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Post-conviction Litigation: "2255" cases

Inmates wishing to challenge their federal convictions, beyond the direct-appeal process, may initiate post-conviction litigation, in accordance with 28 U.S.C. 2255, which provides:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

I. Initial considerations for the practicing lawyer:

- Do not ever tell anyone over the phone (or even in person) that "There's nothing that can be done ... the time has expired for this person to get back into court." Why?
  - You haven't cracked a book;
  - You haven't read the inmate's file;
  - 28 U.S.C. 2255(f)(4) is a potential equitable catch-all.

II. Whether to take the case?

- Charging fees for case evaluations is acceptable and fair.
  - If you *do not* charge a fee, you will likely back-burner the file, leading to more problems;
  - If the inmate's statute of limitations runs while you are looking into his or her case, it can be malpractice, or worse;
  - The only acceptable IAC claim against post-conviction counsel, currently, is "counsel missed my statute of limitations." Martinez v. Ryan, 132 S.Ct. 1309, 1317-1318, 182 L.Ed.2d 272 (2012);
  - Case evaluations are sometimes more valuable than litigation could be, in terms of what you provide to the inmate and/or the family;
  - Case evaluations, if done properly, take as much time as formulating an appellate strategy. The same acts of issue-spotting and legal research are involved;

- Your case evaluation ought to be reduced to written format. If you are charging a fee for it, this is the work product being purchased by the client. And, whether you charge a fee or not, you must have written back-up if you decline the case, because people will get a second opinion. If the statute of limitations ran on your watch, a Martinez claim can arguably be asserted against you;
- I prepare lengthy case evaluations in both state and federal cases, for all types of criminal convictions, in both Kansas and Missouri. I place my findings in "Opinion Letter" format, such as the samples I'll bring to this CLE. The Opinion Letter I suggest is no less than 65 pages, and usually runs 100-200 pages, and is very thorough, attempting to cover every possible procedural avenue in the post-conviction process from hiring through to SCOTUS review. I'm glad to discuss further with anyone who is interested: (816) 421-5200;
- *The possible exception to "full case evaluations"*: Many federal inmates' cases were resolved by plea agreements with "appeal/post-conviction" waivers. These can be quickly discerned, and in most cases, must be honored for the benefit of the inmate. In a "cooperation" case, the sentence is already reduced below both the mandatory minimum and the guidelines, so only an "actual innocence" claim might remain, but even that is dispensed with by the cooperation and the plea;
- *BUT*: The exceptions to the "post-conviction waiver" are "prosecutorial misconduct" (which ought only be used if you're sure), and "ineffective assistance of counsel" (IAC; discussed below).

III. Where to start the analysis? The Statute of Limitations!

- Federal Post-conviction Statute of limitations for "2255" cases
  - 28 U.S.C. 2255(f)(1);
  - "...when the time for filing a certiorari petition expires." Gonzalez v. Thaler, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012).

- 28 U.S.C. 2255(f)(4);
- The Tenth Circuit begrudgingly acknowledges "equitable tolling" of the statute of limitations. See Tahguv v. United States, 2011 Westlaw 4382705 (D. Utah 2011)("only in rare and exceptional circumstances ... when a prisoner is actually innocent, when an adversary's conduct - or other uncontrollable circumstances - prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period.");
- The "mailbox" rule - don't get near it! United States v. Rodriguez, 422 Fed. Appx. 668 (10th Cir. 2011)("mailbox rule" applies to prison's legal mail system only, and is of no avail to inmates using regular U.S. mail, even with proof of mailing before statute ran; prisoner used address for U.S. Attorney's Office rather than court clerk).

