

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of December, 1999, the following order was made and entered:

**In re: Rules Governing Post-Conviction Habeas
Corpus Proceedings In West Virginia**

On this day came the Court and proceeded to consider Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, together with a Post-Conviction Habeas Corpus Petition Form. Upon consideration thereof, the Court is of opinion to and doth hereby adopt said rules, together with Appendix A and Appendix B annexed hereto, effective immediately. The Rules will apply to all post-conviction habeas corpus matters pending in the circuit courts of this State on the date of this Order. This Court's previous Order related to Post-Conviction Habeas Corpus Forms, promulgated February 1, 1977, is hereby superseded.

**"RULES GOVERNING POST-CONVICTION HABEAS CORPUS PROCEEDINGS
IN WEST VIRGINIA**

Rule 1. Purpose and Scope of Rules.

These rules have been adopted to provide the procedure for post-conviction habeas corpus proceedings as they are set forth in West Virginia Code § 53-4A-1 et seq. These rules supplement, and in designated instances supersede, the statutory procedures set forth in § 53-4A-1 et seq. of the West Virginia Code. For petitions filed in any circuit court in the State, all of the rules apply. For petitions filed in the Supreme Court of Appeals, only Rule 2 applies.

Rule 2. Petition.

(a) *Form of petition; copies.* -- Any person in this State seeking post-conviction habeas corpus relief, either in the circuit courts or in the Supreme Court of Appeals, shall file an original and two copies of a petition. The petition shall be in substantially the form annexed to these rules as Appendix A. The petition shall specify: (1) all the grounds for relief which are available to the petitioner; (2) a summary of the facts supporting each of the grounds specified; and (3) a specific statement of the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed or verified under penalty of perjury by the petitioner.

(b) *Return of insufficient petition.* -- If a petition received by the clerk of a circuit court or the clerk of the Supreme Court of Appeals does not substantially comply with the requirements of Rule 2, it may be returned to the petitioner together with a statement of the reason for its return. The clerk of the court in which the petition is filed shall retain a copy of the petition.

Rule 3. Filing Petition.

(a) *Place of filing; filing fee.* -- A petition may be filed: (1) in the circuit court of the county wherein the petitioner is incarcerated; or (2) in the circuit court of the county wherein the petitioner was convicted and sentenced. If appropriate, the circuit court may transfer a petition to either venue. [See Transfer of petition at Rule 4(a), supra.] It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. In order to receive in forma pauperis status, the petitioner must complete the form annexed to these rules as Appendix B and demonstrate to the satisfaction of the circuit court that he or she is unable to pay the costs of the proceeding or to employ counsel.

(b) *Filing and service.* -- Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with Rules 2 and 3, the clerk of the circuit court shall file the petition and enter it on the docket in his or her office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the circuit court.

Rule 4. Preliminary Consideration by the Circuit Court.

(a) *Evaluation for transfer of petition* -- The original petition shall be presented promptly to the circuit court, ("the court"), in accordance with the procedure of the court for assignment of its business. The court shall promptly review whether the petition should be transferred to a venue set forth in Rule 3(a). If transfer is appropriate, the court shall promptly enter an order transferring the petition.

(b) *Initial review; appointment of counsel to file amended petition.* -- If the petition is not transferred, the circuit court shall promptly conduct an initial review of the petition. If, upon initial review of the petition and any exhibits in support thereof, the court determines that the petitioner may have grounds for relief but the petition, as filed, is not sufficient for the court to conduct a fair adjudication of the matters raised in the petition, the court shall appoint an attorney to represent the petitioner's claims in the matter, provided that the petitioner qualifies for the appointment of counsel under Rule 3(a). The court may order appointed counsel to file an amended petition for post-conviction habeas corpus relief within the time period set by the court.

(c) *Evaluation for summary dismissal; contents of summary dismissal order.* -- The petition shall be examined promptly by the judge to whom it is assigned. The court shall prepare and enter an order for summary dismissal of the petition if the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived. The court's summary dismissal order shall contain specific findings of fact and conclusions of law as to the manner in which each ground raised in the petition has been previously and finally adjudicated and/or waived. If the petition contains a mere recitation of grounds without adequate factual support, the court may enter an order dismissing the petition, without prejudice, with directions that the petition be refiled containing adequate factual support. The court shall cause the petitioner to be notified of any summary dismissal.

