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.

South Chicago ABC
Zine Distro
P.O. Box 721
Homewood, IL 60430

# 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 Two

## Chapter Nine Through Twelve
### With Resource List
### (Two Zine Set)

# Table of Contents

## Book 2

Chapter Nine: My petition for post-conviction relief got denied. I'm scared. What do I do?..... page 3

Chapter Ten: My post-conviction relief was denied on the appeal. What now?.....page 11
205

Chapter Eleven: Habeas Corpus. What is it? How do I get started?
..... page 14

Chapter Twelve: Other ways of trying to get out of prison.....page 30

Resource List.....page 34

About Eric D. Smith
(Danachi).....page 48

* Index and Table of Authorities – Available upon request

Much thanks goes to Ryan and the Burning River Collective for transcribing this Handbook.

Published on March 18th, 2009 / @nticopyright / *free to prisoners*

Formatted and Published by Anthony Rayson of the South Chicago ABC Zine Distro. Donations appreciated.

Burning River ABC
P.O. Box 602543
Cleveland, Ohio 44102

South Chicago ABC Zine Distro
P.O. Box 721
Homewood, IL 60430

**ATTACHMENT NO. 5**

MY ATTEMPT TO FILE A SUCCESSIVE
PETITION FOR POST-CONVICTION RELIEF
( 3 PAGES )

**ATTACHMENT NO. 6**

INDIANA COURTS DIRECTING ME
TO FILE A SUCCESSIVE PETITION
FOR POST-CONVICTION RELIEF
( 2 PAGES )

**ATTACHMENT NO. 7**

COSTS OF THE POLYGRAPH TEST
( 2 PAGES )

**ATTACHMENT NO. 8**

NEWS STORY CONCERNING AN ARSON
CASE EXACTLY LIKE SMITH'S
( 1 PAGE )

Index & Table of Authorities available upon request.

Eric D. Smith (Danachi)
D.O.C. No. 112675
MH6-606
The GEO Group Inc.
New Castle Correctional Facility
P.O. Box A
New Castle, IN 47362

102

CERTIFICATE OF SERVICE

46

I certify that a copy of the foregoing has been duly served upon the Indiana Attorney General's office; I.G.C. South, 5th Floor; 302 W. Washington St.; Indianapolis, IN 46204, by depositing the same in the U.S. mail, first-class, postage prepaid, this 30th day of July, 2007

Eric D. Smith,
Certifier

**ATTACHMENT NO. 1**

LETTER WRITTEN BY ONE OF SMITH'S
ALIBI WITNESSES WHO WAS SUBPOENAED
BUT NEVER GOT TO TESTIFY AT TRIAL
( 8 PAGES )

**ATTACHMENT NO. 2**

MY ALLEGED CO-CONSPIRATOR'S,
BRANDON HINKLE, SECOND INCONSISTANT
TAPED STATEMENT GIVEN TO POLICE
( 11 PAGES )

**ATTACHMENT NO. 3**

THE FIRE INVESTIGATOR'S ORIGINAL
FIRE REPORT
( 1 PAGE )

**ATTACHMENT NO. 4**

SMITH'S NEWLY-DISCOVERED EVIDENCE
FROM WAL-MART, WHICH SHOWS
HIS INNOCENCE AND SHOWS THAT
THE STATE FABRICATED EVIDENCE
DURING HIS TRIAL
( 1 PAGE )

59

3

# Chapter 9

## My Petition for Post-Conviction Relief got Denied. I'm Scared. What do I do?

You got your legal mail from prison officials. The return address was that of the post-conviction court, so you just knew it had to be a decision about your petition for post-conviction relief. You opened the letter, praying that the court granted you some relief, and flipped to the very last page in order to see the words: granted or denied. The word read: denied. Your heart nearly stopped beating when you saw the decision. You felt like panicking and screaming. Angry, you flipped back to the front page in order to see what exactly happened and what was said by the court. The first time didn't make sense, so you had to read the decision again.

First, I'm sorry for your misfortunes. I know what you're going through. It happened to me, and it happened to many other people in prison. It wasn't the fist time that something like this has happened, and it won't be the last. Keep fighting.

If you were represented by an attorney, contact them and the court telling them you wish to appeal all adverse orders denying you relief. Any motions that got denied—anything and everything. Something as simple as a denied motion has the possibility of getting the denial of your post-conviction petition overturned, which may put you back at the evidentiary hearing stage.

If you were not represented by an attorney during your post-conviction proceeding, prepare a notice of appeal, stating that you wish to appeal all the dated orders that was denied during your post-conviction proceeding. So if the court denied a motion for the issuance of subpoenas on March 4, 2006 and denied your petition for post-conviction relief on September 28, 2006, then you will specifically write these dates in your notice of appeal. Doing so clearly gives "notice" to the court and state attorney on exactly what you plan on challenging in the state Court of Appeals. Also, your notice of appeal should state what court of appeals your appeal will be taken to, that the clerk is requested to assemble, file, and serve you a copy of the clerk's record, that the court reporter is requested to transcribe the evidentiary hearing on the date that it was held and serve you a copy of the completed transcripts, and that the clerk mail you a file-stamped copy of your notice of appeal because you will need it in order to comply with the appellate rules. Make sure your notice of appeal to the post-conviction court, and do so immediately because you may only have up to 30 days in which to file your notice of appeal, starting on the day of your petition for post-conviction relief was denied and disposed of by the post-conviction court. Mail one copy to the state attorney too, and keep one copy for your records. Your law library and

ublic Defender's office should have a blank, standard notice of appeal
)rm that you can fill out and file with your court. Also, this sample form
iay be included in the appendix to your state's book of appellate
rocedures and rules. At least, one is here in Indiana.

;o While you're waiting on all of this, obtain a copy of all your state's
ppellate procedures and rules. Read over them, and become familiar with
iem. Try to anticipate any problems with meeting filing dates. In fact,
xpect problems. Write down the rules and procedures that might help you
vercome any difficulty. Also, you should write out a motion, requesting
iat the post-conviction court appoint you appellate counsel because the
ircumstances and conditions of your confinement will prevent you from
omplying with the appellate rules and procedures; therefore, causing you
rejudice, and you should mail out the motions to the post-conviction court
nd state attorney. Remember, everything you file with the court must have
certificate of service attached to it, showing that you mailed a copy to the
tate attorney, and you should attach a proposed order to the motion. These
re the first few things you do when you find out that your petition for
iost-conviction relief was denied and dismissed.

Because I'm familiar with Indiana law, I'll break down the Indiana
Appellate process. If you're from Indiana this will be great, but if you're
iot an Indiana State prisoner, then your state appellate rules and procedures
houldn't be too different. Just try to grasp the general process.

Indiana Post-Conviction Rule 1, Section 6 states that the denial of
)ost-conviction relief "is a final judgment." A final judgment is one that
:ompletely puts an end to all issues before the court. See: Catlin v. United
States, 324 U.S. 221, 233, 65 S.Ct. 631 (1945). Indiana Post-Conviction
Rule 1, Section 7 states that an appeal may be taken from a final judgment
n a post-conviction proceeding. Generally, you can appeal all final
udgments, and if you wish to pursue habeas corpus remedies, you first
nust file all your appeals in all of the state's appellate courts that would
iave jurisdiction of your case. If not, you'll be screwed by a doctrine
known as procedural default. If you don't first pursue and exhaust all your
remedies in the state appellate courts, then you won't be able to pursue
hem in federal court unless the state waived a procedural rule or did
something that kept you from exhausting all your state remedies.

In the appellate stage, you need to be on your toes and all your P's
and Q's. When you get a filed, stamped copy of your notice of appeal, you
then need to immediately file your appearance in the state court of appeals.
In Indiana, the procedure of filing your appearance is governed by Indiana
Appellate Rule 15. Here, your appearance is satisfied and known as filing
your "Appellant's Case Summary." Blank forms can be obtained from your
prison law library or you can handwrite the format out by referring to the
blank appellant's case summary form found in the appendix in the back of
the Indiana Rules of Appellate Procedure book. When preparing this
document or your appearance, you also must attach to this your file-



101 legal copy requests and transfer me to different prisons, calculated to cause me court losses. (FN1) I feel these factors meet the prima facie showing that the factual basis of the new claim could not have been discovered previously through the exercise of due diligence, because another federal court held a petitioner in a similar situation met such a showing. (See: Coleman v. Saffle, 912 F. 2d 1217, 1229, (Loth Cir. 1990)) (records obtained during Appeal justified successive petition because counsel did not previously know records existed, and Appellate court refused to remand or stay proceedings on second petition). Additionally, this new evidence excuses any failure to assert a ground in a petition. See: 28 U.S.C. $S_S$ 2254, Rule 9(b), Advisory Committee's Note. (FN1) Interference excuses default. Murray v. Carrier, 477 U.S. 478, 488 (1986).

6. I am even wanting to take a polygraph test to prove my innocence, but it costs $ 900.00! (See: Attachment No. 7).

7. I don't understand how I would not be entitled to relief, because in another Arson case identical to mine, another prisoner with LESS evidence than what I can present, got his conviction overturned! (See: Attachment No. 8). In McCleskey v. Zant, 499 U.S. 467,493 (1991), the U.S. Supreme Court held that any omission of a claim from an earlier petition may be excused if it is demonstrated objective cause and actual prejudice from the inability to raise the claim. I feel I have done this. This is my life here, and I have been wrongfully convicted! I want my life back and a fair trial.

8. I affirm under the penalty of perjury, pursuant to 28 U.S.C. $S_S$1746, that the above representations are true and correct.

WHEREFORE, Smith in *pro se*, prays that this court grant this motion and grant him any other relief in his favor.

Respectfully Submitted,

Dated: July 6, 2007

Eric D. Smith 112625
WCU P.O. Box 473
Westville, IN 46391

- As of March 18th, 2009, Eric Smith has been incarcerated at The prison at New Castle, IN.
- His full address is listed at the bottom of page 47

because the state witnesses first told him when I got arrested that they didn't know anything about the fire (See: Attachment No. 1 p. 2) 100 44

3. I also have evidence that proves the fire investigator presented False evidence and testimony at my trial! Originally, when detectives first talked to my alleged co-conspirator, he denied any involvement in the fire. Then the detective threatened him that he was looking at 20 years and that I was looking at nothing before the detective let him go. Well, the next day, the alleged co-conspirator says his first statement was a lie and puts the blame all on me (See: Attachment No. 2). The co-conspirator told that he didn't know what was used in the fire (See: Attachment No. 2 p. 4-5, 7). In the original fire report the fire investigator stated he only found a gasoline can and green towel (See: Attachment No. 3).

Well, After me and my alleged co-conspirator gets arrested, he changes his story for a third time, stating he now knows what was used because he saw everything, and that I used Duraflame fire logs to start the fire. He said he went to Wal-Mart in Franklin, Indiana with me on February 23, 2001 and bought the Duraflame logs.

At trial, the fire investigator, despite his fire report in Attachment No. 3, presents this photograph and claims it is a picture of a Duraflame log he recovered from the debris of the fire; however, this alleged fire log was never physically produced or forensically tested! I knew this was a set-up, so I contacted Wal-Mart myself after my conviction, and I found out these alleged fire logs was never bought; therefore, what my alleged co-conspirator and fire investigator testified to could not be true (See: Attachment No. 4).

