Getting A Bite of the Federal Apple: Picking, Polishing, and Preserving Federal Issues in State Courts

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"State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 US 838, 844 (1999).

"Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Michael Wayne Williams v Taylor, Warden*, 120 S.Ct. 1479, 1491 (2000).

I. THE FEDERAL WRIT OF HABEAS CORPUS

28 USC §2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(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 --

(A) the applicant has exhausted the remedies available in the courts of the State ; or

(B)(I) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(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.

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

II. I'M A STATE COURT PRACTITIONER, WHY SHOULD I CARE ABOUT MY CLIENT'S FEDERAL HABEAS RIGHTS?

Another Avenue for Appeal and Relief:

If a federal claim has been adjudicated on the merits in the state proceedings, federal habeas relief is available if the state court decision was (1) contrary to, or (2) an unreasonable application of, (3) clearly established federal constitutional principles as determined by decisions of the Supreme Court, or if (4) the state court decision was based on an unreasonable determination of the facts in light of (5) the evidence presented in the state court proceedings. 28 USC §2254(d)(1) and (2).

III. WHAT DO I HAVE TO DO TO PRESERVE MY CLIENT'S CHANCE FOR HABEAS RELIEF?

In order to preserve your client's rights to seek federal habeas relief, you must "fairly present" all potential federal constitutional issues in the trial court, the COA, and the MSC. This is called "exhausting a claim".

How do you "Present" and "Exhaust" a Claim in State Court?

"Fairly presenting a claim" means presenting the facts and analyzing them under a federal theory of relief to the state courts. A claim is presented in federal terms to a state court when it relies on (1) federal case law employing constitutional analysis or (2) state case law which explicitly relies on federal constitutional analysis, or (3) it is presented in words which indisputably present a federal constitutional issue, i.e. ineffective assistance of counsel, cruel and unusual punishment, or (4) alleges facts within mainstream constitutional analysis. *McMeans v Brigano*, 228 F3d 674, 681 (6th Cir., 2000).

- The claims must be presented in the same specific constitutional and factual framework at each level of the state process. *Picard v Connor*, 404 US 270 (1971).

- General allegations of violations of "due process" or "fair trial" do not convert state trial errors into federal constitutional claims. *McMeans*, 228 F3d at 681.

- The claims only have to be presented to the state courts in federal constitutional terms. They do not have to be adjudicated on their merits. *Smith v Digmon*, 434 US 332 (1978).

- The state courts will often ignore federal constitutional claims if the issue can be resolved in terms of state constitutional or non-constitutional law. If the claims are properly presented in federal terms, they are "exhausted" and can then be reviewed essentially *de novo* on the state court facts in a federal habeas proceeding.

- A defendant's pro se brief filed under Std. 11, which raises federal constitutional claims, preserves issues not raised by counsel. Cf: *McMeans, supra*.

"Exhausting" a claim means the claim must be raised in one full round of the state's appellate process, including seeking discretionary review. *O'Sullivan v. Boerkel*, 526 US 838 (1999).

IV. FEDERAL HABEAS AND MCR 6.500: WHAT CAN I DO IF THE TRIAL (AND/OR APPELLATE) ATTORNEY DIDN'T "FEDERALIZE" THE ISSUE?

MCR 6.500 et. seq. permits a Michigan defendant to move for relief from judgment after direct appeal.

, A "6.500" is the only way to belatedly raise federal constitutional claims which were not raised in the trial and direct appeal.

, But MCR 6.508 prohibits relief on any ground (other than jurisdictional defects) which could have been raised on direct appeal, unless the defendant demonstrates "cause" and "prejudice".

, If Defendant fails to show "cause" and "prejudice" for claims which could have been raised on direct appeal, Defendant has procedurally defaulted the federal claims.

, This failure to raise and/or failure to establish cause and prejudice are separate "independent and adequate" reasons to deny consideration of the claims in federal habeas. *Edwards v Carpenter*, 529 US 446 (2000).

, Mandates claims of IAC and IAAC for failure to raise federal claims during direct case.

IV. TIMING IS EVERYTHING: THE 1 YEAR SOL AND THE 6.500 MOTION

, A §2254 petition must be filed within 1 year of the end of direct review of the state conviction.

, "Direct review" includes all time resulting from timely appeals to COA and MSC **PLUS** the 90 days during which the Defendant can seek direct review from the USSC, even if a petition for writ of certiorari is not filed.

