

## Chapter 51

### West Virginia

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### § 51:1 Summary of postconviction remedies in West Virginia

#### Principal postconviction remedy:

Habeas Corpus. This remedy may be applied for in: (1) the West Virginia Supreme Court of Appeals; (2) the circuit court of the county wherein the petitioner is incarcerated; or (3) the circuit

court of the county wherein the petitioner was convicted. The remedy is an independent civil action, not a postsentencing phase of the original criminal case. The remedy is authorized by statute. There is a custody requirement applicable to the remedy. Newly discovered evidence of innocence is not a ground for relief in West Virginia postconviction habeas corpus proceedings.

**Right to counsel:**

There is a right to counsel in West Virginia postconviction habeas corpus proceedings.

**Statute of limitations:**

None.

**Secondary postconviction remedies:**

Motion to correct illegal sentence

Motion to correct sentence imposed in an illegal manner

Motion to reduce sentence

Motion to correct clerical mistake

Writ of error coram nobis

**Other remedies:**

West Virginia has a postconviction DNA testing statute, enacted in 2004.

West Virginia has an erroneous convictions act, enacted in 1987.

**Helpful readings:**

(1) Nichol, Waiver Under the West Virginia Habeas Corpus Act, 81 W. Va. L. Rev. 393 (1979)

(2) Goodwin, Sentence and Punishment—Harsher Penalties Following Habeas Corpus Relief, 70 W. Va. L. Rev. 121 (1967)

(3) Note: Habeas Corpus in West Virginia, 69 W. Va. L. Rev. 293 (1967)

(4) Comment: Constitutional Law—The Widening Scope of State Habeas Corpus Relief, 67 W. Va. L. Rev. 234 (1965)

(5) Comment: Bowman v. Leverett: Retroactivity of Criminal Procedure Decisions, 85 W. Va. L. Rev. 273 (1983)

(6) Carlin, Correction of Error on Motion, 55 W. Va. L. Rev. 1 (1952)

**§ 51:2 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967**

The principal postconviction remedy in West Virginia is the

writ of habeas corpus, as available under the West Virginia Post-Conviction Habeas Corpus Act of 1967, and as codified in Article 4A ("Post-Conviction Habeas Corpus") of Chapter 53 ("Extraordinary Remedies") of the West Virginia Code (W. Va. Code § 53-4A-1 through § 53-4A-11).

The 1967 statute, as codified, has been amended three times—in 1971, 1977, and 1981.

**§ 51:3 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia**

Postconviction habeas corpus proceedings in West Virginia are governed not only by the current codified version of the West Virginia Post-Conviction Habeas Corpus Act of 1967, but also by the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, adopted by the West Virginia Supreme Court of Appeals on Dec. 13, 1999, 206 W. Va. XCII (1999). See, e.g., Rule 1, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (these Rules supplement, and in designated instances supersede, the statutory procedures set forth in postconviction habeas corpus statutes). These Rules are modeled after the Rules Governing Section 2254 Cases in the United States District Courts, as originally adopted in 1976 and effective in 1977.

**§ 51:4 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Independent civil action**

A West Virginia postconviction habeas corpus proceeding is an independent civil action, not a postsentencing phase of the original criminal case. W.Va.Code § 53-4A-1(a) (all proceedings in accordance with the West Virginia Post-Conviction Habeas Corpus Act shall be civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case); W.Va.Code § 53-4A-4(b) (all proceedings under the West Virginia Post-Conviction Habeas Corpus Act are civil and not criminal in character). A habeas corpus proceeding is not a substitute for a writ of error in that an ordinary trial error not involving constitutional violations will not be reviewed. *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 700 S.E.2d 489 (2010).

**§ 51:5 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Custody requirement**

There is a custody requirement in West Virginia postconviction

habeas corpus proceedings. W.Va.Code § 53-4A-1(a) (any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that the conviction or sentence is subject to collateral attack may file a petition for a writ of habeas corpus). See, e.g., *Cline v. Mirandy*, 234 W. Va. 427, 765 S.E.2d 583 (2014) (predicate for filing, pursuing, and vesting the circuit court with subject matter jurisdiction is a habeas petitioner's incarceration; inmate who has been released from incarceration and placed on parole is no longer "incarcerated under sentence of imprisonment"; inmate's right to petition for post-conviction habeas corpus relief ends when he or she is released from incarceration); *Elder v. Scolapia*, 230 W. Va. 422, 738 S.E.2d 924 (2013) (an offender who has been sentenced pursuant to the Home Incarceration Act and is accordingly subject to substantial restrictions on his or her liberty by virtue of the terms and conditions imposed by a home incarceration order, which include arrest and resentencing for a violation of those terms and conditions, is "incarcerated under sentence of imprisonment" for purposes of seeking post-conviction habeas corpus relief); *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 640 S.E.2d 142 (2006) (in the present case, the state invites this court to hold that parole is excluded from the word "incarcerated" within the context of W.Va.Code, § 53-4A-1(a), of the West Virginia Post-Conviction Habeas Corpus Act, and that, therefore, inasmuch as McCabe has been released upon parole, he has no remedy under the Act; such an extension of the law in the factual circumstances herein, however, is unnecessary; nor would such an extension in this unique case be appropriate).

**§ 51:6 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Grounds for relief**

Under the West Virginia Post-Conviction Habeas Corpus Act of 1967, the grounds for habeas relief from a conviction or sentence are comprehensive. See W. Va. Code § 53-4A-1(a) (any person convicted of a crime and incarcerated under a sentence of imprisonment may apply for habeas relief to raise claim of denial or infringement of constitutional rights, or that the convicting court lacked jurisdiction, or that the sentence is in excess of the legal maximum, or that the conviction or sentence is otherwise subject to collateral attack). The language in W. Va. Code § 53-4A-1(a) regarding grounds for relief is modeled after language in 28 U.S.C.A. § 2255 and the 1955 and 1966 versions of the UPCPA.

Newly discovered evidence of innocence is not a ground for relief in West Virginia postconviction habeas corpus cases. The West Virginia Post-Conviction Habeas Corpus Act does not

provide that newly discovered evidence a claim for relief; nor are there any court decisions holding that such evidence is a ground for habeas relief.

Merely finding that counsel's performance may have been deficient on an issue does not afford a defendant habeas relief. It must also be shown that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 691 S.E.2d 183 (2010). See also *Holcomb v. Ballard*, 232 W. Va. 253, 752 S.E.2d 284 (2013) (this appeal was brought by Robert L. Holcomb (hereinafter referred to as "Mr. Holcomb") from an order of the Circuit Court of Nicholas County that denied his petition for habeas corpus relief; in this appeal, Mr. Holcomb argues that the circuit court committed error in ruling that his recidivist life imprisonment sentence was valid, that his life imprisonment sentence was not disproportionate, and that his trial counsel did not improperly advise him to stipulate to the recidivist charges; we reverse and remand this case for further proceedings consistent with this opinion; a recidivist sentence under W. Va. Code § 61-11-19 is automatically vacated whenever the underlying felony conviction is vacated; the procedural requirements of recidivist punishment statute, which required a prosecutor to present an information to a court after a defendant is convicted, but before the defendant is sentenced, and required court to arraign the defendant on the information before expiration of the term of court at which the defendant was convicted, were mandatory, jurisdictional, and not subject to harmless error analysis); *Ballard v. Ferguson*, 232 W. Va. 196, 751 S.E.2d 716 (2013) (this is an appeal of David Ballard, Warden of Mount Olive Correctional Complex ("the State"), from an order of the Circuit Court of Monongalia County that granted habeas corpus relief to Brian Bush Ferguson ("Mr. Ferguson"); the State contends that the circuit court erred in finding that Mr. Ferguson was denied effective assistance of trial counsel; finding no error in the circuit court's rulings, we affirm; a trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who was denied effective assistance of counsel and a judgment so entered is void; in the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different; although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional as-

sistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients; thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation); *Leeper-El v. Hoke*, 230 W. Va. 641, 741 S.E.2d 866 (2013) (appeal from denial of habeas corpus petition was moot because inmate had obtained relief he sought).

**§ 51:7 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Grounds for relief—Challenging decisions of parole and prison officials**

The grounds for relief in West Virginia postconviction habeas corpus proceedings are not limited to claims involving the validity of the conviction or sentence. For example, the decisions of the parole board or of prison officials may be reviewed via the writ of habeas corpus to prevent due process violations and abuse of discretion.

**§ 51:8 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Challenging conditions of confinement**

Habeas corpus may also be used to challenge unconstitutional conditions of confinement in West Virginia prisons.

**§ 51:9 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Statute of limitations**

**§ 53-4A-1 — Statute of limitations**

There is no statute of limitations on filing a petition for a writ of habeas corpus under the West Virginia Post-Conviction Habeas Corpus Act of 1967. W.Va.Code § 53-4A-1(e) (a petition for postconviction habeas corpus relief may be filed at any time after the conviction and sentence in the criminal proceedings have been rendered and imposed and the time for the taking of an appeal with respect thereto has expired or the right of appeal with respect thereto has been exhausted).

**§ 51:10 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Jurisdiction, venue and filing**

Both the West Virginia Supreme Court of Appeals and that

state's circuit courts are vested with original jurisdiction in habeas corpus proceedings by the state constitution and state statutory law. W.Va.Const. art. 8, § 3 and W.Va.Code § 51-1-3 (Supreme Court of Appeals shall have original jurisdiction of proceedings in habeas corpus); W.Va.Const. art. 8, § 6 (circuit courts shall have original and general jurisdiction of proceedings in habeas corpus); W.Va.Code § 51-1-2 (circuit courts shall have original and general jurisdiction of all cases of habeas corpus).

