

## POST-CONVICTION REMEDIES

### ABA STANDARD

#### PART I. GENERAL PRINCIPLES

##### 1.1 UNITARY POST-CONVICTION REMEDY.

THERE SHOULD BE ONE COMPREHENSIVE REMEDY FOR POST-CONVICTION REVIEW (i) OF THE VALIDITY OF JUDGMENTS OF CONVICTION OR (ii) OF THE LEGALITY OF CUSTODY OR SUPERVISION BASED UPON A JUDGMENT OF CONVICTION. THE UNITARY REMEDY SHOULD ENCOMPASS ALL CLAIMS WHETHER FACTUAL OR LEGAL IN NATURE AND SHOULD TAKE PRIMACY OVER ANY EXISTING PROCEDURE OR PROCESS FOR DETERMINATION OF SUCH CLAIMS.

### KANSAS CODE

A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (K.S.A. 60-1507 (a) and (e)).

Subject to the provisions of section 60-1507 any person in this state who is detained, confined, or restrained of his liberty on any pretense

whatsoever, and any parent, guardian, or next friend for the protection of infants or allegedly incapacitated or incompetent persons, physically present in this state may prosecute a writ of habeas corpus in the supreme court, or the district court or probate court of the county in which such restraint is taking place. No deposit for security for costs shall be required. (K.S.A. 60-1501).

Section 60-1507 is intended to provide in a sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in district courts in whose jurisdiction the prisoner was confined. A motion challenging the validity of a sentence is an independent civil action which should be separately docketed, and the procedure before the trial court and on appeal to the supreme court is governed by the rules of civil procedure insofar as applicable. No cost deposit shall be required. When the motion is received and filed by the clerk, he shall forthwith deliver a copy thereof to the county attorney and make an entry of such fact in the appearance docket.

The remedy afforded by section 60-1507 dealing with motions to vacate, set aside or correct sentences is exclusive, if adequate and effective, and a prisoner cannot maintain habeas corpus proceedings before or after a motion for relief under the section. (K.S.A. 1971 Supp. 60-2702, S.Ct. Rule No. 121 (a) (b)).

#### COMMENT

Kansas is in compliance with the Standard. Both the statute and the rule, as well as cases decided thereunder (King v. State, 200 Kan. 461, 436 P.2d 855, (1968) and Cox v. State, 200 Kan. 198, 434 P.2d 843, (1967)) clearly indicate an intent that the remedy provided by K.S.A. 60-1501 shall be the only remedy available to a prisoner who seeks to vacate, set aside or correct his sentence. Habeas corpus is available only in those cases where detention is not based upon a criminal conviction or sentence or for some other reason the remedy afforded by K.S.A. 60-1507 is inadequate or ineffective.

## ABA STANDARD

### 1.2 CHARACTERIZATION OF THE PROCEEDING.

THE CHARACTERISTICS OF THE POST-CONVICTION REMEDY SHOULD NOT BE GOVERNED BY WHETHER IT IS DENOMINATED A CIVIL OR CRIMINAL PROCEEDING. IT PARTAKES OF SOME ATTRIBUTES OF EACH. THE PROCEDURES SHOULD BE APPROPRIATE TO THE OBJECTIVES OF THE REMEDY. WHILE THE POST-CONVICTION PROCEEDING WILL NECESSARILY BE SEPARATE FROM THE ORIGINAL PROSECUTION PROCEEDING FOR MANY PURPOSES, THE POST-CONVICTION STAGE IS, IN A SENSE, AN EXTENSION OF THE ORIGINAL PROCEEDING AND SHOULD BE RELATED TO IT INsofar AS FEASIBLE.

## KANSAS CODE

See K.S.A. 1971 Supp. 60-2702,  
S. Ct. Rule No. 121 (a), cited at  
1.1, supra, which characterizes the  
proceeding as "an independent civil  
action".

## COMMENT

Kansas complies with the Standard. While the rule denominates the proceeding an independent civil action, the Supreme Court has recognized that the motion is essentially a part of the review of the criminal conviction to which it relates. In Stahl v. Board of County Commissioners, 198 Kan. 623, 426 P.2d 134 (1967), the Supreme Court said:

"Although K.S.A. 60-1507 is included in our Civil Code, and the collateral attack upon the criminal judgment authorized therein may be denominated a civil proceeding, we believe that the collateral proceeding is, functionally, a part of the total review process, even though delayed, and should be treated as such in regard both to the right to counsel and to counsel's right to be paid."

Later in the same opinion the court said:

"... we do not intend to say that the post-conviction remedy contemplated by K.S.A. 60-1507 is a criminal action in every respect. Indeed, procedurally, we believe it is governed by civil rules. In a substantive aspect, however, and especially in respect to the appointment and compensation of counsel for an indigent prisoner at appellate and trial levels, we deem the proceeding a part of the criminal cause from which the proceeding arose."

#### ABA STANDARD

##### 1.3 PARTIES; LEGAL REPRESENTATIVES OF THE RESPONDENT.

(a) THE APPROPRIATE MOVING PARTY IN A POST-CONVICTION PROCEEDING IS THE PERSON SEEKING RELIEF, PROCEEDING IN HIS OWN NAME. THE APPROPRIATE RESPONDENT IS THE ENTITY IN WHOSE NAME THE ORIGINAL PROSECUTION WAS BROUGHT, E.G., STATE, PEOPLE, COMMONWEALTH, OR THE UNITED STATES OF AMERICA.

#### KANSAS CODE

All prosecutions for violations of the criminal laws of this state shall be in the name of the state of Kansas. (K.S.A. 1971 Supp. 22-2104).

#### COMMENT

Kansas complies with the Standard. The motion under K.S.A. 60-1507 is regarded as a subsequent stage of the prosecution in which the conviction was had. Hence, the parties continue to be identified as in the original case.

#### ABA STANDARD

(b) THE LEGAL OFFICER WITH PRIMARY RESPONSIBILITY FOR RESPONDING TO APPLICATIONS FOR POST-CONVICTION RELIEF SHOULD BE THE ATTORNEY GENERAL, OR OTHER DESIGNATED LEGAL OFFICER WITH STATE-WIDE JURISDICTION, WITH POWER TO ASSIGN CASES TO THE LOCAL PROSECUTORS WHEN THE ATTORNEY GENERAL DEEMS IT IN THE INTEREST OF THE STATE TO DO SO.

#### KANSAS CODE

When the motion is received and filed by the clerk, he shall forthwith deliver a copy thereof to the county attorney and make an entry of such fact in the appearance docket. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (a)).

#### COMMENT

Kansas is not in compliance with the Standard. Since the motion attacking sentence is regarded as a step in the prosecution, and venue



is placed in the court of original jurisdiction, the rule contemplates that the local prosecutor who represented the state in the initial prosecution shall continue to represent the state. In the event of an appeal, the state is represented in the Supreme Court by the Attorney General, pursuant to the provisions of K.S.A. 75-702.

#### ABA STANDARD

##### 1.4 JURISDICTION AND VENUE.

(a) ORIGINAL JURISDICTION TO ENTERTAIN APPLICATIONS FOR POST-CONVICTION RELIEF CAN BE VESTED EITHER IN THOSE LOCAL TRIAL COURTS AUTHORIZED TO TRY CRIMINAL CASES OR IN A SINGLE COURT OF STATE-WIDE JURISDICTION, SUCH AS AN APPELLATE COURT. ALTHOUGH CHOICE OF A SINGLE STATE-WIDE COURT HAS SEVERAL THEORETICAL AND PRACTICAL ADVANTAGES, IT WOULD NOT BE INAPPROPRIATE TO CONTINUE THE PREVAILING PRACTICE OF USING LOCAL COURTS AS THE COURTS OF ORIGINAL JURISDICTION.

#### KANSAS CODE

See K.S.A. 60-1507, cited and quoted at 1.1, *supra*, which fixes jurisdiction in the "court which imposed the sentence".

#### COMMENT

Kansas complies with the Standard. All proceedings under K.S.A. 60-1507 are initiated in the court of original jurisdiction.

#### ABA STANDARD

(b) THE MOST DESIRABLE VENUE FOR A POST-CONVICTION PROCEEDING IS IN THE COURT IN WHICH THE APPLICANT'S CHALLENGED CONVICTION AND SENTENCE WERE RENDERED. SUCH A CHOICE FOSTERS ADMINISTRATIVE CONVENIENCE AND EQUITABLE DISTRIBUTION OF THE BURDEN OF LITIGATION. TO GUARD AGAINST PREJUDICE BECAUSE OF THE SITE OF THE FORUM, PROCEDURE FOR CHANGE OF VENUE SHOULD BE PROVIDED AND LIBERALLY ADMINISTERED.

#### KANSAS CODE

See K.S.A. 60-1507 at 1.1 and 1.4 (a), *supra*.

In all cases in any of the district courts of this state in which it shall be made to appear that a fair and impartial trial cannot be had in the county where the suit is pending, for reasons other than the disqualification of the judge, the Court may, upon application of either party, change the place of trial to some county where the objection does not exist. (K.S.A. 60-609).

#### COMMENT

Kansas complies with the Standard. Venue is fixed by K.S.A. 60-1507 in the sentencing court. While there are no special provisions relating to changes of venue, K.S.A. 60-609 relating to change of venue in civil cases appears to be applicable.

In Williams v. State, 203 Kan. 246, 452 P.2d 856 (1969), the Supreme Court of Kansas said:

The statute authorizes a prisoner in custody under sentence to move the court which imposed the sentence to vacate, set aside or correct the sentence. It is difficult to see how this could be stated more clearly.

In cases not falling within the scope of K.S.A. 60-1507, where the writ of habeas corpus is sought, venue lies in the court having jurisdiction over the place of detention. (In re Jewett, 69 Kan. 830, 77 Pac. 567 (1904)).