, A properly filed 6.500 pleading will toll the 1 year habeas SOL

, during its own slog through the trial court, COA, and MSC and the 90-day period for a petition for writ of certiorari to the USSC, even if one is not filed. *Abela v Martin*, 348 F3d 164 (6th Cir., 2003) (en banc)

, 1 year §2254 SOL does not start anew if interrupted by 6.500 proceedings

V. 4TH AMENDMENT ISSUES

In *Stone v Powell*, the USSC held that 4th Amendment claims which defendant had a full and fair opportunity to litigate in state court would not be reconsidered in federal habeas. The conventional wisdom has been that 4th Amendment claims cannot be raised in federal habeas. However, some courts have concluded that the AEDPA's 2-tier analysis replaces the "full and fair opportunity" analysis: *Carlson v Ferguson*, 9 F Supp 2d 654 and 993 F Supp 2d 969 (SD WV, 1998); *Herrara v Lemaster*,. 225 F3d 1176 (10th Cir., 2000)

PARALLEL FEDERAL/STATE CONSTITUTIONAL PROVISIONS

4th Amendment Search and Seizure/Const. 1963, Art.1 §11

5th Amendment Due Process/Const. 1963, Art. 1 §17

5th Amendment Double Jeopardy/Const. 1963, Art. 1 §15

6th Amendment Right to Jury Trial/Const. 1963, Art. 1 §14

6th Amendment Right to Speedy Trial, Assistance of Counsel, Confrontation/Const. 1963, Art. 1 §20

8th Amendment Cruel and Unusual Punishment/no identical MI counterpart

Caution: Do not assume a state case analyzing a state constitutional provision with an identical federal counterpart is based on federal constitutional analysis.

SELECTED CASES FOR SELECTED CLAIMS OF FEDERAL CONSTITUTIONAL ERROR

Prosecutorial Misconduct - Due Process/5th Amendment

Donnolly v Christoforo, 416 US 637 (1974) (Prosecutorial misconduct which deprives defendant of fair trial is constitutional error)

Berger v United States, 295 US 78 (1935) (Prosecutor must ensure fair trial not conviction, improper insinuations to jury equal error)

United States v Young, 470 US 1 (1985) (Prosecutorial conduct must be viewed in the context of the whole trial, expressions of personal belief in the truth of testimony is error)

Santobello v New York, 404 US 257 (1971) (where plea is induced in any way by promise of prosecutor, promise must be fulfilled).

Gordon v Kelly, 2001 WL 145144 (6th Cir., 2001) (prosecutorial misconduct in implying witness feared defendant and jury should too)

Kincade v Sparkman, 175 F3d 444 (1999) (Prosecutor's closing remarks that defendant had committed other crimes not in evidence were reversible error)

United States v Carroll, 26 F3d 1380 (6th Cir., 1994) (Criteria for assessing prosecutorial misconduct)

United States v Leon, 534 F2d 667 (6th Cir, 1976) (prosecutor's remarks that gambling destroys inner cities is reversible error).

United States v Francis, 170 F3d 546 (1999) (State's Improper bolstering/vouching for witnesses' truthfulness is constitutional error).

Martin v Burke, 234 F3d 1269 (6th Cir., 2000) (relief granted where prosecutor failed to fulfill plea bargain promise to recommend a 10-20 year sentence.)

Boyle v Million, 201 F3d 711 (6th ir., 2000) (relief granted where prosecutor's conduct during trial was "so deplorable as to define the term 'prosecutorial misconduct'.")

Prosecutorial Vindictiveness

United States v Goodwin, 457 US 368 (1982)

United States v Anderson, 923 F2d 450 (6th Cir, 1991)

Judicial Misconduct

Jenkins v United States, 380 US 445 65) (court's statement to jury in response to note re: their inability to agree on verdict, that "You have got to reach a decision in thise case" was coercive).

Packer v Hill, 2002 WL 47063 (9th Cir., 2002) (trial court's statements to "hold out juror" resulted in coerced verdict).

