

The Appellate and Post-Conviction Process in Missouri

DISCLAIMER: *Every post-conviction case has its unique facts and circumstances. The following is provided to give a general overview and informational background and is **not intended to give legal advice** in any particular case.*

A. The Direct Appeal

After a criminal defendant is convicted and formally sentenced by the judge, the defendant has 10 days to file a notice of appeal in the sentencing court. Thereafter, the case is docketed in the court of appeals, or in the Missouri Supreme Court if it is a death penalty case. The defendant's lawyer has the responsibility for preparing the Record on Appeal and filing it in the court of appeals within 90 days. The Record on Appeal consists of the transcript of the trial and the legal file, which are all relevant dockets from the circuit court's file. The legal file usually includes the charging document, motions, jury instructions, and the formal judgment.

After the Record on Appeal is filed, the appellant's brief is due within 60 days. After that, the State of Missouri, through an Assistant Attorney General, must file their Brief within 30 days. Although not required, the defendant/appellant may file a Reply Brief within 15 days.

After the case is briefed, the case is docketed before a three-judge panel in the Court of Appeals for Oral Argument or, in the discretion of the court unless the defendant requests otherwise, the appeal is submitted on the Briefs. A written opinion is usually issued approximately 60-90 days after oral argument. The party that loses on appeal, after the opinion is issued, has 15 days to move for Rehearing or Transfer to the Missouri Supreme Court by way of written motion in the court of appeals. If that motion is denied, the losing party has 15 days to file an Application for Transfer directly in the Supreme Court seeking discretionary review on important issues of law or to resolve a conflict with a different court of appeal. If transfer is denied, the Mandate issues immediately, making the appeal final.

The issues that may be raised on appeal are limited to claims of trial error. The most common claims of trial error involve the denial of motions to suppress evidence, the improper admission of evidence by the prosecution, the exclusion of evidence by the trial court that would have helped the defendant, defective jury instructions, and improper arguments by the prosecution. It is important for lawyers on direct appeal to raise their claims of error as being in violation in both state and federal constitutional law. If an attorney fails to federalize the claim, it will later be procedurally barred in federal habeas corpus proceedings.

B. The 29.15 Appeal.

A Missouri prisoner in custody must file a Form 40 within 90 days after the direct appeal is final to institute a Rule 29.15 proceeding challenging his conviction and/or sentence. Rule 29.15 is a mechanism to challenge a conviction with facts outside of the trial record. Claims of trial error cannot be re-raised or raised for the first time in this proceeding. The most common claim raised in a 29.15 appeal is ineffective assistance of trial counsel. Other issues that can be raised are the prosecution's suppression of evidence favorable to the accused and claims of ineffective assistance of counsel on direct appeal.

Once the prisoner files the Form 40 in the circuit court where he was convicted, the case goes back before the same judge who presided over trial and sentencing. The court must appoint counsel if the prisoner is indigent. After counsel is either appointed or retained, counsel has up to 90 days to file an amended petition raising all claims for relief.

Missouri courts enforce 29.15's time deadlines very strictly. Thus, if the prisoner misses the 90 day deadline for filing a Form 40, he is forever barred from filing a 29.15 action later. If appointed or retained counsel misses the 90 day deadline for filing an amended motion, no other amendments or claims can be raised unless the prisoner can show he was abandoned by his counsel.

In the amended motion, counsel always should request an evidentiary hearing so evidence can be presented to support the claims. Whether or not a hearing is held, the circuit court is required to issued findings of fact and conclusions of law on each of the prisoners' claims. After a decision is rendered, the defendant or the state has 40 days to appeal the circuit court's judgment to the appropriate court of appeals. In capital cases, the 29.15 appeal is filed directly with the Missouri Supreme Court. The filing of the record on appeal, briefing schedule, and post-judgment rules are identical to those applicable in direct appeals.

C. Federal Habeas Corpus.

Federal habeas corpus is a mechanism by which a Missouri prisoner, after he has exhausted all state appeals, may raise federal constitutional challenges to a state conviction. In an effort to attempt to speed up death row appeals, Congress imposed restrictions upon the availability of federal habeas corpus relief in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), that went into effect in 1996.

