

Appeals and Post Conviction Relief

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This article describes the appeals and post-conviction relief procedures available after a criminal conviction.

I remember a funny cartoon from *The New Yorker* magazine. It showed a bewildered defendant sitting beside his attorney in the courtroom. The judge stared down majestically from the podium, and a prosecutor stood pontificating. The defense attorney leaned over and whispered in his client's ear. Beneath the cartoon was the caption: *Our strategy is to screw up so badly during the trial that we can't help but win on appeal.*

A lot of people I've met in prison believe their attorneys used the same strategy. Unfortunately, because higher courts generally affirm convictions, good fortune was no more likely to shine on a prisoner during his appeal than when they were convicted by a jury. The leading criminal case book, *Modern Criminal Procedure*, by Yale Kamisar and other academics, confirms that, on average, appellate courts affirm more than nine out of ten convictions. Those are not good odds on which to build one's hopes.

Defendants who choose to proceed through trial should understand the finality of the decision. While it is true that juries acquit some defendants, the trend, however, is for juries to convict. Individuals who lose at trial face a far higher hurdle of reversing the conviction on appeal. Unfortunately, many of the men I've met in prison struggled to accept their conviction and begin moving forward with their lives. Invariably, those individuals served time with bitterness and anger that ate away at them like a cancer. Instead of focusing on what they could control, all of their energy was consumed by decisions that only outside forces controlled.

Nevertheless, individuals moving through the criminal justice system should understand the appellate process. Procedure generally dictates that individuals who are convicted at trial

have the right to request the next higher court to review the proceedings for fairness. Those who choose to exercise their right must file a notice of appeal within ten days of the conviction. Upon receipt of the notice of appeal, the appellate court will issue a schedule indicating when briefings will be due.

In the federal system, circuit courts review the decisions made by district courts, and the U.S. Supreme Court may review decisions made by the circuit courts. Those who pleaded guilty generally do not appeal their convictions. Those defendants had to admit their misconduct in open court in order for the judge to accept their guilty pleas. In some cases, however, defendants make conditional guilty pleas while they appeal various pretrial decisions. For example, some defendants believe law enforcement officers violated their constitutional rights. If the district court disagreed, issuing rulings indicating that all procedures were in order, a defendant could appeal the ruling on that narrow issue.

As a defendant contemplates the dilemma of whether to proceed through trial or to accept a plea agreement, I urge them to consider the likely finality of a guilty verdict. During the more than 22 years that I have served in prison thus far, I have been in the midst of tens of thousands of other prisoners. I cannot recall a single individual who walked out of prison because an appeals court overturned his conviction. Defendants must rely on their attorneys for specific legal counsel. Yet my experience suggests that defendants should familiarize themselves, also, with the likelihood of what transpires for those nine out of ten who lose at trial rather than clinging to hopes for reversal on appeal.

Prisoners who reject plea agreements that would lessen their exposure to punishment go all in for victory, swinging for the fences, essentially challenging the government to prove its case. Defendants would be wise to inquire from any reliable source about the success rates of government prosecutors.

When I asked my trial attorney that question, he knew what I wanted to hear. He told me the statistics didn't matter. "You can't compare your case to anyone else's," my attorney told me. "You've got a secret weapon because I'm defending you. Most of those people who lose are defended by schmucks."

In my case, the trial attorney had a vested interest in moving forward. He was receiving a mid-six-figure fee that he would not have been paid had I pleaded guilty. When the jury convicted me on every count, and the judge sentenced me to 45 years, the attorney casually assured me that I would prevail on appeal.

I learned a lesson from that experience. It was the same lesson that thousands of others who proceed through trial learn. The odds of a jury voting to acquit are low, yet the odds of reversing that conviction through appeal are significantly lower.

Defendants begin the criminal justice system from the presumption of innocence. For those who have been arrested, and live under the watchful eye of a pretrial probation officer, or for those who languish in pretrial detention, that presumption of innocence may seem a fallacy. Yet the presumption of innocence requires jurors to consider the defendant as if he had not broken the law. That presumption may sound ridiculous, as the jurors sit in their booth eyeing the defendant suspiciously. Time and again, however, the judge admonishes jurors not to discuss the case or form a decision until after all of the evidence and defense has been presented. Until then, they are told repeatedly to remain impartial.

