Handbook For the Wrongfully Convicted:

What do you do when the Judicial System fails you and gives you the shaft?

By: Eric D. Smith (Danachi)

Part One

Chapter One Through Eight
(Two Zine Set)

About Eric D. Smith (Danachi)

Eric was born on June 7th, 1978. His parents died when he was a child, and he was adopted. After graduating from high school in 1997, he went off to his Basic Combat and Advanced Individual Training for the United States Army Reserves in Fort Jackson, South Carolina. In 2001, Eric was still in the Reserves, holding rank of Specialist (one rank below Sergeant) and was a certified combat life saver. His military occupational skill was a 75H (Personal Service Specialist). During this time, Eric had his own house in Franklin, Indiana, had a good job with a financial company, and was a car show promoter and officer for his custom car club. He was wrongfully arrested and convicted for arson as class B felony. His alleged co-conspirator (who made three different taped statements before trial) put the blame all on Eric, and got his friends to help him do it. There was no evidence, no eyewitnesses, and the motive of Eric wanting revenge for his ex-girlfriend not wanting to go back out with him (which the alleged co-conspirator set-up) was contradicted due to the ineffective assistance of trial counsel of the arson in 2001. Eric had known alibis that never got to testify for him, and now after all this time, Eric has evidence proving the State of Indiana falsified evidence during his jury trial. The only evidence against Eric was the State's witness saying "Eric told me he set the fire." No one died or got hurt in the fire, Eric had never been in trouble before, and he was sentenced to the maximum term of 20 years imprisonment. This, when probation could have been given. Eric's arson case was a high profile case in Indianapolis, Indiana.

In prison, Eric learned and self-taught himself the law. He is a prisoner rights advocate and now an anarchist. Prison officials have physically and mentally tortured him in retaliation for his legal endeavors. He is only 5'4", 135lbs, and three guards beat him while handcuffed behind his back, ankle shackled, and connected to a dog leash, breaking his nose and causing other injuries. In order to undermine his legal endeavors, the prison officials have unlawfully held him in punitive disciplinary segregation in the guise of legitimate correctional goals. Eric is still fighting his wrongful arson conviction and litigating other civil cases in prison. Representing himself, Eric has had a lot of success in civil law. Eric hopes to be released from prison soon.

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Introduction

Greetings, friends. Obviously, you are going through very difficult mes. You need advice, help and support. Hopefully, this handbook will elp you in some way. This is the purpose of this handbook.

I am currently 28 years old. I am a white male, serving twenty ear maximum sentence for arson as a class B felony in the state of ndiana. No one died or got hurt, I had never been convicted of anything in ıy life, was in the United States Army Reserves (still got an Honorable ischarge despite the conviction), had my own house, a good job, etc. etc., nd like you, got the shaft. I am truly innocent of the arson. I had alibis ıat never got to testify in my state proceedings, and I have evidence roving the State falsified evidence in my jury trial. Currently, at the time f writing this, I am at the federal stage regarding Habeas Corpus. I have xtensive "pro se" (representing yourself—the literal term means "for him r herself") experience with the law. Everything concerning this handbook . what I've experienced. I learned the law the hard way and hands-on, and ome of the things discussed in this handbook are things that I would have one differently had I been given a chance to do so, i.e., turning back the ands of time.

The Judicial System is flawed. Mistakes are made, sometimes urposely by the prosecutors and judges. But there are things that can be one to help yourself. It would be an injustice if I did not make a comment out those of you getting your hands on this handbook who are still waiting to go to trial. If you are such a person, then know some of these ings:

1. If you want to get out of jail, try to see if your probable cause fidavit (what the police used to get a warrant to arrest you or hold you in il) is sufficient, because if it's not, more than likely the court will have to lease you from jail with no strings attached until your trial. No cost to ou. This is how it is in the state of Indiana (and what I later learned could ave happened to me). See: e.g. Flowers v. State, 738 N.E. 2nd 1051, 1055 nd. 2000).

2. If you're stuck in jail, try to keep notes of everything about your se. NEVER speak to anyone about the factual details about your case cept for your lawyer. Some prisoners in the jail may try to lie and testify gainst you in order to obtain favorable treatment on their charges.

3. If your attorney is not doing what you want to be done, write a tter to the judge, and in detail, explain the problems. Ask the Clerk of ourt to file it in your cases' record. Keep a copy of it for your records, nd if you don't hear anything, bring the situation up the next time you go o court. Give the court your copy of the letter. This may help you get a ew lawyer or may help you later down the road should you get convicted nd what to appeal any decisions.

4. Make sure that you have some knowledge about evidence rules for the court and try to make sure your jury instructions are not misleading or In contradiction with others. If you feel something is not right, speak up about it in court. Don't be afraid to do this. Make a record of everything. Make sure your issues or problems are filed in the record or recorded by the court recorder. Make a note of the day you addressed your problem to the court. Be as active in your case as you possibly can. Some lawyers call this "making a good record," meaning that things are done before trial or during trial in order to argue errors or possible errors on appeal.

5. If you have a high profile case, meaning that it was in the news, don't be afraid to talk to the media. Try to. Tell them your story. Don't be afraid to cry or show emotion. Don't get angry or violent, but in a respectful and polite way, get your story told. Trust me, my case was high profile, but I was to scared to talk to them. I wish I would have now. You never know who might be watching and who might turn out to support you.

Jail and prison is difficult at best. You're going to meet a lot of different people with different beliefs. Some people are going to be bad, but others will be good. Try to learn as much as you can, and stay away from any trouble or conflicts. Buckle your seatbelt and grab a snickers bar. You may be in jail or prison for a long period. I got arrested March 1, 2001, and nearly six years later, I'm still in prison. Please, do what you can to help yourself and your situation. Keep good records of everything the best that you can, and never be afraid to speak up in court. I hope this handbook helps in setting you free. What do you do when the judicial system fails you and gives you the shaft? You fight the sorry bastards back—the best that you can, and the best way that you can. Never give up, and always remember what they did to you.

Chapter 1
A Verdict is Reached. What Now?

Unfortunately, you have been found guilty. You might be angry, which you should be because you really didn't do what the state or federal government accused you of. You're innocent, and you have all these emotions and fears running through your mind. You're scared. You're sad. After having some time alone or where no one can see or hear you, you cried quietly. Your life is about to change. You're uncertain how, but your liberty has been taken away from you. You want it back. You have people who you care about. Family. Friends. Your boyfriend or girlfriend. Your husband or wife. Your children. What can be done? What's going to happen to your life? What now?

Well, the first thing is to write the court and, in detail, explain to them what you feel went wrong in your case and what you feel should have happened, e.g., "My attorney should have called my witnesses to testify, which I told my attorney to do. These witnesses would have testified that..." or "My attorney did not object to evidence illegally seized by the police. This evidence should have been excluded from my trial." The point of this is to "make a record," as explained above in the introduction. Keep records of everything. Ask the Clerk of Court to file your letter in the record. Next time you go to court, bring it up if you haven't heard anything. Read up on your state's trial rules, and see if you can file a motion for a new trial. Do something, but always be polite. Don't threaten anyone or cuss somebody out. If you have to, apologize and try to tell them you didn't mean it because you were under severe psychological and emotional distress. That you just overreacted in a scary situation that you had never experienced before. This can only help you.

Now that you've done this, what's going to happen next is that a probation officer will come visit you at the jail in order to give you an opportunity to give information to be used in your sentencing. This information will be put in a document called a "Pre-sentence Investigation Report." Try to have your attorney present when the officer comes and speak with you. Try to be as well-groomed as you can. Be polite. These people will be evaluating you, and any negatives will be placed in the officer's mind, who may recommend that prison is an appropriate sentence; therefore, you don't want to piss these people off or give them any reasons to discriminate against you.

You should have told the court that you want to appeal the decision of verdict against you. If you haven't done so, write the court immediately and tell them you wish to do so. In most cases, you only have thirty days from the date of your verdict to do so. If that time passes, you'll have to request the court to grant you "leave" (permission) to file. A "belated notice of appeal," and you'll have to explain why the court should do so, e.g., "because my attorney never told me about this. I didn't know I could appeal. I thought my attorney would take care of this."

The next thing that is going to happen (or should happen) is that your attorney will come visit you at the jail, and he or she will have a copy of the completed pre-sentence investigation report, which will be like a small story of you, your case, and what the victims have to say about you. Recommendations will be made by the probation officer about what your punishment should be, and your attorney will go over everything with you in order to make sure your personal information is correct and what you think about the report. If anything is incorrect, let the attorney know. Also, if you have them, try to get your attorney to subpoena character witnesses on your behalf so they can testify at your sentencing. Discuss "mitigating factors" with your attorney. Mitigating Factors are things that you can argue at sentencing as to why the court or jury should be lenient on you

regarding any punishment that you may receive, e.g., "My incarceration will cause me and my loved ones significant hardships," "I've never been arrested or convicted of anything before," "I completed a substance abuse program or got my G.E.D. in the jail," or "Prisoners are going to prey on me in prison because I'm so small," etc. Keep in mind, you have the right to present evidence and witnesses at your sentencing hearing, and you have the right to argue as many mitigating factors as you can think of.

On the other hand, the state will be arguing "aggravating factors" against you. Aggravating Factors are things that the prosecutor will argue as to why you should go to prison; however, keep in mind that they can't argue everything against you. The prosecutor can't argue any elements of your crime as an aggravator, see: e.g. Green v. State, 424 N.E. 2d 1014, 1015 (Ind. 1981), and they can't argue as aggravating anything that is an opinion, e.g., "The defendant is in need of rehabilitation, which can only be provided within the Department of Corrections." Everything that's aggravating must be factual or something that can be proven beyond a reasonable doubt, e.g., "the defendant has a prior criminal record."

At sentencing, the jury should be the ones deciding all the aggravators and mitigators in your case, not the judge. See: Blakely v Washington, 542 U.S. 296 (2004), reh'g denied. Also, there should be a state law (which are known as "codes" or "statues") or state constitutional laws that prohibit judges from determining the aggravating or mitigating circumstances in your case. In Indiana, Article 1, Section 19 of the State Constitution provides, "In any criminal cases whatever, the jury shall have the right to determine the law and facts." This includes all "the law and facts" during sentencing. Such laws can be enforced through Equal protection of the law sections in your state constitution (Article 1, Section 23 in Indiana) or by the Fourteenth Amendment to the United States Constitution, as the United States Supreme Court held long ago:

> When a right is given by a state legislature, even though it is not a right which is guaranteed by the Federal Constitution, the arbitrary denial of that right violates the Fourteenth Amendment to the United States Constitution." American Ry. Express v. Kentucky, 273 U.S. 269, 273, 47 S. Ct. 355, 71 L.Ed. 639 (1927).

At sentencing, if something doesn't go as planned, e.g., your attorney doesn't call upon your witnesses to testify or non of your evidence was presented, stand up and let your problems be heard. Don't argue or get upset. Politely explain that your attorney hasn't done what you asked or told what you wanted done. Make sure your attorney made proper objections during sentencing, e.g., "Objections. The State is arguing opinions as aggravating." (The proper objection concerning this would be, "Objection. Assumes facts not in evidence." This is the legal wording for such objections). The point of all this is that if these things aren't done then, when you appeal, your Appellate Attorney can't argue the error

because they will be considered "waived." Appellate rules of procedure require that only issues preserved in the record can be argued in an appeal for review of an error. Preserving an issue for an appeal can only be done if an objection is timely made when the error occurs; otherwise, you'll have to wait till other remedies that challenge your conviction or sentence in order to bring up the issue, which will be done by claiming that your attorney was ineffective contrary to the guarantee of effective assistance of counsel as stated in the Sixth Amendment to the United States Constitution of America. (For the standard of review, and what you have to prove in an ineffective assistance of counsel claim, get Strickland v. Washington, 466 U.S. 668 (1984) from your jail or prison law library.

At sentencing, make sure you're well-groomed as best as you can. Take all the notes that you can about what was said, what the prosecutor did, and what your attorney did or didn't do. All of these things will help you for your appeal, and for further remedies if your appeal is unsuccessful. After your sentencing, you will know what will happen to you. If your crime is non-violent, you may get lucky and get no jail time; however, my alleged crime was non-violent, and I got the maximum sentence of twenty years! If your crime is violent, then more than likely you are going to go to prison. Be prepared. There's an old saying: "Expect the worst, and hope for the best!"

If you are going to prison, expect hard times. Many of us have no family. Many of us will lose our loved ones through divorce or break up. (My fiancee left me, and didn't even tell me. I found out later in prison when I happened to catch her at home. On the telephone she told me—told me that she was pregnant and engaged to another man. She then hung up. It was very cold, and it hurt very bad. Don't expect your loved one to ride out the bad waves with you).

By this time, your appeal, known as the "direct appeal" to your conviction and sentence should be in progress. You probably won't hear from your appellate attorney until after he or she has reviewed all the papers filed in your case and the transcripts of everything recorded in court hearings and trial. In the meantime, go over all your issues. Think of everything that you wanted to happen, but did not happen. Come up with a list of questions, asking if what you felt should have happened is something that you can appeal. Ask yourself whatever did happen that you felt was wrong, whether it can be argued on your direct appeal. Whenever you find out who your appeal attorney is, send them a copy of your list and questions. Try to be helpful, and ask your appeal attorney to respond. Keep copies of everything you send and receive. You may very well need them later on down the road.

Keep in mind that the Fourteenth Amendment to the United States Constitution guarantees you the right to effective assistance of counsel on a first appeal. See: Evitts v. Lucey, 469 U.S. 387, 396-99 (1985). This is on a

first appeal only, and not for other appeals like filing a "certiorari" petition with the U.S. Supreme Court. See: e.g., Miller v. Keeney, 882 F. 2d 1428, 1430-32 (9th Cir. 1989).