Under West Virginia Post-Conviction Habeas Corpus Act of 1967, a petition for a writ of habeas corpus seeking postconviction relief may be filed in: (1) the West Virginia Supreme Court of Appeals; (2) any circuit court granted original habeas jurisdiction by the state constitution; or (3) any court of record of limited jurisdiction having criminal jurisdiction (also referred to in the statute, for the sake of convenience, as a "statutory court"). W. Va. Code § 53-4A-1(a). The Act further provides that, whether the writ of habeas corpus is granted by the West Virginia Supreme Court of Appeals, a circuit court, or any statutory court, the writ shall, in the discretion of the court, be returnable before (1) the court granting it, (2) the circuit court, or a statutory court, of the county wherein the petitioner is incarcerated, or (3) the circuit court, or the statutory court, wherein the petitioner was convicted. W. Va. Code § 53-4A-3(b).

Turning now to postconviction habeas petitions filed originally in the West Virginia Supreme Court of Appeals, it is important to note that, of the various provisions of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, only Rule 2 (relating to the form of habeas petitions and the return by the court clerk to the petitioner of a habeas petition that does not substantially comply with Rule 2) applies to original postconviction habeas petitions filed directly in the West Virginia Supreme Court of Appeals. Rule 1, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (for postconviction habeas petitions filed in any circuit court, all of these Rules apply; for postconviction habeas petitions filed in the Supreme Court of Appeals, only Rule 2 applies). In all other respects postconviction habeas petitions filed originally in the Supreme Court of Appeals are governed by the postconviction habeas corpus statutes, and by Rule 14, W.Va.R.App. Proc., which regulates the exercise of that court's original jurisdiction.

Rule 14(c), W.Va.R.App.Proc., provides that if the Supreme Court of Appeals determines, in a case in which an original habeas petition has been filed in that court, not to issue a rule to show cause, such determination shall be without prejudice to the right of the petitioner to present a petition to a lower court having proper jurisdiction, unless the Supreme Court of Appeals



specifically notes in the order denying a rule to show cause that the denial is with prejudice. Rule 14(c), W.Va.R.App.Proc. Thus, the Supreme Court of Appeals reserves the right to decline to hear a postconviction habeas petition and in effect encourages the circuit courts to hear a postconviction habeas petition the appellate court has elected not to entertain.

With respect to petitions for postconviction habeas relief filed in circuit courts, the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, which regulate postconviction habeas proceedings in the circuit courts, provide that such petitions 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." Rule 3(a), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va.

If a petition for postconviction habeas relief is filed in a circuit court, that court may, if appropriate, transfer the petition to either the circuit court where the petitioner is incarcerated or the circuit court wherein the petitioner was convicted and sentenced. Rules 3(a), 4(a), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. "If transfer is appropriate, the court shall promptly enter an order transferring the petition." Rule 4(a), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. The West Virginia Supreme Court of Appeals has construed these Rules to mean that in determining whether a habeas corpus petition is suitable for transfer to another court, the circuit court should consider whether the allegations set forth in the habeas petition relate to the petitioner's conviction or sentence; if the petition does contain such allegations, then practical considerations and judicial economy ordinarily dictate that it be transferred to the county wherein the petitioner was convicted and sentenced; however, if the petition challenges the conditions of confinement or raises other purely legal questions or issues unrelated to the petitioner's conviction or sentence, the writ should be returnable to the court in the county in which the petitioner is confined.

A postconviction petition for habeas relief may also be filed in any court of record of limited jurisdiction having criminal jurisdiction (also referred to in the habeas statute, for the sake of convenience, as a "statutory court"). W. Va. Code § 53-4A-1(a). The Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia do not apply to postconviction habeas proceedings in a statutory court. Rule 1, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (for postconviction habeas petitions filed in any circuit court, all of these Rules apply; for postconviction habeas petitions filed in the Supreme Court of Appeals, only Rule 2 applies).

The preliminary procedures to be followed by the circuit court entertaining the postconviction habeas petition, once the petition has been filed (and, where appropriate, transferred), are set forth in Rules 3(b), 4, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. The filing of the state's answer to the habeas petition is governed by Rule 5, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va.

The habeas corpus jurisdictional statute, stating that any person convicted of a crime and incarcerated under sentence of imprisonment may file a petition, implements the constitutional demand that the writ of habeas corpus be made available. The predicate for filing, pursuing, and vesting the circuit court with subject matter jurisdiction is a habeas petitioner's incarceration. *Cline v. Mirandy*, 234 W. Va. 427, 765 S.E.2d 583 (2014).

**§ 51:11 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Claims previously adjudicated or waived**

Relief is not available under the West Virginia Post-Conviction Habeas Corpus Act of 1967 if the claim for relief was previously and finally adjudicated or waived in a previous proceeding instituted to obtain relief from the conviction or sentence. W. Va. Code § 53-4A-1(a). A claim is deemed to have been previously and finally adjudicated if in prior proceedings to secure relief from the conviction or sentence the petitioner's claim was decided on the merits after a full and fair hearing, W. Va. Code § 53-4A-1(b). A claim is deemed waived if the petitioner could have advanced the claim, but intelligently and knowingly failed to advance it, before trial, or on direct appeal (even if no direct appeal was taken), or in any other proceedings instituted to obtain relief from the conviction or sentence, unless the claim is such that it could not have been waived under the circumstances. W. Va. Code § 53-4A-1(c). No claim shall be deemed waived if under decisions of the courts a new constitutional standard must be applied retroactively. W. Va. Code § 53-4A-1(d). See, *McBride v. Lavigne*, 230 W. Va. 291, 737 S.E.2d 560 (2012), cert. denied, 133 S. Ct. 2772, 186 L. Ed. 2d 223 (2013) (in habeas corpus proceedings, there is a rebuttable presumption that the petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance).

**§ 51:12 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Text**

West Virginia's postconviction habeas corpus statutes, con-

tained in Chapter 53, Article 4A of the West Virginia Code (W.Va.Code § 53-4A-1 through § 53-4A-11), provide:

**§ 53-4A-1. Right to habeas corpus for postconviction review—Jurisdiction—When contention deemed finally adjudicated or waived—Effect upon other remedies**

(a) Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. Any such petition shall be filed with the clerk of the supreme court of appeals, or the clerk of any circuit court, said supreme court of appeals and all circuit courts of this State having been granted original jurisdiction in habeas corpus cases by the Constitution of this State, or with the clerk of any court of record of limited jurisdiction having criminal jurisdiction in this State. Jurisdiction is hereby conferred upon each and every such court of record of limited jurisdiction having criminal jurisdiction (hereinafter for convenience of reference referred to simply as a "statutory court") to refuse or grant writs of habeas corpus ad subjiciendum in accordance with the provisions of this article and to hear and determine any contention or contentions and to pass upon all grounds in fact or law relied upon in support thereof in any proceeding on any such writ made returnable thereto in accordance with the provisions of this article. All proceedings in accordance with this article shall be civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case.

(b) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

(c) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver. When any such contention or contentions and grounds could have been advanced by the petitioner before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, but were not in fact so advanced, there shall be a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds.

(d) For the purposes of this article, and notwithstanding any other provisions of this article, no such contention or contentions and grounds shall be deemed to have been previously and finally adjudicated or to have been waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding or proceedings in which said question otherwise may have been waived, any court whose decisions are binding upon the supreme court of appeals of this State or any court

whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or the Constitution of West Virginia, or both, impose upon State criminal proceedings a procedural or substantive standard not theretofore recognized, if and only if such standard is intended to be applied retroactively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) The writ of habeas corpus ad subjiciendum provided for in this article is not a substitute for nor does it affect any remedies which are incident to the criminal proceedings in the trial court or any remedy of direct review of the conviction or sentence, but such writ comprehends and takes the place of all other common law and statutory remedies, including, but not limited to, the writ of habeas corpus ad subjiciendum provided for in article four of this chapter, which have heretofore been available for challenging the validity of a conviction or sentence and shall be used exclusively in lieu thereof: Provided, that nothing contained in this article shall operate to bar any proceeding or proceedings in which a writ of habeas corpus ad subjiciendum is sought for any purpose other than to challenge the legality of a criminal conviction or sentence of imprisonment therefor. A petition for a writ of habeas corpus ad subjiciendum in accordance with the provisions of this article may be filed at any time after the conviction and sentence in the criminal proceedings have been rendered and imposed and the time for the taking of an appeal with respect thereto has expired or the right of appeal with respect thereto has been exhausted.

**§ 51:13 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Grounds for relief—Challenging decisions of parole and prison officials—Case law**

For habeas corpus case law on challenging decisions of parole and prison officials, see, e.g., *State ex rel. Gordon v. McBride*, 218 W. Va. 745, 630 S.E.2d 55 (2006) (petitioner contends that, inasmuch as his scheduled discharge date in 2023 based upon good time credit will occur five years prior to his scheduled parole eligibility date in 2028, his release upon good time effectively denies his right to be considered for parole, thereby violating principles of due process and equal protection); *Snider v. Fox*, 218 W. Va. 663, 627 S.E.2d 353 (2006) (habeas attack on prison disciplinary decision; petitioner seeks the vacatur of a prison disciplinary conviction and sentence he received for grabbing the breast of a female nurse in the prison; we hold that sufficient ev-

idence supported conclusion that inmate violated prison disciplinary rule that prohibited inmate from physically forcing, or attempting to force, another person to submit to any sexual act, or from threatening another person with harm in order to compel him or her to a sexual act).