When considering that *presumption of innocence* doctrine, I remind those contemplating a journey through the justice system to reflect on their thoughts when they read about a crime in the newspaper, or learned of a suspect in a crime by watching the evening news. I don't know many people who absorb such information, then dismiss it with presumptions of the suspect's innocence. How can a rational mind expect those on a jury to observe a criminal case impartially?

Despite the unlikelihood of impartiality, jurors are required to use the highest standard of proof when considering a defendant's guilt or innocence. Since the defendant is legally presumed innocent, the judge tells the jury that in order to convict, the jury must find the defendant "guilty beyond a reasonable doubt," and the verdict must be unanimous.

The judge in my case told the jury they could still convict me if they doubted my guilt a little. The standard of proof did not require the removal of all doubt, the judge said. The jury was supposed to convict if the members unanimously agreed that the defendant was guilty beyond a reasonable doubt.

Once that guilty verdict was entered, the standard of proof changed. From that point forward, the defendant was no longer "presumed innocent." He was guilty, and he would be judged accordingly in all future proceedings. The system was built to preserve that verdict, as many prisoners learned. The new standard of proof that appellate or post conviction judges would use when considering the merits raised in the briefs of the guilty was called "preponderance of the evidence." Forever gone would be those presumptions of innocence and requirements for unanimous verdicts. After the finding of guilt was settled by a jury, the preponderance-of-evidence standard would guide judges to favor the settled decision.

Whereas the defendant began the journey with an implausible presumption of innocence, after conviction, the system presumed him guilty. That was one of the reasons I have not seen a single prisoner freed because of a victory on appeal. Some people did overturn their convictions. In more than 22 years of confinement, however, I have never met a single person who was set free by an appeals court. I have, however, met many who expressed hindsight that they should have avoided trials and appeals altogether and accepted the certainty of a plea agreement.

After an appeals court affirms a conviction, a prisoner's options narrow further. They may request an *en banc* appeal, meaning they are requesting the entire appeals court to review the decision of the three-judge panel. If that request fails, the prisoner has the option of appealing

to the United States Supreme Court. Whereas circuit courts will review all felony convictions when the defendants proceed appropriately through the appeal process, the U.S. Supreme Court will agree to review only a very small portion of the cases filing an appeal.

As the highest court in our country, the U.S. Supreme Court does not concern itself with issues that do not have a national significance. Although every individual cherishes freedom and believes his case to be of infinite importance, the U.S. Supreme Court will decline the request for appeal unless the matter at issue influences the way justice is practiced across the country. Requests for appeal to the U.S. Supreme Court are known as ‘requests for writs of certiorari.’ Once the U.S. Supreme Court declines to issue the writ, or if the defendant misses the deadline for applying for the writ, the defendant's criminal case is determined to have become final.

Once the criminal case has become final, the prisoner has a clock that begins ticking. He has exactly one year from the time the case became final to file a petition known as a §2255, pursuant to the civil code. That proceeding, known as a ‘habeas corpus,’ represents a last-ditch effort to reverse the criminal conviction.

In the paragraphs above I describe how difficult it is for a defendant to win an acquittal at trial. Overturning a conviction on appeal is infinitely rarer. Statistics show that, on average, fewer than one in ten prisoners win on appeal. As compared to habeas corpus petitions, however, those odds would be quite good. Legal texts show that federal courts receive more than 12,500 requests per year for post-conviction relief. The courts grant relief in those cases fewer than 5 percent of the time; when relief does come, it may not even result in any less time in prison.

When post-conviction motions fail, inmates may proceed through the appellate process again. For post-conviction motions, the prisoner does not receive the right to an automatic appeal. Instead, he must receive permission to appeal from the judge who denied him relief. If the judge refuses to grant permission on account of frivolity, the prisoner may ask the appellate court itself for permission to appeal. Post-conviction is a long, arduous process, though many

inmates pursue the course as a form of therapy; they need to have something pending, and the therapeutic litigation brings hope.

The general practice is for the prisoner to file the habeas petition in the same district court where he was convicted. Subjects raised are generally quite narrow in scope, as the prisoner cannot revisit previously adjudicated issues. Since the strongest issues should have been raised during direct appeal, only weak issues remain at the time of the habeas filing. One of the most common tactics is for prisoners to raise claims of ineffective assistance of counsel. If persuasive, that would represent a constitutional violation that could result in a new trial or a new sentence. Unfortunately, the courts generally consider such grounds weak. Judges recognize that attorneys practice a kind of art form, and the judges do not want to second guess the strategy after the fact. Just because a jury convicted the defendant does not mean that the prisoner had insufficient counsel.

