Chapter 22

Postconviction Remedies

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Chapter 22

Postconviction Remedies

Introduction

Page 22·4. Insert a new note at the end of the first sentence:

. . . the criminal process.[1]

1. One sign of the relative maturity of a field is the existence of broad-based treatises on the subject. Postconviction remedies now has two treatises, each publishing annual supplements, covering postconviction remedies for federal and state prisoners. Each covers as well federal habeas corpus for state prisoners. *See* D. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF (1983); L. YACKLE, POSTCONVICTION REMEDIES (1981).

Page 22·5. Insert a new note at the end of the carryover paragraph:

. . . state postconviction procedures.[2]

2. *See* Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts, An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287 (1983). A number of studies of the efficacy of postconviction remedies in particular states have been published. *E.g.*, Anderson, *Post-Conviction Relief in Tennessee—Fourteen Years of Judicial Administration under the Post-Conviction Procedure Act*, 48 TENN. L. REV. 605 (1981); Comment, *Postconviction Remedies under Missouri Rule 27.26: Problems and Solutions*, 47 MO. L. REV. 787 (1982); Comment, *The Postconviction Review Dilemma in Ohio*, 44 OHIO ST. L.J. 537 (1983); Comment, *Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster"?*, 20 DUQUESNE L. REV. 237 (1982).

Page 22·6. Replace first full paragraph with the following new paragraph:

Implementation of many of the standards in this chapter can be accomplished by statute or by rule of court. The Uniform Post-Conviction Procedure Act (1980)—approved by the American Bar Association on February 10, 1981—has been completely reviewed and revised to conform to these standards. References to Related Standards are keyed to the 1980 version of the Uniform Act.

Standard 22-1.1. Single, comprehensive postconviction remedy

Page 22·7. To the end of note 1, add the following new material:

A motion under rule 35(b) must be filed within 120 days, but most courts of appeals conclude that the ruling thereon may be made after the 120-day period has expired. *See* United States v. Krohn, 700 F.2d 1033 (5th Cir. 1983); United States v. Rice, 671 F.2d 445 (11th Cir. 1982); United States v. DeMier, 671 F.2d 1200 (8th Cir. 1982); United States v. Smith, 650 F.2d 206 (9th Cir. 1981) Government of Virgin Islands v. Geneau, 603 F.2d 438 (3d Cir. 1979). Two circuits, however, suggest that the power of the district court to reduce sentence cannot be extended beyond the 120th day. United States v. Kajevic, 711 F.2d 767, 770-771 (7th Cir. 1983) (dictum), *cert. denied*, —U.S. —, 104 S. Ct. 721 (1984); United States v. Pollack, 655 F.2d 243, 246 (D.C. Cir. 1980) (dictum). On the majority view, date for court action could come after a defendant had completed a substantial part of a sentence involving confinement or probation. *But see* Diggs v. United States, No. 83-3143 (3d Cir. July 26, 1984) (district court lacked power to grant timely filed motion that was lost or mislaid by court for two and one-half years).

Page 22·7. To the end of note 2, add the following new material:

The project was assigned to the Standing Committee on Association Standards for Criminal Justice in 1978. The House of Delegates approved a final draft of these standards in February 1981. They appear as chapter 23 of STANDARDS FOR CRIMINAL JUSTICE.

Standard 22-1.2. Characterization of the proceeding

Page 22·10. To the end of note 3, add the following new material:

Rule 11 was amended in 1979 to specify a time for appeal in §2255 proceedings. The amendment adopts the time allowed for appeal from judgments in civil cases. 441 U.S. 1001. An accompanying Advisory Committee Note explained that this does not signify any departure from the view that a §2255 proceeding is a further step in the criminal case.

Standard 22-2.1. Grounds for relief encompassed

Page 22·18. Replace note 4 with the following new note:

Compare Davis v. United States, 417 U.S. 333 (1974), *with* United States v. Addonizio, 442 U.S. 178 (1980), *and* Stone v. Powell, 428 U.S. 465 (1976). *See also* standard 22-6.1.

