

APPELLATE ARGUMENTS YOU SHOULD PRESERVE FOR FEDERAL COURT

Even if They Don't Have
a Chance in the State Courts

Petition for Cert. to US Supreme Court

- ▣ Part of Direct Appeal
- ▣ Limited to Federal Claims
- ▣ Federal Claim must have been raised throughout state appellate system
- ▣ Including in Petition for Review
- ▣ Must be filed within 90 days of SCOW decision

What is federal habeas corpus?

- ▣ 28 U.S.C. §§2241 - 2254
- ▣ Implement federal constitutional right to habeas corpus
- ▣ Procedure for challenging state conviction obtained in violation of the U.S. Constitution
- ▣ Another appeal after state Supreme Court rules on the case

Federal Habeas Corpus

- ▣ Limited to Federal Constitutional Claims
- ▣ But not Fourth Amendment Claims
- ▣ Must Be Exhausted Through the Entire State Appellate System
- ▣ Must Not Be Subject to Procedural Default - i.e., Waiver/forfeiture

Federalize Claims

- ▣ Both Trial and Appellate Levels

Federalize Claims

- ▣ Not just Hearsay - but Confrontation
- ▣ Not just violation of evidence rules, but Right to Present a Defense
- ▣ Exclusion can be denial of Right to Present a Defense even if valid under evidence rules
- ▣ Not just discovery violation, but Due Process / *Brady* violation
- ▣ or interference with Effective Assistance of Counsel

Federalize Claims

- ▣ Prosecutorial Misconduct - not just bad form but Due Process violation
- ▣ Jury Instructions that do not require proof beyond a reasonable doubt of all elements
- ▣ Not just error, but Due Process violation

Federalize Claims

- ▣ On Appeal -
- ▣ - Any forfeited claims - not just Plain Error or Interests of Justice, but Ineffective Assistance of Counsel
- ▣ Argue constitutional grounds as separate claim even if not raised at trial level
- ▣ if Ct. App. rules on merits without finding waiver or forfeiture - no procedural default

Preserving Federal Issues in State Court

- ▣ Raise the federal constitutional claims **at every level**
- ▣ **Including in the petition for review**

Preserving Federal Issues in State Court

- ▣ FULLY ARGUE FEDERAL CLAIMS
- ▣ - state applicable federal rule (with citations)
- ▣ - state relevant facts (with citations to record)
- ▣ - apply the law to the facts to reach the desired result
- ▣ - fully argue why it matters - i.e., not harmless

Federal Habeas Deadlines

- ▣ Client entitled to know available process
- ▣ Advise client of deadlines 28 U.S.C. § 2244(d)
- ▣ With some exceptions - one year after conviction becomes final through completion of direct appeal

Federal Habeas Deadlines

- ▣ Time for filing federal habeas petition tolled while postconviction motion pending in state court. 28 U.S.C. §2244(d)(2)
 - Wis. Stat. §974.06
 - *Knight Petition*
- ▣ When filed, time stops running through completion of any appeal
- ▣ Starts again when SCOW denies review
- ▣ Starts from point where left off, not a new year

Federal Habeas Deadlines

- ▣ Why does it matter?
- ▣ So client doesn't miss deadline
- ▣ Gives client time to try to fix any mistakes

Federal Habeas Deadlines

- ▣ Best to advise client of habeas deadline and tolling provisions in writing to avoid confusion or allegation you didn't advise them

Appellate Arguments You Should be Preserving for Federal Court

- ▣ All of them

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Ineffective Assistance of Counsel
- ▣ *Machner* Rule: Challenged attorney must be given opportunity to testify at hearing regarding reasons for challenged acts or omissions.
- ▣ Generally reasonable but not always possible
- ▣ Courts will presume reasonableness if no apparent reasonable rationale

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Pleading Requirements
- ▣ SCOW tending toward requirement that IAC motion must detail prior counsel's actual/alleged rationale
- ▣ Essentially creates “attorney veto” over whether defendant gets a hearing

Appellate Arguments You Should be Preserving for Federal Court

- ▣ IAC where no controlling authority
- ▣ Deficient performance limited to “situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue.” *State v. McMahon*, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994).
- ▣ WRONG! Deficient performance turns on whether attorney acted reasonably.

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Defendant's failure to raise claim in response to no-merit report generally forfeits right to challenge effectiveness of no-merit counsel.
State v. Antonio Allen, 2010 WI 89, 328 Wis.2d 1, 786 N.W.2d 184.
- ▣ WRONG! Conflicts with *Smith v. Robbins*, 528 U.S. 259 (2000)

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Ineffective assistance of appellate counsel limited to circumstances where claim prior counsel failed to raise is “clearly stronger” than those raised on the direct appeal. *State v. Starks*, 2013 WI 69, 349 Wis.2d 274, 833 N.W.2d 146 , rehearing denied, cert. pending.
- ▣ WRONG! Deficient performance on appeal judged by same “reasonableness” standards under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000)

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Resulting prejudice in IAC claim
- ▣ Wisconsin appellate courts, especially in District I, regularly claim that prejudice turns on reliability of proceeding.
- ▣ WRONG! Prejudice exists where, but for counsel's deficient performance, there exists a reasonable probability of a different result.
- ▣ SCOTUS rejected "reliability" standard as contrary to *Strickland* in *Williams v. Taylor*, 529 U.S. 362 (2000)

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Statutory interpretation
- ▣ Generally matter of state law
- ▣ BUT, unexpected interpretation can violate *ex post facto* or due process equivalent. *Bouie v. City of Columbia*, 378 U.S. 347 (1964)
- ▣ Or render statute unconstitutionally vague as applied to your client

Appellate Arguments You Should be Preserving for Federal Court

- ▣ “Sufficient reason” under Wis. Stat. §974.06(4)
- ▣ “Actual Innocence” can be exception to federal exhaustion and procedural default rules.
Bousley v. United States, 523 U.S. 614 (1998)
- ▣ And even to habeas deadlines. *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013)
- ▣ *But see State v. Annina*, 2006 WI App 202, 296 Wis.2d 599, 723 N.W.2d 708

Appellate Arguments You Should be Preserving for Federal Court

- ▣ Reliance upon inaccurate information at sentencing – due process
- ▣ Wisconsin – actual reliance upon inaccurate information can be harmless. *State v. Tiepelman*, 2006 WI 66, 291 Wis.2d 179, 717 N.W.2d 1
- ▣ Federal – court's reliance upon inaccurate information inherently harmful. *United States ex rel. Welch v. Lane*, 738 F.2d 863, 865 (7th Cir. 1984)

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