FEDERAL HABEAS CORPUS PETITIONS UNDER 28 U.S.C. § 2254

Meredith J. Ross 2011
Clinical Professor of Law
Director, Frank J. Remington Center
University of Wisconsin Law School

1) Introduction

Many inmates who are unhappy about their state conviction or sentence hope to seek relief from a federal court, by means of a petition for federal habeas corpus relief. Such a petition is allowed under federal law. Specifically, 28 United States Code § 2254 authorizes a state inmate to request relief from a federal district court when the inmate's Constitutional rights have been violated by filing a petition for a writ of habeas corpus.

This information sheet will outline the basic information you need proceed on your own with a § 2254 petition. In addition, following this information sheet, you will find *pro se* § 2254 petitions for the District Courts for the Eastern and Western Districts of Wisconsin, a petition for waiver of costs, a *pro se* form for a motion requesting appointment of counsel, and the statutes and rules governing § 2254 petitions.

Before you consider filing a § 2254 petition, you should recognize that there are significant barriers to federal habeas relief for people with state convictions. It is important to understand that the federal courts are very reluctant to grant relief from state convictions. Furthermore, in 1996 the U.S. Congress revised the habeas statute to create a strict filing deadline, as well as significant additional procedural barriers which did not exist before 1996. The filing deadline and procedural barriers are discussed in more detail below.

Finally, even if a federal court does grant a habeas writ, this usually means only that the state is required to give the defendant a new trial. It does not mean that the defendant necessarily goes free.

2) General Limitations on Federal Habeas Relief

Grants of habeas petitions are very rare, for the following reasons.

First, in 1996 the United States Congress passed a law called the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA created very strict barriers to state inmates' attempts to gain relief under § 2254, the federal habeas statute. These barriers will be discussed in more detail below. You should understand that the AEDPA was specifically designed to limit the authority of federal courts to grant habeas relief to state inmates. Because federal courts are bound by federal statutes, they are required under AEDPA to be very strict and narrow in reviewing any claim you might raise in a habeas petition.

Second, the grounds for relief under §2254 are quite narrow. A federal court will deny a habeas petition unless the defendant can show convincingly that:

- the state court proceedings violated a principle of federal constitutional law clearly established by the U.S. Supreme Court; and

- the federal constitutional error "had substantial and injurious effect or influence" in determining the outcome of the state court proceeding [this is also called an "actual prejudice" standard]. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Third, a series of statutory changes and federal court decisions have made it clear that certain kinds of claims may not be raised in a federal habeas petition. With very limited exceptions, you cannot do the following things in a habeas proceeding:

- try to establish a new legal or constitutional principle;

- raise a Fourth Amendment search or seizure challenge to try to exclude evidence used against you in the state proceeding *See Stone v. Powell*, 428 U.S. 465 (1976);
-
- challenge state statutes or state case law, unless you think they violated a clearly established federal constitutional right; or
- challenge a witness's credibility.

You may be able to raise these kinds of issues as violations of your federal constitutional right to effective assistance of counsel, but only if: 1) your attorney acted unreasonably in not properly raising the issue at the proper time in state court: 2) your attorney's actions prejudiced your case; and 3) you properly raised the ineffective claim throughout the state court system.

3) Procedural Roadblocks to § 2254 Relief

a) Statute of Limitations

Before the AEDPA, there was no time limit for filing a § 2254 petition. The AEDPA created a **new one-year limitation period** for filing a § 2254 petition. Under the AEDPA, a § 2254 petition must be filed within one year from when your state conviction became "final." *See* 28 U.S.C. § 2244(d)(1). If you file a § 2254 petition outside of the one-year limit, your petition will be dismissed without consideration of its merits.

