

Appealing A State Conviction of A **SEX CRIME**

**The Defendant's Guide To
Protecting Rights In Michigan**



Mark A. Satawa, Esq.

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PREFACE

Yes, I went to law school because I wanted to stand up in court on behalf of a client with the odds stacked against them and make an argument on their behalf. I did not know exactly where that would take me or what it would look like, but it's what I wanted to do.

I started as a prosecutor. A great job, I worked with fabulous lawyers and learned a great deal. I was in court every day and tried 100's of cases—no place better to begin a legal career as a trial lawyer. But one day, I knew it was time for a change, that a new challenge awaited me. I became a criminal defense lawyer.

I knew immediately, it was the right move. I liked being a prosecutor, but I loved being a criminal defense attorney. There is nothing better than standing up in a courtroom and being the only thing that stands between an accused citizen and the power of the police, the prosecution, and the government. I was born to do this.

My trial practice and focus on sex crimes eventually led to start tackling appeals. I quickly learned that as difficult as defending those falsely accused of sexual assault, date rape, child molestation, and child abuse was at trial, successfully handling their appeals was even more challenging. I learned very fast that these appeals are different; winning a child sexual assault or date rape appeal does not depend strictly on the law. Rather, you must be able to convince a judge or panel of judges that the person that was convicted at trial was likely innocent, or that the process that led to that person's conviction was so flawed that the result cannot and should not be trusted. That is the basis for my approach and strategy for handling these appeals.

The goal of this book is to provide guidance and assistance if you or a loved one is facing the unimaginable; convicted of sexual assault, child molestation, date rape, or child abuse. I talk about how these cases are different, why these cases are different, and the ways in which that affects the proper way to prosecute a successful appeal. I then discuss in great detail about my time-tested strategies for researching, drafting, and filing that appeal.

Every case is different, and this book is not designed to be a one size fits all solution; but rather a general overview for individuals facing such a conviction. I sincerely hope that you find this book interesting, informative, and easy to understand. It is designed to answer your basic questions and help you decide on a course of action when the unthinkable happens to you. Hopefully, it helps you even a little bit navigate this difficult journey.

DEDICATION

Once again, this book is dedicated to the only people I could ever dedicate a book to – my family. To my wife Lisa, you really were the first person in my life to believe in me, and give me the confidence to believe in myself, and go out on my own to start my own practice.

And to my kids Megan and Justin. We laugh, we share, we live the way a family should. Megan, I cannot imagine a father having a closer, tighter, and more rewarding relationship with a daughter. Watching you transform into adulthood has been pure joy. Justin, you are everything a son should be – you truly are the best of us, and I have treasured walking your journey with you. The world really does need more people like you in it. I could not be more proud of you both.

DISCLAIMER

This publication is intended to be used for educational purposes only. No legal advice is being given, and no attorney-client relationship is intended to be created by reading this material. The author assumes no liability for any errors or omissions or for how this book or its contents are used or interpreted, or for any consequences resulting directly or indirectly from the use of this book. For legal or any other advice, please consult an experienced attorney or the appropriate expert, who is aware of the specific facts of your case and is knowledgeable in the law in your jurisdiction.

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TESTIMONIALS

“We are presently engaged with Attorney Mark A. Satawa to represent our son Daniel, who has been wrongfully convicted of a crime he did not commit. When we met and after talking and observing Mark I was convinced that Mark is a true innovator in terms of his approach to defending our son. I feel that he uses his superior people skills and legal prowess to either convince the Michigan State Supreme Court, at the same time the Parole Board and also the prosecutor to do what he wants for a client and that is: that justice will be served. I noticed Mark’s focused approach in my son’s case, his solid integrity, and his zealous approach in our son’s case, have earned my highest respect and therefore I believe Mark will also have the highest respect of the judges before whom he practices. With confidence, I, therefore, state that in my opinion, Mark is an outstanding attorney and counselor and we along with our son Dan put our trust and hope into his hand, to demonstrate and prove that an innocent man was wrongfully convicted, imprisoned due to a false allegation by women, and with the hope that our son’s name will be cleared and that he will regain his Freedom again. A family that is bounded by love and caring.”

- Ursula

"I can't say enough positive things about Mr. Satawa. He is one of the most detail-oriented, thorough, and committed attorneys I've ever worked with. You don't need to worry about him exploring every option possible for your defense, he thinks out of the box and will do whatever it takes to provide you with the most effective defense possible. When looking for an attorney, I can assure you they are not all created equal, and Mark Satawa is at the top of the food chain."

- J. S.

"As a family, we have dealt with many lawyers, some good and some bad. However, I can finally say that my family met a great lawyer. Mark's passion for his clients is rare. His responsiveness, patience, and attention to detail set him apart from many other lawyers that have represented our family during difficult times. Do not ever underestimate having a great lawyer in your corner, especially when the odds are against you. Mark's exemplary representation is definitely appreciated."

- Lameese

"Mark Satawa is a skilled and caring attorney who has been helping me address some challenging issues. He does not miss any details and is capable of creating a positive environment for finding the best solution. I strongly recommend him."

- Tekva C.

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ABOUT THE AUTHOR



My experience started when I graduated from law school in 1992. My first job was as an assistant attorney general for the state of Michigan, prosecuting civil tax fraud.

After that, I went to the Wayne County prosecutor's office and worked there for five years, from 1994 to 1999, prosecuting violent crimes, cell phone fraud, and other complex conspiracy-type cases. I left the Wayne County prosecutor's office in 1999 and worked for what's commonly referred to as a “silk-stocking” law firm for a year until 2000.

Then in 2000, I left to go out on my own. I have been the principal attorney in my law firm ever since. Ninety-five percent of my practice has been in criminal defense for the last 22 years, and about half of that practice has been in federal criminal defense.

The cases range from guns and drugs charges, to child pornography, internet solicitation of a minor, production of child pornography, child exploitation enterprise cases, and complex conspiracy cases. The complex conspiracy cases include racketeering, medical and Medicare fraud, and many other conspiracy-type racketeering cases. These racketeering cases take the form of both violent and white-collar conspiracies. The cases I've handled include Racketeer Influenced and Corrupt Organizations (RICO) allegations, as well as racketeering in Medicare and Medicaid fraud. I have represented folks from everyday citizens, businesspeople, doctors, other medical providers, and everyone in between.

In the last 20 years, half of my practice has been in federal court, and I have successfully defended the gamut of federal criminal offenses. My successful defense of federal criminal cases includes several

significant wins at trial, dismissals through motions practice (such as motions to dismiss), and very favorable plea negotiated resolution when appropriate.

My federal criminal practice is significant, and it makes up, at any one time and for the last 20 years, approximately 50% of my practice.

CHAPTER 1

APPEALING A STATE CONVICTION OF A SEX CRIME



Methods Of Conviction

The method of conviction—either by plea or by trial—is a significant determinant in the appeal process for a client. For instance, in Michigan, the law provides an automatic right to appeal if the conviction results from a trial. This automatic appeal, referred to as an 'appeal by right,' requires the Court of Appeals to hear your case. It is important to note that this does not

promise a favorable outcome; it simply guarantees your appeal will be heard and ruled upon.

In contrast, plea-based convictions do not offer an automatic right to appeal. To initiate an appeal, an application for leave to appeal, which is a request for permission to even file an appeal, is required. The Court of Appeals must grant this permission before you can proceed with your appeal. Unfortunately, this permission is seldom granted.

The Court's Stance On Leave To Appeal

Michigan adopted a Court Rule change in the 1990s involving appeals following a guilty plea, which was specifically intended to restrict appeals following guilty pleas. For many cases, this effectively positioned a guilty or no contest plea as a final decision. However, exceptions are made in cases where substantial issues come into play. For example, instances of prosecutorial misconduct, ineffective assistance of counsel, jurisdictional flaws, or statute of limitations issues could prompt the Court of Appeals to consider granting leave to appeal. Conversely, objections based

on sentence length or regrets about a guilty plea typically do not provide a sufficient basis for an application for leave to appeal.

CHAPTER 2

FACTUAL ISSUES IN AN APPEAL



The appeal process is a crucial aspect of the legal system that often causes confusion for many clients. Typically, defendants focus on the evidence presented at their trial, which is understandable since it directly led to their conviction. The difficulty lies in the fact that trial courts primarily determine the facts of the case, applying the law to these facts. Appeals courts, such as the Court of Appeals or the Supreme Court, are established to rectify legal issues, and typically do not scrutinize the facts that resulted in a conviction.

Distinguishing Between Courts Of Law And Courts Of Fact

It is the job of the trial court to determine the facts of any case at trial. Once the trial court finalizes the facts, whether through a jury's determination or a judge/bench trial, they are generally not up for review, examination, or reconsideration during the appeal. This applies even in complex cases, like allegations of date rape sexual assault, where different interpretations of events and evidence may exist. The appeal process respects the trial court's findings. It is not in place to second-guess the jury's decision, but to ensure that the legal process has been fair and the law correctly applied.

Considering Evidential Discrepancies In Appeals

Sometimes, defendants present counter-evidence during the appeal to their appellate lawyer, which they believe contradicts the jury's findings. This could include text messages, eyewitness accounts, or testimony indicating the defendant's innocence.

However, such factual disparities are usually irrelevant during appeals, and disregarded or ignored by appellate courts.

The truth is that the Appeals Court does not decide on the credibility of witnesses, or the reliability of the evidence. The focus of appellate courts is on legal issues, not factual ones. For example, if the judge made an incorrect legal ruling during the trial, such as disallowing certain witness testimony, or if the prosecutor concealed exculpatory evidence, these issues are within the purview of the Appeals Court.

