

Myths and Mysteries of State Habeas Practice!

*First District Appellate Project
Jan. 2011 Seminar*

FUN FACTS!

- There's way more federal case law attempting to construe California state habeas procedures than California cases actually defining those procedures

About those California cases....

- Most are either irrelevant to our practice
 - E.g, cases mostly concern post-OSC practice, but most of our practice is trying to get OSC
- Or they're misleading
 - E.g., make it sound like it's all about pleadings

Scope of appellate appointment: Must I? May I?

- Cal. Supreme Ct says “appointed counsel in noncapital appeals do not have an obligation to investigate possible bases for collateral attack on the judgment.” *In re Clark* (1993) 5 Cal.4th 750, 783-784 fn. 20
 - But, if counsel “learns of such facts,” which could support habeas petition, they have “ethical obligation to advise their client of the course to follow to obtain relief, or to take other appropriate action.”

Scope of appellate appointment: Must I? May I? (con't)

- But 4th Dist. says otherwise : “A court-appointed appellate attorney has a duty to investigate any such issues which come to his or her attention ..., and to file a petition for writ of habeas corpus if it appears that trial counsel's failure deprived the defendant of the effective assistance of trial counsel. “ *People v. Thurman* (2007) 157 Cal.App.4th 36, 47 (citing *Clark* fn. 20!)
- Also quotes ADI Manual!

How it really works

- In 1st Dist. (and most others), appointment on direct appeal allows counsel to pursue habeas investigation, when counsel learns of potential grounds
- But counsel exercises considerable judgment and discretion
 - Not obligated to pursue habeas claim, just because defendant insists

How it really works (con't)

- Do not need any special motion to “expand appointment” to include habeas
- Do need pre-approval for any ancillary expenses, including expert or investigator
 - FDAP can pre-clear up to \$900 (@ \$125/hr for expert; \$65/hr for investigator)
 - Ex parte application to Court for anything exceeding \$900 total or those rates

Not covered by appellate appointment

- Habeas petition challenging something other than current judgment (e.g., strike conviction)
- Post-remittitur habeas petition based on new case or factual developments
- OSC returnable in superior court (unless appellate court specifically names you)
- New Court of Appeal habeas petition following superior court's habeas denial

Early steps

- As matter of course, obtain a signed consent/waiver form at beginning of case, authorizing you to obtain confidential docs
- Touch base with trial counsel

Curiouser and curiouser (asking the right questions)

- Trial counsel (often can alert us to juror misconduct, *Brady* violations, etc.)
- Any characters in this story whom no one called? Why?
- Any charges, etc., against witnesses?
- Know the local scandals! Read the paper!
- Records in your other cases. Kinds of expert testimony being presented.

Do-it-yourself discovery

- No right to discovery pre-OSC
 - Except special post-conviction motion for LWOP & death penalty cases, § 1054.9
- But DA has continuing ethical duty to disclose exculpatory evidence
- Google, Westlaw, Lexis searches for police officers, prosecution experts, etc.
- Medical, psych, forensic publications and other info also available on line

Biggest mystery: what's a prima facie case?

- OSC is key to habeas procedural rights (incl. counsel, discovery, subpoenas, etc.)
- Petitioner must state facts which, if true, would entitle him to habeas relief
- In assessing prima facie showing, appellate court must take factual allegations as true

Biggest Myth: It's all about pleading --“Plead with particularity, etc.”

- But it's really all about exhibits
- Courts require competent non-hearsay proof of facts (as to both error & prejudice)
 - Generally decl by witness who could testify
 - Or judicially noticeable or other self-authenticating documents
- IAC claim – need either trial counsel decl or your decl on attempts to obtain one

More helpful hints

- Great to rely on pre-existing documents, where possible
 - Other transcripts, police reports, other official documents, medical records, etc.
 - Don't summarize something in your own declaration, where better source available
- Don't overdo declarations, especially the client's, or hide the ball
 - Can come back to haunt you in evidentiary hearing