4. I've done everything in my power to get this evidence in State court, but they denied me to file a successive petition for post-conviction relief (See: Attachment No. 5), even though this is what they told me to do! (See: Attachment No. 6). How is this justice and fair!?

5. The factual basis of my new claims could not have been discovered previously through the exercise of due diligence because the state courts wouldn't allow me to remand the proceedings, and I did not get the evidence from Wal-Mart till February 7, 2005, which was after my first post-conviction evidentiary hearing. Also, prison official was retaliating against me for my lawsuits, so they would purposely delay my

stamped copy of your notice of appeal and all file-stamped copies of all the adverse orders you wish to appeal, The clerk of the appeals court will not accept for filing any other paper, motion, or other filing by you until you file your appellant's case summary or similar appearance document. See: e.g., Ind. Appellate Rule 15E. Make sure you make enough copies of your appellant's case summary. Send the original and two copies to your court of appeals, one copy to the state's attorney, and one copy for your records.

61 Keep in mind that if you're close to missing a deadline date, or that you're afraid that the court will receive a document in the mail after the deadline date, that all legal papers are deemed filed on the day you 5 personally hand them over to prison officials for mailing. This procedure is known as the "prison mailbox rule." See: Houston v. Lack, 487 U.S. 266, 274 (1988). If you're in this situation, cite this case in your legal document and verify it under the penalty of perjury or draft a legal document doing the same, and tell them what day you gave it to the prison officials; therefore, requesting the clerk of the court that it be filed on that day. If you have to, manipulate this procedure. Just be sure that you're manipulating cannot be disproved beyond a reasonable doubt.

If you're represented by an attorney, you won't have to worry about any of these things except for seeing that you're notice of appeal is filed. But if you're representing yourself, you must make sure that you follow all the rules and file everything that you need to.

Once you mail out you appellant's case summary or appearance to the Indiana Court of Appeals or court of appeals of your jurisdiction, you can now file motions in these courts. All your motions should be verified under the penalty of perjury, and you should attach the documents, if any, backing up your claims in the motion. For some reason, appellate courts like to nit at any motion and they hold strict compliance with their rules. Some appellate judges want to see more than your sworn statements. Just don't give them any excuse to deny your motions. For this reason, you should be as detailed as you can.

The first verified motion you should file in your court of appeals is a "verified motion for extension of time to file an appellant's brief." In Indiana, Ind. Appellate Rules 34 and 35 govern the filing of this motion. Ind. Appellate Rule 23 governs how many copies of the document, as well as how many copies of anything else filed with the court. You should request at least a 90 day extension in which to file your appellant's brief. Reason being is that you give yourself some time to research your claims and some time to work with just in case the prison does something to slow you down. If you don't need that much time, it doesn't hurt to ask, because you can always file your appellant briefs before then.

You should also be monitoring when the post-conviction clerk and court reporter should have the record and transcripts filed. Reason being is that a procedural rule may require you to compel the completion of these documents, and you also won't be able to prepare and file your appellant's

brief without having these things in your possession and filed with the court of appeals.

6

62 In Indiana, Ind. Appellate Rules 10 F and G state that you must file a verified motion to compel completion of clerk's record or transcript with the court of appeals if the time has expired for the post-conviction clerk and court reporter to have these things filed with you and the court of appeals. Remember your notice of appeal asking for these things to be prepared and given to you and the court of appeals? The post-conviction clerk only has 30 days to file its notice of completion of the clerk's record with you and the Court of Appeals. See: Ind. Appellate Rule 11B. If these things are not timely filed, then you may only have up to 15 days in which to file your verified motion to compel the completion of these documents. Ind. Appellate Rules 10F and G specifically warn you that:

"Failure of appellant to seek such an order not later than fifteen (15) days after the [notice of completion of clerk's record and notice of completion of transcript] was due to have been issued, filed, and served shall subject the appeal to dismissal."

Ind. Appellate Rules 10F and G. For this reason, make sure you file the appropriate motions, and make sure that you timely file them. If you're not from Indiana, consult with your state's appellate rules, and make sure that the rules are not the same or similar. If they are, follow those rules.

Another reason why it's a good idea to ask for an extension of time to file your brief is because, normally, your briefs will be due exactly 30 days after the post-conviction clerk and court reporter file their notice of completions with you and the Court of Appeals. This is the time limit in Indiana. See: Ind. Appellate Rule 45B.

By now, you should have heard back from your post-conviction court concerning your motions for appointment of appellate counsel. If it was granted, great! If not, not so great. If the motion was denied, then file a verified motion for an order to appoint appellate counsel with your court of appeals, requesting that the court of appeals order the post-conviction court to do so. Explain that you filed a motion to appoint appellate counsel with the post-conviction court, but that the court denied the motion. State why it was denied. Also, explain to the appellate court that you have no legal training, that you have no or very limited access to legal research materials, that you believe your issues on appeal are meritorious and that you'll be prejudiced if appellate counsel is not appointed. It's important to know that your appellate rules may require you to cite legal cases or other authorities when making your arguments in your brief. In Indiana, Ind. Appellate Rule 46A(8)(2) provides:

"(2) The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities (law, legal cases, etc.), statutes, and the appendix or parts of the record on appeal relied on..."

Ind. Appellate Rule 46 A(8)(2) (emphasis added). If you don't cite law

TransUnion
P.O. Box 2000
Chester, PA 19022

43

Equifax Information Service, LLC
P.O. Box 105518
Atlanta, GA 30348

99

UNITED STATES Court Of APPEALS
For The SEVENTH CIRCUIT

| | | |
|---|---|---|
| Eric D. Smith, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| V. | ) | Cause No. 07-2837 |
| | ) | |
| William K. Wilson, | ) | |
| | ) | |
| Respondent. | ) | |

VERIFIED MOTION FOR AUTHORIZATION ORDER
TO FILE SUCCESSIVE PETITION FOR WRIT
OF HABEAS CORPUS

Comes now the petitioner, Eric D. Smith, in *pro se*, pursuant to 28 U.S.C. Ss2244, moves this court to issue an authorization order to allow the filing of a second petition for writ of habeas corpus for the following reasons:

1. I am wholly innocent of the Arson and I was denied a fair trial. I don't know what my grounds are in order to be allowed an authorization order to file a second petition for writ of habeas corpus, but I do know the facts of my case.
2. The facts are that I had alibis that never got to testify in my jury trial, even though I wished them to be subpoenaed and testify in support of my defense (See: Attachment no. 1). Another witness was Brittany Meyers, who actually seen me in my neighbor during the time of the fire. It is self-explanatory why Meyers' testimony would be relevant. Bricker's would-be testimony is relevant too, not only because he was talking to me on the telephone while I was home during time I was suppose to be buying gasoline and matches for the fire, but

Human Rights Watch
1630 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20009

(Investigates and exposes human rights violations. Challenges governments about abusive treatment of prisoners. Write for information).

98

United States Government:

U.S. Dept. of Veteran's Affairs
810 Vermont Ave., N.W.
Washington, D.C. 20530-0001

(Write for aid if you're a veteran or for military recruiter contact addresses in order to see if you can work out a deal in order to get out of prison and into the military).

President of the United States
1600 Pennsylvania Ave., N.W.
Washington, Ave 20500

(Write for information about pardons).

The Library of Congress Copyright Office
101 Independence Ave, S.E.
Washington, DC 20559-6000

(Write for copyright information if you need literary work legally protected).

Other:

If you need a free copy of your credit report or are worried that someone has damaged your credit, contact all of these credit bureaus:

Experian
P.O. Box 9701
Allen, TX 75013

Computer Sciences Corporation
Consumer Affairs
652 N. Sam Houston Parkway E.
Suite 300
Houston, TX 77060

with your arguments, then the court of appeals will not honor your argument, and they will say that you waived your argument. This is bad; especially down the road for habeas corpus review.

7

63 Sometimes, we will not be able to obtain legal research materials that we can cite to support our arguments. Not because they don't exist, but because we have no way to find them or obtain them. If your verified motion for the appointment of appellate counsel is denied by your court of appeals, and they have a rule like Ind. Appellate Rule 46 A(8)(2), then you should file a verified motion for waiver of the rule, requesting that the court of appeals not apply the rule due to your inability beyond your control that will not allow you to comply with said rule. If this is denied, then you'll have to make due. Keep a copy of all your filed motions and court orders. You may need them later for habeas corpus proceedings.

Try to get your hands on the latest edition of the Georgetown Law Journal Annual Review of Criminal Procedure. This law book is dynamite, and it will greatly assist you in understanding the law. It is published in cooperation with the Georgetown University Law Center's Continuing Legal Education Department. It will be most helpful because it cites literally hundreds of legal cases, giving brief descriptions of what was discussed, from every federal circuit court of appeals in the United States. Las time I checked, the journal cost $55.00 with shipping, but I believe the journal is sold to prisoners for $10.00 with shipping. You law library should also have a current copy. Ask and see. If not, a contact address to obtain a copy of the journal is listed in the back of this handbook under the resource list section. If you don't have the money to pay for the journal, contact their publisher and see if they will let you pay for it with new books of postal stamps. Some publishers do this, and you can always come up with a hustle, e.g., selling your state meals to other prisoners for books of stamps, in order to obtain stamps. Also, contact you Public Defender's Office and see if they would be able to send you copies of some appeal briefs they've done before dealing with your issues on appeal. This could also be a big help.

Start preparing your brief. Your appellant's brief should consist of the following:

1. Your cover page;
2. A table of contents;
3. A table of authorities;
4. A statement of issues;
5. A statement of case, which consists of two separate sections: The nature of the appeal and the course of proceedings;
6. A statement of facts;
7. A summary of argument;
8. An argument;
9. A conclusion;

64 10. A copy of the appealed orders;
11. A word count certificate if necessary; and
12. A certificate of service.

See: e.g., Ind. Appellate Rule 46 A. Sometimes, depending on which appeals court has jurisdiction on over your appeal, your brief must also include a statement of jurisdiction. For example, in Indiana, if you were sentenced to death or life imprisonment, the Indiana Supreme Court would have jurisdiction over your appeal pursuant to Ind. Appellate Rule 4. Your jurisdictional statement would therefore reflect this example, supported by the clerk's record, which you will make into appellate appendices:

Statement of Jurisdiction

On (date you were sentenced), appellant was sentenced to a term of (death or life imprisonment). As such, this court has jurisdiction over this appeal pursuant to Ind. Appellate Rule 4. This appeal is from a final judgment, and according to Ind. Post-Conviction Rule 1, Section 7, an appeal may be taken from a final judgment involving post-conviction proceedings, which is exactly what this appeal involves."

Check your state rules to see if you are required to include a statement of jurisdiction in your appellant's brief.