Exceptions To The Appeals Process

The record established by the trial court is generally unchangeable during the appeal process, with limited exceptions. However, it's essential to understand that you can present additional information under specific circumstances. For example, if you believe that ineffective assistance of counsel occurred during your trial, you can make a factual proffer, or a factual representation, to the Court of Appeals to support your claim.

To illustrate this, when alleging ineffective assistance of counsel, the Defense could provide the court with screenshots of text messages that your trial lawyer didn't use, or affidavits from potential witnesses who weren't called during your trial. These factual proffers are not only allowed, they are critical to establishing the ineffectiveness of trial counsel.

There are two primary ways to file such a request and supporting factual proffer in Michigan. You can either file a motion for a new trial under Michigan Court Rule 7.208 before the trial judge, or you can use your factual proffer to support a motion to remand for an evidentiary hearing in the Court of Appeals. Both these approaches provide an important strategic tool for your appellate lawyer to use if there is significant evidence supporting your innocence.

Ineffective Assistance Of Counsel Claims

An ineffective assistance of counsel claim often serves as a strategic double-edged sword. On one hand, it is frequently a very compelling, stand-alone legal argument to challenge a Defendant's conviction.

But in addition to that, it offers the Defense a platform or vehicle to present new additional evidence that tends to support your innocence during your appeal.

While this process may seem complex, understanding that the primary role of an appeal is to address legal issues, not necessarily factual ones, can provide a clearer path through the intricacies of the legal system.

CHAPTER 3

TYPES OF APPEALS FOR A STATE SEX CRIME CONVICTION



There are three primary ways to challenge a state conviction in Michigan. These are:

- Direct appeals.
- Collateral post-conviction petitions or motions in state court under Michigan Court Rule 6.500, commonly referred to as a "6500 motion".

- Collateral post-conviction petitions in federal court filed under 28 United States Code 2254, often known as a "habeas corpus petition."

Direct Appeals

A direct appeal is the first form of appeal immediately from the trial court to the Court of Appeals, and potentially, from the Court of Appeals to the Supreme Court. The nature of this appeal depends on whether it follows a trial or a plea. If it's following a trial, it is an appeal by right. If it's following a plea, it is by an application for leave to appeal.

In Michigan, every defendant that goes to trial and loses has an automatic right to an appeal. Typically, this appeal must be filed within 42 days from the date of the sentence. Once this "claim of appeal" is filed, various processes get triggered.

Process Of A Direct Appeal

First, the appellate lawyer must order the trial transcripts from the court. These transcripts are critical because the facts that the Court of Appeals will use to

make a decision are those established at trial before the trial judge. After the completion of the transcription process, the transcripts are filed with the court, along with a certificate by the court reporter that the transcripts have been completed.

Following the filing of the transcripts, the Appellant (the party bringing the appeal – typically the defendant), will be given a set period to draft the brief on appeal. The Appellee (or the party defending the appeal – typically the prosecutor), is then given an opportunity to file a response brief. In some cases, the lawyer for the Appellant may also file a reply to the Appellee’s response. If requested, an oral argument typically follows, after which the Court of Appeals will make a decision.

Application For Leave To Appeal

In contrast, an application for leave to appeal necessitates a written brief asking the Court of Appeals for permission to appeal in a guilty plea case. The Court of Appeals can either deny it, ask the prosecutor to file a response, or grant the application. If granted, a

similar timeline to the direct appeal by right following a trial is established.

Appeals To The Supreme Court

After the Court of Appeals' decision, the losing party can file an appeal to the Supreme Court. However, the side that appeals to the Michigan Supreme Court must do so by filing an application for leave to appeal. The Michigan Supreme Court can rule on it without a response from the winning side, or ask them to file a response. The Supreme Court then grants or denies leave to appeal.

The Role Of The Michigan Supreme Court

The Michigan Supreme Court does not act as a second round of the Court of Appeals. Instead, it's supposed to be selective, granting leave to appeal on cases where there is a significant issue of law that would impact many litigants, prosecutors, and defendants across the state, or where there's a disagreement within the Court of Appeals about the interpretation of the law.

Collateral Post-Conviction Petition Filed In State Court

The second type of attack on a state conviction in Michigan is a collateral post-conviction petition filed in state court under Michigan Court Rule 6.500, commonly referred to as a "6500 motion." This motion must be filed in the same court and with the same judge where the conviction took place, barring certain exceptions.

Good Cause And Prejudice Requirements For 6.500 Motions

These motions have strict procedural rules, including good cause and prejudice requirements. You must show good cause for why the issue wasn't raised previously (on the direct appeal), and demonstrate prejudice to the defendant as a result of the issue not being raised. These requirements act as a procedural bar to many 6.500 motions being filed and granted.

Collateral Post-Conviction Petition Filed In Federal Court

The third form of challenging a state conviction in Michigan is by filing a collateral post-conviction petition in federal court under a federal statute, 28 US Code 2254, commonly known as a "habeas corpus petition." The procedural hurdles for this form of appeal are even higher than for a 6.500 motion.

A 2254 habeas corpus petition can only present issues of federal constitutional law. The issues must be "federalized," meaning that they must be clearly framed as objections under federal constitutional issues during the state trial. This is a very stringent requirement; without using specific terminology to make it clear that an objection is based on federal constitutional law, a federal court will likely not hear a 2254 Petition.

There is a related corollary issue, the exhaustion doctrine, which requires the defendant to have given the state's highest court, in this case, the Michigan Supreme Court, at least the opportunity to review that ruling. If the Michigan Supreme Court wasn't given at

least an opportunity to review the issue, the federal court will not review it in a 2254 habeas corpus petition. This doctrine is significant and derived from the 1996 Anti-Terrorism Effective Death Penalty Act (AEDPA), which implemented technical and strict requirements for federal review of state convictions under 2254.

A 2254 habeas petition can be filed in the federal district where the conviction occurred, or where the person is currently in custody. Michigan has two districts: the Eastern District of Michigan and the Western District of Michigan.

Finally, if a 2254 habeas petition is denied in federal court, there is a limited opportunity to appeal to the Sixth Circuit Court of Appeals, based in Cincinnati (which includes Michigan). However, to do so, the District Court judge needs to issue a "Certificate of Appealability," essentially a recognition that reasonable judges or jurists could disagree with the decision and that the defendant should be allowed to appeal the decision.

If the District Court judge denies that Certificate of Appealability, an appeal can still be made to the Sixth Circuit Court of Appeals, but before the substantive appeal can be filed, the petitioner must ask the Sixth Circuit Court of Appeals to issue a Certificate of Appealability. If the Sixth Circuit grants that Certificate of Appealability, the appeal can then proceed. However, if it does not, the defendant is procedurally barred from appealing the denial of the habeas 2254 to the Sixth Circuit Court of Appeals.

CHAPTER 4

GROUNDS FOR APPEALING SEX CRIME CONVICTIONS



An Overview Of Appealing Sex Crime Convictions In Michigan

Sex crimes, given their factually intensive nature and emotional components, often present multiple road blocks and hurdles in filing a successful appeal. In order to win an appeal, cases frequently most reviewed for both legal and factual issues. The emotional resonance of these cases, particularly in the current era of social movements like #MeToo and

#NeverAgain, is a factor not to be underestimated. Successful appeals in sex crimes most often require the appellate lawyer to demonstrate one of two things: (A) that there is a high probability of a wrongful conviction because the defendant is factually innocent; or (B) there was a fundamental flaw in the trial process that was so significant that it calls into question the integrity of the verdict itself period.

Common Grounds For Appeal

Among the most common grounds for appeal in sex crime convictions are:

- **The Improper Use of Expert Testimony:** Prosecutors frequently bolster their case in chief using medical and psychological expert testimony, which is frequently unsupported “junk science.”
- **Instances of Prosecutorial Misconduct:** The emotional nature of sex crimes can sometimes lead to unfair practices in prosecution.
- **Ineffective Assistance of Counsel:** A failure by the defense attorney to consult with experts or

properly prepare a defense could lead to an appeal on the grounds of ineffective counsel.

- Legal errors by the Judge: judges make several legal and evidentiary rulings in every criminal trial. But in sex crimes, due to their factually intensive nature, judges will make even more difficult evidentiary rulings than usual. Prosecutors will frequently push the envelope in trial and attempt to bring questionable evidence, hearsay, and other out of court statements that cannot be cross examined by a defendant's attorney as part of their case. Such rulings are frequent subjects for appellate review.

Remember that this list is not exhaustive; there are numerous other potential grounds for an appeal.

The Challenge Of Insufficient Evidence Issues

Insufficiency of the evidence is a difficult issue in any appeal. However, when appealing sex crimes, it becomes an even higher hurdle to clear.

There are other ways to bring the equivalent of a sufficiency of evidence challenge to a sex crime conviction.

First, in any criminal conviction, a defense lawyer can motion for a directed verdict at the end of the prosecutor's case due to insufficient evidence. However, this carries a high standard of proof – the judge must believe no reasonable juror could be convinced of the defendant's guilt beyond a reasonable doubt.

Post-conviction, a motion for a judgment notwithstanding the verdict (or “JNOV”) can be made. This motion is not an opportunity for the judge to replace the jury's decision with their own, which is also known as the judge not acting as a 13th juror. In a JNOV, the judge is required to examine the evidence in a light most favorable to the prosecution. The standard of proof to win a JNOV motion is even higher than that of a directed verdict.