Sometimes, your appeal attorney will tell you that there is nothing in the record to argue. In some states, the appeal attorney will file what I believe is called an "Alder's Brief," which I'm pretty sure comes from a case called Alder v. California. I don't have the exact case citing right now, but the case discusses that an attorney may file such a brief so that you may pursue other remedies to challenge your conviction or sentence. In some states; however, like here in Indiana, there is no such allowable brief. In such a case, the appellate attorney will more than likely argue that the evidence was insufficient to sustain your conviction, which are the hardest arguments to win because the appeal courts are not allowed to re-weigh the evidence at your trial or re-assess the credibility of witnesses, as they say it was the jury's or the trial judge's job to do so. Only in rare exceptions will the court invade the province of the jury, and that only happens when a witness gives "contradictory testimony of dubiosity." See: e.g. Sisson v. State, 710 N.E. 2ed 203, 206 (Ind. Ct. App. 1999), trans. denied, 726 N.E. 2d 298 (Ind. 1999); See also: Jackson v. Virginia, 443 U.S. 307, 319 (1979). Other exceptions may apply as well.

Whatever arguments your appeal attorney does make, he or she must present all of its arguments to the state's highest Appellate Court in order to preserve the issues for habeas corpus. See: O'Sullivan v. Boerckel, 526 U.S. 838 (1999). If your attorney doesn't do so, then your claims are "procedurally defaulted," which means you may not be able to bring them up successfully in federal court. If this happens to you, you must claim ineffective assistance of appellate counsel in your petition for post-conviction relief, which we will discuss later.

However, your appellate attorney can also file a "Davis Petition" or type of petition in order to make a record to argue ineffective assistance of counsel for direct appeal if you have no issues. In Indiana, this method is called a "Davis Petition," and comes from the case Davis v. State, 267 Ind. 152, 250 N.E. 2d 364 (1977). See also: Hatton v. State, 626 N.E. 2d 442 (Ind. 1993). If you're not from Indiana, consult your local law library, contact an attorney, or your Public Defender's Office in order to inquire about what options concerning this matter are available to you.

An entire appellate process can take up from anywhere between two months to a year, depending on your issues, in order to reach a decision from the appellate court and State Supreme Court. Be patient, but prepare for possible further remedies you may have to pursue. Contact as many resources as you can in order to obtain free legal books or legal aid. A resource list of books and addresses of help groups is listed after Chapter 12 of this handbook.

Chapter 2

I Lost my Direct Appeal Concerning my Wrongful Conviction, What Now?

The first thing you should do is make sure your direct appeal was taken to your state's highest court in order to exhaust your state remedies for federal review, as explained in Chapter 1, which must be done usually within thirty days from the date the lower court of appeals denied your direct appeal. Check your state's appellate rules or procedure in order to see what time limits apply to you. You can get a copy of them at your local law library or Public Defender's Office. At the least, you should wire the state's highest appellate court, your trial court, and the Public Defender's Office that you want to appeal the lower court of appeal's decision to them. If your case was directly decided by the state's highest appellate court, then you have exhausted your state's remedies for federal review of your conviction and sentence via habeas corpus.

Should you proceed with habeas corpus or do you feel you have other issues that contributed to your conviction and sentence that couldn't be argued in your direct appeal, e.g., ineffective assistance of trail counsel? Prosecutorial misconduct? Newly-discovered evidence rendering the conviction unreliable? If the latter relates to you, then I recommend you hold off on pursuing habeas corpus, and pursue post-conviction remedies. The reasons why I say this are simple:

One, because when you pursue post-conviction remedies, the statute of limitations for filing a petition for habeas corpus (which is exactly one year, starting from the day the highest state court denied your appeal) is tolled until after all your post-conviction matter and appeals are taken care of. The clock won't start running until after all of these matters are fully decided, then the clock starts running again on the day the state's highest appellate court denies your appeal concerning post-conviction matters. See: 28 U.S.C. § 2244 (d)(2); See also: Artuz v. Bennett, 531 U.S. 4 (2000); Smith v. Walls, 276 F. 3d 340, 344-45 (7th Cir. 2002).

Second, because this gives you more time to obtain legal research materials, knowledge, and experience with the type of claims you're going to be presenting to the courts; especially if you're going to be representing yourself. In addition, federal or state laws might change, giving you a more favorable standard in order to prevail on the type of claims you wish to argue. Other cases might develop that fits the facts to your case, which you can cite to the case, which you can cite to the courts to support your claims. Keep in mind though, that you're not entitled to appointed counsel for habeas corpus, which we will discuss later in Chapter Eleven. In state post-conviction matters; however, most states appoint you an attorney to represent you in such matters free of charge.

In any event, you need to study and become familiar with the

habeas corpus statutes, which are governed by 28 U.S.C. § 2254. See also: Rules Governing Section 2254 Cases (which there are eleven rules utilized in habeas corpus). You also need to study and become familiar with your state's post-conviction rules, which in Indiana, are called "Indiana Rules of Procedure for Post-Conviction Remedies." You can get copies of these rules from your local law library or Public Defender's office. In almost every situation, they have prepared fill-in-the-blank documents that assist you in preparing these documents for habeas corpus or post conviction relief, as well as other motions needed to prosecute your claims. These are generally referred to as "Pro Se packets."

When filling the actual petitions for habeas corpus or post-conviction relief, it is very important that they are written correctly. For example, when filling out your petition for habeas corpus, on the caption (which is the case information at the top of the front page to the petition) you don't write your name versus the state. In habeas corpus you put your name as "petitioner" (which petitioner means the moving party making a request to the court) and the warden of your prison as "respondent." See: 28 U.S.C. § 2254, Rule 2. So your petition would read, e.g., "(Your Name) v. (Name of Warden)." Don't worry about the case number because the Clerk of the Federal Court will give you a new one, and will fill that part of the caption out. Everything else, you can fill in. We will discuss more about habeas corpus in Chapter 11.

Post-conviction petitions are a little different regarding the caption. You are still the petitioner, but the respondent is the state where you were convicted in. So the post-conviction petition would read, e.g., "(Your name) v. State of (Name of the state where you were convicted)." Leave the case number blank because, like the federal court clerk, the state court clerk will fill that in. We will discuss more about post-conviction in Chapter 4.

When filling these petitions out, no matter which route you decide to take, you'll have to fill them out yourself unless you can afford to pay an attorney to assist you in doing so. In both petitions, you'll come across two questions asking you to "state the grounds known to you for vacating, setting aside or correcting your conviction and sentence" and "state all the facts which support each ground." These two questions are the most important part of your petition, and you must use specific legal language as stated in the rules. In Indiana, the stated grounds you can use are spelled out in Rule one, Section one of the Indiana Rules of Procedure for Post-Conviction Remedies. If you're not from Indiana, check with your law library to see if there are any rules for your state, spelling out the grounds to be stated in your petition for post-conviction relief. In habeas corpus, your grounds would be that "the conviction and sentence was in violation of the United States Constitution, laws or treaties of the United States." This is a similar ground for post-conviction relief, which is frequently used. The reason this is a stated ground in habeas corpus is because federal

courts may only entertain a state prisoner's petition for habeas relief on the grounds that the prisoner's confinement violates the constitution, laws, or treaties of the United States. See: 28 U.S.C. SS 2241(c) (3) (2000); id. SS 2254 (2) (2000). Relief for violations of federal law will only be granted if the violation rises to the level of a fundamental defect which inherently results in a complete miscarriage of justice" or is inconsistent with fair procedure. Reed v. Farley, 512 U.S. 339, 348 (1994) [quoting Hill v. U.S., 368 U.S. 424, 428 (1962)]. See also: e.g., Sanna v. Dipaolo, 265 F. 3d 1, 12 (1st Cir. 2001); Gattis v. Snyder, 278 F. 3d 222, 231, 236 (3d Cir. 2002); Taylor v. Withrow, 288 F. 3d 846, 851 (6th Cir. 2002). 12

When stating your supporting facts, the most common alleged facts will be that you were denied effective assistance of trial counsel or appellate counsel, prosecutorial misconduct, or insufficient evidence. Generally, however, these factual allegations will be things that you either weren't aware of at the time they happened or things that weren't available to argue on your direct appeal. The key to all your factual allegations is to be detailed. If you have to, use extra sheets of paper to write out how your problem occurred and what went wrong against your wishes or against a fair trial. Don't leave anything out. BE SPECIFIC AND DETAILED. As for factual allegations, and examples on how to write them for habeas corpus or post-conviction relief, refer to Chapter 4 for post-conviction petitions and Chapter 11 for habeas corpus petitions.

Lastly, whenever you obtain your state's rules or federal statutes like 28 U.S.C. S.S. 2254 (which governs habeas corpus relief), and ask for the "annotated" versions. The Annotated versions will sometimes, but 95% of the time, give you a list of legal cases (called "Case Law") about what the courts stated about these rules, etc. They are a good starting point when researching your issues and the law.

If you're a federal prisoner, you must file a motion to set aside your conviction instead of petitioning for post-conviction or habeas corpus relief. See: 28 U.S.C. S.S. 2255.

Chapter 3

While in Prison, the Prison Officials are Retaliating Against me, and it is Affecting my Ability to Correspond and do Legal Research. What Can I do to Counter this or Make Things Better?

I've included this chapter because it is something I have experienced, and it's something you should anticipate while being incarcerated; especially if you decide to become active in litigation. It's important to know your rights so you can fight through adversity.

Sadly to say, our prisons in America are plagued with corruption and abuse. Once prison officials catch wind of a prisoner becoming active

in litigation, especially if it is against them, they do whatever they can to manipulate your ability to do legal research, correspond with others, and file legal documents in a timely way with the courts. They will retaliate against you, and harm you mentally and physically. Being active in litigation also means to file prison grievances against correctional officers and officials, filing notices of tort claims for injuries or losses of property, or by making complaints about them to the newspapers or state officials, etc., and this is all calculated to personally benefit the prison officials and their personal interests when they take action against you.

On the other hand, the prison officials and their employees may retaliate against you because of your race, religious or political beliefs, or association with certain prison gangs or individuals. It doesn't matter if your black or white, Spanish or Asian. What does matter is that these prison authorities hate you, and they will do whatever they can to harm you. They'll even kill you if they can get away with it, so please, be careful and know your rights.

The first thing the prison authorities will do is fabricate disciplinary reports against you in order to assassinate your character and deprive you of privileges. It is imperative to know your Due Process rights concerning disciplinary matters. Your Fourteenth Amendment to the United States Constitution is your shield here. To know your exact Due Process rights under the Fourteenth Amendment please review the United States Supreme Court case of Wolff v. McDonnell, 418 U.S. 539, 556-559, 566, 94 S.Ct. 2963 (1974). The key thing to remember is that the Due Process Clauses prohibit prison officials from depriving you of "life, liberty, or property without due process of law." See: U.S. Const., Amends. V, XIV. (The Fifth Amendment's Due Process Clause applies to federal officials, and the Fourteenth Amendment's Due Process Clause applies to state and local officials). This means that they must give you a fair hearing, and allow you to present documentary evidence and witnesses in whatever action they take against you.

Some states may have laws that give you more rights. Regarding disciplinary matters in Indiana, the state legislatures spelled out a prisoner's rights in a disciplinary hearing. See: Indiana Code S.S. 11-11-5-5. These statutes create "liberty interests" under the Fourteenth Amendment, and are enforceable. So do prison rules or regulations; however, these statutes, rules or regulations only do so if they limit the discretion of prison officials. See: e.g. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462, 109 S.Ct. 1904 (1989). The most common way of limiting discretion is to use "explicitly mandatory language in connection with requiring substantive predicates." Hewitt v. Helms, 459 U.S. 460, 472, 103 S.Ct. 864 (1983).

"Mandatory Language" often means words like "shall," "will," or "must." Hewitt v. Helms, 459 U.S. at 471. The word "may" can also be mandatory if the statute, rule or regulation states a prison official "may

not" take a certain action. See: e.g. Mendoza v. Blodgett, 960 F. 2d 1425, 1431-33 (9th Cir. 1992), cert. denied, 113 S.Ct. 1005 and 113 S.Ct. 1027 (1993).

"Substantive Predicates" are "substantive limitations on official discretion" [[redacted] v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741 (1983)] or "particularized standards of criteria" that guide decision makers. [Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 467, 101 S.Ct. 2460 (1981)].

Try to beat the disciplinary reports, because if you don't the prison officials will try to bury you in disciplinary segregation units, keep you on administrative segregation units or supermax prisons. There, the prison officials will force you to use a cell delivery system (at their hands and mercy) for all legal copies, research materials, and supplies. Trust me, I know. I've been kept in these units (all of them) since 2002. I'm only 5'4", 135lbs, and in supermax, three guards beat me up and broke my nose as I was in ankle shackles, handcuffed behind my back, and connected to a dog leash. You don't want to be on these types of units, but if you go there, keep all the prisoners there with you on your side. Try to build good relations with them. You all may need each other's help or support one day. Also, contact your state's civil liberties union and human rights groups. A list of such groups, with their addresses, is listed after Chapter 12.

A couple other pointers about fighting disciplinary decisions is to exhaust all your state administrative remedies, which generally involves appealing to the warden, and then to the Department of Correction's head office. Make sure you appeal to the highest reviewing authority for your appeals. If you don't, you'll be stuck in the segregation unit until they let you go. Also, see if your alleged disciplinary infraction (rule) is vague. Vague disciplinary rules violate Due Process, e.g. "Disorderly Conduct," "Abuse of Mail." A prison rule that is so vague that people of ordinary intelligence must guess at its meaning denies due process. See: Rios v. Lane, 812 F. 2d 1032, 1038 (7th Cir.), cert. denied, 483 U.S. 1001 (1987). A rule may be vague "on its face," meaning that under no circumstances can it be applied constitutionally. See: e.g., Jenkins v. Werger, 564 F. Supp. 806, 807-08 (D. Wyo. 1983). (Statute barring "unruly or disorderly" conduct was void for vagueness). It also may be vague, "as applied," meaning that it does not give adequate notice that it prohibits the conduct with which a particular prisoner is charged. See: Conner v. Sakai, 15 F. 3d. 1463, 1469 (4th Cir.), cert. denied on other grounds, [redacted] 1994); Adamas v. Gunnell, 729 F. 2d. 362, 369 (5th Cir. 1984) (rule prohibiting "disruptive conduct" did not give adequate notice as applied).