You should also get familiar with the appropriate standard of reviews for each of your issues and arguments. In Indiana, the general standard of review is as follows:

"When appealing the denial of a post-conviction petition, the appellant faces a rigorous standard of review. Atchley v. State, 730 N.E. 2d 758, 762 (Ind. Ct. App. 2000). Post-conviction relief is not a substitute for a direct appeal; rather, the post-conviction rules create a narrow remedy for subsequent collateral challenges to convictions. Martins v. State, 760 N.E. 2d 597, 599 (Ind. 2002); Cowherd v. State, 791 N.E. 2d 833, 836 (Ind. Ct. App. 2003), trans. Denied. The scope of the post-conviction remedy is limited to issues not known at the time of the original trial or that was unavailable on direct appeal. Craig v. State, 804 N.E. 2d 170, 172 (Ind. Ct. App. 2004). In a post-conviction proceeding, the petitioner has the burden to establish his claims for relief by the preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Wesley v. State, 788 N.E. 2d 1247, 1250 (Ind. 2003), reh'g denied; Hollins v. State, 790 N.E. 2d 100, 105 (Ind. Ct. App. 2003), trans. denied. This burden for proving claims of ineffective assistance of counsel; however, is less than the preponderance of the evidence, for a petitioner need only show a 'reasonable probability' that absent counsel's errors the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495 (2000) [citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052 (1984)].

"A petitioner who has been denied post-conviction relief appeals

California Habeas Corpus Handbook, 5th Edition. This book covers everything and gives how-to examples concerning many habeas corpus issues. Written by Kent Russell, who does the habeas hints section in Prison Legal News. Obtain for $39.99 from Kent Russell; 2299 Sutter St.; San Francisco, CA 94115. Price includes shipping.

97

Stamp Services:

Nirvana Stamp Collection
P.O. Box 331327
Atlantic Beach, FL 32233

(Trade your unused stamps for cash paid directly to you. They've served federal, state and county inmates since 1985. This might be a good way to hustle up money while on a segregation unit and being indigent. Sell your food to other inmates for stamps, mail the stamps to Nirvana, and get some money off it. You won't get full face value of the stamp, but you'll get the highest price paid for your postage stamps).

Other Helpful Services:

Prison Wizard, Inc.
P.O. Box 421526
Indianapolis, IN 46242

(Pen pal services, gift and buying services, picture copying, internet and legal research, locate friends, print lyrics or sports schedules. Write for information).

Prism Optical, Inc.
10992 N.W. 7th Ave.
Dept LN206
Miami, FL 33168

(This corporation sells brand-name and other safe eyewear for prisoners. Been around since 1959. Write for a free catalog).

University Research Services
P.O. Box 914
Birmingham, MI 48012-0914

(They handle prisoner cases. Have your family or friends contact them. For a fee, they will do all your legal work and represent you at a very affordable and reasonable price).

Ohio University
Independent and Distance Learning Programs
College Program for the Incarcerated
Haning Hall 222
Athens, OH 45701-2979

96

(You can earn a degree with these people. Make sure your prison will give you a time cut with them. It will cost you a lot of money, but if you have it, it will help you. Good courses. A lot of law stuff).

Career Development Institute
430 Technology Parkway
Norcross, GA 30092

(You can earn a high school diploma, GED, and obtain vocational training on many careers. Diploma and certificate programs. Nationally accredited. Good prices. Can pay at cheap monthly installments. Known nationwide. Write for free information).

Self-help and Must-have books:

The Citebook. Obtain it from Prison Legal News or Starlite, Inc.; P.O. Box 20004; St. Petersburg, FL 33742

Post-Conviction Remedies: A Self-Help Manual Prisoner's Self-Help Litigation Manual, 3d Edition; Disciplinary Self-Help Litigation Manual. Obtain these books from Daniel E. Manville, P.C. and Publisher; P.O. Box 20321; Ferndale, MI 48220. He wrote these books, and they cost at least $34.95 each, but are well worth the money.

Georgetown Law Journal: Annual Review of Criminal Procedure. You may be able to obtain these books for $10.00. Each review regularly costs $55.00 with shipping included. Make sure you get the most recent review, as they come out each year. The review summarizes current law on criminal procedure and prisoner's rights. Cites hundreds of cases to use. Obtain it from Georgetown University Law Center; 600 New Jersey Ave N.W.; Washington, D.C. 20001

Nolo's Deposition Handbook, 2nd Edition. Obtain it from Nolo; 950 Parker St.; Berkeley, CA 94710.

40

from a negative judgment. McCary v. State, 761 N.E. 2d 389, 391 (Ind. 2002), reh'g denied; Willoughby v. State, 792 N.E. 2d 560, 562 (Ind. Ct. App. 2003), trans. denied. To obtain relief on appeal, the petitioner must demonstrate that the evidence as a whole leads unerringly and 9
unmistakably to a decision opposite of that reached by the post-conviction court. Wesley, 788 N.E. 2d at 1250; Smith v. State, 770 N.E. 2d 290, 295 (Ind. 2002); Weatherford v. State, 619 N.E. 2d 915, 917 (Ind. 1993). 'In other words, the defendant must convince this court that there is no way within the law that the court below could have reached the decision it did.' Stevens v. State, 770 N.E. 2ds 739, 745 (Ind. 2002) reh'g denied, cert. denied. The appellate court, moreover, accepts the post-conviction court's findings of fact, unless they are clearly erroneous. Bahm v. State, 789 N.E. 2d 50, 57 (Ind. Ct. App. 2003), clarified on reh'g, 794 N.E. 2d 444, trans. denied."

65 As you see from the above standard, it is going to be hard to win a post-conviction appeal unless the post-conviction the post-conviction court clearly erred. Issues dealing with denied motions won't be so hard. You only have to demonstrate that the post-conviction court abused its discretion and the error was not harmless. See: e.g., McCullough v. Archbold Ladder Co., 605 N.E. 2d 175 (Ind. 1003); Chapman v. California, 386 U.S. 18, 22-23 (1967); Brecht v. Abrahamson, 507 U.S. 619, 623, 629-30 (1993).

Some ways to show that the post-conviction court's decision is "clearly erroneous" is to show that its decision conflicts with other cases, goes against the logic of the constitution, legal case, or rule, and to show that the decision was not based on fact. Concerning ineffective assistance of counsel claims, you can try to convince the appellate court that although the findings of fact regarding assistance of counsel are presumed to be correct, that the post-conviction court's conclusions are not, Strickland v. Washington, 466 U.S. 668, 698 (1984); therefore, the post-conviction court's decision is erroneous because the conclusions were incorrectly reached.

Whatever you argue on appeal, the state is obviously going to contradict in their brief, which is called an "Appellee's Brief." You'll get a copy of it when they file it, and you'll have at the most, 15 days to respond to their brief. See: e.g. Ind. Appellate Rule 45 B(3) (granting 15 days from the date the appellee's brief is filed in which the appellant can file a reply brief). Again, if you're not from Indiana, consult with your state's appellate rules of procedures and law library for assistance.

In certain circumstances, the state attorney, in its Appellee's Brief, will argue that your issues are waived because you didn't raise them in your petition for post-conviction relief. This is mainly seen in issues dealing with ineffective assistance of counsel. For example, you might have raised the ground that your conviction was in violation of the United States

Constitution, and then in your supporting factual allegations you simply and vaguely put "petitioner was denied effective assistance of trail counsel." Then, at your evidentiary hearing you specifically identified the acts or omissions of trial counsel that constitutes ineffective assistance. Your petition was denied, and you appeal the decision. In your brief, you argue that trial counsel was ineffective by opening the door to evidence concerning prior criminal convictions, which the prosecutor referred to in closing arguments in order to impeach you and undermine your credibility. Well, in the Appellee's Brief, the state attorney argues that you "waived" this claim because you did not state the act of trial counsel in your petition for post-conviction relief. "Issues not raised in a petition for post-conviction relief may not be raised for the first time on appeal. Emerson v. State, 812 N.E. 2d 1090, 1098-99 (Ind. Ct. App. 2004).

If you're facing this particular problem you should look closely at your petition for post-conviction relief and the post-conviction rules dealing wit waiver of claims. Did you properly state a ground for ineffective assistance of counsel? In the above example, the petitioner did because ineffective assistance of counsel violates the Sixth Amendment to the United States Constitution of America. In Indiana, Ind. Post-Conviction Rule1, Section 8, which deals with waiver of claims, only states that claims are only waived if you didn't raise the "grounds for relief" in your petition for post-conviction relief. So what about the factual allegations? Well, Strickland v. Washington, 466 U.S. 668, 690 (1984) does state you must specifically "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." If you didn't raise the specific acts or omissions in your petition, but you identified them at your evidentiary hearing, remind the court of appeals in your reply brief that Strickland, 466 U.S. at 690 doesn't state that you have to identify your acts or omissions of counsel in your petition. That Strickland just requires you to identify that acts or omissions during the evidentiary hearing, Strickland is satisfied, and your specific claim is not waived. See: e.g., Onifer v. Tyszkiewicz, 255 F. 3d 313 315 (6th Cir. 2001) (exhaustion requirement satisfied when petitioner identified constitutional violations during state court proceedings); Hill v. Lockhart, 28 F 3d. 832, 834-35 (8th Cir. 1994) exhaustion requirement satisfied even though claim not precisely articulated to state court, but instead mentioned in paragraph focusing on different, related claim). Be sure to cite the record where your identifications can be found. This should then take care of your waiver problem.

Hopefully, you can put together a good argument. The main thing is to simply follow your procedural appellate rules. If you do so, you will only give yourself a better chance of success for a judicial system that failed you and gave you the shaft. Once all the briefs are filed, it may take anywhere from 2-8 months to decide the issues on your appeal. Expect the



Prisoner Services:

Inmate Telephone Services
P.O. Box 174393
Arlington, TX 76003

(Write or call toll free at 866-563-0008. You can save up to 60% off to your collect calls to loved ones with these people).

Inmatemailpals.com
C/o Brian Rooney
P.O. Box 264
Fairfax, VA 22038-0264

(This guy was a prisoner before. For a small fee, he would put your picture(s) and an ad on the internet in an attempt to get you pen pals and public exposure. Good guy. Write for exact details).

Typing Services
C/o Sandra Z. Thomas
P.O. Box 4178
Winter Park, FL 32793-4178

(This place is operated by a self-employed woman. She will type anything for you professionally and at a cheap rate for prisoners. Write for exact information).

Schools:

American Academy of Paralegals
P.O. Box 917
Haure de Grace, MD 21078-0917

(Write for free research materials and education information).

Blackstone Paralegal Studies
218 Main Street
P.O. Box 899
Emmas, PA 18049-0899

(These guys have been around for a long time. They are nationally accredited. Prisoner friendly learning materials. Certificate program. Will help you get certified as a paralegal. Write for free information).

Discount Magazine Subscription Service, Inc.
P.O. Box 128
Plainview, NY 11803
94
(This corporation sells all kinds of magazines at cheap prices. Write for free catalog).

Tightwad Magazines
P.O. Box 1941
Bulford, GA 30515

(This company also sells a lot of magazines for interest. Some of their subscriptions are as low as $6.00. Good deals too. Write for a free catalog).

Prison Legal News
2400 N.W. 80th St.
#148
Seattle, WA 98117

(These people are dedicated to protecting human rights. They print a newsletter dealing with solely prisoner issues. They sell legal books, too, and in the letter they give you how-to habeas corpus hints. Write for free catalog and book catalog).

