

STATE AND FEDERAL
POSTCONVICTION
REMEDIES: LAST HOPES

LexisNexis Law School Publishing Advisory Board

Paul Caron

Professor of Law
Pepperdine University School of Law
Herzog Summer Visiting Professor in Taxation
University of San Diego School of Law

Bridgette Carr

Clinical Professor of Law
University of Michigan Law School

Olympia Duhart

Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland

Professor of Law and Senior Scholar
Elon University School of Law

Carole Goldberg

Jonathan D. Varat Distinguished Professor of Law
UCLA School of Law

Oliver Goodenough

Professor of Law
Vermont Law School

Paul Marcus

Haynes Professor of Law
William and Mary Law School

John Sprankling

Distinguished Professor of Law
McGeorge School of Law

STATE AND FEDERAL POSTCONVICTION REMEDIES: LAST HOPES

Ursula Bentele
Professor of Law
Brooklyn Law School

Mary R. Falk
Associate Professor of Legal Writing
Brooklyn Law School

ISBN: 9780769865690
eBook ISBN: 9780769898100

Library of Congress Cataloging-in-Publication Data

Bentele, Ursula, author.

State and federal postconviction remedies : last hopes / Ursula Bentele, Professor of Law, Brooklyn Law School; Mary R. Falk, Associate Professor of Legal Writing, Brooklyn Law School.

pages cm

Includes bibliographical references and index.

ISBN 978-0-7698-6569-0

1. Post-conviction remedies--United States. 2. Habeas corpus--United States. 3. Appellate procedure--United States. 4. Post-conviction remedies--United States--States. 5. Habeas corpus--United States--States. 6. Appellate procedure--United States--States. I. Falk, Mary R., 1942- author. II. Title.

KF9690.B46 2014

345.73'077--dc23

2014002286

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

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 prisoners. 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.

TABLE OF CONTENTS

Chapter 1	INTRODUCTION TO STATE AND FEDERAL POSTCONVICTION REMEDIES	1
<hr/>		
I.	FEDERAL HABEAS CORPUS	3
A.	The History of the “Great Writ”	3
	<i>Moore v. Dempsey</i>	4
	Note	6
B.	Federal Statutory Habeas Corpus	6
C.	Other Federal Postconviction Remedies	7
1.	Section 1983 Actions	7
2.	The All-Writs Act	8
3.	The Innocence Protection Act	9
4.	New Trial Motions: Fed. R. Crim. P. 33.	9
II.	STATE POSTCONVICTION REMEDIES	9
A.	Traditional Remedies: Habeas Corpus and Coram Nobis	9
	<i>Sanders v. State</i>	10
	Note	13
B.	Development of Modern State Postconviction Remedies	13
	Uniform Post-Conviction Procedure Act	16
C.	Other State Postconviction Remedies	17
1.	New Trial Motions	17
2.	Secondary Postconviction Remedies	18
3.	Executive Clemency	18
4.	Specialized Procedures	19
Chapter 2	STATE POSTCONVICTION REMEDIES: GROUNDS FOR RELIEF	21
<hr/>		
I.	CONSTITUTIONAL CLAIMS	23
A.	Prosecutorial Misconduct	23
	<i>People v. Hairston</i>	23
	Notes	30
B.	Ineffective Assistance of Counsel	31
	<i>Gauthier v. State</i>	31
	Notes	35
II.	NEW FACTS	39
A.	Newly Discovered Evidence	39
	<i>State v. Edmunds</i>	39
	Notes	45

TABLE OF CONTENTS

B.	DNA Testing	47
	<i>Hardin v. Commonwealth</i>	47
	Notes	53
	Exercise	55
III.	NEW LAW/RETROACTIVITY	56
	<i>Danforth v. State</i>	56
	Notes	61
IV.	“FREE-STANDING” INNOCENCE	63
	<i>State Ex rel. Amrine v. Roper</i>	63
	Notes	70
V.	ILLEGAL SENTENCE	73
	<i>State v. Acevedo</i>	73
	Notes	77

Chapter 3 STATE POSTCONVICTION REMEDIES: PROCEDURE . . 79

I.	THRESHOLD REQUIREMENTS	80
A.	Standing	80
B.	Where to File	82
C.	Timing and Number of Applications	83
1.	Timeliness and Newly Discovered Evidence	85
	<i>Commonwealth v. Edmiston</i>	85
	Notes	88
2.	Laches	89
3.	Timeliness and Procedural Default	89
II.	ADJUDICATION	91
A.	Pleading	91
	<i>William Coleman v. Commissioner of Correction</i>	91
	Notes	94
B.	Right to Counsel	95
	<i>Commonwealth v. Mitchell</i>	96
	Note	97
	<i>Commonwealth v. Hampton</i>	97
	<i>Commonwealth v. Smith</i>	101
	Note	104
	<i>Silva v. People</i>	105
	<i>Bynum v. State</i>	107
	Notes	109
	<i>Bejarano v. Warden, Nevada State Prison</i>	109
	Note	112
C.	Discovery	115

