

How long will post conviction relief take?

Post-conviction relief can be a very lengthy process. The length of time that it will take will depend largely upon how successful the application for post conviction relief is. If the appeal is successful early in the process of course it will take less time than an appeal to the United States Supreme Court. It is not uncommon for the process of post conviction relief to take years.

Post-conviction remedies give a person convicted of crime an opportunity to get relief from their conviction after their conviction has been affirmed on appeal. The most obvious source of relief is an ineffective assistance of counsel claim where the inmate alleges that his or her trial or appellate lawyer failed a duty owed to the client and the lawyer was ineffective.

Generally, the first step is to seek relief in state court. If a state post-conviction proceeding is not filed within a one year period this may preclude the individual from ever pursuing relief in federal court.

If an individual loses the appeal, typically the next step is a habeas corpus petition in U.S. District Court. Under the federal law known as AEDPA, the Anti-Terrorism and Effective Death Penalty Act, the habeas corpus petition must be filed in federal court within one year of the affirmance by the state appellate court of the post-conviction denial.

Cases are lost all the time because the issues were not timely filed in the appropriate Court.

An experienced criminal defense lawyer knows his or her way through this procedural maze and will protect your rights.

DIRECT APPEALS OVERVIEW

Those individuals convicted of a crime at a jury trial or a bench trial are entitled to appeal the conviction to the Oklahoma Court of Criminal Appeals (COCA). The purpose of an appeal is not to challenge the jury's factual determination, but to ensure that the rights of the accused were not violated during the trial. In most cases, the appellate attorney will raise issues that challenge legal rulings made by the trial judge. However, if appropriate, the appellate attorney can raise propositions of error that do not necessarily involve rulings by the trial court such as newly discovered evidence, prosecutorial misconduct, and ineffective assistance of trial counsel.

Most cases are affirmed on appeal. Successful appeals are typically those appeals that raise serious errors of law that significantly affect the rights of the accused. Errors committed in the trial which do not result in miscarriages of justice or constitute substantial violations of constitutional or statutory rights are known as *Harmless Error*. When considering issues to assert on appeal the Harmless Error Doctrine should be considered.

When the State seeks to convict one of its citizens of a crime and deprive that citizen of his or her life or liberty, the State should, at the very least, be required to follow the law. Quite appropriately, this Court applies the

"harmless error" doctrine to errors which neither result in a miscarriage of justice nor constitute a substantial violation of a constitutional or statutory right. Thus, our law does not require perfection by the State in prosecuting a citizen. We can, and do, frequently deem harmless those errors which do not substantially violate an individual's rights. Flores v. State, 1995 OK CR 31.

THE DIRECT APPEAL PROCESS

- Within 10 days of the formal sentencing a Notice of Intent to Appeal, Designation of the Record, and Advisory Propositions of Error must be filed with the trial court. Before the Designation of Record is filed, arraignments must be made with the Court Reporter to cover the costs of the transcripts. If the individual is without the funds to pay for the transcripts, they are entitled to have the cost of the transcripts paid by the state. Since Appeals are generally restricted to issues that have been raised in the record, the designation of the necessary portions of the record is an important step in the process.
- Within 90 days of the Formal Sentencing a Petition of Error **must** be filed with the Court of Criminal Appeals. This is an important step and if not done within 90 days of the sentencing, the appeal will be dismissed for lack of Jurisdiction.
- Once the record for the appeal is completed the Court Clerk, of the county of conviction, will send a notice of completion to the Court of Criminal Appeals. Once the notice of completion is received by the Court of Criminal Appeals the court will send a notice to transmit the record.
- The appellant's brief is due 60 days after the Notice to Transmit the Record is filed (the Appellant is the defendant). If the attorney for the appellant needs more time they can request additional time from the Court. Typically, the Court will only grant two 30 day extensions, for a total of 60 days of additional time.
- Within 60 days of the filing of the appellant's brief, the state must respond by filing the Answer brief with the Court. Typically, the Court will grant two 30 day extensions to the state, for a total of 60 days of additional time.
- After the Answer brief is received the Appellant (the Defendant) may file a reply brief that responds to the issues raised in the Answer Brief. The Appellant may not raise new issues in the reply brief; in the brief, the Appellant is only allowed to respond to the issues raised in the Answer Brief filed by the state.
- After reviewing the record and the briefs the Court will issue a decision on the case. It could take the Court up to 6 months to issue that opinion. The entire process from the sentencing date to the decision by the Court of Criminal Appeals typically

takes from 12 to 18 months depending on how many extensions are issued in the case.

APPEALS AT STATE EXPENSE

Individuals without the funds to hire an attorney to represent them on appeal are entitled to be represented on appeal at state expense. In order to be represented on appeal at state expense a defendant must file a *Pauper's Affidavit* and based upon that affidavit the Trial Court will make a determination that the individual is "*indigent*," or without the funds to hire an attorney to represent them on appeal.

Once the Court has made a determination of indigence, the Court will appoint that individual an attorney at state expense and order the transcripts prepared at state expense. Just because a defendant had a private attorney representing them at trial does not mean that they are not entitled to be represented on appeal at state expense. The determination must be made on a case-by-case basis based on the *Pauper's Affidavit*.

JUDICIAL REVIEWS

The judge who imposes a sentence or enters an order revoking probation can modify that sentence for a period of 12 months after sentencing. The request for the modification of the sentence is commonly known as a "judicial review." The statutory basis for judicial reviews is Title 22 O.S. § 982 (a).