Countryside and Small Stock Journal
145 Industrial Dr.
Medford, WI 54451

(Countryside is a good magazine about living off the land, hints on all kinds of things to do with the country, self-efficient living and these have a lot of interesting ads and products. $18.00 per year subscription. Published bi-monthly. Write for a free sample issue. Try to get the Vol. 89 No. 3 May/June, 2005 issue).

USA Today
P.O. Box 79002
Baltimore, MD 21279-0002

(This newspaper is speedily delivered to you, and reports nationwide news. Has good stuff about criminal cases).

worst and hope for the best. While you're waiting for a decision you should anticipate that the state court is going to railroad you; therefore, you should be preparing your appeal to the highest state court, which you must be prepared to show that the lower court of appeals' decision is in need of reconsideration because its decision conflicts with state Supreme Court decisions, Federal Circuit Court of Appeals' decisions, or United States Supreme Court decisions. Alternatively, that the lower court of appeals' decision is in need of reconsideration because it decided an issue that hasn't been, but should be, decided by the State Supreme Court. Get some examples at your law library.

67

## Chapter 10

## My post-conviction relief was denied on the appeal. What now?

There's no time to talk about feelings, and there's no time to flip out and go nuts. You got another adverse decision. You're not the first and you won't be the last. Sometimes it takes more work and more reviews of your issues before justice is finally granted.

Hopefully you took my advice from the last chapter and anticipated a court loss. If you did, you've saved yourself some time and have a basic format for your appeal to the state's highest court of appeals, which should be the state's Supreme Court. In Indiana, appeals to the state's highest court after a negative decision from the lower court of appeals are take by filing a "Petition to Transfer." Such petitions are governed by Ind. Appellate Rules 56 and 57.

It is imperative that you get this petition filed within 30 days of the lower court of appeals' decision denying you relief. This is because Ind. Appellate Rule 57(C) provides:

"A Petition to Transfer shall be filed: (1) No later that the thirty (30) days after the adverse decision if rehearing was not sought..." Ind. Appellate Rule 57(C). This rule also states that "no extension of time shall be granted." So this means you have 30 days, and 30 days only in which to file a Petition to Transfer. I cannot stress enough how important this is. If you miss this 30 day deadline, you're screwed. Not completely, but more likely than not. The point of timely filing such an appeal to the state's highest appeal court is to properly exhaust your state administrative remedies in order to secure review via federal habeas corpus. Stated otherwise, "[2] State prisoner...may obtain federal habeas review of his claim only if he has exhausted his state remedies and avoided procedurally defaulting his claim." Thomas v. McCaughtry, 201 F. 3d 995, 999 (7th Cir. 2000). Missing the deadline date procedurally defaults your claims because you did not follow the rules which would give the state's highest appellate court a fair opportunity to correct any errors. See: O'Sullivan v. Boerckel.

526 U.S. 838, 845 (1999). And when you prepare your appeal to the state's highest court, do not leave anything out. Raise all your issues that you raised to the lower courts. If you fail to raise an issue, kiss that issue goodbye on habeas corpus. This is no game, and it is no time to be lazy. The courts won't care if you don't have any legal training or accidentally forgot to bring the issue up. The rules are the rules, and they are strictly enforced. See: e.g., U.S. v. Flores, 981 F. 2d 231, 236 (5th Cir. 1993) (default not excused because of petitioner's illiteracy, deafness, pre se status, ignorance and lack of legal training in the law); Harris v. McAdory, 334 F. 3d 665, 668-69 (7th Cir. 2003) (default not excused because of petitioner's pro se status or by his borderline mental retardation).

But some of you are going to miss the deadline or already have. So what to do? Well, your first step is to finish your appeal to the state's highest appellate court, get all the necessary copies, and draft a verified motion, requesting that the state's highest appellate court "waive" its procedural rule and allow you to file a belated appeal for whatever reason caused you to miss the deadline date, e.g. the prison law library wouldn't timely copy your materials, they were retaliating against you for filing lawsuits or grievances and intentionally prevented you from filing your final appeal on time—anything like this that you can think of and that applies to you. You should also attach documents or witness statements to your motion that supports your claims. The state supreme court does have the discretion to waive its procedural rules. See: e.g., Ind. Appellate Rule 1 (The court may at any time, upon its own motion or by a motion of a party, deviate from the Indiana Appellate Rules of Procedure). If the court receives your appeal and motion in the mail, and they grant your verified motion, then you'll be good to go. If not, you'll have to file a petition for writ of habeas corpus in state or federal court. We will talk more about getting around the procedural defaults in the next chapter.

In Indiana, petitions to transfer consist of the following sections:

1. Cover page,
2. Questions presented on transfer;
3. Table of contents;
4. Background and Prior Treatment of Issues on Transfer;
5. Argument;
6. Conclusion;
7. Word Count Certificate, if necessary; and
8. A Certificate of Service

See: Indiana Appellate Rule 57(G). Other states might require more or less sections, so again, check your appellate rules.

Your main objective here is to try to show your highest appellate court that the lower courts made decisions that conflict with other decided cases. These conflicting cases can be cited from any American court. Commonly, state cases, federal circuit court of appeals cases, and United States Supreme Court cases are used to demonstrate that the lower



your case, but ask them for some of their legal papers they've done concerning your issues. Write for more information and for an address of a Federal Defender's Office in your state).

Federal Bar Association
2215 "M" St.
Washington, DC 20037

(The Bar can give you the mailing address of attorneys you can contact to see if you can obtain their representation or other legal assistance).

Innocence Denied
P.O. Box 18477
Pittsburgh, PA 15236
www.innocencedenied.com

(This place helps provide legal aid and public exposure for those who can make a good show of innocence).

Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, GA 30303

(They have multi-million dollar assets and a big litigation budget with handsomely paid attorneys. They take on bit prison/prisoner cases dealing with both civil and criminal law).

National Association of Legal Assistants, Inc.
1516 South Boston Ave.
Suite 200
Tulsa, OK 74119

(This corporation is a non-profit organization. They may be able to help you make legal arguments for any of your civil or criminal cases).

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

(This innocence project at the Benjamin N. Cardozo School of Law was created by Barry C. Scheck and Peter J. Neufield in 1992. This project handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence).

Lehman's
One Lehman Circle
P.O. Box 41
Kidron, OH 44636
92
(Lehman's has a great non-electric catalog. They sell all kinds of equipment, toys, how-to books, and more. Write for a free catalog.)

C. Crane Company
1001 Main Street
Fortuna, CA 95540-2008

(Crane sells a lot of cool gadgets and books about antennas and radios. They sell solar panels, wind-up radios and all kinds of stuff. Write for a free catalog).

Investigators:

International Investigators, Inc.
3216 North Pennsylvania
Indianapolis, IN 46205-3414
(toll free tel.) 800-403-8111
www.internationalinvestigators.com

(This corporation has associates in all free world major cities. If you need a polygraph test done, a witness located or whatever, International can help you with your investigation. Write for more information.)

Legal Aid:

Federal Community Defenders, Inc.

(For the Northern District of Indiana)
227 S. Main St.
Suite 100
South Bend, IN 46601

(For the Southern District of Indiana)
111 Monument Circle
Suite 752
Indianapolis, IN 46204

(This corporation represents federal defendants and habeas corpus petitioners that the court has ordered. They probably won't be able to take

decisions are erroneous; therefore, that the highest appellate court needs to resolve these errors. For example, if a court of appeals court denied you relief on appeal by finding that your trial counsel was effective concerning your ineffective assistance of counsel claim, your "Question Presented on Transfer" would be: 13

69 1. By finding that trial counsel was effective, does the court of appeals' opinion conflict with Strickland v. Washington, 466 U.S. 668 (1984)?

Then, on your "argument" section, you'd transform the question into an argumentative conclusion, e.g.:

Argument

1. By finding that trial counsel was effective, the court of appeals' opinion conflicts with Strickland v. Washington, 466 U.S. 668 (1984)."

If there are other cases that support this argument, you should also include them in the question and argument just like Strickland. Then you should explain how these decisions conflict with your cited cases, e.g. "The court of appeals found that counsel wasn't ineffective for not calling on my alibi witnesses because I still got to testify where I was."(cite the page number of the court of appeals decision where it says that). However, this decision conflicts with Pavell v. Hollins, 261 F. 3d 217 (2d Cir. 2001) where the Second Circuit Court of Appeals held that although the defendant got to testify to support his defense, counsel was still ineffective for not calling on his witnesses because it left defendant's testimony bare and looking self-serving. A jury is afforded an opportunity to question a witness' credibility, U.S. v. Dawson, 857, F. 2d 923, 930 [C.A.3 (PA.) 1988], but by not calling on these witnesses, trial counsel never have the jury the opportunity to weigh the credibility of these witnesses. Strickland holds that prejudice is shown if there is a reasonable probability that the outcome of the proceeding would have been different, which means the error undermines the confidence of the outcome. Is this court honestly able to say that it is confident in the outcome? These witnessed that never got to testify would have told the jury that they knew petitioner could not have committed the crime because they were with him in a totally different town during the fire. This court should therefore grant transfer to resolve these errors."

The key to arguing a case is to have as many cases that are on point with your issues and that were decided more toward the favor of you issues. Litigating my case was difficult for me. I learned the hard way. Prison officials was retaliating against me, and back then I didn't have access to adequate legal research materials and wasn't as experienced as I am now. I wasn't as well informed. It is for this reason why I'm helping you now. I don't want to see what happened to me happen to you. Yeah, I'm still fighting my case as I'm writing this now, but I still have a chance

to prove my innocence and show that I got the shaft. So do you. 14
70 Once you file your legal documents to the state's highest appellate court, it could take any where from 2-6 months to hear back from the court. Again, anticipate a court loss, and start preparing for habeas corpus. Remember, the clock is always ticking against you.

## Chapter 11
## Habeas Corpus. What is it? How do I get started?

The word habeas corpus means "of the body." It's a legal word taken from the Latin language. Habeas corpus is the exclusive federal remedy available to a state prisoner for collaterally challenging a conviction and seeking a speedier or immediate release from unlawful physical confinement. (If you wish to review the historical development of habeas corpus relief read Wright v. West, 505 U.S. 277, 285-90 (1992)). A prisoner petitioning for a writ of habeas corpus, which is our right to do so under the Ninth and Fourteenth Amendments to the United States Constitution, is contesting the legality of detention (see: Presser v. Rodriguez, 411 U.S. 475, 485-86 (1973)), not guilt or innocence. See: Hill v. U.S., 368 U.S. 424, 428-29 (1962)). In some cases, a state prisoner can file a petition of writ of habeas corpus in state court. It just depends if your state constitution grants its citizenry a right to do so. In Indiana, we have this right, so we have the option to file either or both. Federal habeas corpus deals with violations of the federal constitution or laws. State habeas corpus deals with violations of state constitutional rights or laws. In Indiana, a state petition for writ of habeas corpus is governed by Indiana Code SS 34-25.5-1-1. Federal habeas corpus for state prisoners is governed by 28 U.S.C. SS 2254, while different relief for federal prisoners is governed by 28 U.S.C. SS 2255.

