



Post-Conviction Basics

This course is about Post-Conviction basics and why a defendant would use the Illinois Post-Conviction Act. The purpose of the Act is to provide a remedy for constitutional violations. Also, the course provides information about who, where, and when a post-conviction petition can be filed.





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Course Description

Course Presentation

This course provides an intellectual foundation and introduce a set of learning skills essential for success in the legal profession and for life beyond. The course will provide opportunities for careful reading, for creative and critical thinking, for oral and written communication, and for engaging with others in a shared conversation about stimulating material.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



Course Learning Objectives and Outcomes

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.



Timed Agenda:

Time	Description
00:00:00	Program Start
0:00:23	Introduction to Post-Conviction Basics
0:02:52	Post-Conviction Hearing Act
0:04:10	Young v. Ragen, 337 US 235 (1949)
0:09:23	Why a defendant would use the Act
0:12:06	Where is a post-conviction petition is filed
0:15:00	Who can file a post-conviction petition
0:17:56	When is a post-conviction petition filed?
0:19:54	Safety Valve
0:22:40	Three Stages
0:28:10	Three Stages
0:32:00	Assisting your client in postconviction proceedings
0:33:16	Ill. Sup. Ct R. 651 (c)
0:42:22	What's reasonable assistance of counsel?
0:44:31	Filing the 651(c) certificate
0:46:07	Successive Petitions
0:49:04	Post-Conviction Act Cases
1:06:50	Program End

Course Material

Post-Conviction Basics

Nate Nieman, of Nieman Law Group, Moline

What is post-conviction?

The Illinois Post–Conviction Hearing Act is a statutory mechanism used to collaterally attack criminal convictions and sentences.

The Act was enacted in response to *Young v. Ragen*, 337 U.S. 235 (1949), which held that prisoners must be given a statutory method by which they can raise claims of denial of federal constitutional rights in state courts. *People v. Correa*, 108 Ill.2d 541 (Ill. 1985). The Act was intended to “provide for judicial review in circumstances where direct review, habeas corpus and coram nobis were unavailable.” *People v. Martin–Trigona*, 111 Ill.2d 295, 302 (Ill. 1986).

Why a defendant would use the Act

Purpose of the Act is to provide a remedy for constitutional violations.

However, because criminal law is rooted in the Constitution, almost all errors in a criminal case can be construed as being constitutional in nature.

The Act generally addresses constitutional violations that occur outside of the record, whereas direct appeal addresses constitutional violations or errors that occurred on the record. Filing a post-conviction petition is usually the next step after losing direct appeal.

For most, this is a defendant’s last meaningful challenge to his conviction and/or sentence.

Where is a post-conviction petition is filed

Post-conviction petition is filed in the trial court in which the conviction entered.

Though a post-conviction petition is a type of appeal, it takes the form of something resembling a post-trial motion, instead of an appellate brief.

Unless the defendant can show that it would cause him substantial prejudice, the same judge who presided over the defendant's trial should also preside over the postconviction proceedings. *People v. Hall*, 157 Ill.2d 324, 331 (Ill. 1993).

Who can file a post-conviction petition

The post-conviction remedy is available to “[a]ny person imprisoned in the penitentiary.” 725 ILCS 5/122-1(a). A person is “imprisoned” for purposes of §122-1(a) if the petitioner’s liberty is “curtailed to a degree by the state.”

People

v. Pack, 224 Ill.2d 144 (Ill. 2007). In other words, a defendant must be serving

some form of a sentence in order to have “standing” to file a petition under the Act. This includes being:

Imprisoned in jail or DOC.

On probation.

On MSR (formerly known as “parole”).

On appeal bond.

If the defendant is not serving a sentence, he cannot file a petition under the

Act because the Act is not to be used as an expungement mechanism. This is one of the only rules that has no exception.

Most petitions are filed by pro se prisoners in DOC, though many are also filed

by private lawyers on behalf of their clients.

When is a post-conviction petition filed?

If it is a felony, within 3 years of conviction if no direct appeal is taken. If it is a misdemeanor, within 4 months of conviction is no



direct appeal is taken.

If appeal is taken, petition must be filed within 6 months after final resolution of appeal (at whatever level that the appeal might terminate), for both felonies and misdemeanors.

There is a “safety valve” for filing beyond the time limitation if petition can show “lack of culpable negligence.” In other words, for whatever reason, it was not the defendant’s fault that the petition was filed after the time limitation.

A petition alleging actual innocence is not subject to the Act’s time-bar and that petitioner is not required to show lack of culpable negligence.

How does the Act work?

The petition must advance through three “stages” in order for the

defendant to obtain relief under the Act.

“At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether “the petition is frivolous or is patently without merit.” A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. This first stage in the proceeding allows the circuit court “to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.” Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. At this initial stage of the proceeding, there is no involvement by the State.” *People v. Tate*, 2012 IL 112214, ¶ 9 (internal citations omitted).

