



PRESERVING ISSUES FOR APPEAL

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“TRIAL LAWYERS ARE THE SURGEONS, APPELLATE
LAWYERS ARE THE CORONERS”





MALPRACTICE ATTORNEYS



“A DEFENDANT WHO WISHES TO ADVANCE CLAIMS THAT DEPEND ON MATTERS NOT OF RECORD CAN PROPERLY BE REQUIRED TO SEEK AT THE TRIAL COURT LEVEL AN EVIDENTIARY HEARING FOR THE PURPOSE OF ESTABLISHING HIS CLAIMS. . . .”

PEOPLE V GINTHER, 390 MICH 436, 443-44 (1973)

“IN ORDER TO PRESERVE THE ISSUE OF EFFECTIVE ASSISTANCE OF COUNSEL FOR APPELLATE REVIEW, THE DEFENDANT SHOULD MAKE A MOTION IN THE TRIAL COURT FOR A NEW TRIAL OR FOR AN EVIDENTIARY HEARING. FAILURE TO MOVE FOR A NEW TRIAL OR FOR A GINTHER HEARING ORDINARILY PRECLUDES REVIEW OF THE ISSUE. . . .”

PEOPLE V SABIN, 242 MICH APP 656, 658-59 (2000)

“APPELLATE REVIEW HAS NOW BECOME AN INTEGRAL PART OF THE...
TRIAL SYSTEM FOR FINALLY ADJUDICATING THE GUILT OR INNOCENCE
OF A DEFENDANT”

GRIFFIN V ILLINOIS, 351 US 12 (1956)



TEAM WITH THE APPELLATE BAR TO
TREAT OUR MUTUAL PATIENTS



PREPARE OUR MUTUAL PATIENT FOR
THE NEXT STAGE OF TREATMENT

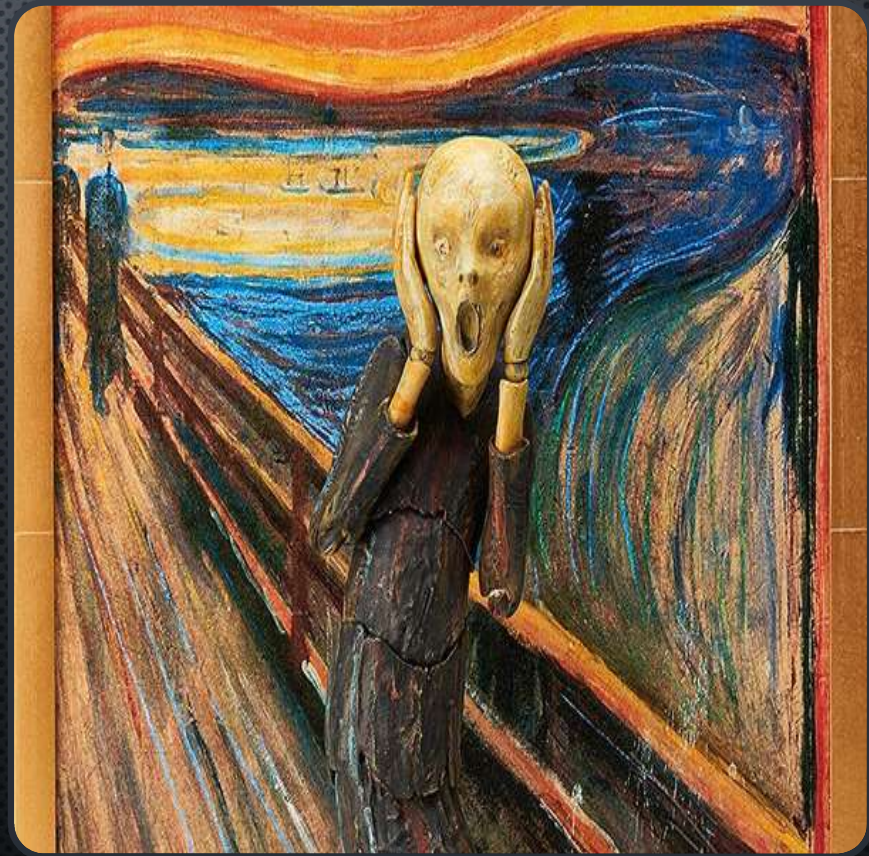


CONSEQUENCES OF PRESERVING/NOT PRESERVING

- Clear Issue Framed for Appeal
- Better Standard of Review
- Easier to Overcome Harmless Error
- Ramifications for Collateral Review

And....

