

Indiana Rules of Court Rules of Post-Conviction Remedies

Including Amendments Received Through January 1, 2012

TABLE OF CONTENTS

Rule PC 1. Post-Conviction Relief	1
APPENDIX TO RULE PC 1	4
Rule PC 2. Belated Notice of Appeal--Belated Motion to Correct Error--Belated Appeal	4

Rule PC 1. Post-Conviction Relief

Section 1. Remedy--To whom available--Conditions.

- (a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
- (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
 - (2) that the court was without jurisdiction to impose sentence;
 - (3) that the sentence exceeds the maximum authorized by law, or is otherwise erroneous;
 - (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
 - (5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;
 - (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
- may institute at any time a proceeding under this Rule to secure relief.
- (b) This remedy is not a substitute for a direct appeal from the conviction and/or the sentence and all available steps including those under Rule PC 2 should be taken to perfect such an appeal. Except as otherwise provided in this Rule, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence and it shall be used exclusively in place of them.
- (c) This Rule does not suspend the writ of habeas corpus, but if a person applies for a writ of habeas corpus in the county where the person is incarcerated and challenges the validity of his conviction or sentence, that court shall transfer the cause to the court in which the conviction took place, and the latter court shall treat it as a petition for relief under this Rule.
- (d) A petition filed by a person who has been convicted or sentenced for a crime by a court of this state that seeks to require forensic DNA testing or analysis of any evidence, whether denominated as a petition filed pursuant to Ind. Code § 35-38-7-5 or not, is considered a Petition for Post-Conviction Relief.
- (e) A petition seeking to present new evidence challenging the person's guilt or the appropriateness of the person's sentence, when brought by a person who has been sentenced to death and who has completed state post-conviction review proceedings, whether denominated as a petition filed pursuant to Ind. Code § 35-50-2-9(k) or not, is considered a Successive Petition for Post-Conviction Relief under Section 12 of this Rule.

Section 2. Filing.

A person who claims relief under this Rule or who otherwise challenges the validity of a conviction or sentence must file a verified petition with the clerk of the court in which the conviction took place, except that a person who claims that the person's parole has been unlawfully revoked must file a verified petition with the clerk of the court in the county in which the person is incarcerated. Three (3) copies of the verified petition must be filed and no deposit or filing fee shall be required.

The Clerk shall file the petition upon its receipt and deliver a copy to the prosecuting attorney of that judicial circuit. In capital cases, the clerk shall, in addition to delivering a copy of the petition to the prosecuting attorney, immediately deliver a copy of the petition to the Attorney General. If an affidavit of indigency is attached to the petition, the clerk shall call this to the attention of the court. If the court finds that the petitioner is indigent, it shall allow petitioner to proceed in

forma pauperis. If the court finds the indigent petitioner is incarcerated in the Indiana Department of Correction, and has requested representation, it shall order a copy of the petition sent to the Public Defender's office.

Section 3. Contents.

- (a) The petition shall be submitted in a form in substantial compliance with the standard form appended to this Rule. The standard form shall be available without charge from the Public Defender's Office, who shall also see that the forms are available at every penal institution in this State.
- (b) The petition shall be made under oath and the petitioner shall verify the correctness of the petition, the authenticity of all documents and exhibits attached to the petition, and the fact that he has included every ground for relief under Sec. 1 known to the petitioner.
- (c) Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Section 4. Pleadings.

