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ANDREA D. LYON

NEW OPPORTUNITIES FOR DEFENSE ATTORNEYS: HOW RECORD PRESERVATION REQUIREMENTS IN THE 1996 HABEAS BILL EXPAND DEFENSE STRATEGIES

The writ of *habeas corpus* seems to most defense attorneys some arcane thing that "federal" attorneys do to fix what went wrong in state court that resulted in the imprisonment or death sentence for their clients. It seems far removed and relatively unimportant in the preparation of a case for trial. Trial lawyers, particularly defense attorneys, certainly understand how important it is to preserve the record, to object, and to state both the state and federal grounds for the objection. But what is not immediately apparent is how, working backwards, the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "the new act" or "AEDPA") has changed, altered and intensified not only the need to preserve the record, but the manner in which it must be done. In fact, the new bill can be seen as providing the support and justification for an expanded motions practice, evidentiary hearings, and discovery.

In many ways, defense attorneys must see this new act as just one more overwhelming thing about defending criminal cases. If a credible case can be made by the prosecution that a fact or a claim *could* have been presented and preserved at the trial level and wasn't, it's waived.[1] If it could have been raised on direct appeal, and wasn't, it's waived.[2] If it could have been raised in state post-conviction or *habeas* and was not, it's waived.[3] While none of this is new, since the rules on waiver have been getting tougher as death penalty jurisprudence has progressed, the new act greatly increases the burden on defense counsel.

But until the new act, there was sometimes a way around the problem of waiver. If an imprisoned or death sentenced inmate could show that he had both *cause* for the failure to present the fact and the federal claim it was tied to *and* he could show prejudice to him as a result, he could get past the procedural roadblock and at least present his issue to the federal court.[4] Well, not any more. Now he must show not only cause, but *innocence* as well.[5]

Even worse, under the new Act, if the defense attorney gets to federal court with her claim, the application for a writ of *habeas corpus* "...shall not

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be granted..."[6] unless one of two conditions is met: either the "decision was contrary to... clearly established federal law, as determined by the United States Supreme Court,"[7] or the state decision "...involved an unreasonable application of clearly established federal law as established by the United States Supreme Court."[8]

The last half of this century saw a great increase in the use and applicability of the writ of *habeas corpus* to state courts and then the federal courts' strong reaction to tighten the availability of the writ. Thus ever stricter rules were promulgated by the courts to make it harder to get to court in the first place, and then to discuss the merits of the claims.[9] AEDPA changes the landscape even further.

How AEDPA Impacts Trial Practice for Defense Attorneys

It is beyond the scope of this article to discuss the impact of AEDPA on *habeas* practice in either the capital or non-capital context.[10] Instead, this article seeks to articulate the duties the AEDPA places on the trial lawyer, and then what opportunities these duties produce for extensive, exciting and exacting motions practice.

Before the AEDPA, it could certainly be argued that a conscientious defense attorney should file and litigate motions where she had (at least) more than a suspicion or a hunch that such a motion was necessary. For instance, she would not file a motion to dismiss the charges based on allegations of prosecutorial misconduct unless she had evidence of that misconduct, and it was sufficiently egregious to warrant such a motion. Indeed, even if it were that egregious, she might decide, for reasons of trial strategy or because she thought the motion unlikely to succeed, not to file it. She could do so, secure in the knowledge that should more evidence come to light later on, and it were evidence which she could not have reasonably located through the exercise of due diligence, such a challenge could be mounted in a federal *habeas corpus* proceeding.[11] That simply is not longer the case *unless* the prosecutorial misconduct is of such a nature that not only could one show prejudice to the court (a difficult enough endeavor), but innocence of the crime itself.[12]

In other words, if the defense attorney has any reason at all to file such a motion she must do so. The price of failing to do so is that the issue can never be brought to the attention of the federal court unless it is accompanied by proof of innocence.[13]

Trial Preparation Opportunities for Defense Attorneys

So what does this mean to defense attorneys? More particularly, what does it mean to defense trial attorneys? Well, it certainly increases the burden on us. To fail to object, to file a motion or to elicit a fact from a witness

may indeed prove fatal later to your client's ability to even talk about the issue to a federal court.