Finally, while not technically a direct insufficiency of evidence issue, one effective method for challenging the facts or evidence supporting a conviction is to couch it as a claim of ineffective assistance of counsel. Such a claim can be made in either a motion for a new trial (filed before the trial

court), or a motion for remand presented to the Court of Appeals. Bringing an ineffective assistance of counsel challenge can be an effective way to argue that the conviction was based on insufficient evidence.

CHAPTER 5

LEGAL ERRORS IN A SEX CRIME CONVICTION APPEAL



Legal Errors As Grounds For Appeal In Sex Crime Convictions

Legal errors observed in other cases can also be argued in sex crime appeals. However, certain legal errors tend to feature more prominently in sex crime cases. One crucial error lies in the violation of the right to confront witnesses, a privilege guaranteed by the Sixth Amendment to the United States Constitution and reinforced by the Michigan State Constitution.

Violations Of The Right To Confront Witnesses

In sex crime cases, the right to confront witnesses often faces significant challenges. Commonly, the prosecution calls on a 'first disclosure witness', typically an individual to whom the alleged victim first disclosed the assault. The statements relayed by this witness are hearsay, and cross-examination becomes difficult since the defendant cannot confront the original source of the information.

A Sexual Assault Nurse Examiner (SANE) can also be called to testify, often recounting statements made by the alleged victim during their examination. The defense is again limited in its ability to cross-examine these statements, made by the complainant but testified to by the SANE nurse at trial.

Even crime lab reports discussing evidence like DNA, blood types, or the presence of semen can potentially be submitted without the analyst being present, challenging the defendant's right to confront their accusers.

Challenges With Face-to-Face Confrontation

Perhaps the most significant recent development lies in the erosion of the tradition of face-to-face confrontation. Advocates for sex crime victims argue against subjecting the victim to the potential trauma of being in the same room as the defendant. As such, they might attempt to have the victim testify via video feed or behind a screen.

This is a development that must be consistently challenged at trial and, if permitted, should feature prominently in any appeal of a sex crime conviction.

There are, of course, many other legal errors that can form the basis of an appeal. However, confronting these issues should be the starting point in any review of a sex crime conviction for appeal purposes.

Evaluating Claims Of Ineffective Assistance Of Counsel In Appeals

Ineffective assistance of counsel is increasingly significant in sex crime conviction appeals. The method by which an appellate court assesses such claims essentially involves two critical questions.

Presence Of An Evidentiary Hearing

Firstly, the court will ascertain if an evidentiary hearing, known as a Ginther hearing, was held to assess the trial lawyer's representation. If such a hearing took place, the Court of Appeals will examine its proceedings to determine whether the trial court correctly judged the effectiveness, or lack thereof, of the trial lawyer.

However, if no such hearing was held, the factual elements presented by the defendant in support of their claim of ineffective assistance of counsel should be assumed true by the Court of Appeals. If these elements, at face value, support a finding of ineffective assistance of counsel, the court should legally reach that decision.

Timing Of The Request For A Hearing

When the request for the Ginther hearing was made is critical. This can be initiated in two stages. It can be requested through a motion for a new trial under Michigan Court Rule 7.208, asking the trial judge to conduct an evidentiary hearing into the trial counsel's effectiveness at trial. Alternatively, once the appeal case is registered at the Court of Appeals, a motion for

remand can be filed, requesting the Court of Appeals to instruct the trial judge to hold the Ginther hearing.

Both paths are valid for bringing the issue of ineffective assistance of counsel before the trial court for an evidentiary or Ginther hearing. Each approach has its own pros and cons, and understanding them is crucial for an effective appeal based on claims of ineffective counsel.

CHAPTER 6

CONSTITUTIONAL VIOLATION AS GROUNDS FOR APPEAL



Constitutional Violations As Grounds For Appeals In Sex Crime Convictions

Aside from the crucial Sixth Amendment right to confrontation discussed elsewhere, other constitutional issues may arise in sex crime cases. A particularly prevalent legal error in appealing a sex crime conviction in Michigan involves the inconsistent stance of the Michigan appellate courts on the use of expert testimony in sex crimes.

Expert Testimony And Child Sexual Abuse Accommodation Syndrome

The Child Sexual Abuse Accommodation Syndrome is frequently employed by prosecutors to rationalize why allegations of sex crimes might appear irrational or implausible. For instance, why might a child wait months or even years to report sexual abuse? Michigan law allows the prosecution to use an expert to elucidate why a complaining witness's actions might seem inconsistent with a credible report, such as delayed disclosure.

Moreover, prosecutors are allowed to question experts on whether the behavior of a complaining witness after an alleged sexual assault, or in the reporting of such, aligns with their experience in treating victims of alleged sexual assault or with the Child Abuse Accommodation Syndrome. The Michigan Court of Appeals and the Michigan Supreme Court permit these lines of questioning.

Inconsistency In The Use Of Expert Testimony

In contrast, Michigan courts have ruled that the defense cannot use counter-expert testimony. The defense is not permitted to bring forth an expert to assert that the defendant does not fit the profile of a sex offender or that the complainant's report does not align with the Child Abuse Accommodation Syndrome or a genuine adult sexual assault report. This means the prosecution can employ an expert to argue that the defendant's actions fit the pattern typically seen in legitimate sexual assault allegations, but the defense is barred from providing expert testimony suggesting the opposite.

This inconsistency should be contested at trial and raised on appeal, as the legal position on this in Michigan seems primed for a challenge. Given the current trajectory in law related to sex crimes emanating from the Michigan Supreme Court, this issue warrants meticulous examination as a potential legal error in appellate considerations.

New Evidence In Appeals Of Sex Crime Convictions In Michigan

Appealing a sex crime conviction based on new evidence is one of the most complex and challenging routes in the appellate procedure. The process can be difficult to comprehend, especially in situations where new evidence points toward the defendant's innocence. One would assume that such evidence would be a priority for the Court of Appeals or the Supreme Court. However, these higher courts will not consider it unless there was a factual record made at the trial court level. Thus, the initial step involves bringing a claim of new evidence before the trial court, barring some exceptional circumstances.

Introducing new evidence in an appeal is inherently challenging. The primary obstacle often lies in proving that the evidence was not only undiscovered at the trial, but also that it could not have been discovered at that time. There are numerous procedural barriers to this, making it an arduous task to win an appeal based on newly discovered evidence.

The Presumption Of Innocence In Sex Crime Conviction Appeals

The presumption of innocence is a vital protection that defendants have during trial proceedings, though in sex crime cases it may hold less weight. Many lawyers experienced in sex crime cases believe that a jury is unlikely to acquit a defendant based solely on the presumption of innocence or the prosecution's failure to prove guilt beyond a reasonable doubt. Most experienced sex crime attorneys feel the need to affirmatively demonstrate their client's innocence, as this is what the jury typically requires for an acquittal.

However, this presumption of innocence ends when the jury delivers its verdict. If the jury finds the defendant guilty, the presumption of innocence disappears and plays no part in any subsequent appeal.

CHAPTER 7

PROSECUTORIAL MISCONDUCT IN SEX CRIME APPEALS



Reviewing Claims of Prosecutorial Misconduct in Sex Crime Conviction Appeals

Prosecutorial misconduct has traditionally been a challenging issue to litigate in any appeal, including sex crime appeals. As per the Michigan Rules of Professional Conduct, all lawyers, including prosecutors, must adhere to professional ethics. Due to their unique role in the criminal justice system, prosecutors bear an additional

level of responsibility – they are supposed to be obligated by law to pursue justice, not simply to secure convictions. This responsibility is expressly codified in the Michigan Rules of Professional Conduct.

Prosecutorial misconduct should best be viewed as a useful secondary or supplemental issue in appeals. Winning on this issue alone can be very difficult because our adversarial system grants prosecutors considerable latitude in zealously advocating for their client - the people of the State of Michigan. Courts are usually reluctant to hinder this zealous advocacy given that it is the basis for our confrontational system.

As the criminal justice system, and specifically, sex crime prosecutions, becomes increasingly confrontational, the occurrence of alleged prosecutorial misconduct is on the rise. However, due to courts' reluctance to curtail zealous prosecution, rulings that identify prosecutorial misconduct are not growing at the same rate.

Instances of prosecutorial misconduct may include making unlawful arguments, urging the jury to rely on emotion or sympathy for the alleged victim, posing

questions without a factual basis, instructing witnesses to present inadmissible information in front of the jury, making improper or illegal closing arguments, or using so-called "civics arguments," such as encouraging the jury to consider what they would want if they were the alleged victim. It can also involve withholding exculpatory evidence, i.e., not providing the defense with evidence that supports the defendant's innocence.

Even though such instances are on the rise, the Court of Appeals and the Michigan Supreme Court often hesitate to reign in this zealous advocacy. Therefore, prosecutorial misconduct is best approached as a supplementary issue in an appeal, bolstering a primary issue such as ineffective assistance of counsel, a constitutional matter like the right to confrontation, or an incorrect evidentiary or other legal ruling by the judge.

While prosecutorial misconduct can significantly strengthen a main issue in an appeal, it is infrequently sufficient on its own to cause a court to overturn a conviction and order a new trial.

Timeframe For A Sex Crime Conviction Appeal Process

The appeals process typically takes longer than most clients anticipate, and it is not uncommon for it to extend well over a year or more. Here's a general idea of the timeline:

After the defendant's sentence, there is a 42-day window to file a claim of appeal, marking the start of the appeal timeline. The Appellant (the party filing the appeal - typically the defendant) then orders the transcripts, which can take a considerable, albeit undefined, amount of time to complete - often several months.