How does the Act work?

“If the circuit court does not dismiss the petition as “frivolous or patently without merit,” the petition advances to the second stage, where counsel may be appointed to an indigent defendant, and where



the State, as respondent, enters the litigation. It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel. At this second stage, the circuit court must determine whether the petition and any accompanying documentation make “a substantial showing of a constitutional violation.” If no such showing is made, the petition is dismissed. If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing.” *People v. Tate*, 2012 IL 112214, ¶ 10.

A petition can, and often does, advance to the second stage if the court fails to determine, within 90 days, whether the filed petition states the “gist” of a constitutional claim.

The State’s duties

State has to file either a motion to dismiss or answer. Within 30 days after the making of an order pursuant to subsection (b) of Section 122-2.1, or within such further time as the court may set, the State shall answer or move to dismiss. In the event that a motion to dismiss is filed and denied, the State must file an answer within 20 days after such denial. 725 ILCS 5/122-5. This rule is toothless, as there is no sanction for State’s failure to timely file its responsive pleadings. *People v. Cortez*, 338 Ill. App. 3d 122, 128 (2003).

If the State’s motion to dismiss is denied, or if no motion to dismiss is filed, the State must answer the petition, and the proceedings move to the third stage.

How does the Act work?

“If relief is warranted under the Act, it generally follows a third-stage evidentiary hearing, where the defendant must prove a constitutional violation and the State is permitted to challenge the defendant's evidence and present its own evidence. A third-stage evidentiary hearing will ensue only upon a substantial showing by the defendant at the second stage that his constitutional rights were violated during his trial.”



People v. Cleveland, 2012 IL App (1st) 101631, ¶ 37.

How does the Act work?

Unless positively rebutted by the record, factual disputes raised by the pleadings require determination of their truth or falsity and cannot be resolved at a hearing on a motion to dismiss at the second stage of the post-conviction process. *People v. Makiel*, 358 Ill. App. 3d 102, 119 (Ill. 2005).

The Act gives the post-conviction court wide latitude to receive proof by affidavits, depositions, oral testimony or other evidence. 725 ILCS 5/122–6 (West 1992); *People v. Watson*, 50 Ill.2d 234, 236 (1972). Indeed, “[t]he hearing on a post-conviction petition is a new and independent investigation, with the hearing court authorized and required to use any proper procedure necessary and appropriate in order to discharge its duty of determining the existence or nonexistence of facts which would constitute a denial of a claimed constitutional right.” *People v. Wakat*, 415 Ill. 610, 616–17 (1953).

Assisting your client in postconviction proceedings

At trial and on appeal, defendant is guaranteed the effective assistance of counsel by the Sixth Amendment.

However, because the Act is a purely statutory creation, a petitioner is only entitled to “reasonable assistance” of counsel, which is something less than effective assistance of counsel but something more than no assistance of counsel.

Oddly enough, the appellate court has held that only appointed petitioners are entitled to reasonable assistance—petitioners who hire private counsel are not entitled to reasonable assistance.

So what’s reasonable assistance of counsel?



Primarily, it is compliance with Ill. Sup. Ct. R. 651(c),
which requires counsel to do 3 things:

Consult with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights.
Examine the record of the proceedings at the trial.
Make any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions.

So what's reasonable assistance of counsel?

Compliance with Rule 651(c) may be shown by the filing of a certificate representing counsel has fulfilled his duties. *People v. Perkins*, 229 Ill.2d 34, 50 (2007). The filing of a Rule 651(c) certificate creates a presumption of compliance with the rule. *People v. Bell*, 2014 IL App (3d) 120637, ¶ 10. Where post-conviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized. If post-conviction counsel fails to fulfill his duties under Rule 651 a remand for additional post-conviction proceedings is required. *People v. Ross*, 2015 IL App (3d) 130077.

Filing the 651(c) certificate

A certificate stating that you, as defense counsel, have complied with the three tasks required of counsel under 651(c) must be filed along with the petition.

The case will probably be remanded if you do not. The absence of a Rule 651(c) certificate is harmless only if the record shows that counsel met the requirements of the rule. *People v. Guest*, 166 Ill.2d 381, 409 (1995).



Consistent with the courts' emphasis on form over substance, filing this boilerplate piece of paper seems to be the most important task in the whole process.

Successive Petitions

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial postconviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.”
725 ILCS 5/122-1(f).

How can you use the Act?

It is very difficult to use the Act to vacate a conviction resulting from a trial. However, it is much easier to undo a guilty plea by using the Act. Because most cases result in a plea, the Act can become very useful. Undoing, or, withdrawing, a guilty plea, can result in a less severe conviction and sentence for your client. It can also prevent your client from being deported; from losing his driver's license, job, or other important privilege or right; or from negatively impacting his civil case with a criminal judgment.

Questions

Contact me at nate@niemanlaw.com or (309) 623-4831



Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org

