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STATE AND FEDERAL POSTCONVICTION REMEDIES: LAST HOPES

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ACKNOWLEDGEMENTS

One of us has been involved for more than 30 years in representing death row inmates, primarily in preparing petitions for certiorari to the United States Supreme Court, often working with attorneys at capital resource centers. She has benefited greatly from the knowledge and wisdom of those dedicated lawyers, and, although the present book does not focus on capital cases, that experience opened her eyes to the great, and highly significant, variations in the postconviction regimes of states with the death penalty. The material on federal habeas corpus in the terrific book she uses in her course on capital punishment (Nina Rivkind & Steven F. Shatz, Cases and Materials on the Death Penalty, West 2009) was also most helpful, as were presentations of co-panelists on years of Federal Bar Council training sessions on federal habeas law for clerks in the Second Circuit. The outstanding work of Randy Hertz, Jim Liebman, and Larry Yackle provides a solid foundation for understanding federal habeas corpus, and Eric Freedman’s habeas corpus listserv is an invaluable source of up-to-date information on the topic.

Another writer also deserves special thanks. We embarked on this project with a bit of trepidation, as our experience in handling state postconviction matters has been limited largely to New York. We were therefore heartened to discover the four-volume treatise published recently by Donald E. Wilkes, Jr., State Postconviction Remedies and Relief Handbook (West 2012). Professor Wilkes’s exhaustive compilation of the remedies available in the 50 states and the District of Columbia was an invaluable research tool.

Finally, we are indebted to students at Brooklyn Law School. The enthusiasm of our clinic students, willing to put their all into a petition knowing that a favorable result is very unlikely, keeps us focused and energized. We also thank our talented research assistants, Rita Cant and Rebecca Naeder, for their careful attention to sometimes arcane materials.
EDITORIAL NOTE

Omissions from cases and other materials are indicated either by ellipses ( . . . ) or by substitution of new text in brackets, subject to the following exceptions. First, certain textual citations, particularly intra-sentence and intra-paragraph citations, have been deleted without notation. Additionally, most footnotes in cases and other material are deleted without ellipses. Where footnotes from cases have been included, we have retained the original numbering and placed that number in brackets.
DEDICATION

We dedicate this book to Buzz Tenny, who is ever willing to discuss the intricacies of AEDPA, and in memory of Omar K. Lerman, who would have cheered us on.
PREFACE

This book began as a chapter in the third edition of *Appellate Advocacy: Principles and Practice*, published in 1998. When the time came for us to plan the fifth edition in 2011, it was clear that postconviction remedies needed their own book. Federal habeas practice had become ever more demanding in the years since the 1996 enactment of the Anti-terrorism and Effective Death Penalty Act, “AEDPA.” Moreover, as expansively interpreted by the Supreme Court, AEDPA’s restrictions on federal court review of the merits of state court decisions had made state postconviction procedures more consequential, since it appeared that federal courts would, for the most part, defer to their judgment. In addition, the DNA exonerations of the past decade and what has been called the “innocence movement” have pulled postconviction principles and procedures out of the shadows. Finally, as teachers with experience litigating criminal cases on behalf of indigent clients, the subject matter is both important and interesting to us. For all of these reasons, it seemed more than time for a textbook — ideally of manageable length — that would address both state and federal remedies.

Despite the tension between the interests in finality and conservation of judicial resources, on the one hand, and the protection of the innocent and the guarantee of constitutional rights, on the other, society by and large agrees that some mechanism must exist to undo grave injustices. Yet these mechanisms are not generally well understood, either by the lay public or by lawyers. States have widely varying forms of relief, sometimes developed from common law procedures, while more recently taking statutory forms; indeed, many states have more than one form of relief. The requirements that must be met before a court will hear a claim in the postconviction setting can be both complex and stringent, and most indigent prisoners must file their initial applications without the aid of counsel. Moreover, as complicated as state procedures can be, securing relief in federal court in the post-AEDPA era has become even more challenging. Accordingly, an important goal for us in writing this book was to attempt to chart some navigable paths through the often tangled issues presented by postconviction practice.

We hope that this book will serve as a useful text for courses on postconviction remedies (whether comprehensive or focused on either state remedies or federal habeas, as each area benefits from some knowledge of the other), for an appellate practice course that includes such remedies, as well as for law school clinics devoted to seeking relief for indigent clients. We also hope the book will be of some assistance to those involved in postconviction litigation, whether as advocates for prisoners seeking postconviction relief, as prosecutors responding to postconviction applications, or as law clerks in the chambers of judges adjudicating these claims.

In the first chapter, we provide a brief history of postconviction remedies and an overview of the various procedures available in state and federal courts. Chapters Two and Three survey the state postconviction scene, providing cases that illustrate the most common grounds for relief and describing the procedural hurdles an applicant must overcome. We begin with state remedies for several reasons. Most prisoners are held under state authority — typically only about one-eighth of all those incarcerated are in federal custody. And those state prisoners, given the exhaustion requirements imposed by federal courts, have no choice but to raise their challenges first in their own state courts. Moreover, as noted above, in light of
recent restrictions on federal relief, state remedies play an increasingly important role in assuring that those whom the state has incarcerated are in fact guilty of the crime and have been afforded all the constitutional rights to which they are entitled. Chapters Four, Five and Six address federal habeas corpus, first noting the restrictions on grounds for relief, then detailing the procedural requirements, and finally, illustrating how habeas works in practice through five opinions capturing some of the most significant principles at work in this area. Again, our main emphasis is on the relief available to those in state custody, addressing more briefly the remedies available to federal prisoners. In Chapter Seven, we highlight ethical issues that are particularly likely to arise for counsel in postconviction practice, whether defense attorneys or prosecutors. Appendix A contains the principal postconviction statutes and rules of four states, illustrating a variety of approaches. Finally, Appendix B contains the major federal statutes and rules, as well as the form application to be used by state prisoners seeking federal habeas relief.
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