Once the transcripts are ready, the court reporter will file them (along with a certificate that they are completed) with the court of appeals. At this point, the clock starts ticking for the Appellant to submit their brief. Initially, the deadline for this submission is 56 days, although extensions are often requested and granted by either stipulation or motion.

Following the submission of the Appellant's brief, the Appellee (the party opposing the appeal – typically the prosecutor) is given a period of time to file their response.

From the defendant's sentencing to the oral argument before the Court of Appeals, it's quite common for a year or more to pass. This timeframe can lengthen by an additional six months or more if a motion for a new trial is filed, requesting an evidentiary hearing on issues such as ineffective assistance of counsel. Similarly, filing a motion for remand in the Court of Appeals, requesting that the trial judge hold an evidentiary hearing, will further extend the timeline.

If the Court of Appeals' decision is unfavorable, an application for leave to appeal to the Michigan Supreme Court can add another nine to twelve months to the process.

Post-conviction collateral attacks on a sex crimes conviction, such as a 6,500 motion in state court or a 2254 habeas petition in federal court, can take even longer. There is no specific timeframe for a state court

judge to rule on a 6,500 motion, and it's not unusual for federal habeas petitions or state 6,500 petitions to wait before a trial judge for one or two years before a decision is rendered.

In conclusion, there is no "typical" timeframe for this process, and it can take significantly longer than initially expected. Clients should be prepared for each stage of a post-conviction appeal to take a year or more.

CHAPTER 8

APPEALING A CHILD ABUSE CONVICTION IN MICHIGAN



Grounds For Appealing A Child Abuse Conviction In Michigan

Child abuse cases, much like sex crimes, present unique challenges in terms of post-conviction appellate practice. It's crucial to understand that reversing a child abuse conviction based solely on a legal technicality can be exceptionally difficult. To successfully appeal a child abuse conviction, it's often necessary to convince the court that either there is a very good chance that the

defendant is factually innocent, or that the trial process that led to the conviction was so fundamentally flawed, that it cast doubts on the reliability of the conviction.

These cases are inherently challenging due to the nature of the crimes, frequently involving the abuse and mistreatment of society's most vulnerable individuals. Law enforcement officials and the judicial system often approach these cases with a firm belief that no effort should be spared in securing convictions for such serious crimes.

Various grounds might support an appeal for a child abuse conviction. These include:

1. **Ineffective Assistance of Counsel:** This has become a prominent issue in child abuse appeals. If a defense attorney's performance was deficient and it affected the outcome, this could be grounds for an appeal.
2. **Legal Errors:** These could include mistakes made by the judge, such as improper admission of evidence, barring the admission of defense evidence or witnesses that should have been permitted, or

permitting testimony such as hearsay or other out-of-court statements that should have been disallowed.

3. **Constitutional Issues:** The denial of a defendant's sixth amendment right to confront witnesses or present a defense can form the basis of an appeal.
4. **Prosecutorial Misconduct:** In high-stakes cases like child abuse, prosecutors may overstep their bounds, including making improper pleas for sympathy, inappropriate questioning of witnesses, or eliciting improper testimony from their witnesses.

Child abuse convictions often rely heavily on the testimony of doctors and other medical professionals. Importantly, these witnesses have serious potential biases due to their roles within child protection teams. Additionally, prosecutors may use statements from parents to hospital medical personal and/or social workers, given during interviews about the child's injuries, against the defendant at trial. In some cases, this could be a legal error, particularly if the parent couldn't adequately explain the injuries.

A key part of the post-conviction appellate review will include assessing the validity of this testimony, and whether the law was properly applied throughout the trial process. For example, in shaken baby or abusive head trauma cases, the allowing the prosecutor's medical experts to go too far in their testimony, or placing limitations on the testimony by defense experts, may violate the defendant's rights and serve as a potential ground for appeal.

Key Factors In Appealing Child Abuse Convictions

In child abuse cases, particularly those involving infants, doctors are often permitted to provide not only testimony in details about the injuries the child has sustained, but also testimony that establishes the causation of injuries. For instance, a child abuse pediatrician might assert that the only way a three-month-old infant could suffer from a subdural hematoma, retinal hemorrhaging, and brain swelling is through shaking. This line of reasoning, though accepted in many courts, has been increasingly challenged as potentially flawed or "junk science."

In response to this type of evidence, there are several potential legal errors made during a trial that might serve as the basis for an appeal. These include:

1. **Violation of the Defendant's Right to Confront Witnesses:** Prosecutors often present witnesses whose statements the defendant cannot challenge through cross-examination. For example, a child protection team leader might refer to a radiologist's report during their testimony, but since it's not the radiologist testifying, the defense attorney can't cross-examine the report. This can be considered a violation of the defendant's Sixth Amendment right.
2. **Failure to Consult Defense Experts:** Defense attorneys often neglect to engage with defense experts who could refute the evidence against their client. According to two relatively recent Michigan Supreme Court cases, *People v. Ackley*, and *People v. Johnson*, effective representation at trial requires a defense attorney to consult with, and probably hire, defense experts to help prepare the case and present opposing expert testimony. The Michigan Supreme Court has further held that the expert

must have the correct professional perspective; hiring an expert who belongs to the "wrong camp" could be seen as ineffective assistance of counsel.

3. **Denial of Defense Expert Testimony:** Even when a defense attorney does consult the right expert, trial judges sometimes bar the defense expert from testifying at trial. This often happens when the prosecution challenges the scientific reliability of the defense's expert and files a Daubert Motion, calling on the court to prevent the defense expert from testifying. Denying a defendant's expert from testifying violates the defendant's Sixth Amendment right to present a defense and confront witnesses.

These issues together create a set of related legal and constitutional violations that should be examined when considering a potential child abuse appeal. The key areas of concern are ineffective assistance of counsel, the right to present a defense, and the right to confront witnesses. These factors can often intertwine and have a combined impact on the trial's outcome.

CHAPTER 9

PROCESS FOR FILING A CHILD ABUSE CONVICTION APPEAL



Process For Filing A Criminal Appeal In Michigan For Child Abuse Convictions

The process for filing a criminal appeal in Michigan for child abuse cases follows the same procedure as for other criminal cases. If a defendant is convicted after a trial, they can file an appeal. This is known as an appeal by right, meaning that the Court of Appeals must hear their case. However, if the conviction is based on a plea and not a jury conviction,

the defendant must file an application for leave to appeal, asking the Court of Appeals for permission to review the case.

In child abuse appeals, similar to sex crimes appeals, it is crucial to investigate potential instances of ineffective assistance of counsel. If there is evidence of such ineffective assistance, it's necessary to file a motion for a new trial under Michigan Court Rule 7.208 in the trial court, or a motion to remand for an evidentiary hearing on the issue in the Court of Appeals. Although this can add several months to the timeline of an appeal, the importance of effective counsel at trial and the increasing relevance of ineffective assistance of counsel as grounds for appeal make this a vital step in the process.

Appealing Child Abuse Sentences In Michigan

Appealing a sentence for a child abuse conviction in Michigan is challenging due to the emotional nature of these cases. The starting point for sentencing is the statutory sentencing guidelines scheme, which the Michigan Supreme Court has ruled to be discretionary. Courts must use these guidelines as a starting point and

may grant a variance or departure from these guidelines, provided they articulate their reasons on record.

If a sentence falls within the guideline range, an appeal is nearly impossible. A sentence above the guideline range may be reviewed by the Court of Appeals, but unless the trial court failed to provide valid reasons on record for the departure, it is unlikely that the Court of Appeals will reverse the sentence.

Trial court judges have considerable discretion in scoring the sentencing guidelines and even more in fashioning an appropriate sentence. The Court of Appeals reviews sentences under an "abuse of discretion" standard, a high bar for appellants. Unless the trial court made a critical error in scoring the guidelines, if the sentence is within or below the guidelines, it's almost impossible to successfully appeal the sentence.

Time Limitations For Filing An Appeal In Michigan For Child Abuse Convictions

It's crucial to remember that federal 2254 habeas corpus petitions require the exhaustion of all state remedies and no default in any of those remedies.

Therefore, failing to file anything timely during the state appeals process can significantly hinder the potential for the case to be reviewed in federal court.

After a conviction at trial, the defendant has 42 days to file an appeal to the Court of Appeals. Once this is done and the transcripts are ordered, the briefing timelines under the court rules take effect. The appellant, usually the defendant, has 56 days to file their brief, which can be extended via either stipulation or motion.

After the appellant files their brief, the appellee (typically the prosecutor), has an equal amount of time to file theirs. Oral argument is then heard, and the Court of Appeals reaches a decision. The losing side then has 56 days to file an application for leave to appeal for the Michigan Supreme Court to review the case.

Once the Michigan Supreme Court issues a ruling (which is considered the final ruling by the state's highest criminal court), the clock for filing post-conviction relief begins. Although there's no timeline for filing a state habeas corpus motion under state law, the federal habeas corpus Law under the Anti-Terrorism and Effective

Death Penalty Act (AEDPA) requires a defendant to file his habeas corpus petition within one year of the finality of a state court petition.