#### ABA STANDARD

(c) WHERE JURISDICTION IS VESTED IN THE TRIAL COURTS AND VENUE IS DETERMINED AS IN (b) ABOVE, NEITHER A GENERAL RULE FAVORING NOR ONE DISFAVORING SUBMISSION OF POST-CONVICTION APPLICATIONS TO THE SAME TRIAL JUDGE WHO ORIGINALLY PRESIDED IS CLEARLY PREFERABLE. IF THE PRACTICE OF ORDINARY ASSIGNMENT TO THE SAME JUDGE IS ADOPTED, IT SHOULD BE TEMPERED TO PERMIT THE JUDGE FREELY TO RECUSE HIMSELF IN A PARTICULAR CASE, WHETHER OR NOT FORMALLY DISQUALIFIED BY BIAS OR BY BEING POTENTIALLY A WITNESS WHO MAY TESTIFY, WHENEVER HE FINDS IT BETTER TO HAVE A DIFFERENT JUDGE PRESIDE IN THE CASE.

#### KANSAS CODE

No comparable Kansas code provision.

## COMMENT

Kansas practice probably conforms with the Standard. Assignment of cases to judges in multi-judge districts is governed by local court rule. Rules and policies relating to the transfer of cases to judges are adequate to avoid embarrassment either to the judge or to the parties in a particular case.

## ABA STANDARD

### PART II. SCOPE OF REMEDY

#### 2.1 GROUNDS FOR RELIEF.

A POST-CONVICTION REMEDY OUGHT TO BE SUFFICIENTLY BROAD TO PROVIDE RELIEF

(a) FOR MERITORIOUS CLAIMS CHALLENGING JUDGMENTS OF CONVICTION, INCLUDING CLAIMS:

(i) THAT THE CONVICTION WAS OBTAINED OR SENTENCE IMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OR LAWS OF THE STATE IN WHICH THE JUDGMENT WAS RENDERED;

(ii) THAT THE APPLICANT WAS CONVICTED UNDER A STATUTE THAT IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF THE STATE IN WHICH JUDGMENT WAS RENDERED, OR THAT THE CONDUCT FOR WHICH THE APPLICANT WAS PROSECUTED IS CONSTITUTIONALLY PROTECTED;

(iii) THAT THE COURT RENDERING JUDGMENT WAS WITHOUT JURISDICTION OVER THE PERSON OF THE APPLICANT OR THE SUBJECT MATTER;

(iv) THAT THE SENTENCE IMPOSED EXCEEDED THE MAXIMUM AUTHORIZED BY LAW, OR IS OTHERWISE NOT IN ACCORDANCE WITH THE SENTENCE AUTHORIZED BY LAW;

(v) THAT THERE EXISTS EVIDENCE OF MATERIAL FACTS, NOT THERETOFORE PRESENTED AND HEARD, WHICH REQUIRE VACATION OF THE CONVICTION OR SENTENCE IN THE INTEREST OF JUSTICE;

(vi) THAT THERE HAS BEEN A SIGNIFICANT CHANGE IN LAW, WHETHER SUBSTANTIVE OR PROCEDURAL, APPLIED IN THE PROCESS LEADING TO APPLICANT'S CONVICTION OR SENTENCE, WHERE SUFFICIENT REASONS EXIST TO ALLOW RETROACTIVE APPLICATION OF THE CHANGED LEGAL STANDARD;

(vii) ON GROUNDS OTHERWISE PROPERLY THE BASIS FOR COLLATERAL ATTACK UPON A CRIMINAL JUDGMENT;

## KANSAS CODE

See K.S.A. 60-1507 (a) at 1.1, *supra*.

When remedy may be invoked. (1) The provisions of section 60-1507 may be invoked

only by one in custody claiming the right to be released, (2) a motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected, (3) a proceeding under section 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal. (K.S.A. 1971 Supp. 60-2702), S. Ct. Rule No. 121 (c)).

#### COMMENT

Kansas is in substantial compliance with the Standard.

K.S.A. 60-1507 expressly authorizes challenges on the ground that (1) the sentence was imposed in violation of the constitution or laws of the United States or the constitution or laws of the state of Kansas; (2) that the court was without jurisdiction to impose the sentence; (3) that the sentence is in excess of the maximum authorized by law; or (4) the conviction is otherwise subject to collateral attack.

The Supreme Court of Kansas has taken note of the fact that section 60-1507 follows the language of 28 U.S.C. Sec. 2255. Thus, the court has said "it may therefore be said the body of federal law which has developed under Sec. 2255, supra, should be given great weight in construing the provisions of 60-1507, supra, in the Kansas law" (State v. Richardson, 194 Kan. 471, 399 P.2d 799 (1965)). Although the Supreme Court has frequently said that a proceeding under 60-1507 is not a substitute for an appeal or the review of trial errors, it has, under the exceptional circumstances clause of S. Ct. Rule No. 121 (c) (3) permitted trial errors affecting constitutional rights to be raised in 60-1507 motions, even though such questions might have been raised by direct appeal. (Barnes v. State, 204 Kan. 344, 461 P.2d 782, (1969); Tuscano v. State, 206 Kan. 260, 478 P.2d 213 (1970)).

#### ABA STANDARD

(b) FOR MERITORIOUS CLAIMS CHALLENGING THE LEGALITY OF CUSTODY OR RESTRAINT BASED UPON A JUDGMENT OF CONVICTION, INCLUDING CLAIMS THAT A SENTENCE HAS BEEN FULLY SERVED OR THAT THERE HAS BEEN UNLAWFUL REVOCATION OF PAROLE OR PROBATION OR CONDITIONAL RELEASE.

#### KANSAS CODE

See K.S.A. 60-1507 at 1.1, *supra*, and  
K.S.A. 1971 Supp. 60-2702 S. Ct. Rule No. 121  
(c) at 2.1 (a), *supra*.

#### COMMENT

Kansas is in partial compliance with the Standard. See Comment following 2.1 (a), *supra*. But K.S.A. 60-1507 is not available to question the propriety of acts of the Kansas Board of Probation and Parole (Foor v. State, 196 Kan. 618, 413 P.2d 719 (1966); Prescher v. State, 205 Kan. 636, 471 P.2d 349, (1970)) nor may the motion be used to challenge irregularities in probation revocation procedures. (Stewart v. State, 206 Kan. 147, 476 P.2d 652 (1970)). Habeas corpus has been held to be the appropriate remedy in such cases. (Johnson v. Stucker, 203 Kan. 253, 453 P.2d 35 (1969)).

#### ABA STANDARD

2.2 PREMATUREITY OF APPLICATION FOR POST-CONVICTION RELIEF; POSTPONED APPEALS.

(a) POST-CONVICTION RELIEF SHOULD NOT BE AVAILABLE SO LONG AS THERE IS A POSSIBILITY OF TAKING A TIMELY APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE.

#### KANSAS CODE

See K.S.A. 1971 Supp. 60-2702, St. Ct.  
Rule No. 121 (c) (2) at 2.1 (a), *supra*.

#### COMMENT

Kansas is in compliance with the Standard. S. Ct. Rule No. 121 (c) (2) provides expressly that a motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time during which an appeal may be perfected. The rule is applied in the State v. Hamrick, 206 Kan. 543, 479 P. 2d 854, (1971).

#### ABA STANDARD

(b) THE OVER-ALL PROCEDURAL SYSTEM SHOULD BE SUFFICIENTLY FLEXIBLE ON THE TIMELINESS OF APPEALS FROM JUDGMENT OF CONVICTION AND SENTENCE, TO PERMIT POSTPONED OR NUNC PRO TUNC APPEALS WHERE REASON FOR SUCH EXISTS. IF AN APPLICATION FOR LEAVE TO TAKE A POSTPONED APPEAL IS DENIED BECAUSE IT RAISES ISSUES OUTSIDE THE RECORD, OR IF FOR ANY OTHER REASON IT APPEARS MORE APPROPRIATE TO CONSIDER THE CLAIMS IN A POST-CONVICTION PROCEEDING, THE SYSTEM SHOULD PROVIDE FOR THE EXPEDITIOUS TRANSFER OF THE CASE TO SUCH A PROCEEDING.

#### KANSAS CODE

(1) If sentence is imposed, the defendant may appeal from the judgment of the district court not later than ten days after the expiration of the district court's power to modify the sentence. The power to revoke or modify the conditions of probation shall not be deemed power to modify the sentence.

(2) If the imposition of sentence is suspended, the defendant may appeal from the judgment of the district court within ten days after the order suspending imposition of sentence. (K.S.A. 1971 Supp. 22-3608).

#### COMMENT

Kansas does not comply with the Standard. In construing an earlier statute, G.S. 1949, 62-1724, the Supreme Court held that the timeliness of appeal in a criminal case is jurisdictional and that the court has no jurisdiction to entertain an appeal by a defendant unless it is taken within the time prescribed by law. (State v. Shores, 185 Kan. 586, 345 P.2d 686 (1959)). Although the statute governing criminal appeals has been redrafted, the present language does not suggest that a different conclusion would be appropriate. However, in Brizendine v. State, 210 Kan. 241, \_\_\_ P.2d \_\_\_ (1972) the Supreme Court, suggested that where the failure to take a timely appeal is the result of dereliction of counsel, an out-of-time appeal may be allowed. See also State v. Johnson, 203 Kan. 947, 457 P.2d 181 (1969).

#### ABA STANDARD

##### 2.3 CUSTODY REQUIREMENT.

EXCEPT FOR A CLAIM UNDER SECTION 2.1 (b) WHICH DOES NOT AFFECT THE

VALIDITY OF A CRIMINAL JUDGMENT, THE AVAILABILITY OF POST-CONVICTION RELIEF SHOULD NOT BE DEPENDENT UPON THE APPLICANT'S ATTACKING A SENTENCE OF IMPRISONMENT THEN BEING SERVED OR OTHER PRESENT RESTRAINT. THE RIGHT TO SEEK RELIEF FROM AN INVALID CONVICTION AND SENTENCE OUGHT TO EXIST:

(i) EVEN THOUGH THE APPLICANT HAS NOT YET COMMENCED SERVICE OF THE CHALLENGED SENTENCE;

(ii) EVEN THOUGH THE APPLICANT HAS COMPLETELY SERVED THE CHALLENGED SENTENCE;

(iii) EVEN THOUGH THE CHALLENGED SENTENCE DID NOT COMMIT THE APPLICANT TO PRISON, BUT WAS RATHER A FINE, PROBATION, OR SUSPENDED SENTENCE.

#### KANSAS CODE

See K.S.A. 60-1507 at 1.1, *supra*, and K.S.A. 1971 Supp. 60-2702 S. Ct. Rule No. 121 (c) at 2.1 (a), *supra*.