**§ 51:14 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Grounds for relief—Challenging conditions of confinement in prison—Case law**

For case law on the use of state habeas corpus in West Virginia to challenge conditions of confinement in prison, see, e.g., *White v. Haines*, 217 W. Va. 414, 618 S.E.2d 423 (2005) (W. Va. Code § 25-1A-2(a) directs an inmate to first exhaust his/her correctional facility's administrative remedies before filing a civil action complaining about his/her conditions of confinement); *State ex rel. Fields v. McBride*, 216 W. Va. 623, 609 S.E.2d 884 (2004) (the habeas petitioner contends that he has been improperly denied good time credit and that he was the victim of physical abuse by prison guards; the warden has argued that the issues raised are not ripe for resolution by this court because petitioner has not exhausted his administrative remedies; we agree with the warden; habeas corpus lies to secure relief from conditions of imprisonment which constitute cruel and unusual punishment in violation of the provisions of the state constitution and of the U.S. Constitution; under § 90-9-3 of the West Virginia Code of State Rules, an administrative procedure is set out for any inmate who wishes to seek formal review of an issue that relates to any aspect of his or her confinement; the general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act; the doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility; here, however, we do not find that the exception to the doctrine of exhaustion of administrative remedies is applicable under the facts of this case).

**§ 51:15 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—§ 53-4A-1—Exhaustion of state remedies—Case law**

For case law on § 53-4A-1, see e.g., *Eilola v. Waid*, 2008 WL 5188765 (S.D. W. Va. 2008) (a prisoner may also exhaust the state court remedies by filing a petition for a writ of habeas corpus filed under the original jurisdiction of the Supreme Court

of Appeals of West Virginia; however, an original jurisdiction petition that is denied without an indication that the denial is with prejudice, following a determination on the merits, will not exhaust the prisoner's state court remedies; because Petitioner has not had a petition for appeal filed on his behalf, it is clear that he has not exhausted his state remedies).

**§ 51:16 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-2—Contents of petition**

A model form of postconviction petition for a writ of habeas corpus is contained in Appendix A of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia; see W.Va.Code § 53-4A-2 (Supreme Court of Appeals may by rule prescribe the form of a postconviction habeas petition). "The petition shall be in substantially the form annexed to these rules as Appendix A." Rule 2(a), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va.

The required contents of a postconviction petition for a writ of habeas corpus in West Virginia are set forth in W.Va.Code § 53-4A-2; see also Rule 2(a), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (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).

**§ 51:17 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-2—Text of W.Va.Code § 53-4A-2**

**§ 53-4A-2. Petition; contents thereof; supreme court may prescribe form of petition, verification and writ; duties of clerk**

A petition seeking a writ of habeas corpus ad subjiciendum in accordance with the provisions of this article shall identify the proceedings in which the petitioner was convicted and sentenced, give the date of the entry of the judgment and sentence complained of, specifically set forth the contention or contentions and grounds in fact or law in support thereof upon which the petition is based, and clearly state the relief desired. Affidavits, exhibits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition unless there is a recital therein as to why they are not attached. All facts within the personal knowledge of the petitioner shall be set forth separately from other allegations, and such facts and the authenticity of all affidavits, exhibits,

records or other documentary evidence attached to the petition must be sworn to affirmatively as true and correct. The petition must also identify any previous proceeding or proceedings on a petition or petitions filed under the provisions of this article; or any other previous proceeding or proceedings which the petitioner instituted to secure relief from his conviction or sentence and must set forth the type or types of such previous proceeding or proceedings, the contention or contentions there advanced, the grounds in fact or law assigned therein for the relief there sought, the date thereof, the forum in which instituted and the result thereof. Argument, citations and discussion of authorities shall be omitted from the petition, but may be filed as a separate document or documents. The supreme court of appeals may by rule prescribe the form of the petition, verification and the writ itself. The clerk of the court in which the petition is filed shall docket the petition upon its receipt, and shall bring the petition and any affidavits, exhibits, records and other documentary evidence attached thereto to the attention of the court.

**§ 51:18 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Text of W.Va.Code § 53-4A-3**

**§ 53-4A-3. Refusal of writ; granting of writ; direction of writ; how writ made returnable; duties of clerk, attorney general and prosecuting attorney**

(a) If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence (if any such record or records are part of the official court files of the court with whose clerk the petition is filed or are part of the official court files of any other court within the same judicial circuit as the court with whose clerk such petition is filed and are thus available for examination and review by such court) show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall by order entered of record refuse to grant a writ, and such refusal shall constitute a final judgment. If it appears to such court



from said petition, affidavits, exhibits, records and other documentary evidence, or any such available record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief, and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall forthwith grant a writ, directed to and returnable as provided in subsection (b) hereof. If any such record or records referred to above are not a part of the official court files of the court with whose clerk the petition is filed or are not part of the official court files of any other court within the same judicial circuit as the court with whose clerk such petition is filed and are thus not available for examination and review by such court, the determination as to whether to refuse or grant the writ shall be made on the basis of the petition, affidavits, exhibits, records and other documentary evidence attached thereto.

(b) Any writ granted in accordance with the provisions of this article shall be directed to the person under whose supervision the petitioner is incarcerated. Whether the writ is granted by the supreme court of appeals, a circuit court, or any statutory court in this State, it shall, in the discretion of the court, be returnable before (i) the court granting it, (ii) the circuit court, or a statutory court, of the county wherein the petitioner is incarcerated, or (iii) the circuit court, or the statutory court, in which, as the case may be, the petitioner was convicted and sentenced.

(c) The clerk of the court to which a writ granted in accordance with the provisions of this article is made returnable shall promptly bring the petition and any affidavits, exhibits, records and other documentary evidence attached thereto, and the writ to the attention of the court if the writ was granted by some other court, and in every case deliver a copy of such petition and any affidavits, exhibits, records and other documentary evidence attached thereto and the writ to the prosecuting attorney of the county, or the attorney general if the writ is returnable before the supreme court of appeals. The prosecuting attorney or the attorney general, as the case may be, shall represent the State in all cases arising under the provisions of this article.

**§ 51:19 Writ of habeas corpus under Post-Conviction  
Habeas Corpus Act of 1967—W.Va.Code § 53-4A-4—  
Right to counsel**

There is a right to counsel in West Virginia postconviction ha-

beas corpus proceedings. W. Va. Code § 53-4A-4(a) (if the court to which the writ of habeas corpus was returnable is satisfied that the petitioner is unable to pay the costs of the proceeding, and that the petition was filed in good faith and has merit, it shall order that the petitioner proceed in forma pauperis and shall appoint counsel to represent the petitioner if the petitioner has requested counsel; if it is determined that the petitioner has the financial means with which to pay the costs incident to any proceedings hereunder and to employ counsel, or that the petition was filed in bad faith or is without merit or is frivolous, the request to proceed in forma pauperis and for the appointment of counsel shall be denied and the court making such determination shall enter an order setting forth the findings pertaining thereto and such order shall be final); W.Va.Code § 29-21-2(2) (for purposes of the office of public defender services, an "eligible proceeding" includes proceedings which are ancillary to an eligible proceeding, including proceedings brought to obtain extraordinary remedies, and postconviction challenges to the final judgment in an eligible proceeding); Rule 3(a), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (in order to receive in forma pauperis status, the habeas 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); Rule 4(b), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (if the habeas 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 postconviction habeas corpus relief within the time period set by the court); Rule 6, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (if counsel has not been previously appointed as provided in Rule 4(b), and the habeas 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).

**§ 51:20 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-4—Right to counsel—Procedure**

The procedures to be followed in West Virginia in regard to appointment of counsel for an unrepresented postconviction habeas petitioner in a circuit court are somewhat complicated. 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 has been given leave to proceed in forma pauperis; and the court may order appointed counsel to file an amended petition for postconviction habeas corpus relief within the time period set by the court. Rule 4(b), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. If summary dismissal is warranted, the court may summarily dismiss the postconviction habeas petition (without having appointed counsel to represent the petitioner). Rules 4(c), 6, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. Finally, 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 where the petitioner has been granted leave to proceed in forma pauperis and where 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 6, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. However, if it is determined that the petitioner has the financial means with which to pay the costs incident to any proceedings hereunder and to employ counsel, or that the petition was filed in bad faith or is without merit or is frivolous, the request to proceed in forma pauperis and for the appointment of counsel shall be denied and the court making such determination shall enter an order setting forth the findings pertaining thereto and such order shall be final. W.Va.Code § 53-4A-4(a).

