Understanding Oklahoma's Criminal Appeal Process

An Overview of the Criminal Appeals Process from Direct Appeal through Federal Habeas

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DISCLAIMER

This information is for informational purposes only and is not intended to be legal advice. If at all possible, you should consult with a lawyer experienced in criminal appellate law to discuss the specific facts of your case and advise you of your legal options.

INTRODUCTION

Some people are sent to prison not necessarily because of any crime that they committed, but because the criminal allegations were mishandled the once they were made. Over the years I have meet far too many people that would have never seen the inside of a prison if their case would have been handled properly. If you are one of these people the criminal appellate system has the potential to give you another shot at freedom. Most defendants will be unsuccessful with their appeals, but you will never get your conviction reversed, or even know if you could have gotten the conviction reversed, unless you try. The criminal justice system is far from perfect, but with a lot of hard work and the right circumstances it is possible to make the system work for you.

I am an experienced trial and appellate lawyer who has represented hundreds of clients, had over fifty (50) jury trials, won more than a dozen acquittals and reversed more than ten felony convictions after conviction. In almost 20 years of practicing law I have yet to see a simple and easy to understand overview of the process an Oklahoma defendant has to go through to fight their conviction all the way through federal habeas. This is my attempt to provide that simple and easy to understand explanation.

This paper will not give a defendant everything they need to successfully challenge their conviction, but it is my hope that after reading this paper that defendants will understand the basic process and some important concepts that will increase their likelihood of success. If you can't use this information please pass it along to someone that can. If you are a defendant and would like a copy of this writing, or would like an updated copy after I update the writing, feel free to write me or have someone contact me on your behalf and I will send you a copy.

MOST CONVICTIONS WILL NEVER BE REVERSED

Let's start with a reality check. Most convictions are never going to be reversed. Even if the defendant had unlimited resources and could hire the best lawyers in America. I'm not saying this to be negative or to discourage anyone from trying, I'm just being honest about the situation most defendants find themselves in. Just because the odds are against a defendant successfully challenging their convictions does not mean a defendant should not try, it just means they need to work hard to understand the process and work hard to present the best argument they can within the process that exists.

A COMPREHENSIVE PLAN

When fighting a conviction a defendant or someone representing a defendant needs to look at the case comprehensively and develop a plan to fight the conviction all the way through federal habeas if necessary. This starts before direct review, when selecting the issues to appeal and writing the brief for the direct appeal one should make every effort to "federalize" the issues so they can continue to fight the case on federal habeas if possible without having to go through the state post-conviction relief process. A defendant who exhausts all of their state remedies on direct appeal will generally have a more favorable "standard of review" than a

defendant who had to go through the state post-conviction relief process to add issues that were not raised on direct appeal. (This will be discussed in detail below.)

I am not saying a defendant should abandon good issues simply because they were not raised on direct appeal, but I am saying that a defendant generally has a better chance of winning an appeal on federal habeas if the issues were raised on direct appeal in a way that "federalizes" the issues. Generally speaking the earlier an issue was raised (or objected to) the more favorable the standard of review is for a defendant.

There are many cases were defendants were denied relief on an issue at the trial court level, on direct appeal[1], on state post conviction relief and eventually won on federal habeas. However, to win a federal habeas you must either get really lucky or or know what it is that you are doing. There are *pro se* defendants that win federal habeas cases. To have a chance at winning a federal habeas case *pro se* you must work hard to understand the process and the law and then choose your issues carefully.

Additionally, if you successfully make it into federal court on a good issue that the judge believes has merit, federal judges are more likely to appoint you an attorney. Federal courts are much more liberal in appointing counsel to indigent defendants than state courts. But you must learn the law and make every effort to follow the rules, otherwise you are almost certain to be denied.

APPEALS ARE ABOUT PROCESS NOT GUILT OR INNOCENCE

Criminal jury trials are about guilt or innocence, but appeals are about the process that was used when the jury convicted the defendant. This is the **most** important thing to understand about appealing criminal convictions. Once a jury convicts a defendant, all of the presumptions shift, and a defendant will never get his or her conviction overturned if they do not focus on **process** and not on guilt or innocence. At trial a defendant is presumed innocent, however, once a verdict of guilt is returned that presumption is replaced with a presumption that the jury and the judge made the right decisions.

This may seem wrong, and in my opinion it is[2], but right or wrong this is how our system is set up. To win an appeal and reverse a conviction you must persuade an appellate court that the **PROCESS** by which the jury reached the conclusion of guilt was flawed and you will have to meet the applicable "standard of review" for that situation. Additionally, you will have to prove that the legal error committed during the trial was serious and likely effected the outcome of the trial. Small error are know as "harmless error" and will not get a conviction reversed.

In our system for most issues the jury is the "finder of fact"[3]. This means that the jury makes determinations of facts, which means juries make determinations of what evidence they believe and what evidence they do not believe. Because we value the jury system, appellate courts will not easily overturn a jury verdict. Appellate courts are not going to replace the jury's determination of fact with its own determination of fact, unless no reasonable jury could have made the determination the jury made.[4]

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[1] Direct appeal is the first appeal taken after conviction to the Oklahoma Court of Criminal Appeals.

[2] Personally I believe that correcting an unjust verdict should be the most important goal of the appellate process.

[3] There are situations in which the judge makes determinations of fact, this frequently happens in ruling on objections.

[4] If no reasonable jury could have made the determination the jury made, the issue is really a legal issue not a factual issue, because as a matter of law the evidence is insufficient.

To win on appeal a defendant must convince the appellate court that their rights were violated and that the violation of their rights made a difference in the trial, or likely made a difference in the trial. It is generally not enough that a defendant can show that errors were made in his or her trial unless they can show that it likely made a difference in the trial.

To get a federal court to reverse a state court decision, it is even more difficult. First of all you must give the state courts every opportunity that you can to fix the problem. (This is called exhaustion of state remedies.) Second you can only appeal to federal courts if your federal constitutional rights were violated. You can not win an appeal in federal court appealing an issue only based upon state law. Third you must establish that the state appellate court reached a conclusion that was contrary to clearly established federal law or "unreasonable determination of the facts in light of the evidence presented in the state court proceeding."

"Motion for a Time Cut"

There is a common misconception in Oklahoma prisons that there is a "Motion for a Time Cut" in Oklahoma criminal law, such a motion does not exists. There are only 5 ways for a court to change a sentence once it has been imposed. Other than the five ways listed below courts does not have jurisdiction to modify or vacate a sentence. These ways are:

1. Reversal on Direct Appeal (Applies to trial verdicts, both jury and non-jury)

2. Post-Conviction Relief under Title 22 O.S. Section 1080 (Applies to trial verdicts, both jury and non-jury)

3. Federal Habeas for a state prisoner under 28 U.S.C Section 2254

4. Withdrawal of Plea either filed on time or filed out of time (explained below)

5. Sentence Modifications under Title 22 O.S. Section 982 (a)

In addition to the five ways listed above, the only other way a defendant can get a sentence modified is through executive action which would be commutation and/or a pardon, I do not discuss commutations and pardons in this writing because I do not have enough experience in commutations and pardons to feel comfortable explaining the process.

CHALLENGING SENTENCES BASED UPON PLEAS

If you received your sentence after a plea of guilty or no contest the post-conviction relief process is not the way to challenge your sentence. To appeal from a conviction, or order deferring sentence, on your plea of guilty or no contest, you must file in the District Court Clerk's Office of the court that accepted your plea, a written Application to Withdraw your Plea of Guilty within ten (10) days from the sentencing date. You must set forth in detail why you are requesting to withdraw your plea. The trial court must hold a hearing and rule upon your Application within thirty (30) days from the date it is filed. If the trial court denies your Application, you have the right to ask the Court of Criminal Appeals to review the District Court's denial by filing a Petition for Writ of Certiorari within ninety (90) days from the date of the denial. Within ten (10) days from the date the application to withdraw plea of guilty is denied, you must file a notice of intent to appeal and designation of

record pursuant to Oklahoma Court of Criminal Appeals Rule 4.2(D). If you are indigent, you have the right to be represented on appeal by a court appointed attorney.

In considering motions to withdraw a plea the only two things the courts will consider is whether or not your plea was knowingly and voluntarily entered and whether or not the court that accepted your plea had jurisdiction over the charges. If you make a motion to withdraw your plea be sure and explain why it is that your plea was not knowingly and voluntarily entered.