Not everyone qualifies for a judicial review. The statute specifically excludes convicted felons who have been in confinement in any state prison system for any previous felony conviction for a period of 10 years prior to the imposition of the sentence they are seeking to modify. The statute also requires that in sentences received as a result of a plea agreement, the state must agree to the modification.

In order to obtain a judicial review, a motion must be filed with the sentencing court requesting a modification of the sentence. If the court agrees to consider a modification, the court will set the matter for a hearing. After the court sets the matter for a hearing the Department of Corrections will be notified, DOC will prepare a report outlining that individual's record since being incarcerated and making a recommendation to the judge as to whether the modification should be granted or denied. The judge is not bound by the recommendation.

Motions requesting judicial reviews may include; positive evaluations by DOC staff, certificates of any programs completed, letters from family members or responsible members of the community, offers of employment if the modification is granted, and any other information that may persuade the sentencing judge to consider a judicial review. It is important to include such information in the motion requesting the review and not wait for DOC to include the information in the report it prepares for the Court. The reason it is important to include such information in the initial filing is that the DOC report is only prepared if the Court agrees to consider the modification. If the Court is not persuaded to consider the modification by the motion requesting the modification then the Court will never see a DOC report or their recommendation.

Post-Conviction Relief

What are the legal grounds to pursue post-conviction relief in Oklahoma?

Title 22 O.S. § 1080 list the statutory basis for pursuing an application for post conviction relief in Oklahoma:

Post-Conviction Procedure Act - Right to Challenge Conviction or Sentence.

Any person who has been convicted of, or sentenced for, a crime and who claims:

(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;

(b) that the court was without jurisdiction to impose sentence;

(c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Do I have to hire an attorney to represent me on post-conviction relief?

Generally you are not entitled to a lawyer at state expense to pursue post-conviction relief. There are organizations that assist those who have been wrongly convicted that are without the funds to hire a private lawyer.

Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011

Midwestern Innocence Project, Inc.
6320 Brookside Plaza
PO Box 1500
Kansas City, MO 64113

Arkansas Innocence Project
PO Box 322
Cherry Valley, AR 72324

Also many law schools have innocence projects. As of the publishing of this brochure none of the Oklahoma Law Schools have such projects but here are two other law school innocence projects;

Texas Center for Actual Innocence
University of Texas Law School
727 East Dean Keeton St.
Austin, TX 78705

University of Houston Innocence Network
100 Law Center
Houston, TX 77204

Other than hiring an attorney what else can I do to fight my case?

Title 22 O.S. § 1080 paragraph (d) provides the following basis for post conviction relief:

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

This exception is commonly referred to as "Newly Discovered Evidence." To succeed on a claim for newly discovered evidence a defendant must establish;

*1) that the evidence is material, 2) that it was not available at the time of trial, or if the evidence was available, the defendant could not, by the exercise of due diligence, have procured the same before trial, 3) that it is not cumulative, and 4) that there is a reasonable probability that the result at trial would have been different. **Sheppard v. State, 731 P.2d 989 (Okla. Cr. 1987).***

Hiring a good private investigator to investigate your case could provide you with the newly discovered evidence that is necessary to overturn your conviction. Many individuals seeking to have their convictions overturned need the services of a competent private investigator even more than they need the services of an attorney.

What are the potential steps in pursuing post-conviction relief?

- **Oklahoma State Court Post-Conviction Relief Petition.** Requests that the District Court order the jail or prison holding the defendant to release the defendant upon a showing that the defendant is being held in violation of some state law or constitutional right. If this is denied then an appeal in the Oklahoma Court of Criminal Appeals can be filed.
- **Federal Habeas Corpus Petition to District Court.** Requests the federal district court to order the jail or prison holding the defendant to release the defendant because the defendant is being held in violation of the U.S. Constitution.
- **Appeal of Federal Habeas Corpus Petition to Circuit Court.** Requests the mid-level federal court to review the federal trial court's decision denying the writ.
- **Appeal of Federal Habeas Corpus Petition to U.S. Supreme Court.** Requests the highest court in the land to review the mid-level federal court's decision denying the writ.

A LEGAL INFORMATION PAMPHLET

FOR THOSE INDIVIDUALS
WHO HAVE BEEN
CONVICTED OF A CRIME
AND SEEK TO CHALLENGE
THEIR CONVICTION OR
MODIFY THEIR SENTENCE

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DISCLAIMER

The information provided in this pamphlet is not intended to be legal advice. The information provided in this pamphlet is intended to provide the reader of this pamphlet with basic legal information without applying that information to the specific facts of the reader's case. You are strongly encouraged to seek legal advice from a licensed attorney who can apply his or her training and experience to the specific facts of your case.



Kevin Adams is a criminal defense attorney who handles trial and appellate cases in state and federal courts throughout Oklahoma. Mr. Adams is the past president of the Tulsa Criminal Defense Lawyers Association and served on the Board of Directors of the Oklahoma Criminal Defense Lawyers Association. Mr. Adams is a recipient of the Clarence Darrow Award, an award given annually to a lawyer who has exhibited outstanding defense and advocacy for his clients. Mr. Adams has a Martindale-Hubbell rating of BV. This is an excellent rating and is the maximum rating a lawyer who has been practicing less than ten years can receive. In 2007, Mr. Adams was named an Oklahoma Super Lawyer. Super Lawyers is a listing of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. Only the top 5% of attorneys in the state are named Super Lawyers.