**§ 51:21 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-4—Text of § 53-4A-4.**

**§ 53-4A-4. Inability to pay costs, etc.; appointment of counsel; obtaining copies of record or records in criminal proceedings or in a previous proceeding or proceedings to secure relief; payment of all costs and expenses; adjudging of costs**

(a) A petition filed under the provisions of this article may allege facts to show that the petitioner is unable to pay the costs of the proceeding or to employ counsel, may request permission to proceed in forma pauperis and may request the appointment of counsel. If the court to which the writ is returnable (hereinafter for convenience of reference referred to simply as "the court," unless the context in which used clearly indicates that some other court is intended) is satisfied that the facts alleged in this regard are true, and that the petition was filed in good faith, and has merit or is not frivolous, the court shall order that the petitioner proceed in forma pauperis, and the court shall appoint counsel for the petitioner. If it shall appear to the court that the record in the proceedings which resulted in the conviction and sentence, including, but not limited to, a transcript of the testimony therein, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, or all of such records, or any part or parts thereof, are necessary for a proper determination of the contention or contentions and grounds (in fact or law) advanced in the petition, the court shall, by order entered of record, direct the State to make arrangements for copies of any such record or records, or all of such records, or such part or parts thereof as may be sufficient, to be obtained for examination and review by the court, the State and the petitioner. The State may on its own initiative obtain copies of any record or records, or all of the records, or such part or parts thereof as may be sufficient, as aforesaid, for its use and for examination and review by the court and the petitioner. If, after judgment is entered under the provisions of this article, an appeal or writ of error is sought by the petitioner in accordance with the provisions of section nine of this article, and the court which rendered the judgment is of opinion that the review is being sought in good faith and the grounds assigned therefor have merit or are not frivolous, and such court finds that the petitioner is unable to pay the costs incident

thereto or to employ counsel, the court shall, upon the petitioner's request, order that the petitioner proceed in forma pauperis and shall appoint counsel for the petitioner. If an appeal or writ of error is allowed, whether upon application of the petitioner or the State, the reviewing court shall, upon the requisite showing the request as aforesaid, order that the petitioner proceed in forma pauperis and shall appoint counsel for the petitioner. If it is determined that the petitioner has the financial means with which to pay the costs incident to any proceedings hereunder and to employ counsel, or that the petition was filed in bad faith or is without merit or is frivolous, or that review is being sought or prosecuted in bad faith or the grounds assigned therefor are without merit or are frivolous, the request to proceed in forma pauperis and for the appointment of counsel shall be denied and the court making such determination shall enter an order setting forth the findings pertaining thereto and such order shall be final.

(b) Whenever it is determined that a petitioner shall proceed in forma pauperis, all necessary costs and expenses incident to proceedings hereunder, originally, or on appeal pursuant to section nine of this article, or both, including, but not limited to, all court costs, and the cost of furnishing transcripts, shall, upon certification by the court to the state auditor, be paid out of the treasury of the State from the appropriation for criminal charges. Any attorney appointed in accordance with the provisions of this section shall be paid for his services and expenses in accordance with the provisions of article twenty-one, chapter twenty-nine of the Code. All costs and expenses incurred incident to obtaining copies of any record or records, or all of the records, or such part or parts thereof as may be sufficient, as aforesaid, for examination and review by the court, the State and the petitioner, shall, where the petitioner is proceeding in forma pauperis, and the court orders the State to make arrangements for the obtaining of same or the State obtains the same on its own initiative, be paid out of the treasury of the State, upon certification by the court to the state auditor, from the appropriation for criminal charges. All such costs, expenses and fees shall be paid as provided in this subsection (b) notwithstanding the fact that all proceedings under the provisions of this article are civil and not criminal in character. In the event a petitioner who is proceeding in forma pauperis does not substantially prevail, all such costs, expenses and fees shall be and constitute a judgment of the court against the petitioner to be recovered as any other judgment for costs.

(c) In the event a petitioner who is not proceeding in forma pauperis does not substantially prevail, all costs and expenses

incurred incident to obtaining copies of any record or records, or all of the records, or such part or parts thereof as may be sufficient, as aforesaid, for examination and review by the court, the State and the petitioner, shall, where the court orders the State to make arrangements for the obtaining of same or the State obtains the same on its own initiative, be and constitute a judgment of the court against the petitioner to be recovered as any other judgment for costs. In any case where the petitioner does not proceed in forma pauperis, the court shall adjudge all costs and expenses to be paid as shall seem to the court to be right, consistent with the immediately preceding sentence of this subsection (c) and with the provisions of chapter fifty-nine of this Code, as amended.

**§ 51:22 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-4—Right to counsel—Case law**

For case law on the right to counsel in West Virginia postconviction habeas corpus proceedings, see, e.g., *White v. Haines*, 217 W. Va. 414, 618 S.E.2d 423 (2005) (there is no requirement that a court, in every instance, appoint counsel to represent a petitioner in a postconviction habeas corpus proceeding).

**§ 51:23 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Text of § 53-4A-5**

**§ 53-4A-5. Service of writ.**

Any writ granted in accordance with the provisions of this article shall be served upon the person to whom it is directed, or, in his absence from the place where the petitioner is incarcerated, upon the person having the immediate custody of the petitioner.

**§ 51:24 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Text of § 53-4A-6**

**§ 53-4A-6. Return; pleadings; amendments.**

Within such time as may be specified in the writ or as the court may fix, the State shall make its return. No other or further pleadings shall be filed except as the court may order. At any time prior to entry of judgment on the writ in accordance with the provisions of this article, the court may permit the petitioner to withdraw his petition. The court may make such orders as to amendment of the petition or return or other pleading, as to pleading over, or filing other or further pleadings, or extending the time for the making of the return or the filing of

other pleadings, as shall seem to the court to be appropriate, meet and reasonable. In considering the petition, the return or other pleading, or any amendment thereof, substance and not form shall control.

**§ 51:25 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-7—Final judgments granting or denying relief**

The final judgment granting or denying postconviction habeas corpus relief "shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in law or fact) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided." W.Va.Code § 53-4A-7(c). See also Rule 4(c), Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va. (if the circuit court enters an order for summary dismissal of the petition because the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived, the 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).

**§ 51:26 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-7—Final judgments granting or denying relief—Text of W.Va.Code § 53-4A-7**

**§ 53-4A-7. Denial of relief; hearings; evidence; record; judgment**

(a) If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall enter an order denying the relief sought. If it appears to the court from said petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the return or other pleadings, or any such record or records referred to above, that there is probable cause to believe that

the petitioner may be entitled to some relief and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall promptly hold a hearing and/or take evidence on the contention or contentions and grounds (in fact or law) advanced, and the court shall pass upon all issues of fact without a jury. 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.

(b) A record of all proceedings under this article and all hearings and evidence shall be made and kept. The evidentiary depositions of witnesses taken by either the petitioner or the State, on reasonable notice to the other, may be read as evidence. The court may receive proof by proper oral testimony or other proper evidence. All of the evidence shall be made a part of the record. When a hearing is held and/or evidence is taken by a judge of a circuit court or statutory court in vacation, a transcript of the proceedings shall be signed by the judge and certified to the clerk of the court in which the judgment is to be rendered, and be entered by him among the records of that court. A record of all proceedings in the supreme court of appeals shall be entered among the records of such court.

(c) When the court determines to deny or grant relief, as the case may be, the court shall enter an appropriate order with respect to the conviction or sentence in the former criminal proceedings and such supplementary matters as are deemed necessary and proper to the findings in the case, including, but not limited to, remand, the vacating or setting aside of the plea, conviction and sentence, arraignment, retrial, custody, bail, discharge, correction of sentence and resentencing, or other matters which may be necessary and proper. In any order entered in accordance with the provisions of this section, the court shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided. Any order entered in accordance with the provisions of this section shall constitute a final judgment, and, unless reversed, shall be conclusive.

(d) Notwithstanding any provision of law to the contrary, whenever a conviction from a crime of violence is reversed or a sentence of incarceration for such an offence is vacated pursuant to the provisions of this article, the prosecuting attorney of the county of prosecution shall, prior to a retrial or entering



into any plea negotiations or sentence negotiations to resolve the matter, notify the victim or if the offence was a homicide, the next of kin of the victim, by United States mail sent to the last known address of said person, if his or her name and address has previously been provided to the prosecuting attorney.

**§ 51:27 Writ of habeas corpus under Post-Conviction  
Habeas Corpus Act of 1967—W.Va.Code § 53-4A-7—  
Case law**

For case law on § 53-4A-7, see e.g., *Tex S. v. Pszczolkowski*, 236 W. Va. 245, 778 S.E.2d 694 (2015) (a court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief; when considering whether such a petition requesting post-conviction habeas corpus relief has stated grounds warranting the issuance of the writ, courts typically are afforded broad discretion; the post-conviction habeas corpus statute leaves the decision of whether to conduct an evidentiary hearing or to compel the State to produce evidence in its possession in large part to the sound discretion of the court before which the writ is made returnable; the discretion afforded circuit courts is not unlimited, the court must be guided by the necessities of each particular case); *Ballard v. Hurt*, 230 W. Va. 374, 738 S.E.2d 538 (2012) ((§ 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner; and to state the grounds upon which the matter was determined; remand warranted in habeas proceeding so that habeas court could comply with statutory requirement to make specific findings of fact and conclusions of law); *State v. VanHoose*, 227 W. Va. 37, 705 S.E.2d 544 (2010) (In deciding to grant or deny habeas relief, a circuit court is required to make adequate findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined; "[i]n the instant case, the circuit court's habeas order set forth legal conclusions in denying relief, but failed to cite any supporting facts. Ordinarily, this Court would remand this case for entry of an order setting out findings of fact. However, because the record in this case is adequately developed, we will not remand for entry of such an order."); *Dennis v. State, Div. of Corrections*, 223 W. Va. 590, 678 S.E.2d 470 (2009) (§ 53-4A-7(c) requires a circuit court denying or granting

relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to state the grounds upon which the matter was determined; findings of fact made by a trial court in a postconviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong; the circuit court's order lacks the requisite findings of fact and conclusions of law that permit meaningful review by this Court; we only can speculate from the appellant's brief and the State's response the possible bases for the circuit court's decision; however, "the mission of the appellate judiciary is neither to mull theoretical abstractions nor to practice clairvoyance," in most circumstances the failure to make specific findings of fact and conclusions of law regarding an issue raised in habeas proceedings necessitates a remand; such is the case here); *Foy v. Ballard*, 2009 WL 667201 (N.D. W. Va. 2009) (it is evident from a reading of W. Va. Code § 53-4A-7(a) that a petitioner for habeas corpus relief is not entitled, as a matter of right, to a full evidentiary hearing in every proceeding instituted under the provisions of the postconviction habeas corpus act; the state court outlined the facts and procedural history of the case, explained the claims advanced by the petitioner, and stated the grounds upon which each claim was determined and ultimately decided; state court's order denying the petitioner state habeas relief satisfied the requirements of § 53-4A-7(c)).