The AEDPA requires the prisoner to file a federal habeas corpus action within one year of the completion of the state appellate and post-conviction process. In Missouri, this usually gives the defendant one year from the date the mandate issues from the denial of the 29.15 appeal. However, a prisoner should be extremely cautious when calculating the time because there may be some lost days arising from the way the case was litigated in state court that could reduce the time for filing the petition by as much as 90 days. If you have any question about the deadline, it is advisable to file the original petition, for which *pro se* forms are provided at most prisons, as early as possible.

Once a federal habeas case is filed by the prisoner, it is docketed in front of a federal district judge in Kansas City or St. Louis, depending on the venue of the conviction. Unless it is a death penalty case, the district courts almost never appoint counsel to represent a prisoner who lacks the means to hire counsel. Thus, unless the prisoner retains counsel, he is unfortunately forced to represent himself, or proceed *pro se*.

Where counsel is either appointed or retained, district courts will usually freely grant counsel leave to file an amended petition to more fully amplify the factual and legal issues in a case. Thereafter, the court will order the state to show cause, which requires them filing a response in opposition to the petition. After this show cause response is filed, the habeas petitioner may file a traverse or reply to address the issues raised by the attorney general in the response. Usually the traverse is the most important document filed by a prisoner because it allows the prisoner to address any procedural defenses and rebut any arguments that habeas relief

is precluded under the standard of review revisions of the AEDPA. Habeas petitioners should be cautioned that in the Western District of Missouri, under local rule, a traverse must be filed within 7 days of the filing of the show cause response. This is an impossible deadline for a *pro se* litigant who must rely upon prison mail. Thus, it is important for all habeas litigants, including those represented by counsel, to immediately ask for an extension of time after the show cause response is filed, in which to file his traverse.

After the traverse is filed, the district court ordinarily issues a written decision, without granting an evidentiary hearing, after reviewing the transcripts and other state court records. When the district court rules on the petition, the losing party may file a notice of appeal to the Eighth Circuit Court of Appeals within 30 days. If the ruling is in favor of the state, a habeas petitioner may not appeal unless he gets what is called a certificate of appealability (COA). This is a mechanism by which the district court is supposed to weed out frivolous appeals and grant a COA if the claims raised have debatable merit. If the district court grants a COA on at least one issue, the case is heard on the merits on appeal before the Eighth Circuit in St. Louis. If, on the other hand, a COA is denied by the district court, the appeal will be docketed in the Eighth Circuit and the prisoner must file a new application for a COA before the court of appeals. If the court of appeals denies a COA, the case is usually over for all intents and purposes.

Where a COA is issued or where the state appeals, the case is heard on appeal by a three-judge panel of the Eighth Circuit Court of Appeals in St. Louis. After oral argument, the Court of Appeals usually issues a decision within approximately six months, depending on the complexity of the case.

After the three-judge panel issues its ruling, either side may file a petition for rehearing or rehearing en banc within 14 days. If the rehearing motion is denied, the only recourse left is to petition the United State Supreme Court for a Writ of Certiorari, which is due within 90 days of the denial of the rehearing motion.

If certiorari is denied, this completes the normal round of state and federal review of a state prisoner's conviction and sentence. In death penalty cases, this usually means that the state will seek an execution warrant if the prisoner has not received any relief. This entire process can take several years to complete, depending upon which judges are assigned to the case and the number and complexity of the issues involved.

D. State Habeas Proceedings Under Rule 91.

In addition to Rule 29.15, Missouri Supreme Court Rule 91 gives prisoners a right to file a petition for a writ of habeas corpus before the state courts. Until the last 20 years, state habeas corpus was rarely utilized. However, the Missouri Supreme Court has carved out some narrow exceptions that allows prisoners to get back into state court with claims for relief even after they have exhausted their normal avenues of appeal.

The exceptions permitting a prisoner to get back into state court on a Rule 91 mirror the procedural bar rules that federal courts use in federal habeas corpus actions. To have any chance of success, there must be evidence supporting a claim of actual innocence or newly discovered evidence supporting a claim for relief that was not available during prior appeals. State habeas corpus is also available, regardless of the procedural posture of the case, to remedy jurisdictional defects or in situations where the state courts have acted beyond their legal authority in imposing a conviction or sentence.