IV. Next step in the analysis? How you formulate a "2255" motion:

- Read the direct appeal decision, and then the briefs;
  - Issues raised and decided on the merits generally can't be re-raised;
  - Issues raised-but-procedurally-defaulted are ripe for "2255" review; but,
  - Issues procedurally defaulted but addressed on the merits likely can't be re-raised.
- Read the trial transcript (or, plea transcript), but with an eye towards what you'd have done differently;
- Make lists;
- Read the discovery, looking for clues and missed motions;
- Investigate, investigate, investigate! Hiring an investigator to locate and interview witnesses is preferable, but a lack of funds does not excuse counsel's obligation to search out these people and try obtaining affidavits and other exhibits from them;
- The main issue - IAC: Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)(movant must prove "deficient performance" which has "prejudicial" impact on

outcome of proceedings); *but see* United States v. Cronic, 466 U.S. 648, 658-59, 104 S.Ct. 2039, 2046-47, 80 L.Ed.2d 657 (1984)(some errors are such that no showing of prejudice is required, such as "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing ... the adversary process itself [is] presumptively unreliable.");

- *Missed suppression motions* fall under Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Argue that the motion need only show reasonable probability of being granted, and oppose the Government's attempt to fully litigate its excuses; but, be prepared to fully litigate suppression issues in "2255" hearings;
- *Sentencing errors*: Glover v. United States, 121 S.Ct. 696, 700-701, 531 U.S. 198, 148 L.Ed.2d 604 (2001)("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.");
- Research, research, research ... Oddly enough, almost every single fact pattern has somehow arisen in the Supreme Court, and definitely in the circuit courts. {Example: Christeson v. Roper, 574 U.S. --, 135 S.Ct. 891, 2015 Westlaw 232187 (January 20, 2015)(cert. granted; case remanded)}

V. The "2255" motion:

- The boilerplate information - use the form on the Court's website;
- DON'T FORGET the affidavit which must be signed by the client and included;
- Think about including a Table of Contents following the Affidavit, as a preface to the merits of the motion;
- Begin with a summary of "2255" standards of review;
- Follow it with a statement of relevant facts;
- Then brief your argument(s);
- IAC claims have two main elements ("deficient performance" and "resultant prejudice");
- In addition, there are likely further "sub-elements" which essentially consist of the IAC error alleged. For example, if you're alleging "failure to file a suppression motion," then you

must include, in your "2255" brief, the entire discussion of how the suppression motion would have read;

- It is your burden to prove the claims, so exhibits help! Scan them and attach them via ECF to your "2255" motion! *Do not presume an evidentiary hearing will be granted. It rarely ever is granted*. But if you attach exhibits and affidavits from witnesses (see above in section on formulating the "2255" motion), and then an evidentiary hearing is denied, you can appeal the denial of a hearing as its own separate issue (see discussion of appellate process, below). The exhibits and affidavits constitute your offer-of-proof for the hearing request;
- There is no page limit, so write well, but do not be afraid to put all you feel is appropriate into the motion. Consider it your only chance, because an evidentiary hearing is generally discretionary.

VI. Discovery:

- Discovery and "expansion of the record" are discretionary, and governed by Supreme Court Rules in Section 2255 cases nos. 6 & 7;
- File motions for discovery, or in the alternative, expansion of the record.

VII. The "2255" evidentiary hearing:

- It's as simple as this: You must do in court whatever it is that you are alleging previous counsel failed to do;
- It's as complicated as this: You must put on witnesses and offer evidence, and show the Court exactly how things would have looked had previous counsel done what you're claiming should have been done;
- For example, if you allege that previous counsel should have filed a suppression motion, at an evidentiary hearing you must fully litigate the suppression issue (as though you had the burden and not the government);
- Don't be afraid to use an expert. A local defense attorney can make a good record on what we are expected to do. Indeed, there is support in Kansas case law that this is needed in order

to prevail on a motion under K.S.A. 60-1507. Mullins v. State, 30 Kan. App. 2d 711, 46 P.3d 1222 (2002)(counsel held ineffective); Lewis v. State, 33 Kan. App. 2d 634, 111 P.3d 636 (2003)(counsel held not ineffective);

- When using an expert, pick an attorney who has litigated many federal cases, and is well-respected;
- Be forewarned that the government will retort with an attempted showing that there was overwhelming evidence of guilt. (In other words, this is how the government will oppose your showing under the "prejudice prong" of Strickland.) So, know the trial transcript well, and ask for argument on that specific aspect of the "2255" case.