Yet I maintain that the AEDPA is actually an opportunity. Because it places such a heavy burden on the State courts, and trial court in particular, and because every fault save the most egregious will be laid at defense counsel's door, the much vaunted defense lawyer's paranoia actually serves her interest.

In other words, if you can think of a legitimate good faith reason to file a motion, you should do so, and you should do so citing the bipartisan sponsored AEDPA. For example, you should consider whether to file a motion to recuse an unfair judge. This is different than a motion to recuse a judge for cause, and it should require a lesser showing than an ordinary motion. If there is to be this heightened deference to the trial judge's findings of fact as required under AEDPA,[14] such that they cannot be overturned except in the most extraordinary of circumstances,[15] then such a motion should be made where there are grounds for it.

You should make broader requests for discovery, since, if you haven't fully developed all of the pertinent facts for a constitutional claim, you are out of luck in federal court unless you can meet the very stringent test of demonstrating 1) a factual predicate that *could not* have been found out with the exercise of due diligence (that is, unless there occurs the unlikely event that a new rule of law is handed down by the United State Supreme Court which applies retroactively to matters on collateral review) and 2) you can show factual innocence.[16]

Broader requests for discovery means asking for the predicates for conclusions that the police have drawn. For example, if you have a police report that says "The suspect matched the description," then you would ask in discovery how was it the police came to that conclusion, and how they located your client's photograph in the first place? The constitutional reason for asking such a question is grounded in the Fourth Amendment, and possibly in the Sixth Amendment, since there is a possibility that the police relied on an informant whom you may have a right to confront. While the new act will not guarantee that such a discovery motion will be granted, down the line such a request may very well satisfy exhaustion requirements since you would have made every effort to have a hearing on the facts.[17]

There are other sorts of constitutional motions that should be made under the auspices of the same section of AEDPA.[18] Because of the need to adequately develop facts in state court, you can (and should) ask for an evidentiary hearing on a plethora of issues relating to motions. For example, if you have a good faith basis to suspect prosecutorial misconduct, a *Brady* violation,[19] or that someone from the police or other law enforcement

agencies has been unduly influencing witnesses, or that there has been interference in your access to evidence via subpoena or other court order (such as an order directing the prosecution to "make available" to you the physical evidence), then you should file a motion to discover the extent of these violations, and ask for appropriate sanctions. If, for example, you have interviewed a witness, and that witness has told you something exculpatory which he asserts he has previously told the police or the prosecution, then you have reason to file a motion alleging a *Brady* violation. Ask for an evidentiary hearing on what precisely occurred with the witness you have interviewed and for disclosure of all contacts between the prosecutorial agency involved and any other witness in the case.

Similarly, if there is physical evidence which has been (or is going to be) sent to a crime laboratory for testing, defense counsel should ask that the evidence be split in half so independent testing can be done, and for an evidentiary hearing to determine the methods by which it was collected and preserved in order to determine if there has been any contamination of the evidence. Defense counsel must ask for an evidentiary hearing on each claim, and you should tell the trial judge that he or she must give it to you in order that you can fully develop the facts as you are now required to do by AEDPA.

Because Title 28 U.S.C. Section 2254 (d) heightens the burden on the defense to prevail in federal court, saying that a writ "shall not issue" unless a state decision resulted in a decision contrary to, or an unreasonable application of, federal law as interpreted by the United States Supreme Court; or unreasonable determination of the facts by the trial judge. Thus, you must ask for reasoning in writing or orally from trial judges on your motions and objections. The federal courts have been told that they must defer to the trial court, and it is not fair to require your client to live with those determinations when they become virtually unreviewable without the reasons for rulings on the record. You should make this request in writing at the beginning of the litigation, and renew and refer to that request as you litigate.

