

Memorandum

To: All Concerned

From: Greg Ayers

Date: 6/1/2010

Re: Comments Re Proposed Rules of Appellate Procedure

Proposed Rule 3 (a) requires the designation of counsel of record where there is more than one attorney listed on the appeal document. This new rule should benefit the Court as well as counsel when contact needs to be made with counsel on the case whether it is on a procedural matter or just giving counsel notice of the Court's decision. The Court will know which attorney with whom it should communicate.

Proposed Rule 5(b) regarding docketing an appeal which utilizes a form notice of appeal is definitely an improvement over the present procedure and combines the filing of a notice of intent to appeal in the trial court and a subsequent docketing statement in the Supreme Court. However, the notice of appeal not only requires the listing of assignments of error but advises counsel that additional assignments of error may not be raised without obtaining leave of the Court per Rule 10(c)(3). While it may be appropriate to require the listing of potential assignments of error as we do in the present notice of appeal, it is wholly inappropriate to hold counsel to that list unless leave of the Court is obtained, particularly if she wasn't trial counsel. It may be possible, if appellate counsel was also trial counsel, to accurately list the assignments of error in the notice of appeal. However, in many cases my office handles we are not trial counsel and therefore do not actually know what the assignments of error will be before reviewing the trial transcripts and court record. Thus, under the proposed rules (Rule 10(c)(3) we would be required in virtually every case to file with the Court a motion for leave to file additional assignments of error. This seems like an unnecessary waste of both the Court's and counsel's time since we can clearly demonstrate why the additional assignments of error were not listed in the notice of appeal. That portion of Rule 10 (c) (3) should be deleted.

The notice of appeal further requires counsel to certify that every assignment of error has been properly preserved for appellate review. This requirement should likewise be deleted because, as indicated above, appellate counsel is often not familiar with the case until she has reviewed the trial transcript and consequently is in

no position to make such a certification. If the Court believes this certification is required, it should only be required when the brief is filed.

Rule 5(d) providing for a scheduling order has the positive benefit if giving all parties notice of the applicable filing deadlines, etc. The Rule does not provide for the scheduling order to indicate the deadline for the completion and filing of the transcript but it should so the court reporter will clearly be on notice of that deadline. In many cases appeals are delayed because court reporters do not timely complete transcripts and including them in the scheduling order will be one way to try to prevent that from happening. In addition, counsel will need to have the transcripts sufficiently in advance of the appeal deadline so that counsel can prepare the appendix since the proposed rules provide that counsel must in her brief cite to page numbers in the appendix. Thus, counsel will have to prepare the appendix before completing the brief which will require additional time.

Rule 6(b) addresses the scope of the record on appeal, indicates the record should only include matter relevant to the issues on appeal, and discourages the inclusion of the entire lower court record. While there is no question that it will not be necessary to include a lot of the filings in the circuit clerk's file because they would not be relevant to the issues on appeal and in some appeals it may be appropriate to provide a limited transcript but in most criminal appeals it will be necessary for the Court to review the entire trial transcript to determine whether the assigned error requires reversal of the conviction or is harmless error. I would suggest that the Rule indicate that where it is necessary to the outcome of the appeal for the Court to review the entire trial transcript, e.g., harmless error, the entire trial transcript should be included in the record.

Rule 6(b) places the responsibility on the petitioner to assemble and present the record, either via an appendix or designated record. This could be an onerous burden on petitioner's counsel, particularly if they are representing an indigent defendant and did not handle the case in the trial court. Absent getting the relevant documents from trial counsel, which many times can be problematic, counsel will have to rely on the good graces of the circuit clerk's office to provide copies of those documents. Therefore, some provision should be made in the rules to require the circuit clerk's office to provide counsel representing an indigent copies of all relevant documents upon request at no charge, which would be consistent with existing case law.

Rule 8 provides another method called a designated record for getting the record before the Court. This is a reasonable alternative to preparation of an appendix which could be very time-consuming depending on the length of the record. This method should be liberally allowed where there is a very lengthy or voluminous record which would place a great burden on counsel to assemble in an appendix.

[Insert comments from Word perfect Memo]

My comments on Rule 16, original jurisdiction, would be the same as those to Rule _____. Thus, Rule 16(d) (4)'s requirement as to the contents of the petition, i.e., that it cite right after the question presented the specific appendix page where the issue was raised and decided, be moved to the statement of the procedural history (Rule 16(d) (6) to avoid repeating three times where in the record the assignments of error were raised, preserved for review, and ruled upon. Also, Rule 16(d) (7)'s requirement regarding the standard of review should be moved to the argument section of the petition since it will have to be argued there. Again, this is to avoid repetition of the same statements and conserve space since the page limits have been reduced by 20% from 50 to 40.

