

## Rule 183

### PROCEDURE UNDER K.S.A. 60-1507

- (a) **Nature of Remedy.** K.S.A. 60-1507 provides a procedure to challenge the validity of a sentence of a court of general jurisdiction and is intended to provide in the sentencing court the same remedy that previously was available—by habeas corpus under K.S.A. 60-1501—in the county where the prisoner was confined. The following rules apply:
- (1) a motion under K.S.A. 60-1507 to vacate, set aside, or correct a sentence is an independent civil action that must be docketed separately;
  - (2) the procedure on a motion under K.S.A. 60-1507 is governed by the rules of civil procedure, K.S.A. 60-201 *et seq.*, to the extent the rules are applicable;
  - (3) if the movant files a poverty affidavit under K.S.A. 60-2001(b), the court will assess the initial filing fee, which may not be less than \$3;
  - (4) a poverty affidavit applies only to the amount that must be paid to file the action and does not prevent the court from later assessing the remainder of the docket fee or other fees and costs against the movant; and
  - (5) when a K.S.A. 60-1507 motion is filed, the clerk must serve a copy of the motion on the county or district attorney and complete a certificate of service.
- (b) **Exclusiveness of Remedy.** The remedy afforded by K.S.A. 60-1507 is exclusive unless it is inadequate or ineffective to test the legality of a movant's custody.
- (c) **When Remedy May Be Invoked.**
- (1) The provisions of K.S.A. 60-1507 may be invoked only by a person in custody claiming the right to be released.
  - (2) A motion to vacate, set aside, or correct a sentence may not be filed 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 K.S.A. 60-1507 ordinarily may not be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors must 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 exceptional circumstances excuse the failure to appeal.
  - (4) Unless the court complies with the requirements of K.S.A. 60-1507(f) by stating in writing the factual and legal basis for finding that manifest injustice will result if the

time is not extended, a motion under K.S.A. 60-1507 must be filed no later than one year after the later of:

- (A) the date the mandate is issued by the last appellate court in this state which exercises jurisdiction on a movant's direct appeal or the termination of the appellate court's jurisdiction; or
  - (B) the date the United States Supreme Court denies a petition for the writ of certiorari from the movant's direct appeal or issues its final order after granting the petition.
- (d) **Successive Motions.** A sentencing court may not consider a second or successive motion for relief by the same movant when:
- (1) the ground for relief was determined adversely to the movant on a prior motion;
  - (2) the prior determination was on the merits; and
  - (3) justice would not be served by reaching the merits of the subsequent motion.
- (e) **Sufficiency of Motion.** A motion to vacate, set aside, or correct a sentence is sufficient if it is in substantial compliance with the judicial council form. The form must be furnished by the clerk on request.
- (f) **Hearing.** Unless the motion to vacate, set aside, or correct a sentence and the files and records of the case in the sentencing court conclusively show that the movant is entitled to no relief, the court must grant a prompt hearing and notify the county or district attorney. "Prompt" means as soon as reasonably possible considering the court's other urgent business. A hearing on the motion must be recorded in a manner approved by the court.
- (g) **Burden of Proof.** The movant has the burden of establishing the grounds for relief by a preponderance of the evidence.
- (h) **Presence of Movant.** When the movant is imprisoned, the movant must be produced at the hearing on a motion to vacate, set aside, or correct a sentence if there are substantial issues of fact regarding events in which the movant participated. A sentencing court may determine whether a claim is substantial before granting an evidentiary hearing and requiring the movant to be present.
- (i) **Right to Counsel.** If a motion to vacate, set aside, or correct a sentence presents a substantial question of law or triable issue of fact, the court must appoint counsel to represent an indigent movant.
- (j) **Judgment.** The court must make findings of fact and conclusions of law on all issues presented.

- (k) **Appeal.** As in a civil case, an appeal may be taken to the Court of Appeals from the order entered on a motion to vacate, set aside, or correct a sentence.
- (l) **Costs.** If the district court finds that a movant desiring to appeal is indigent, it must authorize an appeal *in forma pauperis* and furnish the movant without cost the portions of the transcript that are necessary for appellate review.
- (m) **Attorney on Appeal.** If a movant desires to appeal and contends the movant is without means to employ counsel to perfect the appeal, the district court must, if satisfied that the movant is indigent, appoint competent counsel to conduct the appeal.
- (n) **Withdrawal of Counsel.** If appointed counsel is permitted to withdraw for good cause while the case is pending in either the district court or the appellate court, the district court must appoint substitute counsel.

[**History:** Am. effective September 8, 2006; Restyled rule and amended effective July 1, 2012; Am. effective November 18, 2016.]