

**Missouri State Public Defender Guidelines for
Representation**

Post Conviction (PCR) Representation

February 2022

Postconviction Procedure

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1. Familiarity with Rules of Postconviction Procedure

The Defender is responsible for knowing Missouri Supreme Court postconviction Rules 24.035 and 29.15.

2. Check Pro Se Motion

Upon receipt of a new case, the Defender should review the Form 40 and court records for:

- a. **Timeliness:** Make sure the Form 40 was timely filed; if not, see section below.
- b. **Premature filing:** If the Form 40 is filed prematurely, act to stay or continue the case. The Defender should track the direct appeal. If the case is a 29.15 and no appeal has been taken, consult with the client to see if he or she wants a direct appeal, and contact the appropriate appellate office if necessary.
- c. **Standing:** The Defender should confirm that the underlying case is cognizable (examples of non-cognizable cases are misdemeanor convictions, motions to re-open, or motions for DNA testing). Consider other options that the client may pursue such as state habeas, mandamus, prohibition, declaratory judgment, nunc pro tunc, or informal resolutions through DOC or the Court.
- d. **Signature:** Confirm the Form 40 is signed by the client. If not signed, take steps to correct absent signature as soon as possible.
- e. **Breadth:** Confirm with the client and Case.net that the Form 40 includes all cases the client wants to challenge. Assure that the filing was made in the appropriate circuit court.

3. Untimely Pro Se Motions

If a Form 40 is untimely, the Defender should review the case for an excuse for the untimely filing. This review should involve discussing the timeliness issue with the client. If there is a viable excuse for the untimely filing, the Defender should plead that excuse in the amended motion and present evidence in support of the excuse at a hearing.

If there is no viable basis upon which to excuse the untimely filing, the Defender should discuss dismissing the case with the client. If the client is unwilling to dismiss the case, the Defender should seek to have the motion court find the Form 40 timely filed. This should be accomplished consistent with current case law.

4. Calendar Due Dates and Extensions

Determine the due date for the amended motion, calendar, and docket in Lotus Notes. If the case is one in which extensions must be requested to get the full time, extension should be requested as soon as possible, and monitored to ensure the motion court grants the extensions within the time limit allowed.

5. Entry of Appearance

The Defender should enter his or her appearance within 10 days. The Defender may consider filing a limited entry in the underlying criminal cases.

6. Gathering Documents

Determine what documents are needed to fully investigate the postconviction case.

a. Court Files

The Defender should check the circuit clerk files in the postconviction case and the underlying criminal case(s) to see if all relevant documents necessary for the preparation of the amended motion are available. If additional documents are needed, those should be requested before the amended motion is due.

Relevant documents include, but are not limited to, the following documents:

- 1) All court docket sheets, including those from the originating county if there was a change of venue;
- 2) The indictment, or complaint and information, and any amendments thereto on which the defendant was tried;
- 3) Defendant's arraignment or waiver;
- 4) All motions filed by either party, and the Court's ruling, including but not limited to motions to suppress and motions in limine;
- 5) Mental health evaluations filed with the Court;
- 6) Sentencing Assessment Reports;

- 7) Guilty Plea and Sentencing Transcript(s);
- 8) Jury instructions and verdicts;
- 9) All Sentence and Judgment documents; and
- 10) Probation revocation reports.

b. Transcripts

To secure transcript(s), check Case.net to determine all the court reporters involved in recording the transcript(s). Also determine all the dates on which recorded court events occurred.

Write a letter to the court reporter(s) specifying all the transcripts needed. Transcripts in 29.15 cases need to be checked for completeness. Include the date and type of court proceeding. Make sure the letter contains a date by which the transcript(s) are needed.

If the Defender determines after sending the initial letter that there are other court proceedings that need to be transcribed, send the court reporter(s) follow-up letters. Consider filing a motion, if necessary, to obtain the transcript. The transcript should contain, if not already transcribed:

Rule 24.035 -

- 1) All pretrial matters and appearances on the record;
- 2) Guilty Plea;
- 3) Probation revocation hearings; and,
- 4) Sentencing.

For time limit purposes, the complete transcript consists only of the guilty plea and sentencing transcripts. *See Hewitt v. State*, 518 S.W.3d 227, 231 (Mo. App. S.D. 2017)

Rule 29.15 –

- 1) All pretrial matters and appearances on the record;
- 2) Voir dire;
- 3) Opening statements;
- 4) Closing arguments;
- 5) The entire evidentiary phase of trial, including all matters placed on the record whether within or outside the jury's hearing; and,
- 6) Sentencing.