If a disciplinary report charges you with a certain offense, but at the disciplinary hearing the board finds you guilty of a lesser or greater charge, etc., it also violates due process because a prisoner must know the rule he or she is alleged to have broken in order to know how to "marshal

the facts and present a defense" at the hearing. See: Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963 (1974). You should make all these due process arguments in your appeals to the warden and final reviewing authority. In fact, you must do so or you will procedurally default your arguments in habeas corpus. Keep in mind; however, you cannot file habeas corpus if your punishment is only segregation time. This is because in the United States Supreme Court case of Sandin v. Conner, 515 U.S. 472, 486 (1995), the Supreme Court held that a prisoner's confinement in disciplinary segregation falls within expected parameters of sentence, and is not an "atypical and significant hardship" on the prisoner, thus, the prisoner has no liberty interest in remaining out of segregation. Now you might be able to understand why prison officials employ such sanctions—because they mostly can get away with it. The main reason is that the standard of review for disciplinary matters is so unfavorable to prisoners, that there only has to be "some evidence" to support the conviction. See: Superintendent v. Hill, 472 U.S. 445, 457, 105 S. Ct. 2768 (1985). These unfavorable decisions are a contributing reason as to why prisons in America are overcrowded, and why the recidivism rates are so high for prisoners—because in these segregation unites, prisoners are tortured and deprived of all rehabilitative programs. Because officials bury prisoners in these units, more than likely, the prisoner will be released back into society from these units. On June 12, 2006, the USA Today newspaper; at page 12A, reported a story entitled, "Rising Prison Problems Begin to Trickle into Society," which exposed a scathing indictment on the nation's correctional system and "tough on crime" laws, supporting my statement. But there is hope of getting out of a supermax prison, because a lot of federal courts are starting to certify that incarceration in a supermax prison is an "atypical and significant hardship." See: e.g. Austin v. Wilkinson, 125 S. Ct. 2384 (2005). First, though, in order to release yourself from any type of these segregation units, you must sue the persons responsible for your placement in these units; either that they retaliated against you for your legal endeavors (which violates the First Amendment and other laws dealing with court access; that the prison officials are mentally and physically torturing you in these units (which violates the Eighth Amendment); that the head prison official's policies and procedures are unconstitutional and violates due process; or officials are maliciously treating you differently than other similarly-situated prisoners because of your legal endeavors, race, political or religious beliefs, or association with others (which violates the Fourteenth Amendment—the Fifth Amendment if the prison officials are federal employees).

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Like everything, before you sue, you must exhaust all your administrative remedies. If you file a lawsuit dealing with federal violations, you must file all the steps in the prison grievance process and do so in a timely manner. See: 42 U.S.C. [redacted]; White v. McGinnis, 131 F. 3d 593 (6th Cir. 1997); Pozo v. McCaughtry, 286 F. 3d 1022 (7th Cir.

2002). If you file a lawsuit in state court, you must file a "notice of Tort Claim" (if you are only alleging state law violations) before filing a lawsuit. You must understand that the federal and state officials have placed obstacles in front of prisoners, making it harder for us to file lawsuits. In 1996, Congress enacted a law called the "Prison Litigation Reform Act" (PLRA) designed to protect government interests. For information about these restrictions placed on us by the PLRA, please review 42 U.S.C. S.S. 1997 e (2), 28 U.S.C. S.S. 1915 (b), 28U.S.C. S.S. 1915 (g), and 42 U.S.C. S.S. 1997 e(e). As for the "physical injury requirement" in 42 U.S.C. S.S. 1997 e(e), the federal courts are in disagreement as to what rights fall under this requirement, and what constitutes a physical injury. It all depends on what circuit your federal appellate court belongs and if you're under their jurisdiction. See: e.g. Rowe v. Shake, 196 F. 3d 778 (7th Cir. 1999) (First Amendment claim not barred by physical injury requirement); Canell v. Lightner, 143 F. 3d 1210 (9th Cir. 1998) (First Amendment claim barred without showing of physical injury); Sigler v. Hightower, 112 F. 3d 191 (5th Cir. 1997) (bruised ear does not qualify as injury).

In Indiana, the state legislatures enacted Ind. Codes S.S. 34-58-1-1, S.S. 34-58-1-2, and S.S. 34-58-2-1 in order to make litigation difficult in Indiana State Courts. You should get familiar with them if you're from Indiana. Trust me, I've had many battles in Indiana about these statutes. See: e.g. Smith v. Carrasco, 850 N.E. 2d 468 (Ind. Ct. App. 2006); Smith v. Huckins, 850 N.E. 2d 480 (Ind. Ct. App. 2006); Smith v. Maximum Control Facility, 850 N.E. 2d 476 (Ind. Ct. App. 2006); Smith v. McKee, 850 N.E. 2d 471 (Ind. Ct. App. 2006); Smith v. Indiana Dept. of Correction, 853 N.E. 2d 127 (Ind. Ct. App. 2006), transfer pending as of September 10, 2007.

The Smith v. Carrasco, Huckins and McKee case are erroneous; however. They are final now because the prison officials purposely interfered with my ability to file a timely petition to transfer with the Indiana Supreme Court in order to show that these court decisions conflict with other state decisions. But Indiana Courts are non-friendly to prisoner lawsuits most of the time. Compare, e.g. Smith v. Carrasco, 850 N.E. 2d 468 (Ind. Ct. App. 2006) with Smith v. Carrasco, 334 F. Supp. 2d 1094 [redacted] Ind. 2004).

Litigating civil action is difficult when being in these segregation units. You're unable to research your claims properly; therefore, you walk into the courts blindly. For this reason, you should make an attempt to obtain as many self-help legal books as you can. If you're having difficulty obtaining legal materials from the prison law library, try to get another prisoner to request what you need, and have that prisoner lend you the materials for your review. Once you're done, or whenever they ask for it back, give the prisoner back the material. Remember, this is not time to make enemies. This prisoner is helping you, so don't do anything to

destroy what's been established. If you want to save money or postage, and if you trust the prisoner, have him or her mail out your legal mail if that prisoner is "indigent," meaning they are poor and have no money. Prison officials are required by law to provide indigent inmates with free envelopes and postage to mail legal materials to attorneys or the courts. See: Bounds v. Smith, 430 U.S. 817, 824-25, 97 S. Ct. 1491 (1977). If prison officials are not mailing out your correspondence, have the prisoner mail out your mail, but make sure that there are no rules that allow the prison officials to read your outgoing mail; otherwise, you'll get caught. You might get in trouble, and your legal paper might get confiscated. Remember, however, that the United States Supreme Court has prohibited prison officials from actively interfering with inmates' attempts to prepare legal documents; See: e.g. Johnson v. Avery, 393 U.S. 483, 484, 489-90, 89 S.Ct. 747, 748, 750-51, 21 L.Ed.2d 718 (1969), and they have prohibited prison officials from not allowing prisoners to file legal documents. See: e.g. Ex Parte Hull, 312 U.S. 546, 547-49, 61 S.Ct. 640, 640-42, 85 L. Ed. 1034 (1941).

If you need legal materials, write different attorneys and the Public Defender's office. Explain to them your situation, and ask them if they could donate copies of their appellate briefs or memorandums of law that concerns your legal issues. They may be willing to help you or give you some needed legal materials. If confidentiality is a problem, simply request that they black out all their clients' case information, e.g. their name, case number, etc. If you can, tell them you'll pay for the copies or postage if they send you a copy of their work. This will help you learn professional formats, and how to make legal arguments.

Also, if the prison officials are causing you problems, file grievances, gather sworn witness statements from prisoners, make complaints with the state's ombudsman bureau if your state has one, and contact your state's civil liberties union about what is happening to you. Keep copies of everything you do. Send copies to a friend, family member, or attorney so you can always retrieve your papers later if your copies mysteriously come up missing after a search of your cell by guards. Whatever you do, make sure you have a paper trail; that way, you can show the courts everything that has happened and caused you to miss a filing deadline that wasn't your fault.

If you must file a lawsuit, no matter if you're raising federal claims or state claims, and if you can't afford to pay the whole filing fee, I recommend that you file the lawsuit in a state court. The reason why is because it's cheaper to do so. For example, in Indiana, if you can't afford the filing fee, the state court will waive it, meaning you don't have to pay a filing fee at all. See: e.g. Indiana Codes S.S. 33-19-2.5 (d) and (e); S.S. 34-10-1-1. But if you file a lawsuit in federal court, the PLRA still requires that you have to pay the entire fee whenever you can, even if you're indigent. Anytime you receive money or other income that is accredited to

your prison account, the prison will have to send it to the federal court until they pay the filing fee in full. See: 28 U.S.C. S.S. 1915 (b). The federal courts can find the prison wardens in contempt if they don't forward the money to them. See: e.g. Hall v. Stone, 170 F. 3d 706 (7th Cir. 1999). In addition, state courts have jurisdiction to hear federal claims, See: Fedler v. Casey, 487 U.S. 131, 108 S. Ct. 2302 (1988), and the filing fees can cause hardships in prison if you have that debt against you. Filing fees for a federal lawsuit is $350.00, having been raised from $250.00. The state courts are bound to apply federal law to your federal claims. Just make sure you exhaust all your administrative remedies, and make sure you sue a "person"—a real person, and not a Department of Correction. If you don't know the person's name, use their job title, e.g. John Doe v. The Commissioner of the Indiana Department of Correction." If you don't' know the defendant's name or job title, use the term "John or Jane Doe." Know the elements of the lawsuit too. Courts require that you state them in the lawsuit, which can be done in a "general factual allegations" paragraph before you state your factual allegations. If you're alleging federal violations, the lawsuit and its elements is governed under 42 U.S. C. S.S. 983. If your alleging state violations, your state will have a law that governs the lawsuit. In Indiana, the law is Indiana Code S.S. 34-13-3. The lawsuit's elements are stated in Indiana Code S.S. 34-13-3-5(b).

Chapter 4
What is Post Conviction Relief? How do I know what to write about this?

Post-Conviction is a civil remedy that is used to challenge the constitutionality of your conviction and/or sentence. The purpose of a post-conviction proceeding is to address issues that weren't available in your direct appeal. The Indiana Supreme Court has held that Indiana Post-Conviction relief is not a substitute for direct appeal; rather, the post-conviction rules create a narrow remedy for subsequent collateral challenges to convictions and sentences. See: Martin v. State, 760 N.E. 2d 97, 599 (Ind. 2002).

The first thing you need to do is get the "annotated version" of your state's rules of procedure for post-conviction relief and a blank petition for post-conviction relief from your law library. If you can't get these things there, write your Public Defender's office for them. In addition, obtain a "pro se packet for post-conviction relief." Read over the rules. Pay attention to them because if you don't follow them, the post-conviction court will nit-pick your legal papers and possibly deny your legal papers submitted to them. There are a lot of corrupt, dirty and vindictive judges out there. Keep in mind, your post-conviction petition will be filed in the same county and court in which you were convicted and

sentenced. The judges may be already biased against you; especially if your case was a high profile one like mine.

Once you've read over the rules, go through your blank petition. There will be a lot of questions about your case information and how your appeals turned out. There should be a list of instructions starting on the first page or attached to the petition that tells you how to fill out the petition. Read them, and start filing out the petition. Most of the questions are self-explanatory, but you'll have to know your case information, e.g., court names, case numbers, the dates your appeals were denied, when you were convicted and sentenced, etc.

Eventually, you'll come across a question asking you to state all the grounds known to you for vacating, setting aside, or correcting your conviction and sentence. A lot of people make mistakes here, and jump the gun. They immediately start to write things such as "I was denied effective assistance of counsel." This isn't a "ground." This would be a fact to support a ground. Read your rules to see if it lists any grounds that you can use. In Indiana, the grounds that you can use are in Rule [redacted], Section 1 of the Indiana Rules of Procedure for Post-Conviction Remedies. There are six grounds. I'll go over the first four because, more than likely, these are the grounds that relate to you. If you're not from Indiana, and your grounds are a little different or not listed at all, construe them to your grounds or use these same ones. You should have a copy of your state constitution handy too:

> "Ground One: That the conviction or the sentence was in violation of the United States Constitution or constitution or laws of this state."

Grounds like this are normally for claims of ineffective assistance of trial and appellate counsel or disproportionate and excessive sentences in violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. Ineffective Assistance of trial counsel and appellate counsel are governed by the Sixth and Fourteenth Amendments to the United States Constitution. If all of these issues relate to you, raise the same grounds, but have them separated by Ground One, Two, Three, etc. Provide factual allegations for ineffective trial counsel in Ground One's factual allegations section, which is the next question, right after all your stated grounds. Provide factual allegations for ineffective assistance of appellate counsel on Ground Two's factual allegations section, and provide factual allegations for your Eighth Amendment disproportionate claim in Ground Three's factual allegations section. The blank forms might have the grounds divided by lower case letters rather than "Ground One," "Ground Two," etc. So if that's the case, then Ground One would be "(a)," Ground Two would be "(b)," Ground Three would be "(c)," etc. I'll give a written example on how this would look:

8. State concisely all the grounds known to you for vacating,

setting aside or correcting your conviction or sentence.

(a) That the conviction was in violation of the United States Constitution or laws of this state. 20

(b) That the conviction was in violation of the United States Constitution or laws or this state.

(c) That the conviction was in violation of the United States Constitution or laws of this state.

9. State concisely and in the same order the facts which support each of the grounds set forth in (8).

(a) That petitioner was denied effective assistance of counsel when trial counsel made the errors described below, which fell below and objective standard or reasonableness and that prejudiced the petitioner, thus depriving petitioner of a fundamentally fair trial:

(1) Trial counsel failed to investigate my witnesses. Had he done so, trial counsel would have discovered that they were alibi witnesses and that they knew the state witnesses lied when they testified against me. I told counsel about my alibis, but he did not listen. Had he called these witnesses, there is a reasonable probability that the jury would have considered their testimony credible and that they would have found me not guilty. These alibis are John Doe and Jane Doe. They will testify that I was no where near the scene of the crime when it happened because I was at a party with them in a different town 20 miles away.