Since all cases will now be decided on the merits, it is a good idea for the Court in Rules 19 and 20 to distinguish between the types of cases and issues it will hear on the Rule 19 and Rule 20 dockets. This will give counsel some direction as to which docket upon which the case should be placed. However, Rule 19(e)'s oral argument limitation of five minutes per side is really too short for a legitimate discussion of the legal issues involved in many cases, particularly if there is more than one issue to be argued. Current Rule 5(b)'s time limitation of 10 minutes for oral presentation on the motion document is a more reasonable timeframe, especially where counsel is arguing more than one issue. In addition, if this is a merit argument, as opposed to a current Rule 5 argument as to why the appeal should be accepted, counsel should not be unreasonably limited to a mere five minutes. If the Court has more than a few questions counsel's time can be eaten up too quickly. Also, since this a merit argument and appellant's counsel has the burden on appeal, appellant's counsel should be permitted rebuttal argument. It is not uncommon for appellee's counsel to make arguments that require rebuttal by appellant's counsel. Since appellee's counsel is given the opportunity to address appellant's counsel's arguments, basic fairness requires giving appellant's counsel an opportunity to likewise address his opponent's arguments. Rule 19(e)'s restriction in this regard should be eliminated.

Proposed Rule 20(e)'s limitation to 15 minutes per side is a 50% reduction in the time allotted appellant's counsel from the current oral argument Rule 12(b) which allows counsel 20 minutes to open and 10 minutes to close. Considering the importance of the issues the Court has indicated it will be deciding on the Rule 20 docket, the Court should retain the present time allotted under Rule 12(b) for oral argument. Since the Court proposes a 20% reduction in the briefs, the Court should not further shortchange counsel by cutting the time for oral argument in half. The issues the Court will be considering are simply too important to not give counsel adequate time to argue them. Also, the current time allotments for oral argument seem to have worked fairly well over the years and the Court always has the discretion under proposed Rule 20(e) to determine that further argument is unnecessary. It would certainly be more prudent to guarantee counsel sufficient time to present oral

argument in the most important cases the Court will decide and cutoff unnecessary argument than not to give counsel sufficient time to begin with.

Rule 21(c) states when a memorandum decision may be entered and that the memorandum decision shall contain a succinct statement of the reason for affirmance. There is a concern that if the only reason given for affirmance is one of the reasons identified in Rule 21(c), e.g., “this Court finds no substantial question of law and the Court does not disagree with the decision of the lower tribunal,” such a decision on the merits provides little transparency for the Court’s decision and really isn’t much different than the current order issued by the Court stating that the appeal is refused. Thus, if this is to be a merit decision by the Court, the rule should at least require that the memorandum decision shall contain a succinct statement of the reason for affirmance, in addition to stating one of the reasons specified in Rule 21(c). In addition, if a constitutional issue is raised in an assignment of error, Rule 21(c) should require the memorandum decision to contain a succinct statement why there is no constitutional error. This is because the Court’s ruling will be a decision on the merits and the appellant will be prohibited under our habeas statute, W.Va. Code Section ____, from raising the same issue in a state habeas petition under the principle of *res judicata*. Under current law, if an appeal is refused the criminal defendant can file a state habeas petition raising the state and/or federal constitutional issue that was refused by the Supreme Court and the habeas court is required to address each claimed constitutional error in findings of fact and conclusions of law. An adverse decision by the habeas court on the constitutional issue can then be appealed to this Court. Since a ruling on the merits under proposed Rule 21(c) will thus preclude any further litigation of the same constitutional issue in the West Virginia courts, this Court should at least provide some reason to the appellant why there is no constitutional error. Otherwise, the proposed memorandum decision procedure will create less transparency than our current court system for rulings on constitutional issues in criminal cases. In addition, a federal court considering a federal constitutional claim in federal habeas corpus as a practical matter will not have any substantive reasoning on the merits of the claim from our state courts to consider as they currently do. Again, this does not provide much transparency for rulings by West Virginia courts on important constitutional issues. The proposed rule needs to provide greater, not less, transparency for rulings on constitutional issues.

Proposed Rule 38(c) limits an appellant’s principal brief to 40 pages which is a 20% reduction from the current 50 page limit. The Court understandably wants counsel’s argument to be more focused but if there are four or five assignments of error that page limit easily can be reached even with focused arguments. At the same time the Court has further restricted the number of pages available for discussion of the legal arguments by imposing the additional requirements that the brief contain additional pages which include: per Rule 10(c)(4), a statement immediately following the assignments of error specifically referencing the appendix pages where the issue was raised and ruled upon; per Rule 10(c)5), a waiver of oral argument or a request the case be set for a Rule 19 or Rule 20 argument and if a Rule 19 argument is requested

whether the case is appropriate for a memorandum decision; per Rule 10(c)(7), a summary of argument; and per Rule 10(c)(8), the standard of review as to each assignment of error. Given these additional page requirements and the corresponding reduction in the pages available for legal argument, the 50 page limit would better serve the litigants and the Court. There is also some inequity between the parties created by the proposed page reduction since under Rule 10(d) the respondent will not have to include a statement of the procedural history and statement of facts unless necessary to correct any misstatements or omissions in the appellant's brief. Thus, the respondent will as a practical matter be given more pages for its legal argument. One possible way to remedy this is to limit the argument section of the brief to 40 pages which would give both parties an equal number of pages to present their respective arguments.