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Tentative Draft

AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

Post-Conviction Remedies

Recommended by the

ADVISORY COMMITTEE ON SENTENCING AND REVIEW

Simon E. Sobeloff, Chairman
Curtis R. Reitz, Reporter

January 1967
While this report is addressed primarily to the state's needs, it is applicable in the main to the system of post-conviction for federal prisoners in federal courts. In both instances, the law proscribing the conduct and the system of enforcement are part of the same sovereignty. Unlike the federal system of criminal law, no state system is wholly unitary, since to a substantial extent, federal law is applicable to state prosecutions and imposes restrictions both substantive and procedural in nature. This complication of the state systems will account for some difference between state post-conviction remedies for state prisoners and federal post-conviction remedies for federal prisoners. Nevertheless, there is a substantial similarity between the problems of the two.

Standards

PART I. GENERAL PRINCIPLES

1.1 Unitary post-conviction remedy.

There should be one comprehensive remedy for post-conviction review (i) of the validity of judgments of conviction or (ii) of the legality of custody or supervision based upon a judgment of conviction. The unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination of such claims.

1.2 Characterization of the proceeding.

The characteristics of the post-conviction remedy should not be governed by whether it is denominated a civil or criminal proceeding. It partakes of some attributes of each. The procedures should be appropriate to the objectives of the remedy. While the post-conviction proceeding will necessarily be separate from the original prosecution proceeding for many purposes, the post-conviction stage is, in a sense, an extension of the original proceeding and should be related to it insofar as feasible.

1.3 Parties; legal representatives of the respondent.

(a) The appropriate moving party in a post-conviction proceeding is the person seeking relief, proceeding in his own name. The appropriate respondent is the entity in whose name the original prosecution was brought, e.g., State, People, Commonwealth, or the United States of America.
(b) The legal officer with primary responsibility for responding to applications for post-conviction relief should be the attorney general, or other designated legal officer with state-wide jurisdiction, with power to assign cases to the local prosecutors when the attorney general deems it in the interest of the state to do so.

1.4 Jurisdiction and venue.

(a) Original jurisdiction to entertain applications for post-conviction relief can be vested either in those local trial courts authorized to try criminal cases or in a single court of state-wide jurisdiction, such as an appellate court. Although choice of a single state-wide court has several theoretical and practical advantages, it would not be inappropriate to continue the prevailing practice of using local courts as the courts of original jurisdiction.

(b) The most desirable venue for a post-conviction proceeding is in the court in which the applicant’s challenged conviction and sentence were rendered. Such a choice fosters administrative convenience and equitable distribution of the burden of litigation. To guard against prejudice because of the site of the forum, procedure for change of venue should be provided and liberally administered.

(c) Where jurisdiction is vested in the trial courts and venue is determined as in (b) above, neither a general rule favoring nor one disfavoring submission of post-conviction applications to the same trial judge who originally presided is clearly preferable. If the practice of ordinary assignment to the same judge is adopted, it should be tempered to permit the judge freely to recuse himself in a particular case, whether or not formally disqualified by bias or by being potentially a witness who may testify, whenever he finds it better to have a different judge preside in the case.

PART II. SCOPE OF REMEDY

2.1 Grounds for relief.

A post-conviction remedy ought to be sufficiently broad to provide relief

(a) for meritorious claims challenging judgments of conviction, including claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant’s conviction or sentence, where sufficient reasons exist to allow retroactive application of the changed legal standard;

(vii) on grounds otherwise properly the basis for collateral attack upon a criminal judgment;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.

2.2 Prematurity of application for post-conviction relief; postponed appeals.

(a) Post-conviction relief should not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction and sentence.

(b) The over-all procedural system should be sufficiently flexible on the timeliness of appeals from judgment of conviction and sen-
sentence to permit postponed or nunc pro tunc appeals where reason for such exists. If an application for leave to take a postponed appeal is denied because it raises issues outside the record, or if for any other reason it appears more appropriate to consider the claims in a post-conviction proceeding, the system should provide for the expeditious transfer of the case to such a proceeding.

2.3 Custody requirement.

Except for a claim under section 2.1(b) which does not affect the validity of a criminal judgment, the availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint. The right to seek relief from an invalid conviction and sentence ought to exist:

(i) even though the applicant has not yet commenced service of the challenged sentence;
(ii) even though the applicant has completely served the challenged sentence;
(iii) even though the challenged sentence did not commit the applicant to prison, but was rather a fine, probation, or suspended sentence.