North Carolina v Pearce, 395 US 711 (1969) (presumption of vindictiveness when heavier sentence is imposed after original sentence was vacated, but presumption is overcome if sentencing court can justify heavier sentence)

Juries

Nevers v Killinger, 169 F3d 352 (6th Cir., 1999) (fair trial denied due to extraneous influences on jury)

Batson v. Kentucky, 476 US 79 (1986) (fair trial requires inquiry into use of preemptory challenges to strike jurors in protected classes)

Ineffective Assistance of Counsel

Strickland v Washington, 466 US 668 (1984) (Standard for effectiveness)

Edwards v Mohr, 170 S.Ct. 1587 (2000) (Ineffective assistance of appellate counsel)

Roe v Flores- Ortega, 120 S.Ct. 1029 (2000) (Counsel did not file Notice of Appeal, but did not get defendant's consent. Not per se ineffective, but close to being so)

Kimmelman v Morrison, 477 US 365, 381; 106 SCt 2574; 91 LEd 2d 305 (1986) (Failure to bring a dispositive motion can constitute ineffective assistance of counsel. Further, counsel's or a defendant's waiver of the substantive claim does not preclude the assertion of the ineffective assistance of counsel claim.)
Groseclose v Bell, 130 F3d 1161 (1997) (defense strategy v IAC)

Workman v Tate, 957 F2d 1339 (6th Cir., 1992) (IAC where counsel failed to interview

and call 2 witnesses identified by Defendant who would have been helpful to defense)

Tucker v Prelesnik, 181 F3d 747 (6th Cir., 1999) (IAC for failure to obtain medical records which would have established that Defendant could not run in the manner described by the victim)

Northrop v Trippett, 265 F3d 372 (6th Cir., 2001, unpublished) (IAC due to failure to file a motion to suppress based on anonymous tip without any corroboration)

Washington v Hofbauer, 228 F3d 689 (6th Cir., 2000) (IAC for failing to object to improper egregious closing arguments)

Mitchell v Mason, 257 F3d 554 (6th Cir, 2001) (constructive denial of counsel where defense counsel was suspended from practice during critical periods before trial and did not meet with Defendant sufficiently for adequate representation)

Magana v Hofbauer, 263 F3d 542 (6th Cir,. 2001) (IAC where attorney failed to understand and convey true value of plea offer).

Sufficiency of the Evidence

In re: Winship, 397 US 358 (1970) (Proof beyond reasonable doubt is component of due process)

Jackson v Virginia, 443 US 307 (1979) (Standard of review of sufficiency of evidence claims)

Apprendi v New Jersey, 530 US 466 (2000) (other than a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

United States v Booker, 125 S Ct 738 (2005) (A mandatory guideline sentencing scheme which requires judicial factfinding is unconstitutional. Remedy is to make mandatory guidelines "advisory").

Miranda Rights

Miranda v Arizona, 384 US 436 (1966)

Dickerson v United States, 530 US 2000 (2000) (*Miranda* warnings are constitutionally based)

Thompson v Keohane, 516 US 99 (1995) (Whether defendant is in custody is mixed question of fact and law reviewed *de novo)*

Fourth Amendment - Knock and Announce

Wilson v Arkansas, 514 US 927 (1995) (4th Amendment incorporates the common law requirement that police entering a dwelling must "knock and announce" before attempting forcible entry. Test is "reasonableness under the circumstances".)

Richards v Wisconsin, 520 US 385 (1997) (no blanket exceptions to "knock and announce" requirement)

United States v Dice, 200 F3d 978 (6th, 2000) (Violation of Ohio knock and announce rule requires suppression). Use to challenge *People v Vasquez*, 461 Mich 235 (1999) and *People v Stevens*, 460 Mich 626 (1999)

Fourth Amendment - Exceptions to the Warrant Requirement

Mincey v Arizona, 437 US 385 (1978) (No exigent circumstances exception to warrant requirement at murder scene)

Thompson v Louisiana, 469 US 17 (1984) (No "crime scene" exception to the warrant requirement)

United States v Johnson, 22 F3d 674 (6th Cir, 1994) (Rescue of 14-year-old held against her will and sexually assaulted in locked apartment justifies entry to rescue but not search of closets after rescue is concluded)

Fourth Amendment - Search Warrants

Franks v Delaware, 438 US 154 (1978) (Challenges to veracity of search warrant averments)

Roviaro v United States, 353 US 53 (1957) (Production of informant)

Florida v Jimeno, 500 US 248 (1991) (consent to search must be specific and may be limited)

Florida v J.L., 529 US 266 (2000) (anonymous tip which cannot be corroborated as to allegations of illegal behavior does not establish reasonable suspicion for a *Terry* investigative stop).