(2) Trial counsel failed to object to prosecutorial misconduct when the prosecutor misstated the facts during closing arguments, and when the prosecutor argued her opinions of the case rather than arguing what the evidence was presented.

(3) Trial counsel failed to object to the prosecutor using her strikes during [redacted] to exclude all black members of the jury. Had a black member of the jury been present, they may have been able to relate to my defense. Juror number six said he did not like rap music and felt "gang bangers" deserve to be punished. My crime was gang related.

(4) Trial counsel failed to investigate whether the items alleged to have been used I the crime were bought at John Wayne's market on the day of the crime as the state alleged. Had he done so, he would have found that the store's receipts and records show that these items were never bought. Had this evidence been presented to the jury, the jury would have seen that the state falsified evidence because these items were never physically produced at trial or forensically tested.

(5) Trial counsel failed to object to my pre-arrest identification procedures. The police used a suggestive photo array. My picture was the biggest one and it was centered in the 21 middle of the array. Counsel then failed to raise a defense and argue that the identification was tainted due to the suggestive photo array. I told my attorney to raise this defense, but he refused to do so because he felt my other defense of presumption of evidence would win.

(b) That petitioner was denied effective assistance of appellate counsel when appellate counsel made errors described below, which fell below an objective standard of reasonableness and that prejudiced the petitioner, thus depriving him of a fundamentally fair appeal:

(1) Appellate counsel denied me access to an appeal. Specifically, after the court of appeals denied my appeal, she failed to appeal to the state's highest court. This means that my arguments are procedurally defaulted for habeas corpus remedies. Had counsel argued that the court of appeals' opinion denying my appeal conflicted with other decisions, there is a reasonable probability that the outcome of the appeal would have been different.

(2) Appellate counsel failed to raise the issue on appeal if whether my trial attorney's objections about 404(b) evidence of a prior bad act or crime should have been sustained by the trial court. This objection was properly made during my trial. Had my appellate attorney raised this issue the outcome of my appeal may have been different because of the circumstances set out in the rules of evidence. I told my attorney to raise this issue, but she didn't because she thought her issues were good enough to win.

(3) Appellate counsel also failed to file a "Davis Petition" with the court of appeals to raise my ineffective assistance of trial attorney claims described above when she said she knew about Davis and when Davis would have allowed her to expand the record for appeal. See: Davis v. State, 267 Ind. 152, 250 N.E. 364 (1977).

(4) Counsel failed to argue her issues well enough. The Ind. Appellate Rule 46 (8) (a) states she must have her contentions "supported by citations to the authority's statutes..." but she cited no case law to support her legal conclusions and opinions. Had she cited case law, there is a reasonable probability that the outcome of my appeal may have been different.

(c) The trial judge or jury gave me the maximum sentence as

> a first time found felon. Although they could have sentenced me to this, it is disproportionate because other similarly-situated defendants do not get his much time.
>
> This was a first time felony offense. I have no prior criminal history, and Indiana law indicates that leniency is encouraged for defendants coming into the criminal justice system as a first time felon. It is unusual for such a punishment to be imposed.

As you see, that's how your grounds and facts should be. Provide as much information as you can. Keep in mind that you should have some case law supporting your grounds and facts, but if you don't it's okay. The main reason is because of what the United States Supreme Court held in the ineffective assistance of counsel test set forth in Strickland v. Washington that the judge reviewing such a claim must:

> "Judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range or professionally competent assistance."

Strickland v. Washington, 466 U.S. 668, 690 (1984). Your only job is that you have to "identify" how counsel erred. Strickland does not require you to provide legal arguments to support your factual allegations because it is the judge's job to do so; however, most times the judge will make you file a memorandum of law called a "proposed finding of facts and conclusions of law," which you'll have to apply the law to the facts. Without the proper legal research materials and understanding of the law, this can be a difficult, if not an impossible, thing to do. This is why I recommend that you obtain the representation of a public defender or retain private counsel if you can afford one, which will run you anywhere from $5,000-$20,000. If you can't afford private counsel, don't worry. There should be a question and attachment to the blank petition for post-conviction relief that asks you if you want the state to appoint you a public defender. State yes, and fill out the attachments to do so. After you mail your petition out to the court, the court will appoint you a public defender and refer your petition to the Public Defender's office. If they feel your grounds are meritorious, they will accept your case. If not, you'll have to represent yourself. If this happens, I suggest you get a jailhouse lawyer or someone from the prison law library to assist you and help you prepare for your post-conviction evidentiary hearing. We will discuss more about this in Chapters 7 and 8.

Take note the legal jargon that I used above in the factual allegations in question 9 (a) and (b) concerning the example above. I recommend that you write this exactly as written because these allegations are the "elements" to an effective assistance of counsel claim, and they open way for you to be able to freely "identify" the "acts or omissions" of counsel without having to recite that counsel was ineffective, etc. To obtain a reversal of a conviction or sentence, you must prove: (1) that counsel's performance fell below and objective standard of reasonableness [Strickland v. Washington, 466 U.S. 668, 687-88 (1984)], and (2) that counsel's deficient performance prejudiced the defendant (which is you), resulting in an unreliable or fundamentally unfair outcome of the proceeding. [Strickland v. Washington, 466 U.S. 668, 687 (1984)]. A defendant's failure to satisfy one prong of the Strickland test negates a court's need to consider the other. Strickland v. Washington, 466 U.S. 668, 697 (1984).

Moving to the second stated ground in Rule [redacted], section 1:

"Ground Two: that the court was without jurisdiction to impose the sentence."

Grounds like this concern instances where a judge exceeds his or her authority when issuing a sentence. When this happens, the guarantees of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution are violated. Under Indiana State Law, Article 1, Sections 12, 13, 19, and 23 of the State Constitution are violated. These sections are a reflection of the federal constitutional amendments but in some cases you may have more protections and rights under your state constitution. If this is the case, then these state-created rights will be protected under the Fourteenth Amendment to the United States Constitution. Remember, when a right is given by a state legislature, even though it is not a right which is guaranteed by the federal constitution, the arbitrary denial of that right violates the Fourteenth Amendment to the United States Constitution. [redacted], 273 U.S. 269, 273, 47 S. Ct. 355, 71 L.Ed. 639 (1927).

Some example of the factual allegations to support this ground would be:

(1) On November 17, 2006, petitioner was convicted in the Mercy Superior Court of one count of arson. On December 17, 2006, petitioner was sentenced by the court to serve a ten year sentence in the Indiana Department of Correction; however, three months later, on March 17, 2007, the Mercy Superior Court revised its sentencing order to require that the petitioner serve a twelve year sentence in the Indiana Department of Correction. After the court sentenced petitioner on December 17, 2006, it lost its jurisdiction thereafter. As such, the Mercy Superior Court had no

jurisdiction to revise the sentence on March 17, 2007;

(2) The trial court decided all the law and facts at the petitioner's sentencing hearing on December 17, 2006 when Article 1, Section 19 of the Indiana State Constitution holds that [redacted] all criminal cases whatever, the jury shall have the right to determine the law and the facts." The jury never waived its right to decide all the law and the facts in the sentencing phase of petitioner's case, but the Mercy Superior Court judge determined all the mitigating and aggravating factors in order to sentence the petitioner. Because the jury was supposed to determine all the law and facts in the sentencing phase, the Mercy Superior Court had no jurisdiction to determine the petitioner's sentence and exceeded its authority by doing so. 24

Moving on to the third stated ground in Rule PC1, Section 1:

"Ground Three: that the sentence exceeds the maximum authorized y law, or is otherwise erroneous."

This ground is for those instances where a court sentences a person i violation of the statutory law, where the court sentences a person in olation of the federal or state constitution, or where the court makes a ntencing error, such as running certain convictions consecutively when e convictions should have run together or when the court used factors to crease a sentence beyond the presumptive term that was legally iproper. Legally improper factors are those that have not been proven or ose that are opinions of a person. Also, factors are improper if they viate from sentencing rules, such as the court using a material element of i offense as an aggravating circumstance.

Our United States Supreme Court has held that "[d]eviation from a gal rule is 'error' unless the rule has been waived." U.S. v. Olano, 507 S. 725. 732-33 (1933). Indiana courts have held that deviating from "the ell-established rule that a material element of the underlying offense may it serve as an aggravating circumstance to enhance a defendant's ntence. That rule apparently derives from Green v. State, 424 N.E. 2d 14, 1015 (Ind. 1981), and is a judicial role of construction. It is based on e logic that a presumptive sentence already assumes the underlying ements and that is improper to enhance a sentence based on an act for ich the defendant is already presumed to be punished." West v. State, 5 N.E. 2d 173 (Ind. 2001).

However, some courts still try to use elements to enhance a ntence, which they have been allowed to do on occasion, but in order for em to meet this exception, the courts must show particularized individual idings constituting aggravating factors separate from an element of a

crime. See: e.g. Stewart v. State, (1988), Ind., 531 N.E. 2d 1146, 150 (Court cannot just use the age of the victim as reason to enhance a sentence). But all facts considered by the court must be proved by a preponderance of the evidence. See: Apprendi v. New Jersey, Pennsylvania, 477 U.S. 79, 91 (1986). This means that the jury must decide the facts. See: Blakely v. Washington, 542 U.S. 296 (2004). The court abused its discretion.

Generally, federal courts do not disturb sentences imposed for non-capital cases that fall within statutorily prescribed limits unless the sentencing judge commits an abuse of discretion. See: Harmelin v. Michigan, 501 U.S. 957, 998-99 (1991). In most cases, an abuse of discretion occurs when the court's decision is clearly against the "logic and effect of the facts and circumstances" put before it. See: e.g. McCullough v. Archbold Ladder Co., 605 N.E. 2d 175, 180 (Ind. 1993); Weiss v. State, 825 N.E. 2d 896, 900 (Ind. Ct. App. 2005); United States v. Taylor, 487 U.S. 326, 335-37, 108 S. Ct. 2413 (1988) (explaining abuse of discretion standard).

No matter what your sentence may be, even death, you may be able to show that your punishment and sentence violates the Cruel and Unusual Punishment Clause to the Eighth Amendment of the United States Constitution. The Cruel and Unusual Punishment Clause limits criminal punishment that is "grossly disproportionate" to the severity of the offense. Ingraham v. Wright, 430 U.S. 651, 667 (1997). This prohibition against Cruel and Unusual Punishment is applicable to the states through the Fourteenth Amendment of the United States Constitution. See: Robinson v. California, 370 U.S. 660, 666-67 (1962).

In Solem v. Helm, 463 U.S. 277, 292 (1983), our United States Supreme Court posited three criteria for analyzing the proportionality of sentences:

(1) A comparison of the gravity of the offense with the harshness of the penalty;
(2) A comparison of the sentence with those imposed for the same or similar offenses in the same jurisdiction; and
(3) A comparison of the sentence with those imposed for the same or similar offenses in other jurisdictions.

Keep in mind that maximum sentences should be reserved for the very worst offenders. See: e.g. Evans v. State, 725 N.E. 2d 850, 851 (Ind. 2000); Bacher v. State, 686 N.E. 2d 791, 802 (Ind. 1997). First-time felons should not be the very worst offenders. See: e.g. Biehl v. State, 738 N.E. 2d 337, 339-40 (Ind. App. 2000), trans. denied; Rodriguez v. State, 785 N.E. 2d 1169, 1180 (Ind. App. 2003).

Moving to the fourth stated ground in Rule PC1, Section 1:

"Ground Four: 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 ground concerns instances of newly discovered evidence regarding actual innocence or evidence that shows something in the prosecutions case is not true—both that has a possibility of a different outcome in the verdict or sentence. If you area federal defendant, meaning that you were triad in a federal courtroom under federal law, and you have such evidence, you must do things differently and quickly. 26

Federal defendants must file a motion for a new trial based on the new factual discoveries that might give you a chance at a different outcome in your proceeding. A federal district court may grant a new trial "if the interests of justice so require." Fed. R. Crim. P. 33. Only a defendant who has been tried may invoke Rule 33. See: e.g., U.S. v. Graciani, 61 F. 3d 70, 78 (1st Cir. 1995). A motion for a new trial based on newly discovered evidence for a federal defendant must be filed "within three years after the verdict or finding or guilty." Fed. R. Crim. P. 33. Motions based on any other grounds must be filed within seven days after the verdict, See: e.g., U.S. v. Washington, 184 F. 3d 653, 659 (7th Cir. 1999), or within such additional time as the court may fix during the seven-day period. See: e.g., U.S. v. Holt, 170 F.3d 698, 702-03 (7th Cir. 1999); U.S. v. Andrade, 94 F. 3d 9, 14 N.3 (1st Cir. 1996).