Putting it all together

- Make habeas showing easy to follow
- Include an index of exhibits
- Tab and/or consecutively paginate
- Declarations are exhibits too!
 - Some petitions treat declarations separately
 - Much easier to designate and tab them along with other exhibits

Pleadings & briefs

- Pleadings are vital
 - Must allege supporting facts (especially your new habeas facts)
 - Must allege legal claims
- But pleadings aren't persuasive!
 - Pleading format is cumbersome
 - Be sure to tell the story and make your argument in the brief (i.e., Memo of P's & A's)

More briefing tips

- Don't hide the fruits of your investigation
 - As with a direct appeal brief, be sure to lay out the facts – including what the exhibits are (e.g, percipient witness decl? court records?)
- Make it easy; tell them what's new
 - For arguments overlapping AOB, clearly indicate which portions are new
 - E.g., by explanatory footnote or by boldfacing new stuff

More mysteries: timing standards for non-capital petitions

- Must be filed without unreasonable delay
- Most case law concerns timeliness of capital petitions; don't assume capital benchmarks apply
- Hardly any case law addressing timing of non-capital petitions

Distinct timing questions (but easily conflated)

- Diligence, whether petition filed without unreasonable delay
 - May need to include own declaration explaining delay if filed very late in appeal
- Appellate filing during pendency of appeal
 - Usually OK during briefing (not long after ARB).
 - If court has already worked up appeal & is ready to hear or decide, may decline to exercise appellate jurisdiction (& require superior ct filing)

Supreme Court review

- Can proceed either by petition for review or new habeas petition in Supreme Court
 - Court will likely act faster on a review petition
 - In either case, you're really asking for OSC
- Pet review deadline same as for the appeal (40 days) if decided on same date
- Must file separate petitions on appeal & habeas unless appellate court formally "consolidated" them – must use magic word

Keeping the federal door open (on both appeal & state habeas claims)

- Explicitly federalize claims, citing federal cases (preferably Supreme Ct) & U.S. Constit.
 - E.g., *Strickland*, not just *Pope*
 - 6th Amen. for any *Marsden* claim
 - Due process (*Pate*, etc.) for § 1368
 - *Jackson v. Va.* for sufficiency of evidence

Doesn't have to be cumbersome

- Federalize in heading or subheading, as well as in text (& include cases in text)
- “Federal due process” in heading is fine
- Don't need “in violation of the due process clause of the Fourteenth Amendment of the U.S. Constitution”

“Procedural default” (better known to us as “waiver”)

- Other guy’s mistakes at trial level
 - Any time appellate court says a claim is “waived” because not raised properly below
 - Master state grounds for getting around waiver (see “Elusive Exceptions..., etc.” on FDAP web site)
 - IAC as fallback argument
- And our mistakes at appellate level

Procedural default (con't)

– a worst case example

- AOB raises due process claim (e.g., evidentiary error, prosecutorial misconduct)
- AG claims waiver; ARB says, if so, it's IAC
- Court of Appeal opinion:
 - Due process claim waived; not properly raised below
 - Won't consider IAC; raised for first time in ARB
- Probably both claims will be deemed procedurally defaulted & barred

AEDPA, *Teague* & Retroactivity

- Usual rule: Don't have to petition for cert. to exhaust for federal habeas purposes
- But may need to do so in order to take advantage of recently-decided or not-yet-decided U.S. Supreme Court case

AEDPA, *Teague* & Retroactivity

- If claim rests on currently pending Supreme Court case: Should petition for cert., because a decision establishing “new rule” won’t apply if your case is “final”
- Uncertain status if claim rests on Supreme Ct case decided after appellate opinion but before “finality” (90 days after Cal Sup Ct denial). Safest course is to petition for cert. and ask for “GVR”

AEDPA Statute of Limitations

- Unlike “procedural default” or “exhaustion” which may bar individual claims, blowing the deadline will bar the entire petition
- Advise client: deadline is 1 year after the expiration of 90-day period for cert. pet.
 - That’s the only deadline to tell client
- Don’t count on “tolling” from post-affirmance state habeas petitions
 - Too much uncertainty whether “properly filed”