Document all contact with the court reporter; for example, letters, telephone calls, telephone messages, emails.

After the transcript is delivered, review it to make sure it is in proper form and includes all the necessary and requested proceedings.

c. Trial and Appellate Files

The Defender should request the physical and electronic files from the attorneys who represented the client in the underlying criminal case(s) and appeal(s) within 10 days of assignment.

7. Discovery

Review the court files, transcripts, trial, and, if applicable, appellate files. Make a written request for any additional discovery the Defenders needs from the prosecutor.

8. Responding to State's Request for Discovery

Upon request by the prosecutor, the Defender should send all discoverable materials.

If the prosecutor files a discovery request or Motion to Compel, asking for a copy, or the original, of the file maintained by trial, plea counsel, or appellate, file a response opposing the motion.

If the prosecutor serves the Defender with a subpoena for a copy, or the original, of the file maintained by trial, plea, or appellate counsel, file a Motion to Quash Subpoena and schedule it for hearing.

At the hearing on the Motion to Quash Subpoena, or the hearing on the prosecutor's Motion to Compel, advise the court 1) what documents from the file maintained by trial or plea counsel have already sent the prosecutor, if any; 2) that the Defender would be happy to look through the file again to see if there are any missed documents that would resolve the issues in the amended motion and send them to the prosecutor; and 3) that trial, plea, or appellate counsel has reviewed the file they maintained in client's case OR that the Defender advised trial, plea, or appellate counsel that they may review the file in the Defender's office during normal business hours or at a time mutually agreed upon.

If the court is not inclined to rely on the Defender to supply the documents from the file maintained by trial, plea, or appellate counsel, advise the court that it would be agreeable for the court to review the file *in camera* and turning over to the prosecutor any documents not already sent to the prosecutor that resolve the issues in the amended motion.

The original file belongs to the client, and not the attorney.

9. Engagement Letter for Postconviction Case

An introductory letter should be sent to client within 10 business days of the case being assigned to the attorney. Included with this initial letter, several documents should be enclosed for the client to fill out and return:

a. Conflict Questionnaire:

This document is needed to determine if the complaining witness is a current or previous client, or if there were co-defendants

b. Public Defender Application:

If this is not returned, when the Defender talks to the client, the Defender should take this opportunity to get the information needed to fill out the application. The filled-out application should then be mailed with a self-addressed stamped envelope to the client for signature and return.

The fee assessment should be filed when the completed application is returned.

c. Authorization for Communications:

This document allows clients to provide a contact list of individuals (not witnesses) they would like the attorney to talk with regarding their case, e.g. family members.

d. Release of Information aka Records Authorization and HIPPA form:

These two forms are required to gather medical or other records. These documents are to be signed, dated, and notarized.

e. Self-addressed stamped envelope

Provide a self-addressed stamped envelope for the client to return all the signed documents. Ensure that these documents are filled out completely.

f. Postconviction questionnaire (see below).

Along with the requirements outlined in Section 9, the Defender should send a copy of the relevant postconviction questionnaire with the engagement letter to the client.

10. Postconviction Questionnaire

Upon receipt of the engagement materials from the client, the Defender should review the questionnaire. Regardless of the completeness of the questionnaire, the Defender should not use the questionnaire as a substitute for interviewing and discussing the case with the client.

11. In-person vs. telephone contact – considerations

In any discussions with clients, in-person contacts are preferred.

If conducting a telephone interview, the Defender should be aware that telephone conversations may not be entirely confidential, and that clients may be reluctant to disclose highly confidential or highly personal information over the phone.

The Defender should conduct an in-person visit where necessary to obtain highly confidential or highly personal information.

Other forms of communication may not be confidential and should be utilized with caution.

12. Initial Client Interview

The initial client interview should take place as soon as possible. This will permit the client to understand the potential consequences of proceeding or dismissing and will supply the Defender with direction in considering what claims to raise. This is especially important in 24.035 cases, where clients often do not grasp the consequences of vacating their guilty plea and, once advised, they might want to dismiss the case.

Before the initial client interview, the Defender should conduct a quick review of the case to understand the strength of the evidence and the potential risks and benefits to the client. In a 24.035, this quick review can typically be accomplished by reviewing the probable cause statement, charging instruments, guilty plea and sentencing transcript, and plea agreement. In a 29.15, this quick review can typically be accomplished by reviewing the direct appeal opinion and the statement of facts from the appellate briefs.

