
WEST VIRGINIA CODE CHAPTER 53
ARTICLE 4A

WV Legislature

§53-4A-1. Right to habeas corpus for post-conviction 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 or her 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 or her 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.

(1) For purposes of this article, and notwithstanding any other provisions of this article, a contention or contentions shall not be deemed to be previously and finally adjudicated when

either relevant forensic scientific evidence exists that was not available to be offered by a petitioner at the time of the petitioner's conviction or which undermines forensic scientific evidence relied on by the state at trial; and there is a reasonable probability there would be a different outcome at trial.

(2) For purposes of this section:

(A) "Forensic science" is the application of scientific or technical practices to the recognition, collection, analysis, and interpretation of evidence for criminal and civil law or regulatory issues.

(B) "Forensic scientific evidence" shall include scientific or technical knowledge; a testifying forensic analyst's or expert's scientific or technical knowledge or opinion; reports and/or testimony offered by experts or forensic analysts; scientific standards; or a scientific method or technique upon which the relevant forensic scientific evidence is based.

(C) "Scientific knowledge" shall be defined broadly to include the knowledge of the general scientific community and all fields of scientific knowledge on which those fields or disciplines rely and shall not be limited to practitioners or proponents of a particular scientific or technical field or discipline.

(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 or her 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 or her 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. For the purposes of this article, and notwithstanding any other provisions of this article, a contention or contentions shall not be deemed to have been waived when either relevant forensic scientific evidence exists that was not available to be offered by a petitioner at the time of the petitioner's conviction or which undermines forensic scientific evidence relied on by the state at trial; and there is a reasonable probability there would be a different outcome at trial.

(d) This section does not create additional liabilities, beyond those already recognized, for an

expert who repudiates his or her original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

(e) 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.

(f) 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 §53-4-1 of this code, 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.

§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.

§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.

WV Legislature

§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.

§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.

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§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.

§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.

WV Legislature

§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.

§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.

§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.

§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.