#### COMMENT

Kansas is in partial compliance with the Standard. Both section 60-1507 and S. Ct. Rule No. 121 (c) limit the remedy to one who is in custody claiming the right to be released. At the same time in Davis v. State, 202 Kan. 192, 446 P.2d 830 (1968), the Supreme Court construed the present language of S. Ct. Rule No. 121 (c) to permit a prisoner to challenge the validity of a sentence even though he would still be confined under another sentence if the challenge were successful. The court stated its intent to bring the Kansas policy into conformity with the decisions of the Supreme Court of the United States in Walker v. Wainwright, 390 U. S. 335, (1968) and Peyton v. Rowe, 391 U.S. 54 (1968).

#### ABA STANDARD

##### 2.4 STATUTE OF LIMITATIONS; ABUSE OF PROCESS; STALE CLAIMS.

(a) IT IS UNSOUND TO FIX A SPECIFIC TIME PERIOD AS A STATUTE OF LIMITATIONS TO BAR POST-CONVICTION REVIEW OF CRIMINAL CONVICTIONS. THE CIRCUMSTANCES THAT WILL OCCASION APPLICATIONS FOR POST-CONVICTION RELIEF ARE TOO MANY AND VARIED TO PERMIT OF ONE USEFUL LIMITATIONS PERIOD.

#### KANSAS CODE

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. (K.S.A. 60-1507 (c)).

The sentencing court shall not entertain a second or successive motion for relief on behalf of the same prisoner, where (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (d)).

#### COMMENT

Kansas is apparently in compliance with the Standard.

#### ABA STANDARD

(b) IT SHOULD BE CONSIDERED AN ABUSE OF PROCESS FOR A PERSON WITH A TENABLE OR MERITORIOUS CLAIM FOR POST-CONVICTION RELIEF DELIBERATELY AND KNOWINGLY TO WITHHOLD PRESENTATION OF THAT CLAIM UNTIL AN EVENT OCCURS WHICH HE BELIEVES PREVENTS SUCCESSFUL RE-PROSECUTION OR CORRECTION OF THE VITIATING ERROR. AN APPLICANT WHO HAS COMMITTED SUCH ABUSE OF PROCESS MAY BE DENIED RELIEF ON HIS CLAIM. COURTS SHOULD NOT BE REQUIRED TO DENY RELIEF IN ALL SUCH CASES. ABUSE OF PROCESS OUGHT TO BE AN AFFIRMATIVE DEFENSE TO BE SPECIFICALLY PLEADED AND PROVED BY THE STATE.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

In the absence either code provision or reported decision, it is not possible to say whether Kansas complies.

#### ABA STANDARD

(c) A STATE HAS A LEGITIMATE INTEREST IN AVOIDING LITIGATION OF STALE CLAIMS. WHERE AN APPLICANT HAS COMPLETED SERVICE OF A CHALLENGED SENTENCE AND, BELATEDLY, SEEKS POST-CONVICTION RELIEF, HE CAN BE CHARGED WITH THE RESPONSIBILITY OF SHOWING PRESENT NEED FOR SUCH RELIEF. A



SUFFICIENT SHOWING OF PRESENT NEED IS MADE, FOR EXAMPLE, WHERE:

(i) AN APPLICANT IS FACING PROSECUTION, OR HAS BEEN CONVICTED, UNDER A MULTIPLE OFFENDER LAW AND THE CHALLENGED CONVICTION OR SENTENCE MAY BE, OR HAS BEEN, A FACTOR IN SENTENCING FOR THE CURRENT OFFENSE;

(ii) AN APPLICANT IS OR MAY BE DISADVANTAGED IN SEEKING PAROLE UNDER A LATER SENTENCE; OR

(iii) AN APPLICANT IS UNDER A CIVIL DISABILITY RESULTING FROM THE CHALLENGED CONVICTION AND PREVENTING HIM FROM A DESIRED AND OTHERWISE FEASIBLE ACTION OR ACTIVITY.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

In the absence of either code provision or case law it is difficult to formulate a judgment as to whether Kansas complies with this Standard. Throughout the opinions of the Kansas Supreme Court in proceedings under 60-1507 two dominant themes appear. First, the court has consistently expressed a concern about the litigation and re-litigation of stale claims. Secondly, the court has recognized a range of flexibility in the proceedings consistent with the interests of justice. Hence, should an occasion arise for application of this Standard, we can conjecture that Kansas will be in compliance.

#### ABA STANDARD

#### PART III. THE APPLICATION: PREPARATION, FILING, AND SERVICE.

##### 3.1 PREPARATION OF APPLICATIONS FOR RELIEF; RESOURCES AVAILABLE TO APPLICANTS.

(a) EVERY POST-CONVICTION RELIEF SYSTEM MUST TAKE INTO ACCOUNT THE NECESSARY PREMISE THAT THE INITIAL LEGAL STEP, PREPARATION AND FILING OF AN APPLICATION, PROBABLY WILL BE PERFORMED BY LAYMEN IN PRISON WITHOUT ASSISTANCE OF COUNSEL AND WITHOUT ACCESS TO MORE THAN LIMITED LEGAL MATERIALS.

(b) THE MINIMUM CONDITIONS DESIRABLE IN PRISON WOULD INCLUDE:

(i) AVAILABILITY OF STATIONERY AND SUPPLIES;

(ii) THE RIGHT TO PURCHASE AND RETAIN LEGAL REFERENCE MATERIALS IN REASONABLE AMOUNTS;

(iii) REASONABLE ACCESS TO ANY LEGAL REFERENCE MATERIALS IN THE PRISON LIBRARY; AND

(iv) FREE AND UNINHIBITED ACCESS TO THE COURTS AND TO PRIVATE COUNSEL.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas complies with the Standard. Although there is no relevant code provision, it appears each of the institutions in Kansas is in compliance as a result of administrative regulation.

#### ABA STANDARD

(c) IN ADDITION, IT IS DESIRABLE FOR A STATE TO ARRANGE FOR, OR TO PERMIT, IN-PRISON GUIDANCE OR COUNSELLING OF PRISONERS ON THE VALIDITY OR INVALIDITY OF CLAIMS FOR POST-CONVICTION RELIEF. THE FOLLOWING STEPS MAY BE APPROPRIATELY CONSIDERED:

(i) REGULAR VISITS BY LAWYERS OR LAW STUDENTS TO THE PRISON TO DISCUSS CASES OR PROBLEMS WITH PRISONERS ON AN INDIVIDUAL BASIS, ARRANGED BY AN INDEPENDENT AGENCY SUCH AS A LOCAL BAR ASSOCIATION OR DEFENDER ASSOCIATION OR LAW SCHOOL;

(ii) ESTABLISHMENT AND SUPERVISION OF AN ADEQUATE COLLECTION OF LEGAL REFERENCE MATERIALS RELATED TO CRIMINAL LAW AND PROCEDURE IN THE PRISON LIBRARY TO PERMIT THE PRISONERS' OWN RESEARCH TO BE AS ACCURATE AND COMPLETE AS POSSIBLE;

(iii) DISTRIBUTION OF SPECIALLY PREPARED PAMPHLETS OR BROCHURES TO PRISONERS, PREPARED BY RELIABLE AND INDEPENDENT AGENCIES, OUTLINING THE SCOPE OF POST-CONVICTION RELIEF IN LANGUAGE AND FORM UNDERSTANDABLE TO THE PRISON POPULATION.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas is in partial compliance with the Standard. Since 1966, the Kansas Defender Project, an activity at the University of Kansas School of Law, supported by non-state funds, has provided a program of inmate counseling at the state penitentiary and the state correctional institution for women, using law students under faculty supervision. Representation of inmates by qualified law students in post-conviction matters is authorized by S. Ct. Rule No. 213. Although library resources at the institution are meager, basic libraries have been established and the supply of materials

is currently being expanded. Apparently there has been no program of distribution of specially prepared pamphlets or brochures to prisoners explaining the scope and purpose of post-conviction relief.

#### ABA STANDARD

(d) OPTIMALLY, A STATE COULD ESTABLISH A REGULAR AGENCY TO BE CHARGED WITH THE RESPONSIBILITY OF PROVIDING LEGAL ADVICE AND REPRESENTATION TO ITS PRISONERS. A STATE WITH A PUBLIC DEFENDER SYSTEM COULD MAKE THIS TASK AN ADDED FUNCTION OF THAT OFFICE, OR A SPECIAL AGENCY COULD BE CREATED FOR THIS PURPOSE. IN NO EVENT SHOULD THIS FUNCTION BE ADMINISTRATIVELY RELATED TO THE CUSTODIAL PERSONNEL.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas is in compliance with the Standard. Recent action of the Kansas Bar Association in cooperation with the law schools of the state has resulted in the creation of a non-profit corporation called Legal Services to Prisoners, Inc. The objective of the program is to provide professional legal services to inmates of the Kansas penal institutions. The project is financed by a grant of LEAA discretionary funds. The current staff resources include full time services of an attorney-director, half time services of a litigation attorney, a full time secretarial staff and part time services of two law professors from the University of Kansas. Staff resources are augmented by the use of law students from the University of Kansas and Washburn University law schools.

#### ABA STANDARD

##### 3.2 STANDARDIZED APPLICATION FORMS.

THE PREPARATION AND USE OF A STANDARDIZED APPLICATION FORM USING LANGUAGE AND CONCEPTS UNDERSTANDABLE TO LAYMEN CAN AID CONSIDERABLY IN IMPROVING THE QUALITY OF APPLICATIONS FILED PRO SE BY PRISONERS. THE COST IS SLIGHT COMPARED TO THE GAIN IN COHERENCE AND INTELLIGIBILITY OF APPLICATIONS.

#### KANSAS CODE

A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto which shall be furnished by the court.

## APPENDIX

IN THE DISTRICT COURT OF \_\_\_\_\_ COUNTY,  
STATE OF KANSAS

### PERSONS IN CUSTODY

Full name of Movant \_\_\_\_\_

Prison Number \_\_\_\_\_

vs.

STATE OF KANSAS, Respondent \_\_\_\_\_

Case No. \_\_\_\_\_  
(To be supplied by  
the clerk of the Dis-  
trict Court)

### INSTRUCTIONS—READ CAREFULLY

In order for this motion to receive consideration by the District Court, it shall be in writing (legibly hand-written or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the motion is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay costs of the proceedings. When the motion is completed, *The original and one copy* shall be mailed to the Clerk of the District Court from which he was sentenced.