**§ 51:28 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Text of W.Va. Code § 53-4A-8**

**§ 53-4A-8. Powers of judges or judge in vacation**

A writ may be granted or refused in accordance with the provisions of this article by any three concurring judges of the supreme court of appeals, or a judge of any circuit court or any statutory court, in vacation as well as by any such court in term, and any such writ may be made returnable, consistent with the provisions of subsection (b) of section three of this article, to the supreme court of appeals in term, or to a judge of a circuit court or any statutory court in vacation as well as to such court in term. Although a writ granted in accordance with the provisions of this article is returnable to a circuit court in term or a statutory court in term, the contention or contentions and grounds (in fact or law) advanced, and any incidental matters related thereto, may be heard and/or determined or passed upon by a judge of the court in vacation. Any judge of the supreme court of appeals (where at least three judges of such court concur therein), or of a circuit court or a statutory court,

in vacation shall have the same power to enforce obedience to the writ, to compel the attendance of witnesses, or to punish contempt of their or his authority, as a court has; and the judgment of a judge of a circuit court or a statutory court in vacation when entered of record shall be considered and be enforced as if it were a judgment of the court among whose records it is entered.

**§ 51:29. Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-9—Final judgments granting or denying relief—Appeals**

The final judgment of a statutory court granting or denying postconviction habeas relief may be appealed by the petitioner or the state to the circuit court of the county upon application for an appeal or writ of error in the manner and within the time provided in Article 4, Chapter 58 of the West Virginia Code (W.Va.Code § 58-4-1 through § 58-4-19). W.Va.Code § 53-4A-9(a). This means a petition for an appeal or writ of error must be presented to the circuit court no more than four months after the rendering or making of the judgment to be appealed. W.Va.Code § 58-4-4. Such petition, together with a copy thereof, shall be first filed in the office of the clerk of the court of the statutory court wherein the judgment complained of was entered. W.Va.Code § 58-4-6.

The final judgment of a circuit court granting or denying postconviction habeas relief may be appealed by the petitioner or the state to the West Virginia Supreme Court of Appeals upon application for an appeal or writ of error in the manner and within the time provided by law for civil appeals generally. W.Va.Code § 53-4A-9(a). This means that, in order to validly appeal from the circuit court to the West Virginia Supreme Court of Appeals, the appealing party must file a petition for review in the office of the clerk of the circuit court where the judgment being appealed was entered; and this petition for review must be so filed not more than four months after entry of the judgment being appealed; see Rule 3(a), W.Va.R.App.Proc.

If, after the circuit court enters a final judgment, an appeal or writ of error is sought by the postconviction habeas petitioner, and the court which rendered the judgment is of opinion that the review is being sought in good faith and that the grounds assigned therefor have merit or are not frivolous, and such court finds that the petitioner is unable to pay the costs incident thereto or to employ counsel, the court shall, upon the petitioner's request, order that the petitioner proceed in forma pauperis and

shall appoint counsel for the petitioner. W.Va.Code § 53-4A-4(a). If an appeal or writ of error is allowed, whether upon application of the postconviction habeas petitioner or the state, the reviewing court shall, upon the requisite showing as aforesaid, order that the petitioner proceed in forma pauperis and shall appoint counsel for the petitioner. W.Va.Code § 53-4A-4(a).

If it is determined that the petitioner has the financial means with which to pay the costs incident to any proceedings hereunder and to employ counsel, or that appellate review is being sought or prosecuted in bad faith or the grounds assigned therefor are without merit or are frivolous, the request to proceed in forma pauperis and for the appointment of counsel shall be denied and the court making such determination shall enter an order setting forth the findings pertaining thereto and such order shall be final. W.Va.Code § 53-4A-4(a).

A final judgment entered by a circuit court under the provisions of the West Virginia Post-Conviction Habeas Corpus Act may be appealed by either party. *Ballard v. Ferguson*, 232 W. Va. 196, 751 S.E.2d 716 (2013).

In reviewing challenges to findings and conclusions of Circuit Court in a habeas corpus action, the Supreme Court of Appeals applies a three-prong standard of review, under which the final order and ultimate disposition are reviewed under an abuse of discretion standard, underlying factual findings are reviewed under the clearly erroneous standard of review, and questions of law are subject to de novo review. *Gerlach v. Ballard*, 233 W. Va. 141, 756 S.E.2d 195 (2013), cert. denied, 134 S. Ct. 1782, 188 L. Ed. 2d 609 (2014).

**§ 51:30 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-9—Final judgments granting or denying relief—Bail**

When the final judgment orders the habeas petitioner discharged, the court may, in its discretion, admit the petitioner to bail. W.Va.Code § 53-4A-9(a). If the circuit court denies bail, the petitioner may seek bail in the Supreme Court of Appeals by filing a summary petition for postconviction bail in that court. Rule 6(e), W.Va.R.App.Proc. (summary petitions for postconviction bail shall be filed in accordance with the provisions of W.Va.Code, § 62-1C-1; upon receipt of the prosecuting attorney's response to the summary petition, the court may grant the petition, deny the petition, or schedule the matter for hearing).

**§ 51:31 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—W.Va.Code § 53-4A-9—Text of W.Va.Code § 53-4A-9**

**§ 53-4A-9. Judicial review; disposition of petitioner pending appeal**

(a) A final judgment entered under the provisions of this article by a statutory court may be appealed by the petitioner or the State to the circuit court of the county upon application for an appeal or writ of error in the manner and within the time provided in article four, chapter fifty-eight of this Code, as amended. A final judgment entered under the provisions of this article by a circuit court or a final judgment entered by the circuit court after an appeal or writ of error was granted by such circuit court with respect to the judgment of a statutory court entered under the provisions of this article, as well as an order by a circuit court rejecting an appeal from or writ of error to the judgment of a statutory court entered under the provisions of this article, may be appealed by the petitioner or the State to the supreme court of appeals upon application for an appeal or writ of error in the manner and within the time provided by law for civil appeals generally. When an application for an appeal or writ of error is rejected by the circuit court (and the order of rejection is not appealed to the supreme court of appeals), or the supreme court of appeals, as the case may be, or both, the order sought to be reviewed shall thereby become final to the same extent and with like effect as if said order had been affirmed on appeal.

(b) When the petitioner is remanded, execution of the judgment entered under the provisions of this article shall not be suspended by the granting of an appeal or writ of error, or suspended while the petitioner is applying for an appeal or writ of error. When the petitioner is ordered to be discharged, and execution of the judgment entered under the provisions of this article is ordered suspended to permit the State to apply for an appeal or writ of error, the court making such suspending order may, in its discretion, admit the petitioner to bail until expiration of the time allowed for making application for an appeal or writ of error, or, in case the appeal or writ of error is allowed, until the decision of the appellate court thereon is duly certified.

**§ 51:32 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Text of W.Va.Code § 53-4A-10**

**§ 53-4A-10. Construction; repeal**

All other pertinent provisions of this Code shall be construed so as to conform to and be consistent with the provisions of this article. In the event that there are pertinent provisions in this Code so inconsistent with the provisions of this article as to preclude such construction, such other provisions shall be considered as having been repealed to the extent of such inconsistency by the enactment of this article. The provisions of this article shall be liberally construed so as to effectuate its purposes.

**§ 51:33 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Text of § 53-4A-11**

**§ 53-4A-11. Severability**

If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are hereby declared to be severable. The legislature does hereby further declare that it would have enacted this article even if it had known at the time of enactment that such provision or application thereof would be held to be invalid.

**§ 51:34 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Text of Rule 1**

The Rules Governing Post-conviction Habeas Corpus Proceedings in West Virginia provide:

**RULE 1. PURPOSE AND SCOPE OF RULES**

These rules have been adopted to provide the procedure for postconviction 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.

**§ 51:35 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Text of Rule 2**

**RULE 2. PETITION**

(a) Form of Petition; Copies. Any person in this State seeking postconviction 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.

**§ 51:36 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Text of Rule 3**

**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).] 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.

**§ 51:37 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Text of Rule 4**

**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 postconviction 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.

**§ 51:38 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Text of Rule 5—Contents**

**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 postconviction 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.

**§ 51:39 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Text of Rule 6**

**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.

**§ 51:40 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 7—Discovery**

Discovery is available in West Virginia postconviction habeas corpus proceedings in the circuit courts. Rule 7, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va.

**§ 51:41 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 7—Text of Rule 7**

**RULE 7. DISCOVERY**

(a) Leave of Court Required. In postconviction 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.