If you failed to file an application to withdraw your plea within 10 days of the sentencing date, then the law presumes that you waived your right to attempt to withdraw your plea and you must first go through a process to overcome the legal presumption of a waiver. Then the process to challenge your sentence and conviction is more complicated. You must file a request to "withdraw your plea out of time" with the trial court. The trial court will consider why it was that you did not file the request to withdraw your plea within 10 days and make a recommendation about whether or not you should be allowed to attempt to withdraw your plea out of time. (The court is considering whether or not you have a good reason for failing to file your motion within the 10 day period.) You must then file with the Oklahoma Court of Criminal Appeals a Motion to Withdraw Plea Out of Time and attach the trial court's recommendation. Only the Court of Criminal Appeals can grant you the right to file your motion to withdraw your plea out of time. If the Court of Criminal Appeals grants that right, then you go back to the trial court and file your motion to withdraw your plea and the case proceeds in the same manner as if it was filed within 10 days.

If you are successful in withdrawing your plea you are then placed in the same position that you were prior to entering the plea, meaning you are still facing the same criminal charges. If your charges was reduced as part of a plea agreement in all likelihood your original charges will be re-instated. This writing is not focused on withdrawing of pleas. This writing is focused on appeal of trial verdicts.

SOME GENERAL CONCEPTS ABOUT APPEALS

Harmless Error

Harmless error is an important concept to understand in the appeal of criminal convictions. Every issue, with the exception of issues that involve "fundamental error", will be subjected to the "harmless error analysis"[5]. To demonstrate prejudice, a defendant must show that the complained of error "worked to his [or her] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." (See *U.S. v. Frady*, 456 U.S. 152, 170 (1982)) To establish prejudice, the applicant will have to establish that but for the error, the outcome would have likely been different. (See *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (defining habeas standard for relief as requiring a showing of a "substantial and injurious effect or influence in determining the jury's verdict")

"Standards of Review" (Presumptions & Burdens of Proof)

Throughout the criminal appellate system there are various "standards of review". These "standards of review" are actually nothing more than presumptions and burdens of proof, depending on the situation the presumption will be different and the burden of proof to overcome that presumption will be different. For

[5] Even if a defendant has an error they believe is harmless error, they should argue "in the alternative" that the error would also require reversal if subjected to the harmless error standard.

example, at a trial a defendant has the presumption of innocence and to overcome that presumption of innocence the state has the burden of proving every element of every offense beyond a reasonable doubt.

But once a defendant is convicted, the presumption of innocence is replaced with presumptions that the jury and the trial judge made the right decisions. After conviction not only is the presumption of innocence gone, after a conviction the defendant bears the burden of proof, the burden of proving that the process by which the jury reached its decision was seriously flawed. If a defendant only establishes that the process was flawed, but fails to establish that the error was serious, than that issue will not survive the harmless error analysis.

Understanding the presumptions and burdens of proof is key to understanding the appellate process. These presumptions and burdens of proof are referred to as "standards of review". The presumptions and burdens of proof change for different types of issues, when the issue was raised and are even different depending upon the Court the issue is being argued in.

Below is a quote from a law review article discussing "Standards of Review":

> It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review. Some courts invoke it talismanically[6] to authenticate the rest of their opinions. Once they state the standard, they then ignore it throughout their analysis of the issues. Other courts use standard of review to create an illusion of harmony between the appropriate result and the applicable law. If an appellate court wants to reverse a lower tribunal, it characterizes the issue as a mixed issue of law and fact, thereby allowing de novo review. If the court wants to affirm, it characterizes the issue as one of fact or of discretion. It then applies a higher (more deferential) standard to the lower tribunal's decision. Finally, some courts disregard standard of review in their analysis entirely.
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> Standard of review has been virtually ignored by legal scholars.The phrase does not even appear in any of the major law dictionaries. Yet, as a concept, it is essential to every appellate court decision. It is to the appellate court what the burden of proof is to the trial court. Ironically, although no trial judge would think of sending a case to the jury without an instruction on the burden of proof, appellate judges often omit the standard of review when they discuss whether or not to overrule a trial court's determination.
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> (See Kelly Kunsch, *Standard of Review (State & Federal): A Primer*, Seattle University L. Rev. Vol. 18, No. 1, 12 (Fall 1994)).

The standard of review is the criterion by which the decision of a lower court will be measured by a higher court to determine whether or not to reverse the decision.

"Standards of review" are so important that sometimes you will see judges arguing about them in the "majority opinion" and the "dissenting opinion". (For an example of this see *Seabolt v. State*, 2006 OK CR 50, 152 P.3d 235 (Okla.Crim. 2006) see also see *Rea v State*, 2001 OK CR 28, 34 P.3d 148 (Okla.Crim. 2001)) The reasons that judges are arguing over the proper "standard of review" to apply to a particular case is because the judges know that often times it is the "standard of review" that ultimately determines whether or not the appeal will be granted or denied.

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[6] As it was possessed or believed to possess magic power especially protective power.

The justification for different "standards of review" can be found in the limited role of the appellate courts are supposed to play in the criminal justice system. Many are surprised to learn that ensuring that justice was done in particular cases is not the overriding concern of the appellate courts. Appellate courts are mainly concerned with deferring to the rulings of the lower courts, correcting serious legal errors made by lower courts, developing the law and setting forth precedent that will guide future cases.

In 2009 in the case of *In re Troy Anthony Davis*, Justice Scalia, who was joined by Justice Thomas, actually argued in a dissenting opinion that "*This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent…*". While Scalia's dissenting opinion was quite controversial, he was just being honest about the reality of the criminal justice system.

Scalia's statement highlights what I believe is wrong with the appellate system, and that is that courts are so focused on their presumptions and burdens of proof ("standards of review") that they miss what should be the real question "whether or not the lower court reached the right decision or not". Having said this, while I believe that the system is wrong in that respect, you can't change the whole system with a single case. So I recommend that a defendant learn how the system actually works and try and use this flawed system to get their conviction reversed. If a defendant refuses to accept the reality of the system they must use to challenge his or her conviction, they are much less likely to get their conviction reversed.

Appellate courts are reluctant to make factual determinations and factual findings and prefer to defer to the trial courts to resolve factual disputes and in making credibility determinations regarding the witnesses' testimony because the trial courts see and hear the witnesses testify.

The reason that appellate courts sit in panels (groups of judges) is based on the theory that more judges, acting as a unit, are less likely to make an error in judgment than one judge sitting alone. It is because of these theories regarding the differences in the trial court and appellate court functions that appellate courts will have varying degrees of deference to trial judges' rulings. This will depend on the type of ruling that is being reviewed.

Standards Of Review Are Not The Same As The Legal Test Used To Determine Legal Error

The "standard of review" is the presumption the appellate court will impose in determining whether to reverse a lower court's decision combined with the burden of proof associated with that presumption. For example, if a trial judge made a ruling concerning the admission of evidence at the trial, the legal test (or standard) for the admission of that evidence could be whether or not the evidence was relevant or not or whether or not the probative value of the evidence was substantially outweighed by the prejudicial value of the evidence. However, on appeal the "standard of review" on this type of issue will typically be an "abuse of discretion standard", which means the appellate court will not reverse the conviction unless the judge's decision was an "abuse of discretion" and the legal error survives the harmless error analysis.

What Are Some Of The Different Standards Of Review?

Although there are many different standards of review and each issue must be researched to determine the proper standard of review for that court and the procedural stage the appeal is at, listed below are some of the more common standards of review to help you understand this concept. The list below will certainly not cover all the potential scenarios, but they will help you understand the issue and recognize the appropriate standard for your issue in the cases that you discover in your research.

De Novo Review

Under "de novo" review, the appellate court gives no deference to the trial court's ruling and considers the issue without any regard for the trial court's decision. With de novo review the appellate court's consider below as if it were considering the issue for the first time. "De novo" review is the standard that is most favorable to a defendant because the appellate court is not deferring to the lower court's decision because with this standard of review the appellate court simply applies the legal test used to determine the issue.

Questions of law are generally reviewed de novo, because the courts of appeals are concerned with defining the law, they generally do not give deference to the trial court's assessment of purely legal questions. For example, questions interpreting constitutional law or the meaning of specific terms in a statute are questions of law.

Where limitations on cross-examination directly implicate a defendant's Sixth Amendment right of confrontation, the Oklahoma Court of Criminal Appeals will review the limitation using the "de novo" review standard. *(See Scott v. State,* 1995 OK CR 14, ¶¶ 21-27, 891 P.2d at 1292-93*)*

Defendants, should try to characterize the lower court ruling as a mistake of law, if there is an opportunity to do so, because if the appellate court agrees that the issue involves a question of law, then there is no deference to the lower court's rulings and they can then start with a "clean slate".

