

# OPTIONS FOR POSTCONVICTION RELIEF

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## I. APPEAL

*When:* Notice of intent to pursue postconviction relief in state case filed with the circuit court within 20 days after sentencing and judgment of conviction. In federal case, notice of appeal filed within 10 days after sentencing.

*Where:* To Wisconsin Court of Appeals as a matter of right, to Wisconsin Supreme Court by discretionary petition for review; to United States Supreme Court by discretionary petition for writ of *certiorari*. To Seventh Circuit Court of Appeals as a matter of right if appealing a federal conviction, and by *certiorari* petition to the United States Supreme Court thereafter.

*Why:* To challenge court and trial errors, attack constitutional violations, challenge conviction as based on insufficient evidence, challenge guilty plea as not knowing or voluntary, challenge illegal or unduly harsh sentence or to raise ineffective assistance of counsel issues. To expand or clarify the record and better set the factual stage for appeal, a postconviction motion is often necessary to be brought under sec. 809.30, *Wis. Stats.*, as a prelude to any appeal. If ineffective assistance of counsel issues are alleged, an evidentiary hearing pursuant to the *Machner* case must first be held.

## II. SENTENCE MODIFICATION

*When:* Brought within 90 days of sentencing if defendant waives appeal; or, within 60 days of receipt of transcript on appeal under sec. 973.19, *Wis. Stats.*, or as part of a sec. 809.30 motion; or, at any time under section 974.06, *Wis. Stats.*, if the sentence violates constitutional rights or is in excess of maximum; or, at any time under the *Hayes/Rosado* line of cases if a "new factor" is shown to exist.

*Where:* Brought in the original sentencing court, which usually will be before the same judge if he/she is still hearing criminal cases or his/her successor.

*Why:* New factor not needed if motion is brought within the 60- or 90-day time limits under sec. 973.19 or 809.30, *Wis. Stats.*; constitutional or statutory violation must be shown by defendant if brought as sec. 974.06 postconviction motion; or, if brought under the *Hayes/Rosado* “new factor” grounds for modification, the defendant must show that a new factor is present. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or, if it was, it was unknowingly overlooked by all parties.

A motion for sentence adjustment under sec. 973.195, *Wis. Stats.*, can be brought for some felonies to reduce the in-custody portion of a sentence. Early release reforms in sentencing law enacted by 2009 Wis. Act 28 were repealed in 2011.

### **III. MOTION FOR POSTCONVICTION RELIEF**

*When:* Brought when defendant is in custody, either as part of the appeal process under section 809.30, *Wis. Stats.*, or at any time after the time for a direct appeal has expired, pursuant to section 974.06, *Wis. Stats.* Sec. 974.06 is the Wisconsin equivalent of the federal postconviction relief statute. 28 U.S.C. sec. 2255. If the state can show prejudice due to delay in filing such a motion or if defendant was not reasonably diligent in pursuing the postconviction relief as part of the initial appeal process, then section 974.06 relief may be considered waived under the *Escalona-Naranjo* case.

*Where:* Brought in the original sentencing court before the same judge if he/she is still hearing criminal cases or his/her successor.

*Why:* To challenge the conviction and sentence as being imposed in violation of federal or state constitutions or Wisconsin statutes; or challenging the court’s jurisdiction to impose the sentence; or

challenging the sentence as exceeding the maximum allowed by law; or for other reasons (*e.g.*, newly-discovered evidence, material facts not brought to court's attention; significant change in the law which should be applied retroactively, or ineffective assistance of trial counsel). A postconviction motion for DNA testing of evidence can also be brought under sec. 974.07, *Wis. Stats.*

#### **IV. STATE HABEAS CORPUS**

*When:* Any time after a conviction and sentence but only if defendant has first filed and had denied a postconviction motion for relief brought under sec. 974.06, *Wis. Stats.* It is not necessary for a defendant to have appealed such a denial in order to commence a state *habeas corpus* action.

*Where:* Brought as a separate civil action in the circuit court in the county where the defendant is imprisoned.

*Why:* Brought to challenge a conviction and sentence on grounds that the trial court lacked jurisdiction; or that the conviction was invalid under law; or that the law under which defendant was convicted was void; or that there were federal or state constitutional defects in the conviction or appeal process, including ineffective assistance of appellate counsel.

#### **V. FEDERAL HABEAS CORPUS**

*When:* Brought when defendant is in custody on a state conviction, within one (1) year after defendant has exhausted his/her state court remedies and the judgment of conviction has become final. 28 U.S.C. sec. 2254. This means that the claim for relief must have been presented to the Wisconsin Supreme Court via a petition for review, either as an appeal of the conviction or for review of a denial of a defendant's sec. 974.06 postconviction motion for relief. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) has sharply limited the scope of federal *habeas corpus* review and imposed strict deadlines and exhaustion requirements for federal habeas petitioners.

*Where:* Brought in federal district court in Wisconsin in the district in which the underlying state case arose (*i.e.*, Eastern District of Wisconsin in Milwaukee; Western District of Wisconsin in Madison). Appeal of district court's action on the habeas petition to the Seventh Circuit Court of Appeals in Chicago is possible, if the district court issues a certificate of appealability. Review by United States Supreme Court is by discretionary writ of *certiorari*.

*Why:* To challenge defendant's conviction and sentence on the grounds that his/her custody status is in violation of the Constitution, laws or treaties of the United States. Under the AEDPA, a federal district court may grant relief on a claim adjudicated on the merits in the state courts if the state appellate court's adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

## **VI. EXECUTIVE CLEMENCY, PARDON AND COMMUTATION**

*When:* Pardons by the governor are normally not granted until a substantial period of time has elapsed since a defendant has completed his/her sentence, or for exceptional reasons. The same consideration holds true for presidential pardons of federal convictions. Commutations of sentence can be granted while the defendant is still serving his/her sentence. Pardons and commutations can be either full or partial, and are totally discretionary.

*Where:* Application for executive clemency is made to the governor, and are reviewed by the governor's pardon counsel and the pardon advisory board. Applications for pardons from federal criminal convictions are made to the President of the United States.

*Why:* To obtain complete or partial relief from the effects of a criminal conviction or sentence. Commutations of sentence have been granted in cases in which a high minimum sentence has been imposed (*e.g.*, life imprisonment) and where such sentence is having an adverse effect on the progress of a defendant who has made substantial rehabilitative improvements; or if the legislature has subsequently reduced the penalty for an offense; or where it seems certain that parole or release to extended supervision would be granted and there are compelling reasons to eliminate delay; or where a disproportionately harsh sentence has been imposed; or in exceptional cases, as a motivational tool towards further exceptional rehabilitation efforts, even though parole is unlikely or unavailable. Parole is not available in Wisconsin for sentences imposed for felonies committed after 1999.

## **VII. EXPUNGEMENT OF ARREST RECORD AND CONVICTION RECORDS**

*When:* Expungement (clearing a criminal record) should be sought at sentencing or as part of a juvenile case disposition. Expungement can also be requested at or after the time a defendant has completed his/her sentence.

*Where:* A motion for expungement is brought before the original sentencing judge. Requests to expunge or correct Crime Information Bureau arrest and conviction records may also be made administratively.

*Why:* Wisconsin law permits courts to expunge some records in which adjudications of guilt or juvenile delinquency are made. Granting expungement is discretionary with the court. For criminal convictions, expungement can be obtained for persons convicted of misdemeanors and some minor felonies, if the crime was committed when the person was under age 25. Sec. 973.015, *Wis. Stats.*