§ 51:42 **Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 8—Text of Rule 8**

**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).

§ 51:43 **Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 8—Case law**

For case law on Rule 8, see e.g., *State ex rel. Smith v. McBride*, 224 W. Va. 196, 681 S.E.2d 81 (2009) (a new trial on the ground of after discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special; this Court has indicated, with respect to a newly discovered confession, that: no one would doubt that a confession by another person to the crime, if discovered after trial, could be a ground for a new trial on the basis of newly discovered evidence; a confession by another person, however, does not invariably require a new trial; the integrity of the confession is for the trial court; a new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained; (2) it must appear from facts stated in his or her affidavit that the

defendant was diligent in ascertaining and securing the evidence, and that the new evidence is such that due diligence would not have secured it before the verdict; (3) such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point; (4) the evidence must be such as ought to produce an opposite result at a second trial on the merits; (5) and the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side; if any of the foregoing five essential requirements is not satisfied or complied with, a new trial will not be granted on the ground of newly discovered evidence; newly discovered evidence satisfies the fourth prong of the test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability; if the defendant is seeking to vacate a sentence, the fourth prong requires that the newly discovered evidence would probably yield a less severe sentence or acquittal; the evidence produced at the omnibus hearing amply supports the trial court's findings to the effect that Mr. Sells' confession was false . . . and that even if presented at a new trial, it would 'undoubtedly' not have changed the result).

**§ 51:44 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 9—Text of Rule 9**

**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.

**§ 51:45 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 10—Rules of civil procedure apply**

The West Virginia Rules of Civil Procedure, to the extent that they are not inconsistent with the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, may be applied, when appropriate, to West Virginia postconviction habeas corpus proceedings in the circuit courts. Rule 10, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va.; see also Rule 71B(a), W.Va.R.Civ.Proc. (the West Virginia Rules of Civil Procedure govern the procedure for the application for, and issuance of, extraordinary writs).

Expansion of the record is available in West Virginia postconviction habeas corpus proceedings in the circuit courts. Rule 8, Rules Governing Post-Conviction Habeas Corpus Proceedings in W.Va.

**§ 51:46 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Rule 10—Text of Rule 10**

**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.

[Appendices A and B to the West Virginia's Habeas Corpus

Rules, setting forth respectively a model form of habeas petition and a model form of application to proceed in forma pauperis and affidavit, are omitted.]

### § 51:47 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Case law

For case law on the West Virginia Post-Conviction Habeas Corpus Act of 1967, as amended and codified, see, e.g., *Ballard v. Hurt*, 230 W. Va. 374, 738 S.E.2d 538 (2012) (ineffective counsel claim; West Virginia Post-Conviction Habeas Act requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner); *McBride v. Lavigne*, 230 W. Va. 291, 737 S.E.2d 560 (2012), cert. denied, 133 S. Ct. 2772, 186 L. Ed. 2d 223 (2013) (in reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review; we review the final order and the ultimate disposition under an abuse of discretion standard, the underlying factual findings under a clearly erroneous standard, and questions of law are subject to a de novo review; there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance); *Lucas v. McBride*, 505 F. Supp. 2d 329 (N.D. W. Va. 2007) (W.Va.Code § 53-4A-7(c) requires a West Virginia court denying a request for habeas relief to enter a written order, making specific findings of fact and conclusions of law relating to each contention or contentions and grounds, in fact or law, advanced, clearly stating the grounds upon which the matter was determined, and stating whether a federal and/or state right was presented and decided; in the Final Order Denying Petition for Writ of Habeas Corpus, the circuit court outlined the labyrinthine facts and procedural history of the case, explained the grounds and claims advanced by the petitioner, stated the grounds upon which each was determined, and on which its determinations were made; even assuming *arguendo* that the memorandum opinion and order varied slightly from the norm, based upon a strict reading of the code provision, this Court finds that any minor discrepancy associated therewith does not rise to the level of a constitutional violation); *State ex rel. Waldron v. Scott*, 222 W. Va. 122, 663 S.E.2d 576 (2008) (habeas-corpus statute allows a petition for postconviction habeas corpus relief to advance contentions or grounds that have been previously adjudicated only if those contentions or grounds are based upon

subsequent court decisions that impose new substantive or procedural standards in criminal proceedings that are intended to be applied retroactively; appellant made the same arguments in his habeas petition as he did in his direct appeal; appellant did not present any contentions or grounds for the reversal of his conviction based upon subsequent decisions by this Court as required by *Bowman*; these issues raised by the appellant lacked merit and no evidentiary hearing was required; *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007) (it is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal; the prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied; this Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim); *State ex rel. Hatcher v. McBride*, 221 W. Va. 760, 656 S.E.2d 789 (2007) (appellant leaves this Court with the general allegation that his counsel failed to raise or vigorously defend him on several issues, while he does not cite to a single specific example of such ineffective assistance by his counsel; without providing this Court with any examples of ineffective assistance of counsel, it is impossible for us to grant habeas relief); *State ex rel. McLaurin v. McBride*, 220 W. Va. 141, 640 S.E.2d 204 (2006) (ineffective counsel claim; findings of fact made by a trial court in a postconviction habeas corpus proceeding will not be set aside or reversed on appeal by this court unless such findings are clearly wrong); *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 640 S.E.2d 142 (2006) (the interrelationship of the West Virginia Post-Conviction Habeas Corpus Act and other remedies, and particularly as to habeas relief under W.Va.Code, § 53-4-1, is set forth in W.Va.Code, 53-4A-1(e); W.Va.Code, § 53-4A-1(a), of the West Virginia Post-Conviction Habeas Corpus Act provides for the correction of sentences); *Pethel v. McBride*, 219 W. Va. 578, 638 S.E.2d 727 (2006) (habeas relief is available only where: (1) there is a denial or infringement upon a person's constitutional rights, (2) the court was without jurisdiction to impose the sentence, (3) the sentence exceeds the legal maximum, or (4) the conviction would have been subject to collateral attack by statute or at common law prior to the adoption of the habeas statute; any rights created by the provisions of the Interstate Agreement on Detainers Act are rights which are statutory in nature and which do not give rise to the level of rights guaranteed by either the Constitution of West Virginia or the Constitution of the United States; unlike federal habeas relief, which may be available where a violation of federal statutory law

rises to the level of a fundamental defect in the proceedings, habeas relief is not available in West Virginia solely on the basis of a violation of statutory law; West Virginia limits the availability of habeas relief to constitutional violations, jurisdictional errors, illegal sentences and those convictions which would have been subject to collateral attack by statute or at common law prior to the adoption of the postconviction habeas statute; by restricting the availability of habeas relief, the state's jurisprudence is concerned with remedying defects in the proceeding which constitute a fundamental miscarriage of justice or which result in the imprisonment of an innocent man and which were not adjudicated on direct appeal; statutory violations may be relevant in habeas actions where the statutory violation impacts a person's constitutional rights or results in illegal sentencing); *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006) (where a circuit court is faced with a potential abuse of process by a prisoner or a prisoner's threat to abuse the judicial process, the circuit court may, subject to the following, enter an order imposing reasonable limitations on the prisoner's right to access the court; prior to the entry of such an order, the circuit court must provide the prisoner an opportunity to show cause why such a limitation should not be imposed; if the record demonstrates a clear intention to obstruct the administration of justice, the circuit court may impose limitations on the prisoner's right of access; any order limiting a prisoner's access to the courts must be designed to preserve his right to adequate, effective, and meaningful access to our courts; the circuit court's order imposing such a limitation must include such findings of fact and conclusions of law adequate for meaningful appellate review); *In re Renewed Investigation of State Police Crime Laboratory, Serology Div.*, 219 W. Va. 408, 633 S.E.2d 762 (2006) (although it is a violation of due process for the state to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict; serology reports prepared by employees of the Serology Division of the West Virginia State Police Crime Laboratory, other than Trooper Fred S. Zain, are not subject to the invalidation and other strictures contained in *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W. Va. 321, 438 S.E.2d 501 (1993); this, however, does not end our consideration of the issue before us; as this court has previously noted, the determination that the serology evidence at issue is not subject to the invalidation strictures and systematic review authorized with respect to Zain's work does not preclude prisoners against whom these serologists offered evidence from seeking habeas corpus relief under our postconviction habeas corpus statute, W.Va.Code



§§ 53-4A-1 et seq.; in such a proceeding, a prisoner who challenges his or her conviction must prove that the serologist offered false evidence in his or her prosecution; also, the prisoner must satisfy the standards indicating that a new trial is warranted; this court has power to fashion special relief in habeas corpus for prisoners who may have been affected by false serology evidence; a prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence and who challenges his or her conviction based on the serology evidence is to be granted a full habeas corpus hearing on the issue of the serology evidence; the prisoner is to be represented by counsel unless he or she knowingly and intelligently waives that right; the circuit court is to review the serology evidence presented by the prisoner with searching and painstaking scrutiny; at the close of the evidence, the circuit court is to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence is found to be false, whether the prisoner has shown the necessity of a new trial; a circuit court that receives a petition for a writ of habeas corpus from a prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence, and whose request for relief is grounded on the serology evidence, is to hear the prisoner's challenge in as timely a manner as is reasonably possible; furthermore, this court suspends to a limited degree the rules of res judicata that generally apply to a petition for a writ of habeas corpus subjiciendum; in order to guarantee that the serology evidence offered in each prisoner's prosecution will be subject to searching and painstaking scrutiny, this court now holds that a prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence may bring a petition for a writ of habeas corpus based on the serology evidence despite the fact that the prisoner brought a prior habeas corpus challenge to the same serology evidence, and the challenge was finally adjudicated); *State ex rel. Gordon v. McBride*, 218 W. Va. 745, 630 S.E.2d 55 (2006) (as to the necessity of entering findings and conclusions, the 1967 statute provides that in any order entered in accordance with the provisions of the statute, the court shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided); *State ex rel. Corbin v. Haines*, 218 W. Va. 315, 624 S.E.2d 752 (2005) (claim that, under *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994), the jury instructions given at