The filing of a 6,500 motion in state court can stay or toll the clock for the federal habeas petition. If the defendant appeals a denial of the 6,500 motion to the Court of Appeals and subsequently to the Michigan Supreme Court, the time clock continues to be tolled or stayed. Once the Michigan Supreme Court denies the 6,500 motion or the appeal of the 6,500 motion, the one year clock restarts. Hence, it is critical not to exceed 12 months of non-state-tolled time following the denial of a defendant's direct appeal by the Michigan Supreme Court in order to preserve a potential habeas 2254 petition in federal court.

Role Of The Court Of Appeals In Child Abuse Criminal Appeals In Michigan

The Court of Appeals serves as the first and primary level of appellate review. After a trial, you have an automatic right to appeal a conviction to the Court of Appeals. While this doesn't guarantee that the

Court of Appeals will grant your appeal, it does mean that the court must hear your case and offer an opportunity to be heard.

Every subsequent appeal requires filing an application for leave to appeal, meaning you're asking the Court of Appeals or the Michigan Supreme Court for permission to file an appeal to that court. Such permissions are rarely granted. Therefore, the Court of Appeals plays a pivotal role in reviewing criminal child abuse charges, often serving as the main, and sometimes only, forum to review a child abuse conviction in Michigan.

CHAPTER 10

APPEALING CHILD ABUSE CONVICTIONS IN MICHIGAN



The Appeal Process For Child Abuse Convictions In Michigan

In the state of Michigan, sentencing is governed by a statutory guideline scheme, designed to ensure uniformity across the state. This means that irrespective of whether the defendant is located in southeast Michigan, Western Michigan, Northern Michigan, or the Upper Peninsula, similar sentences would be applied for similar cases.

Factors Considered In Sentencing

The guidelines consider two sets of factors:

1. Factors related to the defendant's prior record and other criminal violations.
2. Factors relating to the specifics of the current offense, such as the severity of the child's injuries, the number of victims, and the level of intent involved in the crime.

The combined scores from these two sets of factors determine a sentencing guideline range within which a trial court judge starts the evaluation. A judge can, however, grant a variance either above or below this guideline range, depending on the circumstances of the case.

In child abuse cases, it's important to note that convincing a judge to grant a variance below the guideline range can be challenging, and sentences often exceed the guideline range when the offense is particularly egregious or the injuries are severe.

The Challenge Of Appealing Sentences

Once a sentence has been passed down by a trial court judge, it can be appealed. However, winning such an appeal can be extremely challenging. The appeal is reviewed by the Court of Appeals under an abuse of discretion standard, which grants wide latitude to trial court judges in their sentencing.

In cases involving child abuse sentences, even wider latitude is given, making the standard for proving abuse of discretion high. You would have to demonstrate that the trial court judge did not exercise proper discretion, and instead acted from prejudice, bias, or other improper motivations. Given these hurdles, succeeding in an appeal for a child abuse sentencing in Michigan can be very difficult.

Understanding Time Limitations For Filing Criminal Appeals In Michigan

When dealing with appeals, it's crucial to distinguish whether you're appealing a conviction that resulted from a trial or a guilty plea. In the case of a conviction following a trial, you have 42 days to file a

document known as a "claim of appeal." This brief, usually one-page document, initiates the formal appeal process, prompting the Court of Appeals to issue deadlines and a briefing schedule. The process and time for appealing a conviction following a guilty plea is by way of asking for permission (or filing an application for leave to appeal). The process for an appeals following a plea is more nuanced and complex, and is explained in a following section.

The Formal Appeal Process

Following the claim of appeal, the court reporter for the trial court has the task of producing the transcripts, a process that can take several months. After the transcripts are ready, you have 56 days to file your brief on appeal or request an extension. Once your brief has been filed, the party defending against the appeal – typically the prosecutor – has an equivalent amount of time to file their reply brief.

Conditions For Defendants Who Plead Guilty

Unlike defendants convicted at trial, those who plead guilty in Michigan don't have an automatic right

to appeal. Their only recourse is to seek "leave for appeal" – that is, asking for permission to file an appeal from the Court of Appeals. This permission is rarely granted; to secure it, you must persuade the Court that there's a substantive issue worthy of review. As a result, your application for leave to appeal must be compellingly drafted.

Compared to the simple one-page claim of appeal required for defendants convicted at trial, the application for leave to appeal is a substantive brief explaining why the Court should grant permission to hear the appeal. Therefore, the timeframe for filing an appeal in a guilty plea case is much tighter.

Filing A Delayed Application For Leave To Appeal

If the initial appellate window has been missed, defendants who have either pled guilty or gone to trial have the option to file a delayed application for leave to appeal. However, because these applications are rarely granted, this is not an advisable strategy. Notably, late filing can be another reason for the Court

to deny your application. Therefore, it is critical to file your appeal on time. Nevertheless, if the initial deadline has passed, this avenue at least provides a potential pathway to the Court of Appeals.

CHAPTER 11

THE ROLE OF APPELLATE COURT IN A CHILD ABUSE APPEAL



The Role Of The Court Of Appeals In Child Abuse Cases In Michigan

The Court of Appeals is primarily responsible for rectifying legal errors in criminal appeals. The Michigan Supreme Court is not meant to serve as an additional appellate court or to offer a defendant a second opportunity to file an appeal. Instead, its role is to ensure that all district courts, circuit courts, and

courts of appeal are applying state and federal laws uniformly and consistently.

The Supreme Court typically only takes on cases where there's a discrepancy in legal interpretations among lower courts. Therefore, the Court of Appeals is effectively the primary body for reviewing and correcting legal errors in criminal convictions, including those involving child abuse.

Introducing New Evidence In A Child Abuse Criminal Appeal

In theory, new evidence cannot be introduced during an appeal because the Courts of Appeal are designed to fix legal errors, not reassess the facts. They take the record or evidence as fixed at the trial court level and do not act as a '13th juror' that can overrule the jury or trial judge.

However, there is an important exception in criminal cases when alleging ineffective assistance of counsel. The law allows the appellate lawyer to present evidence or a factual proffer supporting the argument

that the trial lawyer committed an error that constituted ineffective assistance. This can be done by initially filing a motion for a new trial under Michigan Court Rule 7.208 at the trial court level, or at the Court of Appeals level by filing a motion for remand.

The primary aim of these motions is to demonstrate that the trial lawyer did not provide effective representation, allowing the appellate lawyer to expand the record and submit additional proof. While this new evidence can indirectly show the defendant's factual innocence, its main purpose is to prove the ineffective assistance of the counsel. In effect, this is the only practical avenue through which new evidence can be introduced during an appeal, including child abuse appeals in Michigan.

Possible Outcomes Of A Child Abuse Criminal Appeal In Michigan

While the Court of Appeals has the theoretical power to reverse and overturn a criminal conviction entirely, this outcome is rare. More frequently, the court sets the conviction aside, and orders a new trial,

especially in emotionally charged cases such as those involving child abuse. Even if an appeal is successful, the common result is a retrial with the legal error corrected, rather than a complete overturning of the conviction.

Evaluating The Sufficiency Of Evidence In Child Abuse Cases In Michigan

The standard of review used by the appellate court to evaluate the sufficiency of evidence in child abuse cases in Michigan is exceptionally high. The court assesses whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt when viewing the evidence in a light most favorable to the prosecution. This standard of review is deferential to the trial court.

The Court of Appeals is mandated to draw all reasonable inferences and make credibility evaluations in support of the jury verdict. This means that circumstantial evidence and reasonable inferences from it must be interpreted in a manner that supports the jury's verdict. As a result, challenging the sufficiency of the evidence is a difficult task, both theoretically and practically.

Despite being an issue that many clients are keen to contest, questioning the sufficiency of the evidence is not typically a strong avenue for appeal, except in the most unique circumstances.

CHAPTER 12

SPECIALIZED ISSUES RELATING TO CHILD ABUSE APPEALS



Specialized Appellate Courts Or Programs For Child Abuse Criminal Appeals In Michigan

In Michigan, child abuse appeals are processed through the same Court of Appeals and Michigan Supreme Court as other criminal appeals. However, there is a specific feature of Michigan's child abuse system worth noting: the Central Registry for Child Abuse.

This registry, similar to the sex offender registry, is primarily a private registry accessible only to law enforcement, police officers, prosecutors, probation officers, courts, and Child Protective Services (CPS). It is used to record instances of substantiated child abuse, with entries often made before a criminal court conviction. Most individuals are added to the registry once a petition in their juvenile court or CPS civil proceeding is authorized.

To be removed from this registry, an individual must file a challenge with Child Protective Services. This challenge is first reviewed by a specialized administrative law judge, who makes an initial ruling on whether the person should be removed or remain on the registry. If an individual's request for removal is denied, there are limited pathways to appeal this decision within the broader court system, beyond the jurisdiction of the administrative law judge.

This administrative law judge, tasked with reviewing petitions for removal from the Central Registry for Child Abuse, represents the only specialized

court mechanism specifically handling aspects of child abuse in Michigan.

Child Abuse Criminal Appeals Process Timeline In Michigan

The timeline for the child abuse criminal appeals process in Michigan can greatly vary due to numerous unique and individual factors. However, the following is a generalized overview of the process:

1. **Filing the appeal:** Following a conviction, the defendant has 42 days to file a claim of appeal to the Court of Appeals.
2. **Transcript preparation:** The court reporter is then given a time period to transcribe all relevant court hearings from the trial court. This stage can often take several weeks, if not months, and is often the biggest delay in the process.
3. **Brief filing:** Once the court reporter submits the transcripts and certifies their filing with the Court of Appeals, the appellant has 56 days to file their brief on appeal. This period can be extended by 28 days multiple times via a motion or stipulation.