- (a) Within thirty (30) days after the filing of the petition, or within any further reasonable time the court may fix, the state, by the Attorney General in capital cases, or by the prosecuting attorney in non-capital cases, shall respond by answer stating the reasons, if any, why the relief prayed for should not be granted. The court may make appropriate orders for amendment of the petition or answer, for filing further pleadings or motions, or for extending the time of the filing of any pleading.
- (b) Within ten [10] days of filing a petition for **post-conviction relief** under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. For good cause shown, the petitioner may be permitted to file the affidavit after the ten [10] day period. No change of venue from the county shall be granted. In the event a change of judge is granted under this section, the procedure set forth in Ind.Criminal Rule 13 shall govern the selection of a special judge.
- (c) At any time prior to entry of judgment the court may grant leave to withdraw the petition. The petitioner shall be given leave to amend the petition as a matter of right no later than sixty [60] days prior to the date the petition has been set for trial. Any later amendment of the petition shall be by leave of the court.
- (d) If the petition is challenging a sentence imposed following a plea of guilty, the court shall make a part of the record the certified transcript made pursuant to Rule CR-10. [FN1]
- (e) In the event that counsel for petitioner files with the court a withdrawal of appearance accompanied by counsel's certificate, see Section 9(c), the case shall proceed under these rules, petitioner retaining the right to proceed pro se in forma pauperis if indigent. Thereafter, the court may order the State Public Defender to represent an indigent incarcerated petitioner if the court makes a preliminary finding that the proceeding is meritorious and in the interests of justice.
- (f) If the State Public Defender has filed an appearance, the State Public Defender shall have sixty (60) days to respond to the State's answer to the petition filed pursuant to Rule PC 1(4)(a). If the pleadings conclusively show that petitioner is entitled to no relief, the court may deny the petition without further proceedings.
- (g) The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

Section 5. Hearing.

The petition shall be heard without a jury. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties, except as provided above in Section 4(b). The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing. The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence.

Section 6. Judgment. The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. This order is a final judgment.

Section 7. Appeal. An appeal may be taken by the petitioner or the State from the final judgment in this proceeding, under rules applicable to civil actions. Jurisdiction for such appeal shall be determined by reference to the sentence originally imposed. The Supreme Court shall have exclusive jurisdiction in cases involving an original sentence of death and the Court of Appeals shall have jurisdiction in all other cases.

Section 8. Waiver of or failure to assert claims. All grounds for relief available to a petitioner under this rule must be raised in his original petition. Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition.

Section 9. Counsel.

- (a) Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice. The Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences. Petitioner retains the right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender.
- (b) In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena. Petitioners who are indigent and proceeding in forma pauperis shall be entitled to production of guilty plea and sentencing transcripts at public expense, prior to a hearing, if the petition is not dismissed. In addition, such petitioners shall also be entitled to a record of the post-conviction proceeding at public expense for appeal of the denial or dismissal of the petition.
- (c) Counsel shall confer with petitioner and ascertain all grounds for relief under this rule, amending the petition if necessary to include any grounds not included by petitioner in the original petition. In the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel shall file with the court counsel's withdrawal of appearance, accompanied by counsel's certification that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted. Petitioner shall be provided personally with an explanation of the reasons for withdrawal. Petitioner retains the right to proceed pro se, in forma pauperis if indigent, after counsel withdraws.
- (d) *State.* In non-capital cases, the prosecuting attorney of the circuit in which the court of conviction is situated shall represent the State of Indiana in the court of conviction. In capital cases, the Attorney General shall represent the State of Indiana for purposes of answering the petition, and the prosecuting attorney shall, at the request of the Attorney General, assist the Attorney General. The Attorney General shall represent the State of Indiana on any appeal pursuant to this Rule.

Section 10. Subsequent Prosecution.

- (a) If prosecution is initiated against a petitioner who has successfully sought relief under this rule and a conviction is subsequently obtained, or
- (b) If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.
- (c) The provisions of subsections (a) and (b) limiting the severity of the penalty do not apply when:
 - (1) a conviction, based upon a plea agreement, is set aside;

- (2) the state files an offer to abide by the terms of the original plea agreement within twenty (20) days after the conviction is set aside; and
- (3) the defendant fails to accept the terms of the original plea agreement within twenty (20) days after the state's offer to abide by the terms of the original plea agreement is filed.

Section 11. Definition. Whenever “Public Defender” is mentioned herein, it shall mean the Public Defender of the State of Indiana as defined by statute.

Section 12. Successive Petitions.