2.4 Statute of limitations; abuse of process; stale claims.

(a) It is unsound to fix a specific time period as a statute of limitations to bar post-conviction review of criminal convictions. The circumstances that will occasion applications for post-conviction relief are too many and varied to permit of one useful limitations period.

(b) It should be considered an abuse of process for a person with a tenable or meritorious claim for post-conviction relief deliberately and knowingly to withhold presentation of that claim until an event occurs which he believes prevents successful re-prosecution or correction of the vitiating error. An applicant who has committed such abuse of process may be denied relief on his claim. Courts should not be required to deny relief in all such cases. Abuse of process ought to be an affirmative defense to be specifically pleaded and proved by the state.

(c) A state has a legitimate interest in avoiding litigation of stale claims. Where an applicant has completed service of a challenged sentence and, belatedly, seeks post-conviction relief, he can be charged with the responsibility of showing present need for such relief. A sufficient showing of present need is made, for example, where:

(i) an applicant is facing prosecution, or has been convicted, under a multiple offender law and the challenged conviction or sentence may be, or has been, a factor in sentencing for the current offense;
(ii) an applicant is or may be disadvantaged in seeking parole under a later sentence; or
(iii) an applicant is under a civil disability resulting from the challenged conviction and preventing him from a desired and otherwise feasible action or activity.

PART III. THE APPLICATION: PREPARATION, FILING, AND SERVICE

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

(a) Every post-conviction relief system must take into account the necessary premise that the initial legal step, preparation and filing of an application, probably will be performed by laymen in prison without assistance of counsel and without access to more than limited legal materials.

(b) The minimum conditions desirable in prison would include:

(i) availability of stationery and supplies;
(ii) the right to purchase and retain legal reference materials in reasonable amounts;
(iii) reasonable access to any legal reference materials in the prison library; and
(iv) free and uninhibited access to the courts and to private counsel.

(c) In addition, it is desirable for a state to arrange for, or to per-
mit, in-prison guidance or counselling of prisoners on the validity or invalidity of claims for post-conviction relief. The following steps may be appropriately considered:

(i) regular visits by lawyers or law students to the prison to discuss cases or problems with prisoners on an individual basis, arranged by an independent agency such as a local bar association or defender association or law school;

(ii) establishment and supervision of an adequate collection of legal reference materials related to criminal law and procedure in the prison library to permit the prisoners' own research to be as accurate and complete as possible;

(iii) distribution of specially prepared pamphlets or brochures to prisoners, prepared by reliable and independent agencies, outlining the scope of post-conviction relief in language and form understandable to the prison population.

(d) Optimally, a state could establish a regular agency to be charged with the responsibility of providing legal advice and representation to its prisoners. A state with a public defender system could make this task an added function of that office, or a special agency could be created for this purpose. In no event should this function be administratively related to the custodial personnel.

3.2 Standardized application forms.
The preparation and use of a standardized application form using language and concepts understandable to laymen can aid considerably in improving the quality of applications filed pro se by prisoners. The cost is slight compared to the gain in coherence and intelligibility of applications.

3.3 Applications with false allegations; verification requirement.
(a) There should be a requirement of verification of pro se applications for post-conviction relief, subject to the law of perjury or false swearing for knowing falsehoods.

(b) Prisoners should have ready access to a notary public or other officer authorized to administer oaths.

3.4 Supporting affidavits; sources of evidence to prove claims.
It is not reasonable to require a prisoner to submit with his application affidavits of third parties in support of his claim for post-conviction relief, as a condition for consideration of the application. Nor can the applicant be fairly expected, at this stage, to outline how he intends to prove all the factual allegations material to his claim. Exploration of the existence of evidentiary bases for allegations, sufficient on their face, may be appropriately a matter for inquiry at a later stage, rather than as a test of pleading sufficiency.

3.5 Filing fees.
(a) Because the overwhelming number of applicants for post-conviction relief are indigent, it is probably unwise to require a filing fee for applications. The cost of administration entailed in a procedure for waiver of fees will likely exceed the revenues from fees paid.

(b) If a filing fee is required, there should be a routine procedure for waiver of the requirement. Standardized forms for application should include the requisite averments necessary to proceed without payment of fees.

PART IV. PROCESSING APPLICATIONS

4.1 Judicial responsibility for disposition; masters.
(a) All dispositions should be made by appropriate judicial officers, who bear and acknowledge responsibility for the judgments. The utilization of masters for preliminary inquiries may be appropriate and should be explicitly authorized. Applications should not be disposed of by administrative or non-judicial personnel, whether by refusal to docket or otherwise.

(b) Final disposition of applications should be made at the earliest stage consistent with the purpose of deciding claims on their underlying merits rather than on formal or technical grounds.