4. **Response brief:** Following the appellant's brief filing, the party defending against the appeal (usually the prosecutor) is given an equal amount of time to file a response brief.
5. **Reply brief:** There are specific rules concerning any reply brief from the appellant to the appellee's response brief.
6. **Oral arguments:** Once all briefs are filed, the Court of Appeals may schedule oral arguments for the appropriate cases. Not every case is granted oral argument, but it is frequently granted if requested and the brief was filed on time.
7. **Decision:** After oral arguments, the Court of Appeals typically takes a few weeks to a few months to issue a decision.

Totaling all of these stages, the appeal process can take a year or more. However, certain factors can prolong this timeline. For example, filing a motion for a new trial or a motion for remand on the issue of ineffective assistance of counsel could add several months to the process. If the motion is granted and an evidentiary hearing is conducted, scheduling and conducting this

hearing, along with the necessary transcription, could extend the timeline by an additional three or four months.

So, it is not unusual for a child abuse appeal process, from the filing of the claim of appeal to the ultimate decision by the Court of Appeals, to take one to two years, or more. Beyond this, if an application for leave to appeal to the Michigan Supreme Court is filed, it could frequently add an additional six to twelve months to the process.

It's important to understand that appeals are a marathon, not a sprint. They often take much longer than anticipated due to the complex nature of the legal proceedings involved.

CHAPTER 13

POST-APPEAL COLLATERAL ATTACKS ON CONVICTIONS



Understanding Post-Appeal Collateral Attacks On Convictions

After a conviction, two principal avenues exist to challenge both the conviction and the sentence: a direct appeal and a collateral post-conviction attack. The latter comes into play once the direct appeal process has been exhausted. However, it follows a distinct set of procedural rules and can be categorized into two main routes for relief.

The first avenue involves a state court motion that contests the conviction. In Michigan, this motion is known as a 6500 Motion, referring to Michigan court rule 6.500. The second route utilizes a federal Habeas Corpus Petition, filed under 28 United States Code 2254.

Exploring The Specifics Of 6500 Motions

In Michigan, a 6500 Motion is the method used to challenge a state conviction following an unsuccessful direct appeal. The rule stipulates that it must be filed before the same judge and court that where the conviction and sentence was entered. This post-conviction challenge only occurs after the case has been appealed directly to both the Michigan Court of Appeals and the Michigan Supreme Court.

A 6500 motion has specific requirements for valid presentation, such as demonstrating good cause and prejudice, along with clearly stated items within the motion or petition itself. Again, it's important to remember that this motion has to be filed in the same court, under the same judge, where the original sentencing occurred.

Timeframe And Decision Process For 6500 Motions

Interestingly, there is no definitive timeframe for a judge to rule on a 6500 Motion. The lack of time constraints can result in 6500 motions lingering in court for extended periods, sometimes longer than seems necessary. This delay arises from the absence of any court rule requiring a decision within a specific period.

For those desiring an evidentiary hearing, it's crucial to formally request one. The request must detail the reasons for needing this hearing in the 6500 Motion brief, supporting your demand with a factual proffer. This proffer should include relevant facts, evidence, and arguments supporting the need for the hearing. Remember, an evidentiary hearing isn't a guarantee, and it can be denied unless properly substantiated by facts, evidence, and a persuasive argument.

CHAPTER 14

GOOD CAUSE AND PREJUDICE IN AN APPEAL



The Concept Of Good Cause And Prejudice In 6500 Motions

One legal nuance associated with 6500 motions is the requirement to raise new issues. Re-litigating a matter already ruled upon by the Michigan Court of Appeals and the Michigan Supreme Court during a direct appeal is not allowed. As a result, the issues addressed in a 6500 motion must be those which have not been dealt with by these

courts. Once these courts have made a ruling on a matter, it becomes the "law of the case."

The "law of the case" denotes that once a decision has been made by a court, it should not be reversed or altered. Once a trial court has given its verdict, only a higher court, such as the Court of Appeals, can reverse it. Similarly, a decision by the Court of Appeals can only be reversed by the Michigan Supreme Court. When the direct appellate process concludes, the "law of the case" principle establishes the legal decision as final and not subject to further review. Thus, a 6500 motion must introduce new issues.

However, there is a catch to introducing new issues. They must meet the "good cause and prejudice" requirements. "Good cause" requires that the petitioner must demonstrate a valid reason for not addressing the issue during the direct appeal. Such reasons may include newly discovered evidence or ineffective assistance by the appeal counsel.

Alongside demonstrating "good cause," the petitioner must also prove "prejudice." This means that

there must be a reasonable probability that the issue, if it had been raised during the direct appeal, could have resulted in a different outcome. This requirement essentially narrows down the potential issues that a defendant can raise in a 6500 motion.

Understanding Statute 2254 And Its Implications

Statute 28 United States Code 2254 allows a defendant in the state court system, essentially a state prisoner, to petition a federal judge for habeas corpus relief. This statute underwent significant amendments with the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in the 1990s. The AEDPA introduced several procedural restrictions on filing a habeas corpus petition under the code.

A habeas corpus petition represents a collateral attack by a state prisoner on a state conviction within a federal court. It's specifically designed to address issues related to federal constitutional law. Federal courts traditionally show deference and respect to state courts when it comes to state court matters, including

criminal convictions. Thus, there are significant procedural bars to filing a successful 2254.

The primary rule is that issues brought to a federal court must have been 'federalized' when the case was in the state system. For example, if you raise an issue related to prosecutorial misconduct, ineffective assistance of counsel, or an infringement on a defendant's right to confront witnesses during a direct appeal, these issues must have a federal constitutional law element, and the objection must have specifically cited the federal constitutional provision.

For effective preservation for habeas corpus review, the appellate lawyer must cite federal law in the direct appeal. This could involve citing the Fifth Amendment for due process rights, the Sixth Amendment for the right to confront witnesses and present a defense, or the 14th Amendment, which applies these requirements to the states.

If the state court appellate lawyer did not properly federalize these issues during the direct appeal, making them eligible for a federal habeas

corpus petition, the defendant must raise these issues, and properly federalize them, in a State 6500 Motion. The defendant could argue ineffective assistance of counsel, stating that the appellate lawyer failed to properly preserve the issue on direct appeal. The defendant might argue that the trial court judge infringed on their Sixth Amendment rights to confront witnesses against them. By raising this issue, the state court is given an opportunity to rule on this federal issue, making it eligible for federal judicial review.

The Exhaustion Doctrine And Filing Federal Habeas Corpus Petitions

In addition to the preservation of an issue, a concept known as exhaustion also plays a significant role. This doctrine maintains that it's insufficient to simply raise a federal issue in state court; you must also have given the highest appellate court in the state an opportunity to rule on that federal issue.

For instance, if you raised a Sixth Amendment confrontation issue in your direct appeal and the Court of Appeals denied it, the issue is preserved. However,

if you did not include this issue in your application for leave to appeal to the Supreme Court, you did not exhaust the issue, even though it was preserved in the Court of Appeals. This means you did not allow the Michigan Supreme Court to rule on it, rendering that issue ineligible for Federal review. Consequently, an issue must be both preserved by being raised in federal court and exhausted by offering the Michigan Supreme Court at least the opportunity to rule on it. If an issue is not properly preserved and exhausted, it cannot be reviewed by a federal judge.

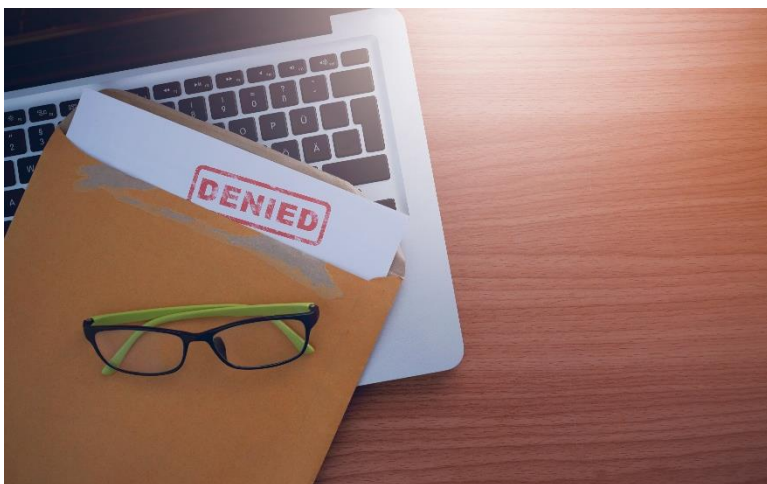
A federal habeas corpus petition under 28 United States Code 2254 can be filed either in the federal district where the conviction occurred, or in the district where the state prisoner is currently in custody. For instance, if you were convicted in Oakland County, Michigan, and are currently serving time in Muskegon, Michigan, you could choose to file in the Eastern District (where Oakland County is located) or the Western District of Michigan (where Muskegon is located). This choice provides a federal habeas petitioner with some degree of discretion in terms of choosing the venue.

Obtaining a grant for a habeas corpus petition under 28 US Code 2254 from a federal judge can be challenging. Federal judges are cautious not to interfere with the state court criminal justice system and overturn a state court conviction, unless there are clear examples of federal constitutional law violations.

This generally refers to significant issues deeply rooted in federal constitutional protections such as denial of the Fifth Amendment right to remain silent, denial of the Sixth Amendment right to confront witnesses or present a defense, or denial of the Sixth Amendment right to effective counsel. Absent a substantial issue deeply rooted in federal constitutional protections, the chances of success in a federal habeas corpus petition are typically low.