- (a) A petitioner may request a second, or successive, Petition for **Post-Conviction Relief** by completing a properly and legibly completed Successive **Post-Conviction Relief** Rule 1 Petition Form in substantial compliance with the form appended to this Rule. Both the Successive **Post-Conviction Relief** Rule 1 Petition Form and the proposed successive petition for **post-conviction relief** shall be sent to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals, and Tax Court.
- (b) The court will authorize the filing of the petition if the petitioner establishes a reasonable possibility that the petitioner is entitled to **post-conviction relief**. In making this determination, the court may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings including the record, briefs and court decisions, and any other material the court deems relevant.
- (c) If the court authorizes the filing of the petition, it is to be (1) filed in the court where the petitioner's first **post-conviction relief** petition was adjudicated for consideration pursuant to this rule by the same judge if that judge is available, and (2) referred to the State Public Defender, who may represent the petitioner as provided in Section 9(a) of this Rule. Authorization to file a successive petition is not a determination on the merits for any other purpose and does not preclude summary disposition pursuant to Section (4)(g) of this Rule.

APPENDIX TO RULE PC 1

Petition for Post-Conviction Relief	MS Word
Form for Successive Post-Conviction Relief Rule 1 Petitions	MS Word

Rule PC 2. Belated Notice of Appeal--Belated Motion to Correct Error--Belated Appeal

Eligible defendant defined. An “eligible defendant” for purposes of this Rule is a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

Appellate court jurisdiction. Jurisdiction of an appeal under this Rule is determined pursuant to Rules 4 and 5 of the Indiana Rules of Appellate Procedure by reference to the sentence imposed as a result of the challenged conviction or sentence.

Section 1. Belated Notice of Appeal

- (a) *Required Showings.* An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;
 - (1) the defendant failed to file a timely notice of appeal;
 - (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
 - (3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.
- (b) *Form of petition.* There is no prescribed form of petition for permission to file a belated notice of appeal. The petitioner's proposed notice of appeal may be filed as an Exhibit to the petition.
- (c) *Factors in granting or denying permission.* If the trial court finds that the requirements of Section 1(a) are met, it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission.
- (d) *Hearing.* If a hearing is held on a petition for permission to file a belated notice of appeal, it shall be conducted according to Ind. Post-Conviction Rule 1(5).
- (e) *Appealability.* An order granting or denying permission to file a belated notice of appeal is a Final Judgment for purposes of Ind. Appellate Rule 5.
- (f) *Time and procedure for initiating appeal.*

If the court grants permission to file a belated notice of appeal, the time and procedure for filing such notice of appeal is governed by App. R. 9(A).

Section 2. Belated Motion to Correct Error.

- (a) *Required Showings.* An eligible defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion to correct error addressing the conviction or sentence, if:
 - (1) no timely and adequate motion to correct error was filed for the defendant;
 - (2) the failure to file a timely motion to correct error was not due to the fault of the defendant; and
 - (3) the defendant has been diligent in requesting permission to file a belated motion to correct error under this rule.
- (b) *Merits of motion.* The trial court shall not consider the merits of the motion until it has determined whether the requirements of Section 2(a) are met.
- (c) *Hearing.* Any hearing on whether the petition should be granted shall be conducted according to P-C. R. 1(5).
- (d) *Factors in granting or denying permission.* If the trial court finds that the requirements of section 2(a) are met, it shall permit the defendant to file the motion, and the motion shall then be treated for all purposes as a motion to correct error filed within the prescribed period.
- (e) *Appealability of Denial of Permission.* If the trial court finds that the requirements of Section 2(a) are not met, it shall deny defendant permission to file the motion. Denial of permission shall be a Final Judgment for purposes of App. R. 5.
- (f) *Time for initiating appeal.* The time for filing a notice of appeal from denial of permission is governed by App. R. 9(A).

Section 3. Belated Perfection of Appeal.

An eligible defendant convicted after a trial or plea of guilty may petition the appellate tribunal for permission to pursue a belated appeal of the conviction or sentence if:

- (a) the defendant filed a timely notice of appeal;
- (b) no appeal was perfected for the defendant or the appeal was dismissed for failing to take a necessary step to pursue the appeal;
- (c) the failure to perfect the appeal or take the necessary step was not due to the fault of the defendant; and
- (d) the defendant has been diligent in requesting permission to pursue a belated appeal.