4.2 Preliminary judicial screening of applications.
(a) Because of the limited pleading capabilities of lay applicants,
it is not expedient for courts to undertake to evaluate applications filed pro se by such persons. A routine practice of ruling on such applications for sufficiency of pleadings should be avoided. The court will be better able to understand the nature of the grievance asserted and to determine the proper mode of proceeding after a responsive pleading has been filed and the pertinent record has been brought into focus. It is preferable, therefore, that the courts make it clear that responsive pleadings are expected as of course.

(b) If any preliminary judicial screening of pro se applications is undertaken prior to receipt of responsive pleadings, orders of final dismissal should be confined to cases of unmistakably frivolous allegations.

4.3 Responsive pleading; calendar priority; bail; stays of execution; dismissal on the pleadings.

(a) A responsive pleading should be required, by a rule to show cause or otherwise, no more than 30 days after an application has been filed. The response should fully and fairly meet the allegations of the application. Where the record of prior proceedings would aid the court in understanding the nature of the contentions, counsel for the respondent should undertake to supply the relevant portions, to the extent that they were not appended to the application.

(b) In addition to making effective the requirement of prompt response by the state, if the applicants are held under sentence of death or imprisonment, or if there is other reason for expedition, courts should accord calendar priority to the determination of applications for post-conviction relief.

(c) Courts should have the power to order executions stayed or to release applicants on recognizance or with sufficient sureties in appropriate cases, pending final disposition of applications for post-conviction relief.

(d) In light of the application and response, the court must determine whether to order further proceedings, including appointment of counsel for a pro se applicant, if not made previously, or to look toward termination of the matter. If the latter course is taken, the court should indicate its intention to dismiss the application with a brief statement of the reasons, and permit the applicant a reasonable opportunity to reply before final disposition.

(e) Disposition on the pleadings and record of prior proceedings without appointment of counsel for the unrepresented applicant is not proper if it requires resolution of a non-frivolous question of law. Disposition at this stage is always improper whenever there exists a material issue of fact.

4.4 Appointment of counsel; withdrawal of appointed counsel.

(a) It is most desirable to avoid processing of applications for post-conviction relief beyond the initial screening of the documents without counsel representing the applicant. Counsel should be provided for pro se applicants unable to afford adequate representation. When private counsel are appointed to represent such applicants, their services should be compensated adequately from public funds.

(b) The responsibility of appointed counsel to continue to serve their clients through any appellate proceedings, including review by the Supreme Court of the United States, should be affirmed. Even if appointed counsel is not expected to continue in a case beyond the level of the court appointing him, he should be responsible at a minimum to continue in the case, if the applicant wishes to proceed further, until an appeal is perfected or the necessary preliminary steps have been taken to bring the case before the reviewing court.

4.5 Summary disposition without plenary hearing; discovery.

(a) Applications for post-conviction relief can appropriately be decided on the merits without a plenary evidentiary hearing, and without the expense, risk, and inconvenience of transporting the applicants, if in custody, from the prison to the courthouse. Such summary disposition is proper in all cases where there is no factual issue or where the case is submitted on an agreed statement of facts.

(b) Discovery techniques, specially adapted for post-conviction proceedings, should be utilized for assistance in advancing a case toward disposition by exploring issues of fact. The fruits of the discovery process may be useful in determining whether summary disposition is appropriate, or whether a plenary evidentiary hearing is necessary to resolve material issues of fact.
(i) In-prison depositions of applicants in custody, to develop more fully the nature of their claims and the potential evidentiary support therefor, should be authorized. Such depositions may be oral or upon written interrogatories.

(ii) An effective procedure should be established for the production of documents, including the relevant parts of the transcript of the original trial, or tangible things, for taking depositions of witnesses, and for the service of requests for admissions or written interrogatories on the opposing party.

(iii) Employment of the various discovery techniques in this context should be subject to continuing court supervision. A requirement of a showing of good cause may be appropriate prior to utilization.

(iv) It is a prerequisite of effective discovery that the applicant be represented by counsel.

(v) The applicant retains his privilege against self-incrimination and cannot be compelled to create evidence which might prejudice him at any retrial. Such evidence, reflecting on the guilt or innocence of the applicant, would not in any event be relevant to his claim for post-conviction relief.

(vi) The costs of discovery, where the applicants are indigent, should be borne by the state.

4.6 Plenary hearing; presence of applicant; evidence and proof; findings of fact.

(a) A plenary hearing to receive evidence, by testimony or otherwise, is required whenever there are material questions of fact which must be resolved in order to determine the sufficiency of the application for relief.