The goals of an initial client interview should be the following:

- a. Build rapport and trust with the client;
- b. Outline the responsibilities in the case;
- c. It is the attorney's job to warn the client of potential consequences, both good and bad;
- d. It is the client's job to determine what outcome the client wants in the case;
- e. It is the attorney's job to identify and raise claims that accomplish the client's goal in the case;
- f. Value the case for the client, let the client know the potential benefits and detriments of both proceeding or dismissing the case;
- g. Risk of a higher sentence;
- h. Risk of reinstatement of, or additional charges;
- i. Dismissal vs. trial vs. resentencing;
- j. Provide the client with a timeline of the case and the different stages of the case;
- k. If the client has not yet returned the application for services, the Defender should take the application over the phone and then send it to client for a signature;
- l. Find out what the client wants from the case.

13. Investigation

Each office should have a procedure ensuring the investigation begins when a case is opened. When a case is opened, the investigator should request the files from the associated criminal and appellate cases, and request documents and other discovery from the prosecutor or police agencies.

Given that an amended motion cannot be further amended once it is filed, the goal should be to have the investigation in the case completed before the amended motion is due.

In investigating, the Defender should consider the admissibility of all evidence (affidavits, business records affidavits, certified documents, etc.) and the standards by which claims must be proven.

The Defender should speak with plea, trial, or appellate counsel before filing an amended motion raising a claim of ineffective assistance of counsel. Similarly, the Defender should speak with potential witnesses before raising a claim involving the witnesses.

14. Issues to Consider Raising

The client sets the goals in the case: resentencing, new trial, dismissal, etc. In considering issues, the Defender should speak with the client to determine the goals in the case. The Defender should consider all possible meritorious claims that meet the client's goals.

Only potentially meritorious claims should be raised. Frivolous claims, those with no serious purpose or value, should not be raised just because the client wants the claims raised. The Defender controls the final claims raised in an amended motion.

The Defender should consider all the different ways in which an error can be raised (ineffective assistance of counsel, prosecutorial misconduct, judicial error, mistake of all parties, etc.).

Issues should be considered in light of the "reasonable counsel" standard that controls claims of ineffective assistance of counsel. However, Defenders should raise claims that seek to improve the bar set for reasonable counsel.

15. Amended Motion

The amended motion should follow the form of Criminal Procedure Form No. 40, insofar as current under the Rules.

Postconviction counsel should ascertain whether the *pro se* motion is supported by sufficient facts and includes all claims known to the client for attacking the judgment and sentence. Counsel should file an amended motion asserting all claims for relief for the client. Counsel should advise the client, before filing the amended motion, of the claims that will be presented in the amended motion.

Postconviction counsel should be familiar with how to properly plead postconviction claims.

If investigation of a postconviction claim has not been completed at the time of the filing of the amended motion, counsel should raise the claim, as he or she best expects the results of the investigation to conclude, if counsel has a good faith basis that the investigative results may support the claim.

Counsel should allege facts showing that the client timely filed the *pro se* motion by alleging that: 1) the client timely filed the original *pro se* motion so that the file stamp reflects that it is within the time limits proscribed in the Rule; 2) the client falls within a recognized exception to the time limits; or 3) the court misfiled the motion. *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012). In addition to the above, the amended motion should set forth in the motion any other reason that any *pro se* motion, file stamped past the due date, should nevertheless be treated as timely. Counsel should also correct any other deficiencies of the *pro se* motion through allegations in the amended motion or by taking other appropriate action. For example, Rule 55.03 permits prompt correction of any signature omission on the *pro se* motion.

The Amended Motion should be timely filed.

16. Statements in Lieu of Amended Motion

Statements in lieu of amended motion are highly discouraged and should rarely, if ever, be filed.

Situations where a statement in lieu of amended motion may be filed include:

- a. Where a client has cut off communication with the attorney and refuses to discuss their case, leaving the attorney without any guidance on what the client's goals and objectives with the case are.
- b. Where a client only wants to pursue a frivolous claim and does not want the potential relief afforded by other viable claims.
- c. Where the *pro se* motion is out of time and there is no possible excuse for the late filing.

Before filing a statement in lieu of amended motion, the Defender should discuss the case with their District Defender and receive approval to file a statement in lieu.