In most cases, your Wisconsin conviction became "final" at the *latest* of the following dates:

- if you did not request a direct appeal from your conviction, 20 days after the date when you were sentenced;
- if you requested a direct appeal, but then did not file a notice of appeal to the court of appeals, the date when the deadline for filing a notice of appeal expired (*see* Wis. Stat. § 809.30);
- if you had a direct appeal and lost in the Wisconsin Court of Appeals and did not request a petition for review to the Wisconsin Supreme Court, the date when the deadline to file a petition for review to the Supreme Court expired;
- if you lost in the Wisconsin Supreme Court (either because you filed a petition for review which was denied, or because the Wisconsin Supreme Court denied your case on the merits), and did not file a petition for *certiorari* review to the United States Supreme Court, the date when the deadline for filing a *certiorari* petition expired (i.e. 90 days after the Wisconsin Supreme Court's decision or order) (*see Anderson v. Litscher*, 281 F.3d 672 (7th Cir. 2002);
- if you filed an unsuccessful *certiorari* petition from the Wisconsin Supreme Court to the United States Supreme Court, the date when the United States Supreme Court denied *certiorari* review of your direct appeal;
- if the United States Supreme Court accepted *certiorari* review of your direct appeal, the date when the United States Supreme Court affirmed the ruling of the Wisconsin Supreme Court.

If your conviction became final before 1996, then the one-year period expired on April 23, 1997, a year after the AEDPA became effective.

The one-year statute of limitations for filing a § 2254 petition is very strictly applied. However, 28 U.S.C. § 2244(d) does provide some very limited exceptions to this requirement. The most important of these are as follows:

This one-year period can be "tolled," or extended, if a state postconviction motion (usually a § 974.06 motion) is "properly filed" <u>before</u> the end of the one-year period. The deadline remains tolled while your state postconviction motion is pending in the state courts. However, it does not remain tolled for the time during which you seek review of an unfavorable state court decision by the United States Supreme Court. *Lawrence v. Florida*, 549 U.S. 327 (2007).) Furthermore, the one-year period starts running again once your postconviction motion is finally resolved in state court.

Theoretically, you may file a § 2254 petition outside of the one-year limit if your petition is filed within one year after the announcement by the U.S. Supreme Court of <u>a new constitutional rule which is made retroactive to cases on collateral review</u>. *See* 28 U.S.C. § 2244 (d)(1)(C). However, it is would be extraordinarily unusual for the Supreme Court to announce a new, retroactive, constitutional rule.

You may file a § 2254 petition outside of the one-year limit based upon newly discovered facts. However, you must file within one year of the date that

the facts could have been discovered with "due diligence." *See* 28 U.S.C. § 2244(d)(1)(D). Furthermore, the newly discovered facts must be sufficient to establish by clear and convincing evidence that, if not for the alleged constitutional error, no reasonable factfinder would have found you guilty of the offense. *See* 28 U.S.C. § 2254(d)(2)(B).

b) "Successive" Petitions

There are also strict rules which govern the filing of a second, or successive, § 2254 petition. *See* 28 U.S.C. § 2244(b). In general, a defendant is allowed only one federal habeas petition in a given case. However, there are very limited exceptions to this rule. These are similar to the exceptions to the one-year time limit, discussed above. That is, you may be allowed to bring a successive petition if you can show either:

- newly discovered facts which could not have been discovered earlier with due diligence, and which establish by clear and convincing evidence that, if not for constitutional error, no reasonable factfinder would have found you guilty of the offense. *See* 28 U.S.C. §2244(b)(2)(B); or

- a new constitutional rule of the United States Supreme Court which is made retroactive to cases on collateral review. *See* 28 U.S.C. § 2244(b)(2)(A).

To be safe, you should include all the constitutional claims you want to raise in your first § 2254 petition, because you almost certainly won't have a chance to raise them at a later time.

If you want to bring a successive habeas petition, you will first have to ask the Court of Appeals for the Seventh Circuit for permission (or "leave") to file a successive petition. *See* 28 U.S.C. § 2244(b)(3). The Seventh Circuit's address is:

Clerk of Court
United States Court of Appeals
219 South Dearborn Street
Chicago, IL 60604

Your request for leave to file a successive petition will have to explain how your situation fits into one of the exceptions outlined above. Otherwise, you can expect the Seventh Circuit to deny you leave to file a successive petition.

c) Exhaustion of State Remedies

You cannot raise a federal constitutional claim in a § 2254 habeas proceeding unless you have first "exhausted" the claim in state courts. There

is a very complex and ever-changing body of case law on the exhaustion requirement.