### MOTION

1. Place of detention \_\_\_\_\_
2. Name and location of court which imposed sentence \_\_\_\_\_
3. The case number and the offense or offenses for which sentence was imposed:
  - (a) \_\_\_\_\_
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
4. The date upon which sentence was imposed and the terms of the sentence:
  - (a) \_\_\_\_\_
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. Check whether a finding of guilty was made after a plea:
  - (a) of guilty \_\_\_\_\_; or
  - (b) of not guilty \_\_\_\_\_
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
  - (a) a jury \_\_\_\_\_; or
  - (b) a judge without a jury \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence? \_\_\_\_\_
8. If you answered "yes" to (7), list
  - (a) the name of each court to which you appealed:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_

(b) the result in each court to which you appealed and the date of such result:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_

- (c) \_\_\_\_\_

10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

12. Prior to this motion have you filed with respect to this conviction?

(a) any petitions in state or federal courts for habeas corpus? \_\_\_\_\_

(b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? \_\_\_\_\_

(c) any other petitions, notions or applications in this or any other court? \_\_\_\_\_

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(b) the name and location of the court in which each was filed:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(c) the disposition thereof and the date of such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other court, *state or federal*, in any petition, motion or application which you have filed? \_\_\_\_\_

15. If you have answered "yes" to (14), identify (a) which grounds have been previously presented:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) \_\_\_\_\_

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(b) \_\_\_\_\_

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(c) \_\_\_\_\_

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and in detail what counsel failed to do in representing your interests:

(a) \_\_\_\_\_

\_\_\_\_\_

(b) \_\_\_\_\_

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Signature of Petitioner

STATE OF \_\_\_\_\_ }  
COUNTY OF \_\_\_\_\_ } ss.

I, \_\_\_\_\_, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

Signature of Affiant

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_  
day of \_\_\_\_\_, 19\_\_\_\_.

Notary Public

My commission expires:

(month) (day) (year)

FORMA PAUPERIS AFFIDAVIT  
(See instructions page 1 of this form)

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Signature of Petitioner

STATE OF \_\_\_\_\_ }  
COUNTY OF \_\_\_\_\_ } ss.

I, \_\_\_\_\_, being first duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

Signature of Affiant

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_  
day of \_\_\_\_\_, 19\_\_\_\_.

Notary Public

My commission expires:

(month) (day) (year)

(K.S.A. 1971 Supp. 60-2702, S. Ct.  
Rule No. 121 (e) and appendix).

#### COMMENT

Kansas is in compliance with the Standard.

#### ABA STANDARD

##### 3.3 APPLICATIONS WITH FALSE ALLEGATIONS; VERIFICATION REQUIREMENT.

(a) THERE SHOULD BE A REQUIREMENT OF VERIFICATION OF PRO SE APPLICATIONS FOR POST-CONVICTION RELIEF, SUBJECT TO THE LAW OF PERJURY OR FALSE SWEARING FOR KNOWING FALSEHOODS.

(b) PRISONERS SHOULD HAVE READY ACCESS TO A NOTARY PUBLIC OR OTHER OFFICER AUTHORIZED TO ADMINISTER OATHS.

#### KANSAS CODE

See Form of motion, Appendix to Rule 121 at 3.2, supra.

Perjury is willfully, knowingly, and falsely swearing testifying, affirming, declaring or subscribing to any material fact upon any oath or affirmation legally administered in any cause, matter or proceeding before any court, tribunal, public body, notary public or other officer authorized to administer oaths.

Perjury is a class C felony if the false statement is made upon the trial of a felony. Perjury is a class E felony if the false statement is made in a cause, matter or proceeding other than the trial of a felony charge. (K.S.A. 1971 Supp. 21-2805).

#### COMMENT

Kansas complies with the Standard. Notarial services are made available to the inmates at the offices of the record clerks in the institutions.

#### ABA STANDARD

##### 3.4 . SUPPORTING AFFIDAVITS; SOURCES OF EVIDENCE TO PROVE CLAIMS.

IT IS NOT REASONABLE TO REQUIRE A PRISONER TO SUBMIT WITH HIS APPLICATION

AFFIDAVITS OF THIRD PARTIES IN SUPPORT OF HIS CLAIM FOR POST-CONVICTION RELIEF, AS A CONDITION FOR CONSIDERATION OF THE APPLICATION. NOR CAN THE APPLICANT BE FAIRLY EXPECTED, AT THIS STAGE, TO OUTLINE HOW HE INTENDS TO PROVE ALL THE FACTUAL ALLEGATIONS MATERIAL TO HIS CLAIM. EXPLORATION OF THE EXISTENCE OF EVIDENTIARY BASES FOR ALLEGATIONS, SUFFICIENT ON THEIR FACE, MAY BE APPROPRIATELY A MATTER FOR INQUIRY AT A LATER STAGE, RATHER THAN AS A TEST OF PLEADING SUFFICIENCY.

#### KANSAS CODE

The movant has the burden of establishing his grounds for relief by a preponderance of the evidence. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (g)).

#### COMMENT

To the extent that neither the statute nor the rule require that affidavits be attached to motions filed under section 60-1507, Kansas complies with the Standard. At the same time, the Supreme Court has frequently held that the trial court is not obliged to grant relief or order an evidentiary hearing upon the basis of the movant's uncorroborated statements. (State v. Yurk, 203 Kan. 629, 456 P.2d 11 (1969); Lee v. State, 204 Kan. 361, 461 P.2d 743 (1969)). While Rule No. 121 (g) was apparently drawn to assign the burden of proof in hearings, the Supreme Court seems to have extended the rule to require corroboration at the pleading stage. (See Lee v. State, supra). Thus, in order to assure an evidentiary hearing, it is necessary for the accused to attach corroborating evidence, either by way of abstracts from the record, affidavits, or other external data.

#### ABA STANDARD

##### 3.5 FILING FEES.

(a) BECAUSE THE OVERWHELMING NUMBER OF APPLICANTS FOR POST-CONVICTION RELIEF ARE INDIGENT, IT IS PROBABLY UNWISE TO REQUIRE A FILING FEE FOR APPLICATIONS. THE COST OF ADMINISTRATION ENTAILED IN A PROCEDURE FOR WAIVER OF FEES WILL LIKELY EXCEED THE REVENUES FROM FEES PAID.

(b) IF A FILING FEE IS REQUIRED, THERE SHOULD BE A ROUTINE PROCEDURE FOR WAIVER OF THE REQUIREMENT. STANDARDIZED FORMS FOR APPLICATION SHOULD INCLUDE THE REQUISITE AVERMENTS NECESSARY TO PROCEED WITHOUT PAYMENT OF FEES.

#### KANSAS CODE

See K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (a) under 1.1, supra, where it is

stated "No cost deposit shall be required",  
and S. Ct. Rule No. 121, Appendix (22),  
under 3.2, supra.

#### COMMENT

Kansas complies with the Standard.

No deposit for costs is required of the plaintiff in a habeas corpus action. See K.S.A. 60-1501 under 1.1, supra.

#### ABA STANDARD

#### PART IV. PROCESSING APPLICATIONS

##### 4.1 JUDICIAL RESPONSIBILITY FOR DISPOSITION; MASTERS.

(a) ALL DISPOSITIONS SHOULD BE MADE BY APPROPRIATE JUDICIAL OFFICERS, WHO BEAR AND ACKNOWLEDGE RESPONSIBILITY FOR THE JUDGMENTS. THE UTILIZATION OF MASTERS FOR PRELIMINARY INQUIRIES MAY BE APPROPRIATE AND SHOULD BE EXPLICITLY AUTHORIZED. APPLICATIONS SHOULD NOT BE DISPOSED OF BY ADMINISTRATIVE OR NON-JUDICIAL PERSONNEL, WHETHER BY REFUSAL TO DOCKET OR OTHERWISE.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas complies with the Standard. K.S.A. 60-253 (b) authorizes the appointment of masters in civil cases generally. However, they are apparently not often used in post-conviction proceedings.

#### ABA STANDARD

(b) FINAL DISPOSITION OF APPLICATIONS SHOULD BE MADE AT THE EARLIEST STAGE CONSISTENT WITH THE PURPOSE OF DECIDING CLAIMS ON THEIR UNDERLYING MERITS RATHER THAN ON FORMAL OR TECHNICAL GROUNDS.



#### KANSAS CODE

Unless the motion and the files and records of the case conclusively show that the movant is entitled to no relief, the court shall notify the county attorney and grant a prompt hearing. "Prompt" means as soon as reasonably possible considering other urgent business of the court. All proceedings on the motion shall be recorded by the official court reporter. (K.S.A. 1971 Supp. 60-2702, S.Ct. Rule No. 121 (f)).

#### COMMENT

Kansas is in compliance with the Standard.

#### ABA STANDARD

##### 4.2 PRELIMINARY JUDICIAL SCREENING OF APPLICATIONS.

(a) BECAUSE OF THE LIMITED PLEADING CAPABILITIES OF LAY APPLICANTS, IT IS NOT EXPEDIENT FOR COURTS TO UNDERTAKE TO EVALUATE APPLICATIONS FILED PRO SE BY SUCH PERSONS. A ROUTINE PRACTICE OF RULING ON SUCH APPLICATIONS FOR SUFFICIENCY OF PLEADINGS SHOULD BE AVOIDED. THE COURT WILL BE BETTER ABLE TO UNDERSTAND THE NATURE OF THE GRIEVANCE ASSERTED AND TO DETERMINE THE PROPER MODE OF PROCEEDING AFTER A RESPONSIVE PLEADING HAS BEEN FILED AND THE PERTINENT RECORD HAS BEEN BROUGHT INTO FOCUS. IT IS PREFERABLE, THEREFORE, THAT THE COURTS MAKE IT CLEAR THAT RESPONSIVE PLEADINGS ARE EXPECTED AS OF COURSE.

(b) IF ANY PRELIMINARY JUDICIAL SCREENING OF PRO SE APPLICATIONS IS UNDERTAKEN PRIOR TO RECEIPT OF RESPONSIVE PLEADINGS, ORDERS OF FINAL DISMISSAL SHOULD BE CONFINED TO CASES OF UNMISTAKABLY FRIVOLOUS ALLEGATIONS.