For federal defendants to obtain a new trial based on newly discovered evidence, the defendant must show all of the following five things:

(1) "That the evidence was discovered after trial." Information within the defendant's knowledge at the time of the trial does not constitute newly discovered evidence. See: e.g., U.S. v. Desir, 273 F. 3d 39, 42-43 (1st Cir. 2001) (evidence that jury member knew defendant is not new evidence when defendant realized their relationship during the trial). The Fifth Circuit has observed that "newly available" evidence is not necessarily synonymous with "newly discovered" evidence. United States v. Metz, 652 F. 2d 478, 480 (5th Cir. 1981). See also: U.S. v. Jasin, 280 F. 3d 355, 368 (3d Cir. 2002) (same);

(2) "That the failure to learn of the evidence at the time of trial was not due to the defendant's lack of diligence." See: e.g., U.S. v. Alicea, 205 F. 3d 480, 487 (1st Cir. 2000) (Conversations of state witnesses before trial not newly discovered evidence because conversations were "readily discoverable" through exercise of due diligence); U.S. v. Petrillo, 237 F.3d 119, 124 (2d Cir. 2000). (defendant could have used evidence made available in pre-trial discovery); U.S. v. Ross, 245 F. 3d 577, 585 (6th Cir. 2001) (New trial denied with evidence discovered by investigator because such evidence could have been discovered prior to trial with due diligence); U.S. v. [redacted], 148 F. 3d 548, 552 (5th Cir 1998) (new trial denied because new evidence regarding alibi not

discovered due to defendant's lack of diligence);

(3) "That the evidence is material to the issues involved." Compare, U.S. v. Stoddard, 875 F. 2d 1233, 1238 (6th Cir. 1989) (new trial warranted by newly discovered evidence that bank was not member of Federal Reserve System because membership established element of crime) with, U.S. v. Yang, 281 F. 3d 534, 551 (6th Cir. 2002) (new trial not warranted by evidence that witness tampered with original evidence before submitting it to investigators because redacted evidence was not material to defendant's convictions);

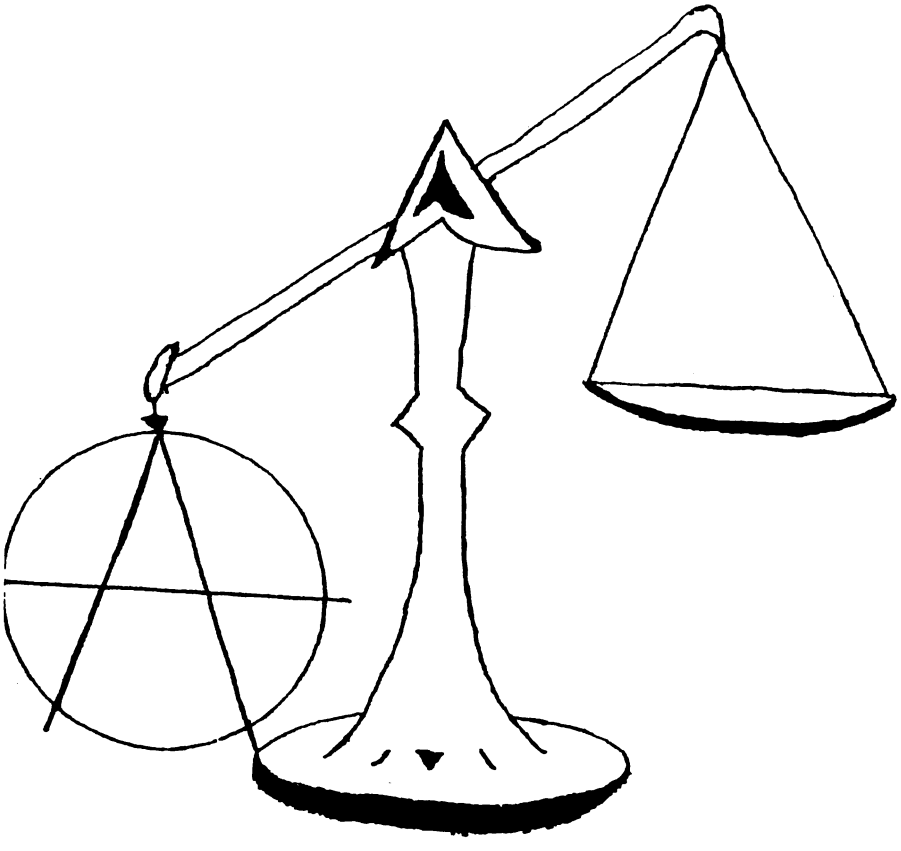
(4) "That the evidence is authentic." See: e.g. U.S. v. Woolfolk, 197 F. 3d 900, 905 (7th Cir. 1999) (New trial not warranted because witness' testimony was "incredible"); and

(5) "That the new trial would probably produce a different result." Compare: U.S. v. Jackson, 209 F. 3d 1103, 1106 (9th Cir. 2000) (new trial not warranted based on new evidence of "extremely general recantation" of alleged bribe recipient because there is "no such probability" that evidence would lead to acquittal) with: U.S. v. Young, 17 F. 3d 1201,1203 (9th Cir. 1994) (new trial warranted by post-trial discovery of prosecutor's use of officer's false testimony, including its use in closing argument, because new trial would probably have different outcome).

A federal appellate court will reverse a ruling on a motion for a new trial only for abuse of discretion. See: e.g. U.S. v. Fulcher, 250 F. 3d 244, 249 (4th Cir. 2001); U.S. v. Runyan, 290 F. 3d 223, 246 (5th Cir. 2002); U.S. v. Yang, 281 F. 3d 534, 551 (6th Cir 2002); U.S. v. Curtis, 280 F. 3d 798, 803 (7th Cir. 2002).

If you're a state prisoner, meaning you were convicted in a state courtroom under state law, then you can raise your issues of newly discovered evidence in a petition for post-conviction relief or other similar remedies in your state. But the state courts may make you show more than the federal courts, and this may be a difficult thing to do. For example, in Indiana, the courts make a petitioner show that:

(1) the evidence has been discovered since the trial;
(2) it is material and relevant;
(3) it is no cumulative;
(4) it is not merely impeaching;
(5) it is not privileged or incompetent;
(6) due diligence was used to discover the evidence before the trial;
(7) the evidence is worthy of credit;
(8) it can be produced on a retrial of the case; and
(9) it will probably produce a different result.



Anarchism And Litigation

By Eric D. Smith (DANAchi)

Anarchism & Litigation

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See: Powell v. State, 714 N.E. 2d 624, 627 (Ind. 1999); Bradburn v. State, 425 N.E. 2d 144, 146 (Ind. 1981). The petitioner must satisfy all nine prongs or the newly discovered evidence test. See: e.g. State v. McCraney, 719 N.E. 2d 1187, 1189 (Ind. 1999).

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"By definition, a claim for relief based on newly discovered evidence must not be based on evidence or information of which the claimant had knowledge prior to trial." Wisehart v. State, 693 N.E. 2d 23, 36 (Ind. 1998) (paralleled citations omitted). This is particularly the case when a witness comes forward with exculpatory testimony after a trial has been completed. As Fox v. State, 568 N.E. 2d 1006, 1007, makes clear, evidence is not "newly discovered" if due diligence was not used to discover it in time for trial. Indiana courts have rejected as not meeting the Fox requirements, newly available evidence consisting of post-trial exculpatory testimony from a co-defendant, accomplice or alibi witness where there was no effort made to produce it at trial. See: e.g. James v. State, 613 N.E. 2d 15, 25 (Ind. 1993); Bradburn v. State, 425 N.E. 2d 144, 146 (Ind. 1981). Basically, if you knew of the evidence before trial, you must explain why it was not presented. I'd put a dollar on it that it was because your attorney was ineffective. In this event, you must allege that your attorney would not obtain the evidence and failed to investigate your claims when you old your attorney about it, and had it been obtained, that there is a reasonable probability that the outcome of your proceeding would have been different. Remember the two-prong test for ineffective assistance claims in Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

You should also prepare and file your petition for post-conviction relief as quickly as possible. Remember in Chapter 2 that the clock is ticking in which you have to file your petition for writ of habeas corpus, which is only one year. While you pursue your post-conviction remedies and only when your petition for post-conviction relief is filed in the court where you were convicted is the clock for habeas relief stopped. If you wait past this time, then the issues you raised on direct appeal after your conviction will be procedurally defaulted. It's possible to get those claims heard if you miss your deadline for habeas relief, but it is very unlikely that you will unless you can actually show "excusable neglect" as to why you missed the filing deadline. See: e.g. Artuz v. Bennett, 531 U.S. 4, 8 n. 2 (2002).

If you believe that your trial judge will not give you a fair post-conviction hearing, you should request a change of judge and send the request in with your petition for post-conviction relief so each are filed at the same time. We will discuss more of this in the next chapter. I recommend you read it.

Chapter 5

What do I do about biased, prejudicial, or vindictive judges?

Don't ever think that you're probably going to get a fair hearing in your post-conviction proceeding, because more than likely you're not unless you obtain a different judge who is in no way related to your case. Remember, this is America. Malcolm X was once quoted, "America means prison." It is no wonder? Statistics prove that America has the highest incarceration rate in the world, and most of our prisoners are being treated in violation of United Nations Treaties, which the United States are member to. See: e.g. the International Covenant on Political and Civil Rights and United Nations Standard Minimum Rules for the Treatment of Prisoners. Just remember this: "The supposed system of justice amounts to a closed caste of judges and legal professionals. These are initiated into a tangled web or complex rules and regulations, where any concept of justice or fair play intrudes purely randomly." quoted from the Irish Anarchist Newspaper, Worker's Solidarity No. 37.

USA Today reported a case in their Thursday, December 29, 2005 paper on Page 3a entitled, Ohio Justice Reprimanded for Conviction. In the report, an Ohio Supreme Court Justice was stopped for drunken driving where she was recorded saying to police, "My God, you know I decide all these cases in your favor. And, my golly, look what you're doing to me." These are just examples of what we're facing here, and being convicted means we have almost insurmountable obstacles in our way in order to obtain any relief. Judges with prior knowledge of your case just makes it worse because there is a great chance that the judge will have some form of bias against you. It also may be a matter of pride. I mean, who likes to admit that they are wrong? Especially when doing so may hold the state liable in some sort of civil action for damages. For these reasons and others, there is an interest in seeing your conviction stick, and if the judges can manipulate a few rules in order to do so, they more than likely will do so.

Luckily, post-conviction rules in your state may allow for a change of judge. Note the emphasis in the word may. Even if rules allow such a possibility, the request still can be denied.

In Indiana, a request for change of judge is governed by Indiana Post-Conviction Rule 1, Section 4 (b) which provides:

> "Within ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change or judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the

attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change or judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. For good cause shown, the petitioner may be permitted to file the affidavit after the ten [10] day period. No change or venue shall be granted. In the event of a change or judge is granted under this section, the procedure set forth in Ind. Criminal Rule 13 shall govern the selection of a special judge."
Ind. Post-Conviction Rule 1, Sec. 4 (b). 32

An "affidavit" is a typed or hand-written statement of facts, alleged under the penalty of perjury by statute, used to prove a certain claim. All affidavits must be based on personal knowledge, and you must be a competent person in order to submit an affidavit. As a general rule, you should always submit such a request to the court at the same time you submit your petition for post-conviction relief. Reasons being that you will be able to comply with any procedural time limit in which you make such a request, which in Indiana is within ten days after the filing of the petition, and also that you'll preserve your request. If you're denied a change of judge, then you can raise the issue on appeal.

If you miss the procedural time limit to make such a request, then you'll have to show "good cause" as to why you missed the deadline date. This is also known as "excusable neglect." See: e.g., Rule [redacted]. ; Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 113 S. Ct. 1489, 1496, 1498 (1993). In the habeas aspect, if you fail to present a particular claim in a state court prescribed by the state's rules, a federal court will generally refuse to consider that claim on habeas review. See: Dretke v. Haley, 541 U.S. 386, 124 S. Ct. 1847, 1849 (2004). To show "good cause" in federal court as to why they should hear your habeas claim, which should have been presented upon all the state trial and appellate courts, you can overcome the procedural default by either showing (1) cause for his procedural default and actual prejudice as a result of the alleged violation of federal law or (2) that failure to review the claims will "result in the fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). We will discuss this more in Chapter 11.

In any event, if you're denied a change of judge or denied permission (the legal term of this world is called "leave") to file a belated motion for change of judge, then you'll have to appeal. On such appeal, in addition to any other issues denied by the court concerning your post-conviction petition, you'll have to raise the issue of whether the post-conviction court abused its discretion when it denied you a change of judge, etc. Under such an argument, you'll have to show that the post-conviction court's decision was "clearly against the logic and effect of the

facts and circumstances" put before it. See: e.g., Weiss v. State, 825 N.E. 2d 896, 900 (Ind. Ct. App. 2005); McCullough v. Archbold Ladder Co., 605 N.E. 2d 175, 180 (Ind. 1993). See also: United States v. Taylor, 487 U.S. 326, 335-37, 108 S. Ct. 2413 (1988) (explaining abuse of discretion standard).

If a judge is really out to get you or treating you differently, you should try to develop a record in court as best as you can and try to appeal any adverse decision to you state court of appeals. Still, this may not be possible for some reason. If all else fails, you may be able to file a civil complaint against them, but keep in mind that judges are absolutely immune from damages for acts performed in the judicial capacities. See: Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099 (1978). Only if they clearly act outside the scope of their employment can they be held liable. Stump, 435 U.S. at 356-57. Showing that a judge is wrong is not enough—you must show a complete departure from their judicial role. See: Mireles v. Waco, 112 S. Ct. 286, 288-89 (1992). Basically, if a judge uses their power to harm you physically or to abuse you in some extreme way. See: e.g., Zarcome v. Perry, 572 F. 2d 52, 53 (2d Cir. 1978) (judge had coffee vendor brought to the chambers in handcuffs in order to abuse him for the low quality of the coffee).

If more of these options are possible, you can file a formal complaint with your state's disciplinary commission, who will investigate any claims of misconduct or ethical-type violations. If your judge violated any of these judicial or ethical rules, s/he will be punished by the disciplinary commission. You should contact your law library, Public Defender's office, or State Attorney's office in order to obtain the address of the disciplinary commission.

Chapter Six

I don't feel my attorney is helping me. What do I do? Should I represent myself in the state's post-conviction proceedings?

The key thing to remember here is that there is no absolute right to post-conviction counsel. See: Coleman v. Thompson, 501 U.S. 722, 752 (1991). If your state provides such counsel, you should feel very lucky.

If you are appointed such counsel or have hired an attorney, and you feel s/he is not helping you, the first thing you should do is talk it out. In a polite way, explain to them what you feel should be done. If you can show them something to support your issues, do so. Ask them to explain why they are or are not taking a certain course of action. Try to get these explanations on paper. A professional attorney should be understanding and should explain to you what is exactly going on and why.