(d) *Order to file answer.* -- For all petitions not dismissed summarily as provided in Rule 4(c), the court shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the court deems appropriate. A copy of the order directing that an answer be filed shall be served upon the prosecuting attorney of the county wherein the petition will be heard.

Rule 5. Answer; Contents.

Within such time as may be specified by the court, the State shall file an answer which shall respond to the allegations of the petition. The answer may be consolidated with other pleadings, such as a motion under Rule 12(b)(6) or Rule 56 of the West Virginia Rules of Civil Procedure. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished and what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court, on its own motion or upon request of the petitioner, may order that further portions of the existing transcripts be transcribed and furnished. If a transcript is neither available nor procurable, a properly verified narrative summary of the evidence may be submitted.

Rule 6. Appointment of Counsel.

If counsel has not been previously appointed as provided in Rule 4(b), and the petition is not summarily dismissed, the court may appoint counsel to represent the petitioner. Counsel may only be appointed if the petitioner qualifies for the appointment of counsel under Rule 3(a), and the court has determined that the petition was filed in good faith and that the appointment of counsel is warranted. If warranted, the court shall appoint counsel for the petitioner.

Rule 7. Discovery.

(a) *Leave of court required.*-- In post-conviction habeas corpus proceedings, a prisoner may invoke the processes of discovery available under the West Virginia Rules of Civil Procedure if, and to the extent that, the court in the exercise of its discretion, and for good cause shown, grants leave to do so. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the court for a petitioner who qualifies for the appointment of counsel under Rule 3(a).

(b) *Requests for discovery.*-- Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) *Expenses.*-- If the respondent is granted leave to take the deposition of the petitioner or any other person, the court may, as a condition of taking the deposition, direct the respondent to pay the expenses of travel, subsistence and fees of counsel for the

petitioner to attend the taking of the deposition.

Rule 8. Expansion of Record.

(a) *Direction for expansion.* -- If the petition is not summarily dismissed, the court may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) *Materials to be added.* -- The expanded record may include, without limitation, letters predating the filing of the petition in the court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the court. Affidavits may be submitted and considered as part of the record.

(c) *Submission to opposing party.*-- In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the other party against whom they are to be offered, and he or she shall be afforded an opportunity to admit or deny their correctness.

(d) *Authentication.*-- The court may require the authentication of any material under subdivision (b) or (c).

Rule 9. Evidentiary hearing.

(a) *Determination by court.* -- If the petition is not dismissed at a previous stage in the proceeding, the circuit court, after the answer is filed, shall, upon a review of the record, if any, determine whether an evidentiary hearing is required. If the court determines that an evidentiary hearing is not required, the court shall include in its final order specific findings of fact and conclusions of law as to why an evidentiary hearing was not required.

(b) *Hearing* -- If the court determines that an evidentiary hearing is necessary, the court shall hold a hearing and/or take evidence on the matters raised in the petition. The court shall pass upon all issues of fact without a jury. The court shall inquire on the record as to whether the petitioner has raised all available grounds for habeas corpus relief. The court shall also ascertain on the record whether the petitioner has knowingly and intelligently waived all grounds for habeas corpus relief not asserted. The court may also provide for one or more hearings to be held and/or evidence to be taken in any other county or counties in the State.

(c) *Order* -- The court shall draft a comprehensive order

including: (1) findings as to whether a state and/or federal right was presented in each ground raised in the petition; (2) findings of fact and conclusions of law addressing each ground raised in the petition; (3) specific findings as to whether the petitioner was advised concerning his obligation to raise all grounds for post conviction relief in one proceeding; and (4) if the petitioner appeared pro se, specific findings as to whether the petitioner knowingly and intelligently waived his right to counsel.

Rule 10. West Virginia Rules of Civil Procedure; Extent of Applicability.

The West Virginia Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed in West Virginia circuit courts under these rules."

It is hereby ordered that the Clerk of this Court provide the circuit judges, circuit clerks, prosecuting attorneys and public defender offices in this State with a copy of this order and attachments.

A True Copy

//S// Deborah L. McHenry
Clerk, Supreme Court of Appeals