VIII. The appeal of a "2255" denied - the COA process:

- Appeals are discretionary, in that a "Certificate of Appealability" (COA) must first be obtained from either the district court of the circuit court. 28 U.S.C. 2253(c);
    - It is acceptable to include a general boilerplate "request for a COA on all issues herein" to preserve the request, after your signature block, much like a certificate of service;
    - It is acceptable to ask for time at the end of an evidentiary hearing to make a specific record on COA issues, in the event that the district court might rule against you;
- COA briefing at the Tenth Circuit differs from the Eighth Circuit;
- File your Notice of Appeal in the Tenth Circuit, and follow the briefing schedule as normal, but include a "COA request" section in your brief;
- File your Notice of Appeal in the Eighth Circuit and notify the Court in writing that you will be filing a brief to support a COA request;
- "*The reasonable jurists test*": The standard for granting a COA is minimal, though these are rarely, if ever, granted. The applicant must make a "substantial showing of the denial of a constitutional right," but said showing is satisfied if "reasonable

jurists may disagree" about the propriety of the claim, itself. Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003).

IX. The "second-successive 2255" motion:

- The request for permission to file a second or successive "2255" motion must be submitted to the Circuit Court. If filed in the district court, it is summarily dismissed. 28 U.S.C. 2255(h);
- The grounds are:
  - "newly discovered evidence" negating guilt by "clear and convincing evidence" when viewed against the record as a whole; or,
  - a new rule of constitutional law made retroactive to cases on collateral review by the U.S. Supreme Court.

X. What to do when you *receive* the call asking for *your* file:

- Upon written request from the client, immediately comply with Kansas Supreme Court Rule 226, KRPC 1.16(d);
- When requested by either side to provide an affidavit, the lawyer *may* elect to do so, or instead can wait until ordered to do so by the district court. Kansas Supreme Court Rule 226, KRPC 1.6(b)(3)("A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary: to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."). See also, ABA Formal Opinion 10-456 (July 14, 2010);
  - Don't be defensive. "Trial strategy" doesn't work if it was a doomed strategy. (citations omitted);
  - Don't be vindictive. In re Bryan, 275 Kan. 202, 61 P.3d 641 (2003)(in defense against bar complaint, attorney provided "too much" embarrassing information to Disciplinary Administrator, including "a copy of a

petition to foreclose [complainant's] grandmother's house.");

- *BUT* Don't hedge to help the client, i.e., "I'd say anything at all to help this guy get his sentence cut...";
- *Why?* Candor towards the tribunal. Kansas Supreme Court Rule 226, KRPC 3.3;
- For a discussion which concludes that our duty of confidentiality supersedes the inclination to defend our good reputations, see *Jenna Newmark*, 79 Fordham Law Review 699 (2011)(discussion of "self-defense" exception to attorneys' obligations under the attorney-client privilege, and the idea that the privilege can't be used by post-conviction petitioners as "both a shield and a sword");
- *Considerations in favor of non-disclosure*: Clients generally are told in initial meetings with counsel that they enjoy a relationship cloaked in complete confidence. Likely no lawyer forewarns a client that "someday in the far-off future, after a trial and a direct appeal, you may file a petition for *habeas corpus*, at which time I will tell some or perhaps even all that you have confided in me.";
- *Considerations in favor of disclosure*: Not only is the lawyer being attacked, but if this entire process from case inception through to post-conviction is indeed a search for the truth, the attorney-client communications are not exempt, especially if they inform the final outcome.
- Consider the approach of maintaining confidentiality at all times, except to the extent you are ordered to prepare an affidavit, and when in the courtroom after first being ordered to divulge information. See also, Hicks v. United States, 2010 Westlaw 5441679 (S.D.W.Va. 2010)(court concluded that it needed to monitor prosecution's gathering of information from former defense counsel); see also, Dyer v. United States, 2014 Westlaw 5092252 (S.D.W.Va. 2014)(ordering defense counsel to respond by affidavit to allegations of ineffectiveness, but permitting counsel to invoke redaction on attachments to affidavit).

Special thanks to Attorney Melanie Morgan (Morgan Pilate LLC) for her invaluable contributions to this outline, and for her firm's unwavering dedication to the defense of those wrongfully accused. And special thanks as well to Attorney Laura Shaneyfelt who spent significant time locating articles which gave divergent but comprehensive analyses of the ethical issues inherent in the decision of how one responds to a "2255" complaint.