If there is still a conflict, weigh it out. Is it serious enough to warrant the firing of the attorney? If it is, then you should write the post-conviction court and explain the conflict. See if the court will appoint you a different attorney. In serious cases, it very well may. If the attorney violated rules of conduct or ethical type of rules, you can also file a formal complaint with your states disciplinary commission. You may also want to consult with a paid attorney who specializes in the filed of Legal Malpractice or Professional Ethics and Discipline to see if you are entitled to any reimbursement of your money, etc. If this is not possible, again, ask your law library or Public Defender's Office for assistance. They should be able to tell you who to contact or what your legal options are.

If you fire your attorney and the post-conviction court will not appoint you an attorney, they you'll have to represent yourself. I don't recommend that you do this, but some of us may have no choice. If your state has laws or rules where they do entitle you to post-conviction counsel, but they refuse to appoint you come, even after appointed counsel was fired for a convict of interest, you should raise the issue of whether the post-conviction court erred when it refused to appoint you counsel. You would then make an argument that "the post-conviction court's decision was an abuse of discretion because it goes against the logic that the post-conviction rules (cite rule or state law) that defendants are entitled to representation during a post-conviction proceeding. An abuse of discretion occurs when the court's decision goes against the logic and effect of the facts put before it. See: United States v. Taylor, 487 U.S. 326, 335-37, 108 S. Ct. 2413 (1988). In addition, the post-conviction's decision violates the Fourteenth Amendment because it arbitrarily violated (your last name) state created right to representation of counsel in a post-conviction proceeding. The arbitrary denial of a right given by a state legislature, even though it is not a right which is guaranteed by the federal constitution, violates the Fourteenth Amendment to the United States Constitution. See: American Ry. Express v. Kentucky, 273 U.S. 269, 273, 47 S. Ct. 355, 71 L. Ed. 639 (1927)." Then explain the facts of your problem, and explain how the court was aware of them; therefore, it was fully aware of the situation in order to make a correct decision, which should have been to appoint counsel. Keep in mind; however, that if you represent yourself to a point to where you were still able to present your claims to the post-conviction court concerning the errors of your conviction and sentence, the appeals court will probably rule that the error was "harmless." Under this standard, the appeals court will not set "aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Chapman v. California, 386 U.S. 18, 22 (1967); See also: Neder v. U.S., 527 U.S. 1, 19 (1999) (quoting Chapman). A court may only characterize an error as harmless if it determines beyond a reasonable doubt that the error did not contribute to the judgment. See: Chapman, 386 U.S. at 23.

In habeas proceedings, federal courts apply the Brecht standard of harmless error. See Brecht v. Abrahamson, 507 U.S. 619, 623, 629-30 (1993). Under this standard, habeas relief is automatically granted for "structural defects," while habeas relief for constitutionally significant trial errors is granted only when the error "had substantial and injurious effect or influence on determining the jury's verdict." Brecht, 507 U.S. at 623 [quoting, Kotteakos v. U.S. 328 U.S. 750, 756 (1946)]. If a habeas court is in "grave doubt;" however, meaning "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise" as to whether the error had a substantial and injurious effect, the judge must find in favor of the petitioner. O'Neal v. McAninch, 513 U.S. 432, 435 (1995).

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Because you have nothing to lose, I'd still make this argument. Point being is that you may not have adequate access to a law library in order to comply with procedural appellate or post-conviction rules for your state. When preparing a habeas corpus petition, you're constitutionally entitled to some form of legal assistance, such as access to adequate law libraries or the aid of someone trained in the law, See: e.g., Bounds v. Smith, 430 U.S. 817, 821-28 (1997) (plurality opinion). Still though, you must show and make a record during your post-conviction proceeding that you were hindered in your ability to access legal materials needed to prosecute your claims so you can cite this portion of the record to your state appellate courts.

On the other hand, representing yourself may be beneficial. Reason being is that you're more likely to get into court sooner, as court-appointed attorneys usually handle post-conviction petitions on a first come, first served basis, Still, you should let the attorney handle your case. There is no telling what might happen. For example, prison officials may retaliate against you for filing grievances or lawsuits against them or their co-workers. They could destroy all your legal materials, evidence, and notes, as all these things may be preserved with an attorney. Also, your knowledge in the law is more likely to be less than an attorney. An attorney has legal education and unfettered access to research materials, investigators to t rack down witnesses and evidence, and s/he may even have some pull with the judge. It's for all the unexpected reasons that I recommend that you do not represent yourself. Trust me. I represented myself and I regret it now. True, I learned a lot, but I went through a lot of headache, pain, stress, and hard times doing so. It's like a catch-22: you're screwed if you do and screwed if you don't. You should ask yourself how bad are you willing to be screwed and are you willing to accept the consequences if the condom busts or the birth control pill doesn't work. If you have to represent yourself, read the next chapter.

Chapter 7

I'm representing myself in the post-conviction proceeding. What do I do?

The first thing you need to do is get a copy of the stat's post-conviction evidence and appellate rules. It is imperative that you know, and become familiar with the rules.

Second, ask your law library or Public Defender if they have a "pro se packet for post-conviction relief." In Indiana, the Public Defender's office put together a packet to help prisoners like you. The packet comes with all types of fill-in-the-blank court documents and motions that you might need to file with the court. A brief set of instructions also comes with it, giving you little pointers on how to utilize the packet.

Third, try to get your hands on any legal materials concerning post-conviction remedies. Obtain some case law dealing with your grounds, and get familiar with your petition. Read over your factual allegations for each ground. Did you leave anything out? Are they too vague? Do you need to add anything? If so, re-draft your petition to touch any errors up. Write a motion to the post-conviction court requesting "leave" (permission) to file an amended petition. You should entitle your motion "Petitioner's Verified Motion for Leave to File an Amended Petition for Post-Conviction Relief." Not the word "verified" in the motion. Most courts require a motion to be verified, meaning that you swear under the penalty of perjury that the factual allegations in your motion are true and correct. In any event, it's good practice to verify a motion because it gives the motion more weight, which will help in any appeal issues if the motion is denied. If it is, then on appeal you'll have to argue that the post-conviction court abused its discretion when it denied you leave to file such a petition. Make sure that you attach a copy of your proposed petition to the motion too, along with any proposed order forms. Some courts, by their own local rules, such as Indianapolis, Indiana Superior Courts, require that each proposed petition or motion be accompanied with an order explaining that your petition or motion is meritorious and what relief is to be ordered by the court. Any document filed with the court can be a petition or motion. Technically, a petition should be used if you're asking something which would not be required by law, meaning that its not guaranteed by law, and a motion should be used if a state law, rule, or other law gives you a right to have something done by the court. Both words are used interchangeably, but if either is denied, the same abuse of discretion standard will be used on appeal arguments.

Next, know the burdens you have to establish in order to obtain the sought relief in your post-conviction petition remedy. In Indiana, Ind. Post-conviction Rule 1, Section 5 states that the "petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence." A

preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probably than its nonexistence.'" In re winship, 397 U.S. 358, 371, 90 S. Ct. 1068 (1970) (Harlan, J., concurring). Establishing a case by the preponderance of the evidence is done by presenting a "prima facie" case, which is "[s]uch as will prevail until contradicted and overcome by other evidence...A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to the contrary is disregarded." Black's Law Dictionary, p. 1189-90 (6th Ed. 1990).

If your ground and factual allegations deal with ineffective assistance of counsel, your burden will be far less than the preponderance of evidence, no matter if your state rules say you must establish your grounds by the preponderance of the evidence. The reason being is that to have you prove ineffective assistance of counsel by the preponderance of the evidence would be "diametrically different," "opposite in character or nature," and "mutually opposed" to the United States' Supreme Court clearly established law because the Supreme Court held in Strickland v. Washington, 466 U.S. 668, 694 (1984) that a prisoner need only demonstrate a "reasonable probability that ...the result of the proceeding would have been different." Williams v. Tayor, 529 U.S. 362, 405-06, 146 L.Ed. 2d 389, 120 S. Ct. 1495 (2000). A "reasonable probability" is less that the preponderance of the evidence: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The whole point of this is that the state courts must use the burden as stated in Strickland and no other burden. The United States Supreme Court's law is the law of America, and the law that prevails over all other law. If your rules are like Indiana, make sure you remind your state court about the lower Strickland burden of proof. If they still disregard this burden, you must argue the issue on appeal all the way to the state's highest and last court of resort. If the state courts still refuse to acknowledge Strickland's burden, their decision will be grounds for federal habeas corpus relief, because such actions in making you prove ineffective assistance of counsel by any higher burden would be "contrary to" United States Supreme Court law. See: 28 U.S.C. S.S. 2254 (d) (1) (explaining one example of obtaining habeas corpus relief). Still, state courts will try to be tricky. Sometimes, they'll just cite the language of Strickland on paper, but in their mind s still hold you to a higher burden of proof. This is one reason why state conclusions are not presumed to be correct regarding ineffective assistance of counsel claims, which we will talk amore about in Chapter 11.

Have a good habit of note keeping. Write out what you have to prove and how you'll prove it. Remember, a fact finder's judgment must be based upon proven facts, and cannot be based upon mere guess, conjecture. surmise, possiblity, or speculation. See: e.g., Halkias v. Gary National Bank, 234 N.E. 2d 652, 655 (Ind. Ct. App. 1968); Hunnicut v. Boughner, 231 N.E. 2d 159, 160 (Ind. Ct. App. 1967). Therefore, you'll have to identify what happened—everything. The who, when, where, why, and how. You should be able to develop a record of facts that support your grounds, which could be inferred as a violation by the burden of proof.

Get to know your state and federal constitution. Research the history and purpose of each section or clause related to your issues. These are very powerful and persuasive arguments to make in order to prove your claims with the force of the law. In Indiana, the language of each provision of their constitution must be treated with particular deference, "As though every word had been hammered into place." Warren v. Indiana Tele. Co., 217 Ind. 93, 102, 26 N.E. 2d 399, 403 (1940). Their "provisions of the Constitution are a part of the fundamental law of the state, declared by the people themselves acting in their sovereign capacity. As such, they are entitled to strict construction." Hillman v. State, 234 Ind. 27, 123 N.E. 2d 180, 182 (1954) (citations omitted). Each state should have some case law dealing with the history and purpose of their state constitution.

If you have witnesses or evidence that will testify or support your claims, have them and the evidence subpoenaed to your evidentiary hearing. This can be done by filing a "Petition for Issuance of Subpoenas in Post-Conviction Proceedings." In your petition state to the court who or what it is that you're needing subpoenaed, and why they are necessary to testify or to be presented. This should be done in the form of an affidavit attached to your motion. In addition, you should list the address of the party to be served the subpoena. A good example on how all this works is to review your state's post-conviction rules. In Indiana, Ind. Post-Conviction Rule 1, Section 9 (b) states:

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary haring, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena." Ind. Post-Conviction Rule 1, Sec. 9(b).

Remember, you have a sixth amendment right to compulsory processes to obtain and present evidence in your favor which was held applicable to each state in Washington V. Texas, 388 U.S. 14, 19 (1967) through the Fourteenth Amendment to the

United States Constitution. You also should be able to utilize your state's civil rules of procedure in order to aid you in obtaining discover. See: e.g., Ind. Post-Conviction Rule 1, sec. 5 (explaining all rules and statutes applicable in civil proceedings are available to post-conviction parties).

Some problems you might run into is that you don't know the address of what you are trying to subpoena, you might need an expert witness or testing done; or your witnesses might not be allowed to testify because they allegedly would testify to hearsay.

If you need to find out the address of your witness, first try to look for it in a telephone directory if possible. If you cannot do that, file a motion and order with the court, requesting that "pauper counsel" or an investigator be assigned to you in order to aid in discovery, explaining why you need their assistance and what it is that your evidence or witnesses will show or testify to if they were allowed to be present at your hearing. If you need an expert witness in order to prove a certain claim that might create a doubt to negate the State's evidence and theory against you, which they used to convict or sentence you, then you should also file a petition with the court and explain why it's so necessary to have the expert do what needs to be done. If you have the money, consult with a private investigator. A nationwide investigating agency is listed in the resource list in the back of this handbook.

If you are denied a witness because of hearsay, and you feel it is truly relevant, there is a lot to do. First, you must become familiar with hearsay rules and hearsay itself. "Hearsay" is defined as " a statement, other than one made by the declarant (the person who is testifying_ while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801 (C), Fed. R. Evid.

Make sure you research whether or not the alleged hearsay would be admissible under a hearsay exception rule. This can be done by reading through your state's rules of evidence and the federal rules of evidence governing hearsay exceptions. Also, you should research whether the evidence is relevant or not. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Fed. R. Evid. 401. Therefore, if the hearsay is relevant and falls within the hearsay exception then you should try to admit that hearsay by either making the witness testify under this exception, or if you are denied, make a "proffer" to the court. A "proffer" is an offering provided to the court used to prove something. Also, file a motion to reconsider the issuance of the subpoena, explaining that the expected testimony is relevant and falls within a hearsay exception.

Sometimes the witness just cannot be found or that they fail to appear; therefore, you may have no choice but to proffer the hearsay or have another witness with personal knowledge of the hearsay testify to the hearsay. Still, this hearsay should be admissible. See: e.g., Indiana Evidence Rule 804 (A) (S). (Hearsay is admissible if the witness was unable to be procured "by process or other reasonable means"). In response to any denial or hearsay objection, you should state that the hearsay falls within a hearsay exception, citing the rule or give a legal citation showing its admissibleness, and remind the court that the compulsory process clause to the sixth amendment of the United States Constitution is violated when courts refuse to admit hearsay that is material to a defense. See: e.g., Gray v. Klauser, 282 F.3d 633, 649 (9th Cir. 2002). This is particularly true because a state court cannot rigidly apply otherwise valid rules if their application to a specific case would abridge the defendants compulsory process rights. Thus, in Chambers v. Mississippi, 410 U.S. 284, 300-08 (1973), the United States Supreme Court held the defendant was denied a fair trial when the court mechanistically applied state hearsay laws and excluded witness' reliable, self-inculpatory statements that exonerated the defendant. Specifically, the court stated this about hearsay:

> When "Constitution rights, directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."