The scope of claims cognizable in a postconviction proceeding continues to evolve as federal and state courts are presented with new contentions. For persons convicted of federal crimes, the Supreme Court defined postconviction relief under 28 U.S.C. §2255 as including any claimed error that constituted "a fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979). Under this principle, federal courts of appeals have recognized new grounds for §2255 relief. *E.g.*, Diggs v. United States, No. 83-3143 (3d Cir. July 26, 1984) (dictum); United States v. Baylin, 696 F.2d 1030 (3d Cir. 1982); United States v. Higdon, 627 F.2d 893 (9th Cir. 1980); United States v. Williams, 615 F.2d 585 (3d Cir. 1980); *but see* United States v. Coyer, 732 F.2d 196 (D.C. Cir. 1984); Mars v. United States, 615 F.2d 704 (6th Cir. 1980).

The Supreme Court had acted to narrow the availability of postconviction relief for federal prisoners by requiring them to show "cause and prejudice" with respect to the failure to present the claims in the original prosecutions. A person seeking collateral relief under §2255 must explain why the contention now advanced had not been presented earlier and must show how the alleged error harmed the movant. United States v. Frady, 456 U.S. 152 (1982). Nineteen years after conviction for murder and robbery, Frady had

challenged for the first time the instructions to the jury on the issue of intent. The Court held that the evidence at trial of Frady's malice was so overwhelming that the jury would have found malice regardless of the jury instructions; even though the jury instructions would have constituted "plain error" on direct appeal, that standard does not apply in a postconviction proceeding. At least one count of appeals has applied *Frady* to a claim based on the Constitution, where a claim had been fully pressed at trial but defendant had not taken an appeal. Norris v. United States, 687 F.2d 899 (7th Cir. 1982); *but see* United States v. Baylin, 696 F.2d 1030 (3d Cir. 1982); United States v. Corsentino, 685 F.2d 48 (2d Cir. 1982). *Compare* People v. Turman, 659 P.2d 1368 (Colo. 1983) (citing standards).

Narrowing access to postconviction relief on the ground of procedural default at an earlier stage of the proceedings is likely to add to the burgeoning claims for postconviction relief on the ground of ineffective assistance of counsel. *See* Annot., 13 A.L.R.4th 533 (1982); Annot., 2 A.L.R.4th 27 (1980). *And see* Jones v. Barnes, — U.S. —, 103 S. Ct. 3308 (1983) (defense counsel does not have a duty to raise every nonfrivolous issue requested by defendant). For recent interpretation of the sixth amendment's impact in defining effective assistance of counsel, *see* Strickland v. Washington, — U.S. —, 104 S. Ct. 2252 (1984); United States v. Cronic, —U.S. —, 104 S. Ct. 2039 (1984).

Page 22·18. At the end of the carryover paragraph, insert:

The difficulty of the question of finality and change of law was presented graphically in a 1980 Florida case involving a death sentence. One aspect of the case was the determination of what court actions will be deemed a relevant change of law. The Florida Supreme Court held that only decisions by it or by the United States Supreme Court would be so considered.[4a] The court refused to consider an intervening decision of the United States Court of Appeals for the Fifth Circuit, the circuit in which Florida is located, holding that a defendant's statements during a court-ordered psychiatric examination could not be admitted in the absence of *Miranda* warnings.[4b] The Florida court was aware that the Fifth Circuit decision was pending in the United States Supreme Court on certiorari granted but viewed that as an additional reason for not giving it effect. The United States Supreme Court subsequently affirmed the Fifth Circuit.[4c] Since state

prisoners have the right to seek federal habeas corpus relief after exhausting state remedies, it is questionable whether the goal of finality is served by refusal of state courts to follow constitutional law decisions by the United States Courts of Appeals in their respective circuits.

The Florida case also presented three claims based on nonconstitutional decisions by the Florida Supreme Court itself. The intervening decisions had dealt with the handling of mitigating and aggravating circumstances and, presumably, the changes could have benefitted the postconviction applicant. The court held that the decisions would not be applied retroactively. The Chief Justice, concurring, observed: "Disparities in sentencing will occur—despite all the rhetoric about death being different and the courts exercising special scrutiny to prevent arbitrariness—simply to preserve overriding societal needs."[4d]

4a. Witt v. State, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980).
4b. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979).
4c. Estelle v. Smith, 451 U.S. 454 (1981).
4d. Witt v. State, 387 So. 2d at 932.