#### KANSAS CODE

See K.S.A. 1971 Supp. 60-2702 S. Ct.  
Rule No. 121 (f) at 4.1 (b), supra.

#### COMMENT

Kansas partially complies with the Standard. There is no rule governing Kansas practice which requires that a responsive pleading be filed by the state. The Supreme Court has expressly stated that "it is neither necessary nor required that the defendant answer or otherwise

plead to the plaintiff's motion in order to refute the allegations of the motion or the evidence offered by the plaintiff in support thereof". (Tipton v. State, 194 Kan. 705, 402 P.2d 310 (1965); Patterson v. State, 198 Kan. 507, 426 P.2d 310 (1965)). However, the court may in the exercise of its discretion require a responsive pleading.

#### ABA STANDARD

#### 4.3 RESPONSIVE PLEADING; CALENDAR PRIORITY; BAIL; STAYS OF EXECUTION; DISMISSAL ON THE PLEADINGS.

(a) A REPONSIVE PLEADING SHOULD BE REQUIRED, BY A RULE TO SHOW CAUSE OR OTHERWISE, NO MORE THAN 30 DAYS AFTER AN APPLICATION HAS BEEN FILED. THE RESPONSE SHOULD FULLY AND FAIRLY MEET THE ALLEGATIONS OF THE APPLICATION. WHERE THE RECORD OF PRIOR PROCEEDINGS WOULD AID THE COURT IN UNDERSTANDING THE NATURE OF THE CONTENTIONS, COUNSEL FOR THE RESPONDENT SHOULD UNDERTAKE TO SUPPLY THE RELEVANT PORTIONS, TO THE EXTENT THAT THEY WERE NOT APPENDED TO THE APPLICATION.

#### KANSAS CODE

See K.S.A. 1971 Supp. 60-2702, S. Ct.  
Rule No. 121 (f) under 4.1 (b) supra.

#### COMMENT

Kansas partially complies with the Standard. Although the Kansas rule does not require that a responsive pleading be filed, the court may require a response by the attorney for the state. Inasmuch as the challenged proceeding occurred in the court which tried the case, records of prior proceedings are available for consideration by the court.

#### ABA STANDARD

(b) IN ADDITION TO MAKING EFFECTIVE THE REQUIREMENT OF PROMPT RESPONSE BY THE STATE, IF THE APPLICANTS ARE HELD UNDER SENTENCE OF DEATH OR IMPRISONMENT, OR IF THERE IS OTHER REASON FOR EXPEDITION, COURTS SHOULD ACCORD CALENDAR PRIORITY TO THE DETERMINATION OF APPLICATIONS FOR POST-CONVICTION RELIEF.

#### KANSAS CODE

See K.S.A. 1971 Supp. 60-2702, S. Ct.  
Rule No. 121 (f), under 4.1 (b), supra.

#### COMMENT

Except that a response by the state is not required, Kansas complies with the Standard. Although there is no rule requiring such preference, most local courts grant calendar priority to the determination of applications for post-conviction relief.

#### ABA STANDARD

(c) COURTS SHOULD HAVE THE POWER TO ORDER EXECUTIONS STAYED OR TO RELEASE APPLICANTS ON RECOGNIZANCE OR WITH SUFFICIENT SURETIES IN APPROPRIATE CASES, PENDING FINAL DISPOSITION OF APPLICATIONS FOR POST-CONVICTION RELIEF.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas does not comply with the Standard.

#### ABA STANDARD

(d) IN LIGHT OF THE APPLICATION AND RESPONSE, THE COURT MUST DETERMINE WHETHER TO ORDER FURTHER PROCEEDINGS, INCLUDING APPOINTMENT OF COUNSEL FOR A PRO SE APPLICANT, IF NOT MADE PREVIOUSLY, OR TO LOOK TOWARD TERMINATION OF THE MATTER. IF THE LATTER COURSE IS TAKEN, THE COURT SHOULD INDICATE ITS INTENTION TO DISMISS THE APPLICATION WITH A BRIEF STATEMENT OF THE REASONS, AND PERMIT THE APPLICANT A REASONABLE OPPORTUNITY TO REPLY BEFORE FINAL DISPOSITION.

#### KANSAS CODE

If a motion presents substantial questions of law or triable issues of fact the court shall appoint counsel to assist the movant if he is an indigent person. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (i), see also S.Ct. Rule No. 121 (f), at 4.1 (b)).

#### COMMENT

Kansas partially complies with the Standard. Kansas practice does not include the appointment of counsel in case the motion is to be disposed of without a hearing. Also, there is no provision which requires the court to inform the applicant of its intention to dismiss the application and to hear a response.

#### ABA STANDARD

(e) DISPOSITION ON THE PLEADINGS AND RECORD OF PRIOR PROCEEDINGS WITHOUT APPOINTMENT OF COUNSEL FOR THE UNREPRESENTED APPLICANT IS NOT PROPER IF IT REQUIRES RESOLUTION OF A NON-FRIVOLOUS QUESTION OF LAW. DISPOSITION AT THIS STAGE IS ALWAYS IMPROPER WHENEVER THERE EXISTS A MATERIAL ISSUE OF FACT.

#### KANSAS CODE

See K.S.A. 1971 Supp. 60-2702, S. Ct.  
Rule No. 121 (i), at 4.3 (d).

#### COMMENT

Kansas complies with the Standard.

#### ABA STANDARD

#### 4.4 APPOINTMENT OF COUNSEL; WITHDRAWAL OF APPOINTED COUNSEL.

(a) IT IS MOST DESIRABLE TO AVOID PROCESSING OF APPLICATIONS FOR POST-CONVICTION RELIEF BEYOND THE INITIAL SCREENING OF THE DOCUMENTS WITHOUT COUNSEL REPRESENTING THE APPLICANT. COUNSEL SHOULD BE PROVIDED FOR PRO SE APPLICANTS UNABLE TO AFFORD ADEQUATE REPRESENTATION. WHEN PRIVATE COUNSEL ARE APPOINTED TO REPRESENT SUCH APPLICANTS, THEIR SERVICES SHOULD BE COMPENSATED ADEQUATELY FROM PUBLIC FUNDS.

(b) THE RESPONSIBILITY OF APPOINTED COUNSEL TO CONTINUE TO SERVE THEIR CLIENTS THROUGH ANY APPELLATE PROCEEDINGS, INCLUDING REVIEW BY THE SUPREME COURT OF THE UNITED STATES, SHOULD BE AFFIRMED. EVEN IF APPOINTED COUNSEL IS NOT EXPECTED TO CONTINUE IN A CASE BEYOND THE LEVEL OF THE COURT APPOINTING HIM, HE SHOULD BE RESPONSIBLE AT A MINIMUM TO CONTINUE IN THE CASE, IF THE APPLICANT WISHES TO PROCEED FURTHER, UNTIL AN APPEAL IS PERFECTED OR THE NECESSARY PRELIMINARY STEPS HAVE BEEN TAKEN TO BRING THE CASE BEFORE THE REVIEWING COURT.

#### KANSAS CODE

K. S. A. 1971 Supp. 60-2702, S. Ct.  
Rule No. 121 (i), at 4.3 (d).

If a movant desires to appeal and contends he is without means to employ counsel to perfect the appeal, the district court shall, if satisfied that the movant is an indigent person, appoint competent counsel to conduct such appeal. If for good cause shown appointed counsel is permitted to withdraw while the case is pending in either the district court or the supreme court, the district court shall appoint new counsel in his stead. (K.S.A. 1971 Supp. 60-2702, S.Ct. Rule No. 121 (m)).

#### COMMENT

Kansas is in substantial compliance with the Standard. Also see Standards relating to Providing Defense Services.

#### ABA STANDARD

##### 4.5 SUMMARY DISPOSITION WITHOUT PLENARY HEARING; DISCOVERY.

(a) APPLICATIONS FOR POST-CONVICTION RELIEF CAN APPROPRIATELY BE DECIDED ON THE MERITS WITHOUT A PLENARY EVIDENTIARY HEARING, AND WITHOUT THE EXPENSE, RISK, AND INCONVENIENCE OF TRANSPORTING THE APPLICANTS, IF IN CUSTODY, FROM THE PRISON TO THE COURTHOUSE. SUCH SUMMARY DISPOSITION IS PROPER IN ALL CASES WHERE THERE IS NO FACTUAL ISSUE OR WHERE THE CASE IS SUBMITTED ON AN AGREED STATEMENT OF FACTS.

#### KANSAS CODE

See K.S. A. 60-1507 (b) at 4.6, *infra*;  
K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121  
(h) at 4.6 (b), *infra*; and K.S.A. 1971 Supp.  
60-2702, S. Ct. Rule No. 121 (f) at 4.1 (b).

#### COMMENT

Kansas complies with the Standard. Where the motion files and records before the district court establish that there is not substantial issue of law or triable issue of fact and that the movant under K.S.A. 60-1507 is entitled to no relief, it is not error to deny the motion without appointment of counsel or holding an evidentiary hearing. (State v. Komarek, 213 Kan. 532, 516 P.2d 912 (1973)).

#### ABA STANDARD

(b) DISCOVERY TECHNIQUES, SPECIALLY ADAPTED FOR POST-CONVICTION PROCEEDINGS, SHOULD BE UTILIZED FOR ASSISTANCE IN ADVANCING A CASE TOWARD DISPOSITION BY EXPLORING ISSUES OF FACT. THE FRUITS OF THE DISCOVERY PROCESS MAY BE USEFUL IN DETERMINING WHETHER SUMMARY DISPOSITION IS APPROPRIATE, OR WHETHER A PLENARY EVIDENTIARY HEARING IS NECESSARY TO RESOLVE MATERIAL ISSUES OF FACT.

(1) IN-PRISON DEPOSITIONS OF APPLICANTS IN CUSTODY, TO DEVELOP MORE FULLY THE NATURE OF THEIR CLAIMS AND THE POTENTIAL EVIDENTIARY SUPPORT THEREFOR, SHOULD BE AUTHORIZED. SUCH DEPOSITIONS MAY BE ORAL OR UPON WRITTEN INTERROGATORIES.