Basically, the exhaustion rule means that the state courts must have had the opportunity to consider both the factual and legal bases for a claim before a federal court will consider it in a § 2254 proceeding. This may require you to go back into state court to litigate a claim before you will be allowed to raise it in federal court.

For the most part, in order to exhaust a state claim, you must raise it on direct appeal, including an appeal to the Wisconsin Court of Appeals *and* a petition for review to the Wisconsin Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). If you did not raise the claim on direct appeal, then you will first be required to raise it in a state postconviction motion, and then appeal any denial of that postconviction motion, so that the state courts, including the Wisconsin Supreme Court, have had a fair chance to consider it.

In particular, if you have a new evidence claim which arises more than one year after your conviction, you will probably have to go back to state court in a state postconviction motion under Wis. Stat. § 974.06 and allow the state court to consider the claim. *See, e.g., State v. Bembenek*, 140 Wis. 2d 248, 252 (Ct. App. 1987). Only then should you try to raise the claim in federal court.

d) Procedural Default

If the state courts held that you waived or forfeited your right to challenge certain alleged errors, you will have significant problems getting those claims heard in federal court. You will have to show that the state procedural rule used to deny you relief was new and unexpected or inconsistently applied by the state courts. *See Beard v. Kindler*, 130 S. Ct. 612 (2009); *Lee v. Kemna*, 534 U.S. 362 (2002)..

Alternatively, you will have to show "cause" for your failure to follow state procedures, as well as resulting "prejudice." *See generally Gray v. Netherland*, 518 U.S. 152 (1996).

e) Petitioner's Burdens

Under the AEDPA, § 2254 sets up a presumption about the correctness of state court factual determinations. A presumption is something that the law requires a judge to consider true, unless a person can prove otherwise. Under the AEDPA, a federal judge *must* presume that any factual finding by the state court is correct. As the petitioner in a federal habeas case, you will have to "rebut" (disprove) this presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

In addition, under the AEDPA, it is no longer enough for you to show that the state court erred and that the error prejudiced your defense. Rather, if the state court ruled on the merits of your claim (i.e., did not find waiver), then state court decision will stand, unless it is: 1) contrary to clearly established U.S. Supreme Court constitutional case law; or 2) an unreasonable application of such case law. *See* 28 U.S.C. § 2254(d); *Carey v.* Musladin, 549 U.S. 70 (2006); Williams *v. Taylor*, 529 U.S. 362 (2000).).

f) Lack of Counsel

You do not have a right to a lawyer in a § 2254 proceeding. However, if you file a *pro se* § 2254 petition, you can certainly ask the federal court to appoint a lawyer to represent you, and we strongly encourage you to do so. Following this information sheet is a sample *pro se* motion form for requesting appointment of counsel.

In your request for appointment of counsel, you might want to emphasize the procedural complexities of habeas proceedings, your limited access to legal materials, your limited access to the trial and appellate records in your state case, or your inability to conduct factual investigation from prison. You should understand, however, that courts rarely appoint lawyers for inmates in § 2254 cases.

If the federal court will not appoint a lawyer for you, you can also hire an attorney to represent you, if you or your family can afford one.

Finally, you should understand that because there is no right to counsel in § 2254 proceedings, there is also no right to *effective assistance of counsel* in these proceedings. In other words, if your lawyer does not do a good job in your § 2254 case, you will ordinarily not be entitled to another § 2254 proceeding. *Compare Coleman v. Thompson*, 501 U.S. 722 (1991) *with Holland v. Florida*, 130 S. Ct. 2449 (2010).

4) How and Where to File a § 2254 Petition

A § 2254 petition is filed either in the federal district court for the district that includes the county in which you were convicted, or in the federal district court for the district that includes the institution where you are confined. *See* 28 U.S.C. § 2241(d).

In Wisconsin, there are two federal district courts. The Eastern District of Wisconsin includes Milwaukee and the eastern part of the state, while the Western District of Wisconsin includes Madison and the western part of the state. The address of each district court is on its *pro se* petition form, following this information sheet.

