing the Habeas Corpus Petition

Assuming you have laid the proper foundation for your federal constitutional claims at trial and on appeal in the state system and have been denied relief by the state, you are

now ready to file a federal civil suit against the warden confining your client. The petition itself is a concise pleading that should briefly identify the petitioner and the respondent warden, state that the action is a habeas corpus petition under 28 USC section 2254, claim that the respondent is confining petitioner in violation of a distinct federal constitutional provision, explain how and when the constitutional issue was exhausted at each level of the state court system, state that no previous federal habeas petitions have been filed challenging the conviction at issue, and state the relief requested. The petition should be accompanied by a memorandum or brief in support of the petition, which fully sets forth the constitutional argument.

The petition must be filed within one year of the end of direct review, which in Michigan is generally the denial of relief by the Michigan Supreme Court. Due to the wording of the AEDPA, however, the Sixth Circuit has held that the end of direct review occurs at the expiration of the 90-day period after the state supreme court's denial of relief during which certiorari can be sought in the United States Supreme Court, even if no certiorari petition is filed.[22] Thus, the one-year time limit would not start to run until 90 days following denial of leave in, or affirmance of the conviction by, the Michigan Supreme Court. If a certiorari petition is filed, the end of direct review occurs on the date that the United States Supreme Court denies relief.

If there is a need to conduct state post-conviction proceedings after the end of direct review, under MCR 6.500 for example, the running of the one-year time limit is stopped or "tolled" (but not reset) while the state post-conviction process runs its course.[23] Care must be taken to timely pursue post-conviction relief all the way to the Michigan Supreme Court so as to keep the clock tolled. Once the Michigan Supreme Court denies a post-conviction motion, the one-year clock immediately begins running again without a 90-day grace period.[24]

The habeas petition must be filed in the federal district where the petitioner is incarcerated or where the conviction arose. In Michigan there are two federal districts, Eastern and Western. If, for example, the petitioner was convicted in Grand Rapids (Kent County, Western District) but is incarcerated in Detroit (Wayne County, Eastern District), the petition could be filed in either district.

Conclusion

Despite all of the obstacles a habeas petitioner faces, dozens of Michigan prisoners have been able to obtain habeas relief in the last few years by showing that the state had clearly violated their federal constitutional rights. Therefore, it is important for criminal defense counsel to litigate cases at every stage with an eye on the possibility that federal habeas corpus proceedings will be necessary to safeguard their clients' federal constitutional rights. ✦

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F. Martin Tieber recently retired from the State Appellate Defender Office, where he directed the Lansing office since 1978, to begin a private law practice as of counsel to the Reynolds Law Firm in Lansing. For nearly two decades he taught several courses at the Thomas M. Cooley Law School in Lansing. Mr. Tieber is a member of the National Association of Criminal Defense Lawyers and is currently president of the Criminal Defense Attorneys of Michigan. He founded Michigan's Innocence Project and served as the first chair of the Innocence Project Commission in 2000–2001.

Footnotes

1. In its annual report for 2001, the Michigan State Appellate Defender Office notes a marked decline in relief rates from 1993–2000 for the approximately 25 percent of Michigan appeals that office handles. In 1993 the relief rate was 25.4 percent and by 2000 it had dropped to 16.76 percent.
2. Pub L No 104-132, 110 Stat 1213 (codified, inter alia, at 28 USC 2244 et seq.).
3. See, for example, *Nevers v Killinger,* 169 F3d 352 (CA 6, 1999), cert den, *Killinger v Nevers,* ___ US ___, 119 S Ct 2340 (1999); *Northrop v Trippett,* 265 F3d 372 (CA 6, 2001), cert den, *Trippett v Northrop,* ___ US___, 122 S Ct 1358 (2002); *Barker v Yukins,* 199 F3d 867 (CA 6, 1999), cert den, *Yukins v Barker,* ___ US ___, 120 S Ct 2658 (2000); *Bulls v Jones,* 274 F3d 329 (CA 6, 2001); *Washington v Hofbauer,* 228 F3d 689 (CA 6, 2000); *McGraw v Holland,* 257 F3d 513 (CA 6, 2001); *Magana v Hofbauer,* 263 F3d 542 (CA 6, 2001); *Hill v Hofbauer,* 195 F Supp 2d 871 (ED Mich 2001); *Mathis v Berghuis,* 202 F Supp 2d 715 (ED Mich 2002).
4. 28 USC 2254(a).
5. See, e.g. *Garlotte v Fordice,* 515 US 39 (1995) (discussing custody requirement).
6. 28 USC 2254(a).
7. 28 USC 2254(b)(1)(A).
8. See, e.g., *Coleman v Thompson,* 501 US 722 (1991) (holding claim procedurally defaulted because petitioner's lawyer filed state appeal three days late).
9. 28 USC 2244(d).
10. In Michigan, a criminal defendant may file a so-called "6500 Motion" (Michigan Court Rules 6.501, et seq.) in the trial court after the conclusion of his or her direct appeals in order to raise new issues that were not litigated during the direct appeal.
11. Compare, e.g., *People v Schutte,* 613 NW2d 370 (Mich Ct App 2000) (holding, under authority of *People v Poole,* 506 NW2d 505 (Mich 1993), that non-testifying codefendant's statement implicating defendant admissible under statement against interest hearsay exception), with *Lilly v Virginia,* 527 US 116 (1999) (admission of non-testifying accomplice's statement implicating defendant violates Confrontation Clause doctrine of *Bruton v United States,* 391 US 123 (1968)).
12. *Coleman v Thompson,* 501 US 722, 730 (1991).
13. *Rose v Lundy,* 455 US 509, 518 (1982).
14. *Picard v Connor,* 404 US 270, 275–278 (1971); *Lyons v Stovall,* 188 F3d 327, 331 (CA 6, 1999).
15. Id. at 332.
16. *O'Sullivan v Boerckel,* 526 US 838 (1999).
17. *Murray v Carrier,* 477 US 478 (1986).
18. Counsel's performance must have fallen below an objective standard of reasonableness and there must be a reasonable probability that, but for counsel's conduct, the result of the proceedings would have been different. *Strickland v Washington,* 466 US 668 (1984).
19. *Edwards v Carpenter,* 529 US 446 (2000).
20. *Lee v Kemna,* 534 US 362 (2002).
21. *Ford v Georgia,* 498 US 411, 423–424 (1991).
22. *Bronaugh v Ohio,* 235 F3d 280, 283 CA 6, 2000). Caution should be exercised on this point, however, as the United States Supreme Court has not yet spoken on the issue.
23. *Artuz v Bennett,* 531 US 4 (2000); *Carey v Saffold,* ___ US ___, 122 S Ct 2134 (2002).
24. *Isham v Randle,* 226 F3d 691 CA 6, 2000).