(b) The applicant and his counsel should be present at a plenary hearing, unless the right to be present has been expressly waived. The applicant's presence is not required at any preliminary conference held to frame the issues and expedite the hearing.

(c) Normal rules of admissibility of evidence should be followed in post-conviction hearings. Evidence should be given in open court, recorded and preserved as part of the record.

(i) A duly authenticated record or transcript, or portion thereof, may be used as evidence of facts and occurrences during prior proceedings. Such record or transcript should be subject to impeachment by either party.

(ii) Depositions of witnesses, unavailable for the hearing, should be admissible if properly administered and taken subject to the right of cross-examination.

(iii) If facts within the personal knowledge of the judge who presided at an earlier proceeding are to be adduced by his testimony or otherwise, he cannot properly preside at the hearing. The presiding judge at the hearing should not take into account facts within his personal knowledge unless those facts may be judicially noticed.

(d) The allocation between the applicant and respondent of the burden of proof on issues of fact is primarily a corollary of the underlying substantive law governing the claims advanced. Ordinarily, the proponent of factual contentions, whether the applicant's proof of the elements of a prima facie case or the respondent's proof of affirmative defenses, should have the burden of establishing those facts by a preponderance of evidence.

(e) At the conclusion of a plenary hearing, the court should make explicit findings on material questions of fact. Effort to keep separate the recital of relevant historical events from the legal characterization of those events is most desirable, especially on issues that may be described as involving mixed questions of law and fact.

4.7 Dispositive orders; trial court opinions.

(a) The order of the court, at the conclusion of a post-conviction proceeding, should provide appropriate disposition.

(i) If the court finds in favor of the state, it should enter an order denying the application for relief. The order should indicate whether the denial is after plenary hearing, on summary disposition, or on the pleadings.

(ii) If the court finds in favor of the applicant, the order should identify clearly the claim or claims found meritorious. The kind of affirmative relief ordered will vary with the nature of the merito-
rious contention. Where the court finds in favor of the applicant for error in the trial or pre-trial stages of the process leading to conviction, relief may be immediate discharge from custody or may be release at a specified early date unless, within that time, the state takes the necessary steps to commit the applicant to custody pending re-indictment, re-arrangement, retrial, or re-sentence, as the case may be. In some instances, only a declaration of invalidity of the prior conviction may be required. Where the court finds in favor of the applicant for error concerning his right to appeal from his judgment of conviction, the court should have authority to fix the time within which the applicant may now pursue such appeal.

(iii) The court should have authority in all instances, upon timely request, to stay its final order or to issue supplementary orders regarding custody, bail, and the like, pending review of its determination by an appellate court.

(b) It is desirable that the court prepare at least a brief opinion indicating the legal standards applied and, in light of the findings of fact, its specific conclusions of law. Such opinion is especially useful in the event of appeal from the court’s determination.

PART V. APPELLATE REVIEW

5.1 Appellate jurisdiction; limitation on right to appeal.

(a) If post-conviction applications are considered in the first instance by the trial level courts (see section 1.4, supra), appellate review should be available through the same courts authorized to hear appeals from judgments of conviction. The time period within which the appellate process must be initiated should be the same as is normally provided for appeals from judgments of conviction, unless that period is too short in light of the difficulties of communication between a person confined in prison, his counsel and the court.

(b) Appellate review of final judgments should be available as of right at the instance of either the applicant or respondent. It is undesirable to impose as a condition of taking an appeal that the party seeking review obtain leave to appeal from either the trial court or the appellate court.

(c) Appellate review of an interlocutory order denying a stay of execution of a death sentence should be authorized when necessary to prevent carrying out of the sentence before final judgment in the trial court. Such power of review may be assigned to a single judge or justice.

5.2 Appellate court process; counsel; bail.

(a) As is true with respect to proceedings in trial level courts, appeals should not be processed pro se for want of assignment of counsel to persons unable to afford adequate representation. Where counsel has been appointed to represent an applicant in the court of original jurisdiction, it is desirable to recognize his continuing responsibility to represent his client through any appellate proceedings.

(b) The appellate court, or an individual judge or justice, should be authorized to release applicants for post-conviction relief or otherwise to stay execution of their judgments of conviction pending appellate review. It is appropriate to require applicants to seek such interim relief first from the trial courts, and ordinarily the determinations of the trial courts on such matters should not be modified or reversed.

5.3 Appellate court disposition; scope of appellate review.

(a) Appellate courts should exercise a broad scope of review on matters of fact and law consistent with the fundamental rights subject to litigation in post-conviction proceedings.