Chambers, 410 U.S. at 300-02. "Creditability is a question of fact to be decided by the finder or fact based on face-to-face observation." U.S. v. Dawson, 857 F.2d 923, 930 (C.A. 3 CPA.) 1988. Yet, if the alleged hearsay is not allowed, then the fact finder would be denied their right to marshal the facts and determine what evidence is credible and which is not.

If the hearsay is still not allowed, make sure that it is in the record what the testimony or evidence would state and show, and then you'll have to argue the issue on appeal if your denied relief. an you must if you wish to preserve your issue for writ of habeas corpus. The denials of "pauper counsel", which means "counsel for the poor," investigators, testing and hearsay must be addressed in appeal. The standard of review for such denials will be the abuse of discretion standard. In federal court it will be the Brecht v. Abrahamson harmless error standard. If you have a witness that is important to your claims and the witness fails to appear, you should ask for a continuance, and you should try to compel the attendance of that witness. Also, make sure that your presence is ordered at each hearing.

Write a list of questions down for each witness you plan on questioning at your evidentiary hearing. Try to ask the who, what, where, when, how and why out of them. If they're your witnesses, make sure your questions are non-leading. All leading questions are those "that suggest to

the witness the answer that is desired. That is, it puts words into the witness's mouth." Robert S. Hunter, Federal Trial Handbook at S.S. 40.3 (Lawyer's Cooperative Pub. Co. ed. 1974). If the witnesses are not yours, which means the state has brought their own witnesses to rebut your claims, then you can ask the state's witness leading questions. If the witness is your witness, then the first question will be, "For the Court Reporter, what is and how do you spell your name?" 41

Preparing questions will help show what you might be able to prove, and they will always be there for reference. If you lose your train of thought during the hearing, you'll never forget your questions because they'll be right there on paper, and they'll help draw you back to what you're trying to prove. Things happy so quickly that it's very difficult to question a witness on the wing and on the top of your head. You should be like a boy scout: always be prepared.

Another thing that is important is to "shepardize" all the law that you plan on using. Shepardizing is done by utilizing a book called "Shepard's Citations," which is a collection of books that list any law found in the American Law Reports. Shepardizing will help you know if your proposed citations are good law, and not law that has been overturned by other court decisions. It will also help you with research. Other cases like yours will be cited with the law that you're shepardizing, whether what you're shepardizing is a case law, rule, or statute. Ask your law library to shepardize your case for you or tell you how to do it yourself.

Last, you should also obtain a free copy of you criminal record and transcripts concerning the conviction and sentence that you are challenging in your post-conviction proceeding. If you're indigent, meaning you cannot afford to pay for the copies of your record and transcripts covering your trial, you should be able to obtain a free copy pursuant to statutory law or by rule. See: e.g.

Chapter 8
I'm at my post-conviction evidentiary hearing. What do I do?

More than likely, the court will dress you in orange or yellow scrubs, sometimes in the old time black and white stripped jail suits. It all depends on where you are from. You'll also be shackled and handcuffed in front or by the waist. You should have all your notes, questions for witnesses and documentary evidence you wish to present to the court. You should also have any other legal items you need to prosecute your case. If you have a hard time going through your papers, ask the judge if she or he will allow your handcuffs to be removed or one hand set free. Explain to the judge your difficulty going through and grabbing your materials while in restraints and that they are causing you discomfort. If your judge is

understanding and not worried about any possible safety and security threat from you, he or she may see to your request. If not, you'll have to make due.

Keep all your materials neatly spread out on top of the desk so they are easily identifiable to you. If you plan on questioning your witnesses about some of these materials, try to keep them in an order as needed for each witness. This means for each witness, keep your materials associated with that witness in a separate spread or stack. The main thing is to be organized so you can easily grab your relevant materials and papers without having to shuffle through everything, which not only slows down the proceeding down, but might also cause you to lose your train of thought. Your county prosecutor or state attorney general will be at a separate desk to the side or across from you doing the same thing.

During this time you're going to feel nervous and intimidated. Things are going to be quiet and you're going to feel as if everyone in the courtroom is watching you. Don't worry about it. Take a deep breath and try to relax. These feelings are normal because this may be a new experience for you.

Call the bailiff over to your desk and ask him or her if all your witnesses are here to testify. If he or she doesn't know, to ask the clerk of the court who should be sitting at a desk by the judge's bench. If the clerk is uncertain, ask the post-conviction judge if all your witnesses are present. If they are, you'll be ready to proceed. If not you should ask the judge for a continuance if you witness is important. Explain that you will not be able to prove your claims without the witness being able to testify. One thing on court manners: when speaking directly to the judge, whether you're asking the judge a question or being asked a question by the judge, always stand up and address him or her. There are different reasons for doing this, but make sure you do it unless the judge directs you otherwise. If your witnesses fail to appear and you asked for a continuance of your hearing that is granted, also ask the judge to provide you with the means to make sure your witnesses are compelled to attend the next hearing so that they will be present without question. Verbally requesting these things is called "oral motions". You should also write your motions out and file them later just in case the judge forgets.

In any event, you'll know that your evidentiary hearing has begun because you'll hear the clerk of the court give theses famous words: "All rise," you'll see the judge walk to the bench. At this time, the court reporter will be recording everything that is being said. The judge should ask you if you're ready to proceed, which at this time would be the best time to raise any concerns or questions to the court. If you're ready to proceed, you'll start with the hearing because you're the one prosecuting your case, alleging violations of the law. An example of how everything might go is as follows:

Clerk: All rise for the honorable Cool Mullet now presides for Eric D. Smith verses the State of Indiana, case number 49602-0103-PC-051465.

Judge: Thank you, clerk. Please everyone, be seated.

The judge will then look at you and the state attorney. 43

Judge: Mr. Smith, Counsel, are we ready to proceed?

Mr. Smith: I think so, your honor. Are all of my witnesses here?

Judge: Are Mr. Smith's witnesses here?

Clerk: Yes, your honor.

Mr. Smith: Excellent. Yes, I'm ready, you're Honor.

Judge: Counsel?

State Attorney: Yes, you're Honor. The state is prepared.

Judge: Very well, Mr. Smith, you may proceed.

Mr. Smith: Thank you, your honor. Your honor, in support of my first ground for post-conviction relief and the factual allegations of ineffective assistance of counsel, I'd like to call upon Mr. Patrick Henry, who was my attorney during my arson trial.

Judge: Mr. Thompson, could you please go get Mr. Henry?

Bailiff: Sure, you're Honor.

The bailiff then gets the witness.

Judge: Mr. Henry, could you please come up here and take the stand. I'm going to swear you in. Could you please raise your right hand and repeat after me?

Mr. Henry: Sure, your honor.

Henry is then sworn in.

Judge: Mr. Smith, your witness.

Mr. Smith: Thank you, your Honor. Mr. Henry, for the court reporter, what is your full name and how do you spell it?

Mr. Henry: Patrick Henry. P-A-T-R-I-C-K. Henry, H-E-N-R-Y.

Mr. Smith: Mr. Henry, do you recall who I am?

Mr. Henry: Yeah. You are one of my former clients.

Mr. Smith: Are you an attorney?

Mr. Henry: Yes.

Mr. Smith: What are do you specialize in as an attorney?

Mr. Henry: Criminal Law.

Mr. Smith: Are you a paid attorney or a public defender?

Mr. Henry: Both. I've got my own private office in Indianapolis and I have a contract with the public defender's office here in Indianapolis as well.

Mr. Smith: Was there ever a time in 2001 that you became involved with me concerning a criminal matter?

Mr. Henry: I'm not too sure if it was 2001 but I recall that I was appointed to a criminal case of yours by the Marion County Superior Court.

Mr. Smith: What was the nature of my criminal case?

Mr. Henry: An arson case, if I remember correctly. A class B

felony.

Mr. Smith: Do you recall what the evidence against me was in this case?

Mr. Henry: I believe just some witnesses saying to the police that you told them you burned a building down.

As you see from the above example, that's how each opening direct-examination of your witness might go. You can use this as a starting point for your witnesses.

If you want a witness to look at a document, then you'd say: e.g., "Mr. Henry, I'm going to show you a document. I'd like you to look at it and tell me if you know what it is." Depending on what you're trying to show or prove with the document, you'll as your witness questions about it because you know they have some knowledge about the document. Once you're satisfied with the witness's answers concerning the document, you'll want to enter it as an evidentiary exhibit. To do so, you'll look at the judge and say: e.g. "Your Honor, I'd like to admit the document Mr. Henry just looked at into evidence as Petitioner's Exhibit Number 1."

At this time the State Attorney might make an objection. If this happens, don't interrupt and wait for the judge to make a ruling. If you feel the objection was improper or that the ruling was incorrect, then ask the judge if you can make a record by explaining the relevancy of the document and why you feel it should be authenticated; that is, that the document is not a fake. If you created a document, then your testimony is sufficient to authenticate it. If the document is part of the record filed in your case, then the court can take judicial notice that the document is real because it is part of the official record. This means that it's okay to present copies of the original documents as long as those copies haven't been altered in any way.

Most objections by the state concerning documents will be on the grounds of hearsay, if not, authenticity. For example, say you're questioning your trial attorney on direct-examination during your evidentiary hearing. If you show him a letter that he wrote you where he states he spoke to one of your alibi witnesses who stated they saw you at a different place and time during the time you alleged to have committed a crime. Your attorney, however, never called on this alibi to testify at your trial and now you are using the letter to prove that you attorney knew about your alibi, which would establish deficient performance and prejudice by your attorney's act in not calling on this alibi to testify in support of your defense. As you try to admit the letter as an exhibit, the state attorney objects on the grounds of hearsay because the letter contains statements allegedly made by you alibi- if this happens, you should respond by stating that the letter falls under a hearsay

exception as an "admission by a party-opponent" because the trial attorney admits he talked to your alibi and learned of favorable knowledge in support of your defense. See: Rule 801(d)(2) Fed. R. Evid. Also, state that the document falls into an exception to hearsay as a "business record". See: Rule 803(6), Fed. R. Evid. and Wheeler v. Sims, 951 F. 28 796, 805 (7th Cir. 1992), cert. denied, 113 S. Ct. 320 (1992). 45

You should always keep notes of all the exhibits, noting which ones were only marked for identification and which ones were admitted into evidence. Before you rest your case, you should make sure that all the documents you want in the record have been admitted into evidence. If the judge has delayed any ruling on the admissibility of the evidence, then request the judge make a ruling before the state proceeds with its case.

When the state examines its witnesses, you'll probably have little idea about what theses witnesses will actually testify to. For this simple reason, you should pay very close attention to the witness's testimony. Try to write notes covering the answers to important questions that may weaken you claims. Then try to come up with some questions, which may be lending at this point, in order to weaken their testimony. One method for adverse expert witnesses, and trial attorneys who you are trying to claim was ineffective through deficient performance that prejudiced you, is to limit the witness's testimony. For example, an expert witness might testify that he performed a polygraph test on you, and that the test showed you were guilty of your crime or that you lied about something. On cross-examination, you could ask the polygraph expert, "The test showed that I lied, but these tests are not 100% reliable, are they? And this was the only test you took, wasn't it? You didn't give me a voice stress analysis to determine if I was lying, did you?"

With the trial attorney, it would be good to highlight any helpful parts of the testimony if you conduct cross-examination on your trial attorney. For example, if the trial attorney was asked if he or she thought it as risky to open the door about something of by failing to object to certain evidence, and they testified that they took their certain action because they thought it was best at the time to do what they did or didn't do, on cross-examination you'd ask, "You thought not objecting was risky though, didn't you? You didn't do any research in order to tell for sure though, did you?" Also, on cross-examination of the attorney, you could try to state your claims again thorough accusatory leading questions. For example, you could ask, "You failed to call my witnesses in order to see what they would testify to, isn't that true? Isn't it true you failed to investigate whether the items alleged to have been used in

the crime, and bought from a drug store, were actually bought from the drug store, because you thought I was guilty? Isn't it true you failed to object to the admission of the evidence when I wanted you to object to it?" Literally go over each act or omission that you alleged in your petition, or during the hearing, that you stated 46 violated your constitutional right to effective assistance of counsel, and get the attorney to admit or re-admit that he or she did or didn't do what you claim was deficient performance. One reason being because the judge may not have written down any or all the adverse testimony, and your cross-examination will give your trial an opportunity to write down that your trial attorney did or didn't do exactly what you alleged in your petition or at the hearing. These admissions will also be the last thing that might stick in the judge's mind.

Once all the witnesses testify, the judge may ask you and the state attorney to file a memorandum of findings of fact and conclusions of law by a certain time, which the judge will review and grant in favor of whomever makes the most persuasive arguments. This practice is probably either done to cause you to lose your case or so the court can make sure that it didn't overlook something and can make a well-informed decision. I'd say it's the former because the majority of pro se litigants do not have adequate access to legal research materials, nor do they have legal training or pro se experience. If you are placed in this position, request that the court assign you pauper counsel so you can apply the law to your facts in a professional and unobstructed manner as the state attorney will be able to. If the court denies your request, then ask the court to issue an order upon the prison officials that they provide you access to an adequate law library and the aid of persons trained in the law, in preparing your memorandum of findings of fact and conclusions of law. See: e.g., Bounds v. Smith, 430 U.S. 817, 821-28 (1977) (prisoner is constitutionally entitled to some form of legal assistance from prison officials). You should also explain to the court that the current legal system established by the prison officials will hinder your ability to prepare the memorandum as the court wishes, e.g., you're forced to use a cell delivery system for all legal research materials at the hands and mercy of the prison officials, and that the prison law clerks won't help you unless you pay them to do so.. Still, if the court refuses to make the order, then request that the court give you at least 90 days to prepare and file your findings of fact and conclusions of the law. This way, you give your self more time to try to come up with legal research materials.