petitioner's 1993 murder trial were unconstitutional; findings of fact made by a trial court in a postconviction habeas corpus proceeding will not be set aside or reversed on appeal by this court unless such findings are clearly wrong); *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004) (under the statutes of this state dealing with habeas corpus proceedings a prima facie case, in order for this court to issue the writ, may be made by petition showing by an affidavit or other evidence probable cause to believe that a person is detained without lawful authority; however, this does not in any way warrant the release of a petitioner confined in the penitentiary; such petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release; the general nature of habeas corpus, our own postconviction habeas corpus statute, and the views of other jurisdictions establish that a postconviction petitioner seeking DNA testing must be incarcerated); *Markley v. Coleman*, 215 W. Va. 729, 601 S.E.2d 49 (2004) (West Virginia's postconviction statute and the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia ensure that a petitioner's due process rights are protected; circuit courts have the discretion to deal with habeas corpus allegations in several different ways; a circuit court may summarily deny unsupported claims that are randomly selected from the list of grounds found in the opinion in *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981); a circuit court may find that a habeas corpus allegation has been previously waived or adjudicated; finally, a circuit court may find that it lacks adequate information to make a ruling on a habeas corpus allegation, whereupon it may appoint counsel to represent the habeas petitioner; in the alternative, when a circuit court finds that a petition contains a mere recitation of grounds without adequate factual support, the circuit court may enter an order dismissing the petition, without prejudice, with directions that the petitioner be refiled containing adequate factual support; when a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation, because the petition does not provide adequate facts to allow the circuit court to make a fair adjudication of the matter, the dismissal is without prejudice; circuit court cannot act to render a potentially meritorious habeas corpus allegation as having been finally adjudicated without addressing the merits of the habeas corpus allegation in some fashion on the record; while we do not believe that a petitioner is entitled to habeas corpus upon habeas corpus, we will not invoke res judicata principles until the petitioner has had a full and fair opportunity with the assistance of counsel to litigate all issues at some stage of the proceedings; the postconviction habeas corpus proceedings provide a petitioner

with the opportunity to raise any collateral issues which have not previously been fully and fairly litigated; our postconviction habeas corpus statute clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one postconviction habeas corpus proceeding; at subsequent habeas corpus hearings, any grounds raised at a prior habeas corpus hearing are considered fully adjudicated and need not be addressed by the circuit court; a prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; because a petitioner is required to raise all known grounds at their first habeas corpus hearing, there are only a few narrow grounds upon which circuit courts will grant additional habeas corpus hearings; an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively; in deciding to grant or deny relief, circuit courts must make adequate findings of fact and conclusions of law related to the petitioner's habeas corpus allegations; here, the petitioner argues that the circuit court erred in denying his second petition for a writ of habeas corpus; in his second habeas corpus petition, the petitioner reargued all of the allegations that he had raised by counsel in the his original habeas corpus petition; the petitioner also alleged for the first time that his original habeas corpus counsel had acted ineffectively; as factual support for the his ineffective assistance of habeas corpus counsel claim, the petitioner alleged that habeas counsel failed to investigate any of the evidence, that counsel did not speak to any of the witnesses, and that counsel did not focus on any other issues; other than the issue of ineffective assistance of trial counsel; the petitioner also alleged that his habeas corpus counsel was not properly prepared or experienced and did not file documents that the petitioner asked him to file at the petitioner's original habeas corpus hearing; because the petitioner had not previously waived the issue of ineffective assistance of habeas corpus counsel, nor has the circuit court fully addressed the issue, the circuit court's dismissal of the appellant's ineffective assistance of habeas corpus counsel allegation for a lack of factual support is not a final adjudication; the petitioner may refile his petition, with adequate factual support); *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004) (claim that trial court should have made finding of competency on the record before accepting prior negotiated guilty pleas; under postconviction habeas corpus statute, all prisoners are entitled to a habeas corpus hearing where they are given the opportunity to constitutionally challenge all the grounds underlying

ing their conviction; a circuit court may deny a habeas corpus petition without a hearing; the circuit court erred in denying the petitioner a habeas corpus hearing under the concurrent sentence rule); *Coleman v. Painter*, 215 W. Va. 592, 600 S.E.2d 304 (2004) (ineffective counsel claim; whether denying or granting a petition for a writ of habeas corpus, the circuit court must make adequate findings of fact and conclusions of law relating to each contention advanced by petitioner, and to state the grounds upon which the matter was determined).

**§ 51:48 Writ of habeas corpus under Post-Conviction Habeas Corpus Act of 1967—Rules governing postconviction habeas corpus proceedings in West Virginia—Case law**

For case law on the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, see, e.g., *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 640 S.E.2d 142 (2006) (with regard to the disposition of cases under the West Virginia Post-Conviction Habeas Corpus Act, see this court's Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia); *Markley v. Coleman*, 215 W. Va. 729, 601 S.E.2d 49 (2004) (West Virginia's postconviction statute and the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia ensure that a petitioner's due process rights are protected; under Rule 4(c) of the Habeas Corpus Rules, if the circuit court enters an order for summary dismissal of the petition because the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived, the 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; under Rule 4(b) of the Habeas Corpus Rules, when the circuit court finds 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 circuit court may then appoint an attorney to represent the petitioner's claims in the matter; in the alternative, under Habeas Corpus Rule 4(c), in the alternative, when a circuit court finds that a petition contains a mere recitation of grounds without adequate factual support, the circuit court may enter an order dismissing the petition, without prejudice, with directions that the petitioner be refiled containing adequate factual support; when a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation under Habeas Corpus Rule 4(c) because the petition does not provide adequate facts to allow the circuit court to make a fair adjudication of the matter, the dismissal is without prejudice).

**§ 51:49 Motions to correct or reduce sentence under West Virginia Rule of Criminal Procedure 35—Text of Rule**

Rule 35, W.Va.R.Crim.Proc., authorizes three postconviction remedies: (1) the motion to correct illegal sentence; (2) the motion to correct sentence imposed in an illegal manner; and (3) the motion to reduce sentence, each of which is available in the convicting court. Rule 35, W.Va.R.Crim.Proc., is modeled after the pre-1987 version of Rule 35, Fed.R.Crim.Proc. Rule 35, W.Va.R.Crim.Proc., was originally adopted in 1981 and has been amended twice since then—in 1985 and 1996.

Rule 35, W.Va.R.Crim.Proc., provides:

**RULE 35. CORRECTION OR REDUCTION OF SENTENCE**

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

(b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

**§ 51:50 Motions to correct or reduce sentence under West Virginia Rule of Criminal Procedure 35—Case law**

For case law on the three West Virginia postconviction remedies authorized by Rule 35, W.Va.R.Crim.Proc., see, e.g., *State v. Shingleton*, 2016 WL 1192921 (W. Va. 2016) (Double jeopardy clause is not violated when a court restructures the lawful portions of a defendant's sentence when correcting the unlawful portions, pursuant to motion for correction of sentence, when the sentence is within statutory limits and the aggregate sentence has not increased; any correction of sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure shall be

in accordance with the statutory penalty in effect at the time of the original sentencing); *State v. Tex B.S.*, 236 W. Va. 261, 778 S.E.2d 710 (2015) (on motion to correct illegal sentence for first-degree sexual assault, defendant was not entitled to de novo sentencing hearing and did not have constitutional right to be present at hearing, absent any showing of structural defect in original sentencing hearing; defendant need not be present at a proceeding to correct an illegal sentence); *State v. Coles*, 234 W. Va. 132, 763 S.E.2d 843 (2014) (in reviewing the findings of fact and conclusions of law of a circuit court concerning motion to reduce sentence, Supreme Court of Appeals applies a three-pronged standard of review; it reviews the decision on the motion under an abuse of discretion standard, the underlying facts are reviewed under a clearly erroneous standard, and questions of law and interpretations of statutes and rules are subject to a de novo review); *State v. Griffy*, 229 W. Va. 171, 727 S.E.2d 847 (2012) (trial court has two options to comply with the mandatory requirements of the rule of criminal procedure addressing acceptance or rejection of a negotiated guilty plea: it may initially advise the defendant at the time the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea, and as a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by the rule, but if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea; plain error doctrine was applicable to defendant's claim, which had not been raised in trial court; that trial court, when accepting his negotiated guilty plea to two counts of grand larceny, failed to comply with rule of criminal procedure addressing a trial court's advisement regarding a defendant's right to withdraw his guilty plea if the trial court does not accept the recommended sentence; it was obvious from the record that defendant had labored under the misapprehension that his plea could be withdrawn, so that defendant's substantial rights had been affected by trial court's failure to give the advisement); *State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010) (in reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under W.Va.R.Crim.P. 35 the Supreme court applies a three-pronged standard of review; the decision on the Rule 35 motion is reviewed under an abuse of discretion standard, the underlying facts are reviewed under a clearly erroneous standard, and questions of law and interpretations of statutes and rules are subject to a *de novo review*); *State*

*v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (we review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review); *State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004) (this state's Youthful Offender Act does not prohibit a circuit court from granting probation under Rule 35(b) after it has revoked a probation it originally granted under the Act; here, denial of the motion to reduce was an abuse of discretion; relief granted); *Barritt v. Painter*, 215 W. Va. 120, 595 S.E.2d 62 (2004) (this is an appeal by defendant Barritt from a decision of the circuit court of Ohio county denying his motion to reduce sentence as untimely filed; defendant's petition for habeas corpus did not extend defendant's time to file Rule 35 a motion for reduction of sentence).

