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Barriers to Jailhouse Lawyering

Rahsaan "New York" Thomas

ABSTRACT

Jailhouse lawyers face unreasonable barriers to have their constitutional claims heard post-conviction. Courts, without adequate regard for the physical limitations inherent behind bars, place procedures over justice.

AUTHOR

Rahsaan "New York" Thomas is the co-host and co-producer of the Pulitzer Prize nominated podcast Ear Hustle, as well as a contributing writer for The Marshall Project and San Quentin News. He co-founded Prison Renaissance and works with the Initiate Justice and the Ella Baker Center on achieving social justice. He is currently incarcerated and has a legal campaign seeking help to secure his freedom through hiring an attorney and expert witnesses at: bit.ly/BringRahsaanHome.


THE UNIVERSITY OF CALIFORNIA
UCLA
SCHOOL OF LAW

They say that a lawyer who represents himself has a fool for a client. When you are poor and incarcerated, you often have no choice. Your right to appointment of counsel post-conviction only extends as far as one filing to the state appellate court.[1] To pursue further relief in federal court or start a round of state habeas corpus writs, you'll have to learn how to do so yourself.

The California State Constitution guarantees that a person improperly deprived of liberty has the right to petition for a writ of habeas corpus,[2] and the U.S. Supreme Court has ruled that a document filed pro se "is to be liberally construed . . . 'however inartfully pleaded,' . . . [and] must be held to 'less stringent standards than formal pleadings drafted by lawyers.'"[3] But in actual practice, numerous barriers prevent the average jailhouse lawyer from getting the merits of their claims reviewed.

Courts are largely intolerant of parties not knowing and not following procedural rules, even in pleadings filed by pro se litigants. Before a court will even look at any legal claim for merit, the court examines a writ for procedural violations. If there are any, they deny justice on technical grounds without regard for the human being filing the writ from the limitation of a cell.

The first of many complex rules revolves around what issues can be raised on direct appeal—the only stage at which the state of California guarantees counsel.[4] Direct appeals are limited to matters that were "preserved."[5] This means that proof of the error must be documented within the official trial transcripts.[6] Even if the issue happened on the record, the trial attorney must have objected and stated the correct grounds for the violation, unless an objection would have been futile, to preserve the claim.[7] Additionally, for the issue to have been preserved for review by the federal courts, the lawyer must have expressly raised the perceived violation on the correct federal grounds.[8] A workaround is to file a writ of habeas corpus under ineffective assistance of trial counsel, but you'll likely have to do that on your own.

1. *See* Douglas v. California, 372 U.S. 353 (1963); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further.").
2. CAL. CONST. art. I, § 11.
3. Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Haines v. Kerner, 404 U.S. 519, 520–21 (1972)).
4. *See Douglas*, 372 U.S. 353.
5. *See, e.g.*, People v. McKinnon, 259 P.3d 1186 (Cal. 2011).
6. *See id.*
7. *See id.*
8. *See* Duncan v. Henry, 513 U.S. 364, 366 (1995); *see also* Baldwin v. Reese, 541 U.S. 27, 29 (2004).

Meanwhile, a person coming to prison for the first time is unlikely to know or understand any of the direct appeal limitations. All an individual might know is that an aspect of the trial was unfair and they should not be in prison. Incarcerated people rely on state appointed counsel to do something about securing their freedom. So, you write your counsel and tell them about what you feel went sideways. Appellate counsel files what they see in the record—even though it is possible for counsel to seek funds to prepare a writ of habeas corpus attacking matters outside the trial transcripts, if they become aware of a meritorious claim.[9] The money offered for this work, however, isn't attractive when compared to the amount of work habeas proceedings entail, so appellate counsel's aid usually stops with, at best, a petition to the California Supreme Court requesting review.[10] The incarcerated lawyer, with or without legal training, must figure out what to do on his own from that point on.

Additionally, any issue that could have been presented on direct appeal and was not is barred from habeas corpus review under the *Waltreus* rule.[11] There is an exception to the *Waltreus* rule for violations of fundamental constitutional rights that "so fatally infected the regularity of [the] trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice."[12] If appellate counsel misses a claim, a litigant can try to overcome the *Waltreus* rule by filing ineffective assistance of appellate counsel claims on a writ of habeas corpus. Because appellate attorneys have no duty to file all meritorious claims,[13] however, it will be tough to win.