Abuse Of Discretion

With the abuse of discretion standard the appellate court decides if the lower opinion is "unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." (*Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.)

At numerous times during a criminal case, the trial judge must make a number of decisions that require the exercise of discretion. In making these rulings, the judge must weigh many different factors, often it is not clear how heavily any of these factors should be weighed in the decision. In reviewing the trial court's discretionary decisions, the courts of appeals will give great deference to the decisions reached by the trial judge, because the appellate judges were not present at trial and are not in as good a position as the trial judge to evaluate the relevant factors. Appellate courts generally uphold discretionary rulings by trial courts.

However, it is different if a defendant can argue on appeal that the trial judge committed legal error in exercising their discretion. If the trial judge fails to consider the various legal options or fails to consider the relevant legal factors or considers irrelevant factors, the appellate court is more likely to reverse the decision.

A trial court's failure to apply the law correctly in making a ruling is always an abuse of discretion. (see *Koon v. United States*, 518 U.S. 81, 100 (1996); "A district court by definition abuses its discretion when it makes an error of law.").

The extent of cross-examination rests in the discretion of the trial court and reversal is only warranted where there is an abuse of discretion resulting in prejudice to the defendant, this is true as long as the restrictions on cross examination do not implicate the defendants Sixth Amendment right to confront the witnesses against them. (See *Parker v. State*, 1996 OK CR 19, ¶ 13, 917 P.2d 980, 984, cert. denied, 519 U.S. 1096, 117 S.Ct. 777, 136 L.Ed.2d 721 (1997).

The decision whether to disqualify a prospective juror for cause rests in the trial court's sound discretion. (See *Allen v. State*, 862 P.2d 487, 491 (Okl.Cr.1993), cert. denied, 511 U.S. 1075, 114 S.Ct. 1657, 128 L.Ed.2d 375 (1994) and *Black v. State*, 2001 OK CR 5, ¶ 25, 21 P.3d 1047, 1060.)

The manner and extent of a trial court's voir dire is reviewed by the Oklahoma Court of Criminal Appeals under an abuse of discretion standard and the Court will not reverse unless an abuse of discretion is shown. (See *Littlejohn v. State*, 2004 OK CR 6, ¶ 49, 85 P.3d 287, 301)

The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Cipriano v. State*, 2001 OK CR 25, 714, 32 P.3d 869, 873

Clearly Erroneous

A trial judge's factual findings are given great deference because the trial judge has presided over the trial, heard the testimony, and has the best understanding of the evidence. This is also true when a trial judge considers evidence regarding pre-trial motions, such as a motion to suppress evidence. Under the clearly erroneous standard, it is not enough to show that the factual decision was questionable. It is very difficult to overturn a trial court's factual determination, so if your appeal rests solely on a challenge to a finding of fact, your likelihood of success will be low, unless the determination was really a bad decision.

In criminal cases, the due process clauses of the Fifth and Fourteenth Amendments require that criminal convictions be based on sufficient evidence presented at trial. Therefore an appellate court must reverse a conviction if, after considering the evidence in the light most favorable to the state, it finds no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In determining whether or not there was sufficient evidence to convict a defendant at trial, Oklahoma's Court of Criminal Appeals applies the standard of review set forth in *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204, "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." A reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict. See *Washington v. State*, 1986 OK CR 176, ¶ 8, 729 P.2d 509, 510.

Shock the Conscience

A sentence within the statutory range will not be modified on appeal by the Oklahoma Court of Criminal Appeals unless, considering all the facts and circumstances, it shocks the conscience. *Maxwell v. State*, 1989 OK CR 22, ¶ 12, 775 P.2d 818, 820. To "shock the conscience" has been defined to mean manifestly and grossly unjust.

Plain Error

Plain error is another very important concept to understand on appeal. In *Warner v State*, 2006 OK CR 40, 144 P.3d 838 (Okla.Crim. 2006), the Oklahoma Court of Criminal Appeals explained the plain error doctrine.

> As a result of the recognition of our prior jurisprudence, we hold and restate the following: (1) Failure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of trial, waives that error for appellate review unless the error constitutes fundamental error, i.e. plain error; (2) The concept of fundamental error is now codified in the Oklahoma Evidence Code 12 O.S. 1981 § 2104 [12-2104], and shall hereafter be referred to as plain error; (3) Plain error only allows review of an error on appeal which was not preserved through a timely objection at the trial court, but does not automatically constitute reversible error; (4) Plain error, which allows review on appeal in the first instance, will be reviewed by the appellate court in the same manner as error which was preserved by timely objection during the trial; (5) Error preserved by timely objection during the course of trial, together with plain error reviewed for the first time on appeal, will be analyzed to determine if the error requires reversal or whether the error was harmless.

It trying to understand the "plain error" standard may also be helpful to read the decisions of *Simpson v State*, 1994 OK CR 40, 876 P.2d 690 (Okla.Crim. 1994), *Bland v. State*, 2000 OK CR 11, ¶ 49, 4 P.3d 702, 718, cert. denied, 531 U.S. 1099, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001), *Romano v. State*, 1995 OK CR74, ¶ 18, 909 P.2d 92, 109, cert denied, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996) and to read Title 12 O.S. Section 2104, which is referred to in the Warner case cited above.

Ineffective Assistance of Counsel Standard of Review

Claims of ineffective assistance of counsel are most frequently considered for the first time on appeal and have generally not been ruled upon by the trial court, so defendants do not have to overcome presumptions concerning the trial court's factual rulings. The reason this is true is because it is typically raised against the trial attorney by the appellate attorney and not by the trial attorney against themselves. If the issue was raised at the trial level, for some reason, I would expect the trial court's factual findings to be judged by the clearly erroneous standard and the legal conclusions based upon those findings to be judged by the de novo review standard.

However, ineffective assistance of counsel claims have their own test that has presumptions that weigh against a defendant already built into the standard. With the most common type of ineffective assistance of counsel claims, also referred to as "actual ineffectiveness", with this test the courts do not defer the findings of a lower court, but to the decisions of the attorney. (Courts "indulge a strong presumption that counsel's conduct" was constitutionally adequate and that "judicial scrutiny of counsel's performance must be highly deferential.")

The most often quoted case on ineffective assistance (actual ineffectiveness) of counsel is the United States Supreme Court case of *Strickland v. Washington,* if you believe that your case may involve ineffective assistance of counsel I would encourage you to read every United States Supreme Court case that cites *Strickland v. Washington.*

In *Jones v. State*, 2009 OK CR 1, 201 P.3d 869 (Okla.Crim. 2009) the Oklahoma Court of Criminal Appeals has a good discussion of ineffective assistance of counsel claims.

> As for counsel's conduct, we review claims of ineffective assistance under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Warner v. State*, 2006 OK CR 40, ¶¶ 198-199, 144 P.3d 838, 891-892. Strickland sets forth the

two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. Id. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. Id. Unless the defendant makes both showings, "it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." Id. quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Appellant must demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. Id. The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id., citing *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

There are also two other types of ineffective assistance of counsel claims that are much less frequent, but you should be aware of them. These types of ineffective assistance of counsel claims are 1. Constructive Ineffectiveness and 2. Conflict of Interest.

1. **Constructive Ineffectiveness: "The Cronic Standard"** (*United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d. 657, 667 (1984)). With "Constructive Ineffectiveness" you do not have to prove there was actual prejudice, the reason you do not have to prove actual prejudice with the constructive ineffectiveness claims is because they represent scenarios where there is a complete breakdown in the adversarial process. Constructive Ineffectiveness can be found in three situations.

First, when a defendant was completely completely denied counsel during a "critical stage" of their trial. (See, *Wright v. Van Patten*, 128 S. Ct. 743, 746, 169 L. Ed. 2d 583, 588 (2008) (holding counsel's participation in plea hearing by speakerphone should not be treated as complete denial of counsel); *Rickman v. Bell*, 131 F.3d 1150, 1156–60 (6th Cir. 1997) (affirming judgment of ineffective assistance where counsel had abandoned defendant's interests by repeatedly expressing contempt for client at trial and portraying client as crazy and dangerous, effectively acting as a second prosecutor); *Javor v. United States*, 724 F.2d 831, 833–34 (9th Cir. 1984) (finding prejudice inherent when counsel slept through much of the trial). But see also *Tippins v. Walker*, 77 F.3d 682, 683–85 (2d Cir. 1996) (holding ineffective assistance claim should be judged under *Strickland* when counsel slept through the trial).