Page 22·20. Insert a new note at the end of the carryover paragraph:

. . . in certain cases.[7a]

7a. Although the Minnesota postconviction statute did not expressly include newly discovered evidence as a ground for relief, the state supreme court, citing the first edition of this standard, held that such claims were cognizable. Martin v. State, 295 N.W.2d 76 (Minn. 1980). Claims based on newly discovered evidence should be considered even if the outcome might result only in reduction of the degree of the offense. State v. Davis, 25 Wash. App. 134, 605 P.2d 359 (1980).

Standard 22-2.2. Prematurity of applications for postconviction relief; postponed appeals

Page 22·21. Replace line 3 under the heading* Related Standards *with the following new reference:

NCCUSL, Uniform Post-Conviction Procedure Act §3(c), (d)

Standard 22-2.3. Custody requirement

Page 22·24. To the end of note 1, add the following new reference:

Annot., 26 A.L.R.4th 455 (1983).

Page 22·24. Insert a new note on line 8 of the first full paragraph:

. . . or concurrent convictions.[1a]

1a. People v. West, 42 Colo. App. 217, 592 P.2d 22 (1979) (completed service of sentence does not bar postconviction relief where prior conviction affects parole eligibility on current sentence); *cf.* Hanson v. Circuit Court, 591 F.2d 404 (7th Cir. 1979) (federal habeas corpus for state prisoners).

Page 22·24. Insert a new note on line 10 of the first full paragraph:

. . . been completed.[1b]

1b. *See* Thiesen v. State, 86 Wis. 2d 562, 273 N.W.2d 314 (1979) (custody requirement bars postconviction review where applicant has completed service of sentence, even though conviction may affect pending deportation proceedings).

Page 22·24. To the end of note 2, add the following new reference:

See also Note, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. MICH. J.L. REFORM 465 (1981); Annot., 61 A.L.R. FED. 938 (1983).

Standard 22-2.4. Statute of limitations; abuse of process; stale claims

Page 22·26. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §12

***Page 22·26. Insert a new note at the end of the first paragraph under the heading* Commentary:**

. . . period of limitations[a]

a. The Colorado Supreme Court held unconstitutional a statute that imposed a time bar on the commencement of proceedings for collateral relief for most offenses, *e.g.*, three years after conviction for all felonies except class 1 felonies, or eighteen months for all misdemeanors. People v. Germany, 674 P.2d 345 (Colo. 1983). The controversy arose in several prosecutions under an habitual criminal statute wherein the prosecutors relied on felony convictions, more than three years old, which defendants contended were invalid. The state supreme court held that preclusion of collateral challenges to the constitutional admissibility of prior convictions in pending criminal prosecutions on the basis of passage of time, without opportunity for defendants to show that failure to assert the challenges earlier was the result of justifiable excuse or excusable neglect, violates the United States and Colorado constitutions.

Page 22·27. Insert a new note on the last line of the second paragraph:

. . . deprivation of remedy.[1a]

1a. In a Minnesota murder case, a postconviction applicant alleged that his drug intoxication at the time of the offense resulted in diminished capacity. The Supreme Court of Minnesota held that the claim would not be barred for abuse of process because the defendant was only eighteen years old at the time of the offense, had no prior involvement with the criminal justice system, and feared his father's reaction to his admitting drug use. Bangart v. State, 282 N.W.2d 540 (Minn. 1979). *See also* Annot., 60 A.L.R. FED. 481 (1982).

Page 22·28. Insert a new note at the end of the carryover paragraph:

. . . applicant for relief.[1b]

1b. *See* United States v. Darnell, 716 F.2d 479 (7th Cir. 1983); Brenner, *The Chancellor's Foot: A Proposal for Using a Judicial Presumption to Structure Discretionary Dismissals of Dilatory Post-Conviction Relief Petitions*, 37 ARK. L. REV. 325 (1984).