In the event that you lose your case, since 28 U.S.C. 2244 (d)(1) imposes a one year federal filing deadline from "finality," and since most states have very short filing deadlines of their own for filing any state post-conviction or *habeas*,[20] you should ask for a new lawyer to be appointed to look at what was done and not done. Since this litigation is, by its nature, so fact intensive, you should also ask that a new investigator and possibly a new expert or experts be appointed so that new counsel can adequately develop the facts as required. Remember that ineffective assistance of counsel at the collateral stage is not a grounds for relief under AEDPA,[21] so you cannot rely on someone being able to correct your mistakes during the collateral stage later.[22]

Conclusion

All of this may sound overwhelming to defense counsel, but remember, the burden falls not only on the defense; it falls equally on the prosecution which must (usually) oppose such motions. It also falls on judges who are acutely aware of the burdens placed on already crowded dockets by this requisite "extra" litigation. Most importantly, it falls on the public, who will see added costs both in time and money in trial litigation. While the intent of Congress was certainly to "move things along," the actual effect of this legislation may very well be the opposite. It should further complicate the pre-trial and trial stages of these cases, giving the defense attorney the opportunity to truly investigate her case at a level she has been unable to reach before, thus creating a more complex trial, an even more complex record and expanding rather than contracting the scope of litigation.

NOTES

1 Title 28 U.S.C. Sec. 2254(d).

2 *Id.*

3 *Id.*

4 *Wainwright v. Sykes,* 433 U.S. 72 (1977).

5 28 U.S.C. Sec. 2254(e)(2)(A).

6 28 U.S.C. Sec. 2254(d) (preamble).

7 *Id.* Sec. 2254(d)(1).

8 *Id.*

9 This monitoring function has been the source of much resentment by the states, particularly by state prosecutorial agencies who see this oversight as unwarranted intrusion into the affairs of the state court system. See, Larry W. Yackle, *Explaining Habeas Corpus*, 60 NYU L. Rev. 991, 1010 (1985) ("State courts may resent federal, trial level courts accepting habeas petitions and thus undertaking to second guess judgements that may have been affirmed by the state's highest courts.").

10 For an excellent discussion, please read Boston University Professor of Law Larry W. Yackle's *A Primer on the New Habeas Corpus Statute* (1996) (unpublished manuscript on file with the author).

11 *Keeney v. Tamayo-Reves*, 112 S.Ct. 1715 (1992).

12 28 U.S.C. Sec. 2254(e)(2)(A).

13 Since the AEDPA seems to follow in large part some of the more restrictive decision of the United States Supreme Court, it seems likely that this dichotomy was created by the shameful holding in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1993), that it was not unconstitutional to execute an innocent man, and then its *sub silentio* overruling by *Schlup v. Delo*, 115 S.Ct. 851 (1995). In *Schlulp* there was a video tape of the defendant in a prison cafeteria line at the time that the alarm went off regarding the murder of another inmate on a tier, not in the cafeteria. Schlup's death sentence and conviction were reversed and remanded in light of this evidence of actual innocence.

14 28 U.S.C. Sec. 2254(d).

15 28 U.S.C. Sec. 2254(e)(1).

16 28 U.S.C. Sec. 2254(e)(2).

17 All the motions discussed below will serve a similar purpose even if they are denied.

18 28 U.S.C. Sec. 2254(e)(2).

19 *Brady v. Maryland*, 378 U.S. 83 (1963).

20 See, e.g., Az. St. S. 13-4234 (for capital cases in Arizona, 100 day filing deadline); Id. St. S. 19-2719 (for capital cases in Idaho, 42 day filing deadline); Il. St. Ch. 725 S. 5/122 - 2.1 (for capital cases in Illinois, 45 day filing deadline); Nv. St. S. 34.575 (for capital cases in Nevada, 30 day filing deadline).

21 28 U.S.C. Sec. 2254(1).

22 While 28 U.S.C. Sec. 2244(d)(1)(B) says that an exception to the filing deadline will be made when an "impediment to filing created by State action" exists. It is not at all clear what exactly such an impediment might be.

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43 YEARS AGO IN GUILD PRACTITIONER

"The traditional gaiety of the President's reception, following the Civil Liberties Panel [at the February 1956 National Convention of the Guild], was heightened immeasurably by the appearance of Mrs. Franklin D. Roosevelt, who happened to be in Detroit at the time. Mrs. Roosevelt was pleased to fraternize with this group, which, the next day, was to bestow its highest honor in the name of her husband [to Patrick H. O'Brien, charter member of the Guild, who began practicing law in 1891]."

Excerpt from REPORT ON GUILD ACTIVITIES, in Volume XVI, No. 1 (Spring 1956) of the LAWYERS GUILD REVIEW (predecessor of Guild Practitioner).