One of the biggest threats to pro se litigants are the state and federal time bars. In contradiction to the rule that pro se writs must be interpreted liberally, late filing forfeits all post-conviction proceedings, unless a litigant qualifies for narrow exceptions that subject them to more stringent standards.[14]

Under state law, a litigant must file a writ of habeas corpus without substantial delay. According to *In re Robbins*—a case in which the California

9. CAL. CT. R. 4.551(c)(2).
10. My appellate counsel ended his aid with a petition to the California Supreme Court.
11. *See generally In re* Harris, 855 P.2d 391 (Cal. 1993).
12. People v. Crooker, 303 P.2d 753, 756–57 (Cal. 1956).
13. *See* Evitts v. Lucey, 469 U.S. 387, 394 (1985) ("[T]he attorney need not advance *every* argument, regardless of merit, urged by the appellant."); *see also* Jones v. Barnes, 463 U.S. 745, 751–52 (1983) (emphasizing that appellate attorneys do not have a duty to raise every meritorious claim, and in fact, may want to "winnow[] out weaker arguments on appeal and focus[] on one central issue if possible, or at most on a few key issues").
14. *See generally* 20A CAL. JUR. 3D *Criminal Law Pretrial Proceedings* § 837 (2014).

Supreme Court addressed timeliness in death penalty cases for which state appointed and pro bono attorneys are litigating through the complete appellate process—litigants have "'90 days after the final due date for the filing of appellant's reply brief on the direct appeal'" to start state habeas proceedings.[15] Substantial delay is also measured from the "time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim."[16]

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), which governs rules for federal court habeas corpus review of constitutional violations, a litigant has one year from the date the appeal decision becomes final.[17] A case is final shortly after the California Supreme Court declines to review or denies the claims made on direct appeal.

The AEDPA time deadline works like a shot clock, which is paused whenever claims are filed in a state court pending a decision.[18] The clock is also paused between states courts as a case works its way up the chain from the Superior Court, Court of Appeals, and then California Supreme Court, refiling any denied claims, as long as the litigant does not take longer than ninety days to refile between courts.[19] Litigants must "exhaust" all of their claims in state court by at least filing them in the California Supreme Court before they will be ripe for federal review.[20] Some bars to state court review can also bar federal review such as: (1) timeliness in state court,[21] (2) Fourth Amendment violation (search and seizure cannot be raised in a habeas petition),[22] or (3) issue could have been raised on direct appeal and was not.[23]

15. *In re* Robbins, 959 P.2d 311, 311 (Cal. 1998).
16. *Id.*
17. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2261–66.
18. *Id.*
19. Evans v. Chavis, 546 U.S. 189 (2006).
20. *See generally In re* Reno, 283 P.3d 1181 (Cal. 2012).
21. *See, e.g.*, Walker v. Martin, 562 U.S. 307 (2011) (holding that California's untimeliness bar for habeas petitions is an adequate state procedural ground that bars relief in federal court).
22. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494 (1976) (concluding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial").
23. The general rule is that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." Massaro v. United States, 538 U.S. 500, 504 (2003); *see also* United States v. Frady, 456 U.S. 152, 167–68 (1982); Bousley v. United States, 523 U.S. 614, 621–22 (1998).

While there are timeliness exceptions for those who allege actual innocence, the standard of review for such late-filed claims is almost impossible to meet. Take the case of *In re Miles*,[24] in which the petitioner filed a writ of habeas corpus based on new evidence twelve years after his robbery convictions. Originally, the courts decided his case under a fundamental miscarriage of justice exception to the time bar for actual innocence claims. Under that standard, Guy Donell Miles had to prove no other conclusion could be reached, based on the new evidence presented, other than the evidence unerringly pointing to his innocence. Although he had the confessions of the person who had actually committed the robbery and issues with the eyewitnesses' identifications, the petition was denied. Miles eventually gained a reversal of his convictions under the newer standard for claims involving newly discovered evidence, which went into effect January 1, 2017. The relevant standard now requires that "[n]ew evidence exists that is credible, material, *presented without substantial delay*, and of such decisive force and value that it would have more likely than not changed the outcome at trial."[25]

The difference between filing an actual innocence claim without substantial delay, or, at least, good cause for delay, amounts to being judged under the more lenient preponderance of the evidence standard[26] rather than the "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability" standard.[27] Filing on time is everything.