Page 22·28. To the end of note 4, add the following new material:

In Aiken v. Spaulding, 684 F.2d 632 (9th Cir. 1982), the Court of Appeals for the Ninth Circuit interpreted the analogous rule for federal habeas corpus proceedings to allow dismissal only if the

government is prejudiced in its ability to respond to the claim for postconviction relief; difficulty in reprosecuting an underlying criminal charge is not within the scope of the rule. The Supreme Court denied certiorari. 460 U.S. 1093. Chief Justice Burger attached a separate statement critical of the lower court's decision and suggesting need to amend the rule. *Id.*

Standard 22-3.1. Preparation of applications for relief; resources available to applicants

Page 22·32. Insert a new note at the end of the carryover paragraph:

. . . own legal affairs.[6a]

6a. Prisoners on death row in Florida sought an order from the state supreme court that would require appointment of counsel, paid by the state, for each person under death sentence. Such appointments were sought for the purpose of providing legal advice and, if necessary, representation in possible postconviction proceedings. The court rejected the proposal. In doing so, it noted that a legal services office existed at the state prison to advise all inmates. Graham v. State, 372 So. 2d 1363 (Fla. 1979).

Standard 22-3.3. Applications with false allegations; verification requirement

Page 22·34. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §3

Page 22·35. Replace the first full paragraph with the following new paragraph and delete note 3:

The Uniform Post-Conviction Procedure Act (1980) does not require verification of applications. The commissioner's comment to §3 of the act suggests that the deterrent purpose of such requirement could be met by appropriate amendment of the perjury statute to encompass postconviction applications, provided that effective notice is communicated in advance to potential applicants.

Standard 22-3.5. Filing fees; potential liability for costs

Page 22·36. Under the heading **Related Standards,** *add the following new reference:*

NCCUSL, Uniform Post-Conviction Act §§3(a), 13

Standard 22-4.1. Judicial responsibility for dispositions, magistrates and court staff

Page 22·39. Before the last paragraph of note 2, insert the following new material:

The discrepancy between the amended Federal Magistrates Act and the federal rules was eliminated by amendment to the rules in 1979. Rule 10 of the RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS was revised to incorporate by reference §636 of the Federal Magistrates Act. 441 U.S. 1001.

Standard 22-4.3. Appointment of counsel

Page 22·42. To the end of note 3, add the following new material:

Comment, *Postconviction Remedies under Missouri Rule 27.26: Problems and Solutions,* 47 MO. L. REV. 787 (1982). *But see* United States v. Degand, 614 F.2d 176 (8th Cir. 1980); Commonwealth v. Conceicao, 388 Mass. 255, 446 N.E.2d 383 (1983); State v. McMorrow, 332 N.W.2d 232 (N.D. 1983).

Page 22·42. To the end of note 5, add the following new material:

Counsel representing an applicant for postconviction relief should provide effective assistance of counsel. *See* Commonwealth v. Watlington, 491 Pa. 241, 420 A.2d 431 (1980); Annot., 13 A.L.R.4th 533 (1982); Annot., 15 A.L.R. 4th 582 (1982); Comment, *Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster,"?* 20 DUQUESNE L. REV. 237 (1982).

Standard 22-4.4. Responsive pleading; calendar priority; bail; stay of execution; judgment on the pleadings

Page 22·44. Replace the line under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §§6, 9

Page 22·45. Insert a new note at the end of the carryover paragraph:

. . . meet individual circumstances.[a]

a. *See* De Vincent v. United States, 602 F.2d 1006 (1st Cir. 1979) (four months between application and response); United States v. Boniface, 601 F.2d 390 (9th Cir. 1979) (thirty days allowed for response).

The Court of Appeals for the Second Circuit, in a federal habeas corpus proceeding, held that the district court should not grant a default judgment summarily if the state fails to file a responsive pleading, even after extensions of time have elapsed, but should first hold a hearing to review the evidence in support of an applicant's claim for relief. Bermudez v. Reid, 733 F.2d 18 (2d Cir. 1984).

Page 22·45. To the end of note 1, add the following new reference:

See also State v. Feng, — R.I. —, 421 A.2d 1258 (1980) (power to admit to bail pending appeal in postconviction cases).

Standard 22-4.5. Discovery; summary disposition on expanded record without plenary evidentiary hearing

Page 22·47. Replace line 3 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §§8, 9

Standard 22-4.6. Plenary evidentiary hearing; presence of applicant; evidence and burden of proof; finding of fact

Page 22·50. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §§10, 11

Page 22·52. Delete the first sentence of note 2.

Page 22·53. To the end of note 9, add the following new reference:

See also Hansel v. State, 604 P.2d 222 (Alaska 1979) (proof by preponderance of the evidence on claim of diminished capacity, raised by newly discovered evidence motion, is applicant's burden; when same issue is raised at prosecution stage, burden is on state to prove defendant's capacity beyond a reasonable doubt).