5) What to Say in Your § 2254 Petition

If you decide to file a *pro se* § 2254 petition, you should do your best to answer all the questions on the *pro se* form. We also suggest that you focus on telling the story of how you were harmed by what happened in the state court proceedings, and how you would like that injury to be fixed. Tell the story in specific factual detail— don't get bogged down in the law. The facts must be compelling before you are going to convince any federal court to take an interest in the law, so focus on the facts of your case.

6) Appealing the Denial of a § 2254 Petition

There are strict rules limiting a state inmate's ability to appeal the denial of a § 2254 petition. *See* 28 U.S.C. § 2253. You do not have a right to have the Court of Appeals for the Seventh Circuit review a district court's order denying your § 2254 petition. Instead, you have to ask the district court for permission to appeal from its denial, by requesting that the court issue a "certificate of appealability."

If the district court refuses to issue a certificate of appealability, you do have the right to ask the Seventh Circuit to review that refusal to issue a certificate. However, the Seventh Circuit rarely overturns a district court's refusal to issue a certificate of appealability.

There are fairly complicated rules on appealing a district court's judgment or order denying a habeas petition. You have to file a notice of appeal and a "docketing statement" in the district court within 30 days of the denial of your habeas petition. *See* Seventh Circuit Rules 3 and 4. If you do decide to appeal the district court's decision, you can file a motion requesting appointment of counsel at the same time that you file a notice of appeal.

7) Conclusion

It is very hard to obtain federal habeas relief from a state conviction. This has always been the case, and the AEDPAhas made it even more difficult. If there is another remedy still available to you, such as direct appeal or a postconviction motion under Wis. Stat. § 974.06, you may be wise to take that route. But remember to keep in mind the one-year filing deadline for a § 2254 petition.

OUTLINE FOR CONSIDERING A § 2254 PETITION

1) How long ago did your state conviction become "final"? (*See* Part C(1) of the information sheet). If the answer (excluding the time when a state postconviction motion was pending), is "more than one year," then go to #2. If the answer (excluding the time when a state postconviction motion was pending) is "less than one year," then go to #3.

2) If it has been more than a year since your conviction became final, can you show that you are filing within one year of the occurrence of either of the following?

> a) a new federal constitutional rule which is made retroactive to cases on collateral review <u>and</u> which provides a basis for relief in your case; or
>
> b) newly discovered facts which could not have been discovered earlier with due diligence, <u>and</u> which establish by clear and convincing evidence that, if not for constitutional error, no reasonable factfinder would have found you guilty of the offense.

If you can show either a) or b), then go to #3. If you cannot show a) or b), then the federal court will dismiss your § 2254 petition as "untimely."

1) Is this your first § 2254 petition? If the answer is yes, go to #4. If the answer is no, can you show that one of the following has occurred since your previous § 2254 petition?

> a) the United States Supreme Court has issued a new federal constitutional rule which is made retroactive to cases on collateral review <u>and</u> which provides a basis for relief in your case; or
>
> b) newly discovered facts exist which could not have been discovered earlier with due diligence, <u>and</u> which establish by clear and convincing evidence that, if not for constitutional error, no reasonable factfinder would have found you guilty of the offense.

If you can show either a) or b), then go to #4. If you cannot meet either a) or b), then the federal court will dismiss your petition as "successive."

2) If you can satisfy both the one-year deadline requirement and the "successive petition" requirement, are the issues you wish to raise the <u>kind</u> that can be raised in a §2254 petition? (*See* Part 2 of the information sheet). If

the answer is yes, go to #5. If the answer is no, your petition will probably be dismissed with little review.

3) For the federal issues that you do wish to raise in your § 2254 petition, can you show that you have "exhausted" these issues in state court? (*See* Part 3(C) of the information sheet). If the answer is yes, go to #6. If the answer is no, the federal court is unlikely to consider your claims.

4) Is the court going to find that your federal constitutional claims were "procedurally defaulted"? (*See* Part 3(D) of the information sheet). If the answer is no, go to #7. If the answer is yes, the federal court is unlikely to consider your claims.

5) Finally, can you show convincingly that the violation of federal constitutional law in your state court proceeding had the state court error "had substantial and injurious effect or influence" on the outcome? (See Part 2 of the information sheet).