FEWER INEFFECTIVE ASSISTANCE
OF COUNSEL CLAIMS



COURTS DON'T LIKE UNPRESERVED ERRORS

“[The] general and longstanding rule in Michigan [is] that issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. . . . This Court disfavors consideration of unpreserved claims of error, even unpreserved claims of constitutional error”

People v Grant, 445 Mich 535, 546 (1994)

ISSUE PRESERVATION IMPACTS

STANDARD OF REVIEW

LEVEL OF DEFERENCE GIVEN TO TC

*WILLINGNESS OF APPELLATE COURT TO FIND
ERROR*

HARMLESS ERROR

*WILLINGNESS OF APPELLATE COURT TO
REVERSE BECAUSE OF AN ERROR*

STANDARDS OF REVIEW: PRESERVED

- BEST: PRESERVED CONSTITUTIONAL ERROR
 - Most often de novo
 - Easiest to get reversal
- BETTER: PRESERVED NON-CONSTITUTIONAL ERROR
 - Legal issue gets de novo review
 - If judge applied facts to the law, abuse of discretion
- AEDPA: Must be federal. Reviewed for contrary to or unreasonable application or SCOTUS precedent or for unreasonable fact finding

STANDARD OF REVIEW: UNPRESERVED

- **BAD:** PLAIN ERROR: *PEOPLE V CARINES*, 450 MICH 750 (1999)
 - CONSTITUTIONAL OR NON-CONSTITUTIONAL
 - “Clear or Obvious” error
- **WORSE:** AEDPA IS PROCEDURALLY DEFAULTED
 - Must show cause/prejudice, or
 - Actual innocence
- **TERRIBLE:** Waived, not appealable unless you can show IAC

SHOWING HARM ON APPEAL



Best: Preserved Constitutional Structural

Better: Preserved Constitutional Non-Structural

Ok: Preserved Non-Constitutional

Bad: Unpreserved

Terrible: Habeas, Procedural Default

PRESERVED CONSTITUTIONAL

- STRUCTURAL: VICTORY! NO SHOWING OF HARM REQUIRED
 - Closed courtroom
 - Biased judge
 - Pierced veil of judicial impartiality
 - *Batson*
- NON-STRUCTURAL: BURDEN ON PROSECUTION TO PROVE HARMLESS BRD
 - Most errors are non-structural

PRESERVED NON-CONSTITUTIONAL

- MCL 769.26
- MCR 2.613
- *People v Lukity*, 460 Mich 484(1999)
- Burden on defense to show “more probable than not” that the error was outcome determinative



PLAIN ERROR: CONSTITUTIONAL & NON-CONSTITUTIONAL ERRORS

Defense has burden of showing that plain error:

1. Affected substantial rights, i.e., was outcome determinative
2. And, that the error either:
 - a) resulted in conviction of an actually innocent person
 - b) seriously affected the fairness, integrity or public reputation of judicial proceedings independent of a person's innocence

AEDPA: FAILURE TO PRESERVE = PROCEDURAL DEFAULT



- CAUSE & PREJUDICE
 - Some external barrier to raising or,
 - IAC
- ACTUAL INNOCENCE



Waiver



Forfeiture

WAIVER

- Intentional relinquishment of known right
- “Extinguishes” error and cannot appeal
- Occurs if:
 - Party invites error
 - Party expresses satisfaction
 - Unconditional plea



FORFEITURE



- Failure to properly assert right
 - Staying silent/failure to object
 - Failing to object on same grounds as on appeal
 - Failure to renew objection to non-final/preliminary ruling
- Can still appeal but need to show plain error

**10 COMMONLY-SEEN
BARRIERS TO
PRESERVATION
(BESIDES JUST FAILING TO RAISE)**

(1) UNTIMELY OBJECTION

- *Improper question*: Must be done between question and answer or followed up by motion to strike, request for a curative instruction, or motion for mistrial
- *Closing argument*: Immediately after improper comment and request for curative instruction
- *Jury instructions*: Before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations)
- Ideally Pretrial in a *Motion in limine*

(2) UNCLEAR OR NON-FINAL RULING

- Be alert to statements of non-finality by judge:
 - “Not at this time”
 - “Let’s see how the testimony develops”
 - “Make a Foundation”
- Presumption that pretrial ruling *in limine* is final

(3) FAILURE TO BE SPECIFIC

- Specify evidence sought to exclude
- Specify legal grounds: Must be same as on appeal
- Best to argue alternative grounds

“It is well settled that an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground”

(4) ABSENCE OF AN OFFER OF PROOF

- Substance of the evidence must be made known to the court by offer or was apparent from the context within which questions were asked. MRE 103.
- Possible offers of proof:
 - Have witness answer outside jury's presence but on the record
 - Attorney provides narrative record of the substance of what she seeks to admit
 - Can provide affidavit of what witness would have said
- Pretrial motion gives time to make sufficient record

(5) OFF RECORD DISCUSSIONS/ISSUES

Michael,

Thank you for your correspondence. There are many issues to review in this matter, a fair amount of them relating to what the judge allowed in and what he did not allow in. In some cases, a record was not made of what he did not allow in. I will forward the files I have this week.

Thanks.

(5) OFF RECORD DISCUSSIONS/ISSUES

- Place side-bars and in-chambers conferences on record
- Be the eyes and ears for appellate court
 - Makes note of witness demeanor (Shrugging, laughing, looking at pros)
 - Make note of conversations between witnesses/jurors/police officers/etc.
- Clarify comments/testimony
 - “About from here to the wall” does not tell the Court of Appeals how far something was

(6) INADVERTENT WAIVERS

- “When the trial court asks whether a party has any objections to the jury instructions and the party responds negatively, it is an affirmative approval of the trial court’s instructions.” *People v Miller*, 326 Mich App 719 (2019)
- Be wary of “going along” with procedure while there is a clear opportunity to object. *People v Buie*, 494 Mich 294 (2012)
- Be wary of opening the door
- Be aware that entering plea waives most appellate issues and advise your client of this.