(ii) AN EFFECTIVE PROCEDURE SHOULD BE ESTABLISHED FOR THE PRODUCTION OF DOCUMENTS, INCLUDING THE RELEVANT PARTS OF THE TRANSCRIPT OF THE ORIGINAL TRIAL, OR TANGIBLE THINGS, FOR TAKING DEPOSITIONS OF WITNESSES, AND FOR THE SERVICE OF REQUESTS FOR ADMISSIONS OR WRITTEN INTERROGATORIES ON THE OPPOSING PARTY.

(iii) EMPLOYMENT OF THE VARIOUS DISCOVERY TECHNIQUES IN THIS CONTEXT SHOULD BE SUBJECT TO CONTINUING COURT SUPERVISION. A REQUIREMENT OF A SHOWING OF GOOD CAUSE MAY BE APPROPRIATE PRIOR TO UTILIZATION.

(iv) IT IS A PREREQUISITE OF EFFECTIVE DISCOVERY THAT THE APPLICANT BE REPRESENTED BY COUNSEL.

(v) THE APPLICANT RETAINS HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND CANNOT BE COMPELLED TO CREATE EVIDENCE WHICH MIGHT PREJUDICE HIM AT ANY RETRIAL. SUCH EVIDENCE, REFLECTING ON THE GUILT OR INNOCENCE OF THE APPLICANT, WOULD NOT IN ANY EVENT BE RELEVANT TO HIS CLAIM FOR POST-CONVICTION RELIEF.

(vi) THE COSTS OF DISCOVERY, WHERE THE APPLICANTS ARE INDIGENT, SHOULD BE BORNE BY THE STATE.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas partially complies with the Standard. Kansas has no discovery procedures especially designed for post-conviction proceedings. Presumably the provisions of the code of civil procedure governing discovery (K.S.A. 60-226 to 60-237) are available in proceedings under section 60-1507. However, it is doubtful if discovery proceedings are used extensively in actions of this kind.

#### ABA STANDARD

##### 4.6 PLENARY HEARING; PRESENCE OF APPLICANT; EVIDENCE AND PROOF; FINDINGS OF FACT.

(a) A PLENARY HEARING TO RECEIVE EVIDENCE, BY TESTIMONY OR OTHERWISE, IS REQUIRED WHENEVER THERE ARE MATERIAL QUESTIONS OF FACT WHICH MUST BE RESOLVED IN ORDER TO DETERMINE THE SUFFICIENCY OF THE APPLICATION FOR RELIEF.

#### KANSAS CODE

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. The court may entertain and determine such motion without requiring the production of the prisoner at the hearing. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. (K.S.A. 60-1507 (b). See K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (h) at 4.6 (b), *infra*. See K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (f) at 4.1 (h).

#### COMMENT

Kansas complies with the Standard.

#### ABA STANDARD

(b) THE APPLICANT AND HIS COUNSEL SHOULD BE PRESENT AT A PLENARY HEARING, UNLESS THE RIGHT TO BE PRESENT HAS BEEN EXPRESSLY WAIVED. THE APPLICANT'S PRESENCE IS NOT REQUIRED AT ANY PRELIMINARY CONFERENCE HELD TO FRAME THE ISSUES AND EXPEDITE THE HEARING.

## KANSAS CODE

Presence of prisoner. The prisoner should be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to events in which he participated. The sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing and requiring the prisoner to be present. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (h)).

## COMMENT

Kansas complies with the Standard.

## ABA STANDARD

(c) NORMAL RULES OF ADMISSIBILITY OF EVIDENCE SHOULD BE FOLLOWED IN POST-CONVICTION HEARINGS. EVIDENCE SHOULD BE GIVEN IN OPEN COURT, RECORDED AND PRESERVED AS PART OF THE RECORD.

(i) A DULY AUTHENTICATED RECORD OR TRANSCRIPT, OR PORTION THEREOF, MAY BE USED AS EVIDENCE OF FACTS AND OCCURRENCES DURING PRIOR PROCEEDINGS. SUCH RECORD OR TRANSCRIPT SHOULD BE SUBJECT TO IMPEACHMENT BY EITHER PARTY.

(ii) DEPOSITIONS OF WITNESSES, UNAVAILABLE FOR THE HEARING, SHOULD BE ADMISSIBLE IF PROPERLY ADMINISTERED AND TAKEN SUBJECT TO THE RIGHT OF CROSS-EXAMINATION.

(iii) IF FACTS WITHIN THE PERSONAL KNOWLEDGE OF THE JUDGE WHO PRESIDED AT AN EARLIER PROCEEDING ARE TO BE ADDUCED BY HIS TESTIMONY OR OTHERWISE, HE CANNOT PROPERLY PRESIDE AT THE HEARING. THE PRESIDING JUDGE AT THE HEARING SHOULD NOT TAKE INTO ACCOUNT FACTS WITHIN HIS PERSONAL KNOWLEDGE UNLESS THOSE FACTS MAY BE JUDICIALLY NOTICED.

## KANSAS CODE

See K.S.A. 1971, Supp. 60-2702 S. Ct. Rule No. 121 (f) at 4.1 supra which provides that a record shall be made of the proceedings.



#### COMMENT

Kansas practice is in substantial compliance with the Standard. The normal rules of admissibility of evidence in civil cases are followed in proceedings under K.S.A. 60-1507.

#### ABA STANDARD

(d) THE ALLOCATION BETWEEN THE APPLICANT AND RESPONDENT OF THE BURDEN OF PROOF ON ISSUES OF FACT IS PRIMARILY A COROLLARY OF THE UNDERLYING SUBSTANTIVE LAW GOVERNING THE CLAIMS ADVANCED. ORDINARILY, THE PROponent OF FACTUAL CONTENTIONS, WHETHER THE APPLICANT'S PROOF OF THE ELEMENTS OF A PRIMA FACIE CASE OR THE RESPONDENT'S PROOF OF AFFIRMATIVE DEFENSES, SHOULD HAVE THE BURDEN OF ESTABLISHING THOSE FACTS BY A PREPONDERANCE OF EVIDENCE.

#### KANSAS CODE

The movant has the burden of establishing his grounds for relief by a preponderance of the evidence. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (g)).

#### COMMENT

Kansas complies with the Standard. The rule requiring proof by preponderance of the evidence has been applied in Metcalf v. State, 199 Kan. 800, 433 P.2d 450 (1967); Goodwin v. State, 195 Kan. 414, 407 P.2d 528 (1965); and Brown v. State, 198 Kan. 527, 426 P. 2d 49, (1967). While the cases do not deal with affirmative defenses by the state, under the normal rules of procedure in civil cases, proof of such defenses by a preponderance of the evidence would be the responsibility of the state.

#### ABA STANDARD

(e) AT THE CONCLUSION OF A PLENARY HEARING, THE COURT SHOULD MAKE EXPLICIT FINDINGS ON MATERIAL QUESTIONS OF FACT. EFFORT TO KEEP SEPARATE THE RECITAL OF RELEVANT HISTORICAL EVENTS FROM THE LEGAL CHARACTERIZATION OF THOSE EVENTS IS MOST DESIRABLE, ESPECIALLY ON ISSUES THAT MAY BE DESCRIBED AS INVOLVING MIXED QUESTIONS OF LAW AND FACT.

## KANSAS CODE

See K.S.A. 60-1507 (b) at 4.6 (a), *supra*.

The court shall make findings of fact and conclusions of law on all issues presented.  
(K.S.A. 1971 Supp. 60-2702, S.Ct. Rule No. 121 (j)).

## COMMENT

Kansas complies with the Standard. The Kansas Supreme Court has held that it is mandatory for the district court to make findings of fact unless the files and records conclusively show the prisoner is entitled to no relief. The failure of the court to comply with the requirements of the rule requires that the case be remanded in order that appropriate findings of fact and conclusions of law may be made. (*White v. State*, 201 Kan. 801, 443 P.2d 182 (1968)). However, it has been held that findings are not required to be made where the questions to be raised on appeal may be determined from the record of trial. (*Patterson v. State*, 198 Kan. 507, 426 P.2d 42, (1967)).

## ABA STANDARD

### 4.7 DISPOSITIVE ORDERS; TRIAL COURT OPINIONS.

(a) THE ORDER OF THE COURT, AT THE CONCLUSION OF A POST-CONVICTION PROCEEDING, SHOULD PROVIDE APPROPRIATE DISPOSITION.

(i) IF THE COURT FINDS IN FAVOR OF THE STATE, IT SHOULD ENTER AN ORDER DENYING THE APPLICATION FOR RELIEF. THE ORDER SHOULD INDICATE WHETHER THE DENIAL IS AFTER PLENARY HEARING, ON SUMMARY DISPOSITION, OR ON THE PLEADINGS.

(ii) IF THE COURT FINDS IN FAVOR OF THE APPLICANT, THE ORDER SHOULD IDENTIFY CLEARLY THE CLAIM OR CLAIMS FOUND MERITORIOUS. THE KIND OF AFFIRMATIVE RELIEF ORDERED WILL VARY WITH THE NATURE OF THE MERITORIOUS CONTENTION. WHERE THE COURT FINDS IN FAVOR OF THE APPLICANT FOR ERROR IN THE TRIAL OR PRE-TRIAL STAGES OF THE PROCESS LEADING TO CONVICTION, RELIEF MAY BE IMMEDIATE DISCHARGE FROM CUSTODY OR MAY BE RELEASE AT A SPECIFIED EARLY DATE UNLESS, WITHIN THAT TIME, THE STATE TAKES THE NECESSARY STEPS TO COMMIT THE APPLICANT TO CUSTODY PENDING RE-INDICTMENT, RE-ARRAIGNMENT, RETRIAL, OR RE-SENTENCE, AS THE CASE MAY BE. IN SOME INSTANCES, ONLY A DECLARATION OF INVALIDITY OF THE PRIOR CONVICTION MAY BE REQUIRED. WHERE THE COURT FINDS IN FAVOR OF THE APPLICANT FOR ERROR CONCERNING HIS RIGHT TO APPEAL FROM HIS JUDGMENT OF CONVICTION, THE COURT SHOULD HAVE AUTHORITY TO FIX THE TIME WITHIN WHICH THE APPLICANT MAY NOW PURSUE SUCH APPEAL.