Second, a defendant can claim ineffective assistance under *Cronic* if their lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing." The lawyer's failure to test the state's case must have been "complete," meaning they put up no opposition whatsoever. (See *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914, 928 (2002) (holding counsel's failure to produce mitigating evidence and waiver of closing argument did not constitute a complete failure to test the prosecutor's case and that *Strickland* applied rather than Cronic). The *Cronic* standard is a difficult standard to meet, and a defendant that believes that he or she may have a claim under *Cronic* may do well to argue the issue in the alternative (I would make it a separate claim with a separate issue number) that the same behavior was a violation of the *Strickland* standard. For example, counsel's decision to concede guilt in a capital trial and focus instead on the sentencing phase, even though his client entered a "not guilty" plea, is not automatically a complete failure to subject the prosecution's case to adversarial testing, because that could be a strategic decision based upon the evidence. Compare *Florida v. Nixon*, 543 U.S. 175, 189, 125 S. Ct. 551, 561, 160 L. Ed. 2d 565, 579–80 (2004) ("The Florida Supreme Court's erroneous equation of [counsel's] concession strategy to a guilty plea led it to [wrongly apply the Cronic standard] in determining whether counsel's performance ranked as ineffective assistance."),

with *State v. Carter*, 270 Kan. 426, 440–41, 14 P.3d 1138, 1148 (2000) (finding a breakdown in the adversarial system of justice when counsel premised defense on defendant's guilt against his client's wishes).

Third, you can also make a *Cronic* claim if the circumstances of your trial made it highly unlikely that any lawyer could have provided effective assistance to you. (Compare *Powell v. Alabama*, 287 U.S. 45, 56–58, 53 S. Ct. 55, 59–60, 77 L. Ed. 158, 164–65 (1932) (finding a denial of effective counsel when defendants, who were "young, ignorant, illiterate, [and] surrounded by hostile sentiment," were tried for a capital offense, and when defense counsel was designated only minutes before their trials began and thus had no opportunity to investigate the facts or to prepare), with *United States v. Cronic*, 466 U.S. 648, 658–67, 104 S. Ct. 2039, 2046–51, 80 L. Ed. 2d. 657, 667–73 (1984) (rejecting defendant's constructive ineffective assistance argument based on counsel's lack of experience in criminal law or jury trials, and 25-day preparation time).

2. **Conflict of Interest:**

In addition to actual and constructive ineffectiveness claims, a defendant can also argue that their lawyer provided ineffective assistance due to a conflict of interest. To establish that a lawyer had a conflict of interest, a defendant must show that the lawyer had an actual conflict of interest that "adversely affected" the lawyer's performance. (*Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 348 (1980); see also *United States v. Iorizzo*, 786 F.2d 52, 57–58 (2d Cir. 1986) (applying *Cuyler* and finding that defendant's trial counsel had a conflict of interest because he had previously represented the state's key witness on a related matter and failed to effectively cross examine this witness after the trial judge had told counsel that he might encounter ethical problems if he pursued certain lines of questioning). A conflict of interest can also happen when one lawyer represents more than one co-defendant for the same crime. (A conflict of interest may also arise in other situations, including: if a lawyer represented a government or defense witness in a related trial, if the victim was a client of the defendants lawyer, or if defendant's lawyer collaborated or had a connection with the prosecution. See, e.g., *Perillo v. Johnson*, 205 F.3d 775, 808 (5th Cir. 2000) (finding actual conflict existed when counsel represented a co-defendant cooperating with the state as witness against the accused); *United States v. O'Leary*, 806 F.2d 1307, 1315 (7th Cir. 1986) (holding actual conflict existed when counsel was prosecutor's campaign manager for State's Attorney election, and counsel colluded with prosecutor and a police officer to get defendant to retain him because it would be good for the campaign). <u>The conflict must be actual, not just potential</u>. This means that a defendant's lawyer must have taken some action, or refrained from acting in some way, which harmed the defendant and benefited the other person. (See, e.g., *Burger v. Kemp*, 483 U.S. 776, 783–85, 107 S. Ct. 3114, 3120–21, 97 L. Ed. 2d 638, 650–51 (1987) (holding that petitioner failed to show actual conflict when his lawyer's partner was appointed to represent co-defendant, because "defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation"); *Edens v. Hannigan*, 87 F.3d 1109, 1116 (10th Cir. 1996) (holding actual conflict of interest existed when counsel made no effort to present a defense for client because it would have harmed co-defendant); *Burden v. Zant*, 24 F.3d 1298, 1305–07 (11th Cir. 1994) (finding ineffective assistance where counsel, representing two co-defendants, made an agreement with the prosecutor that one co-defendant would testify against the other in exchange for not prosecuting that co-defendant); *Dawan v. Lockhart*, 31 F.3d 718, 721–22 (8th Cir. 1994) (finding ineffective counsel where a public defender also represented co-defendant who had pleaded guilty and made statements tying the client to the crime) A defendant does not have to show prejudice if their lawyer had an actual conflict of interest that adversely affected the defendant; instead, prejudice is presumed. Conflicts of interest <u>should never happen</u>, unfortunately they do. It can be a good issue if a defendant has the right facts in their case.

Mixed Questions of Fact and Law

Some issues are mixed questions of fact and law. The questions of fact will generally be reviewed using a "clearly erroneous" or "clear error standard" and the questions of law will be reviewed de novo.

Shifting Presumptions and Burdens

The same issue will have different presumptions and different burdens ("standards of review") at various stages of the criminal justice system, this is important to understand because when you are appealing a conviction it is not enough to just argue the rule of law that you are claiming caused the legal error. You must also address the "standard of review" that is appropriate for the alleged legal error and you must generally also address the "harmless error" issue.

Let me give you an example so you can start to understand what I am talking about. In our example we will say the defendant is on trial for a murder of his child under Oklahoma's child abuse murder statute. (21 O.S. Section 701.7 (c)). Let's say the state seeks to introduce evidence that the DHS worker concluded that abuse had occurred and the defendant's attorney objects to the introduction of this evidence.

This evidence should not be admissible in a criminal trial, in my opinion, because it invades the province of the jury (meaning its up to the jury to decide whether abuse occurred) and it creates a substantial risk of unfair prejudice and confusion of the issues because the DHS workers uses a lower standard in reaching her conclusions than the jury does and we do not know whether or not she reached her conclusion based upon admissible or even reliable evidence. Whether or not this evidence was admitted at the trial court level would be determined by Title 12 O.S. Section 2401, 2402 and 2403 of the Oklahoma evidence code, this would define the legal rules for the admissibility of this evidence at trial. In arguing the admissibility at trial a trail lawyer would address the following rules of evidence.

Section 2401 defines what is relevant evidence and reds as follows:

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." And section 2402 says that "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Oklahoma, by statute or by this Code. Evidence which is not relevant is not admissible."

So at trial most lawyers would start by arguing that the fact that the DHS worker concluded there was abuse was not relevant because it does not "have a tendency to make the existence of" abuse more likely. The DHS workers conclusion is simply the DHS worker's opinion and should not be admitted. Then the lawyer would argue that under Title 12 O.S. Section 2402 that "evidence which is not relevant is not admissible." And therefore the evidence should not be admitted because it is not relevant.

As a backup argument, or in the alternative, most lawyers would also argue the evidence should also be excluded under Title 12 O.S. Section 2403 because the "probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confession of the issues, misleading the jury". Section 2403 reads "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of

cumulative evidence, or unfair and harmful surprise…." So most lawyers would argue as a backup that the "probative value" of the DHS workers conclusion is substantially outweighed by danger of unfair prejudice and confusion of the issues."

So lets talk about presumptions and burdens of proof. At the trial court level, if the judge determines the evidence is relevant (meaning the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Title 12 O.S. Section 2401)) than the legal presumption is the evidence should be admitted (Section 2402 says "All relevant evidence is admissible") and the defense would have the burden of proving that the "probative value of the evidence is substantially outweighed "by danger of unfair prejudice and confusion of the issues." (Section 2403) These are the presumptions and burdens of proof at trial, essential the presumptions and burdens associated with the legal rules surrounding the admissibility of this evidence at trial, however, the presumptions and burdens of proof for this issue are different on direct appeal because on appeal a defendant must contend with the "standards of review" that are used in evaluating the trial judge's decisions.

So in our example, the judge allows the evidence to be introduced, the defendant is convicted and the defendant appeals. On direct appeal at the Oklahoma Court of Criminal Appeals this issue will be determined by an "abuse of discretion standard". (An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.)