Habeas corpus proceedings use to be prisoner-friendly. Now; however, because habeas corpus proceedings was such a powerful weapon, state and federal courts, along with legislators pampering to the public's fear of crime, have established numerous obstacles that stand in our way of justice. Some of these obstacles are extremely complex, such as issues concerning procedural default and exhaustion of state remedies, and confuse lawyers and judges alike. Other obstacles are specifically designed to create a "damned if you do and damned if you don't" situation. For example, if you failed to raise a novel theory of defense at trial, you are deemed to have waived it, but if you succeed in establishing a "new rule," which is favorable to your position, it will not be applied retroactively—in some instances, not even in your case, let alone to that of others. See: Teague v. Lane, 489 U.S. 288, 301 (1989).

Now, habeas corpus proceedings are regulated by the 1996 Anti-

(AzureGreen is a religious materials distributor. Books, jewelry, all kinds of stuff. I recommend getting "Pagans and the Law" by Dana Eilers 35
because it deals with the law and religious issues. Has a lot of good cases in it to cite in court.)

91
The Hit Pointe

540 North LaPeer Rd
Suite 255
Orion Township, MI 48362

(Hit Point sells a lot of fantasy books and play role games like Dungeons and Dragons. These things might help you occupy your time and escape into your own world. Write for a free catalog.)

Amazon.com
1550 48th Street South
Grand Forks, ND 58201-3808

(Amazon.com is an internet company. They can get all kinds of books, magazines, all kinds of stuff. They don't have a catalog, but maybe friends can go on the internet and try to find you some legal materials or other items of interest).

Oceana Publications, Inc.
75 Main St.
Dobbs Ferry, New York 10522

(Oceana was the first name in international legal publishing for over 50 years. They sell a lot of great legal books. Write for a free catalog.)

Loompanics Unlimited
P.O. Box 1197
Port Townsend, WA 98368

(Loompanics sells all kinds of learn-how, self-help, and all kinds of interesting books. Write for a free catalog. It shows the books and tells about what they are. Good stuff.)

Jack L. Marcus, Inc.
5300 W. Fond du Lac Avenue
Milwaukee, WI 53216

(This corporation sells all kinds of prison commissary items. Write for a free catalog.)

There are a lot of different entities that might be helpful to you. I recommend that you obtain these books and information below. After each entry, I'll write a brief explanation on how these entities might be helpful.

Book Companies and Distributors

AK Press Distribution
674-A 23rd Street
Oakland, CA 94612-1163

(These select people sell all kinds of, and publish, radical books, visual and audio media, and other mind-altering material. Write for a free catalog.)

Edward R. Hamilton
Falls Village, CT 06031-5000

(This bookseller has all kinds of interesting books. Write for a free catalog.)

Audio-Forum
1 Orchard Park Rd.
Madison, Connecticut 06443

(This company specializes in selling 295 self-instructional courses in 140 languages. If your prison will allow CD's or tapes, you can learn to speak another language. They provide discounts to prisoners. Write for free catalog).

NOLO
950 Parker St.
Berkeley, CA 94710

(NOLO publishes and sells self-help legal books. They have a very large selection and good deals, including free shipping if you buy at least three books. I recommend getting "Nolo's Deposition Handbook," 2nd Edition, by Paul Bergman and Albert Moore. This book will show you, not only how to do a deposition and ask questions for a witness, but it will help you with objections too).

AzureGreen
48 Chester Rd.
Middlefield, MA 01243

terrorism and Effective Death Penalty Act (AEDPA), which was signed by former President Bill Clinton. With the AEDPA, the old presumption of innocence standard was replaced by a requirement that federal judges must hold a "presumption of correctness" to the state court's factual findings unless a petitioner rebuts this presumption with clear and convincing evidence. See: 28 U.S.C. SS 2254 (e) (1). 15

71 The AEDPA was passed by the Congress in the aftermath of Timothy McVeigh's Oklahoma City bombing, when Democrats sought to grant law enforcement agencies greater leeway to circumvent constitutional rights in the guise of fighting terrorism. This goal, dovetailed with the Republican's effort to make state court convictions in capital cases "effective," resulted in the Anti-terrorism and Effective Death Penalty Act. Both goals are reactionary.

The "effective death penalty" portion of the act was incorporated to essentially eliminate the right to appeal to federal courts because prior to the AEDPA, some 40% of state court convictions was reversed on appeal by the federal circuit court of appeals, largely, according to studies on the subject, because of police misconduct, racism, intimidation of witnesses, falsification of evidence, and ineffective assistance of counsel. A "presumption of correctness"? Some 40%!? Our only saving grace is that state court conclusions of law are not entitled to a presumption of correctness, and it is not as hard anymore in order to appeal to the federal circuit court of appeals after a federal district court denies you relief on a petition for writ of habeas corpus. Still, habeas relief is nearly impossible to obtain thanks to the other provisions of the AEDPA that re-wrote 28 U.S.C. SS 2254.

My stomach is rotting. We have such a tremendous uphill battle before us. Most of us are going to lose our habeas claims because of these appalling hurdles that contradicts the general principles of which our judicial system was founded on. You can thank those victims of crime, their families, every employee in your Department of Correction, businesses providing products for state prisons, and those politicians who will do anything for a vote. We are big business to these people. Their over exaggerations, misleading motives and lies, and their sadism and vindictiveness are why these things are happening to us. These people don't care about us. They don't care that we are innocent or that we might have evidence that would create a reasonable doubt of guilt. By keeping us locked up and keeping their wrong-doings hush-hush, they perpetuate their own existence and continue to feed off their sadism by seeing us suffer. We are caught in their web.

So if it's like this, then why should we file a petition for writ of habeas corpus? Well, for one reason, it's the last chance we have to overturn our conviction(s) or sentence. Some of us might be able to walk through this web. Some of us might be able to see through this matrix and

manipulate the procedure. Some of us might be able to convince these 16
federal judges that our rights were violated. Because it still gives us that little hope—that small chance that we can be free again and be in the arms of our loved ones. That's why, damn it! To hell with it! If anything, we should file this petition just to cost them tax-payer dollars and their time. They took our time, so let's take some of theirs. Let's do it!

72 Which should we file—federal or state habeas corpus? Assuming that you have a state procedure for habeas corpus relief, you should file a petition, raising the grounds of only state law violations. Then provide your factual allegations to support your ground. Remember, you still cannot raise new issues on your state petition that you did not argue and raise in your district appeal and post-conviction proceedings unless your state laws create an exception. You should get an "annotated" copy of your state statutes or other laws dealing with your state habeas remedy so you can see exactly what you're up against. From what I've read on Indiana's state habeas procedures, I don't see how anyone gets granted a writ, but still, they do. (I'm working on mine now while I still have my federal petition pending. Hopefully, by the time this book is distributed to you, I'll be free, and hopefully, after reading this book you'll be set free too). Just make sure that you request an evidentiary hearing and the appointment of counsel in your state petition for writ of habeas corpus. Your law library should have blank petitions for you to fill out, which you may have to modify a little, but make sure you put it in your requested relief that you want an evidentiary hearing and the appointment of counsel. If these things are denied, then they will help you on your federal habeas claims and on your state appeal concerning any denial of your state petition for writ of habeas corpus.

But some of us may have no choice to go federal. Remember, if you're a state prisoner, your petition will be governed by 28 U.S.C. SS2254. If you're a federal prisoner, relief will be governed by 28 U.S.C. SS 2255. Remember you still have filing deadlines too.

Your law library should have blank petitions for you to fill out for pursuing your petition for writ of habeas corpus in federal court. You need to get one. If your law library doesn't have one, contact your United States District Court that would have jurisdiction over your claims, explain that your law library doesn't have the blank petition forms, and that you need one. If you don't know their address, contact your Public Defender's office for the address. You might want to try to get a blank petition form from them too.

Filling out the petition will be nearly alike what you did with your post-conviction petition. You'll see some of the same questions concerning your case, etc., but you need to fill out, copy it, and mail it out to the federal court as soon as possible. One of the hurdles the AEDPA placed on habeas corpus procedures was that it established a one-year

App. 1990). If the court denies your motion, the decision becomes a final judgment or order, which means you can appeal the decision to your state appellate court. On such an appeal, you will have to convince the appellate court that the lower court abused its discretion because its decision goes against the logic of the facts and circumstance put before it. Some 33
circumstances might be that the decision violates the state's or United States Constitution somehow. Maybe the lower court treated you differently than other similarly-situated prisoners? This would be a violation of equal protection of the law. If the appeal is denied, then pursue it t o the state's highest court. If you lose there, then you can file another motion in the trial court and repeat the whole process all over again.

89 This might be a stretch, but you might want to contact a recruiter from one of the branches of the military. They might be able to help you get out and under their care in exchange for your service. Under "meritorious cases," a convicted felon can join the military. See: 10 U.S.C. S.S. 504. If you can't find an address, the address to the Veteran Department of Affairs is listed in the resource list following this chapter.

For any other remedies, you should write your Public Defender's Office in order to see if there are any other avenues you can take in order to get out of prison. Keep in mind that the law is ever-changing, so more remedies may become available. Others may change. But it's going to be up to you in order to make use of them, and I pray that you do



Collins, 506 U.S. 390 (1993). In this case, the U.S. Supreme Court heard Herrera's claims. After ten years while serving his sentence, he filed a 32 federal habeas petition to challenge his murder conviction based on newly discovered evidence. The newly discovered evidence? Affidavits written by his dead brother, sating that it was he, and not Herrera, who had committed the murder. Herrera, 506 U.S. at 393-98. Herrera argued that the affidavits proved that he was "actually innocent." The U.S. Supreme Court; however, stated that because he had already been convicted, that the presumption of innocence no longer applies, Id. at 399, and that his only remedy would be to request for executive clemency in order to be set free on newly discovered evidence. Id. at 411-12. The U.S. Supreme Court held that a claim of actual innocence based on newly discovered evidence is not an issue that is cognizable for federal habeas corpus relief absent an independent constitutional violation in the underlying criminal proceeding that resulted in the prisoner's conviction. Herrera, 506 U.S. at 400. If you have newly discovered evidence, you could either file for clemency with your state governor or with the President of the United States, or you could present this evidence in a successive petition for post-conviction or habeas corpus relief, and allege that trial counsel was ineffective for not investigating or obtaining evidence.

88 Petitioning for clemency to your state governor is usually done by submitting a petition to the state's Parole Board. The law library will have these forms available, and in most cases, you can only uses these forms. Filling out the petition based on newly discovered evidence would be considered a reprieve. Requesting a pardon cannot be done until after you serve your whole sentence or submitting a request to the President of the United States. If you don't' have any newly discovered evidence, then the clemency that you will request will be for a commutation of sentence. Going this route; however, you won't be able to file for clemency immediately. Laws mandate at what and which time you can file for clemency when requesting a commutation of sentence. Depending on what you wish to do, you should review the annotated versions of federal and your state law governing such requests for clemency or presidential pardons. Keep in mind that these requests are rarely granted, as they are mostly considered and granted as an act of grace and mercy.