(iii) THE COURT SHOULD HAVE AUTHORITY IN ALL INSTANCES, UPON TIMELY REQUEST, TO STAY ITS FINAL ORDER OR TO ISSUE SUPPLEMENTARY

ORDERS REGARDING CUSTODY, BAIL, AND THE LIKE, PENDING REVIEW OF ITS DETERMINATION BY AN APPELLATE COURT.

(b) IT IS DESIRABLE THAT THE COURT PREPARE AT LEAST A BRIEF OPINION INDICATING THE LEGAL STANDARDS APPLIED AND, IN LIGHT OF THE FINDINGS OF FACT, ITS SPECIFIC CONCLUSIONS OF LAW. SUCH OPINION IS ESPECIALLY USEFUL IN THE EVENT OF APPEAL FROM THE COURT'S DETERMINATION.

#### KANSAS CODE

See K.S.A. 60-1507 (b) at 4.6 (a), *supra*,  
and K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No.  
121 (j) at 4.6 (e), *supra*.

#### COMMENT

Kansas complies with the Standard. See Comment following 4.6 (e) *supra*.

#### ABA STANDARD

#### PART V. APPELLATE REVIEW

##### 5.1 APPELLATE JURISDICTION; LIMITATION ON RIGHT TO APPEAL.

(a) IF POST-CONVICTION APPLICATIONS ARE CONSIDERED IN THE FIRST INSTANCE BY THE TRIAL LEVEL COURTS (SEE SECTION 1.4, *SUPRA*), APPELLATE REVIEW SHOULD BE AVAILABLE THROUGH THE SAME COURTS AUTHORIZED TO HEAR APPEALS FROM JUDGMENTS OF CONVICTION. THE TIME PERIOD WITHIN WHICH THE APPELLATE PROCESS MUST BE INITIATED SHOULD BE THE SAME AS IS NORMALLY PROVIDED FOR APPEALS FROM JUDGMENTS OF CONVICTION, UNLESS THAT PERIOD IS TOO SHORT IN LIGHT OF THE DIFFICULTIES OF COMMUNICATION BETWEEN A PERSON CONFINED IN PRISON, HIS COUNSEL AND THE COURT.

#### KANSAS CODE

An appeal may be taken to the supreme court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. (K.S.A. 60-1507 (d)).

If the court determines that the restraint is not wrongful, the writ shall be dissolved at the cost of the plaintiff. If the restraint is found to be wrongful, the judgment shall be either that the person shall be released, or that custody shall be transferred to some other

person rightfully entitled thereto, and the court may make such other orders as justice and equity or the welfare of a minor physically present in the state may require. In cases in which the person restrained is a minor or other incompetent or incapacitated, at the time of rendering judgment at the request of any person adversely affected thereby, the judge shall stay the enforcement of the judgment for a period of not to exceed forty-eight (48) hours to permit the filing of an appeal, and the judge may provide for the temporary custody of the person during such stay in such manner as he sees fit. Enforcement of the judgment after the taking of any appeal may be stayed on such terms and conditions, including such provisions for custody during pendency of the appeal, as the judge shall prescribe. If the state, in open court, announces its intention to appeal from an order discharging a prisoner, the judge shall stay the enforcement of the judgment for a period not more than twenty-four (24) hours to permit the filing of an appeal. (K.S.A. 60-1505 (d)).

An appeal may be taken to the supreme court from the order entered on the motion as in a civil case. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (k)).

#### COMMENT

Kansas is in substantial compliance with the Standard, except that the time for appeal is governed by the rule relating to civil appeals.

#### ABA STANDARD

(b) APPELLATE REVIEW OF FINAL JUDGMENTS SHOULD BE AVAILABLE AS OF RIGHT AT THE INSTANCE OF EITHER THE APPLICANT OR RESPONDENT. IT IS UNDERSIRABLE TO IMPOSE AS A CONDITION OF TAKING AN APPEAL THAT THE PARTY SEEKING REVIEW OBTAIN LEAVE TO APPEAL FROM EITHER THE TRIAL COURT OR THE APPELLATE COURT.

#### KANSAS CODE

See K.S.A. 60-1505 (d) and 60-1507 (d),  
supra, at 5.1 (a).

COMMENT

Kansas is in compliance with the Standard.

ABA STANDARD

(c) APPELLATE REVIEW OF AN INTERLOCUTORY ORDER DENYING A STAY OF EXECUTION OF A DEATH SENTENCE SHOULD BE AUTHORIZED WHEN NECESSARY TO PREVENT CARRYING OUT OF THE SENTENCE BEFORE FINAL JUDGMENT IN THE TRIAL COURT. SUCH POWER OF REVIEW MAY BE ASSIGNED TO A SINGLE JUDGE OR JUSTICE.

KANSAS CODE

No comparable Kansas code provision.

COMMENT

In view of the current status of the death penalty, this Standard seems no longer useful.

ABA STANDARD

5.2 APPELLATE COURT PROCESS; COUNSEL; BAIL.

(a) AS IS TRUE WITH RESPECT TO PROCEEDINGS IN TRIAL LEVEL COURTS, APPEALS SHOULD NOT BE PROCESSED PRO SE FOR WANT OF ASSIGNMENT OF COUNSEL TO PERSONS UNABLE TO AFFORD ADEQUATE REPRESENTATION. WHERE COUNSEL HAS BEEN APPOINTED TO REPRESENT AN APPLICANT IN THE COURT OF ORIGINAL JURISDICTION, IT IS DESIRABLE TO RECOGNIZE HIS CONTINUING RESPONSIBILITY TO REPRESENT HIS CLIENT THROUGH ANY APPELLATE PROCEEDINGS.

KANSAS CODE

If a movant desires to appeal and contends he is without means to employ counsel to perfect the appeal, the district court shall, if satisfied that the movant is an indigent person, appoint competent counsel to conduct such appeal...  
(K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (m)).

COMMENT

Kansas complies with the Standard.

#### ABA STANDARD

(b) THE APPELLATE COURT, OR AN INDIVIDUAL JUDGE OR JUSTICE, SHOULD BE AUTHORIZED TO RELEASE APPLICANTS FOR POST-CONVICTION RELIEF OR OTHERWISE TO STAY EXECUTION OF THEIR JUDGMENTS OF CONVICTION PENDING APPELLATE REVIEW. IT IS APPROPRIATE TO REQUIRE APPLICANTS TO SEEK SUCH INTERIM RELIEF FIRST FROM THE TRIAL COURTS, AND ORDINARILY THE DETERMINATIONS OF THE TRIAL COURTS ON SUCH MATTERS SHOULD NOT BE MODIFIED OR REVERSED.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas has no code provision expressly authorizing a stay of execution of judgment and release of the applicant for post-conviction relief pending appellate review. However, the provisions of K.S.A. 60-262 (f), relating to stays in civil appeals, appear to be applicable. See Cox v. State, 197 Kan. 395, 416 P.2d 741 (1966)).

#### ABA STANDARD

##### 5.3 APPELLATE COURT DISPOSITION; SCOPE OF APPELLATE REVIEW.

(a) APPELLATE COURTS SHOULD EXERCISE A BROAD SCOPE OF REVIEW ON MATTERS OF FACT AND LAW CONSISTENT WITH THE FUNDAMENTAL RIGHTS SUBJECT TO LITIGATION IN POST-CONVICTION PROCEEDINGS.

(b) A STATEMENT OF THE BASIS OR BASES FOR DECISION IN A REASONED OPINION OUGHT TO ACCOMPANY DISPOSITION OF APPEALS.

#### KANSAS CODE

The supreme court shall have jurisdiction to correct, modify, vacate, or reverse any act, order, or judgment of a district court in order to assure that any such act, order or judgment is just, legal, and free of abuse. (K.S.A. 60-2101 (b)).

It shall be the duty of the judges of the supreme court to prepare and file with the papers in each case, the opinion of the court upon the

questions of law arising in the case, within sixty (60) days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party, and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed. (K.S.A. 60-2105 (a)).

#### COMMENT

Kansas appears to comply with the Standard.

#### ABA STANDARD

#### PART VI. FINALITY OF JUDGMENTS

##### 6.1 THE JUDGMENTS OF CONVICTION; WAIVER.

(a) UNLESS OTHERWISE REQUIRED IN THE INTEREST OF JUSTICE, ANY GROUNDS FOR POST-CONVICTION RELIEF AS SET FORTH IN SECTION 2.1 WHICH HAVE BEEN FULLY AND FINALLY LITIGATED IN THE PROCEEDINGS LEADING TO THE JUDGMENT OF CONVICTION PROCEEDINGS.

(i) IT IS ESSENTIAL THAT ACCURATE AND COMPLETE RECORDS OF PROCEEDINGS LEADING TO SUCH JUDGMENTS BE COMPILED AND RETAINED IN ACCESSIBLE FORM.

(ii) A QUESTION HAS BEEN FULLY AND FINALLY LITIGATED WHEN THE HIGHEST COURT OF THE STATE TO WHICH A DEFENDANT CAN APPEAL AS OF RIGHT HAS RULED ON THE MERITS OF THE QUESTION.

(ii) FINALITY IS AN AFFIRMATIVE DEFENSE TO BE PLEADED AND PROVED BY THE STATE.

#### KANSAS CODE

(1) The provisions of section 60-1507 may be invoked only by one in custody claiming the right to be released, (2) a motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected, (3) a proceeding under section 60-1507 cannot ordinarily be used as a substitute for direct appeal

involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (c)).

#### COMMENT

Kansas appears partially to comply with the Standard. The Supreme Court of Kansas has frequently held that a motion under K.S.A. 60-1507 is not a substitute for an appeal for the review of trial errors. (Hannon v. State, 206 Kan. 518, 479 P.2d 852 (1971); Carithers v. State, 207 Kan. 607, 485 P.2d 1368 (1971)). Nor is the guilt or innocence of a convicted person properly justiciable in a 60-1507 proceeding. (Hughes v. State, 206 Kan. 515, 479 P.2d 850 (1971)). Moreover, a motion to set aside a judgment may not be based on points which might have been raised on a former direct appeal. (Young v. State, 207 Kan. 166, 483 P.2d 1020 (1971); Cipolla v. State, 207 Kan. 822, 486 P.2d 1391 (1971)). However when exceptional circumstances exist trial errors affecting constitutional rights may be raised by motion under K.S.A. 60-1507 even though they could have been raised by direct appeal (Tuscano v. State, 206 Kan. 260, 478 P.2d 213 (1970)).