**§ 51:51 Motions to correct clerical mistake under West Virginia Rule of Criminal Procedure 36—Text of Rule**

The motion to correct clerical mistake, available in the convicting court, is another postconviction remedy in West Virginia. The remedy is authorized by Rule 36, W.Va.R.Crim.Proc., which is modeled after Rule 36, Fed.R.Crim.Proc.

Rule 36, W.Va.R.Crim.Proc., provides:

**RULE 36. CLERICAL MISTAKES**

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

**§ 51:52 Writ of error coram nobis**

Another West Virginia postconviction remedy is the writ of coram nobis.

At first blush it would seem that coram nobis is not a postconviction remedy in West Virginia. The West Virginia Post-Conviction Habeas Corpus Act states that it "comprehends and takes the place of all other common law and statutory remedies" and that the Act "shall be used exclusively in lieu thereof." W.Va. Code § 53-4A-1(e). Moreover, Rule 60(b), W.Va.R.Civ.Proc. (which is modeled after Rule 60(b), Fed.R.Civ.Proc.), abolishes writs of coram nobis.

Nevertheless, there can be no doubt that, at least in situations where habeas corpus is unavailable—for example, in cases in

which the convicted person cannot satisfy the custody requirement applicable to habeas proceedings—*coram nobis* is an available postconviction remedy in West Virginia.

### § 51:53 Writ of error *coram nobis*—Case law

For case law on postconviction *coram nobis* relief in West Virginia, see, e.g., *State v. Hutton*, 235 W. Va. 724, 776 S.E.2d 621 (2015) (in West Virginia, the common law writ of error *coram nobis* is available only in criminal proceedings; in criminal cases, the modern trend has been to narrowly expand the writ to include limited legal errors involving constitutional deprivations; we now hold that a claim of legal error may be brought in a petition for a writ of error *coram nobis* only in extraordinary circumstances and if the petitioner shows that (1) a more usual remedy is not available, (2) valid reasons exist for not attacking the conviction earlier, (3) there exists a substantial adverse consequence from the conviction, and (4) the error presents a denial of a fundamental constitutional right); *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 640 S.E.2d 142 (2006) (we have noted that even though *coram nobis* is abolished in purely civil cases, it may still be available in a postconviction context when the petitioner is not incarcerated); *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004) (we have noted that even though *coram nobis* is abolished in purely civil cases, it may still be available in a postconviction context when the petitioner is not incarcerated; *coram nobis*, however, is of limited scope since it does not reach prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence; likewise, even assuming *coram nobis* reaches the issue of conviction based upon perjured testimony, relief does not lie in circumstances, such as found here, where the result of the trial was not affected by the false testimony).

### § 51:54 Postconviction DNA testing statute—W.Va. Code § 15-2B-14

West Virginia's postconviction DNA testing statute was created by the Act of Dec. 2, 2004, ch. 9, 2005 W.Va. Acts 2712, and is codified at W.Va. Code § 15-2B-14, which provides:

#### § 15-2B-14. Right to DNA testing

(a) A person convicted of a felony currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction for performance (DNA) testing.

(b)



(1) An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request must include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request must also include the person's statement as to whether he or she previously had appointed counsel under this section.

(2) If any of the information required in subdivision (1) of this section is missing from the request, the court shall return the request to the convicted person and advise him or her that the matter cannot be considered without the missing information.

(3)

(A) Upon a finding of indigency, the inclusion of information required in subdivision (1) of this section, and that counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel. Counsel shall investigate and, if appropriate, file a motion for DNA testing under this section. Counsel represents the indigent person solely for the purpose of obtaining DNA testing under this section.

(B) Upon a finding of indigency, and that counsel has been previously appointed pursuant to this subdivision, the court may, in its discretion, appoint counsel. Counsel shall investigate and, if appropriate, file a motion for DNA testing under this section. Counsel represents the person solely for the purpose of obtaining DNA testing under this section.

(4) Nothing in this section provides for a right to the appointment of counsel in a postconviction collateral proceeding or sets a precedent for any such right. The representation provided an indigent convicted person under this article is solely for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section.

(c)

(1) The motion shall be verified by the convicted person under penalty of perjury and must do the following:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(D) Reveal the results of any DNA or other biological testing previously conducted by either the prosecution or defense, if known.

(E) State whether any motion for testing under this section has been filed previously and the results of that motion, if known.

(2) Notice of the motion shall be served on the prosecuting attorney in the county of conviction and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within sixty days of the date on which the prosecuting attorney is served with the motion, unless a continuance is granted for good cause.

(d) If the court finds evidence was subject to prior DNA or other forensic testing, by either the prosecution or defense, it shall order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing.

(e) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial or accepted the convicted person's plea, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

(f) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case;

(4) The convicted person has made a prima facie showing that the evidence sought for testing is material to the issue of the convicted person's identity as the perpetrator of or accomplice to, the crime, special circumstance, or enhancement allegation resulting in the conviction or sentence;

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction. The court in its discretion may consider any evidence regardless of whether it was introduced at trial;

(6) The evidence sought for testing meets either of the following conditions:

(A) The evidence was not previously tested;

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;

(7) The testing requested employs a method generally accepted within the relevant scientific community;

(8) The evidence or the presently desired method of testing DNA were not available to the defendant at the time of trial or a court has found ineffective assistance of counsel at the trial court level;

(9) The motion is not made solely for the purpose of delay.

(g) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. Testing shall be conducted by a DNA forensic laboratory in this state.

(h) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion and the prosecuting attorney. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(i) If testing was requested by the state or the individual is an indigent, the cost of DNA testing shall be borne by the state.

(j) An order granting or denying a motion for DNA testing under this section is not to be appealable and is subject to review only through a petition for writ of mandamus or prohibition filed with the supreme court of appeals by the person seeking DNA testing or the prosecuting attorney. The petition shall be filed within twenty days of the court's order granting or denying the motion for DNA testing. The court shall expedite its review of a petition for writ of mandamus or prohibition filed under this subsection.

(k) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the

DNA testing, the court may require the DNA laboratory to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

(l) DNA profile information from biological samples taken from a convicted person pursuant to a motion for postconviction DNA testing is exempt from any law requiring disclosure of information to the public.

(m) Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and may not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

### § 51:55 Erroneous Convictions Act—W.Va. Code 14-2-13a

West Virginia has an erroneous convictions act, enacted in 1987, Act of Mar. 14, 1987, ch. 23, 1987 W.Va. Acts 56, 57 to 60, and codified, as amended in 2014, in Article 2 ("Claim Against the State") of Chapter 14 ("Claims Due and Against the State") of the West Virginia Code (W.Va. Code § 14-2-13a). Claims under the act are presented to the West Virginia Court of Claims created by W.Va.Code § 14-2-4.

The West Virginia erroneous convictions act provides:

#### § 14-2-13a. Claims for unjust arrest and imprisonment or conviction and imprisonment

(a) Legislative intent—The Legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned and innocent persons wrongly arrested, charged with a crime or imprisoned, who have subsequently been released when another person was arrested, prosecuted and convicted of the same criminal offense have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that affected persons should have an available avenue of redress over and above the existing tort remedies. Therefore, the Legislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate that they were wrongly arrested and imprisoned or unjustly convicted and imprisoned are able to seek damages against the state for loss of liberty.

(b) Notice of Claim—The claimant's notice of claim shall state facts in sufficient detail to permit the court to find that a claimant is likely to succeed at a trial on the merits. If the court finds in its discretion after reviewing a claim that the claimant has failed to allege sufficient facts upon which relief

can be granted, the court may dismiss the claim, either on its own motion or by a motion of the state.

(c) **Burden of Proof**—A claimant shall demonstrate by clear and convincing evidence that they were unjustly arrested and imprisoned or unjustly convicted and imprisoned, and the court shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf. Specifically, the following shall be proven by clear and convincing evidence:

(1) (A) The claimant has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of confinement, and has served all or any part of the sentence; or

(B) The claimant has been arrested and confined, and charged by warrant, information, or any other accusatory instrument for one or more felonies or misdemeanors, and that the charges were dismissed against the claimant; when another person was subsequently charged, arrested, and convicted of the same felony or felonies, or misdemeanors, or;

(2) (A) Another person was subsequently charged, arrested and convicted of the same felony or felonies or misdemeanors;

(B) The claimant has been pardoned upon the ground of innocence of the crime or crimes for which the claimant was sentenced and which are the grounds for the complaint; or

(C) The claimant's judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either the claimant was found not guilty at the new trial or the claimant was not retried and the accusatory instrument dismissed; and

(3) The claimant did not by his or her own conduct cause or bring about his or her conviction.

(d) **Type of Relief Granted and the Claimant's Burden to Prove Damages**—If the court finds that the claimant is entitled to a judgment, the court shall award damages in a sum of money as the court determines will fairly and reasonably compensate the claimant based upon the sufficiency of the claimant's proof at trial. Whether the damages fairly and reasonably compensate the claimant will depend upon the unique facts and circumstances of each claim. The claimant shall bear the ultimate burden of proving all damages associated with the

**claimant's claim:** [The text in this section is extremely faint and largely illegible. It appears to be a list of legal points or a detailed description of a claimant's position.]

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