Right to Remain Silent - Fifth Amendment

Estelle v Smith, 451 US 454 (1981)

Griffin v California, 380 US 609 (1965) (References to defendant's failure to testify are error)

Doyle v Ohio, 426 US 610 (1976) (State's references to post-*Miranda* silence to impeach violate due process)

Mitchell v United States, 119 S.Ct. 1307 (1999) (Right to remain silent survives guilty plea and extends through sentencing)

Lent v Wells, 861 F2d 972 (1988) (Where defendant did not testify or present evidence, prosecutor's references to "uncontroverted evidence" violated defendant's privilege against self-incrimination)

Combs v Coyle, 205 F3d 269 (6th Cir, 2001) (use of defendant's pre-arrest pre *Miranda* statement ("Talk to my lawyer") as substantive evidence of defendant's purpose and prior calculation and design", issues contest at trial, violates privilege against self-incrimination). The holding in *Combs* invites reevaluation of *People v Reavy*, 436 M 197 (1990) and *People v Schollaert*, 194 MA 158 (1992).)

McGraw v Holland, 257 F3d 513 (6th Cir., 2001) (Defendant's absolute right to remain silent must be scrupulously honored)

Confessions

Maine v Moulton, 474 US 159 (1985) (state violates right to counsel when it allows codefendant, acting undercover, to record incriminatory conversations with defendant.)

McNeil v Wisconsin, 501 US 171 (1991) (Violation of 6th Amendment right to counsel means statements are inadmissible)

Arizona v Fulminate, 499 US 279 (1991) (Statements induced by threats/promises are involuntary)

County of Riverside v McLaughlin, 500 US 44 (1991) (Due process violated if excessive detainment of defendant or to delay an arraignment for purposes of prolonging an interrogation.)

McGraw v Holland, 257 F3d 513 (6th Cir., 2001) (habeas relief granted where state courts unreasonably applied USSC precedent re: honoring defendant's exercise of right to remain silent)

Double Jeopardy- Fifth Amendment

Blockburger v United States, 284 US 299 (1932) (Test is whether each offense has same elements) NOTE: Michigan uses a different test for legislative intent; *People v Robideau*, 419 M 458 (1984) and rejects *Blockburger* test.

Schiro v Farley, 510 US 222 (1994) (Successive prosecutions)

United States v Ursery, 519 US 267 (1996) (Successive punishments)

Hudson v United States, 522 US 93 (1997) (Multiple criminal punishments)

United States v Halper, 490 US 435 (1989) (Civil sanctions so onerous as to be "criminal")

Identification Procedures

Neil v Biggers, 409 US 188 (1972) (Test is totality of circumstances which indicates reliability)

Manson v Braithwaite, 432 US 98 (1977) (Reliability of identification is key inquiry)

Simmons v United States, 390 US 377 (1968) (Suggestive photos)

United States v Wade, 388 US 218 (1967) (pretrial identification procedures and in-court identification)

Right to Present Defense - Fifth and Sixth Amendment

United States v Sarafite, 376 US 575 (1964) (Refusal to grant continuance at trial is constitutional violation)

Crane v Kentucky, 476 US 683 (1986) (Right to present defense does not hinge on consideration of merits of proposed defense)

California v Trombetta, 467 US 479 (1984) (State's failure to preserve exculpatory evidence violates due process)

Duty to Disclose Exculpatory Evidence

Brady v Maryland, 383 US 83 (1963) (prosecutor has constitutional duty to turn over material exculpatory evidence and evidence in mitigation of punishment)
Strickler v Greene, 527 US 263 (1999) (defense attorney may reasonably rely on State's "open file" policy as satisfying *Brady* obligation)

Kyles v Whitley, 514 US 419 (1995) (*Brady* violation may occur if police withhold exculpatory evidence from prosecutor)

United States v Bagley, 473 US 667 (1985) (Failure to disclose impeachment evidence is *Brady* violation)

Napue v Illinois, 360 US 264 (1959) (Failure to correct false testimony by state witness is *Brady* violation)

Campbell v Marshall, 769 F3d 314, 321 (6th Cir., 1985) cert. den., 475 US 1048; 106 SCt 1268; 89 LEd 2d 576 (1986). (A defendant who pleads guilty may still argue that his plea was invalid because it was made in the absence of *Brady* material.)