A pro se attorney must file his claims on time and within the rules. But, besides the legal barriers to bringing claims, there are also physical challenges that make doing so difficult. For me, the barriers began in the Los Angeles County Jail. There, litigants only get law library access if they are representing themselves. Going pro per[28] grants a litigant ample access to computers with books on procedures and case law loaded in, plus the actual law library books themselves. Pro pers even get placed in a special module limited to other legal beagles[29]—where, importantly, case files are less likely

24. *In re* Miles, 213 Cal. Rptr. 3d 770 (Ct. App. 2017), *as modified on denial of reh'g* (Feb. 10, 2017).
25. CAL. PENAL CODE § 1473(b)(3)(A) (West 2020) (emphasis added).
26. *See In re Miles*, 213 Cal. Rptr. 3d at 792.
27. *In re* Clark, 855 P.2d 729, 797 n.33 (Cal. 1993).
28. "Pro per" is another term to describe self-represented litigants, derived from the Latin *in propria persona*, meaning "for one's own person." It is used interchangeably with the designation "pro se."
29. A legal beagle is an incarcerated person who is diligent and skilled at practicing the law behind bars.

to get thrown all over the unit in searches by deputies exercising unnecessary toughness. If a litigant keeps their public defender, the Los Angeles County Jail will not give the person law library access at all. (On Rikers Island, when I was housed there in the 1990s, the New York Department of Corrections allowed everyone law library access.) Older men warned me that I should go pro per, use the resources that would be available to learn all about my case, and then request reappointment of counsel.

I chose instead to stick with my attorney and rely on him, and that led to other barriers. At the end of my trial, during closing arguments, I knew something was going terribly wrong, as the prosecutor argued things during closing argument that we both knew could not be true, while my lawyer stayed mute. I did not know that he was supposed to object because otherwise, post-conviction, the issue would not be properly preserved for appeal.

Since I was not allowed law library access in the Los Angeles County Jail, my legal education did not start until I reached state prison. Even then, lockdowns frequently hampered my law library access.

I started my 55-to-life with the possibility of parole sentence at Calipatria State Prison, a maximum-security level-four prison. I was placed on B yard, which shared A yard's law library on an alternating, every-other-day basis. Since those of us on B yard had to be handcuffed and escorted to another yard, law library access was by appointment only. I sent in slips every day for a slot and only averaged about two or three appointments per month—until the lockdown. During my first lengthy lockdown, I entered the law library about twice in six months.

Under California regulations, only those incarcerated persons who have thirty days or less until an established court deadline are given priority access to the law library.[30] The way that works right now because of COVID-19 program modifications at San Quentin State Prison is that anyone with Priority Legal User (PLU) status—granted to those who have proof of an upcoming court deadline—gets in-person law library access twice a week for at least two hours each time. Everyone else must settle for a paging system, where an individual sends case cites to the staff and they return Xerox copies of the requested material.

The problem with the paging system is that the law library staff does not do research for you. An individual must know the exact cites in order to get the requested information. You can't cite what you don't know. Therefore, I

30. CAL. CODE REGS. tit. 15, § 3122 (2020).

have been denied adequate law library access since March 17, which will continue until the pandemic is brought under control and COVID-19 restrictions have been lifted. Lockdowns are often not accepted as a valid excuse when explaining the denial of law library access to the courts as a justification for late filings.[31]

Calipatria State Prison, where I was housed from 2003 to 2009, did not have a paging system at all. Four years of my time there was spent on lockdown or "modified program" because of acts of violence that had nothing to do with me.[32] The effect of these restrictions amounted to severely reduced time to conduct my research for filing a writ of habeas corpus; and the earlier denial of law library access in the Los Angeles County Jail combined with those in state prison kept me ignorant of the procedural and legal basis of all my claims. The state prison system must grant you law library access during the last thirty days before a deadline, but those four hours per week were not enough to learn all potential legal issues and habeas procedures, plus type up the writ.

The next barrier is access to a litigant's complete case file. Until September 2018, only those sentenced to life without the possibility of parole had a right to post-conviction discovery under California law.[33] In 2008, I filed a motion arguing that someone sentenced to 102 years to life with the possibility of parole is facing the equivalent of life without parole. The courts denied my motion. Since then, post-trial discovery law has been expanded to those sentenced to fifteen years or more—but that was done so too late for me, and too bad for anyone sentenced to fourteen years and three hundred sixty-four days or less. Therefore, the only hope of accessing relevant discovery for some pro pers is if they can get the whole file from their trial attorney.