You may also file a motion in the court that sentenced you to a term of incarceration, requesting a reduction or suspension of your sentence. State laws govern what steps must be taken in order to obtain such relief. For example, Indiana State law mandates that you must first obtain the prosecutor's approval to file such a motion so the trial court will have the jurisdiction to hear it. See: e.g., Beanblossom v. State, 637 N.E. 2d 1345 (Ind. Ct. App. 1994). Once the trial court that sentenced you has jurisdiction, its decision to reduce or suspend a sentence becomes discretionary. See: e.g., Marshall v. State, 563 N.E. 2d 1341, 1343 (Ind. Ct.



limitation on being able to file a petition once your state remedies was exhausted. The clock begins to run from the latest date of the following:

73 (1) the final judgment on direct review or "the expiration of the time seeking such review," which deals with your direct appeal after your jury trial or bench trial. See: 28 U.S.C. SS 2244 (d)(1)(A) (2000);

(2) A removal of any state-imposed action that unconstitutionally prevented the filing of such a petition, which is like when a prison official doesn't give you legal materials and then you are placed into a different prison on a certain day where you are given legal materials to file a petition. See:28 U.S.C. SS 2244(d)(1)(B) (2000);

(3) A United State Supreme Court recognition of a new, retroactively applicable constitutional right. See:28 U.S.C. SS 224(d)(1)(c) (2000); or

(4) Where the new facts supporting your claims "could have been discovered through the exercise of due diligence." See:28 U.S.C. SS 2244 (d)(2); Artuz v. Bennett, 521 U.S. 4,8,11 (2000). The clock stops when other collateral review is pending too. See: e.g., Currie v. Matesanz, 281 F.3d 261, 266-67 (1st Cir. 2002) (limitation tolled while motion for new trial pending).

Federal Courts have jurisdiction to hear a petition for writ of habeas corpus if the confinement is the result of a violation of federal law. federal law. See: 28 U.S.C. SS 2241, 2254 (2) (2000). You should file the petition in the federal United States District Court for the district in which you are incarcerated. The only exception is if you're a prisoner in the District of Columbia, whicl such prisoner cannot file a petition in federal court unless he or sh first brings a post-conviction claim before the District of Columbi court that imposed the sentence. See: D.C. code Ann. SS 23-110 (g) (1981). Unless that local remedy is inadequate or ineffective t test the legality of detention, the District of Columbia prisoner cannot seek federal habeas corpus review. See: Swain v. Pressley 430 U.S. 372, 378 (1977).

Once you get your blank petition, look at the first page of the petition. At the top of the page it should read something like, "Petition under 28 U.S.C. SS 2254 For writ of Habeas Corpus by person in state custody." You'll see some empty boxes entitled "name" and "docket or case No." All other boxes should be self-explanatory, but with the box entitled "name" put your full legal name verses the name of the top prison official, usually the warde or superintendent, whose prison you're incarcerated in. For example, "Eric D. Smith v. Craig Hanks." This will be the case title for your petition. Leave the docket or case number box

empty. Don't put any of your past case numbers in the box. When the United States District Court Clerk receives your petition, he or she will put a totally different and new number in the box. You'll find out what it is later. In the habeas proceeding, you'll be known as the "petitioner" and the warden or head prison official of your prison will be known as the "respondent." After you fill these boxes out, start answering the questions in the blank petition. 18

74 Eventually, you'll come to a question asking you if you sought review from the state's highest court. If you did, mark yes. If you didn't, but tried to, mark no, but explain exactly why you didn't, e.g., "I tried to, but the prison officials wouldn't give me any legal and writing materials because they was retaliating against me for my filed grievances. Then, I missed the state's deadline governed by Ind. Appellate Rule 57c because of this. When I did get the needed materials, I tried to submit my issues to the highest court, but they wouldn't accept it even though I told them why I missed the deadline; therefore, this action is a necessity. Here are some grievances I filed about not getting any supplies, which I wrote after I finally got some, and when I missed my deadline date. See: Exhibit No. 1)."

The reason why the petition asks you this question is so the District Court knows whether your petition is barred by the Exhaustion and Procedural doctrine. In general, a federal court may only grant habeas corpus relief to a state prisoner who has exhausted all state remedies. See: 28 U.S.C. SS 2254 (b)(1)(A) (2000). State remedies are not exhausted until a prisoner utilizes all procedures available under state law to raise its claims. See: 28 U.S.C. SS 2254 (c). Under the exhaustion requirement, the prisoner must present the substance of its claims to the state court to allow those courts a fair "opportunity to apply controlling legal principles to the facts bearing upon [its] constitutional claim." Picard v. Connor, 404 U.S. 270, 276-77 (1971). Because of this, this is why you must make such an explanation to District Court in your petition; otherwise, it will be dismissed pursuant to this doctrine right after the court reviews it. If you have to, re-write the page so you can put your explanation in it.

Putting such an explanation will prevail because there are ways to get out of the exhaustion and procedural default doctrines. Such explanation is an example of "cause and prejudice." "Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus (sic) absent a showing of cause and prejudice to excuse the default." Dretke v. Haley, 124 S.Ct. 1847, 1849 (2004). The federal courts may disperse with these doctrines in other exceptions too:

we get out of prison? What if I have a lot of time or life in prison? Is this the end? 31

87 No, not necessarily. You still have a chance (or chances) to get out of prison. Remedies are still available, even for you lifers.

The first thing; however, which will be difficult, is to keep a clear disciplinary record. The best way to do this is just to sit back in your cell and keep quiet. If someone is driving you nuts, ignore them. Question just looking for an excuse to release my anger? Try to understand the person upsetting you. Look at his or her perspective. This may help calm you down. Don't get involved in any prison gangs. Write, read, listen to a radio. Do something to keep focused. Keeping a clear disciplinary record will only help you down the road. Try to stay in the shadows, and as much as you may hate it, just do whatever the correctional officer tells you to do, as long as the order is lawful, and according to prison policy and procedure. Do it, and get it over with so both of you can get on with your day.

Maintaining a clear disciplinary record will help you in many ways. First, is the obvious: The prison officials won't be able to deprive you of any earned credit time. Second, it will help you gain entry to rehabilitative programs, such as educational or vocational programs that might entitle you to some time cuts and reduction of your imposed sentence. Third, any motions for a sentence modification that you wish to file with a court, etc., will look reasonable if you have a clear or pretty good disciplinary record.

Really, there are still a lot of things to do in order to get out of prison without having to break any laws. If you still feel you have grounds to fight your conviction and sentence, then you still have the possibility to apply for a successive petition for post-conviction relief or a successive petition for a writ of habeas corpus. Your law library should have the blank forms available for you to fill out. Make sure you read over the annotated version of the rules governing such remedies, and seek assistance from a law clerk or dependable jailhouse lawyer when filling out the blank forms. If you can, obtain some self-help legal books dealing with these issues. Check out the resource list following this chapter.

Remember in chapter 11 how we discussed a little about procedural default and newly discovered evidence? About why you want to claim ineffective assistance of counsel for its failure to introduce, investigate, and obtain the evidence for trial? Well, if your issues failed or you just now obtained the evidence, then you want to read when filling out the blank forms. If you can, obtain some self-help legal books dealing with these issues. Check out the resource list following this chapter.

Remember in chapter 11 how we discussed a little about procedural default and newly discovered evidence? About why you want to claim ineffective assistance of counsel for its failure to introduce, investigate, and obtain the evidence for trial? Well, if your issues failed or you just now obtained the evidence, then you want to read Herrera v.

known witnesses to support his testimony and defense was prejudicial. New trial warranted). 30

86 "But even then, petitioner need not show with a 100% certainty that he is "actually innocent." See: House v. Bell, 126 S.Ct. 2064 (2006). House makes clear that a state procedural default may be overcome by introducing evidence on habeas corpus that makes it likely that a new jury, hearing the missing evidence, would have a reasonable doubt as to petitioner's guilt. Trial counsel wholly failed to do this by not presenting this evidence.

"As explained in Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1034, 154 L.Ed 2d 931 (2003), resolution of the grounds raised is debatable among jurists and different courts, particularly our United States Supreme Court, could resolve the grounds in a different manner. As such, a certificate of appealability should issues in this matter since denial of petitioner's S.S. 2254 presents questioning deserving encouragement to proceed further. Additionally, when this court is in grave doubt, it can issue a certificate of appealability. See: e.g., Soffar v. Johnson, 237 F. 3d 411 460 (5th Cir), reh'g granted, 253 F. 3d 227 (5th Cir. 2000).

"Because petitioner has made such a substantial showing of the denial of Federal constitutional rights and jurists of reasonable minds would find it debatable as to the District Court's resolutions of the petition for writ of habeas corpus, the court should issue a certificate of appealability for an appeal to the United States Court of Appeals."

As you can see, it's not going to be easy. You must be detailed and persuasive. If the District Court still denies you a grant of a certificate of appealability, you may either file a notice of appeal within the thirty days of the judgment of the denial and appeal to the United States Court of Appeals of your jurisdiction, raising the question whether the District Court erred when it refused to issue a certificate of appealability on your grounds [See: e.g. 28 U.S.C. S.S. 1291, 2253 (2000)], which is a final order not requiring a certificate of appealability, or you can file a motion directly with the United States Court of Appeals in your jurisdiction, which is the favored method. [See: e.g., Lozada v. U.S., 107 F. 3d 1011, 1017 (2nd Cir 1997)]. From there, you'll see what fate has in store for you.

And this, my friends, is what habeas corpus is.

## Chapter 12
## Other ways to try to get out of prison.

Maybe you can't get your case overturned. You tried, but you fell short some how. So justice failed us. This is our judicial system. Is it all about population control, money, and job security? Are these law makers and others perpetuating their own existence? Yet, they are the ones in control, advocating and praising this so-called system of justice. So how else can

(1) When further state litigation would be "futile." Federal courts determine the futility of seeking a state remedy based upon the totality of 19 circumstance surrounding each petition. See: e.g., Szuchon v. Lehman, 273 F.3d 299, 323 (3d Cir. 2001) (requirement not excused because petitioner failed to meet it despite ample opportunities to do so and could not return to state court and show cause to overcome default); Grey v. Hoke, 933 f.2d 117, 120 (2d Cir. 1991) (requirement excused because claims would be deemed procedurally barred if presented in state court); Gardner v. Pitchess, 731 F.2d 637, 640 (9th Cir. 1984) (requirement excused because it was clear state court would not reinstate petitioner's appeal);

(2) For procedural defaults, e.g., missing a deadline establishes by an appellate rule: "showing cause for the procedural default and actual prejudice as a result of the alleged violation of federal law," which we saw a little abuse in Dretke. See: Coleman v. Thompson, 501 U.S. 722, 750 (1991) (Coleman court establishing the cause and prejudice standard). A petitioner can satisfy the "cause" requirement by showing that "some objective factor external to the defense impeded defense counsel's efforts to comply with the procedural rule," Murray v. Carrier, 477 U.S. 478, 488 (1986); see: e.g., Castellanos v. U.S., 26 F.3d 717, 719 (7th Cir. 1994) (default excused because counsel's failure to appeal as requested by petitioner was ineffective assistance), that the "factual or legal basis for a claim was not reasonably available to counsel," Carrier 477 U.S. at 488; see: e.g., Gayle v. Mann, 966 F.2d 81, 84 (2d Cir. 1992) (cause shown when petitioner learned after incarceration that pre-sentencing report was incorrect), or that "government interference rendered procedural compliance impracticable." Carrier, 477 U.S. at 488; see: e.g., Johnson v. Champion, 288 F.3d 1215, 1228 (10th Cir. 2002) (state court clerk's failure to certify copy of order and to timely transmit

76 record constituted sufficient to excuse default). To establish "prejudice," you must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of 20 constitutional dimensions." See: U.S. v. Frady, 456 U.S. 152, 170 (1982); And

(3) If more of these things work or relate to you, before you file the petition you can try to get the state attorney to waive exhaustion requirement. See: 28 U.S.C. SS 254 (b)(3) (2000). If you convince the state to waive the requirement, attach the letter to the petition, and let it be known that the state waived the requirement.