Witness Bias

Davis v Alaska, 415 US 308 (1974) (Constitutional right to confront witnesses is right to cross-examine. Witness' motive for testifying (bias) is always relevant. Refusing to allow Defendant to cross-examine key prosecution witness regarding his status as a probationer after adjudication as juvenile delinquent violates 6th Amendment Confrontation Clause because witness' probationary status was relevant to his bias (under pressure to implicate Defendant and divert attention from himself as a possible suspect)).

Delaware v Van Arsdall, 475 US 673 (1986) (forestalling inquiry into state's dismissal of public drunkenness charge against witness violated Defendant's rights under Confrontation Clause).

Right to Counsel - Sixth Amendment

Geders v United States, 425 US 80 (1976) (Court's order to attorney not to speak to client during overnight recess in trial violates right to counsel)

Weatherford v Bursey, 429 US 545 (1977) (Intrusion in attorney-client relationship not per se unconstitutional, but requires showing of prejudice)

United States v Bryant, 545 F2d 1035 (6th Cir., 1976) (Denial of consultation with client during one hour lunch break denies defendant right to counsel)

Caver v Straub, 349 F3d 340 (6th Cir., 2003) (reinstruction of a jury is a "critical state" requiring presence of defense counsel)

Confrontation - Sixth Amendment

Crawford v Washington, 541 US 36 (2004) (Rejecting *Ohio v Roberts*, 448 US 56 (1980) and holding that Confrontation Clause only allows admission of testimonial statements from witnesses absent from trial if the declarant is unavailable and Defendant had a prior opportunity to cross-examine.)

California v Green, 399 US 149 (1970) (Cross-examination is "greatest legal engine ever invented for the discovery of truth")

Chambers v Mississippi, 410 US 284 (1973) (Right to confrontation may trump state procedural rules)

Bruton v United States, 391 US 123 (1968) (Admission at Defendant's trial of non-testifying co-defendant's statements that implicate Defendant violates Confrontation Clause)

Lilly v Virginia, 119 S.Ct. 1887 (1999) (Non-testifying accomplice's confession violates confrontation clause. Declarations against penal interest are "presumptively unreliable and to rebut this presumption, we must evaluate the indicia of reliability associated with each individual remark or declaration made by the co-defendant".)

Vincent v Seabold, 226 F3d 681 (A state court which refuses to recognize the binding effects of *Lilly* is acting unreasonably) NOTE: *Vincent's* analysis is a direct rejection of the analysis of the Michigan Supreme Court in *People v Poole*, 444 Mich 151 (1993).

Ohio v Roberts, 448 US 56 (1980) (Reliability and admissibility of hearsay testimony versus confrontation)

Dorchy v Jones, 398 F3d 783 (6th Cir., 2005) (Under *Ohio v Roberts*, Sixth Amendment is violated when out-of-court testimony and statement were admitted under then MRE 804(b)(6), the "residual hearsay" rule.)

Bulls v Jones, 274 F3d 329 (6th Cir., 2001) (*Bruton* violation where non-testifying co-defendants' unredacted statements were admitted as substantive evidence of guilt)

Jury Instructions

Sullivan v Louisiana, 508 US 275 (1993) (constitutionally deficient reasonable doubt instruction requires reversal)

Sandstrom v Montana, 442 US 510 (1979) (Jury instructions which shift burden of proof on elements of offense are unconstitutional)

Barker v Yukins, 199 F3d 867 (6th Cir., 2000) cert den (2000) (Failure to instruct fully on defendant's theory of self-defense not harmless error. Michigan COA erred in weighing factual evidence and concluding what jurors might have done if properly instructed.)

Eighth Amendment

United States v Bajakajian, 524 S.Ct. 321 (1998) (Discusses limits on forfeiture under the 8th Amendment)

Harmless Error

Chapman v California, 386 US 18 (1967) (standard for reviewing constitutional error on direct appeal is harmless beyond a reasonable doubt).

Brecht v Abrahamson, 507 US 619 (1993) (standard for constitutional error raised in collateral proceedings is whether error had a substantial and injurious effect or influence in determining jury's verdict)

O'Neal v McAninch, 513 US 432; 115 SCt 992; 130 LEd 2d 947 (1995) (When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict", the error is not harmless and the petitioner must win.)

Barker v Yukins, 199 F3d 867 (2000) (*supra*)