Moreover, I did not receive my official trial transcripts until my direct appeal was nearly over. There was insufficient money in the budget for my state-appointed appellate attorney to make me a copy of my trial transcripts. So, I had to wait until we lost on direct appeal and a petition for review was filed before a box with the transcripts showed up. From the moment I received the trial transcripts, I had about four months to file a writ of habeas corpus in state court—but only thirty days of priority access to the law library.

31. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996).
32. Whenever there is a potential security threat to the institution, the whole prison is placed on lockdown to investigate or prevent further incidents.
33. *See* CAL. PENAL CODE § 1054.9 (West 2020).

Another barrier is the stigma of fighting your own case from prison. The burden of proof during habeas corpus proceedings is on the petitioner. That means a petitioner must submit proof of every claim made. For me, that meant needing a forensic expert; but forensic experts, in my experience, do not work with people in prison.

I wrote to several forensic experts, and most never wrote me back. The two that did both said the same thing: They only work with attorneys or private investigators. In my letter, I made it clear that I was my attorney. It was bad enough that I would have had to save and sacrifice to hire an expert witness, but the restrictions these forensic experts imposed on working with jailhouse lawyers required me to spend extra money I did not have to first hire a lawyer or private eye.

The deadline rules and limited law library access explain why prisons are filled with dozens of jailhouse lawyers who are able to help get everyone out but themselves. By the time you as a jailhouse lawyer learn enough to file a proper writ, your own deadline has long passed. You push a second-rate writ up the chain, wishing you knew then what you know now. Your knowledge helps everyone but you.

Other physical barriers include no laptops, copying fees of ten cents per page (plus the need for law library access in order to make copies), as well as living in a cage with another human being who may or may not be supportive of you typing all day and night to meet a deadline. Not to mention the fact that typewriter ribbons cost about seven dollars and only last for about twenty-five pages. Plus, as a new arrival to prison, you only get one fifteen-minute phone call per month, and that is only if the prison is not on lockdown. Even when you get a job or get into a program,[34] which ups your status to one call each day, the person you want to reach must first have opened a prepaid account in order to accept your collect calls. Imagine trying to conduct an investigation under the limits of incarceration.

Despite these numerous obstacles, pro pers are held to most of the same standards as those represented by external counsel on the most important points—timeliness, procedures, correct presentation of issues, ripeness—as lawyers who passed a state bar exam and who work with the help of a team of paralegals, investigators, and experts equipped with laptops, cell phones, and internet access.

34. Programs might include going to school or working as a porter, education clerk, or prison industry authority worker (the equivalent of a factory worker).

For the courts' guarantees—that everyone improperly deprived of liberty has the right to petition for a writ of habeas corpus[35] and that pro per petitions are held to less stringent standards than formal pleadings drafted by lawyers—to mean anything more than just words, justice must come before procedures. No one in prison wants to remain here a moment longer than necessary, so while time limits designed to compel free lawyers into action and give victims finality make sense for them, such deadlines hamper justice in pro se cases. No procedures or time limits should trump justice.

Moreover, a referee in an NBA basketball game should not be a better arbiter of fairness with more tools to do what is right than justices in appellate court proceedings. Appellate attorneys are limited to matters on the record and so are appellate judges. On habeas review, judges limit their review to the issues raised by the pro se lawyer. In an NBA game, when a referee sees a violation, he calls it and enforces the rules. In contrast, during appellate procedures, a pro se litigant must make his own call, then the judge hears both parties and rules. If the pro se litigant calls traveling when the actual violation is a carry, the claim is denied, even if it is obvious that a violation happened that affected the outcome of the game.

Appellate attorneys should be able to file all meritorious issues, regardless of the official record, whether preserved or not preserved by an objection. Additionally, if the court sees a violation that was not raised, it should not be forfeited. Appellate review should aim to achieve justice, to ensure that the conviction was obtained fairly enough to be a reliable verdict. One thorough review would actually streamline the process and better achieve court goals of finality and speed. No innocent or harshly sentenced person should remain in prison because of poverty, ignorance, or barriers inherent to incarceration. Justice must be safeguarded for all.

35. CAL. CONST. art. I, § 11.