(b) A statement of the basis or bases for decision in a reasoned opinion ought to accompany disposition of appeals.

PART VI. FINALITY OF JUDGMENTS

6.1 The judgments of conviction; waiver.

(a) Unless otherwise required in the interest of justice, any grounds for post-conviction relief as set forth in section 2.1 which have been
fully and finally litigated in the proceedings leading to the judgment of conviction should not be re-litigated in post-conviction proceedings.

(i) It is essential that accurate and complete records of proceedings leading to such judgments be compiled and retained in accessible form.

(ii) A question has been fully and finally litigated when the highest court of the state to which a defendant can appeal as of right has ruled on the merits of the question.

(iii) Finality is an affirmative defense to be pleaded and proved by the state.

(b) Claims advanced in post-conviction applications should be decided on their merits, even though they might have been, but were not, fully and finally litigated in the proceedings leading to judgments of conviction.

(c) Where an applicant raises in a post-conviction proceeding a factual or legal contention which he knew of and which he deliberately and inexcusably

(i) failed to raise in the proceeding leading to judgment of conviction, or

(ii) having raised the contention in the trial court, failed to pursue the matter on appeal,

a court should deny relief on the ground of an abuse of process. If an application otherwise indicates a claim worthy of further consideration, the application should not be dismissed for abuse of process unless the state has raised the issue in its answer and the applicant has had an opportunity, with the assistance of counsel, to reply.

(d) Because of the special importance of rights subject to vindication in post-conviction proceedings, courts should be reluctant to deny relief to meritorious claims on procedural grounds. In most instances of unmeritorious claims, the litigation will be simplified and expedited if the court reaches the underlying merits despite possible procedural flaws.

6.2 Prior post-conviction proceedings; repetitive applications.

(a) In general, the degree of finality appropriately accorded to a prior judgment denying relief in a post-conviction proceeding should be governed by the extent of the litigation upon the earlier application and the relevant factual and legal differences between the present and earlier applications. In particular,

(i) a judgment dismissing an application, on its face, for want of sufficient allegations should not bar consideration of the merits of a subsequent application that adequately indicates a cognizable claim; and

(ii) a judgment denying relief, after plenary evidentiary hearing, to an applicant represented by counsel should be binding on questions of fact or of law fully and finally litigated and decided, unless otherwise required in the interest of justice. A question has been fully and finally litigated when the highest state court to which an applicant can appeal as of right has ruled on the merits of the question.

Finality is an affirmative defense to be pleaded and proved by the state.

(b) In any case where an applicant raises in a subsequent application a factual or legal contention which he knew of and deliberately and inexcusably

(i) failed to raise in an earlier application or,

(ii) having raised the contention in the trial court, failed to pursue the matter on appeal,

a court should deny relief on the ground of an abuse of process. If an application otherwise indicates a claim worthy of further consideration, the application should not be dismissed for abuse of process unless the state has raised the issue in its answer and the applicant has had an opportunity, with assistance of counsel, to reply.

(c) A judgment granting relief in a post-conviction proceeding should not foreclose renewal of prosecution proceedings against the applicant so long as that does not conflict with the ground upon which relief was granted. Proceedings can commence with the stage at which the vitiating defect occurred, without necessity to repeat valid processes.
6.3 Sentence on re-prosecution of successful applicants; credit for time served.

(a) Where prosecution is initiated or resumed against an applicant who has successfully sought post-conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be re-sentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.

(b) Credit should be given towards service of the minimum and maximum term of any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

Standards with Commentary

PART I. GENERAL PRINCIPLES

1.1 Unitary post-conviction remedy.

There should be one comprehensive remedy for post-conviction review (i) of the validity of judgments of conviction or (ii) of the legality of custody or supervision based upon a judgment of conviction. The unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination of such claims.

Commentary

It is always difficult to make a neat cut into a continuous judicial process, and this is no less true in defining the area of "post-conviction." Literally, this would include certain pre-appeal motions in the trial court and the appeal itself. Such is not the accepted usage of "post-conviction," however, which applies rather to remedies that can be invoked after the final appeal from conviction has been decided or after the prescribed time for taking an appeal has passed. It is the latter connotation that is intended. Perhaps "post-final judgment" would be more accurate, but no phrase is likely to communicate perfectly. Consider, e.g., the federal rule permitting a reduction of sentence, which may be granted within 120 days after affirmance of judgment of conviction. Fed. R. Crim. P. 35. For purposes of this report, such provision is not considered a "post-conviction" remedy.

Just as it is difficult to draw a sharp line between the process of conviction and post-conviction proceedings, so too it may be difficult to