So on direct appeal the issue is no longer a question of whether or not the probative value of the admitted evidence is substantially outweighed by the "danger of unfair prejudice and confusion of the issues." Because of the "standard of review" or as I refer to them the presumptions and burdens of proof on appeal, the issue on appeal is no longer about whether or not it was legal error to admit the evidence at trial. The issue on appeal is whether or not the trial court judge abused his or her discretion in admitting the evidence. Meaning the defendant would have to prove more than the probative value of the admitted evidence is substantially outweighed by the "danger of unfair prejudice and confusion of the issues", but that the trial judge's conclusion that the evidence was admissible was "unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. (see *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170). On appeal there is a presumption that the trial court made the right decision (relevance and materiality of evidence is left to the trial court's sound discretion, see *Owens v. State*, 1983 OK CR 85, 665 P.2d 832, 835) and to overcome that presumption there is a a higher burden than they had at trial to exclude the evidence.

Because of the presumptions on appeal and the higher burden of proof ("standard of review") it is entirely possible that the judges on the appellate court could believe that the evidence should not have been admitted at trial, but that the judge's decision to admit the evidence was not "an abuse of discretion" and deny the claim because the defendant could not meet their burden on appeal. The court could find this even though

they would have made different a decision at the trial court level.[7] This is why I say "appeals are about process not guilt or innocence."

And even if a defendant is able to meet the abuse of discretion standard regarding this issue on appeal, they are only halfway there. The issue must also survive the "harmless error" analysis describe above. In other words even if they establish that the judge abused their discretion in admitting the evidence they still must prove that it made a difference in the outcome of the trial or would have likely made a difference in the trial.

So lets say the defendant loses this issue on direct appeal, than that issue is exhausted in state court[8]. A defendant can not come back on state post conviction relief (Title 22 OS Section 1080) and re-urge the argument. [9] The defendant could raise this issue in Federal Habeas[10], but once again the presumption and the burden of proof becomes even tougher to overcome.

To overcome a ruling made by a state appellate court in federal court a defendant must establish that the ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or that the decision was based upon an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." This is a tougher standard, not only does the decision have to be wrong, it must be contrary to clearly established Federal law, as determined by the United States Supreme Court or it must involve an unreasonable determination of the facts.

First there is a presumption the trial court made the right decision and now that they state appellate court affirmed the decision there is now another presumption that the state appellate court reached the right decision. As a defendant's case progresses through the criminal justice system, it generally becomes harder and harder to win the case because of the increasing burdens. I say generally, because there are instances even in federal habeas where the courts will not defer to the lower court rulings, but you will need to research the "standard of review" for each issue depending on the findings made by the lower courts to determine the standard in your case.

WAIVER, PLAIN ERROR & INEFFECTIVE ASSISTANCE OF COUNSEL

Let's take the same issue, the admission of the DHS worker's opinion, and analyze it in a situation where the trial attorney did not object to the introduction of the DHS worker's opinion. Failure to object is a waiver of all issues except for "plain error". Now the defendant has tougher presumptions and a more difficult burden of proof because the "plain error" standard of review is a more difficult standard.

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7 I know this may seem crazy that the appellate court could actually believe the trial judge made an error but still not reverse the conviction because it was not bad enough of a mistake, but this is how the system works.

8 *Res Judicata* means issues that were raised and decided on direct appeal are barred from further consideration on post conviction relief, basically the courts are saying we already told you no once don't ask again. (See *Paxton v. State*, 910 P.2d 1059.)

9 Post-conviction review does not afford defendants opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings. *Trice v State*, 912 P2d 349 (1996) and Defendants may not obtain review of issue raised previously by presenting it in a slightly different manner on post conviction relief. *Williamson v. State*, 852 P2d 167 (1993). "The Post-Conviction Procedure Act is not intended to provide a second appeal." *Richie v State*, 957 P.2d 1192 (1998)

10 Technically, this issue as explained could not be raised in federal court because it is based solely on state law, the issue would have had to been "federalized" (argued to involve a constitutional right). But this fact does not matter for our example.

Now with this same legal issue, whether or not the DHS worker's opinion should have been admitted will be analyzed under the "plain error" standard[11], which means the presumptions against the defendant are stronger and the burden the defendant must prove is more difficult. Because the defendant's trial attorney did not object to the introduction of the evidence now the appellate court will find that the error is waived except for "plain error". Plain error is described as:

> …..this Court determines whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. Id. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. See also *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.
>
> (See *Fredrick v State*, 400 P.3d 786 (Okla.Crim. 2017))

So now because the trial attorney did not object to the introduction of the evidence, with the same evidentiary issue (the admission of the DHS worker's opinion), on appeal the defendant must prove that the error was "plain or obvious" and that the error "seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." That is a tougher standard than it would have been if the trial attorney would have objected. Remember, generally speaking, the later in the process an issue is raised, the more difficult the presumptions are to overcome and the higher the burden of proof or tougher "standard of review" will be applied; if an issue should have been raised at trial and was not raised until later in the process on appeal the "standard of review" will generally be tougher. And if this issue is denied on direct appeal, on federal habeas the tougher habeas standard (the state appellate court decision was against clearly established federal law or involved unreasonable determination of the facts in light of the evidence presented in the State court proceeding) will apply to this new tougher standard of plain error.

Often times when there is a failure to object by the trial counsel the appellate attorney will raise the issue as "ineffective assistance of counsel". This doesn't necessarily solve the problem of the tougher "standard of review", because the presumptions and burden of proof associated with claims of ineffective assistance of counsel[12]. To prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. In order to show ineffective assistance of counsel, a defendant first must show that the attorney's representation fell below "an objective standard of reasonable-ness." Second, a defendant must prove that the attorney's inadequate representation prejudiced the defendant. A defendant is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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[11] The "plain error standard" is a standard of review generally used when an attorney fails to object at trial.

[12] Often times state evidentiary issues are raised as ineffective assistance of counsel (IAC) because it raises the issue of whether the defendant's 6th Amendment constitutional right to effective assistance of counsel was violated and by raising an issue as IAC the issue is "federalized" and creates an issue that could potentially be successful in a federal habeas proceeding.

Once again there are strong presumptions that make these claims difficult because reviewing courts "indulge a strong presumption that counsel's conduct" was constitutionally adequate and that "judicial scrutiny of counsel's performance must be highly deferential." With ineffective assistance of counsel claims there is a very difficult burden of persuasion or "standard of review".

The issue becomes even more difficult if the issue was not raised by both trial counsel and appellate counsel. In that situation a defendant must argue ineffective assistance of appellant counsel and must prove that no reasonable appellate lawyer would have failed to raise an issue and that the defendant would have prevailed on the claim if it would have been raised.

Keep these General Principles in Mind when Planning an Appeal

1. After conviction all of the burdens shift against the defendant, except for issues that involve de novo review. (Primarily, legal questions.)
2. Legal decisions of the trial judge are easier to get reversed than factual findings, because with pure questions of law the more favorable standard of de novo review is used.
3. Not taking into account the quality of the various courts, generally speaking the higher a defendant goes into the criminal appellate process the more difficult it becomes to reverse the convictions because the presumptions and burdens of proof become more difficult for the defendant.
4. Generally, speaking the later in the process that an issue is raised, the more difficult it is to prevail on that issue.
5. All issues that do not involve fundamental error must survive the "harmless error" analysis.

Fighting a Criminal Case After Direct Appeal

To continue to fight a criminal charge after losing a direct appeal, you must have an issue that qualifies for either post-conviction relief under the Oklahoma state statute Title 22 O.S. Section 1080 or federal habeas under Title 28 United States Code Section 2254. It is important to understand that both of these avenues are restricted to certain types of appeal issues.

Oklahoma State Post-Conviction Relief Act

Oklahoma's post-conviction relief act can be found at Title 22 O.S. Section 1080 the act reads as follows:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
>
> (b) that the court was without jurisdiction to impose sentence;
>
> (c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Understanding Oklahoma's Post-Conviction Relief Act

The Oklahoma Post-Conviction relief act is so important because before you can be granted relief through federal habeas, the claims raised must have been exhausted in state court first. When I say exhausted, I mean you must have used every process available in the state system to challenge the conviction and you must have raised that particular issue at the state court level and given the state court an opportunity to decide the issue. Furthermore, you must have raised the issue arguing federal law, not state law.

Ideally speaking an attorney handling the direct appeal for a defendant would raise all of the issues that could be raised in both state and federal court in a manner that would allow a defendant to go directly into federal court on federal habeas if he or she had an issue that they could pursue on habeas. If all of the issues are raised on direct appeal are argued in a manner that "federalizes" the issue than state post conviction is not necessary and the issues are cleaner because it removes a level of complexity. However, in my experience that generally does not happen. State appellate lawyers generally focus on state issues and do not typically look towards a federal habeas.