If more of this is possible, then explain in the petition that the failure to grant sought relief "would work a fundamental miscarriage of justice." A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Thomas v. McCaughtry, 201 F.3d 995, 999 (7th Cir. 2000) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986) (additional internal citations omitted)).

Obviously, for an example of "a constitutional violation," you'd state that the constitutional violation was your Sixth Amendment right to effective counsel, but because counsel violated this right by making the errors he or she did, your conviction is of "one who is actually innocent" because had counsel not erred, there is a reasonable probability that the outcome would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 446 U.S. 668, 694 (1984) (emphasis added). If you have DNA tests, polygraph tests, or other evidence establishing you innocence, mention that too and attach any copies of the evidence to the petition as an exhibit.

Next we are going to come across the question asking you what are the grounds that your petition for habeas corpus is based upon.

85 "Petitioner's S.S. 2254 petitions raises a substantial showing of the denial of federal constitutional rights because the District Court clearly 29 erred when it found all grounds procedurally defaulted, because the record shows that petitioner did identify his claims of ineffective assistance of counsel to the state courts, and that he couldn't appeal timely to the state's highest court because prison officials purposely kept petitioner from doing so. In Slack v. McDaniels, 529 U.S. 473, 484-85 (2000), the U.S. Supreme Court held that a dismissal of a habeas petition on procedural grounds does not bar the issuance of a certificate of appealability. The circumstances of this case justify such an issuance because the U.S. Supreme Court held that procedural defaults may be waived by a showing of cause for the default, occurring when governmental interference rendered procedural compliance impracticable. See: Murray v. Carrier, 477 U.S. 478, 488 (1986). Because the court's judgment denying petitioner's grounds based on procedural default is debatable, a certificate of appealability should issue.

"Further, factual findings by the District Court are reviewed for clear error by a Court of Appeals. See: e.g., Davis v. Litscher, 290 F. 3d 943, 946 (7th Cir 2002); Flores v. Demskie, 215 F. 3d 293, 300 (2d Cir. 2000); Cradle v. U.S. ex rel. miner, 290 F. 3d 536, 538 93d Cir. 2002) (per curiam). However, even though such findings are reviewed for facts that are clearly erroneous, finding s of counsel's performance and prejudice to defendants are mixed questions of law and fact; therefore, they are not entitled to a presumption of correctness. Strickland v. Washington, 466 U.S. 668, 669 (1984). Here, petitioner had alibis that never got to testify, his trial attorney made numerous errors, and petitioner has evidence, not only showing some of the state court's facts clearly erroneous, but that the prosecution falsified evidence during his jury trial. This all resulted from the constitutional violation of the Sixth Amendment's right to effective counsel, thus a fundamental miscarriage of justice occurred. A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986) (emphasis added). In Strickland v. Washington, 466 U.S. 668, 694 (1984), the U.S. Supreme Court held that a showing of prejudice from counsel's errors is met by showing "there is a reasonable probability, but for counsel's professional errors, the result of the proceeding would have been different." A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (emphasis added). This "probability" and conviction that "probably resulted in one who is actually innocent" is exampled in U.S. v Young, 17 F. 3d 1201, 1203 (9th Cir 1994) where a new trial was warranted by post-trial discovery of prosecutor's use of officer's false testimony, including its use in closing argument, because a new trial would probably have a different outcome. See also: Pavell v. Hollins, 261 F. 3d 217 (2nd Cir. 2001) (Although defendant testified, counsel's error for not calling on

see anyone die, and it's a sad part of our judicial system. Are we just unrepairable? Even junk cars can be restored to beauty and use. Please, never give up.

28

84 If your petition for writ of habeas corpus is dismissed, you have only thirty days to file your notice of appeal with the District Court. You should get all the blank forms from your law library or District Court. You also must petition the District Court for a "certificate of appealability" that makes a "substanting showing of the denial of a constitutional right" as to why you should be able to appeal the dismissal. See: 28 U.S.C. S.S. 2253 (c) (2) (2000). This is difficult to do, and the United States Court of Appeals will only review the claims on which the District Court granted a certificate of appealability for.

However, if you feel the dismissal was wrong, you have ten days to file a motion to alter or amend the judgment of the dismissal, pursuant to 28 U.S.C. S.S. 2254, Rule 11, Rule 59 (e), Fed. R. Civ. Pr.

Rule 59 (e) "authorizes relief when a moving party 'clearly establish[es] either a manifest error of law or fact' or present[s] newly discovered evidence.'" Souter v. International Union, 993 F. 2d 595, 599 (7th Cir. 1993) (quotation omitted). The purpose of the motion to alter or amend judgment under Rule 59 (e) is to have the court reconsider matters "properly encompassed in a decision on the merits." Osterneck v. Ernst and Whinney, 489 U.S. 169, 174 (1988). The Seventh Circuit Court of Appeals for the United States held that there are only three valid grounds for a rule 59 (e) motion—newly discovered evidence, an intervening change in the law, and manifest error of law. See: Cosgrove v. Bartolotta, 150 F. 3d 729, 732 (7th Cir. 1998). If you can't possibly draft and mail the motion to the District Court, then the motion can be deemed filed on the day that you dated your motion, which is a lot more favorable than the prison mailbox rule. See: Jones v. Bertrand, 171 F. 3d 499 (7th Cir. 1999).

If you still can't file or date your motion within the ten day limit, then you can file a motion to relieve yourself from a judgment or order, pursuant to 28 U.S.C. S.S. 2254, Rule 11, Rule 60 (b), Fed. R. Civ. Pr. Your grounds for filing such a motion must either be based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or any other reason justifying relief from the operation of the judgment. See: Talano v. Northwestern Med. Faculty Found., Inc. , 273 F. 3d 757, 762 (7th Cir. 2001). But this motion is an extraordinary remedy that is to be granted only in exceptional circumstances. Still, you should file all your appeal documents and try to obtain a certificate of appealability while these motions are pending. Again, the blank motions to fill out to the District Court or Court of Appeals, if the District Court denies to issues a certificate of appealability, can be obtained from your law library or District Court. An example of how to make a "substantial showing" for the issuance of a certificate of appealability is as follows:

77 Federal courts may entertain a petition for writ of habeas corpus only on the grounds "that the conviction and sentence violates the U.S. constitution, laws or treaties of the United States." See: 28 U.S.C. SS 2241 (c)(3) (2000); Id., SS 2254 (2) (2000). If you know which specific constitutional Amendments, federal laws or treaties of the United States, then you will write them in as your ground. For example, if your claiming that your trial counsel was ineffective, you write this as your ground:

21

"That the conviction and sentence was in violation of the Sixth Amendment to the United States Constitution."

Now, in your factual allegations, you'd state how trial counsel was in violation of the Sixth Amendment by stating the exact acts he committed that amounted to ineffective assistance of counsel. For exampte, you'd write:

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

(1) (State all your identified acts)."

Number eacn identified act of error by its own separate paragraph. If there are seven errors, you should have seven numbered paragraphs. Also, if a state court decided a ground that you're arguing in your habeas corpus petition, a federal court may only grant relief if the state decision was:

(1) Contrary to, or involved an unreasonable application of Supreme Court precedent; or
(2) Based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. See: 28 U.S.C. SS 2254 (d)(1)(2); Early v. Packer, 537 U.S. 3, 7-8 (2003).

Because of this you should choose which if the abuse factors apply to you. Generally, you should state this at the end of your factual allegations. You should also prepare a memorandum of law supporting these allegations, and file it simultaneously with your petition, which will be sectioned off by Roman numerated paragraphs, which will be:

I. Introduction (this opening paragraph should explain to the federal court the nature of your case, explaining the relief you are seeking);
II. Statement of facts (this following section should state the facts that are relevant to all your claims);
III. Standard of Review (this section should explain how the federal court must review your claims by citing legal cases and statutes for the court guidance);
IV. Analysis (this section should lay all your arguments down, applying United States Supreme

78

Court and federal law to the facts of your case and claims); and

V. Conclusion (this section will briefly state that for all the foregoing reasons stated in your other sections, that the federal court should grant you relief).

A state court decision is contrary to U.S. Supreme Court's clearly established precedent if it applies a rule that contradicts the governing law set forth in its cases, or if it confronts a set of facts that is materially indistinguishable from a decision of the U.S. Supreme Court but reaches a different result. A state court decision involves an unreasonable application of the U.S. Supreme Court's clearly established precedent if the state court applies such precedent to the facts in an objectively unreasonable manner. See: Brown v. Payton 544 U.S. 131, 141 (2005).

If preparing a memorandum in support of your petition for writ of habeas corpus would cause you to miss your filing deadline, then file your petition without it. You can file the memorandum later in reply to the state's answer to your filed petition. Remember, though, that you have the burden of proof to show that the application of federal law was unreasonable. See: e.g., Harding v. Sternes, 380 F.3d 1034, 1043 (7th Cir. 2004). Also, you bear the burden of rebutting the presumption of correctness of the state's factual issues by "clear and convincing evidence." See: e.g., Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000); 28 U.S.C. SS 2254 (e)(1).

So what are the cognizable issues for a petition for writ of habeas corpus to challenge my criminal conviction in the state, and how do I argue all of this in my memorandum?

Well, first, write to your Federal Community Defender's office. Each district court and state has one, and this is where your attorneys will come from if the district court appoints you counsel. As you write them, explain your grounds and supporting facts, and ask them if they can supply you with some briefs that they've done before dealing with your claims. They may or may not be able to provide them to you. But you have nothing to lose by asking. Their mailing address can be found in your state's legal directory, usually up in the front of the directory under the government sections. Their address will be in small print, but it's there, so look hard. Both of Indiana's Federal Community Defenders' office's addresses are listed in the resource list in the back of this book. If you're not from Indiana, you might want to write them if you cannot locate your state's federal community defender's office. They may be able to provide you with the contact addresses that you need.

Cognizable issues for your petition are as follows:

(1) Violations of the constitution, laws, or treaties of the United

still a long way to go, and when the state files its answer, and a reply is filed in response to that answer, is where most of us lose on the merits of our claims. But, if the District Court finds the state's answer unpersuasive, it will either grant you relief or hold an evidentiary hearing for further review. If an evidentiary hearing is scheduled, file a motion pursuant to 28 U.S.C. 2254, Rule 8 cc), and move the District Court to appoint you counsel.