CHAPTER 15

APPEALING THE DENIAL OF A 6500 AND 2254



Understanding The Appeal Process For Denials Of 6500 And 2254 Motions

If a post-appeal collateral attack (also known as a state 6500 motion) is denied, it's important to understand that the appeal process isn't automatic. While you do have the ability to file an appeal following a trial court's denial of a 6500 motion, it's not an appeal by right. You need to request permission

from the Court of Appeals by filing an application for leave to appeal to the Michigan Court of Appeals.

If Michigan's Court of Appeals denies that application or grants it but then denies the appeal, you can take your case to the Michigan Supreme Court. However, again, it's not an automatic right to appeal. Instead, you again must file an application for leave to appeal to ask the Michigan Supreme Court for permission to file an appeal on a denial of a 6500 Motion from the Michigan Court of Appeals to the Supreme Court.

When appealing a post-conviction collateral attack in federal court, also known as a habeas corpus petition filed under 28 United States Code 2254, an automatic appellate right is also not available. To appeal a federal district court judge's denial of a federal habeas corpus, the Petitioner must first secure a Certificate of Appealability.

This certificate is an order from the district court, indicating that even though the court ruled one way, it acknowledges that reasonable minds could

disagree on the decision. As a result, the judge issues a Certificate of Appealability, signaling that the defendant should be permitted to appeal the denial of the habeas corpus petition.

If the district court judge does not rule (one way or the other) on the Certificate of Appealability, then the petitioner can file a motion before that judge requesting its issuance. If the district court denies the Certificate of Appealability, or includes a denial in their original habeas corpus petition denial, the federal habeas corpus petitioner can then attempt to secure the Certificate from the Sixth Circuit Court of Appeals. However, the Petitioner cannot directly file an appeal there. Instead, they must request a Certificate of Appealability from the Sixth Circuit, essentially arguing that, despite the District Court judge's decision, reasonable judicial minds could disagree on the outcome.

If a Certificate of Appealability is granted by either the District Court judge or the Sixth Circuit Court of Appeals, the defendant then has the opportunity to appeal the substance of the 2254 denial

to the Sixth Circuit Court of Appeals. However, without that Certificate of Appealability, the substance of the habeas petition denial cannot be appealed.

The Purpose And Issues Raised In A Post-Appeal Collateral Attack On A Conviction

A 6500 post-appeal collateral attack on a conviction serves a specific purpose: to provide a defendant with an opportunity to rectify a significant procedural flaw in their conviction, ensuring justice is achieved. In essence, if a significant flaw occurred during the trial that led to the conviction, and this flaw wasn't addressed or rectified during the appeal, this statutory court rule offers a pathway for the defendant to challenge the conviction, essentially offering a final chance at legal relief.

However, it's equally important to clarify what a post-appeal collateral attack under 6500 is not – it is not a second chance to litigate issues that have already been ruled upon in the direct appeal. The most common problem with a 6500 Motion or a post-appeal collateral attack is an attempt to re-litigate an issue

fully briefed and ruled on during the direct appeal, which almost inevitably results in the failure of a post-conviction 6500 Motion.

Possible Issues Raised In A Post-Appeal Collateral Attack

The critical factor here is that the issues raised should be new, i.e., not raised in the direct appeal. If they were raised in the direct appeal, there must be a specific reason permitting the defendant to re-raise them in a 6500 Motion. For instance, if an issue wasn't taken to the Michigan Supreme Court during the direct appeal, the defendant can plead and show ineffective assistance of counsel for not having raised that issue in an application for leave to appeal to the Michigan Supreme Court.

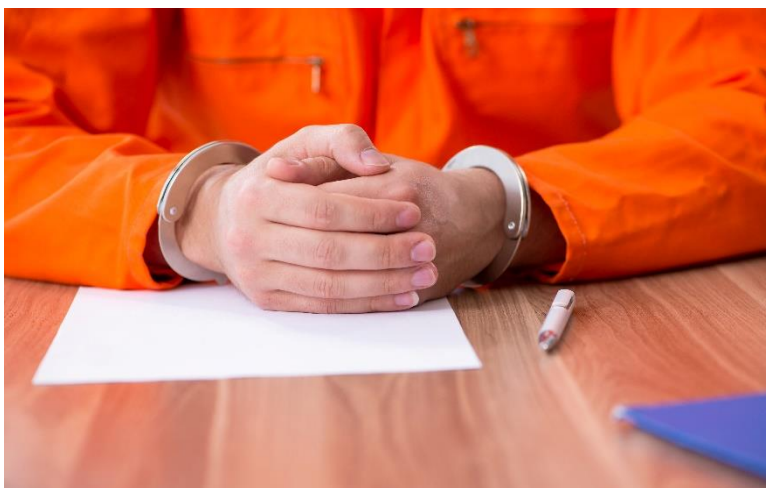
The most common types of issues in a post-appeal collateral attack generally fall into two semi-related categories. Despite seeking legal relief based on legal arguments, a strategically effective 6500 Motion or a habeas corpus petition often focuses on factual arguments and issues that fall into one of two related categories:

- A. An argument, backed by facts and evidence, that raises serious questions about the defendant's factual innocence. In other words, it's not merely a hyper-technical legal argument but rather a challenge to the defendant's guilt; or
- B. An issue that fundamentally questions the procedure leading to the defendant's conviction, suggesting the procedure was so fundamentally flawed that the conviction itself is called into question. For example, if a critical witness didn't appear at the trial and a judge allowed their prior testimony to be read into the record, or if there's evidence showing that the defendant's lawyer was inadequately prepared, these situations could indicate a severe flaw in the trial procedure.

However, a mere legal challenge based on a hyper-technical legal issue typically makes a weak argument in a post-appeal collateral attack.

CHAPTER 16

DIRECT APPEAL VS. POST APPEAL ATTACKS ON CONVICTION



Distinguishing Between Direct Appeals and Post-Appeal Collateral Attacks On A Conviction

A direct appeal is distinguished by a very formal set of rules and procedure in terms of pleading requirements and timeframes. In contrast, post-appeal collateral attacks tend to be more flexibility regarding the arguments that can be made. However, this flexibility is

counterbalanced by the several technical legal barriers surrounding post-appeal collateral attacks.

Any issue raised in the trial court and preserved by way of either a proper legal objection or motion could theoretically be included in a direct appeal. In contrast, there are numerous procedural rules and barriers that preclude many issues raised in the trial court and the direct appeal from being eligible for discussion in a post-appeal collateral attack.

Procedure For Initiating A Post-Appeal Collateral Attack On Conviction

It's important to talk about state and federal collateral post-conviction procedures separately due to their distinct nature. In a State 6500 Motion, the motion is filed in the same court, with the same judge, under the same case number that resulted in the conviction. Essentially, you are submitting a motion or petition to the same court and judge responsible for the original conviction and sentence.

There are significant pleading requirements embedded in the motion, as outlined in the Michigan Court rule 6.500 et seq. Most importantly, you must demonstrate good cause and prejudice for any new issues raised in a 6500 Motion.

Contrastingly, a Habeas Corpus Petition filed under 28 USC 2254 in federal court is technically considered a civil action. It is lodged as a habeas corpus petition in federal court under a civil case code, thereby initiating a new case in front of a federal judge. After properly filing the petition, the case starts with a judge in the district where the habeas corpus petition is being filed. Essentially, the petitioner is filing what is equivalent to a civil complaint in the district where the habeas corpus will be pending, with the civil complaint being the habeas corpus petition itself.

The Role Of Newly Discovered Evidence In A Post-Appeal Collateral Attack On A Conviction

Newly discovered evidence serves as an excellent example of an issue that could be successful in a post-appeal collateral attack, particularly in a state

6500 motion. For instance, evidence that surfaces following the conviction and the direct appeal, suggesting that the defendant may be innocent - like a new witness stepping forward, or DNA testing carried out on biological evidence found at the crime scene - could make a compelling argument in a state 6500 motion. However, it's essential to understand the stringent rules regarding what qualifies as newly discovered evidence.

In a state 6500 motion, it's insufficient that a piece of evidence wasn't raised at the defendant's trial. The defendant must demonstrate not only that the evidence was not presented at the trial court, but also that it could not have been discovered prior to the trial through reasonable diligence by the defendant and his lawyer. If the evidence was available and could have been found, and the defendant and his lawyer failed to unearth it, this could lead to the rejection of a newly discovered evidence issue in most cases.

Challenging The Effectiveness Of Trial Counsel In A Post-Appeal Collateral Attack On A Conviction

Ineffective assistance of counsel is a common issue in post-appeal collateral attacks, be it in a state 6500 or a federal 2255 Petition. It's crucial to note that the Sixth Amendment guarantees every criminal defendant in the United States not merely the right to representation, but the right to constitutionally effective representation.

Ineffective assistance of counsel can be at the heart of a post-appeal collateral attack. Frequently the true thrust of an ineffective assistance of counsel argument is an attempt to prove that an innocent person was convicted at trial, or that there was a fundamental flaw in the trial process that the conviction itself cannot be trusted be relied upon. These issues are frequently supported or enhanced by a strong effectiveness of trial counsel argument, and sometimes can even extend to ineffective assistance of appellate counsel for failing to raise issues related to the trial counsel during the direct appeal.