This adds layers of complexity because of waiver and *res judicata*. Waiver means that post-conviction claims which could have been raised on direct appeals, but were not raised, are generally considered waived. (See *Walker v. State*, 933 P2d 327.) *Res Judicata* means issues that were raised and decided on direct appeal are barred from further consideration on post conviction relief, basically the courts are saying we already told you no once don't ask again. (See *Paxton v. State*, 910 P.2d 1059.)

This may seem like a catch 22 and it is. If an issue could have been raised on direct appeal and was not it is deemed to have been waived[13] and if it was raised and denied than it is "res judicata" and it can not be argued again. Under Oklahoma law, post conviction relief is reserved only for rare set of circumstances where a particular claim could not have been raised on direct appeal. *Brecheen v Reynolds*, 41 F.3d 1343, (see also *Paxton v. State*, 910 P.2d 1059.)

[13] There are issues such as ineffective assistance of appellate counsel and newly discovered evidence that avoid the waiver issue on post conviction, but these issues come with their own problems.

Post-conviction review does not afford defendants opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings. *Trice v State*, 912 P2d 349 (1996) and defendants may not obtain review of issue raised previously by presenting it in a slightly different manner on post conviction relief. *Williamson v. State*, 852 P2d 167 (1993). "The Post-Conviction Procedure Act is not intended to provide a second appeal." *Richie v State*, 957 P.2d 1192 (1998)

So if after reviewing a case an issue is uncovered that should have been raised on direct appeal and that could serve as a basis for federal habeas relief, than you must look for a way to argue the issue in a way that will not be barred by waiver and that will federalize the issue. Remember though, because the issue was raised later on in the process this will generally mean that the presumptions and burdens of proof will be more difficult.

This is why lawyers working on post-conviction relief cases look for issues such as ineffective assistance of appellate counsel and newly discovered evidence. If you can argue that appellate counsel was ineffective by not raising a particular issue than that excuses waiver. There are a number of ways lawyer may attempt to get around barriers to the issues they need to pursue to have a chance at getting relief. But with all of these strategies to get an issue into the process that was previously abandoned the presumptions and burdens of proof are more difficult.

If this seems complicated it is. If it seems like this system was constructed to stop people from getting their convictions reversed, it was. Our criminal justice system favors finality and the system is designed to make it very difficult to get a conviction reversed. It helps to think of the criminal justice system as a funnel, the defendant has the biggest chance at the beginning of the system, as the case proceeds through the system the chance for relief gets smaller and smaller.

Ideally speaking state post-conviction would not be part of a successful federal habeas claim, because all of the issues would have been properly raised within the direct appeal and therefore the issue would have been exhausted in state court and the defendant would go straight into federal habeas. But, if the issues were not raised on direct appeal this is generally a defendant's last opportunity to get an issue into the process before federal habeas, so it should be explored. I would never recommend abandoning a good issue for federal habeas simply because simply because going through the state post conviction relief process would create a tougher standard of review for that issue. If a defendant has a good issue it should be pursued no matter what the standard of review is. It only takes one good issue to get a conviction reversed.

Federal Habeas Corpus

In my experience there is no doubt that Oklahoma state courts give defendants more rights than federal courts give them, however, the federal courts are more serious about enforcing those rights. There are numerous cases that were affirmed through the state court process only to be reversed by the federal courts. But to have a chance at having your conviction reversed by a federal court, you have to have the right facts and issues in your case (something you have little to no control over) and you have to follow the procedural rules and make sound legal arguments (something you have total control over).

Habeas corpus is guaranteed by the Constitution to federal prisoners whose arrest, trial, or actual sentence violated a federal statute, treaty, or the U.S. Constitution. Because the Constitution is the only federal law that governs state criminal procedures, if you are a state prisoner, you must show a violation of the U.S. Constitution for your habeas petition to succeed. As a state prisoner, you can challenge your conviction or sentence by petitioning for a writ of habeas corpus in federal court. The flow of the case will be:

State Direct Appeal

↓

State Post-Conviction Appeal (If issue is not already Exhausted)

↓

Federal Habeas Claim

As a state prisoner, to obtain federal habeas relief, a defendant must show their rights were violated, that the violation was not harmless, and that the state court's ruling that their rights weren't violated or any violation was harmless was an unreasonable decision that was contrary to clearly established federal law or involved unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

After a defendant has proven that the proper standard of review was met (presumptions and burdens), a defendant still must show that the error effected the outcome of the trial (the harmless error standard). To show harm, a defendant needs to convince the court that the violation may have negatively affected the outcome of their trial. Also defendants will need to show that the state court was incorrect in failing to find that the violation occurred. If the state court ruled there was a violation, but it was "harmless error", a defendant will need to show that its finding of "no harm" was unreasonable or contrary to federal law or involved unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Prejudice is an important concept in both the state appeal process and habeas proceedings. It means that there is a "reasonable probability" that the result of a defendants trial would have been different but for the error.

State prisoner defendants need to overcome the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") standard, which limits federal courts' ability to grant habeas relief when reviewing claims from state prisoners. Defendants must show the state court appellate decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or that the decision was based upon an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

This is a very high standard and it is not easily met. The federal courts do not like to overturn state court decisions. This means that to get federal habeas relief, you cannot just show the federal court that the state court was wrong (meaning that they made a legal error)—you must show that the state court's ruling was "unreasonable" or "contrary" to the Supreme Court's interpretation of federal law or involved unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

How the federal court will apply the AEDPA standard of review will depend on how the state court handled a defendants claims in state court, either on direct appeal and/or post-conviction. <u>If the state court made a determination about certain issues</u>, then the federal court will apply the AEDPA standard of review to the state court's decision-making process. The federal court will look to see if the state court's decision was "unreasonable" or "contrary" to the Supreme Court's interpretation of the law or involved unreasonable determination of the facts in light of the evidence presented in the State court proceeding. In addition to

demonstrating that the state court's decision-making process was incorrect, a defendant still needs to provide facts that show that the state court's ultimate determination was incorrect.

Federal statutes and case law have created nine prerequisites[14] to federal habeas relief. To get relief using the federal habeas system a defendant must have the following:

First they must be in custody (or suffering the effects of a conviction)

Second they must raise a cognizable (within the jurisdiction of the Court) claim

Third the habeas petition must be filed within the applicable statute of limitations

Fourth the claims raised must have been exhausted in state court (See *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 302 (1984));

Fifth the claims must not be procedurally defaulted.

Sixth the claims must be based on violations of the Constitution, federal law, or treaties. (Violations of state law alone are not sufficient to win a federal habeas claim. See 28 U.S.C. § 2254(a))

Seventh if the constitutional right upon which the violation is based is newly recognized, issues of retroactivity must be considered.

Eighth if the constitutional right is not new, it will form the basis for relief only if the state court decision was contrary to or an unreasonable application of clearly established federal law.

Ninth the error must have had a substantial and injurious effect or influence on the jury's verdict. (harmless error analysis.) To demonstrate prejudice, a defendant must show that the constitutional violation "worked to his [or her] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." (See *U.S. v. Frady*, 456 U.S. 152, 170 (1982)) To establish prejudice, the applicant will have to establish that but for the error, the outcome would have likely been different. (See *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (defining habeas standard for relief as requiring a showing of a "substantial and injurious effect or influence in determining the jury's verdict")

Fourth Amendment Claims (Search and Seizure Claims)

Most claims based on Fourth Amendment violations are not within the jurisdiction of the federal courts in habeas corpus actions because of the rule set forth in *Stone v. Powell*. In that case, the U.S. Supreme Court barred applicants from pursuing relief based on Fourth Amendment claims in habeas proceedings when the applicant was represented by competent counsel and had a full and fair opportunity to litigate the claim in state court. *Stone v. Powell*, 428 U.S. 465 (1976). The rationale behind the *Stone* case is that the purpose of the Fourth Amendment's exclusionary rule (mainly the deterrence of future unlawful police conduct – would not be furthered by applying the rule on collateral review of cases in which full and fair consideration of the claim had already been given by the state courts). Many lawyers, including myself, strongly disagree with the Supreme

[14] a thing that is required required as a prior condition for something else to happen or exist.

Court's decision and reasoning in *Stone v. Powell,* however it is the law and a defendant needs to plan their appeal accordingly. There are some exceptions to *Stone v. Powell*, but there are not many cases that will fit into those exceptions.