TABLE OF CONTENTS

State v. LePage 115

D. Evidentiary Hearings 117

People v. Williams 118

 Note 120

III. APPEALS 120

Chapter 4 FEDERAL HABEAS CORPUS: GROUNDS FOR RELIEF . 123

I. FOURTH AMENDMENT CLAIMS 124

Stone v. Powell 124

 Notes 130

II. NEW RULES/RETROACTIVITY 131

Chaidez v. United States 132

 Note 135

Schriro v. Summerlin 135

 Note 138

III. “FREESTANDING” INNOCENCE 139

Herrera v. Collins 139

 Notes 143

Chapter 5 FEDERAL HABEAS CORPUS: PROCEDURE 147

I. THRESHOLD REQUIREMENTS 148

A. Custody 148

Davis v. Nassau County 149

 Notes 154

B. Where to File 157

C. Exhaustion of State Remedies 159

 1. Fair Presentation to the State Courts 159

O’Sullivan v. Boerckel 160

 Notes 164

Duncan v. Henry 165

 Notes 166

Anderson v. Johnson 167

 Notes 171

 2. Exceptions 171

Lee v. Stickman 172

 3. The Fate of Unexhausted Claims 176

D. Procedural Default 177

 1. Procedural Default: From Waiver to Forfeiture 178

Wainwright v. Sykes 180

 Notes 185

TABLE OF CONTENTS

2.	Escape from Procedural Default: The Cause and Prejudice Gateway . . .	186
	<i>Martinez v. Ryan</i>	188
	Notes	194
	<i>Maples v. Thomas</i>	194
	Note	202
3.	Escape from Procedural Default: The Miscarriage of Justice Gateway . .	202
	<i>House v. Bell</i>	203
	Notes	213
E.	Timing and Number of Applications	213
1.	Statute of Limitations	213
2.	Statutory Tolling	215
3.	Equitable Tolling: Attorney Misconduct	216
	<i>Holland v. Florida</i>	217
	Notes	221
4.	Equitable Tolling: Other Circumstances	223
5.	“Miscarriage of Justice” Equitable Exception	224
	<i>McQuiggin v. Perkins</i>	224
	Note	228
6.	Timely Amendment/“Relation Back”	229
7.	Time of Filing: The Mailbox Rule	231
8.	Number of Petitions	232
	Exercise	234
II.	ADJUDICATION	235
A.	Pleading	235
B.	Right to Counsel	237
	<i>Graham v. Portuondo</i>	237
	Notes	239
C.	Discovery	241
	<i>Bracy v. Gramley, Warden</i>	243
	Note	247
D.	Evidentiary Hearings	247
	<i>Michael Williams v. Taylor</i>	248
	Notes	259
E.	AEDPA Limitations to Federal Relief	259
1.	“Contrary to” or Involving an “Unreasonable Application” of the Law .	260
	<i>Williams (Terry) v. Taylor</i>	260
	Note	265
	<i>Harrington v. Richter</i>	266
	Note	268
a.	Clearly Established Federal Law	269

TABLE OF CONTENTS

	<i>Carey v. Musladin</i>	270
	Notes	276
	<i>Nevada v. Jackson</i>	278
b.	Adjudicated on the Merits	281
c.	State Court Decision Viewed in Light of Facts and Law at Time of Decision	284
	<i>Cullen v. Pinholster</i>	285
	<i>Greene v. Fisher</i>	288
	Notes	290
2.	Based on an “Unreasonable Determination of the Facts”	291
a.	Before AEDPA	291
	<i>Jefferson v. Upton</i>	291
	Note	297
b.	The AEDPA Approach to State Factual Findings	297
	<i>Burgess v. Commissioner, Alabama Department of Corrections</i> . .	298
	<i>Merzbacher v. Shearin</i>	301
	Note	313
F.	Harmless Error	313
	<i>Fry v. Pliler</i>	314
	Exercise	319
III.	APPEALS	321
	Note	323
Chapter 6	HABEAS CORPUS UNDER AEDPA: SELECTED OPINIONS	325
<hr/>		
I.	SUFFICIENCY OF THE EVIDENCE	325
	<i>Cavazos v. Smith</i>	325
	Notes	333
	Question	334
II.	INEFFECTIVE ASSISTANCE OF COUNSEL	334
	<i>Bell v. Cone</i>	334
	Note	343
III.	DUE PROCESS “BRADY” CLAIM	343
	<i>Cone v. Bell</i>	343
	Notes	354
IV.	HARMLESS ERROR	355
	<i>Wood v. Ercole</i>	355
	Note	365
V.	SUCCESSIVE APPLICATIONS	365
	<i>United States v. MacDonald</i>	365

TABLE OF CONTENTS

Notes	380	
Chapter 7	ETHICAL CONSIDERATIONS IN POSTCONVICTION PROCEEDINGS	381
I.	DEFENSE COUNSEL	381
A.	Duties of Assigned Counsel	381
	<i>State v. Rue</i>	382
	Note	383
B.	Conflicts of Interest	384
	<i>Gray v. Pearson</i>	387
	Exercise	390
II.	THE PROSECUTOR	390
A.	Conflicts of Interest	391
B.	Responding to Misconduct	393
C.	Actual Innocence	394
	Exercise	396
Appendix A	SELECTED STATE POSTCONVICTION STATUTES AND RULES	399
Appendix B	SELECTED FEDERAL STATUTES AND RULES; FORM FOR HABEAS PETITION	439
TABLE OF CASES	TC-1	
TABLE OF STATUTES	TS-1	
INDEX	I-1	