Standard 22-4.7. Dispositive orders; trial court opinions

Page 22·55. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §§11, 13

Standard 22-5.1. Appellate court jurisdiction; right to appeal

Page 22·57. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §14

Page 22·58. Insert a new note on line 4:

. . . and from prison.[1]

1. Rule 11 of the RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS was amended to avoid possible incorporation of the unusually short time allowed to initiate appeal in federal criminal cases. The amended rule incorporates the thirty-day provision in FED. R. APP. P. 4(a). 441 U.S. 1001.

Standard 22-5.2. Initiating appeals; release from custody pending appeal

Page 22·60. Insert a new note on line 2 of the second full paragraph:

. . . by many factors.[1]

1. *See* State v. Feng, — R.I. —, 421 A.2d 1258 (1980).

Standard 22-6.1. Finality of the judgment of conviction and sentence

Page 22·63. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §12

Page 22·66. To the end of note 6, add the following references:

And see County Ct. of Ulster County v. Allen, 442 U.S. 140 (1979); Blackledge v. Allison, 431 U.S. 63 (1977); Estelle v. Williams, 425 U.S. 501 (1976).

Page 22·66. Replace note 7 with the following new note:

See Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY L. REV. 639 (1981); O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981); Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821 (1981); Hillman, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

Standard 22-6.2. Finality of judgment in a post-conviction proceeding; repetitive applications

Page 22·68. Replace line 2 under the heading **Related Standards** *with the following new reference:*

NCCUSL, Uniform Post-Conviction Procedure Act §12

Page 22·68. To the end of note 3, add the following new material:

A Colorado inmate filed in 1981 a second claim for postconviction relief alleging a ground for relief presented in his earlier application.

In the previous proceeding, the Colorado Court of Appeal had affirmed denial of relief. That intermediate court's opinion dealt with other issues but did not address the ground advanced again in the 1981 application. The Colorado Supreme Court, citing this standard, held that the applicant was not precluded from pursuing the ground to an appellate determination in the present proceeding. People v. Billings, 652 P.2d 1060 (Colo. 1982).

If counsel for an applicant in a postconviction proceeding provides inadequate assistance, the question arises of finality of the judgment in that proceeding. The ineffectiveness of counsel could be treated as a new and independent ground for postconviction relief, but it would be preferable to hold that counsel's failure is a basis for not treating the prior adjudication as preclusive upon a later application raising presented previously. *See* Commonwealth v. Watlington, 491 Pa. 241, 420 A.2d 431 (1980); Annot., 15 A.L.R.4th 582 (1982); Comment, *Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster,"?* 20 DUQUESNE L. REV. 237 (1982).

Pages 22·68 and 22·69. Replace the third full paragraph and note 4 under the heading* Commentary *with the following new material:

The Uniform Post-Conviction Procedure Act (1980) provides that "an applicant misuses process if he presents a claim for relief which he inexcusably failed to raise . . . in a previous post-conviction proceeding."[4] Under the act, misuse of process is an affirmative defense to be pleaded by the state.

4. NCCUSL, Uniform Post-Conviction Procedure Act §12(b)(1).

Page 22·69. To the end of note 5, add the following new material:

Repeated claims for postconviction relief should not be confused with multiple applications challenging conditions in penal institutions or other civil claims. *See* Green v. United States District Court, 494 F. Supp. 1037 (D.D.C. 1980); *and see* Carter v. Stetson, 601 F.2d 733 (5th Cir. 1979).

Standard 22-6.3. Renewal of prosecution against a successful postconviction applicant

Page 22·72. To the end of note 6, add the following new material:

But see United States v. Del Piano, 593 F.2d 539 (3d Cir. 1979). A convicted bank robber successfully challenged a twenty-five-year sentence, imposed in 1964, on the ground that the sentencing judge had considered six invalid juvenile delinquency adjudications. Thereafter, in a de novo sentencing proceeding, a different judge reimposed a twenty-five-year sentence. On appeal, Circuit Judge Adams expressed grave concern for the appearance of injustice from imposition of the same sentence without an explanation by the sentencing judge of his reasons for that result. *Id.* at 540-543.