What is Required to Get Federal Relief

Habeas applicants who satisfy the many procedural requirements previously discussed are entitled to relief **only when** the conviction is contrary to clearly established federal law, or that involved an unreasonable application of clearly established federal law" (was "based on an unreasonable determination of the facts in light of the evidence presented") **and when they demonstrate actual prejudice**. (See *Brecht v. Abrahamson*, 507 U.S. 619 (1993))

"Demonstrate actual prejudice" is a requirement that a defendant shows that it actually mattered in his or her particular case. When I say "actually mattered" what I am really saying is if this would not have happened in this trial it would have made a difference. Courts also refer to this as the "harmless error" analysis. It is not enough that a defendant shows that in his case that clearly established federal law was violated or that the state appellate court made an unreasonable determination of the facts, a defendant must show that it mattered in their case.

For example, lets say that a defendant is seeking federal habeas for a conviction, and that at the trial the state introduced multiple eye witnesses, a video of the defendant committing the crime, DNA evidence, a note written by the defendant explaining how the defendant intended on committing the crime, and the murder weapon; in a case like that it is probably not going to matter that the police illegally obtained a confession. Why? Because it would not have made a difference. Even if the confession was excluded from the trial the state still had overwhelming evidence of the defendant's guilt and the outcome would have been the same. Generally speaking the stronger the state's case against a defendant, the more difficult it is to get the conviction reversed even if there was legal error.

This means that a defendant could have had evidence introduced at their trial that was obtained in violation of their Constitutional rights and that alone is not enough to get the conviction reversed.

The cause-and-prejudice standard requires that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." (See 28 U.S.C. § 2254(e)(2))

A state court decision is "contrary to" U.S. Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or if the state court "confronts a set of facts that are materially indistinguishable from a decision of the [U.S. Supreme] Court and nevertheless arrives at a result different from precedent." *Williams v. Taylo*r, 529 U.S. 362, 406 (2000)

A state court's decision involves an "unreasonable application of clearly established Federal law" when its application is objectively unreasonable. For example, an unreasonable application occurs when a state court correctly identifies the applicable legal principle but unreasonably applies the legal principle to the facts. A federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)

Unreasonable is not the same as incorrect. "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." See P*rince v. Vincent*, 538 U.S. 634 (2003) (though lower court finding was incorrect, it was not objectively unreasonable given that other courts reached similar conclusions).

A federal court may also grant relief based on a state court's "unreasonable determination of the facts in light of the evidence presented in the state court proceedings." (See 28 U.S.C. § 2254(d)(2)) In *Wiggins v. Smith*, the U.S. Supreme Court found that a state court had both unreasonably applied clearly established federal law and unreasonably determined facts in the state court proceedings. The claim in *Wiggins* was an ineffective assistance of counsel the U.S. Supreme Court held that even if the legal standard used was correct, the decision involved an unreasonable application of clearly established law by adding an additional requirement.

A federal court may only grant relief based on a state court's determination of facts if the state court adjudication "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." 28 U.S.C. § 2254(d)(2) Moreover, state court factual determinations are presumed to be correct, 28 U.S.C. § 2254(e)(1) and may be rebutted only by clear and convincing evidence. The presumption of correctness applies only to state court factual determinations. (See *Townsend v. Sain*, 372 U.S. 293 (1963); see also *Miller v. Fenton,* 474 U.S. 104 (1985)). The presumption does not apply, for example, when the state court fails to resolve the factual issues or to provide for a full and fair hearing. So a defendant who has a case where the state court did not make factual findings has a lower burden of proof as it relates to the factual determinations than a defendant in which the state court made a factual finding.

Developing a Strategy for Fighting Convictions

If a defendant has the resources, the best thing for them to do is to hire a lawyer that they trust to handle their direct appeal, a defendant can hire a lawyer to handle their direct appeal after a court appointed lawyer has been appointed on direct appeal as long as they have time to write the brief before it is due.

If a defendant does not have the money to hire a lawyer and they lose their direct appeal than they will have to represent themselves in most cases. So how should a defendant go about preparing for the appeal?

First thing is you need to keep in mind that you must start immediately, because there are time limitations associated with the AEDPA. (1 year from time conviction becomes final, excluding time pursuing post-conviction relief.) A defendant needs to research the statute of limitations associated with the AEDPA and make sure they plan accordingly.

Typically A Four Step Process

1. Gather your file .
2. Review the file to identify all potential issues.
3. Research the law to the narrow the issues to the issues that are viable.
4. Write the brief including the good issues and file the brief.

Gathering Transcripts, Copies of Exhibits and Original Record

You have to have a copy of your transcripts and the Original Record (pleadings filed in the case) and any exhibits. Most defendants do not have copies of their transcripts because the agencies representing indigent

defendants on appeal do not like to pay for the copying of transcripts.[15] You can write your appellate attorney and ask them to send the transcript to you or to allow a friend or family member to copy the transcript. (I would keep a copy of this letter, it may be an issue later on.)

Defendants file motions in court all of the time for transcripts to be provided to the defendant at "state expense" after their direct appeal has been denied, judges routinely ignore and or deny these motions. These transcripts have already transcribed and they are in the clerks office, so in my request for transcripts I would point that out. If you have a trial judge that wants to be fair, but is reluctant to order the court fund to pay for transcripts, it just might make a difference if the judge understood that the transcripts had already been transcribed and are just sitting in the file. It may also make a difference to a federal judge later on if it only costs the state a minimal amount of money, (only mailing), to provide the transcripts to an indigent defendant and the state still refused. (Remember this is an equal protection argument, meaning the problem is that indigent defendants do not have the same access to the criminal justice system as non-indigent defendants.)

If the defendant's appellate lawyer returned their copy to the clerk's office than there are two copies of the transcripts in the file. If the appellate attorney returned their copy I would ask the court to order the clerks office to mail the defense copy of the transcripts to the defendant. If the appellate attorney had not returned the transcripts I would ask the attorney for the entire file. Either way, the defendant should be entitled to the copy of the transcripts that his lawyer had to do the direct appeal.

Sadly many trial courts stonewall defendants, they don't want them to have copies of the transcripts because they don't want to deal with the inevitable post-conviction applications that will result from turning over the transcripts. But you have to have a copy of the transcripts.[16]

It may also be possible to have the court clerk copy the transcript for a family member and mail it to a defendant. This will cost you, but it is cheaper (generally 25 cents a page) than buying a copy from the court reporter. Some court clerks will not allow you to copy the transcripts out of the file, but some will.

You can always purchase a copy of the transcripts from the court reporter. Generally they charge $1 a page, but you can negotiate with them and I have seen some court reporters cut people a deal. Court reporters like selling copies of transcripts they have already been paid to transcribe because all they have to do is print the transcripts.

In addition to the transcripts, the original record and copies of the exhibits you will need the briefs filed in the direct appeal and the opinion of the court of Criminal Appeals denying the direct appeal. If you can get it you will also want copies of the police reports or the "discovery" in the case.

If I were a defendant who wanted to fight my conviction after direct appeal and I had to fight it on my own, I would ask my family to buy a copy of my transcripts and get copies of the pleadings in my district court

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[15] If I were a defendant being represented on appeal by a court appointed attorney I would write a letter requesting a copy of the transcripts and original record before the brief was filed. If I had to I would offer to pay for the copying expenses.

[16] While I have never had the need to research this issue, I could see a scenario where a defendant made a due process and equal protection argument based upon the trial court's refusal to allow defendant access to their transcripts that had been transcribed and are just sitting in the file. Such an argument would be started at the trial court level on post conviction and taken up to the Court of Criminal Appeals before taken to federal court. This may not get the conviction reversed, but it may cause a court to order the transcripts be given to an indigent defendant or even possibly excuse a waiver for not raising an issue.

and appellate file instead of asking them to "put money on my books". The average direct appeal takes at least a year, I would start trying to obtain a copy of my transcripts as soon as they had been transcribed and I would not wait for the direct appeal was denied before I would start working on getting together a copy of my file. Especially if I knew I would have to pursue post-conviction and federal habeas on my own, I would want to have my file together and I would already be learning the law just in case that became necessary.

If you can not get your transcripts any other way and you ask the Court to give you your transcripts and the Court denies that request, you have to appeal that order. Do not let that order sit. If I was a defendant in state prison that did not have transcripts, and could not get the transcripts any other way and the trial judge refused to give me the transcripts that were already transcribed, I would appeal that order! (Beware of the time limitations for filing notices of intent to appeal for final orders.) I would probably appeal that order to the Court of Criminal Appeals seeking a Writ of Mandamus, if I lost the writ at the Court of Criminal Appeals I would include the transcript issue in my habeas brief and make sure an explain my efforts regarding the transcripts in any post-conviction relief motion and in my federal habeas brief.