#### ABA STANDARD

(b) CLAIMS ADVANCED IN POST-CONVICTION APPLICATIONS SHOULD BE DECIDED ON THEIR MERITS, EVEN THOUGH THEY MIGHT HAVE BEEN, BUT WERE NOT, FULLY AND FINALLY LITIGATED IN THE PROCEEDINGS LEADING TO JUDGMENTS OF CONVICTION.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas does not comply with the Standard in that the Supreme Court has consistently held that a motion to set aside judgment, absent constitutional considerations, cannot be based on points which might



have been raised on a former direct appeal. (Young v. State, 207 Kan. 166, 483 P.2d 1020 (1971) and Cipolla v. State, 207 Kan. 822, 486 P.2d 1391 (1971)).

#### ABA STANDARD

(c) WHERE AN APPLICANT RAISES IN A POST-CONVICTION PROCEEDING A FACTUAL OR LEGAL CONTENTION WHICH HE KNEW OF AND WHICH HE DELIBERATELY AND INEXCUSABLY

(i) FAILED TO RAISE IN THE PROCEEDING LEADING TO JUDGMENT OF CONVICTION, OR

(ii) HAVING RAISED THE CONTENTION IN THE TRIAL COURT, FAILED TO PURSUE THE MATTER ON APPEAL,  
A COURT SHOULD DENY RELIEF ON THE GROUND OF AN ABUSE OF PROCESS. IF AN APPLICATION OTHERWISE INDICATES A CLAIM WORTHY OF FURTHER CONSIDERATION, THE APPLICATION SHOULD NOT BE DISMISSED FOR ABUSE OF PROCESS UNLESS THE STATE HAS RAISED THE ISSUE IN ITS ANSWER AND THE APPLICANT HAS HAD AN OPPORTUNITY, WITH THE ASSISTANCE OF COUNSEL, TO REPLY.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas practice is in substantial compliance with the Standard. However, the Kansas code and rule do not require that the issue of abuse of process be raised by the state in an answer and that the applicant have opportunity, with the assistance of counsel, to reply.

#### ABA STANDARD

(d) BECAUSE OF THE SPECIAL IMPORTANCE OF RIGHTS SUBJECT TO VINDICATION IN POST-CONVICTION PROCEEDINGS, COURTS SHOULD BE RELUCTANT TO DENY RELIEF TO MERITORIOUS CLAIMS ON PROCEDURAL GROUNDS. IN MOST INSTANCES OF UNMERITORIOUS CLAIMS, THE LITIGATION WILL BE SIMPLIFIED AND EXPEDITED IF THE COURT REACHES THE UNDERLYING MERITS DESPITE POSSIBLE PROCEDURAL FLAWS.

#### KANSAS CODE

No comparable Kansas code provision.

## COMMENT

Kansas practice complies with the Standard.

## ABA STANDARD

### 6.2 PRIOR POST-CONVICTION PROCEEDINGS; REPETITIVE APPLICATIONS.

(a) IN GENERAL, THE DEGREE OF FINALITY APPROPRIATELY ACCORDED TO A PRIOR JUDGMENT DENYING RELIEF IN A POST-CONVICTION PROCEEDING SHOULD BE GOVERNED BY THE EXTENT OF THE LITIGATION UPON THE EARLIER APPLICATION AND THE RELEVANT FACTUAL AND LEGAL DIFFERENCES BETWEEN THE PRESENT AND EARLIER APPLICATIONS. IN PARTICULAR,

(i) A JUDGMENT DISMISSING AN APPLICATION, ON ITS FACE, FOR WANT OF SUFFICIENT ALLEGATIONS SHOULD NOT BAR CONSIDERATION OF THE MERITS OF A SUBSEQUENT APPLICATION THAT ADEQUATELY INDICATES A COGNIZABLE CLAIM; AND

(ii) A JUDGMENT DENYING RELIEF, AFTER PLENARY EVIDENTIARY HEARING, TO AN APPLICANT REPRESENTED BY COUNSEL SHOULD BE BINDING ON QUESTIONS OF FACT OR OF LAW FULLY AND FINALLY LITIGATED AND DECIDED, UNLESS OTHERWISE REQUIRED IN THE INTEREST OF JUSTICE. A QUESTION HAS BEEN FULLY AND FINALLY LITIGATED WHEN THE HIGHEST STATE COURT TO WHICH AN APPLICANT CAN APPEAL AS OF RIGHT HAS RULED ON THE MERITS OF THE QUESTION.

FINALITY IS AN AFFIRMATIVE DEFENSE TO BE PLEADED AND PROVED BY THE STATE.

## KANSAS CODE

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. (K.S.A. 60-1507 (c)).

The sentencing court shall not entertain a second or successive motion for relief on behalf of the same prisoner, where (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (d)).

#### COMMENT

Kansas is in substantial compliance with the Standard. The rule against successive motions under K.S.A. 60-1507 does not preclude consideration of a second motion alleging grounds which could not have been raised in the earlier proceeding. In such cases, the trial court is required to consider the additional grounds presented in the second motion. (Jackson v. State, 202 Kan. 194, 448 P.2d 18 (1968)).

#### ABA STANDARD

(b) IN ANY CASE WHERE AN APPLICANT RAISES IN A SUBSEQUENT APPLICATION A FACTUAL OR LEGAL CONTENTION WHICH HE KNEW OF AND DELIBERATELY AND INEXCUSABLY

(i) FAILED TO RAISE IN AN EARLIER APPLICATION OR,

(ii) HAVING RAISED THE CONTENTION IN THE TRIAL COURT, FAILED TO PURSUE THE MATTER ON APPEAL,

A COURT SHOULD DENY RELIEF ON THE GROUND OF AN ABUSE OF PROCESS. IF AN APPLICATION OTHERWISE INDICATES A CLAIM WORTHY OF FURTHER CONSIDERATION, THE APPLICATION SHOULD NOT BE DISMISSED FOR ABUSE OF PROCESS UNLESS THE STATE HAS RAISED THE ISSUE IN ITS ANSWER AND THE APPLICANT HAS HAD AN OPPORTUNITY, WITH ASSISTANCE OF COUNSEL, TO REPLY.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas complies substantially with the Standard. In Cox v. State, 200 Kan. 198, 434 P.2d 843 (1967) the Supreme Court recognized that the doctrine of res judicata does not extend to 1507 proceedings but held,

"such rule does not preclude a court from exercising its discretion in refusing a discharge upon the ground of abuse of the privilege of the writ where a contention could have been presented on a prior petition but was withheld so as to preserve it for a subsequent application."

continuing, the court said:

"Some degree of finality should be achieved so that endless piecemeal litigation will not interfere with the timely dispatch of all the business of the courts."

The court suggested that the doctrine of abuse of remedy applicable in federal post-conviction cases should govern in Kansas. See also Lee v. State,

207 Kan. 185, 483 P.2d 482 (1971) where a similar result was reached. It has also been held that grounds alleged in a motion to set aside a conviction, but not raised and argued on appeal, are deemed to have been abandoned (Call v. State, 195 Kan. 688, 408 P.2d 668 (1965) cert. den., 384 U.S. 957).

The Kansas statute and rule do not require that the defense of abuse of process be raised in an answer by the state and that the applicant be given the opportunity with the assistance of counsel to reply.

#### ABA STANDARD

(c) A JUDGMENT GRANTING RELIEF IN A POST-CONVICTION PROCEEDING SHOULD NOT FORECLOSE RENEWAL OF PROSECUTION PROCEEDINGS AGAINST THE APPLICANT SO LONG AS THAT DOES NOT CONFLICT WITH THE GROUND UPON WHICH RELIEF WAS GRANTED. PROCEEDINGS CAN COMMENCE WITH THE STAGE AT WHICH THE VITIATING DEFECT OCCURRED, WITHOUT NECESSITY TO REPEAT VALID PROCESSES.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas practice complies with the Standard.

#### ABA STANDARD

6.3 SENTENCE ON RE-PROSECUTION OF SUCCESSFUL APPLICANTS; CREDIT FOR TIME SERVED.

(a) WHERE PROSECUTION IS INITIATED OR RESUMED AGAINST AN APPLICANT WHO HAS SUCCESSFULLY SOUGHT POST-CONVICTION RELIEF AND A CONVICTION IS OBTAINED, OR WHERE A SENTENCE HAS BEEN SET ASIDE AS THE RESULT OF A SUCCESSFUL APPLICATION FOR POST-CONVICTION RELIEF AND THE DEFENDANT IS TO BE RE-SENTENCED, THE SENTENCING COURT SHOULD NOT BE EMPOWERED TO IMPOSE A MORE SEVERE PENALTY THAN THAT ORIGINALLY IMPOSED.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas substantially complies with the Standard. In North Carolina v. Pearce, 395 U.S. 711 (1969) the Supreme Court of the United States held

that when a sentence is set aside on appeal or collateral attack, the defendant who has successfully attacked his prior sentence may not be resentenced to a term greater than that originally imposed unless the court acts on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. This decision, grounded upon due process considerations, is binding in the state of Kansas. In State v. Daegele, 206 Kan. 379, 479 P.2d 891 (1971) the Supreme Court of Kansas apparently reached a result similar to Pearce in holding that in resentencing a defendant the sentencing court is limited to a consideration of the record before it at the time of the prior sentence.

#### ABA STANDARD

(b) CREDIT SHOULD BE GIVEN TOWARDS SERVICE OF THE MINIMUM AND MAXIMUM TERM OF ANY NEW PRISON SENTENCE FOR TIME SERVED UNDER A SENTENCE WHICH HAS BEEN SUCCESSFULLY CHALLENGED IN A POST-CONVICTION PROCEEDING.

#### KANSAS CODE

No comparable Kansas code provision.

#### COMMENT

Kansas complies with the Standard.

North Carolina v. Pearce, supra, held that the constitutional guarantee against multiple punishments for the same offense requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Prior to the Pearce case the Kansas Supreme Court had established as a matter of law that when a valid sentence is imposed in lieu of one which has been determined to be void, full credit must be given the prisoner for all time served under the void sentence. (Jackson v. State, 201 Kan. 481, 466 P.2d 305 (1968)).