83

If you have been given the death penalty, you are entitled to have your death postponed while any petition for writ of habeas corpus or appeal from the denial of such petition is pending. You can file a motion with either the federal court or your United States Court of Appeals. See: 28 U.S.C. S.S. 2262 (2) and 28 U.S.C. S.S. 2251 (2000). If all else fails you should try to obtain a successive petition for post-conviction relief or petition for writ of habeas corpus, and obtain another stay concerning your death. See: 28 U.S.C. S.S. 2262 (c). To try to obtain a successive petition for post-conviction relief, consult with your state rules for post-conviction procedure. To obtain a successive petition for writ of habeas corpus, obtain the "annotated" version of 28 U.S.C. S.S. 2244 (b). See also: Felker v. Turpin, 518 U.S. 651, 657 (1996). Your last resort would be to file a 42 U.S.C. S.S. 1983 federal lawsuit against your state governor and prison warden or superintendent, whoever is the facility head, and allege that the defendants are maliciously and with deliberate indifference, while acting under the color of state law, depriving you of your protections against cruel and unusual punishment and equal protection of law as spelled out in the Eighth and Fourteenth Amendments to the United States Constitution of America. Allege that the Governor and the Facility Head are using procedures concerning execution that "cause, inflict, and subject" you to pain and suffering. File a motion for a preliminary injunction, requesting an emergency postponement of your execution until the merits of your lawsuit have been resolved. Remember; however, that if the federal civil court grants you the stay, that you still have the burden to prosecute the claims to your lawsuit. File as many motions as you can in order to delay, e.g., motions for discovery requests pursuant to Rule 33 and 34, Fed. R. Civ. Pr., requesting the chemicals used in the execution, a copy of the procedures, and the qualifications of the person administering the execution—anything you can think of. Then request appointment of counsel. Ask the federal civil court to stay the prosecution of your case for a year so you can try to write attorneys in order to obtain representation. Once you run out of ideas to delay, if the state hasn't already done so, file for summary judgment. If your case is dismissed, try to obtain leave to file an appeal. Request another stay of execution with your United States Court of Appeals. Remember to re-read Chapter 3 of this book, too. A properly filed lawsuit can give you at least two years delay, maybe longer, on your execution. If you are unsuccessful, I am truly sorry for you. I don't want to

evidence and alleged ineffective assistance during your state proceedings, but the state courts found counsel was not ineffective, then you should 26 remind the District Court that determinations of counsel's performance and prejudice are mixed questions of law and fact; therefore, the state court conclusions are not presumed to be correct. Strickland v. Washington, 466 U.S. 668, 698 (1984). Remember, you have a constitutional right to present a complete defense, see: e.g., Holmes v. South Carolina, 164 L. Ed. 2d 503, 509 (2006), and that counsel's error and the evidence not being heard denied you this right. A reasonable probability for a jury to find your guilty is a probability that undermines confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694. Because a jury can only find you guilty beyond a reasonable doubt, this missing evidence provides such a probability and basis for a new trial or actual freedom. But remember, you still must argue and show that the state court's decision was "contrary to, or involved an unreasonable application of" federal law clearly established by the Supreme Court [28 U.S.C. S.S. 2254 (d) (1) (2000)]. or "based on an unreasonable determination of the facts." [28 U.S.C. S.S. 2254 (d) (2) (2000)]. To argue that the state court's factual determinations should not be presumed correct requires that you show that they are erroneous by "clear and convincing evidence." See: 28 U.S.C. S.S. 2254 (e) (1) (2000). Presumptions of correctness do not apply to factual determinations that are not fairly supported by the record of your case. See: e.g., Meyers v. Gillis, 142 F. 3d 664, 666 (3d Cir. (1998); Torres v. Prunty, 223 F. 3d 1103, 110 (9th Cir. 2000).

82 In a habeas corpus proceeding you are not entitled to the appointment of counsel unless you have been given the death penalty (See: 21 U.S.C. S.S. 848 (q) (4) (B) (2000). Otherwise, the District Court can appoint counsel when its necessary to utilize discovery [See: 28 U.S.C. S.S. 2254, Rule 6 (2)] or when the "interests of justice" so require. [See: 18 U.S.C. S.S. 3006 A (2) (2) (B) (2000)]. However, the District Courts will only appoint counsel in the "interests of justice" when a prisoner is illiterate or can not in any way prosecute the claims. Things to this nature, so basically if you're competent and have access to legal materials, you won't be appointed counsel in order to help prepare your petition for writ of habeas corpus or to file a reply to the state's answer to your petition. Nonetheless, You hare still constitutionally entitled to access to an adequate law library or the aid of persons trained in the law when preparing your petition. (See: Bounds v. Smith, 430 U.S. 817, 821-28 (1977) (plurality opinion). If you're proceeding in your habeas proceeding as an indigent, you are also entitled to obtain needed documents or portions of the record without cost. See: 28 U.S.C. S.S. 2250 (2000).

Once you file your petition, and the District Court does not dismiss the petition upon its initial review, the District Court will order the State to answer your petition. See: 28 U.S.C. S.S. 2254, Rule 4. Don't expect victory because of this. Your head is only through the window. There is

79 States. See: 28 U.S.C. SS 2241 (c)(3) (2000); 28 U.S.C. SS 2254 (2) (2000); and

(2) Violations of state law. 23

For the first issues dealing with the constitution, laws, or treaties of the United States, relief for federal law violations 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)). District courts reach different conclusions when deciding such alleged violations. Compare, e.g., Sanna v. Dipaolo, 265 F.3d 1, 12 (1st Cir. 2001) (confusing jury instruction was not cognizable because it did not betray fundamental principle of justice) with Taylor v. Withrow, 288F.3d 846, 851 (6th Cir. 2002) (failure to instruct jury on self-defense was cognizable because betrayed fundamental principle of justice).

With the second issue of violations of state law, you have to show that the violation was of "constitutional magnitude." This is because the United States Supreme Court has held that it "is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). See also: Pulley v. Harris, 465 U.S. 37, 41 (1984). Because of this, your factual claims of violations of state law should be supported for a ground that your conviction and sentence was in violation of the United States Constitution of America. In most cases, these are the Sixth and Fourteenth Amendments to the United States Constitution. Remember American Ry. Express v. Kentucky? If a state law or rule gives you a right, 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). When analyzing such claims of state law violations, federal courts should 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 or injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623 (quoting Kotteakos v. U.S., 328 U.S. 750, 756 (1946)). The up-shot in this is that you should allege that your state law rights was arbitrarily violated and/or that the violations had a substantial and/or injurious effect. You should then explain how.

Most state law violations occur when the state excludes evidence or unreasonably applies state hearsay laws to prevent favorable testimony. Such violations are always of constitutional magnitude and fundamentally unfair, thus, cognizable as the Supreme Court stated:

"Whether rooted directly in the Due Process Clause of the
80 Fourteenth Amendment or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'." 24

Holmes v. South Carolina, 164 L.Ed. 2d 503, 509 (2006).

In addition, federal courts have ruled that the compulsory process clause of the Sixth Amendment was violated when state courts refused to admit hearsay that was material to a defense. See: e.g., Gray v. Klauser, 282 F.3d 633, 649 (9th Cir. 2002). This is considered a violation that is of constitutional magnitude because a state court cannot rigidly apply otherwise valid rules if their application to a specific case would abridge the defendant's compulsory process rights. Thus, in Chambers v. Mississippi, 410 U.S. 284, 300-02 (1973), the U.S. Supreme Court Upheld that the defendant was denied a fair trial when the state court mechanistically applied state hearsay laws and excluded witnesses' reliable self-inculpatory statements that exonerated defendant. Specifically, the Supreme Court held:

> When "constitutional 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.

Common cognizable issues, which research has shown, include Sixth Amendment claims ineffective assistance of counsel (see: Strickland v. Washington, 466 U.S. 668, 687 (1984) to review what you must show); claims of improper conduct by the prosecutor (see: e.g., Kyles v. Whitley, 514 U.S. 419, 453 (1995) (due process violated because state prosecutor suppressed exculpatory evidence, that if disclosed, could reasonably altered result of proceeding) and Brady v. Maryland, 373 U.S. 83, 87 (1963) (due process violated if (1) defense requests suppressed material, (2) prosecution suppresses such material favorable to defense upon request, and (3) material is relevant to guilt or punishment); claims of improper conduct by a judge (see: e.g., Herrera v. Collins, 506 U.S. 390, 411 (1993)); Fifth Amendment claims of statement obtained by police in violation of your Miranda rights in Miranda v. Arizona, 384 U.S. 436 (1966) (see: Withrow v. Williams, 507 U.S. 680, 688-93 (1993) (violations of Miranda rights protecting defendants Fifth Amendment rights are violations of due process; therefore, they are cognizable in federal habeas corpus proceedings)); and claims of insufficient evidence. (see: Jackson v. Virginia, 443 U.S. 307 319 (1979) to habeas corpus relief is granted on this claim).

If you have a Fourth Amendment claim concerning evidence that was used against you stemming from an unconstitutional search and seizure, and the state courts provided an opportunity for full and fair litigation on your claim, federal courts will not grant you any relief. See: Stone v. Powell, 428 U.S. 465, 481-481 (1976). But if the state courts didn't do so, federal courts can grant you relief. Still, if the state courts did give you a full and fair hearing on your claim, you can still insert the violation by including it in your ineffective assistance of counsel allegations by alleging counsel's representation was deficient performance3 in litigating the Fourth Amendment claim, which the federal courts will have to hear. See: Kimmelman v. Morris, 477 U.S. 365, 375-76, 382-83 (1986). 25

Are you actually innocent and have newly discovered evidence to prove it? There are two things to do.

81 First, you should request an evidentiary hearing because claims of actual innocence based on newly discovered evidence are not cognizable unless you can show an independent constitutional violation in your criminal proceeding that led to your conviction. See: Herrera v. Collins, 506 U.S. 390, 400 (1993). You then want to tie this evidence into an ineffective assistance of counsel claim, alleging that counsel's representation was deficient performance by failing to investigate and inquire about the evidence that you discovered and obtained. Of course, your claims will be procedurally defaulted, and the state attorneys will argue this, but there is an exception to the default—"Actual innocence." See: Schlup v. Delo, 513 U.S. 298 (1995). This is why the District Court must hold an evidentiary hearing.

Second, you must make the proper arguments in your reply to the state's answer to your petition for writ of habeas corpus. The state might argue that your claims are procedurally defaulted, but that in any event, your newly discovered evidence doesn't prove that you are actually innocent. If your claims fit into the procedural default concerns, then make the argument above, and add on that in House v. Bell, 126 S. Ct. 2064 (2006), the U.S. Supreme Court held that one makes it through the Schlup gateway simply by introducing evidence, via your petition for writ of habeas corpus, that makes it likely that a new jury, hearing the missing evidence, would have a reasonable doubt as to your guilt. Thus, House makes clear that you do not have to prove with 100% certainty that you are "actually innocent" in order to overcome your procedural default; therefore, relief should be granted.

But what if you had the newly discovered evidence during your state proceedings, but still procedurally defaulted the claim because you didn't raise the claim to the state's highest appellate court? Well, there's one thing to argue—that there is cause for the default, as discussed above. (Consult the Index and Table of Authorities under the word "default, showing case for" for the specific page numbers of this chapter). In any event, you should still argue that the failure to grant you relief would work a fundamental miscarriage of justice because you were denied your right to present a complete defense to the jury. If you raised your newly discovered