17. Late Amended Motions

The Defender should not intentionally file an untimely amended motion. However, in the event an untimely amended motion is filed, the Defender should inform their District Defender and seek to get a ruling from the court on abandonment as soon as practicable. Depending on the jurisdiction, this can be accomplished by filing a motion or taking up the issue in Court. However, there should be evidence in support of the abandonment finding – an affidavit or sworn testimony provides this evidence. Abandonment is required to be resolved at the motion court level and not be the subject of the postconviction appeal.

18. Securing Prompt Evidentiary Hearings

After filing the amended motion, if not noticed up for hearing, every three months the Defender should determine if the court has taken any action. Examples of actions that could be taken include emailing or writing the court asking it to set a hearing or filing a motion to set a hearing or to compel. Ultimately, a petition for writ of mandamus should be considered. The client should be kept informed. In extreme cases, the District Defender should be consulted.

19. Evidentiary Hearing

If an evidentiary hearing is granted and the client is in custody, there is a presumption that the Defender should request the client's presence for the evidentiary hearing, absent justification and notice to the client. If the request for a confined client's presence is granted, the Defender should file an application for writ of *habeas corpus ad testificandum* and subsequent writ. Before the evidentiary hearing, the Defender should confirm that DOC has received the writ.

The Defender should promptly notify the client and witnesses when an evidentiary hearing date is scheduled or continued. The Defender should offer trial/plea and, if applicable, appellate counsel, the opportunity to review the client's trial/plea files.

The Defender should complete any necessary investigation before the hearing date, including, but not limited to, interviewing witnesses, obtaining additional discovery, and updating legal research.

Subpoenas should be served upon all witnesses in a prompt manner with adequate notice provided to witnesses. Returns for subpoenas should be confirmed several days before the hearing.

Depositions should be taken of any witnesses unable to testify in person at the hearing and the Defender should offer the depositions into evidence in lieu of live testimony pursuant to Missouri Supreme Court Rule 57.07. In the event that a subpoenaed witness whose testimony is required for the postconviction claims fails to appear at the evidentiary hearing, the Defender should request that the evidence be held open for the admission of testimony from such witness, and, when appropriate, request a body attachment be issued for such witness.

If the client's testimony is needed to support the allegations made in the amended motion, the Defender should prepare the client in advance for such testimony and cross-examination. If evidence is presented at the hearing which requires rebuttal testimony from a deposed client, the Defender should request the evidence be held open for the admission of additional deposition testimony by the client.

Prior to the evidentiary hearing, the Defender should prepare, mark, and copy all anticipated exhibits. The Defender should prepare examination plans for all witnesses the Defender intends to call at the evidentiary hearing.

At the evidentiary hearing, the Defender should ensure that the proceedings are being officially recorded. The Defender should ask the motion court to take judicial notice of the record in the underlying criminal case including all transcripts of underlying court proceedings. The Defender should present evidence on all meritorious claims presented in the amended motion, unless those claims are already conclusively established by the existing record or are affirmatively waived by the client. The Defender should keep a record and be certain that all exhibits used at the evidentiary hearing are permanently preserved for later appellate review. The Defender should object to any evidence or cross-examination by the State which goes beyond the claims raised in the amended motion. The Defender should be mindful that the filing of a postconviction motion waives attorney-client privilege only as to the claims raised in the amended motion. The Defender should object to the State's request to examine the client's plea, trial, or appellate files, and should not allow the State to examine those files absent a court order. Any such examination should be limited to documents relevant to issues raised in the amended motion.

If the client was not present at the evidentiary hearing, the Defender should promptly summarize the evidentiary hearing proceedings for the client via letter, phone call, or visit.

20. Postconviction Exhibits – Retention Of

All marked exhibits, when possible, should be scanned into the client's electronic file. Before the evidentiary hearing, the Defender should make copies of exhibits, including media exhibits, to be offered. The original exhibits should be maintained in the client's file whenever possible. Exhibits offered and/or admitted at the evidentiary hearing should be retained in the Defender's file.

21. Proposed Findings of Fact, Conclusions of Law

The motion court may ask the Defender to prepare proposed Findings of Fact, Conclusions of Law, and Order.

If the court does so, the Defender should file proposed Findings and Conclusions.

The Findings and Conclusions should state the facts and law supporting the judgment. If no evidentiary hearing was held, the facts should have been pleaded in the amended motion. If an evidentiary hearing was held, the findings of fact should not contradict the evidence adduced at the evidentiary hearing.

The Defender should ensure that the proposed Findings and Conclusions are timely filed by any party ordered to file them. When the Defender files the proposed Findings and Conclusions, and/or receives respondent's proposed Findings and Conclusions, the Defender should send a copy of each to the client.

