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Appellate Review of Unpreserved Issues

The panel in 'Harmon v. Sharp' didn't reach any binding conclusions as to how the court would treat appellate arguments not raised in federal district court habeas proceedings. But all three judges treated Harmon's arguments as waived and not merely

Insight — October 23, 2019

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A panel of the U.S. Court of Appeals for the Tenth Circuit recently plunged into difficult questions concerning the court's consideration of issues that were not preserved in the district court. More specifically, the three panel judges struggled to reach agreement on whether the forfeiture/clear-error rubric applicable to unpreserved issues in ordinary cases should also apply uniformly to habeas cases.

The case was *Harmon v. Sharp,* — F.3d —, 2019 WL 4071870 (10th Cir. Aug. 29, 2019). In it, Harmon, a state prisoner sentenced to the death penalty in Oklahoma, filed a petition for habeas relief under 28 U.S.C. §2254 after exhausting his state court appeals and post-conviction remedies. His federal habeas petition raised various issues, including ineffective assistance by his state trial and appellate counsel. The district court denied the petition, and Harmon appealed.

The Tenth Circuit's opinion, authored by Judge Joel Carson, affirmed the conviction and sentence. In the course of doing so, it confronted several arguments Harmon's counsel hadn't made in the federal district court and one his counsel hadn't made in his initial state court appeal.

Claims Not Raised on Direct Appeal

The *Harmon* panel readily agreed on the framework for considering the appeal issue Harmon's counsel hadn't raised in his direct appeal of the conviction and sentence. As the panel explained, under circuit precedent, the court won't address issues that have been waived under state law unless a petitioner demonstrates cause and prejudice or a fundamental miscarriage of justice.

In Harmon's case, his appellate counsel didn't raise an ineffective assistance of counsel claim in his direct appeal; that claim was first raised in his initial state post-conviction proceeding. The Oklahoma courts held in that post-conviction proceeding that, as a matter of state law, the claim was waived because it hadn't been raised on direct appeal.

The Tenth Circuit panel concluded that Harmon hadn't shown either cause

and prejudice or a fundamental miscarriage of justice so as to allow him to raise the claim in his federal habeas case. This was so for three primary reasons: (1) he'd had separate trial and appellate counsel in the state proceedings; (2) the state provides a procedural mechanism for supplementing the record to include the factual basis of a claim of ineffectiveness; and (3) he hadn't sufficiently established ineffective assistance of appellate counsel so as to overcome the procedural bar to his ineffective assistance of trial counsel claim.

In addressing this third reason, the court had to consider whether the ineffective assistance of trial counsel claims Harmon's appellate counsel had failed to raise in his direct appeal actually had merit. Thus, in a sense, the court reviewed the merits of the waived claims anyway; and had it found them meritorious, it likely would have afforded him relief despite his earlier waiver.

Claims Not Raised in the District Court

The *Harmon* panel had far greater difficulty reaching a consensus on how to treat the issues Harmon's counsel hadn't raised in the habeas proceedings in federal district court. At several points in his opinion, Judge Carson noted arguments Harmon raised on appeal that he hadn't preserved in the district court. In each instance, the court declined to consider the argument, citing an earlier decision in which the court held that "[w]e do not generally consider issues that were not raised before the district court as part of the habeas petition." *Stouffer v. Trammel*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013).

In a lengthy concurring opinion, Judge Holmes expressed that, while he agreed with the majority opinion, he wanted to "address a significant issue relating to the application of preservation principles in the habeas context"—namely, why unpreserved issues should be treated differently in habeas cases than in other types of cases.

As Judge Jerome Holmes explained, outside of habeas proceedings, a litigant's failure to raise an issue ordinarily results in *forfeiture* of the issue, such that the court will review it only for plain error. And if a litigant doesn't invoke and argue the plain-error rubric, the court will deem the issue waived (as opposed to merely forfeited) and thus usually won't consider it at all.

However, Judge Holmes went on to say, in the context of habeas proceedings the court "usually has treated arguments that petitioners have not advanced before the district court as waived—*viz.*, not subject to review at all." After citing several of these cases, he noted that there were other habeas cases in which the court had instead invoked the forfeiture/plain-error rubric, but he reasoned that those cases were infrequent, lacked any reasoning, and couldn't be followed under *stare decisis* because the earlier authorities applying the waiver doctrine were binding. In addition, he stated, the other federal circuits seemed largely to agree that issues not raised in habeas district court proceedings are waived. Finally, he remarked that plain-error review had no place in

habeas collateral-review proceedings, where petitioners already must overcome a very deferential, fairminded-jurist standard and are required by rule to specify in their petitions all grounds for relief available to them.

Thus, Judge Holmes concluded, "[I]t seems logical that, if a party seeks to present a claim or ground for relief on appeal that was not presented to the district court in his or her habeas petition, the court should treat such a claim or ground for relief as waived, rather than merely forfeited. Put another way, such an extra-petition argument would be outside the boundaries of the habeas litigation and, therefore, should be deemed waived and not considered at all."

In a separate concurrence, Judge Harris Hartz expressed that he agreed with "much in Judge Holmes's concurrence," including that "this court should not grant habeas relief on a claim not raised in district court," just as it doesn't grant relief on civil claims not raised in the district court. But he stated that he was "reluctant … to go so far as to say that there is never a place for plain-error review of matters not properly preserved during proceedings in district court in habeas cases."

As Judge Hartz explained, while postconviction proceedings generally are very deferential to the final judgments in prior criminal proceedings, "plain-error review does not concern the relationship between the original criminal proceeding and postconviction proceedings; rather, it concerns the relationship between the appellate court and the trial court in the same postconviction proceeding." Thus, he reasoned, "[a]bsent specific contrary direction by the rules of procedure or statute, I do not see why that relationship should be different in postconviction proceedings."

Judge Hartz therefore suggested that the rule should be the same in habeas cases as in other types of cases. He further remarked that plain-error review may be appropriate in some circumstances in a habeas case, such as where a federal district court properly conducts a hearing but a prisoner fails to object to an erroneous procedural or evidentiary ruling at that hearing. Ultimately, he advised that the court should "be cautious in stating a global conclusion."

The Bottom Line

The panel in *Harmon* didn't reach any binding conclusions as to how the court would treat appellate arguments not raised in federal district court habeas proceedings. But all three judges treated Harmon's arguments as waived and not merely forfeited. And it's certainly clear that attempts to raise new issues on appeal will be treated with far greater scrutiny in such cases.

It's also worth noting that Judge Holmes acknowledged in his concurrence (in a footnote) that the court retained discretion to consider arguments raised for the first time on appeal and that it had previously utilized that discretion in habeas cases. So even if the Tenth Circuit ultimately decides that the waiver rule applies to unpreserved issues in habeas cases, prisoners still may have an avenue to try to get potentially serious errors

before the appellate court.

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