Ineffective assistance of counsel can critique the defense lawyer's handling of the prosecution's case, such as insufficiently challenging the prosecution's evidence, or inadequately researching their witnesses and experts. Additionally, it can also focus on the defense lawyer's failure to mount an effective defense case. This could involve neglecting to investigate, interview, or locate key witnesses, failing to consult or present expert witnesses, or not adequately challenging the prosecution's expert at trial. Ineffective assistance of counsel can essentially highlight what the defense lawyer didn't do in countering the prosecution's case, as well as failing to present an effective defense case.

CHAPTER 17

INEFFECTIVE ASSISTANCE OF COUNSEL



Application Of Ineffective Assistance Of Counsel

In the context of ineffective assistance of counsel, it's vital to bear in mind that any motion, appeal, or post-appeal collateral attack must include a detailed factual proffer supporting the claim. The defendant and their counsel should not only request an evidentiary hearing to demonstrate ineffective assistance of counsel, but also provide the court with ample factual evidence

to convince the court to grant such a hearing. This hearing, known as a Ginther hearing, is designed to determine if the defendant received constitutionally effective assistance of counsel during the trial.

To obtain this Ginther hearing, it's advisable to proffer as much factual documentation as possible. This can include affidavits by witnesses that the defense lawyer failed to interview or present, reports by experts who weren't consulted or could have testified at the trial, and declarations by the defendant or their family indicating that the defense lawyer didn't properly prepare for the trial.

A review of the defense lawyer's trial preparation can also be enlightening; for instance, if billing records reveal limited time spent on trial preparation, or if witnesses were ready to meet but were never approached. A robust, factually intensive proffer is critically important as part of the request for the evidentiary hearing, demonstrating the need and entitlement to such a hearing.

Potential Outcomes Of A Successful Post-Appeal Collateral Attack On A Conviction

It's extremely rare for a successful post-appeal collateral attack to result in an outright reversal and dismissal of the charges. The most common outcome is typically the setting aside of the conviction, followed by an order for a new trial for the defendant. The bottom line is that post-appeal collateral attacks on convictions rarely lead to a complete overturning of a conviction.

The Significance Of Procedural Default In Post-Appeal Collateral Attacks On Convictions

Procedural default is a crucial factor in post-conviction collateral attacks. Various rules, such as the law of the case, the finality of convictions, the inability to revisit issues from the direct appeal, and the necessity of proper preservation and exhaustion of federal habeas issues, all contribute to this problem. Any procedural default can almost universally bar the raising of an issue, regardless of the issue's substantive

merit. If there's a procedural barrier to an issue, it's likely to prevent the substance of the issue from being heard or ruled upon by the court.

Filing Deadlines For A Post-Appeal Collateral Attack On Conviction

In federal cases, it's critical to understand that there are very strict time limitations for filing a post-appeal collateral attack on conviction under 28 USC 2254. These limitations are particularly less stringent for a post-conviction 6500 Motion.

Federal Habeas Petitions And AEDPA

The Anti-Terrorism Effective Death Penalty Act (AEDPA) stipulates that a habeas corpus petition must be filed within a year of a case denial by the highest criminal court of appeals in the state. From a practical standpoint, this means that in Michigan, for example, due to the rule of exhaustion and the necessity of having issues properly preserved for federal habeas relief, it is imperative to prosecute the direct appeal all the way through the Michigan Supreme Court.

The Importance Of Exhaustion Doctrine

In order to satisfy the exhaustion doctrine, the appeal must be taken to the Court of Appeals, and if denied there, then further taken to the Michigan Supreme Court. The caveat is that once the Michigan Supreme Court also denies the appeal, then a one-year window is activated for filing a habeas petition in federal court.

Addressing Unpreserved Federal Issues

There are two equally important limitations on your ability to bring a federal habeas petition, known as preservation (or federalization) and exhaustion – that is the federal issues must be both properly preserved (or federalized) during the state direct appeal, and exhausted in the state court appeal (up to the state supreme court). If a valid and potentially winning federal issue exists, that has not been properly preserved (or federalized) and exhausted, then that may force a prisoner to preserve and or exhaust the issue by way of a state 6500 motion. In such a case, a state 6500 Motion must be filed within a year of the Michigan Supreme Court denial, with one of the

express reasons being to federalize and/or exhaust any unpreserved federal issues for habeas review.

Here is a list of issues to consider when researching a potential post-conviction claim:

- The good cause and prejudice requirement of 6500 must be satisfied.
- If the 6500 Motion is denied by the trial court, an appeal must be filed with the Court of Appeals to satisfy the exhaustion doctrine.
- If the Court of Appeals denies it, then it needs to be appealed, via an application for leave, to the Michigan Supreme Court.
- If any link in this chain is broken, then a federal habeas corpus can never be filed, essentially making the process unending.

Post-Appeal Collateral Attack And 6500 Motion

Nevertheless, even if you do not file a post-appeal collateral attack, you can technically file a 6500 motion years later. However, there are procedural rules that make it difficult (or even impossible) to file

successive 6500 motions, so except in the most unusual case, a prisoner is limited to only one 6500 petition.

If it's been more than one year since the Michigan Supreme Court denied your direct appeal, then it is unlikely that you would ever be able to file a federal habeas corpus petition under 28 USC 2254. However, if you have never filed a 6500 motion, you still have the opportunity to file one.

CHAPTER 18

PURSUING A POST-APPEAL COLLATERAL ATTACK ON CONVICTION



Pursuing A Post-Appeal Collateral Attack Following An Unsuccessful Original Appeal

It is common for a post-appeal collateral attack to be initiated after an original, direct appeal has been unsuccessful. However, it's crucial to bear in mind that a post-appeal collateral attack in state court (commonly known as a 6500 motion) can only address issues not covered in the direct appeal.

Furthermore, a federal post-conviction petition under 28 U.S.C. 2254 must satisfy two important criteria – the issue must be properly preserved (or federalized) in state court, and it must be exhausted through the entire appellate process. This means that the issue/objection must have been clearly cited to a federal constitutional provision in the trial court (federalized), and the Michigan Supreme Court was given an opportunity to rule on it and either rejected the issue or declined to grant the application for leave. As long as these prerequisites are met, a post-appeal collateral attack on a conviction is the standard route when the original appeal has not achieved the desired outcome.

Impact Of the Doctrine Of Finality Of Judgments On Post-Appeal Collateral Attacks

The doctrine of finality of judgments significantly influences post-appeal collateral attacks. The criminal justice system highly values finality – cases need to end at some point. The system believes that finality also aligns with the rights of the alleged victim under the Crime Victims’ Rights Act, and it serves an important societal goal (having cases not last forever).

There is an understanding that a case cannot persist indefinitely and that every case must have a conclusion.

As a result, the criminal justice system assigns tremendous importance to a jury's verdict - where the unanimous agreement of 12 citizens beyond a reasonable doubt is required before a defendant can be found guilty. Once this verdict is achieved, it is viewed as a high burden met that was met by the prosecution, and thus, the jury verdict is granted a significant degree of finality and respect. Overturning the verdict is reserved only for the most exceptional and unique circumstances.

This degree of finality extends to a defendant's right to appeal a conviction after trial to the Court of Appeals. Consequently, three Court of Appeals judges review the legal flaws associated with the conviction in a direct appeal and endorse the conviction.

The defendant also has the opportunity to file an application for leave to appeal to the Michigan Supreme Court. If any three Supreme Court justices agree that the case warrants their attention, the application for leave to appeal would be granted. If this

application for leave is denied or the defendant's conviction is upheld once more, the law states that a judgment should become final at some point.

The defendant is provided with a jury trial, an automatic right to appeal to the Court of Appeals, and an opportunity to request permission to appeal to the Michigan Supreme Court. This process is accorded a certain degree of respect and deference due to the finality of judgments. Consequently, this is why the standards for granting a 6500 Motion or a 2254 in federal court (also known as a federal habeas petition), are considerably high. Thus, the doctrine of finality of judgments significantly impacts post-appeal collateral attacks.

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Appealing A State Conviction Of A Sex Crime

The Defendant's Guide To Protecting Rights In Michigan



Mark A. Satawa, Esq.

My experience started when I graduated from law school in 1992. My first job was as an assistant attorney general for the state of Michigan, prosecuting civil tax fraud.

After that, I went to the Wayne County prosecutor's office and worked there for five years, from 1994 to 1999, prosecuting

violent crimes, cell phone fraud, and other complex conspiracy-type cases. I left the Wayne County prosecutor's office in 1999 and worked for what's commonly referred to as a "silk-stocking" law firm for a year until 2000.

Then in 2000, I left to go out on my own. I have been the principal attorney in my law firm ever since. Ninety-five percent of my practice has been in criminal defense for the last 22 years, and about half of that practice has been in federal criminal defense.

The cases range from guns and drugs charges, to child pornography, internet solicitation of a minor, production of child pornography, child exploitation enterprise cases, and complex conspiracy cases. The complex conspiracy cases include racketeering, medical and Medicare fraud, and many other conspiracy-type racketeering cases. These racketeering cases take the form of both violent and white-collar conspiracies. The cases I've handled include Racketeer Influenced and Corrupt Organizations (RICO) allegations, as well as racketeering in Medicare and Medicaid fraud. I have represented folks from everyday citizens, businesspeople, doctors, other medical providers, and everyone in between.

In the last 20 years, half of my practice has been in federal court, and I have successfully defended the gamut of federal criminal offenses. My successful defense of federal criminal cases includes several significant wins at trial, dismissals through motions practice (such as motions to dismiss), and very favorable plea negotiated resolution when appropriate.

My federal criminal practice is significant, and it makes up, at any one time and for the last 20 years, approximately 50% of my practice.

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