If I absolutely could not get a copy of the transcripts and I was a pro se defendant in prison I would proceed without them and make sure I explained in my brief why I did not have transcripts and every effort I took get the transcripts. I would then state the facts as fairly and clearly as I could remember them. You can get some citations to facts from the appeal briefs filed in the case. (I would probably include the lack of access to transcripts as a separate appeal issue in my post-conviction and or habeas petition and brief and be sure and explain that you have been denied access to the transcripts that have already been transcribed.)

Identify All potential issues

After you gather everything you want to start looking for issues. By this point you may already know the issues you want to raise, that is fine, but you still need to go through the process of looking for more issues. Start with making a list of everything that could possibly be an issue.

I would start by making a list of everything that was objected to at trial or before trial in the form of written objections. The objections the defense won will generally not serve as a basis for appeal, but make sure you include every issue the defense lost in the potential issue list.

Then go through and add to the list every issue that was not objected to, for example the failure of the lawyer to object to prejudicial evidence, newly discovered evidence, jury instructions, request lessor included offenses, any plea offer issues, any issues involving bad legal advice, failure to secure expert witnesses, failure to investigate the case, refusal to present favorable evidence, prosecutorial misconduct or failure to present evidence.

Once I was satisfied that I had a complete list of everything that could possibly be an issue I would start my legal research. While performing your legal research you may come across other potential issues, if you do add them to the list.

Research the Law to the Narrow the issues

I do not know what your law library may look like or what resources they should have. However, if you have the Oklahoma Statutes Annotated (these are small green books) I recommend you go to title 22 O.S. Section 1080 and read the annotations under Oklahoma's Post-Conviction Relief Act. This will help you

understand what post-conviction is and is not in Oklahoma. If you have federal statutes annotated you can do the same thing for the federal habeas statute.

You **need to read** the rules of the Oklahoma Court of criminal Appeals, of the federal courts you will be filing in and the Federal Rules of Appellate Procedure.

Another resource I think is helpful is available for free on the internet it is "A Jailhouse Lawyer's Manuel Chapter 13: Federal Habeas Corpus" written by the Columbia Human Rights Law Review. This publication is less than 100 pages and can be printed off the internet free of charge. There is also a chapter on ineffective assistance of counsel that may be helpful. There is also a printed copy that can be ordered for a large discount for incarcerated inmates at a large discount, as of the writing of this paper they were charging $30 for the 11th Edition Jailhouse Lawyers Manual for incarcerated defendants. The order form for this manual can be easily found on the internet and downloaded.

You need to read, read, read. Read the cases, take notes, think about what the Court is saying, think about the reasoning the court uses. The more cases you read the more you will start to understand the issues.

READ the cases cited in the opinion denying your direct appeal. Read the cases those cases cite and keep reading until you are confident that you have found the relevant law, understand the law and can articulate it.

While research your issues you need to pay particular attention to not only the rule of law that you believed was involved in your case, but the "standard of review" the appellate courts will use depending on which stage of the appellate process you are at. As described above these "standards of reviews", or presumptions and burdens as I like to call them, change not only at different stages of the appellate process but can change for a particular issue depending on when it was raised and what the appellate court ruled. <u>This is the heart of the appeal, this is the law you must first find, then understand and finally be able to correctly articulate and argue to the appellate court.</u> You must be able to do this if you want to have any chance of winning your appeal.

The goal of this step is to take the complete list of everything that could be an issue and go through the issues one by one and eliminate the issues that do not really work legally, keep narrowing the issues eliminating the ones that do not work or that are very unlikely to succeed <u>until you have a set of your best issues</u>.

Writing your Brief

With both state post-conviction and federal habeas their are forms that you can complete and submit. You should use the forms. However, you should also file a brief in support of the Post Conviction or Habeas Petition (Reference in the post conviction or habeas pleadings that you are filing a brief in support contemporaneously.) Generally, the Courts are more forgiving with *pro se* defendants, but I would do my best to make my brief in support look as much like the briefs from my attorney and the state in my direct appeal, try and use the same general format.

1. Raise each issue as a separate proposition. <u>Do not</u> combine multiple issues into a single proposition of error.
2. For each proposition make sure you include citations to the transcript or record to support your factual assertions about what occurred in your case if you have the transcripts, failure to cite to the facts to provide a factual basis could waive the issue.

3. For each proposition be able to articulate the rule of law your are claiming was violated and give a case to support your explanation of the law, for each proposition you want to give the "standard of review" and cite to at least one case that says that is the appropriate "standard of review".
4. Include the case citations for the law you cite.
5. Apply the facts of your case to the law you cite and explain to the Court why the facts in your case warrant a finding of error and meet the appropriate "standard of review".
6. Address the issue of harmless error. Explain why this error mattered to your case. This will require you to give a general explanation of the evidence presented at the trial so that you can explain why the alleged legal error mattered.
7. Proof read the brief multiple times. Once you are done with the brief put it away for a couple of days and go back to it with a fresh set of eyes. Keep reading and polishing the brief until it is as good as you can get it.
8. File the post-conviction and habeas forms and the accompanying brief.

Looking for a Lawyer

The best way for you to find a lawyer to help you on your appeal is to have a friend or a family member contact the lawyer for you. If a friend or family member contacts a lawyer for you give them some basic information to give to the lawyer. I would suggest they know your DOC number, your case number and the county you were convicted out of, the crimes you were convicted of, whether or not the conviction was a result of a plea or a trial, whether or not there was a direct appeal and/or whether or not a post-conviction has been filed if the direct appeal was denied. If you don't have help on the outside and you write lawyers asking for help I suggest you put all of this information in the letter.

When writing an attorney, until and unless they ask, DO NOT send them items that you want returned, DO NOT send them briefs or long rambling letters about the law. The longer the letter the less likely you are to have it read by the lawyer, so I would recommend you get to the point quickly. Print legibly and make sure your letter is not a struggle to read.

Most lawyers can not afford to represent you for free. Do not be surprised if you have difficulty finding a private lawyer to represent you for free. Appeals take a lot of work and most lawyers can not afford to represent people free of charge. When you ask a lawyer to represent you for free you are asking that lawyer to give you thousands of dollars of their time.

A lawyer can not take a criminal case on a contingency[17] fee basis, this violates the rules of ethics. So offers to pay the lawyer out of funds you expect to receive from suing over your wrongful conviction and offering "movie and book rights" are not going to be helpful. (Not to mention its a rare case that a defendant has a viable claim for wrongful conviction. Wrongful conviction lawsuits are very difficult cases to win and the chances of selling the story for any money is probably even less likely than winning a lawsuit over the conviction.)

If you are indigent and can not find a lawyer to represent you, I would focus on getting the best viable issue I could get into federal court on habeas. If you can get a good viable issue into federal court, you have a decent chance of having an attorney appointed by the federal judge handling your case.

[17] Contingent upon the outcome of the case.

CONCLUSION

After I graduated law school and began practicing law, I began to see the way the legal system really worked. I learned that the legal system does not actually work the way they explained it to me in law school and it certainly does not work the way that most people think it does. The criminal justice system has a vested interest in convincing the public that it is providing justice and to accomplish that goal the appellate courts have developed standards of review "to create an illusion of harmony between the appropriate result and the applicable law"[18]. It is my belief that if the general public truly understood how the criminal justice system worked, that they would demand significant changes. However, that is not likely to happen anytime soon and as a defendant fighting your case on appeal all you can do is work hard to understand how the system truly works and then try and use our flawed system to get your conviction reversed.

Personally I know what it is like to be poor, I know what it is like to struggle. I grew up in a working class family, my father worked in a steel mill and my grandfather was a share cropper. I am the first one in my family to graduate from college and I was only able to afford college after serving in the military. I have know several people that I grew up with that ended up in prison and I wrote this paper because I want to help people who grew up like I did and can not afford to hire an attorney to continue fighting their case on appeal. Over the years I have looked at dozens of cases that had good issues that may have been reversed in federal court if the case would have been handled properly on appeal. It is a shame that the system is so focused on its "standards of review" and procedural rules that it has lost focus on what should be the real issue.

I hope this writing helps you understand the system and gives you a fighting chance in challenging your conviction. I fully expect that one day I will hear from somebody that used this information to help them successfully challenge their conviction.

[18] See Kelly Kunsch, *Standard of Review (State & Federal): A Primer*, Seattle University L. Rev. Vol. 18, No. 1, 12 (Fall 1994)