Arguably, you shouldn't have to submit your own findings of fact and conclusions of law. See: e.g. Ind. Post-Conviction Rule

1 Section 6. ("The court shall make specific findings of fact, and conclusions of law on all issues presented , whether or not a hearing is held") (emphasis added). See also: Strickland v. Washington, 466 U.S. 668, 690 (1984) (A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"). However, by no means should you not do as the court wishes and not prepare and file your findings of fact and conclusions of the law. Reason being, it is possible that your state has some established procedural rule that requires you to prepare and file your own findings of fact and conclusions of the law, and the failure to do so will procedurally default all of your claims, which means higher reviewing courts will not be able to hear your claims because you didn't properly follow the rules. Also, the law is always changing, so a law could be established, requiring that you take this action. This is why it's important to shepardize the law and obtain annotated versions of the law. Make sure what you're looking at is updated and good law.

"Findings of fact" are findings of factual events relating to your case. These findings are not speculations or possibilities. They are simply something that was undeniably said or done in your case. "Conclusions of law" are legal opinions of the facts and how the law applies to the facts of your case. They are argumentative, and they may be based on speculations or possibilities.

When drafting your findings of fact and conclusions of law, you'll have to follow a certain format. Your legal document should be written as if the judge were writing it. At the end, there should be a blank space for the judge to sign his or her name. It should also be attached to a proposal document. The following is an example of how to draft your findings of fact and conclusions of law:

STATE of Indiana) IN THE SUPERIOR COURT No. 2
COUNTY OF MARION) SS: CASE No. 49602-0103-PC-051465
ERIC D. SMITH,)
PETITIONER)
V.)
STATE OF INDIANA,)
RESPONDENT.)

Petitioner's Proposed Findipgs of Fact and Conclusions of Law

COMES NOW the petitioner, Eric D. Smith, in pro se, respectfully submitting his proposed findings of fact and conclusions of law as follows: 48

1. Petitioner's proposed findings of fact and conclusions of law are attached hereto as attachment No. 1.

WHEREFORE, petitioner in pro se prays that this court sign off on his proposed findings of fact and conclusions of law, and grant him any relief deemed just and proper by this court.

Respectfully Submitted,

Eric D. Smith
DOC No. 112675
Pendleton Correctional Facility
P.O. Box 30
Pendleton, IN 46064

CERTIFICATE OF SERVICE

I certify that a copy of foregoing has been duly served upon the Marion County Prosecutor's Office, by depositing the same in the U.S. Mail, first-class, postage prepaid, this 30th day of July, 2080.

Eric D. Smith, Supra

ATTACHMENT No. 1

PETIIONER'S PROPSED FINDINGS AND FACTS OF LAW

STATE of Indiana) IN THE SUPERIOR COURT No. 2
COUNTY OF MARION) SS: CASE No. 49602-0103-PC-051465
ERIC D. SMITH,)
PETITIONER)
V.)
STATE OF INDIANA,)
RESPONDENT.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As required by Ind. Post-Conviction Rule 1 Section 6, and after conducting an evidentiary hearing, the court now enters its specific findings of fact and conclusions of law on all issues raised in this cause.

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FINDINGS OF FACT

1. On March 1, 2001, the petitioner Eric D. Smith was arrested for arson as a class B felony.
2. On August 27, 2001, a jury trial was held concerning the arson charge, and Patrick Henry represented Smith during the trial.
3. Before the trial, Smith informed Henry of alibi witnesses who would have testified at trial that Smith could not have set the fire during the time of the fire because they had seed Smith at a totally different town than where the fire was started. These witnesses were Brittany Meyers and Andrew Bricker; however, Henry did not call upon these witnesses to testify at the jury trial.
4. Smith wanted these witnesses to testify, as they were his only witnesses that could support his claims.
5. During trial, Henry failed to object to hearsay that Smith had tried to set a fire at the same place where the arson took place.
6. Smith wanted Henry to object on the grounds of hearsay because there was no indication of reliability concerning the hearsay, and Smith feared the jury would use the hearsay as evidence to show that he intended on burning down the apartment building.
7. On August 29, 2001, the jury found Smith guilty of the arson charges.
8. On September 26, 2001, Smith was sentenced to the maximum sentence of 20 years. The trial court found as an aggravating factor the amount of dollar damage that the arson caused.
9. Henry did not object to the aggravator.
10. On May 19, 2004, this court held an evidentiary hearing on a petition for post-conviction relief filed by Smith.
11. Smith's raised grounds in his petition, was that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state. See: Ind. Post-Conviction Rule1, Section1 (2)(1).
12. Smith's factual allegations to support this ground was

that he was denied the effective assistance of trial counsel when his trial counsel Patrick Henry failed to call upon his alibi witnesses to testify in support of his defense, when Henry failed to object to hearsay 50 concerning Smith trying to set a previous fire where the arson took place, and that Henry failed to object to the trial court's aggravating circumstance that the amount of dollar damage in the arson was aggravating.

13. At the evidentiary hearing, Smith testified that he told Henry of his alibi witness during the first time they met, and that his witness would contradict the state's allegations that he had set the fire. Smith wanted these witnesses to testify, as they were the only witnesses that could support his defense that he wasn't present to set the fire as alleged by the state.
14. 14. At the evidentiary hearing, Smith called upon both Andrew Bricker and Brittany Meyers who testified that they had seen Smith on the evening of and during the time of the arson at a totally different town than were the arson took place.
15. 15. Henry testified at the hearing, that these witnesses' names "rang a bell," but that he couldn't remember who they were. Reid testified that he didn't object to the hearsay because he thought it fell into a hearsay exception, and he testified that he didn't object to the court's aggravating circumstance because he thought it was legally proper and that his argued mitigating circumstances would outweigh the court's aggravating circumstance.

Conclusions of Law

1. Post-conviction relief in Indiana is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. Timberlake v. State, 753 N.E. 2d 591, 597, (Ind. 2001).
2. In order to prevail on his post-conviction claim that his Sixth Amendment right to effective assistance of counsel was violated, petitioner must establish two components from Strickland v Washington, 466 U.S. 668 (1984); Wesley v. State, 788 N.E. 2d 1247, 1252 (Ind. 2003) [citing Williams v. Taylor, 529 U.S. 362, 390 (2000) (parallel citations omitted)]. First, petitioner must show that defense counsel's performance was deficient, which "requires showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." Id. (citing Strickland, 466

U.S. at 687-88). Second, petitioner must show that the deficient performance prejudiced the defense. Wesley, 788 N.E. 2d at 1252. Prejudice is proven by showing that counsel's errors were so serious as to deprive the defendant of a fair trial where the result is unreliable. Id. In other words, petitioner must show that there is a "reasonable probability" that, but for counsel's errors, the result of a trial would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Id.

3. The court finds that petitioner is entitled to relief on his ground raised in his petition for post-conviction relief for the following reasons:

a. Failing to call upon alibi witnesses at the jury trial.

The compulsory process clause to the Sixth Amendment grants a defendant the right to offer testimony of favorable witness and to compel their attendance at trial. This right was held applicable to the states through the Fourteenth Amendment in Washington v Texas Washington v Texas, 388 U.S. 14, 19 (1967). The facts show that petitioner told Henry of favorable alibi witness, and that he wanted them to testify. Instead. Henry did not call upon them. No reasons were given why, and Henry had petitioner testify that he was not present at the scene of the arson and that he did not set the fire. While the jury was informed that petitioner was not present at the scene of the crime, it was still deficient performance not to call upon petitioner's witnesses. This deficient performance prejudiced petitioner.

Here, Henry had available witnesses who would have bolstered petitioner's defense and trial testimony. Instead, petitioner's testimony was left bare and seemed self-serving. Creditability of a witness "is a question of fact to be decided by the finder of fact based on face-to-face observation." U.S. v. Dawson, 857 F. 2d 923, 930 (C.A.3 CPA.) 1988). Yet, by failing to call upon these alibis, Henry denied the jury their right to determine creditability of witnesses. Had the jury heard from these alibi witnesses, the case at hand would have been more equally balanced, and petitioner's testimony wouldn't be bare and seemed self-serving. Pavell v. Hollins, 261 F. 3d 217 (2d Cir. 2001). Given the fact that witnesses testified that petitioner was not present in order to commit the arson, and the jury never heard from these witnesses, this court believes there is a "reasonable probability sufficient to undermine confidence in the outcome of the proceeding."

b. Failure to object to hearsay.

Hearsay "is a statement, other than one made by the declarant

while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801 (c), Fed. R. Evid. Constitutional issues arise only if the out-of-court statements are offered to prove the truth of the matters asserted. Tennessee v. Street, 471 U.S. 409, 417 (1985). The admission of hearsay evidence against a criminal defendant implicates the Sixth Amendment because a defendant has no opportunity to confront the out-of-court declarant. Ohio v. Roberts, 448, U.S. 56, 63 (1980). Hearsay can only be admitted if the statement has sufficient "indicia of reliability," Id. At 66, or if it falls within a "firmly rooted" exception to the hearsay rule. White v. Illinois, 502 U.S. 346, 355 N. 8 (1992). See also: Rules 801 (d) (2) (D), 801 (d) (2) (E), 803, 804 (b) (2) (3), Fed. R. Evid.

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Violations of the confrontation clause are subject to harmless error analysis, and will constitute harmless error if it is beyond a reasonable doubt that the violation did not contribute to the verdict. Harrington v. California, 395 U.S. 250, 253-54 (1969). Here, it cannot be said that Henry's failure to object to the hearsay was deficient performance, because the facts and record demonstrate that the admitted statement was indeed hearsay. Based on the basic fundamentals, reasonable counsel would have made an objection. While Henry testified he didn't do so because he thought the hearsay was a firmly rooted exception, he provides no explanation as to how he reached this conclusion. Nor can it be said that the error did not prejudice the petitioner.

The state's case at trial relied on no eye witnesses, just testimony from an alleged co-conspirator who stated he drove petitioner to the apartment building in order to commit the arson, and a couple other witnesses who testified petitioner admitted to them that he set the fire. While these witnesses testified that he set the fire, they also testified that petitioner told them he didn't meat to burn the building down.

While examining the co-conspirator on direct, the state offered hearsay that another person told the co-conspirator that petitioner meant to burn the apartment building down because he previously tried to do so before. Henry didn't object. Defendants can only be convicted beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). If the state fails to sustain its burden of proof on any element, the defendant must be acquitted. Id. At 363. Here, there was evidence putting into question the intent of petitioner to burn the apartments down. Intent is a necessary element to support a conviction of arson.

See: Ind. Code S.S. 35-43-1-1. Because the admitted hearsay was the only evidence that petitioner intended on burning down the apartments, it cannot be said that the jury did not use evidence in order to reach their guilty verdict. This was not harmless error, and there is a reasonable probability had Henry objected, that the outcome of the proceeding would have been different. See: e.g., McCandless v. Vaughn, 172 F. 3d 255, 266 (3d Cir. 1999); Calvert v. Wilson, 288 F. 3d 823, 835 (6th Cir. 2002).

C. Failing to object to trial court's aggravating circumstance.

Last, it cannot be stated that Henry's error, when he failed to object to the trial court's aggravating circumstance, was not deficient performance, and that the error did not prejudice the petitioner. Henry testified that he thought the aggravating circumstance was legally proper. Legally proper it was not.

The consideration of the amount of the damage was improper because the amount of damage was an element of the arson. A fact which comprises a material element of the crime may not also constitute an aggravating circumstance to enhance a sentence. Armstrong v. State, 742 N.E. 2d 972, 981 (Ind. Ct. App. 2001). But sometimes such aggravating circumstances which are a material element of a crime are still proper. See: e.g. Francis v. State, 817 N.E. 2d 235, 238 (Ind. 2004) (holding that although age of the victim had been taken into account by the fact that the offense was a Class A felony, the young age of the victim was a proper aggravating circumstance). However, in addition to the "very young age" of a victim, in order for that aggravator to be proper, the trial court must additionally show "particularized individual circumstances constituting aggravating factors separate from just the age of the victim." Stewart v. State, 531 N.E. 2d 1146, 150 (Ind. 1988).

With petitioner's case, the trial court did not state any particularized individual circumstances constituting aggravating factors separate from just the amount of damage that was caused. Because so, the trial court and Henry disregarded "the well-established rule that a material element of the underlying offense may not serve as an aggravating circumstance to enhance a defendant's sentence. That rule apparently derives from Greene v. State, 424 N.E. 2d 1014, 1015 (Ind. 1981), and is a judicial role of construction. It is based on the logic that a presumptive sentence already assumes the underlying elements and that it is improper to enhance a sentence based on an act for which the defendant is already presumed to be punished." West v State, 755 N.E. 2d 173

(Ind. 2001). Because the trial deviated from this legal rule it was error. "[D]eviation from a legal rule is 'error' unless the rule has been waived." U.S. v. Olano, 507 U.S. 725, 732-33 (1993).

Had Henry objected to this error he would have left the trial court with no aggravating circumstances and only mitigating circumstances, which could have suspended petitioner's sentence. Instead, Henry did not object, and petitioner received the maximum sentence. For Henry to state that he felt the aggravating circumstance would be outweighed by the mitigating circumstances is still no excuse because a single aggravating circumstance is sufficient to enhance a sentence. Deane v. State, 759 N.E. 2d 201, 205 (Ind. 2001). And this is what the trial court exactly did. Because it cannot be stated that the error did not prejudice petitioner, and because the law is clear on this error, there is a reasonable probability that the outcome of the proceeding would have been different. 54

4. The law is with petitioner and against the state.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the petition for post-conviction relief is hereby granted.

ALL SO ORDERED this _____ day of _____, 200__.

_____

MARION COUNTY

SUPERIOR COURT, JUDGE

Distribution:
Petitioner
MCPO

As you can see, there is a lot of work to be done. This example; however, is how you should draft your findings of fact and conclusions of law. Just add facts and law relevant to your case. When your finished, make the necessary copies, keeping one copy for your record, and mail the others to the post-conviction court and state attorney. Then you'll wait for your answer, which could take at least 30 days. Sometimes sooner.

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