22. Judgments – Where Judgment is Delayed

The Defender should inform the client that it typically takes judges several months to issue judgments after submission (the date of the evidentiary hearing or the determination the case will be denied without an evidentiary hearing) or the date proposed findings are due. If a judgment is not received 6 months after submission, the Defender should update the client, in writing or by phone, that the judgment has not issued. If a judgment is not received 6 months after submission, the Defender should contact the court and inquire as to the status of the judgment. The Defender should then contact the court every 6 months thereafter until the judgment issues and should update the client that no judgment has issued and of the Defender's attempts to secure a judgment in the case. Communications with the court can take the form of emailing the appropriate court personnel (law clerk, court clerk, administrative assistant, judge), scheduling a case management conference, or filing a letter or motion with the court. In cases where no judgment has issued 2 years after submission of the case, the Defender should consult with their District Defender about pursuing a petition for writ of mandamus in the Court of Appeals.

23. Judgments

When the Defender receives notice that the motion court has issued its decision, generally entitled “Findings of Fact, Conclusions of Law, and Order,” the Defender should read the Findings and Conclusions to determine if the motion court has decided all the issues in the amended motion including timeliness and abandonment.

If the court has not, the Defender should file an authorized post-trial motion under Rule 78.

24. Judgments – Where Relief Denied

If the motion court has denied postconviction relief in whole or in part, the Defender should notify the client of the court’s decision and the client’s right to appeal the denial of postconviction relief. The notification should include a copy of the findings, conclusions, and judgment/order. The Defender should also determine the due date of the Notice of Appeal and notify the client of that as well.

The Defender should discuss the option of an appeal with the client. The conversation should include, but not be limited to, information about the merits of an appeal, what claims likely will be appealed, the possible outcomes of an appeal, and the timing of an appeal. If the client does not want to appeal the case, the defender should memorialize the discussion in Notes and close the case. If the client wants to appeal the case, the Defender should file with the motion court either a Motion to Proceed In Forma Pauperis or a Certification of In Forma Pauperis Status, under section 514.040.3 and Rule 77.03, and the Notice of Appeal.

An exception to the above is in 24.035 cases where the Defender determines, after consultation with the District Defender, that an appeal would be frivolous. An appeal may be frivolous if it has no arguable merit, no arguable issues to appeal, or no legally valid reason to appeal. This is a far lower standard, however, than certainty of winning on appeal. Even if the Defender believes the appeal will not win, the appeal is not frivolous if it has arguable merit, arguable issues, or legally valid reasons to appeal, such as to preserve an arguable issue for federal review. Where an appeal is determined frivolous by the Defender, and after receiving approval from the District Defender, the Defender should inform the client that the Office of the Public will not represent the client in an appeal of the 24.035 case. The Defender should memorialize the discussion with the District Defender in Notes. The Defender should also notify the client that they may still pursue the appeal *pro se*. If the client wants to pursue the appeal *pro se*, the Defender should follow the notice of appeal procedure in the preceding paragraph

except that the notice of appeal should be filed as *pro se*, and the Defender should withdraw from the postconviction case and notify the client that representation has ended.

25. Judgments – Where Relief Granted

If the motion court has granted postconviction relief in whole, the Defender should notify the client, and include a copy of the court's Findings and Conclusions. The Defender should also notify the client of any subsequent proceedings before the motion or trial court, or appellate remedies the State may pursue.

The Defender should determine if the Defender will continue to represent the client. This determination depends on what representation the client will require, and after consultation with the District Defender. If the Defender's representation ends with the granting of postconviction relief, the Defender should close the file, and notify the client the postconviction case is closed and representation is ended. The Defender should notify the appropriate trial office if future action is required.

26. Voluntary Dismissals

If the client wants to dismiss, the Defender should obtain a signed waiver or have a second person in the office listen to the phone call in which the client confirms their desire to dismiss the case, and file a notice of dismissal. Where a second person listens in on the phone call, the Defender should document in Notes who the second person was and that they listened in and confirmed the client's wish to dismiss, and the date of this phone call.

27. Cooperation with Attorneys Who Come Later or For Clients Filing Pro-Se Federal Habeas Motions

The file belongs to the client and the Defender should cooperate fully with the client and subsequent counsel in all subsequent proceedings. Before providing the file to third parties, a written release should be obtained. The Defender owes a continued duty to clients of confidentiality, contact, and assistance.