

Tuesday

14th

June, 2005 .

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective August 15, 2005.

Amend Rule 5A:5 to read as follows:

**Rule 5A:5. Original Proceedings.**

(a) With the exception of petitions for the issuance of writs of actual innocence under subsection (B), all proceedings before the Court of Appeals pursuant to its original jurisdiction shall be conducted in accordance with the procedure prescribed by Rule 5:7 of the Rules of the Supreme Court; however, in cases brought by prisoners pro se, no responsive pleading shall be required except as ordered by the court. If responsive pleading is ordered, four copies shall be filed.

(b) *Petition for a Writ of Actual Innocence.* —

(1) *Scope.* — Any person convicted of a felony upon a plea of not guilty may file in the Court of Appeals a petition under Code § 19.2-327.10 *et seq.* seeking a writ of actual innocence based on nonbiological evidence.

(2) *Form and Contents of Petition.* — The petition must be filed using Form 12 in the Appendix of Forms following Part 5A and must include all allegations and documents required by subsections A and B of Code § 19.2-327.11. Under Code § 19.2-327.11(B) “relevant documents” shall include, but not be limited to, any felony conviction and sentencing orders being challenged, any appellate dispositions on direct review or any habeas corpus orders (issued by any federal or state court), and any prior petitions filed under Code § 19.2-327.10 *et seq.* in the Court of Appeals or under Code § 19.2-327.2 *et seq.* in the Supreme Court.

(3) *Parties.* — All pleadings shall name as the petitioner the person convicted of a felony who is seeking relief. The pleadings shall identify the Commonwealth, represented by the Attorney General, as the respondent.

(4) *Filing Fee.* — The petition must be accompanied by either (i) a \$25.00 check or money order for the filing fee, or (ii) an *in forma pauperis* affidavit demonstrating that the petitioner

cannot afford the filing fee. An affidavit seeking *in forma pauperis* status shall list all assets and liabilities of petitioner, including the current balance of any inmate account maintained by correctional facility.

(5) *Appointment of Counsel.* — If the Court does not summarily dismiss the petition, the Court shall appoint counsel for any indigent petitioner who requests the appointment of counsel and satisfies the indigency criteria of Code § 19.2-159. In the Court’s discretion, counsel may be appointed at an earlier stage of the proceeding at the petitioner’s request upon a showing of requisite indigency. All requests for the appointment of counsel shall be made on the form provided by the Court of Appeals.

(6) *Service of Petition and Return of Service.* — Prior to filing a petition, the petitioner shall serve the petition, along with all attachments, on the Attorney General and on the Commonwealth’s Attorney for the jurisdiction where the conviction occurred. When represented by counsel, the petitioner shall file with the petition either (i) a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served, or (ii) an acceptance of service signed by either or both of the parties to be served, or (iii) a combination of the two. When unrepresented by counsel, the petitioner shall file with the petition a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the Attorney General and the Commonwealth’s Attorney for the jurisdiction where the conviction occurred.

(7) *Response.* — If the Court of Appeals does not summarily dismiss the petition, the court will provide written notice to all parties directing the Commonwealth, within 60 days after receipt of such notice, to file a response to the petition pursuant to Code § 19.2-327.11(C). For good cause shown, the 60-day deadline may be extended by the Court of Appeals. The Commonwealth’s response may include any information pertinent to the petitioner’s guilt, including proffers of evidence outside the trial court record and evidence previously suppressed at trial.

(8) *Reply.* — The petitioner may file a reply to the Commonwealth’s response only if directed to do so by the Court of Appeals.

(9) *Copies.* — An original and four copies of the petition, the Commonwealth’s response,

and the petitioner's reply, if any, shall be filed with the Court of Appeals. Attachments shall be included with the original petition, response, or reply, but not with any copies of the same.

(10) *Evidentiary Hearing.* — The Court of Appeals may order the circuit court that entered the conviction to conduct an evidentiary hearing and to certify factual findings pursuant to Code § 19.2-327.12. Such findings, however, shall be limited to the specific questions addressed by the Court of Appeals in its certification order. In the circuit court, the petitioner and the Commonwealth shall be afforded an opportunity to present evidence and to examine witnesses on matters relevant to the certified questions.

(11) *Oral Argument.* — Unless otherwise directed by the Court of Appeals, oral argument shall only be allowed on the final decision whether to grant or deny the writ under Code § 19.2-327.13.

(12) *Appeal.* — The petitioner or the Commonwealth may petition for appeal to the Supreme Court from any adverse final decision issued by the Court of Appeals under Code § 19.2-327.13 to issue or deny a writ of actual innocence. Such an appeal shall be initiated by the filing of a notice of appeal pursuant to Rule 5:14.

Amend Rule 5A:20 (h) to read as follows:

**Rule 5A:20. Opening Brief of Appellant.**

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(h) A certificate (which need not be signed in handwriting) stating (1) that Rule 5A:19(f) has been complied with, and (2) whether counsel desires to waive oral argument. Additionally, any party may waive oral argument without leave of court by written notification to the clerk of this court within 21 days after the date on which the appellee's brief is due to be filed or has been filed.

Amend Rule 5A:21(g) to read as follows:

**Rule 5A:21. Brief of Appellee or Guardian Ad Litem.**

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(g) A certificate (which need not be signed in handwriting) stating (1) that Rule 5A:19(f) has been complied with, and (2) whether counsel desires to waive oral argument. Additionally, any party may waive oral argument without leave of court by written notification to the clerk of this court within 21 days after the date on which the appellee's brief is due to be filed or has been filed.

A Copy,

Teste:

Clerk