Prisoners who lose at trial and lose on appeal may be vulnerable to a kind of legal predator. The booming prison population has given rise to a huge cottage industry of post-conviction specialists. Even inside prison, cadres of jailhouse lawyers abound. For a fee that generally begins in the thousands, and can quickly grow into the tens of thousands, these "specialists" will file briefs, motions, appeals. They are in the business of selling hope. Many people in prison, as well as loved ones outside of prison, are buying.

This is not to say that every post-conviction lawyer is a shyster. Yet prisoners and family members should beware of false promises. I have known many, many prisoners who have lost tens of thousands of dollars in legal fees. They insisted on pursuing frivolous petitions for relief when they should have preparing themselves for success upon release.

Miguel is an example. I knew Miguel when we were confined together in Fort Dix. He was serving a 20-year sentence for convictions related to the distribution of cocaine. When I knew Miguel, he had already served eight years of his sentence, which meant that he was about

half way finished. During the time that he had served, the appeals court affirmed his conviction. The Supreme Court refused to grant him a writ for certiorari, thus making his case final. He filed a habeas corpus petition, and the district court declined to grant Miguel relief. Then Miguel appealed that ruling, and the appellate court declined to grant Miguel relief. One might have thought that Miguel was finished with the criminal courts.

Not so. He received a brochure from a self-titled post conviction firm. The brochure was quite impressive, with a national presence and even a self-published book with a lot of boilerplate details about the prison system. The brochure suggested that the firm specialized in finding relief for clients who had a history of judicial losses. Miguel was intrigued and asked his wife to call the firm.

When his wife called, she spoke with one of the firm's partners. The partner described how he had filed motions that have resulted in the release of many prisoners. He would be willing to review Miguel's case for a flat fee of \$5,000. Those funds would cover the cost of the lawyer reading through Miguel's previous legal work. Once the lawyer read all of the prior rulings, he would quote the price to represent Miguel through the next proceeding.

Miguel and his wife were infected with hope. His wife was on welfare, but she was willing to charge the \$5,000 on her credit card if Miguel thought it was a good idea. Not having had enough from the judicial system, Miguel agreed to go for it. His wife charged the \$5,000 on her credit card and sent the attorney the paperwork. A few weeks later, the lawyer said it would be a long shot, but he thought he could persuade the court that Miguel had received ineffective assistance of counsel.

It didn't matter that Miguel had lost on that very issue in his previous habeas petition. Since it was questionable on whether the court would agree to hear Miguel's case, the lawyer said that he would file the necessary paperwork for an additional \$2,500. Miguel's wife charged the fee to her credit card.

The court did not take long to rule. Miguel was procedurally barred from filing a second habeas petition. Specific rules, about which the attorney was likely aware, must be followed for a prisoner to file a second habeas. Miguel was not eligible. The attorney knew it from the beginning, yet he still managed to sell Miguel and his family hope for \$7,500.

Final Word

Individuals who are confronting criminal charges should arm themselves with as much information as possible before they commit themselves to decisions of proceeding through trial. Prisons are filled with men who told me that if they had known how the criminal justice system functioned, they never would have rejected a plea agreement. Juries are prone to convict, and appeals courts are likely to uphold those convictions.

One source of information that I found helpful was the annotated edition of the U.S. Code. The defendant can research the statute numbers of the crime with which he was charged. The annotated edition of the criminal code book provides information on how trial courts and appeal late courts have responded to others who have been charged with the same type of offense. Readers may find similarities between those decided cases and the case at hand. With that information, defendants would be better equipped to discuss strategies with a defense attorney. If resources are available, defendants should consider hiring another attorney for a second opinion.

What is most important for all defendants to know is that the odds of victory drop precipitously with a criminal conviction. Appellate courts rarely upset the findings of a jury's decision. Relief on post-conviction motions comes even more rarely.

These are the reasons that I urge those confronting criminal charges to discuss the possibility of a plea agreement as soon as possible. In nine out of ten cases, plea agreements are the best approach for those targeted in criminal prosecutions. Sometimes it is hard to take such advice. It is like watching a stock that was purchased at \$50 drop to \$40. Sometimes the investor

must realize it's better to cut losses before the stock drops to \$20, or lower. Unfortunately, many defendants in prison, including this writer, discovered this truism too late. All too often, sentences for those who made the wrong decisions are measured in decades.