(7) FAILURE TO FEDERALIZE AND LEGALIZE ISSUES

- Frame objections as legally-based to allow *de novo* review
- Frame issues in constitutional terms
 - Argue confrontation in addition to hearsay
 - Pose requests to present evidence as right to present a defense
 - Object to improper opinions as invading province of jury
 - Object to instructions as burden shifting or omitting element of offense

(8) LACK OF MOTION PRACTICE

- Pretrial motions
 - Motions for expert/investigator funding
 - *Daubert* hearings
- Motion for mistrial
- Motion for new trial

(9) NEED FOR HOUSEKEEPING

- Get exhibits to the Court of Appeals. MCR 7.210 (C)
- Have recordings transcribed

(10) FAILURE TO HOLD TRIAL COURT ACCOUNTABLE

- Get clear and final rulings from the court,
with reasoning, on the record

WISH-LIST OF PRESERVED ISSUES



NON-EVIDENTIARY MATTERS

- Shackling: Can't shackle as a matter of course
 - Violates presumption of innocence if visible to jury
 - *Also interferes with right to counsel*
- Motions for Adjournment
 - Request as soon as possible
 - Argue necessary to provide effective assistance

CLOSED COURTROOM:

PRESLEY V GEORGIA, 558 US 209 (2010)

- Look for Signs! Deps at Frank Murphy were routinely closing
- Court almost never justified in closing, even based on space
- Structural error if preserved



EVIDENTIARY MATTERS

- Prosecutorial misconduct
- Opinion testimony/*Daubert*
- *Crawford*/Confrontation
- Unanimity instructions
- Inadequate redaction of recordings
- Pierce veil of judicial impartiality

PROSECUTORIAL MISCONDUCT

- Asking client if prosecution witnesses are lying
- Shifting burden of proof
- Commenting on client's silence or failure to testify
- Personally vouching for prosecution witnesses
- Arguing facts not in evidence
- Violating rulings in limine
- Urging improper use by jurors of evidence admitted for limited purpose

EXPERT/OPINION TESTIMONY

- *Daubert!*
 - MRE 702 has Broad Application: Applies where witness with “scientific, technical, or *other specialized knowledge*” is offered
- Other improper expert or lay opinion testimony:
- Vouching for complainant or invading province of jury
 - *People v Vaughn and Harbison*, MSC Nos 156777, 157404
- Police officer testifying that client is person seen on video
 - *People v Fomby*, 300 Mich App 46 (2013)
- Seek funding for expert witnesses! *People Kennedy*, 502 Mich 206 (2018)
 - Eyewitness identification
 - Coaching in CSC cases

CONFRONTATION: CRAWFORD/BULLCOMING

- Lab reports, drug tests, autopsy reports: person who did the analysis and wrote the report must testify
- Police officer testifying about what CI told them to “explain their actions”
- Admission of prelim transcripts when witness unavailable
 - Must have been a meaningful opportunity to cross examine
 - A lot can change between prelim and trial to alter cross examination approach and strategy

UNANIMITY INSTRUCTION: *PEOPLE V COOKS*

- Separate distinct acts that could be basis to convict of a single count
- Jury could “split” votes and return non-unanimous verdict
- Must be instructed that they must all unanimously agree as to which act client committed
- Example: 1 count of R&O
 - Cop testifies client disobeys order to stop, then resists when he tries to cuff him.
 - Some jurors could find that client didn't hear cop's order, but actually resisted the cuffing
 - Other jurors could find that client did hear cop's order and disobeyed, but that he didn't put up physical resistance to being cuffed.
 - Less than 12 jurors agree as to what act was proven BRD.

REDACTING RECORDED POLICE INTERVIEWS

- *Musser Issue*: Police officer vouching for complainant's credibility during Interrogation
People v Musser, 494 Mich 337 (2013)
- References to prior convictions, prior bad acts, etc

PIERCE THE VEIL OF JUDICIAL IMPARTIALITY

- Judge's questioning of witnesses: Manner of asking and substance of questions
- Manner in which judge addresses trial counsel
- Off-hand comments
- Body language
- If preserved, automatic reversal
- *People v Swilley*, 2019 WL 3227466 (July 17, 2019)
- *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015).

SENTENCING

- Object in a sentencing memorandum filed before sentencing AND orally on the record
- Possible objections:
 - Errors in the PSIR
 - Relevance/Accuracy
 - Presumed accurate unless effectively challenged
 - Errors in scoring the Prior Record Variables and Offense Variables
- Cite to case law and the due process right to be sentenced based on accurate information

STRATEGIC LITIGATION: PARTNERING WITH SADO

- Litigation: representing an individual or group of people in a court
- Strategic litigation: selecting and litigating cases for their impact beyond the individual client